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3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 CENTRAL DISTRICT OF CALIFORNIA 10 11 DAVID M. JASSY, NO. CV 13-8611-JVS (AS) 12) Petitioner, ORDER ACCEPTING FINDINGS,) 13 CONCLUSIONS AND RECOMMENDATIONS v. 14 KEVIN CHAPPELL, Warden, OF UNITED STATES MAGISTRATE JUDGE) 15 Respondent.) 16

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 <u>de novo</u> 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.

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Petitioner contends that the Report and Recommendation failed 1 2 to conduct an appropriate harmless error inquiry with regard to Petitioner's instructional error claim, and misconstrued Ninth 3 Circuit precedent in relation to Petitioner's Batson claim. 4 (Objections at 1-11). The Court does not agree.

7 Petitioner claims that, with regard to his instructional error claim, the Report and Recommendation erred in its prejudice 8 analysis and "incorrectly viewed the harmless error inquiry as a 9 10 sufficiency of the evidence test." (Objections at 9.) Petitioner cites to a recent Ninth Circuit case in which the court reiterated 11 "that the relevant question is not simply whether we can be 12 13 reasonably certain that the jury *could* have convicted [the 14 defendant] based on the valid theory . . . but whether we can be reasonably certain that the jury did convict him based on the valid 15 . . . theory." <u>Riley v. McDaniel</u>, No. 11-99004, 2015 WL 2262549, 16 17 at *4 (9th Cir. May 15, 2015). Here, the jury found that Petitioner was guilty of second degree murder based on an implied 18 19 malice theory. As set forth in the Report and Recommendation, the jury made this finding pursuant to the appropriate implied malice 20 21 test in People v. Phillips, 64 Cal. 2d 574, 587 (1966) (requiring 22 that the "natural consequences of the act were dangerous to life"). However, Petitioner maintains that the trial court's involuntary 23 24 manslaughter instruction erroneously stated that assault and 25 battery were "crime[s] that posed a high risk of death of great 26 bodily act [sic]," and that this error was not harmless because it

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

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

19 Petitioner also contends that the Report and Recommendation ignores Supreme Court precedent and misconstrues Ninth Circuit 20 21 precedent in relation to his <u>Batson</u> 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 <u>Powers v. Ohio</u>, 499 U.S.

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

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

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Petitioner's reliance on several Ninth Circuit cases cited in the Report and Recommendation as support for his position that the

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prosecutor's statements were sufficient to show a prima facie case 1 2 under <u>Batson</u> is similarly misplaced. First, circuit precedent is relevant only to the extent it clarifies what constitutes clearly 3 established law as determined by the United States Supreme Court. 4 28 U.S.C. § 2254(d). Second, all of the cases cited by Petitioner 5 involved other evidence, including statistical analyses of the jury 6 pool, establishing a prima facie case. See Fernandez v. Roe, 286 7 F.3d 1073, 1078-80 (finding inference of discrimination based on 8 "bare record of statistical disparities of peremptory strikes" 9 against prospective Hispanic jurors); Paulino v. Castro, 371 F.3d 10 1083, 1091 (9th Cir. 2014) (determining an inference of bias was 11 raised where the prosecutor removed eighty-three percent of 12 13 possible African-American jurors using five out of six possible 14 peremptory challenges); <u>Smithkline Beecham Corp. v.</u> Abbott Laboratories, 740 F.3d 471, 477-78 (9th Cir. 2014) (finding a prima 15 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 presented an issue of consequence to the gay community). Unlike 18 the cases cited by Petitioner, the trial court record here does not 19 disclose the exact composition of the venire as a whole or of the 20 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 <u>Batson</u>.

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Petitioner also claims that because the "[c]onstitution forbids 1 2 striking even a single juror for a discriminatory purpose[,]" Snyder v. Louisiana, 552 U.S. 472, 478 (2008), the state court's 3 finding that there was no apparent race-neutral challenge to Juror 4 M-5435 was enough for the showing of discrimination required at the 5 first step of Batson. The Court finds this claim to be without 6 In order to determine whether a juror was indeed stricken 7 merit. for a discriminatory reason, the Court would have to engage in a 8 comparative juror analysis to determine whether the prosecutor's 9 10 reasons for striking that juror were indeed race-neutral. Boyd v. 11 Newland, 467 F.3d 1139, 1145 (9th Cir. 2004) ("Comparative juror analysis refers . . . to an examination of a prosecutor's questions 12 13 to prospective jurors and the jurors' responses, to see whether the prosecutor treated otherwise similar jurors differently because of 14 their membership in a particular group."). Although the California 15 16 Petitioner both speculate Court of Appeal and about the 17 prosecutor's reasons for striking Juror M-5435, among other jurors, 18 what matters is the prosecutor's real reasons, not just potential reasons. Paulino v. Castro, 371 F.3d 1083, 1090 (9th Cir. 2004); 19 20 Miller-El v. Dretke, 545 U.S. 231, 252 (2005) ("A Batson challenge 21 does not call for a mere exercise in thinking up any rational 22 basis."). Here, the prosecutor never gave her real reasons for 23 striking the challenged juror but even if those reasons had been 24 provided, the Court would still be unable to conduct a proper 25 comparative juror analysis without knowing the race of the jury 26 members who ultimately sat on the jury. Miller-El, 545 U.S. at 252-

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

Petitioner's remaining objections are simply re-assertions of arguments raised in the Petition. These arguments were addressed in and rejected by the Report and Recommendation and do not cause the Court to reconsider its decision to accept the Magistrate Judge's conclusions and recommendations.

IT IS ORDERED that Judgment be entered denying and dismissing the Petitioner with prejudice.

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IT IS FURTHER ORDERED that the Clerk serve copies of this
Order, the Magistrate Judge's Report and Recommendation and the
Judgment herein on counsel for Petitioner and counsel for
Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: June 4, 2015.

JAMES V. SELNA UNITED STATES DISTRICT JUDGE