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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVE ROMERO, Petitioner-Appellant, v. MIKE D. MCDONALD, Respondent-Appellee.	No. 18-55929 D.C. No. 5:10-cv-00462-SVW-SP MEMORANDUM[*]

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Submitted August 13, 2019[**]
Pasadena, California

Before: SCHROEDER and GRABER, Circuit Judges, and M. WATSON,[***] District Judge.

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Michael H. Watson, United States District Judge for the Southern District of Ohio, sitting by designation.

Petitioner Steve Romero, a California prisoner, appeals the denial of his petition for habeas corpus. Romero claims ineffective assistance of counsel because his trial counsel failed to challenge Juror No. 7, who had said during voir dire that he could not be fair and impartial. In an earlier appeal, we remanded for a possible evidentiary hearing on the claim.

On remand, the district court ruled that no evidentiary hearing was warranted because counsel had stated at trial that there was a tactical reason for retaining the juror and no additional evidence or information was now available: There was no record of the sidebar conversation in which the court and counsel discussed Juror No. 7, and neither counsel could presently recall the conversation.

Because the record has not changed on remand, Romero has not met his burden to establish that counsel's decision to retain the juror was professionally incompetent. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984). Romero's claim therefore fails under the first prong of *Strickland*'s test for ineffective assistance of counsel. The district court correctly denied the petition.

AFFIRMED.