

JUN 24 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD ANTHONY HERNANDEZ,

Petitioner - Appellant,

v.

ANTHONY A. LAMARQUE, Warden;
ATTORNEY GENERAL FOR THE
STATE OF CALIFORNIA,

Respondents - Appellees.

No. 07-15921

D.C. No. CV-04-05293-
OWW/WMW

MEMORANDUM *

Appeal from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Argued and Submitted June 12, 2008
San Francisco, California

Before: SCHROEDER, WALKER,** and N.R. SMITH, Circuit Judges.

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

** The Honorable John M. Walker, Jr., Senior United States Circuit Judge for the Second Circuit, sitting by designation.

Richard Anthony Hernandez, a California state prisoner, appeals the denial of his 28 U.S.C. § 2254 habeas corpus petition challenging his jury conviction for escape. We have jurisdiction pursuant to 28 U.S.C. § 2253. We affirm.

We review the district court's decision to deny a 28 U.S.C. § 2254 habeas petition de novo. See *Rodriguez Benitez v. Garcia*, 495 F.3d 640, 643 (9th Cir. 2007) (per curiam). We review the "last reasoned decision" of the state courts, which here is the California Court of Appeal decision. See *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which governs our review of challenges to state convictions brought under 28 U.S.C. § 2254, a petitioner must demonstrate that the state court's decision on the merits was contrary to, or involved an unreasonable application of, clearly established federal law under United States Supreme Court precedent, or that the decision was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d); see *Lockyer v. Andrade*, 538 U.S. 63, 70-73 (2003). The district court concluded that Hernandez failed to carry his burden under AEDPA. We agree.

The use of peremptory challenges to remove prospective jurors solely on grounds of presumed racial or other group bias is prohibited under both the United States and California Constitutions. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986);

People v. Wheeler, 22 Cal. 3d 258, 272 (1978). In *Batson*, the Supreme Court set out a three-step process for the trial court to determine whether a peremptory challenge is race-based in violation of the Equal Protection Clause. See *Purkett v. Elem*, 514 U.S. 765, 767 (1995).

We conclude that the state court satisfied its requirement to properly apply *Batson*, the relevant clearly established federal law under United States Supreme Court precedent. 28 U.S.C. § 2254(d)(1). The Court of Appeal determined, as it was required to do under the third step in the *Batson* test, that the prosecutor's proffered reasons for using peremptory challenges to strike jurors were not pretextual. The record supports the state court's conclusion that the prosecution offered "legitimate reasons" for striking each of the jurors at issue. See *Batson*, 476 U.S. at 98 & n.20. Thus, the Court of Appeal decision was not contrary to, or an unreasonable application of, Supreme Court precedent. 28 U.S.C. § 2254(d)(1).

We also conclude that the state court findings were not unreasonable in light of the evidence presented. 28 U.S.C. § 2254(d)(2). The Court of Appeal adequately examined the prosecutor's stated reasons for dismissing each challenged juror in determining whether the reasons were legitimate. Our review of the record does not reveal that similarly situated members of a different race were allowed to serve, nor does it reflect a statistical record suggesting "extensive

evidence of purposeful discrimination” against Hispanic jurors. *See Miller-El v. Dretke*, 545 U.S. 231, 241 (2005). Thus, Hernandez has not met his burden of showing that “any appellate court to whom the defect is pointed out would be unreasonable in holding that the state court’s fact-finding process was adequate.” *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004).

AFFIRMED.