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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID M. JASSY,)	NO. CV 13-8611-JVS (AS)
)	
Petitioner,)	ORDER ACCEPTING FINDINGS,
)	
v.)	CONCLUSIONS AND RECOMMENDATIONS
)	
KEVIN CHAPPELL, Warden,)	OF UNITED STATES MAGISTRATE JUDGE
)	
Respondent.)	

Pursuant to 28 U.S.C. section 636, the Court has reviewed the Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. After having made a de novo determination of the portions of the Report and Recommendation to which Objections were directed, the Court concurs with and accepts the findings and conclusions of the Magistrate Judge. However, the Court addresses certain arguments raised in the Objections below.

1 reduced the State's burden to prove the objective component of the
2 implied malice element of second degree murder.

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4 Instructional error claims are evaluated for harmlessness under
5 the "Brecht" standard. See Brecht v. Abrahamson, 507 U.S. 619, 623
6 (1993) (habeas relief available only where the trial-type error had
7 a "substantial and injurious effect or influence in determining the
8 jury's verdict"). The Report and Recommendation appropriately
9 applies the "Brecht" standard, finding that the purported error did
10 not have a "substantial and injurious effect or influence" in
11 determining the jury's verdict. That is - even if the jury
12 instruction omitted the incorrect statement that assault and
13 battery were crimes posing a high risk of death - the jury still
14 would have found Petitioner guilty of second-degree murder. This
15 is because there was overwhelming evidence in the record that
16 Petitioner's forceful head-kick constituted an act committed with
17 implied malice.

18
19 Petitioner also contends that the Report and Recommendation
20 ignores Supreme Court precedent and misconstrues Ninth Circuit
21 precedent in relation to his Batson claim. (Objections 6-11.)
22 Petitioner notes that when the trial court invited the prosecutor
23 to respond to Petitioner's Batson claim, the prosecutor made a
24 statement indicating that the excusal of potential Hispanic jurors
25 was irrelevant because the Petitioner is Black. Petitioner claims
26 that this was in direct contravention of Powers v. Ohio, 499 U.S.

1 400 (1991), which held that a criminal defendant may object to
2 race-based exclusions of jurors effected through peremptory
3 challenges whether or not the defendant and excluded jurors share
4 the same race. The Report and Recommendation found that because
5 Petitioner did not meet his burden of establishing a *prima facie*
6 case of discrimination in Step One of Batson, it was not necessary
7 for the Court to consider the prosecutor's explanations which is an
8 inquiry reserved for the second step of Batson.

9
10 However, even if the Court were to consider the prosecutor's
11 response to the trial judge's request for an explanation (i.e., her
12 statement that the excusal of potential Hispanic jurors is
13 irrelevant because the Petitioner is Black) as a "relevant
14 circumstance" for Step One of Batson, Petitioner still has not met
15 his burden of establishing a *prima facie* case of discrimination.
16 Johnson v. California, 545 U.S. 161 (2005) (the defendant still has
17 the burden of "producing evidence sufficient to permit the trial
18 judge to draw an inference that discrimination has occurred.").
19 The prosecutor's response was merely a misstatement of the law, see
20 Powers v. Ohio, 499 U.S. 400 (1991) (a defendant can raise a Batson
21 claim even if his race differs from that of the excluded juror),
22 and, by itself, cannot give rise to an inference of discriminatory
23 purpose.

24
25 Petitioner's reliance on several Ninth Circuit cases cited in
26 the Report and Recommendation as support for his position that the
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1 prosecutor's statements were sufficient to show a *prima facie* case
2 under Batson is similarly misplaced. First, circuit precedent is
3 relevant only to the extent it clarifies what constitutes clearly
4 established law as determined by the United States Supreme Court.
5 28 U.S.C. § 2254(d). Second, all of the cases cited by Petitioner
6 involved other evidence, including statistical analyses of the jury
7 pool, establishing a *prima facie* case. See Fernandez v. Roe, 286
8 F.3d 1073, 1078–80 (finding inference of discrimination based on
9 "bare record of statistical disparities of peremptory strikes"
10 against prospective Hispanic jurors); Paulino v. Castro, 371 F.3d
11 1083, 1091 (9th Cir. 2014) (determining an inference of bias was
12 raised where the prosecutor removed eighty-three percent of
13 possible African-American jurors using five out of six possible
14 peremptory challenges); Smithkline Beecham Corp. v. Abbott
15 Laboratories, 740 F.3d 471, 477–78 (9th Cir. 2014) (finding a *prima*
16 *facie* case where the juror in question was the only self-identified
17 gay member of the venire and the subject matter of the litigation
18 presented an issue of consequence to the gay community). Unlike
19 the cases cited by Petitioner, the trial court record here does not
20 disclose the exact composition of the venire as a whole or of the
21 individual prospective jurors, or contain any information that
22 would permit Petitioner to demonstrate a statistical disparity or
23 evidence raising an inference of discriminatory intent. The Report
24 and Recommendation properly found that Petitioner had failed to
25 meet his burden of producing sufficient evidence for the inference
26 of discrimination required at step one of Batson.

1 53 (finding prosecution's reasons for striking a juror implausible
2 based on a consideration of entire voir dire testimony, including
3 the prosecution's "shuffling of the venire panel" and "the
4 contrasting voir dire posed to black and nonblack panel members").
5 Accordingly, Petitioner has failed to meet his burden at Step One
6 of the Batson inquiry. See Purkett v. Elem, 514 U.S. 765, 768
7 ("the ultimate burden of persuasion regarding racial motivation
8 rests with, and never shifts from, the opponent of the strike.")
9

10 Petitioner's remaining objections are simply re-assertions of
11 arguments raised in the Petition. These arguments were addressed
12 in and rejected by the Report and Recommendation and do not cause
13 the Court to reconsider its decision to accept the Magistrate
14 Judge's conclusions and recommendations.
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16 IT IS ORDERED that Judgment be entered denying and dismissing
17 the Petitioner with prejudice.
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1 IT IS FURTHER ORDERED that the Clerk serve copies of this
2 Order, the Magistrate Judge's Report and Recommendation and the
3 Judgment herein on counsel for Petitioner and counsel for
4 Respondent.

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6 LET JUDGMENT BE ENTERED ACCORDINGLY.

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8 DATED: June 4, 2015.

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JAMES V. SELNA

14 UNITED STATES DISTRICT JUDGE
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