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**FILED**

AUG 25 2010

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STEPHEN LOUIS MITCHAM

Case No C-97-03825 VRW

Petitioner,

ORDER REGARDING CLAIM D

v

VINCE CULLEN, Warden of  
California State Prison at San  
Quentin,

Respondent

On June 18, 2010, the court granted in part and denied in part respondent's motion for summary judgment requesting dismissal of nine guilt-phase claims, and instructed the parties to submit further briefing in relation to claim D, petitioner's challenge to the prosecutor's use of peremptories under Batson v Kentucky, 476 US 79 (1986). As discussed below, the court finds claim D, with the exception of its ineffective assistance of counsel subclaim, waived.

In claim D, petitioner alleges that the prosecutor's use of peremptory challenges to exclude all African-Americans from the jury violated his constitutional rights. Petitioner did not raise

1 an objection to the prosecutor's use of peremptory challenges at  
2 trial, nor did he present this claim on direct appeal. Rather, he  
3 raised it for the first time in a state habeas petition. The  
4 Supreme Court of California denied it on the procedural ground that  
5 it could have been, but was not, raised on direct appeal, a  
6 procedural bar established in Ex Parte Dixon, 41 Cal 2d 756 (1953).

7 Respondent counters that petitioner waived claim D by  
8 failing to raise an objection at trial. Respondent is correct.

9 To raise a valid Batson claim on federal habeas review, a  
10 petitioner must timely and properly object in state court to the  
11 prosecutor's exercise of the peremptory challenges petitioner  
12 wishes to challenge. See, eg, Andrew v Collins, 21 F3d 612, 621  
13 (5th Cir 1994) ("Andrews' failure to timely object at trial to the  
14 prosecutor's use of his peremptory challenges is a constitutional  
15 bar to his Batson challenge"); Thomas v Moore, 866 F2d 803, 804-05  
16 (5th Cir 1989); Ruff v Armontrout, 77 F3d 265, 267 (8th Cir 1996);  
17 McCrorry v Henderson, 82 F3d 1243, 1249 (2d Cir 1996); see also  
18 Williams v Calderon, 48 F Supp 2d 979, 997 (CD Cal 1998) ("Neither  
19 the Ninth Circuit nor the United Supreme Court has squarely  
20 addressed \* \* \* how to resolve a Batson claim where trial counsel  
21 failed to object.") This principle finds expression in People v  
22 Wheeler, 22 Cal 3d 258 (1978), in which the Supreme Court of  
23 California noted that to raise a valid challenge to an opponent's  
24 use of peremptory challenges, a party "must raise the point in a  
25 timely fashion." Id at 280. The United States Supreme Court has  
26 also characterized the requirement that Batson claims be raised  
27 between the selection of the jurors and administration of their  
28

1 oaths as a "sensible rule." Ford v Georgia, 498 US 411, 422  
2 (1991).

3 Indeed, failure timely to object to the use of peremptory  
4 challenges at trial makes appellate, and a fortiori, collateral  
5 review of a Batson claim difficult, if not impossible. As observed  
6 by the court in Williams,

7 [A] "contemporaneous objection is especially pertinent as  
8 to Batson claims, where innocent oversight can so readily  
9 be remedied and an accurate record of the racial  
10 composition the jury is crucial on appeal." United  
11 States v. Pulgarin, 955 F2d 1, 2 (1st Cir. 1992). Unless  
12 the facts supporting the Batson claim are articulated at  
13 trial, "they are lost to the record and appellate review  
14 becomes impossible." United States v. Changco, 1 F.3d  
15 837, 840 (9th Cir. 1993). The "'decision to exercise a  
16 peremptory challenge . . . is subjective; often the  
17 reasons behind that decision cannot be reasonably  
18 articulated.'" McCrorry v. Henderson, 82 F.3d 1243, 1247  
19 (2nd Cir. 1996) (quoting Thomas v. Moore, 866 F.2d 803,  
20 805 (5th Cir. 1989)). The trial judge must rule on  
21 whether the prosecutor's justifications for the  
22 challenges are legitimate or are a subterfuge for  
23 discrimination. Given the often subtle reasons for the  
24 exercise of peremptory challenges, the trial court's  
25 ruling on the Batson claim may turn on the court's  
26 observations of the prospective jurors and the  
27 prosecutor. Id. at 1248

28 Williams, 48 F Supp 2d at 996-97.


29 The Ninth Circuit has, however, stated in *dictum* that  
30 "the defendant whose counsel fails to make a timely objection to a  
31 peremptory challenge merely forfeits the right to object and may  
32 argue on appeal that the peremptory challenge constituted plain  
33 error." Unites States v Contreras-Contreras, 83 F3d 1103, 1105 n1  
34 (9th Cir 1996) (defendant's Batson claim, raised for the first time  
35 on direct appeal, was subject to plain error review). Contreras-  
36 Contreras, however, was a direct appeal case. Federal habeas  
37 challenges to state convictions "entail greater finality problems  
38

1 and special comity concerns . . . [T]he burden of justifying  
2 federal habeas relief for state prisoners is 'greater than the  
3 showing required to establish plain error on direct appeal.'" Engle  
4 v Isaac, 456 US 107, 134-35 (1982) (quoting Henderson v Kibbe, 431  
5 US 145, 154 (1977)).

6           Because petitioner failed to object to the prosecutor's  
7 exercise of peremptory challenges at trial, he has failed to  
8 preserve his Batson claim for review on federal habeas.  
9 Accordingly, summary judgment on claim D, with the exception of its  
10 ineffective assistance of counsel subclaim, is granted.  
11 Petitioner's surreply and respondent's response relating to claim D  
12 should only address the ineffective assistance subclaim.

13  
14           IT IS SO ORDERED.

15  
16 DATED: 8/25/2010

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19           VAUGHN R WALKER  
20           United States District Chief Judge