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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY BUSH,

Petitioner-Appellant,

v.

CHERYL K. PLILER, et al.,

Respondents-Appellees.

No. 04-56348

D.C. No. CV-01-00042-NAJ/NLS

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Napoleon A. Jones, District Judge, Presiding

Argued and Submitted October 20, 2005
Pasadena, California

Before: KLEINFELD and FISHER, Circuit Judges, and SHADUR, Senior
District Judge.**

Anthony Bush (“Bush”) appeals the district court’s denial of his 28 U.S.C.
§ 2254 (“Section 2254”) petition for a writ of habeas corpus. Bush claims that the
State violated his constitutional rights via (1) the trial court’s failure to require that

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

** The Honorable Milton I. Shadur, Senior Judge for the United States
District Court for the Northern District of Illinois, sitting by designation.

the prosecutor provide a race-neutral explanation for using a peremptory challenge to excuse the last African-American juror from the alternate jury panel, (2) the trial court's admission into evidence of irrelevant and prejudicial excerpts from letters authored by Bush and the prosecutor's use of those excerpts to comment improperly on Bush's failure to testify at trial, (3) the trial court's exclusion of Bush's trial counsel from an *in camera* proceeding in which the court decided that the identity of two confidential informants would not be disclosed and (4) the state appellate court's denial of access by Bush's appellate counsel to the sealed record of the *in camera* proceeding.

Under Section 2254(d) a writ of habeas corpus on behalf of a petitioner in custody pursuant to a State court judgment is to be granted only if that judgment resulted in a decision that either (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." But that "highly deferential" standard of review, *see Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam), applies only "with respect to any claim that was adjudicated *on the merits* in State court proceedings," Section 2254(d) (emphasis added).

Here the state court system did not adjudicate the merits of Bush's claim

invoking *Batson v. Kentucky*, 476 U.S. 79 (1986); instead the California Supreme Court, the only state court to which that claim was presented, rejected that claim on state procedural grounds. We therefore review the *Batson* claim not under Section 2254(d), but under our pre-AEDPA law. Under pre-AEDPA law, the trial court's failure to find a prima facie case of discrimination under *Batson*'s first step would be entitled to a "presumption of correctness." See *Tolbert v. Page*, 182 F.3d 677, 683, 685 (9th Cir. 1999) (en banc). The trial court, however, denied Bush's *Batson* claim solely with reference to *People v. Wheeler*, 22 Cal. 3d 258 (1978). The Supreme Court has held that the "strong likelihood" standard articulated in *Wheeler* impermissibly places on the defendant a more onerous burden of proof than is permitted by *Batson*'s standard of "raising an inference" of discriminatory purpose. See *Johnson v. California*, 545 U.S. 162, 168, 170-73 (2005); *Wade v. Terhune*, 202 F.3d 1190, 1195 (9th Cir. 2000). "[W]here the state court uses the wrong legal standard, this [*Tolbert*] rule of deference does not apply." *Wade*, 202 F.3d at 1195. We therefore review Bush's *Batson* claim de novo.

Under *Batson*, a prosecutor is required to provide a race-neutral explanation once the defendant has shown that the "totality of relevant facts" surrounding the peremptory challenge at issue "gives rise to an inference of discriminatory purpose." 476 U.S. at 93-94. As Bush himself notes, the mere fact that a

prosecutor uses a peremptory challenge to strike a sole prospective African-American juror is not enough on its own to raise such an inference. *See United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994). Bush points to several “relevant facts” in support of his prima facie case, however, including that racial motivation was part of the prosecution’s theory of the case, that the defendant was African-American and the victim was white and that the remaining jurors were all white. He also argues that a comparison between the struck juror and jurors who were not struck supports his prima facie case of discrimination.

Comparative juror analysis is relevant to whether Bush has established a prima facie case of discrimination. *See Boyd v. Newland*, 467 F.3d 1139, 1144-45 (9th Cir. 2006). The voir dire transcripts show that differences between the struck juror and other jurors were not significant and that the prosecutor may have engaged in disparate questioning by inquiring into the African-American juror’s knowledge of gangs, but not other jurors’ knowledge of gangs. We therefore hold that Bush has presented a prima facie case of discrimination under *Batson*’s step one. Because the “state has never been required to present evidence of the prosecutor’s actual, non-discriminatory reasons for striking [the juror],” we remand so that the district court may hold a hearing to give the prosecutor a chance to offer a race-neutral explanation and so that the district court may determine whether the

prosecutor violated *Batson*. See *Paulino v. Castro*, 371 F.3d 1083, 1092 (9th Cir. 2004).

Bush's remaining claims require no extended treatment, for each fails to meet the rigorous requirements of either of the AEDPA standards under Section 2254(d). In sum, the trial counsel's exclusion from the *in camera* proceeding, the admission of the letter excerpts, the prosecutor's comments at closing and the appellate counsel's inability to access the record of that proceeding – both singly and in combination – were neither contrary to, nor involved an unreasonable application of, clearly established law, nor did they involve an unreasonable determination of the facts.

Each party shall bear its own costs on appeal.

REVERSED IN PART; AFFIRMED IN PART.