

APR 25 2012

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U.S. COURT OF APPEALS

## NOT FOR PUBLICATION

## UNITED STATES COURT OF APPEALS

## FOR THE NINTH CIRCUIT

CARL MONTIGUE LEWIS,  
  
Petitioner - Appellant,  
  
v.  
  
DAVID L. RUNNELS,  
  
Respondent - Appellee.

No. 10-17415

D.C. No. 2:03-cv-01410-GEB-  
EFB

MEMORANDUM\*

Appeal from the United States District Court  
for the Eastern District of California  
Garland E. Burrell, District Judge, Presiding

Argued and Submitted April 17, 2012  
San Francisco, California

Before: KOZINSKI, Chief Judge, McKEOWN and N.R. SMITH, Circuit Judges.

A. The district court did not commit clear error in its determination that the prosecutor provided credible, race neutral reasons for excluding two African-American women from the jury and that he was not motivated by racial bias. *See Felkner v. Jackson*, 131 S. Ct. 1305, 1307 (2011). Therefore, Lewis failed to

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

establish “purposeful discrimination.” *See Batson v. Kentucky*, 476 U.S. 79, 90 (1986).

B. The California Court of Appeal’s determination that the special circumstance jury instruction (California Jury Instruction–Criminal 8.80.1) complied with *Tison v. Arizona*, 481 U.S. 137 (1987), “was [not] contrary to,” and did not “involve[] an unreasonable application of, clearly established” Supreme Court precedent. 28 U.S.C. § 2254(d)(1). Even assuming error in the instruction, the error would not have “a substantial and injurious effect,” *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), because there was sufficient evidence for the jury to conclude that Lewis was the actual killer, *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

**AFFIRMED.**