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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STEPHEN LOUIS MITCHAM

Petitioner,

v.

MICHAEL MARTEL, Warden of California
State Prison at San Quentin,

Respondent.

Case No C-97-03825 JW

ORDER REGARDING APPLICATION OF
BATSON V. KENTUCKY, 476 U.S. 79 (1986)
TO CLAIM D

Pursuant to the Court's Order of November 5, 2010, the parties have submitted briefs addressing the applicability of Batson v. Kentucky, 476 U.S. 79 (1986), to the ineffective assistance of counsel subclaim of claim D of the petition. In Batson, the Supreme Court held that the Equal Protection Clause forbids the prosecution from challenging potential jurors solely on account of their race. Id. at 89. In his subclaim, petitioner alleges that trial counsel was ineffective for failing to challenge the prosecutor's use of peremptory challenges at trial.¹ As discussed below, the Court finds that Batson does not apply to petitioner's ineffective assistance subclaim.

¹Petitioner did not present this challenge on direct appeal, but raised it in his state habeas petition. Lodged Ex. CC-1. The state court denied it solely on the procedural ground that it could have been, but was not raised on appeal. Lodged Ex. FF. Because the state court did not reach the merits of the ineffective assistance of counsel subclaim of claim D, this Court's review is not limited to the record that was presented to the state court. See Cullen v. Pinholster, 131 S. Ct. 1388, 1401 (2011).

1 To establish a right to habeas relief due to a violation of the Sixth Amendment right to the
2 effective assistance of counsel, a petitioner must show that counsel’s performance was deficient, and
3 that counsel’s errors were so serious as to deprive the defendant of a fair trial. Strickland, 466 U.S.
4 668 (1984). Judicial scrutiny of counsel’s performance must be highly deferential, and a court must
5 indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable
6 professional assistance. Id. An assessment of an attorney’s performance “requires that every effort
7 be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s
8 challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Id. at 689.
9 “Failure to anticipate a change in existing law does not amount to ineffective assistance of counsel.”
10 Ruff v. Armontrout, 77 F.3d 265, (8th Cir. 1996).

11 Pursuant to Strickland, petitioner’s trial counsel’s performance must be assessed based on the
12 legal landscape existing at the time of petitioner’s trial. 466 U.S. at 689. Petitioner was tried in
13 1984. Batson was not decided until 1986. Evaluating trial counsel’s performance based on caselaw
14 that had not yet been decided at the time of trial would run counter to Strickland’s directive.

15 Petitioner argues that Batson applies to his case because it imposes the same obligations on
16 counsel as did People v. Wheeler, 22 Cal. 3d 258 (1978), California’s predecessor to Batson,
17 decided six years prior to his trial. Wheeler held that the “use of peremptory challenges to remove
18 prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a
19 representative cross-section of the community under article I, section 16, of the California
20 Constitution.” Id. at 276-77. Petitioner asserts that a Wheeler motion serves as an implicit objection
21 under Batson, and that a petitioner who makes a Wheeler objection also preserves his federal
22 constitutional claim. At issue here however, is an ineffective assistance of counsel claim, not a
23 substantive Batson claim. Similarities between the standards of Wheeler and Batson
24 notwithstanding, the governing law at the time of petitioner’s trial was Wheeler, not Batson. Any
25 similarity between the two cases does not obviate Strickland’s requirement that counsel’s
26 performance be evaluated from counsel’s perspective at the time of trial.

