

DEC 13 2010

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>JOHNNY RAY WASHINGTON,</p> <p>Petitioner - Appellant,</p> <p>v.</p> <p>CHARLES L. RYAN,* Director, AZ Department of Corrections and STATE OF ARIZONA ATTORNEY GENERAL,</p> <p>Respondents - Appellees.</p>

No. 08-17039

D.C. No. 2:07-cv-00008-JAT

MEMORANDUM**

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Submitted December 6, 2010***

Before: GOODWIN, RYMER, and GRABER, Circuit Judges.

* Charles L. Ryan is substituted for his predecessor, Dora B. Schriro, as Director of the Arizona Department of Corrections, pursuant to Fed. R. App. P. 43(c)(2).

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

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

Arizona state prisoner Johnny Ray Washington appeals from the district court's judgment denying his 28 U.S.C. § 2254 habeas petition. We have jurisdiction under 28 U.S.C. § 2253(c), and we affirm.

Washington contends that the prosecutor in his first trial intended to provoke the defense into moving for a mistrial and that, consequently, his retrial violated the Double Jeopardy Clause of the 5th Amendment. Washington's contention is not supported by the record. Accordingly, the state court's decision was not contrary to, or an unreasonable application of, clearly established Supreme Court law, or an unreasonable determination of the facts in light of the evidence. *See* 28 U.S.C. § 2254(d); *see also Oregon v. Kennedy*, 456 U.S. 667, 676 (1982) (“[o]nly where the governmental conduct in question is intended to ‘goad’ the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion”).

AFFIRMED.