

OCT 17 2013

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD R. MCNEELY,

Petitioner - Appellant,

v.

MATTHEW L. CATE, Secretary CDCR,

Respondent - Appellee.

No. 11-56393

D.C. No. 3:08-cv-02284-BTM-
CAB

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Barry T. Moskowitz, District Judge, Presiding

Argued and Submitted October 7, 2013
Pasadena, California

Before: FERNANDEZ, PAEZ, and HURWITZ, Circuit Judges.

California state prisoner Donald R. McNeely appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.

The blog post by the jury foreman before the conclusion of deliberations was improper. The state court did not unreasonably conclude, however, that the juror was

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

not biased, *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998), and that no extraneous prejudicial information was thereby brought to the jury's attention. The state court found that the juror's statements during voir dire were incomplete but technically correct and also were not indicative of bias; this was not an unreasonable determination of the facts in light of the evidence presented in the evidentiary hearings in state court. 28 U.S.C. § 2254(d)(2). The district court properly held that McNeely is not entitled to relief on this claim.

McNeely's request to represent himself was made just before the jury was seated; the state court's determination that the request was untimely was not an unreasonable application of settled federal law. *Id.* § 2254(d)(1).

The district court also did not err in rejecting McNeely's claim that he was improperly removed from the courtroom. McNeely disrupted the proceedings several times; his ejection was warranted. *Illinois v. Allen*, 397 U.S. 337, 343 (1970).

The district court also properly rejected McNeely's sentencing challenges. Because McNeely admitted to his prior convictions, the enhanced sentences were proper under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) and *Cunningham v. California*, 549 U.S. 270, 288 (2007), and the consecutive sentences were proper under *Oregon v. Ice*, 555 U.S. 160, 169-70 (2009).

AFFIRMED.