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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

STEVEN EDWARD CRITTENDEN,

Petitioner,

No. CIV S-95-1957 KJM GGH P
No. CIV S-97-0602 KJM GGH P

vs.

DEATH PENALTY CASE

ARTHUR CALDERON,

Respondent.

FINDINGS AND RECOMMENDATION

Introduction and Summary

The denial of the operative petition in this death penalty case was affirmed in all respects by the Ninth Circuit in its opinion Crittenden v. Ayers, 624 F.3d 943 (9th Cir. 2010), except for the Batson claim involving the third part of the Batson paradigm.¹ In respect to the remand on that issue, the Ninth Circuit directed that the district court employ the “motivated in substantial part” analysis in lieu of the “mixed motives” analysis employed previously by the district court.

After briefing and hearing, the undersigned finds and recommends that the bias shown by the prosecutor when striking one African-American juror, although significant, was not

¹Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986).

1 substantial in terms of the prosecutor's motivation.

2 *Procedural History*

3 The entire history of the case is not relevant, and only that pertinent history
4 relevant to the Batson issue will be set forth. The issue centers about the peremptory challenge
5 by the prosecutor of the sole African-American juror in the capital case venire. In initial Findings
6 and Recommendations, the undersigned recommended that no prima facie case was set forth by
7 petitioner. The district judge assigned at the time, the Honorable Frank C. Damrell, Jr., disagreed
8 and upon finding that petitioner had set forth a prima facie case, remanded the remainder of the
9 Batson analysis to the undersigned.²

10 This further analysis of the last two steps of the Batson analysis was complicated
11 by the fact that the prosecutor had essentially no memory concerning his use of the peremptory
12 challenge. Nevertheless, the undersigned found that the prosecutor's notes at the time, utilizing a
13 code and cryptic word description, and the context of the voir dire and challenge as set forth in
14 the transcript, enabled the undersigned to find the articulation of non-discriminatory reasons for
15 exercise of the challenge. Findings and Recommendations, dated February 27, 2003, Docket #
16 163 (hereafter Findings and Recommendations or F & Rs) at 16-21. This finding was later
17 upheld by the district judge, Order dated February 23, 2005, Docket #180 (hereafter "the Order")
18 at 14-18, and the Ninth Circuit, Crittenden at 957-958.

19 The undersigned held an evidentiary hearing to determine whether the articulated
20 reasons were pretextual. The substantive facts found at that evidentiary hearing are set forth at
21 length below. Suffice it to say here that the undersigned found that the prosecutor's
22 reconstructed reasoning was pretextual in part, i.e., played a significant role, but upon
23 application of the "mixed motives" test (as that test had been defined in case law of other
24 circuits), the undersigned found that a reasonable prosecutor would have exercised the

25 ²The Ninth Circuit later upheld the district judge's finding of a *prima facie* case.
26 Crittenden at 957.

1 peremptory challenge even in the absence of discriminatory animus due to Juror Casey’s
2 reluctance/ambiguity with respect to her ability to vote for a death penalty verdict if such were
3 warranted by the evidence. Findings and Recommendations at 21-40. Put another way, that
4 “prosecutor Flanagan had a good reason to exercise his challenge which outweighed the bad.” Id
5 at 40. The district judge, although not agreeing with all of the undersigned’s analysis, adopted
6 this finding with an explained decision. Order at 18-23.

7 While this case was on appeal, the Ninth Circuit determined (in another case in
8 which the undersigned had been involved), that this circuit would not apply the “mixed motives”
9 analysis to Batson challenges. Cook v. LaMarque, 593 F.3d 810 (9th Cir. 2010). The Crittenden
10 court applied Cook:

11 Acting prior to our decision in *Cook*, the district court appears to
12 have conducted its step three analysis by asking whether race
13 played a “significant” part in the decision to issue the peremptory
14 strike, and if so whether the defendant could prove under a mixed
15 motives analysis that the strike would have issued even if race had
16 played no role. *Cook* framed the first inquiry in different terms and
17 eliminated the second. As *Cook* explains, the proper analysis at
18 *Batson*’s step three is whether the peremptory strike was
19 “motivated in substantial part” by race. *Id.* If it was so motivated,
20 the petition is to be granted regardless of whether the strike would
21 have issued if race had played no role. *Id.* (“[W]e reject the ...
22 mixed-motives analysis, and limit our inquiry to whether the
23 prosecutor was ‘motivated in substantial part by discriminatory
24 intent.’”).

19 Crittenden, at 958.

20 However, the Crittenden court did not make the ultimate analysis itself; rather it
21 remanded the case for the district court to make the analysis:

22 As the district court was operating under the erroneous impression
23 that the *Batson* inquiry required an additional step—i.e., mixed
24 motives analysis—we remand to give the court an opportunity to
25 apply the proper standard, as articulated in *Cook*. We do not
26 foreclose the possibility that the district court could conclude on
remand that its previous finding that “race played a significant part
in the prosecutor’s decision to remove Casey” was sufficient under
Cook to establish a *Batson* violation. [FN6 omitted.] Nonetheless,
the district court did not have the benefit of *Cook* when it last

1 addressed the question, and its evaluation of the significance of the
2 race factor in the decision to strike Mrs. Casey could have been
3 informed by its understanding that there would be another analytic
4 step focusing on the several race-neutral justifications offered. We
5 therefore leave it to the district court to make a step three
6 determination in the first instance, unconstrained by its prior
7 findings under the pre- *Cook* standard.

8 Crittenden, at 958-959.

9 *Substantive Facts*

10 Three points bear emphasis before recounting the underlying facts. First, the
11 evidentiary facts underlying the Batson dispute are essentially not at issue as “they are what they
12 are,” i.e., based on incontrovertible transcript and other record evidence. Moreover, the parties
13 did not attempt to add new facts into the analytical mix on remand.³ Rather, it is the application
14 of those established facts, or the inferences to be drawn from them, which are contested.
15 Therefore, the undersigned will repeat at length those evidentiary facts he initially found. To the
16 extent that the district judge previously explicated additional/different/superseding evidentiary
17 facts in his discussion, those facts will be included in the discussion. Further, to the extent that
18 the parties have referred the undersigned to additional, undisputed evidentiary facts, those will be
19 included in this discussion as well.

20 While the complete re-explication of all these facts may seem tedious to counsel
21 who have been involved in this case for years, and who are well aware of the underlying Findings
22 and Recommendations/Orders, the fact is that the district judge newly assigned to this case will
23 not have such familiarity. Rather than have this judge (the Honorable Kimberly J. Mueller) hunt
24 and sift through the now very voluminous file, the undersigned will place as complete a record as
25 feasible before Judge Mueller.

26 Secondly, the undersigned will not modify the underlying subsidiary factual
determinations with respect to the prosecutor’s state of mind. Such would be beyond the

³The parties expressly eschewed any further evidentiary hearing.

1 mandate of the Ninth Circuit which simply calls for an application of the already found facts to a
2 new analytical standard, i.e., whether a previously found significant, discriminatory reason for
3 exercising a peremptory challenge was a substantial motivation, or put another way—how
4 significant was significant. “District courts must implement both the letter and spirit of the
5 mandate, taking into account the appellate court’s opinion and the circumstances it embraces.”
6 Vizcaino v. USDC (W.D. Wa.), 173 F.3d 713, 719 (9th Cir. 1999) (internal quotation marks
7 omitted). While the finding under the Ninth Circuit’s articulated third step Batson standard
8 would be considered a new ultimate factual finding, and the Ninth Circuit gave the district court
9 *carte blanche* to reconsider its ultimate finding, the subsidiary facts will not change.

10 Moreover, neither side requests the opportunity to present new facts; it would be
11 odd then in the absence of such, and years later than the initial deeply thought out determinations,
12 to arrive at completely different subsidiary factual determinations. Thus, the undersigned at this
13 point will neither find the absence of a discriminatory motivation on the part of the prosecutor,
14 nor will he find that discrimination was the only reason the prosecutor exercised his peremptory
15 challenge. The undersigned will only determine how substantial was the prosecutor’s existing
16 discriminatory motivation.

17 Finally, the undersigned presided at the evidentiary hearing, made credibility
18 findings and issued ultimate findings of facts. These ultimate findings were adopted *in their*
19 *entirety* by the district judge (Judge Damrell). The district judge did, however, utilize a different-
20 in-part subsidiary factual basis, disagreeing with the undersigned in part on the underlying,
21 subsidiary factual basis. The undersigned has been careful to include Judge Damrell’s findings,
22 and the undersigned has relied on them where they are different from those of the undersigned.
23 The undersigned has been tasked with making the first decision to employ the Ninth Circuit’s
24 Batson third step analytical standard, i.e., the application of those facts to the directed standard.
25 The undersigned has made herein an ultimate factual finding concerning whether the prosecutor’s
26 peremptory challenge of Mrs. Casey, the juror in question, was substantially motivated by racial

1 bias. That ultimate finding is the undersigned's independent finding.

2 The undersigned turns to the subsidiary facts.

3 *The Casey Voir Dire*

4 Prospective juror, Manzanita Casey, the only African-American prospective juror
5 in the entire venire, was initially challenged for cause by the prosecution, and when that
6 challenge was denied, was later peremptorily challenged by the prosecution. This juror, as did all
7 the other jurors, had furnished questionnaire responses about personal histories and opinions. At
8 the time of petitioner's trial, prospective juror Casey was married and the mother of two children.
9 Respondent's Exhibit 44 (Evidentiary Hearing) (Casey juror questionnaire). The questionnaire
10 demonstrated that this juror was concerned about drugs and street crime. For questions related to
11 potential racial bias, Mrs. Casey demonstrated concern for the lingering existence of bias in the
12 country, but did not believe that her locale (Placer County) had such a problem. Mrs. Casey's
13 views were not extremist in any manner. As found previously by the undersigned and the district
14 judge, absent consideration of a willingness to impose the death penalty, Mrs. Casey was
15 seemingly an ideal prosecution juror.

16 Mrs. Casey did express hesitancy about her willingness to apply the death penalty,
17 although at no time did she unequivocally state that she could not vote in favor of such a penalty
18 if warranted under the facts. She wrote in the juror questionnaire in response to a question about
19 her general feelings about the death penalty: "I don't like to see anyone put to death." She did
20 not answer other questions concerning whether she thought the death penalty was used too often
21 randomly, or too seldom. Exhibit 44. As petitioner points out, Mrs. Casey did say that she
22 could put aside her personal feelings and follow the law.

23 Mrs. Casey was extensively voir dired by the court, defense counsel, and the
24 prosecutor on her death penalty views. Without being redundant, the pertinent parts of that voir
25 dire are set forth here, as it is important to let juror Casey's responses speak for themselves, at
26 least initially:

1 RT 6106: 23 to 6108: 28 Voir Dire by the Court

2 Against that backdrop, I need to ask you some questions about your
3 concerns and your opinions regarding the death penalty.

4 If the People in the prosecutor [sic] proves beyond a reasonable
5 doubt that Mr. Crittenden is guilty of murder in the first degree,
6 would you refuse to vote for that verdict because of a conscientious
7 opinion concerning the death penalty knowing that if you did vote
8 for a murder in the first degree, you may obligate the jury to get
9 into the question of penalty in a later trial?

10 In other words, would you, even though the prosecutor had shown
11 that the murder was a first degree murder, would you nevertheless
12 not vote for it for the reasons of fearing having to reach the issue of
13 the death penalty?

14 A: Well, I am against death -- being put to death. And I am against
15 people killing people.

16 Q: Okay.

17 A: That is hard to answer.

18 Q: All I am asking you is whether your feelings concerning the
19 death penalty would influence your vote to the extent –

20 A: No —

21 Q: – that you would not vote for a first degree murder conviction.

22 A: No.

23 Q: Let me also ask you if you have such a conscientious opinion
24 concerning the death penalty that should the jury be requested to
25 vote on the issue of the special circumstances, and should the
26 prosecution prove that the special circumstances were true, would
you refuse to vote for the truth of the special circumstances
because you know that if you voted for them, then it would
obligate the jury to then consider the question of penalty?

A: No.

Q: Now, let me go one step further and let's say you are on the
jury, and you have voted for a first degree murder conviction. The
jury has found first degree murder. The jury has also found the
existence of the special circumstances.

25 ///

26 ///

1 Now we are in a different trial. And, the evidence that will be
2 put before the jury will deal with primarily the defendant, himself.
3 Background, education, schooling, things relating to the defendant
4 generally is what the law provides may be introduced at that trial.

5 Do you have such an opinion concerning the death penalty that
6 regardless of the evidence that would be produced at the penalty
7 trial, that you would automatically and in every case vote against
8 the imposition of the death penalty?

9 A: No.

10 Q: Okay. You can conceive of situations in which you might vote
11 for the death penalty?

12 A: Yes.

13 Q: Let me ask you the reverse of that. And I think I know what the
14 answer is. And that is regardless of the evidence that would be
15 presented at a penalty trial, would you automatically and in every
16 case vote for a death verdict and never vote for life imprisonment
17 without the possibility of parole?

18 A: Would I vote for the death?

19 Q: Would you vote for the death automatically and never vote for
20 life imprisonment without possibility of parole?

21 A: No.

22 RT 6111: 10 to 6112: 16 (voir dire by defense counsel)

23 Q: As I understand your answers to the Judge's questions just a
24 few moments ago, that as a general principle, you don't agree with
25 execution as a penalty. Is that correct?

26 A: I don't believe in death penalty.

Q: Okay.

A: And I don't believe in nobody killing anybody either. So I
guess – I don't know what you would say – in between or
whatever.

But–

Q: Well –

A: It is hard.

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Q: You have indicated that you can conceive of a situation where a death penalty might be appropriate?

A: Yeah.

Q: Just as in terms of generalities, a crime so bad and a defendant so bad that it appears appropriate that under the standards that you would be instructed to apply, that the death penalty would be appropriate penalty?

A: Yes.

Q: So you are not telling us that in any situation you couldn't or wouldn't vote for a death penalty?

A: No.

Q: What you are telling us is in terms of your opinion, although you have general reservations about it, about the death penalty, it would have to be a severe case before you would?

A: It would be have to be awful bad, yes.

Q: Okay.
And if it was –

A: And, if I believed it. You know.

Q: I am sorry.

A: And if I believed it.

Q: Okay. Believed it being that the situation was awfully bad?

A: Was that bad, uh-huh.

RT 6116: 16 - 6118: 27 (voir dire by the prosecutor)

Q: Do you honestly believe, considering what your feelings are toward the death penalty, that you could vote for a verdict which would mean that this gentlemen here, Mr. Crittenden, would be executed in the gas chamber?

A: Could I vote –

Q: Yes.

A: – for it?
I can't sit here and really say for sure if I could.

1 But, if it is proven to me, truly proven to me, and I feel deep
2 down inside that he did it, I could. I think I could.

3 Q: You think you could?

4 A: Yes. I have to say I think I could. This is all new to me. So I
5 am very upset with it.

6 Q: Well, this is a – for all of us who have thought in any depth
7 about the death penalty, very few of us ever get into the position
8 that you are in where you have to–

9 A: It is hard.

10 Q: – think out loud and tell us what your feelings are.

11 Do you think that your feelings about the death penalty – in
12 other words, that you don't believe in it – would make it difficult
13 for you to make a decision regarding the death penalty?

14 A: Yes, I think it would.

15 Q: And, do you think it might substantially impair your ability to
16 fairly evaluate all of the evidence regarding the death penalty?

17 A: I can't say yes. I can't say no. I really don't – don't know.

18 Q: Even – let's say for a moment that a jury has decided, and you
19 are on the jury, that Mr. Crittenden has committed these crimes and
20 that special circumstances are involved. So it is up to the jury then
21 to hear evidence about Mr. Crittenden upon which – and including
22 the information about the crimes you have already heard – you are
23 going to make a decision about life or death. Okay?

24 A: Uh-huh.

25 Q: Do you think that you are in such a position because of your
26 strong feelings about the death penalty that even before you heard
evidence in that second part of the trial that you would be leaning
toward life instead of death?

A: No. I don't think so.

Q: You think –

A: I could – after I have set there, has set through it all, and had the
feeling that he did do it, then I think I could –

Q: You understand that neither side in this case wants to have as a
juror someone who has their mind made up before?

A: I haven't.

1 Q: Before they heard the facts.

2 A: I haven't. Because I haven't heard the facts.

3 Q: So, is it really the bottom line of your statement to us that
4 despite your statement that you don't believe in the death penalty,
5 that you could still vote for the death penalty if you heard facts and
6 circumstances which warranted it?

7 A: True. Yes.

8 Q: You really think?

9 A: I think I could. Uh-huh.

10 I can't say – I can't come out and say fully, yes, I could or, no, I
11 couldn't, because I don't know the circumstances.

12 Q: That is what I am getting at. I don't want to give you the
13 circumstances because I don't want you to have to prejudge the
14 facts. What I am trying to find out is if your general feeling about
15 the death penalty would even interfere with your being able to
16 make a decision about it.

17 A: I don't think so. I try not to let it.⁴

18 ⁴Petitioner included the entire voir dire by the prosecutor for discussion. The part omitted
19 by the undersigned in the text again exemplifies the back and forth that Mrs. Casey had with her
20 thoughts on the death penalty. For completeness, that portion of the voir dire by the prosecutor
21 (beginning) is reprinted in this footnote.

22 Q. Mrs Casey, do you understand that if we reach a point in the trial where a jury
23 has to decide upon punishment being life in prison or the death penalty, that both
24 sides, the defense and the prosecution, which I represent, are entitled to an
25 unbiased jury. Do you understand that?

26 A. Yes.

Q. Now I gathered from your answer to the question on the death penalty that you
do not believe in the death penalty?

A. I really don't. But if it is bad, it really bad and I felt that, you know– I hate
death. I don't know how to express myself, really. But I really hate to see
anybody be put to death. And I hate to see someone take a life. I don't care
whose it is. So–it is–it is hard for me to express it. But I could, if proven to me,
to, no doubt, that it was a crime, then I don't think I would hesitate.

Q. You understand, I am sure, from years of watching how the system works, that
as a representative of the People, that we are asking for the death penalty in this
case. You understand that?

A. Yes.

Q. Do you think considering your feelings on the death penalty that even before
we start giving you evidence in this case, that my side, the side of the People, is at
a disadvantage with regard to the death penalty because of your feelings about it?

A. You feel you are at a disadvantage?

Q. Do you think?

1 The record facts of the jury selection, much of which was previously set forth in
2 the Findings and Order, are detailed in the subsection entitled “Pretext” because the record as a
3 whole is pertinent to that discussion. For the articulation by the prosecutor of the race neutral
4 explanation, and for other facts pertinent to the “pretext” prong, the undersigned sets forth the
5 following facts developed after Judge Damrell’s Order.

6 *Facts Developed After Remand From District Judge*

7 Prior to the holding of the evidentiary hearing, petitioner engaged in discovery
8 which included taking the deposition of the prosecutor, Gerald Flannagan. As related in the
9 undisputed facts adopted by the Pre-hearing Order, set forth below, the prosecutor did not
10 remember *anything* of significance to the exercise of his peremptory challenge.

11 1. He [the prosecutor] alone conducted the trial and exercised peremptory
12 challenges of prospective jurors at the trial of People v. Crittenden.

13 2. He has no recollection of exercising the peremptory challenge to remove
14 prospective juror Manzanita Casey. He has no recollection of why he removed
15 Mrs. Casey, who is African-American. He cannot say what he was thinking at the
16 time he exercised the peremptory.

17 3. He does not recall if he used peremptories to remove African-American
18 jurors.

19 4. He has no recollection of the peremptory challenge process in the
20 *Crittenden* trial, or the final selection of the jury, or of the method used for

21 A. Do I think?

22 Q. Because of your strong feelings on the death penalty, that my side which is
23 asking of the death penalty is at a disadvantage in this case?

24 A. I don’t really think so. I don’t know.

25 Q. Do you as you sit there today think that you are completely open and objective
26 about the issue of the death penalty?

 A. I try to be.

 Q. Do you think?

 A. I couldn’t say fully. I would try.

 Q. His Honor has told you at an earlier time in the State of California when a
 person is sentenced to death, that means exactly what it says?

 A. Yeah.

 Q. That he is supposed to die in the gas chamber. Do you understand that?

 A. Yes.

 Q. And, as a juror, sitting on a case such as this, it is up to you along with the
 other eleven members of the jury to make that final decision as to what the penalty
 is going to be. Do you understand that?

 A. Yes.

[the voir dire as set forth in the text continues at this point.]

1 exercising peremptories, or whether he used all of his available peremptories.

2 5. He has no independent recollection of the individual voir dire of Mrs.
3 Casey, and cannot say what his personal observations of her were. He has no
4 recollection of her and he is not able to describe her. When he reviewed the
5 transcript of the individual voir dire of Mrs. Casey in preparation for the August
6 26, 2002 deposition, it did not refresh his recollection as to what had taken place.

7 6. He has no recollection of what his position was, if any, regarding Mrs.
8 Casey at the conclusion of the voir dire by both sides.

9 7. He has no recollection of having challenged Mrs. Casey for cause, and
10 has no recollection of what the basis was for the cause challenge, other than what
11 is in the record.

12 8. He does not remember what his general concerns were as he
13 approached selecting a jury in the *Crittenden* case.

14 10. He does not recall if there were any black people in the original panels
15 of jurors summoned for jury service in the *Crittenden* case, or how many black
16 people were excused for hardship, if any.

17 11. He does not recall how many black people were questioned during
18 individual voir dire, or whether there were any other black people in the venire
19 other than Mrs. Casey.

20 13. He made notations on his copy of the questionnaire of Mrs. Casey.
21 He does not recall whether the notations are the actual reasons he exercised a
22 peremptory to remove Mrs. Casey from the jury. He cannot say what he was
23 thinking when he wrote the notations.

24 14. When he read the California Supreme Court decision in *People v.*
25 *Crittenden* in approximately May or June, 2002, he did not recall that a
26 peremptory used by him had been the subject of a *Wheeler* motion during the trial,
and reading the decision did not refresh his recollection as to what had taken place
with respect to Mrs. Casey.

15 15. He has no independent recollection of the reasons why he retained
16 Mrs. Gislea Clark on the jury. When he read the transcript of the individual voir
17 dire of Mrs. Clark in preparation for the August 16, 2002, deposition, it did not
18 refresh his recollection of her voir dire.

19 16. *People v. Crittenden* and *People v. Willie Junior Johnson* are the only
20 capital trials he has participated in.

21 17. He has no recollection of the *Wheeler* motion in the *Johnson* case.

22 There is also no dispute that the prosecutor herein was not asked by the trial judge to proffer a
23 race neutral reason after the trial judge found that petitioner had not established a prima facie
24 case.

25 At hearing, respondent's counsel indicated that he had not stipulated to the above
26 facts, but only that the prosecutor had stated them at deposition. The court need not decide
whether respondent's "clarification" was appropriate in that prosecutor Flannagan testified at the

1 hearing, and with the possible exceptions of Facts Nos. 8 and 13, did not significantly depart
2 from any of the undisputed facts. The court finds these facts as *part* of the factual universe
3 pertinent to the Batson issues, but permits the expansion of facts related to Nos. 8 and 13 as set
4 forth below.

5 The undersigned states from the outset that he found Mr. Flannagan to be credible
6 and forthright in his factual testimony relating his non-recollection and recollections with respect
7 to his systemic practices and the rating system in this case. Flannagan was not purposeful in his
8 non-recollection, nor was he creating recollections where he really had none. In general,
9 Flannagan confirmed that he had no recollection for the most part of what he was thinking or
10 observing in the past, except that he did have a recollection of systemic practices that he utilized
11 along with what was meant by certain practices at the time, and a vague recollection of general
12 events, e.g., identities of defense counsel, the presence of the judge, meeting with defense
13 counsel. He could also identify handwriting/marks on juror questionnaires as his, could read the
14 words, and “translate” his marking system. The court was careful to permit only that testimony
15 for which Flannagan could actually recollect, or for which his recollection was actually refreshed,
16 and *not* that testimony for which Flannagan was testifying to a *present day* inference of what *he*
17 *must have been thinking at the time*. That is, if Flannagan could ultimately recall what he
18 observed, thought, marked, interpreted, practiced etc. at the time of trial, he could testify to that.
19 If however, he was simply attempting to draw his own inferences from presently reading the
20 exhibits to construct a present day hypothetical scenario of a past event, he was not permitted to
21 testify. See RT Evid. Hrg. 20, 22, 23, 24, 25, 26, 27, 42, 54, 55, 56, 57, 93, 94, 95, 96.

22 Thus, even though Flannagan could not recall what he was thinking 15 years ago
23 vis-a-vis a particular juror, it might be perfectly logical for Flannagan to actually recollect a
24 system or methodology pertinent to exercising peremptory challenges in the Crittenden trial, and
25 interpretation of that system, because he had used such for a number of years without significant
26 change, or because the writing/marks on the juror questionnaires were self evident and not

1 seriously open to question. The critical evidentiary factor would be whether the exhibit disclosed
2 enough about the system or methodology to be useful to a determination of the prosecutor's
3 thinking at the time and not be misleading.

4 On the testimony permitted, the court finds that the term "passed for cause" on the
5 questionnaire cover sheet indicated that the juror had actually not drawn a cause objection, or that
6 the juror had survived a challenge for cause. In either event, the juror could potentially be seated
7 absent a peremptory challenge. It is most probable that the "passed for cause" notation was made
8 at a time that the juror had survived an initial hardship inquiry or a pre-voir dire review of
9 counsel. The handwritten number "56", at the bottom of the questionnaire meant that question
10 56 (an inquiry about death penalty views) had caught Flannagan's attention as he had reviewed
11 the questionnaires *prior to his having met the juror*.⁵ The court does not find that the cartoon
12 doodles on any part of the questionnaires had any significance to the issues before the court.

13 The court further finds that Flannagan's rating of the juror in terms of favorability
14 to the prosecutions case, especially a willingness to impose the death penalty if the facts at trial
15 indicated such should be imposed, or conversely in terms of non-favorable, appeared generally
16 on page two of the juror questionnaire. The court finds from a review of the entire voir dire
17 transcript that for the most part, Flannagan (and defense counsel) was focused on the death
18 penalty issue during voir dire. However, the rating was not invariably focused solely on the
19 death penalty issue. See juror comparisons below. Moreover, "question 56" or a later annotation
20 of "DP" on page 2 (see below) appeared most frequently as the prosecutor's concern. If a juror
21 exhibited characteristics, in terms of being a "good" prosecution juror, or conversely a "bad"
22 prosecution juror, even for the liability phase, the comments accompanying the rating system
23 were clear enough to make all notations meaningful to the issues herein. The court rejects
24 petitioner's assertions that the prosecutor's ratings and notations are not useful in adjudicating
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26 ⁵Other numbers corresponding to the questionnaire appeared as well.

1 the Batson issues even if a few seem anomalous.⁶ Determination of the issues here is enhanced
2 by understanding the rating and notations *actually* given to each juror at the time even if counsel
3 today believe the rating should have been different, or is somehow pretextual.

4 Thus, “check marks” on page 2 indicated that the prosecutor thought this juror to
5 be favorable to the prosecution—the more check marks, the more favorable. Similarly, “Xs”
6 meant that the juror was thought to be unfavorable to Flannagan—again, the more Xs, the more
7 unfavorable. It appears that the maximum rating either way was four check marks, or four Xs.
8 The prosecutor often made cryptic comments to go along with the rating. The most frequent
9 comment had to do with “DP,”—death penalty. A “DP” set forth on page 2 indicated that the
10 prosecutor had concerns that the juror could have some type of problem (mild or otherwise) in
11 the penalty phase. The court finds that where legible, the other comments were self-evident and
12 easily understood. The notations/comments were made at or about the time that voir dire had
13 been completed with the juror.

14 Taking a few illustrative examples will clarify the above. For example, on juror
15 Fortier’s questionnaire (respondent’s Exhibit 3) at page 2, Flannagan rated him as three checks,
16 but with a possible concern that the juror was “too strong,” i.e., too fixed in his opinions or
17 overbearing in his opinions. On the other hand, juror Hurst (Exhibit 18) received two Xs and no
18 comments. Juror Hunter (Exhibit 20) received two Xs and the comment “teacher, doesn’t like
19 DP.” Flannagan did recall that he had a general aversion to having teachers on the jury. By far,
20 more jurors received check marks than Xs. Indeed, relatively few jurors received Xs.

21
22 ⁶The rating system and understandable notations on the questionnaires were quintessential
23 past recollection recorded. Fed. R. Ev. 803(5). They were “a record” “concerning a matter about
24 which the witness once had knowledge but now has insufficient recollection to enable the
25 witness to testify fully and accurately” “shown to have been made or adopted by the witness
26 when the matter was fresh in the witness’ memory and to reflect that knowledge correctly.” To
the extent that the court had any doubt about the content of the notation, the court has not relied
on the exhibit. Again, the import of the notations are common sense. The court overruled
petitioner’s somewhat unclear objection to use of the exhibits and their notations. RT (Evid.
Hrng.) 89. See also RT 102, 103.

1 Most pertinent to the past record review of the voir dire, juror Manzanita Casey
2 (the only known African-American) (Exhibit 44) received a four “X” rating, the most
3 unfavorable. Prior to Flannagan ever seeing her, he noted that question 56 was of concern. After
4 her voir dire (presumably), he rated her with four [large] Xs and commented: “DP” and
5 “transport[ation] problems” and “can’t say if could set aside.” Clearly, the last comment was
6 directed to the juror’s death penalty views and not her transportation problems.

7 The other, comparison juror who received much attention in the prior briefing was
8 Gislea Clark (Exhibit 1). Clark was voir dired subsequent to Mrs. Casey. Flannagan did note
9 that question 56 caught his attention as she had starkly written that she was “against” imposition
10 of the death penalty. Despite the continued hesitance about imposition of the death penalty set
11 forth in the Clark voir dire as expounded upon in the initial Findings and Recommendations and
12 the Order, this juror received *three checks*. For some reason, although it is not readily evident
13 from the voir dire, the prosecutor had obtained the impression that she “might vote DP;”
14 Flannagan liked this juror because she was “otherwise strong.” (Emphasis in original). The
15 latter observation is borne out by the voir dire (see Casey/Clark comparison below).

16 *Underlying Facts Found by the Undersigned and the District Judge*

17 Both the undersigned and the district judge (Judge Damrell) found that racial bias
18 was a “significant factor” in the state of the prosecutor’s mind when exercising his challenge
19 against Mrs. Casey. Ultimately, both the undersigned and the district judge did not believe that
20 race was the prosecutor’s motive in exercising the challenge—the legitimate, death penalty
21 ambiguity exhibited by Mrs. Casey was a reason which would have led a reasonable prosecutor
22 to challenge her. However, the district judge’s underlying basis for arriving at the same
23 conclusion differed somewhat from that of the undersigned. The undersigned will list each of his
24 explanations, as the undersigned remains of the belief in their accuracy, and then the district

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26 ///

1 judges's superseding findings, if such were made.⁷

2 **The "Question "56" Annotation**

3 Flannagan testified that he annotated the cover page of the juror questionnaire
4 with a "56" *prior to voir dire of the juror* if he had noted concerns with the way the juror
5 answered the death penalty questions. There is nothing about the Casey questionnaire which
6 would have led a reasonable person to conclude the race of the person answering the question.
7 No evidence at hearing demonstrated that Flannagan knew otherwise. This pre-voir dire concern
8 tends to indicate that Flannagan had a death penalty concern about juror Casey even before he
9 knew her race.

10 *This factor weighs in favor of respondent.* The district judge did not issue superseding findings.

11 **Prosecutor's Cause Challenge of Mrs. Casey**

12 As discussed in the Findings and Order, the meritless cause challenge to juror
13 Casey, denied in a one word ruling from the trial judge, evidenced an ulterior motive to remove
14 her. In other words, the prosecutor appeared too anxious to remove her. As Judge Damrell
15 found:

16 It was well established at the time the prosecutor challenged Casey
17 for cause that challenges for cause based solely on the fact that a
18 juror 'voiced general objections to the death penalty or expressed
19 conscientious or religious scruples against its infliction' were
20 improper....*No other jurors who voiced general objections to the
21 death penalty were challenged for cause.*"

22 Order at 27-28 (emphasis in original).

23 However, the undersigned believed that this apparent bias had been mitigated by comparison to
24 other jurors:

25 ⁷The district judge found that his factual bases for finding a prima facie case were "law of
26 the case." The undersigned did not believe he was bound by these facts at Step 3 of the Batson
analysis held after the evidentiary hearing. What is important here, however, and which will be
discussed later, is whether even accepting the district judge's findings at the prima facie stage as
law of the case, the motivation for striking Mrs. Casey was substantially motivated by bias *given
the circumstances at when the strike was made.*

1 *This factor weighs in favor of petitioner, but is mitigated by the*
2 *prosecution's desire to challenge juror Clark for cause, and juror*
3 *Moreno's actual challenge for cause.*⁸ See also juror Smith, R.T.
4 6141-42 examined immediately after juror Casey.

5 The district judge believed this factor weighed more heavily in favor of petitioner.

6 Also, the F&R understates the importance of Flannagan's meritless
7 cause challenge of Casey. According to the F&R, and the
8 magistrate judge's prior findings and recommendations, filed
9 January 29, 1999, this challenge "weighs in favor of petitioner, but
10 is mitigated by the prosecution's desire to challenge Clark for
11 cause, and juror Moreno's actual challenge for cause." F&R at
12 24-25. However, the May 13 M&O implicitly rejected the F&R
13 findings by concluding that the use of the meritless cause challenge
14 against Casey contributed to a prima facie case of racial
15 discrimination. The MO found persuasive the fact that "No other
16 jurors who voiced general objections to the death penalty were
17 challenged for cause." M&O at 28 (emphasis in original).

18 Finally, in the F&R the magistrate judge concluded that he "cannot
19 ascribe a discriminatory animus to the prosecutor in the Casey
20 challenge based on a challenge in [the Willie Junior Johnson] case
21 which the trial court found proper." F&R at 39. This same finding
22 was made in the January 29, 1999 F&R, and the court rejected it.
23 See May 13 M&O at 28. The court stands by that rejection now.

24 Order at 23.

25 **The Very Unfavorable Rating Received by Juror Casey**

26 Juror Casey received a "four X" rating, the most unfavorable on the prosecutor's
27 scale. Only one other juror whose questionnaire was presented to the undersigned at the

28 ⁸The undersigned had previously found that juror Moreno, see RT 6699-6721, had voiced
29 only general objections to the death penalty, but was challenged for cause. Findings (Vol.1) at
30 44, 46. Moreno had written "undecided" on her questionnaire about her views on the death
31 penalty, Exhibit 32, and through the course of voir dire indicated that she had problems with the
32 death penalty, but would impose it if that was the decision she would have to make under the
33 instructions and the facts. She did say that she would not want to be the foreperson of the jury in
34 any event because the foreperson had to sign the death verdict. Flannagan challenged her for
35 cause because she could not sign the death penalty verdict as foreperson (although she on several
36 occasions related that she could vote for it) and because she was "undecided about her feelings
37 about the death penalty." RT 6721. The undersigned remains of the view that juror Casey was
38 not the only juror challenged for cause because of general scruples against the death penalty, and
39 this mitigates the bias potential arising out of Casey's challenge for cause.

1 evidentiary hearing⁹ received such a rating, juror Lois Smith. Petitioner’s point, and it is a good
2 one, focuses on the fact that in all other respects, juror Casey was an ideal juror from the
3 prosecution standpoint. Petitioner argues that the forcefulness of the negative rating could only
4 have been instigated by the fact of Casey’s race.

5 As related above, the main focus of the voir dire, and especially that of juror
6 Casey, were her views on the death penalty. RT (Evid. Hrng.) 31-32. However, within that
7 parameter and in general, the prosecutor, Flannagan, was looking at “people’s backgrounds,
8 whether they’re employed, homeowners, what they had to lose. [The prosecutor] wanted people
9 who had something to lose in society, who might be victims of crime, solid citizens, preferably
10 fairly well educated” [but not teachers]. RT (Evid. Hrng.) 14. These same factors were in play
11 when juror Casey was rated. RT (Evid. Hrng.) 26. Nevertheless, it was possible for an otherwise
12 “good juror” to be rated for rejection, based on death penalty views. See below.

13 However, petitioner’s point is that the “force” of the rejection of juror Casey
14 embodies the motivation to rid the panel of its only African-American. The district judge has
15 found, and the undersigned certainly agrees, that death penalty aside, juror Casey was the
16 epitome of what Flannagan was generally seeking in good juror material. As evidenced by her
17 questionnaire, Exhibit 44, Casey was a middle class person who had something to lose if a
18 victim of crime. She expressed her concern over crime, especially drug related crime. Her
19 husband was a state worker who had also served in the military. Casey read magazines such as
20 *Better Homes and Gardens*, *Reader’s Digest*, *Women’s Day*– not exactly one’s anti-
21 establishment reading list. Although Casey did not respond to questions on her educational level,
22 Casey’s interest in television programs such as “*Sixty Minutes*” demonstrated a significant

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25 ⁹Evidently, not all juror questionnaires were presented at evidentiary hearing. The vast
26 bulk of juror questionnaires were jurors who sat in the box and were peremptorily challenged, or
ultimately chosen.

1 intellectual level. Last, but not least, Casey was not, nor had she been, a teacher.¹⁰

2 The court will engage in a comparative analysis of juror Casey with other
3 potential jurors below, but based simply on her own responses, and the prosecutor’s predelictions
4 with respect to picking jurors, Casey did not rate a “four X” score based on what she had related
5 on the questionnaire and voir dire. She was not adamantly opposed to the death penalty,
6 although any reasonable prosecutor would have been concerned with her voir dire responses in
7 this respect, and her attributes in other areas indicated that she was a “keeper.” A one or two “X”
8 rating was reasonable based solely on her death penalty views, and the court can understand the
9 reasonable argument that Casey may never have avoided a peremptory challenge because of her,
10 at best, indecisive, negative death penalty views, no matter how favorable she appeared in other
11 areas. However, to reject this juror as the “worst of the worst” appears to be unexplainable
12 overkill—unexplainable unless one attributes a discriminatory motive, be it conscious or sub-
13 conscious, to Flannagan’s rating.¹¹

14 *This factor, without other juror comparison, weighs in favor of petitioner.*¹² The district judge
15 did not issue superseding findings.

16 **The Prosecutor’s Manner of Questioning**

17 The manner of the prosecutor’s questioning may be relevant to a finding of
18 whether the prosecutor harbored racial animus when exercising his peremptory challenges.

19 Miller-El v. Cockrell, 537 U.S. 322, 344. 123 S.Ct. 1029, 1043 (2003). Mirroring petitioner’s

20
21 ¹⁰In reviewing all of the juror questionnaires, it also appears that the prosecutor disfavored
social workers. Mrs. Casey was not a social worker.

22 ¹¹The court does not place much stock in petitioner’s argument that because the “X”
23 marks given Casey were larger than other juror’s “X” marks, this shows how badly Flannagan
desired to be rid of Casey. No one at the evidentiary hearing could testify to such significance,
24 and such an argument smacks too much of Rorschach testing by an amateur psychologist. In any
event, other X’ed jurors received large Xs. See e.g., juror Works, Exhibit 34.

25 ¹²The purported travel problems that this juror might have had were not fleshed out, have
26 not been demonstrated by respondent as an articulation of a significant reason for rating Casey so
poorly, and will be given no credence by the undersigned.

1 allegations here, the Supreme Court found possible fault with the very explicit description of the
2 death process utilized with African-American jurors, but with only a handful of non-black jurors.
3 (Although the disparate questioning here was not performed in any way to the degree manifested
4 in Miller-El). In finding a prima facie case in this case, the Order focused upon prosecutor's
5 Flannagan's use of the term "gas chamber," a term not utilized according to petitioner with any
6 other juror.

7 However, respondent has accurately pointed out that the *trial judge first* utilized
8 this term a relatively short time before the Casey voir dire with juror Shalley. RT 5204. Thus, it
9 might not be viewed as discriminatory that the prosecutor simply picked up on the judge's
10 language in a later voir dire.

11 Moreover, petitioner obliquely argues that the prosecutor was much more pointed
12 and lengthy in his questioning with juror Casey than he was with other jurors. This is not to be
13 completely unexpected, because, as discussed at length below, juror Casey was more equivocal
14 in her death penalty responses than the large majority of other jurors. Indeed, the defense took
15 slightly longer in questioning Casey than did the prosecution. RT 6109-6114 (defense), 6114-
16 6119 (prosecution). Such equivocation would necessarily lengthen and sharpen the focus of the
17 questions. The court has also undertaken an extensive review of the "X" jurors below, and does
18 not find that the prosecutor's manner of questioning exhibited significant differences when
19 compared with other equivocal jurors. The court could take pages of comparison voir dire, but
20 one example will suffice—that of Lois Smith, the other four "X" juror: "Q. So, if I chose you to
21 sit as a juror in this case would it not be taking a chance that the evidence I produce would not
22 comport with what you already have in your mind as what a death penalty case is?" RT 6139.
23 That is a fairly pointed question.

24 *This category is neutral.* The district judge disagreed, but only with respect to the prosecutor's
25 reference to the gas chamber with Mrs. Casey.

26 [T]his court concluded in the May 13 M&O that Flannagan's

1 mentioning the gas chamber to Casey constituted disparate
2 questioning and supported an inference of discrimination, yet the
3 F&R concluded it was a “neutral” actor with respect to its ultimate
4 finding on the issue of discriminatory intent. F&R at 28.

5 Order at 22-23.

6 **Comparison in Ratings between Jurors Casey, Clark and Krueger.**

7 Juror Clark

8 Much has previously been made of a comparison between juror Clark and Casey
9 based only on voir dire responses when assessing the prima facie case. See [February 29, 1999]
10 Findings and Recommendations at 40, 46-48; [May 13, 2002] M&O at 29. However, we now
11 know that Juror Clark, who was very similar in background and hesitance on the death penalty
12 vis-a-vis Casey was rated with *three ✓✓✓*. Exhibit 1. We also know that the prosecutor was
13 disappointed enough in the Clark voir dire at the time that he expressed his frustration in not
14 being able to challenge her for cause. RT 6408. (The Clark voir dire took place after Casey’s,
15 and the prosecutor had evidently learned from that denial). One might have expected Clark to be
16 in the “X” category based on her death penalty responses.

17 However, there was something about Clark which the prosecutor liked. He wrote
18 in his notes—“might vote DP otherwise strong” (emphasis in original). The prosecutor’s
19 contemporaneous notes corroborated the independent reading of the voir dire by the undersigned,
20 where Clark seemed to exude decisiveness outside of her hesitant death penalty views. F&R at
21 46-47. The point here is not whether all reasonable prosecutors would agree with Flannagan’s
22 Clark rating; the point is whether the discrepancy between Casey and Clark indicates racial
23 discrimination. While a comparison limited to Casey and Clark *by itself* would lend quite a bit of
24 weight to petitioner’s inference of discrimination, the anomaly in the scores between these two
25 jurors is so extreme so as to reduce its significance in petitioner’s favor because the *Clark score*
26 *was anomalous with respect to the other “X’ed” jurors as well, not just Casey. See below.*
Indeed, it was also anomalous with respect to three plus jurors. Based on the fact that the Clark

1 discrepancy seems too extreme in the context of *all* juror questionnaires and voir dire, the
2 significance of the discrepancy fades for the purposes of this case.

3 *The undersigned cannot find that this comparison favors either side.*

4 The district judge believed the juror comparison of Casey vs. Clark informative,
5 but such was stated in the context of the district judge findings that the rating system was very
6 important, and indeed the primary motivator of the exercise of peremptory challenges. Order at
7 25. Indeed, the district judge did not consider Clark’s rating an anomaly (although the district
8 judge did believe that Casey’s and Clark’s death penalty views were dichotemous), and favored
9 an inference that Casey’s extremely negative rating had been biased. The district judge’s
10 findings in this regard will be quoted in that section concerning the rating system.

11 Juror Krueger

12 Petitioner points with emphasis to Juror Krueger (++ and ½+) as another
13 otherwise prosecution oriented juror that “should have been challenged” because of her death
14 penalty views, and compares her with juror Casey. If looking only at the juror questionnaire,
15 petitioner is correct. Krueger answered question 56 with: “No one should receive death
16 penalty.” However, in question 57(e), she stated that she could set aside her personal feelings.

17 She portrayed quite a different person at voir dire. In response to the judge’s
18 question about whether she had such an opinion that would preclude her from voting for the
19 death penalty, she responded, “No. I think I would be able to vote for the death penalty.” RT
20 7376. She assured the judge that she could act impartially for both sides. RT 7377. After a
21 long explanation of aggravating factors and mitigating factors, where defense counsel summed
22 up: “And the jury hears evidence on both sides, and considers and weighs those. And if the jury
23 finds that the aggravating factors so substantially outweigh the mitigating factors, that they feel
24 death is the appropriate verdict; that’s the verdict they return. Otherwise, life without possibility
25 of parole. In that framework, I assume you don’t have any problems with your ability to serve as
26 a fair and impartial juror?” She responded: “No, I would not have any problem with that.” RT

1 7385. Later, she was questioned by the prosecutor and explained her Question 56 response as
2 one that there might not be much need to impose the death penalty because life in prison was
3 “close to death” already. RT 7391. The questions continued:

4 Q. So beyond a reasonable doubt, any reasonable doubt, you would
have already found—

5 A. Yes. That—

6 Q --him to be guilty?

7 A. That this individual was guilty.

8 Q. Okay.

9 A. *Then I would be able to vote for the death penalty.*

10 RT 7392 (emphasis added).

11 ***

12 Q. You understand that the People in this case are asking for the
death penalty?

13 A. Yes, I do.

14 Q. And obviously, the Defense in this case, should we get that far,
would want you to vote for life without the possibility of parole?

15 A. Yes, sir.

16 Q. And you think at this stage, as of today, that you could give us
both the benefit of your undivided feeling and intent, and base your
decisions solely upon the evidence and His Honor’s instructions?

17 A. Yes, I would be able to.

18 RT 7393.

19 Petitioner’s taking of an ambiguous comment about the State of Texas (a
20 comment that was made in the context of both race and death penalty (“and you know I’m not in
21 agreement.” RT 7379–80), and her general feeling that she “would be more toward the life
22 imprisonment versus death,” RT 7383, does not fairly characterize the entire voir dire.

23 If voir dire can be used to demonstrate that Mrs. Casey was perhaps not as anti-
24 death penalty as question 56 might otherwise indicate, it can certainly be used here to
25 demonstrate the same. In comparison between the two voir dire, there can be no doubt that juror
26 Krueger was a demonstrably more favorable prosecution juror vis-a-vis the death penalty than
Mrs. Casey. The prosecutor’s final voir dire evaluation of juror Krueger was not out of line with
her voir dire. (And, it should be noted that this sitting juror’s vote for the death penalty

1 confirmed the prosecutor's analysis.)

2 *These comparisons are at least neutral, and could be viewed as favoring respondent.* The
3 district judge did not agree:

4 Likewise, a comparative analysis between Casey and juror Mary
5 Krueger is similarly instructive on the issue of discriminatory
6 intent. On Krueger's questionnaire, Flannagan wrote "NO DP for
7 anyone." EH Exh. 5 (capitalization in original). In response to
8 question 56 ("What are your GENERAL FEELINGS regarding the
9 death penalty?"), Krueger stated: "no one should receive death
10 penalty." She also indicated, in response to question 57, that she
11 felt the death penalty was used "too often." Finally, in response to
12 question 17, which inquired about her involvement with criminal
13 cases, Krueger indicated that her sons had been arrested. RT 7379.

14 Based on Krueger's answers, arguably a prosecutor would give her
15 a more negative rating than Casey, though the two were otherwise
16 demographically similar. Krueger lived 14 years at the same
17 address (Casey lived 17 years at hers); she was 45 years old (Casey
18 was 58); both of their husbands were veterans, and both husbands
19 were employed by the government; neither had prior jury
20 experience; both had two adult sons; and both thought drugs were
21 the primary cause of crime. EH Exh. 5 and 44.

22 During her voir dire, Krueger, like Casey, expressed her opposition
23 to the death penalty but indicated that she thought she would be
24 able to impose it. RT 7376, 7391-93. However, Krueger
25 emphasized to the court that although she was originally from the
26 State of Texas, she was not in favor of the death penalty. In fact,
Krueger stated, "I would think that I would be more toward the life
imprisonment versus death." RT 7383.

Despite Krueger's hesitancy toward the death penalty, Flannagan
rated her as ✓✓1/2 ✓. EH Exh. 5. Krueger exhibited qualities that
Flannagan liked, which apparently outweighed her negative
feelings on the death penalty. As the May 13 M&O noted, the
purpose of comparative analysis is to determine whether jurors like
Krueger and Clark were "sufficiently 'similar' or 'comparable'
such that the striking of Casey, and not Clark or Krueger, provides
substantial evidence that Casey was removed on account of her
race." M&O at 31. See Turner v. Marshall, 121 F.3d 1248,
1251-54 (9th Cir. 1997). Again, this factor strongly supports a
finding that race played a significant part in the prosecutor's
decision to challenge Casey.

25 Order at 27-28

26 ///

1 **Comparison with Other Jurors Who Received an “X” Rating**

2 An important comparison, one not performed by petitioner or respondent, places
3 juror Casey in the context of other jurors who received “X” ratings. That is, was Mrs. Casey’s
4 placement in the “X” category an ill fit in light of the other jurors put in that category. The
5 undersigned has performed that comprehensive review. Two points become evident as the
6 comparison is performed: (1) Casey did not deserve a “XXXX” rating (*favors petitioner*);
7 however, (2) Casey was not an ill fit in the “X” category in general (*favors respondent*).

8 Joy Bertrando XXX- Exhibit 46-

9 Question 56- “Sometimes in very terrible crimes I have felt that it
10 might be justified, but that is just an angry reaction. Actually, I
11 think life imprisonment is worse punishment. I also think that
12 killing people isn’t right no matter who is doing it.”
13 but see -question 38 (a) “I feel this country is too lenient about
14 crime”

15 Prosecutor Comments- “DP ‘thinks’ could base[d] on facts”

16 Voir Dire--RT 6256 start

17 When asked whether she could impose a death sentence: “Well, I
18 would—that is—well, I feel—I feel somewhat strongly against the
19 death penalty, but I suppose I am not—I am not just so absolute
20 about it that—I wouldn’t—that is so hard.” RT 6260. In response to
21 Defense counsel’s questions, she related that she would follow
22 instructions regardless of her views; however, upon questioning by
23 the prosecutor she opined—how difficult a situation it was, and
24 could only muster an equivocal—“I think I could,” RT 6278, when
25 asked if she could approach the decision from a neutral position.

26 The answers of this juror are similar to those elicited of Mrs. Casey.

Lois Smith XXXX- Exhibit 16

21 Question 56- “I do not believe in it as a general rule—there are
22 exceptions”

23 Welfare worker; had questions about the fairness of the legal
24 system

25 Otherwise favorable

26 Voir Dire RT 6121 start

“It is horrifying,” *id.*—in answer to question about the prospect of
being on the jury

RT 6125. In other questions concerning her feelings about the

1 death penalty, RT 6125-26, she related– “It is hard to–semantics
2 are–confusing.. I don’t think I would have a difficult time if I
3 really believed that it was the correct action.” “I couldn’t say
4 never. No. There might be circumstances in which I would.”

4 Arguably, this four “X” juror was more disposed to render a death penalty verdict than Mrs.
5 Casey.

6 Robert Hurst XX– Exhibit 18

7 Q 56– “It’s OK.”

8 Voir dire RT 5735 start

9 Hurst answered “no” to the question whether he had a
10 conscientious determination that would preclude him from voting
11 for the death penalty, RT 5742; he could keep an open mind about
12 the death penalty, RT 5747

12 Karen J. Hunter XX–Exhibit 20

13 Question 56–“In certain circumstances it could be warranted. I’m
14 reluctant to say that I’m wholesale for the death penalty”
15 Prosecutor written comments after voir dire–“teacher, doesn’t like
16 DP”

16 Voir Dire RT 5959 start

17 She could vote for the death penalty, RT 5963; “If I really felt
18 strongly that all the evidence warranted a decision and the Judge
19 has so instructed us, then I would have to do that. I would have to
20 give that [death] judgment.” RT 5968

19 Donald Gilbert XX–Exh. 22

20 Question 56–death penalty could be imposed in rare cases where it
21 fits

21 Prosecutor written comments–“if OK, will never vote DP”

22 Voir Dire–RT 5496 start

23 “I’m an extremely liberal person,” RT 5500; “I would have a
24 difficult time voting for the death penalty,” RT 5502; “Maybe” he
25 could impose the death penalty, but would have a “very difficult
26 time.” RT 5504-5505

26 ///

1 This juror seemed “worse” than Casey from a prosecutor’s viewpoint in terms of
2 death penalty responses.

3 Mary Haffly X–Exhibit 24

4 Question 56–(response illegible)

5 Prosecutor written comments–“too young” “says could do death
6 penalty”

7 Voir Dire RT 5140 start

8 The voir dire supports the prosecutor’s notes. This juror stated that
9 she could vote death penalty; she did not seem to have too much of
10 a problem with it; on other hand she was “not looking forward to
11 it,” RT 5147. She would have voted for Briggs initiative
12 (reinstating the death penalty in California). RT 5152

13 This juror was clearly an “X” only because she was young.

14 Nancy L. Pisarek X– Exhibit 26

15 Question 56–“Generally, I am against the death penalty. It is the
16 law tho + [and] I can see where I could support it...”

17 Voir Dire 6479 start

18 This juror was a bit anxious to make a decision on someone else–“I
19 could vote for the death penalty, but I am generally opposed to the
20 death penalty. But I could, because it is the law....” RT 6483.

21 William Lloyd Henley X and ✓–Exhibit 28

22 Question 56–“There are times and circumstances when I have
23 considered it appropriate”

24 Prosecutor written comments– “‘Borderline’ DP weak”

25 Candice Works XXX (and pretty large Xs)–Exhibit 34

26 Recovery Counselor

Q 56–“All life is precious–But I will keep an open mind”

Voire Dire RT 5903 start

This juror was a recovering addict/alcoholic; she thought the legal
system to be unfair.

With respect to the death penalty, she could vote for it in some
cases, but– “You know, honestly, I don’t know. I really can’t

1 project;" RT 5908; she could "conceive of a situation where she
2 would," RT 5913; she would not refuse to vote death penalty on a
3 "conscientious ground," id. She told the prosecutor that she was
4 not "uncertain" about the death penalty, she just wouldn't say
5 whether she would vote for the death penalty in this case or not.
6 RT 5918.

7 While the undersigned has found that the prosecutor exercised his peremptory
8 challenge against Mrs. Casey in part because of discriminatory reasons, the undersigned also
9 finds that juror Casey belonged in the "X" category. The court reiterates some of Casey's
10 answers that so persuade the undersigned for comparison purposes.

11 Q: Do you honestly believe, considering what your feelings are
12 toward the death penalty, that you could vote for a verdict which
13 would mean that this gentlemen here, Mr. Crittenden, would be
14 executed in the gas chamber?

15 A: Could I vote –

16 Q: Yes.

17 A: – for it?

18 I can't sit here and really say for sure if I could.

19 But, if it is proven to me, truly proven to me, and I feel deep
20 down inside that he did it, I could. I think I could.

21 Q: You think you could?

22 A: Yes. I have to say I think I could. This is all new to me. So I
23 am very upset with it.

24 ***

25 Do you think that your feelings about the death penalty – in
26 other words, that you don't believe in it – would make it difficult
for you to make a decision regarding the death penalty?

A: Yes, I think it would.

Q: And, do you think it might substantially impair your ability to
fairly evaluate all of the evidence regarding the death penalty?

A: I can't say yes. I can't say no. I really don't – don't know.

Q: That is what I am getting at. I don't want to give you the

1 circumstances because I don't want you to have to prejudge the
2 facts. What I am trying to find out is if your general feeling about
3 the death penalty would even interfere with your being able to
4 make a decision about it.

5 A: I don't think so. I try not to let it.

6 The "I don't know(s)," the "I think so(s)" and the "I'll try(s)" combined with Casey's
7 unmistakable reluctance to impose the death penalty would, by any reasonable measure when
8 comparing her to the other "X" jurors, have placed her in an "X" category. The court recognizes
9 that in other parts of the voir dire juror Casey was less equivocal, e.g.:

10 Q. You can conceive of situations in which you might vote for the
11 death penalty?

12 A. Yes.

13 ***

14 Q. So you are not telling us that in any situation you couldn't or
15 wouldn't vote for a death penalty?

16 A. No.

17 However, the voir dire, judged as a whole, demonstrated repeated doubts on Casey's part as to
18 whether she could in fact vote for the death penalty if warranted. Indeed, in the second answer
19 set forth above, Mrs. Casey expressed that she was not sure she could vote for the death
20 penalty—that she could so vote—and then back to she did not know. The prosecutor was not
21 tasked with the obligation to ignore the doubts and indecision.

22 *This factor favors both the petitioner and respondent.*

23 The district judge believed that the undersigned had meant to imply in this
24 comparison that the prosecutor's rating system was "solely dependent on the juror's death
25 penalty views." Order at 23. If this were conveyed in the above analysis, the undersigned did not
26 mean to convey it, nor does the undersigned disagree with the district judge that other factors

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1 entered into the ratings.¹³ The findings of the district judge are quoted below, and fairly read
2 indicate the same conclusion found by the undersigned—this factor favors petitioner and
3 respondent:

4 Turning next to certain substantive “factors” reviewed by
5 the magistrate judge, regarding Flannagan’s jury rating system, a
6 close look at many jurors’ ratings illustrates that Flannagan’s rating
7 system was not, contrary to the magistrate judge’s conclusion,
8 solely dependent on jurors’ death penalty views. Flannagan
9 assigned positive ratings to several members of the jury pool who
10 expressed anti-death penalty views. For example, Suzanne Tennes
(✓✓, EH Exh. 58), repeatedly expressed strong anti-death penalty
11 views, and Flannagan noted on her questionnaire “probably
12 wouldn’t vote for DP.” RT 4992, 4994, 4995, 4997, 4999. In fact,
13 unlike Casey, Tennes was unable to conceive of situations in
14 which she would impose a death sentence. RT 4992, 6108, 6111,
15 6112, 6114-6115, 6116, 6118.

16 Similarly, Francis Sullivan (✓✓, EH Exh. 54) stated he
17 “would automatically and in every case vote for life without
18 possibility of parole and never vote for the death penalty” and “he
19 had reservations about the death penalty.” RT 6413.

20 Michael Fisher (✓, EH Exh. 50) claimed he was “generally
21 opposed to the death penalty” and stated “where there’s an option
22 between a death penalty and life in prison without the possibility of
23 parole, generally, I believe, I would choose the latter option” RT
24 6846. Fisher said he could only conceive of imposing the death
25 penalty in an extreme case of serial murder, stating “good example
26 would be Ted Bundy... somebody who has killed, or allegedly
killed, 40 people.” RT 6846. When the trial judge asked Fisher if
his bias against the death penalty, and in favor of life without
possibility of parole, was “based on an absence of information on
[his] part at this particular point of the case, insofar as [his]
preference between those two entities?” he replied, “No, it is not. It
would be easier if it was, but it isn’t. It’s not relative to this
particular case at all. This is just my disposition.” RT 6864-6865.
When Flannagan asked Fisher if “the People at the outset are at a
disadvantage in seeking [the death penalty] with regard to having

¹³In fact, as set forth previously, the undersigned had previously found: “However, the rating [of the prosecutor] was not invariably focused solely on the death penalty issue.” Perhaps the district judge got this impression from the undersigned’s juror comparison which focused upon those jurors who received Xs in addition to Mrs. Casey— the majority of such marks were death penalty related. See also Findings and Recommendations dated January 29, 1999, Docket #62 at 45: “The prosecutor exercised all 26 of his peremptory challenges. He did not strike only anti-death penalty jurors; he struck several persons for other reasons even though they had expressed a willingness to impose a death sentence if appropriate.”

1 you as a juror?" he replied, "They could be," since he was "more
2 inclined to give life than death." RT 6860-6862.

3 Despite their strong anti-death penalty views, Flannagan
4 rated Tennies, Sullivan, and Fisher substantially more positively
5 than Casey. Although each was ultimately struck during jury
6 selection, their positive ratings are additional indicators that
7 Flannagan's juror rating system was not based solely, or even
8 primarily, on jurors' death penalty views. Therefore, the question
9 remains what, if not Casey's death penalty views, explains her
10 "XXXX" rating? This factor weighs strongly in favor of finding
11 that race played a significant part in Flannagan's challenge of
12 Casey.

13 Second, the magistrate judge did not find a comparative
14 analysis of Casey and trial juror Clark highly probative. However,
15 in the May 13 M&O this court classified such analysis as
16 "substantial evidence that Casey was removed on account of her
17 race." MO at 31. There is a notable difference in the way
18 Flannagan rated jurors Casey and Clark, considering the similarity
19 of their backgrounds and their shared hesitancy on the death
20 penalty issue. Despite their similarities, the prosecutor rated Casey
21 a "XXXX," while juror Clark received a rating of ✓✓✓. See Exh.
22 1. Further, Flannagan expressed his frustration during the voir dire
23 in not being able to challenge Clark for cause, as he had
24 unsuccessfully done with Casey. See RT 6408. Despite
25 Flannagan's initial hesitancy, he liked something about Clark,
26 writing in his notes: "might vote DP otherwise strong" (emphasis
in original).

The F&R underestimates the importance of Flannagan's
rating system, even labeling Clark's rating "an anomaly." F&R at
15. The objective facts, supported by the testimony at the
evidentiary hearing, suggest that the prosecutor did not primarily
rely on jurors' death penalty views in the jury selection process, as
the F&R suggests.

However, the facts do suggest that, in selecting jurors,
Flannagan substantially relied upon his rating system. For example,
Flannagan left Clark (✓✓✓), and other ✓✓✓-rated jurors, on the
jury. Notably, when given the opportunity, Flannagan exercised a
peremptory against every X-rated juror he could remove. When no
X-rated jurors were available to strike, Flannagan removed single-
✓ jurors. [footnote] In fact, every juror who sat on the trial jury
received a rating of at least ✓✓, and all but two jurors scored even
higher. Therefore, Clark's rating cannot be dismissed as an
"anomaly," and a comparative analysis between Clark and Casey is
instructive as to whether Flannagan's dismissal of Casey was
racially motivated.

26 ///

1 [footnote] The prosecutor's juror ratings and his challenges, in the
2 order in which he exercised his peremptories, follow. The court
3 notes that because the trial court used the "modified struck system"
4 to select the final jury (as a juror was removed, a panelist was
5 selected from the pool to take the struck juror's place), an X-rated
6 juror may appear in the pool late in the selection process: Smith
7 (XXXX); Hurst (XX); Hunter (XX); Gilbert (XX); Haffly (X);
8 Pisarek (X); Henley (X- ✓); Anderson (✓); Moreno (✓); Works
9 (XXX); Testa (✓✓); Thelan (✓); Culbertson (✓✓); Lester (✓?);
10 Casey (XXXX); Bertrando (XXX); Rehm (✓); Fisher (✓); Shalley
11 (✓); Murillo (no rating); Sullivan (✓); Brand (✓✓); Tennies
12 (✓✓); Naess (✓); McMullin (✓✓); Bell (✓).

13 [Krueger analysis quoted above omitted here]

14 Additionally, comparing Casey to panelist Lois Smith, the only
15 other juror to whom Flannagan assigned a XXXX rating, is also
16 instructive. A review of Smith's voir dire indicates why the
17 prosecution considered her so unappealing. Smith stated that she
18 had a strong anti-death penalty belief, and found the prospect of
19 sitting on a death penalty case "horrifying" and "frightening." RT
20 6121, 6138. Further, Smith had a "preconceived notion as to the
21 type of crime or the type of evidence which would allow [her] to
22 vote for the death penalty." RT 6139.

23 During voir dire, Smith also indicated she might require a higher
24 standard of proof than beyond a reasonable doubt when
25 considering special circumstances. In fact, she failed to give clear
26 answer to the questions about reasonable doubt, indicating to the
27 judge and the attorneys that she had difficulty with the concept of
28 reasonable doubt. RT 6125, 6132-33.

29 In Smith's juror questionnaire, she indicated a prior bad
30 experience within her family pertaining to law enforcement.
31 During questioning by defense counsel, the reason for Smith's
32 XXXX rating became clear:

33 Q. Okay. You had mentioned in your questionnaire that
34 there was some bad experience within your family as it pertains to
35 law enforcement. In that answer were you referring to the situation
36 with your daughter? [footnote]

37 A. No. No. I had a situation quite a few years back
38 where they came to arrest my husband for stealing a bottle of
39 whisky out of a drug store. And, they came to my house. They had
40 witnesses who saw him. And then when they asked to see a picture
41 of my husband, my husband is a white man, and they were looking
42 for a black man. So, it wasn't funny. It was horrendous.

43 Q. I imagine it was.

44 A. But, I mean, that is the only thing that saved him.
45 He would have been in jail because there was a witness who saw
46 him, you know, get into our car, and we have a black and white

1 dog, and he described the dog. And they still thought it was my
2 husband and - so, I mean, that kind of - horrified me. You know.

3 Q. Well, obviously Mr. Flannagan wasn't part of that
4 situation some years ago?

5 A. No. It was a long time ago, and hopefully it doesn't
6 happen very often. But -

7 And I take it there is nothing about that experience
8 that is going to spill over in terms of your ability?

9 A. *Only in that I think I would be extra cautious*
10 *because of it.* RT 6133-34, emphasis added.

11 [footnote] Earlier, Smith had revealed that her daughter had been a
12 complaining witness or victim of a crime. RT 6123.

13 Flannagan was likely troubled by Smith's "extra cautious"
14 approach because an important piece of the government's evidence
15 was testimony by a witness about seeing a black man in the
16 victims' neighborhood near the time of the murders. Witness
17 Rodney Cox lived four houses away from the victims', and claimed
18 to have seen a male fitting the description of the defendant near the
19 victims' home on the date the prosecution claimed the murders
20 occurred. RT 9058. However, when Cox observed defendant
21 Crittenden in a lineup, Cox could not identify him as the man he
22 had seen. RT 6069. Flannagan knew he was going to present this
23 shaky testimony to the jury, hoping they would nevertheless
24 conclude that the man Cox observed was in fact Crittenden. Under
25 these circumstances, it is apparent why Flannagan would want to
26 avoid an "extra cautious" juror like Smith. Therefore, solid
justifications exist for Smith's XXXX rating. Although a clear and
identifiable reason for Smith's XXXX rating exists, no such
justification exists for the "XXXX" rating of Casey. It is puzzling
why Casey received the same rating as Smith, when no similarly
glaring evidence for prosecutorial disfavor of Casey exists.

Turning finally to Casey's XXXX rating, one of the two
worst juror ratings Flannagan gave. The rating is troubling, since
Casey's responses on her juror questionnaire and during voir dire
do not seem to justify such a negative rating. Flannagan made
several written notations next to Casey's rating, but none
satisfactorily explain her rating. First, on the jury questionnaire,
Flannagan wrote "DP," indicating an issue with the death penalty.
As discussed above, while Casey first stated in her juror
questionnaire that she didn't "like to see anyone put to death," later
when asked whether her feelings about the death penalty would
interfere with her being able to make a decision about it, she
answered, "I don't think so. I try not to let it." F&R at 10.
Certainly, jurors Tennes, Sullivan, and Fisher had equally
negative, if not more negative, death penalty views than Casey, yet
all received positive ratings.

On Casey's questionnaire, Flannagan also noted that she
had "transport problems." EH Exh. 44. Although Casey raised a

1 concern that she would need to make arrangements to get to the
2 court, after being questioned and reassured by the judge, her
transportation issue appeared resolved. RT 6119-20.

3 Finally, Flannagan made the notation “can’t say if could set
4 aside,” referring to Casey’s views on the death penalty. However,
at no time during her voir dire did she unequivocally make such a
comment.¹⁴

5 Accordingly, the three notations made by Flannagan, while
6 they indicate some qualities a prosecutor would find unattractive,
do not justify Casey’s XXXX rating, especially when compared to
7 the other venire members. Therefore, for all the above reasons, and
others not discussed herein but analyzed by the magistrate judge,
8 the court agrees with the magistrate judge that race played a
significant part in the prosecutor’s decision to remove Casey.

9 Order at 23-31.

10 **The Make-up of the Potential Jury at the Time of the Casey Challenge**

11 The undersigned continues with the analysis of the district judge at this point, in
12 that it demonstrates the counterweight to the above finding of bias on the part of the prosecutor.
13 The undersigned will then continue with his final analysis of the most important juror
14 comparison in the case—the comparison of the jurors at the time of the Casey peremptory
15 challenge.

16 First, while Casey “did not rate a ‘four X’ score based on what she
17 had related on the jury questionnaire and voir dire,” (F&R at
26:14-15), she did nonetheless reasonably deserve a “X” rating
18 based on her death penalty views (F&R at 34-35, recounting key
portions of her voir dire testimony). Indeed, Flannagan noted
19 concern about Casey’s death penalty views on her jury
questionnaire even before he met her. Additionally, judged as a
20 whole, her voir dire demonstrates Casey’s repeated and substantial
doubts as to whether she could in fact vote for the death penalty.
21 The prosecutor was not, on account of her race, obligated to ignore
her doubts and indecision. Nor was the prosecutor the only one to
22 place Casey in the “X” category. The trial judge commented on his
perception of Casey in ruling on the “Wheeler” motion, calling her
23 “indecisive” on the death penalty issue and finding that she
“couldn’t decide whether or not she would be able to follow the
24 law.” The judge expected that a “peremptory challenge was going

25 ¹⁴Undersigned’s note—It is true that no such express statement was made; however, the
26 gist of Casey’s responses are accurately summed up by this notation. This is made clear by the
district judge’s further analysis.

1 to be [made].” F&R at 38:10-13. Importantly, these factual
2 comments are entitled to special weight. [citations omitted] It is
3 the trial judge, and not this court, who witnessed her testimony and
4 observed her demeanor. Moreover, petitioner’s defense counsel at
5 trial conceded on the Wheeler motion that Casey was in a group
6 who “have expressed views opposing the death penalty or with
7 their own ability to impose a death penalty.” F&R at 39:7-8.¹⁵
8 Accordingly, it was not only the prosecutor who would have placed
9 Casey in the “X” category; the trial judge and defense counsel
10 placed her in that category as well.¹⁶ *These contemporaneous*
11 *observations are critical to this analysis.* [emphasis in the original
12 and added by the undersigned]

13 ¹⁵The undersigned expressed similar findings.

14 **“The Trial Judge’s Views**

15 Nor was the prosecutor alone in placing Casey in the “X” category. Whatever the correctness of
16 the trial judge’s determination not to find a prima facie case of discriminatory use of peremptory
17 challenges, the trial judge did comment on his perception of Casey herself.

18 This is a case where a Wheeler motion would be inappropriate, because of the fact
19 that she is indecisive and cannot guarantee that she would vote a certain way.
20 And in my language that does not mean that, that (sic) would vote a certain way,
21 based on the facts. But that she couldn’t decide whether or not she would be able
22 to follow the law.... And, as such, her wrestling with these issues indicated to me
23 that; although a cause challenge was certainly not called for, that a peremptory
24 challenge was going to be expected in any event.

25 RT 7302-03

26 ... The value of observing *how* a response is made can be very bit as descriptive of a
response as the literal *substance* of the response. Even assuming arguendo that latter day readers
might reasonably argue, selectively taking textual portions of the Casey voir dire, that she was
decisive with respect to her death penalty questions, or that the trial judge may have been
incorrect in his perception, the point here is that the trial judge also observed *how* Casey made
her responses, something of which the text transcript gives only a partial answer. That is, “she is
indecisive,” her “wrestling with the issues,” speaks loudly as to how she answered the questions.
The trial judge kept copious notes of the voir dire so that the Casey challenge was fresh in his
mind at the time of the Wheeler motion. The law correctly gives great deference to such
observations.”

Findings and Recommendations at 38-39.

¹⁶The undersigned also thought the placement of Casey in the “X” category was critical,
and not a latter day stretch of the facts.

“Defense Counsel’s Views

Finally, not only the prosecutor and the trial judge would have placed Casey in the
“X” category, defense counsel said as much themselves. In support of the Wheeler motion,
defense counsel placed Mrs. Casey in a group who “have expressed views opposing the death
penalty or with their own ability to impose a death penalty.” CT 3300-3301.”

Findings and recommendations at 39.

1 Where such a valid and well supported race-neutral reason
2 exists for Casey's challenge, the court cannot find the "real" or
3 "motivating" reason for Casey's removal was her race.

4 Order at 32-33.

5 The undersigned also found critical the make-up of the potential jury at the time
6 the Casey strike was made. A very important context in which to review the Casey challenge
7 requires a snapshot of the potential jury at the time of the Casey challenge, i.e., was the Casey
8 challenge ill advised in light of the jurors at that time, or was the jury so prosecution oriented that
9 the prosecutor had little choice but to strike juror Casey. The court has charted the pertinent part
10 of the jury selection:

11 *Italics*-- indicates a seated but struck juror

12 (*P*_)-- indicates a prosecution challenge

13 (*D*_)-- indicates a defense challenge

14 1. etc.-- indicates the seat which each juror took

15 **Bold**-- indicates the jury at the time of the Casey challenge

16 1. *Simmons(D3) Testa(P11) Naake(D11) Thelen(P12) Corrao*

17 2. *Fox (D4) Culbertson(P13) CASEY-P15*

18 3. **Fisher**

19 4. *Erickson (D2) Paul(D5) Carrington(D6) Cousley(D13) Lester(P14) Rehm*

20 5. *Luna(D7) Houck(D10) Martinez(D12) Tennies*

21 6. *Lois Smith (P1) Silveira (D1) Henley(P7) Moreno(P9) Naess*

22 7. *Roberts(D14) **Bertrando***

23 8. *Pisarek(P6) Anderson(P8) **Shalley***

24 9. *Haffley(P5) Shumski(D8) Phelps(D9) Works(P10) **McMahan***

25 10. *Gilbert(P4) **Stewart***

26 11. *Hurst (P2) Hunter (P3) **Fortier***

 12. **Curtis**

1 At the time of Mrs. Casey's Challenge, the jury was comprised of :

2 Corrao-✓✓✓

3 CASEY- XXXX

4 Fisher-✓

5 Rehm-✓

6 Tennies-✓✓

7 Naess-✓

8 Bertrando-XXX

9 Shalley-✓

10 McMahan-✓✓✓

11 Stewart - {✓}[no rating on the questionnaire but see RT 7735 where the
12 prosecutor called her one of his "good jurors" when she was later excused for hardship after
13 Casey challenge; she would have rated at least a ✓ based on that comment]

14 Fortier-✓✓✓

15 Curtis-✓✓✓

16 Neither Gislea Clark nor Mary Krueger had been seated at this point. The
17 prosecutor did not challenge Casey the moment he could have; he exercised a challenge to juror
18 Lester ("✓?" rating) after Casey had been seated. Bertrando was seated immediately after a
19 defense challenge and after Casey was seated.

20 It is apparent to the undersigned that the prosecutor, if following his own
21 evaluations, had little choice in determining to strike juror Casey at this point. The make-up of
22 the jury was pro-prosecution at the time Casey was challenged. There exists no authority that
23 requires the prosecution to strike a favorable juror in order to maintain an appearance of non-
24 discrimination in not striking a minority when that minority is an unfavorable juror. And,
25 whether Casey was stricken first, or Bertrando was stricken first (Bertrando was the very next
26 prosecution strike, RT 7283), would seem to make little difference. The prosecutor would want

1 both off the jury, and striking them in the order in which they were seated appears reasonable.

2 Of course, the significance of the above depends on whether Casey was properly
3 in the “X” category at all. If she should have been a “✓” juror, the prosecutor would not have
4 been faced with a decision to strike Casey or some other “X” juror. He would have simply struck
5 Bertrando. Nevertheless, as seems clear from the previous section, Casey’s “X” rating (as
6 opposed to the strength of such rating) was not unreasonable at all. Given that Casey fit into that
7 general strike category, it then becomes apparent that she would have been stricken regardless of
8 her race.¹⁷

9 Yes, as petitioner notes, there were a few, very few, jurors who received check
10 ratings which might puzzle the objective observer when reading only the prosecutor notes and
11 transcript years later, e.g. juror Tennes (Exhibit 58) (however, her voir dire was much less
12 strident and she indicated that she, as foreperson, could even sign the death verdict if warranted).
13 But puzzlement about a few jurors does not indicate that the entire system used by the prosecutor
14 is unfathomable, or that legitimate comparisons cannot be made when viewing the jury selection
15 as a whole. While the prosecutor may be viewed as “wrong” about juror Tennes, that does not
16 indicate that he was “wrong” in the vast majority of his ratings or wrong about placing Casey in
17 the “X” category. It should also be noted that the prosecutor ultimately struck juror Tennes. RT
18 7228).

19 *This category significantly favors respondent.*

20 *Discussion*

21 1. AEDPA Standards Do Not Apply

22 It bears repeating that although this habeas petition was otherwise subject to
23

24 ¹⁷The conclusions to be drawn from the strike chronology also might have been different
25 if the composition of the jury at the time of the Casey strike was primarily unfavorable as far as
26 the prosecutor was concerned. Then reaching out to strike Casey, as opposed to a significant
number of other unfavorable jurors might be viewed in petitioner’s favor. However, the history
of the strike chronology cannot be changed to fit petitioner’s views.

1 AEDPA strictures, the Batson issue was not reviewed under AEDPA deference:

2 [W]hen it is clear that the “[state] courts did not reach the merits of
3 [the petitioner’s constitutional] claim, federal habeas review is not
4 subject to the deferential standard that applies under AEDPA to
5 ‘any claim that was adjudicated on the merits in State court
6 proceedings;’” “[i]nstead, the claim is reviewed de novo.” *Cone v.*
Bell, ___ U.S. ___, 129 S.Ct. 1769, 1784, 173 L.Ed.2d 701 (2009)
(quoting 28 U.S.C. § 2254(d)).

6 Williams v. Cavazos, ___ F.3d ___, 2011 WL 19475744 (9th Cir. 2011)

7 In this case, the state courts never reached the third step of the Batson analysis
8 (pretext) because the state courts ceased analysis with the first step (prima facia case). An
9 evidentiary hearing was held, and the third step was adjudicated under *de novo* review. That
10 same standard applies here on remand.

11 2. The Application of “Motivated in Substantial Part”

12 As the Supreme Court has instructed, “the ultimate burden of persuasion
13 regarding racial motivation rests with, and never shifts from, the opponent of the strike.” Purkett
14 v. Elem, 514 U.S. 765, 768, 115 S.Ct. 1769 (1995). However, this burden applies to the factual
15 presentation; the court has the ultimate duty to get the law right—here, what precisely is the
16 quantum of proof necessary before one has demonstrated a peremptory challenge “motivated in
17 substantial part” by discrimination.

18 As stated previously, the case was remanded to this court to make a determination
19 whether the peremptory challenge was motivated in substantial part by race bias. But how
20 substantial must a motivation be before it can be said that a peremptory challenge so motivated
21 results in a vacating of the entire trial. That is, what is the quantum of discriminatory animus
22 which must be shown—de minimis, more than a scintilla but less than a preponderance, clear
23 possibility, or a predominant motive. Put another way, when does a legitimate reason for striking
24 a juror become so tainted by discriminatory animus that the striking of the juror would be
25 considered motivated in substantial part by the animus.

26 ///

1 The undersigned looks, first and foremost, to the case which instituted the
2 “motivated in substantial part” analysis—Cook v. LaMarque, 593 F.3d 810 (9th Cir. 2010), and
3 which stood as the basis for remand of the present case. Cook, not argued by petitioner herein in
4 any meaningful way, is especially instructive in that it involved a situation where there was
5 arguably mixed motives for the striking of jurors, and the Ninth Circuit analyzed the reasons
6 expressed by the prosecutor. The majority in Cook analyzed the prosecutor’s reasons for the
7 striking of several jurors. In applying the “motivated in substantial part” test, the majority
8 utilized a number of explanatory phrases to describe how they were implementing the test:
9 “primary motivation [was race],” id. at 821; “the motivating factor [was valid],” id. at 822, “the
10 valid reason is overwhelming in substance,” id. at 824; “significant motivating factor [was not
11 race],” id. at 825; “most significant justifications [were valid],” id. at 826 (cumulative
12 assessment). The dissent in arriving at a conclusion opposite that of the majority utilized an
13 assessment where the treatment of the African American jurors “contrasted starkly” with the
14 treatment of the non-African American jurors. To the dissent, the “critical question” involved
15 the persuasiveness of the prosecutor’s justifications (quoting Miller v. El I, 537 U.S. at 338-339,
16 123 S.Ct. At 1040.

17 Distilling all of the above, it appears to the undersigned that when the legitimate
18 articulation(s) of the prosecutor for striking a juror clearly and convincingly predominated in the
19 prosecutor’s mind over the discriminatory, illegitimate reason, petitioner has not met his burden
20 of demonstrating that the illegitimate reason motivated the challenge in substantial part.¹⁸ This
21 standard could be phrased in its mirror image form, but judges have more experience in
22 determining whether a fact clearly predominates, as opposed to finding whether a fact is less than
23

24 ¹⁸This is *not* the application in different clothes of the “one-good, one-bad” analysis
25 utilized previously. That analysis ultimately uses an objective basis to demonstrate that whatever
26 the substantiality of the prosecutor’s motivation for exercising the challenged strike, a strike
would have been made in any event by a reasonable prosecutor. Here the focus remains on the
believability and weight of the prosecutor’s articulated justifications *in this case* based on the
evidence of record. This is precisely what Cook illustrates.

1 probable, but substantial nevertheless. In any event, judging the persuasiveness of the legitimate
2 factor on a clear and convincing basis gets all to the same point in this analysis as judging the
3 nature of the illegitimate factor. Indeed, as shown above, Cook itself primarily looked to the
4 predominance of the legitimate factors in employing the new standard.

5 This showing of the prosecutor’s mind can be made from direct evidence as to
6 that state of mind (not available in this case), or circumstantial evidence. Indeed, from the
7 undersigned’s experience, in most situations where the finding of discriminatory intent, or its
8 absence, is necessary, circumstantial evidence is the most important evidence.

9 The undersigned has reviewed a myriad of Ninth Circuit (unpublished) and
10 district court cases citing the Cook motivated in substantial part test. However, the vast majority
11 were unhelpful to the analysis here in that the ultimate assessment determined either that the
12 reason(s) chosen by the prosecutor were entirely suspect, or entirely non-pretextual. There were
13 very few cases where the situation of found mixed motives were arguably in play. One possible
14 case was Munoz v. McDonald, 2011 WL 569889 (N.D. Cal. 2011), which utilized an analysis of
15 “most significant justifications were entirely sound,” but it is difficult to decipher whether the
16 court in Munoz ever found that the prosecutor was motivated in part by discriminatory animus.

17 Also considered for utilization here, but ultimately rejected, were other areas of
18 the law in which “substantial” was the lynchpin for assessing the issue, e.g. the “a substantial
19 factor” causation standard in tort law; whether retaliation “substantially motivated” the actor’s
20 decisions (civil rights actions), Social Security law “substantial evidence” test. However, these
21 tests designed for use in totally different contexts were not as persuasive as the actual
22 explanations set out in the Cook case.¹⁹

23 3. The Substantiality of the Motivation May Vary At Different Times

24 Whether a discriminatory state of mind was a substantial motivator in the acts of a

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26 ¹⁹See e.g., Consalo v. Federal Maritime Commission, 383 U.S. 607, 619-20, 86 S.Ct. 1018 (1966) (substantial evidence is “something less than the weight of the evidence.”)

1 person, or the mirror image utilized here, whether a legitimate reason “clearly predominated,”
2 depends on the circumstances in existence at the time the act is performed. Here, the question on
3 remand, the pertinent act, involves the peremptory challenge of juror Casey. The state of mind of
4 the prosecutor at this point, and whether bias was a substantial motivation for the strike
5 necessarily is pinpointed at the time of the strike.

6 This common sense proposition is best illustrated by a hypothetical divorced from
7 the facts of this case. Assume that an employer has indicated through unambiguous statements to
8 others at the commencement of a hiring process that his company would be better off if persons
9 of a particular race, religion or gender were not working there. One could label this
10 discriminatory mindset “substantial” at the commencement of the process. However, also
11 assume that during the interview process, a person with the “wrong” characteristics conceded
12 that he had misrepresented his criminal history background on the application, and that in fact he
13 had been convicted on several occasions of serious fraudulent conduct in connection with
14 working with similar businesses. The employer immediately told the applicant that his services
15 were not needed. While the unlawful mindset at the commencement of the process was
16 substantial, quere whether it remained so at the end of the interview, and whether the abrupt
17 termination of the hiring process for this applicant/interviewee was “motivated in substantial
18 part” by bias at the time of the action in question. Probably not, because the legitimate factors,
19 need for honesty, and fear of further criminal acts in his business, so clearly would predominate
20 in the employer’s mind.

21 The same dichotomy is present in this case. While one could say that the
22 prosecutor’s bias in this case (not to have an African American on the jury so as to preclude any
23 possible commiseration at verdict time) substantially motivated the challenge for cause, the
24 circumstances present at the time of the peremptory challenge may have mitigated the effect of

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1 the bias quite a bit.²⁰

2 This is not to say that the initial bias is not probative of the question at the time of
3 the challenge; it may be very active at the time. However, it is to say that this bias must be
4 assessed in light of the other circumstances *at the time of the challenge*.

5 4. The Decision in this Case

6 Clearly, based on the factual recitation set forth above, the prosecutor had dual
7 motives at the time he challenged Mrs. Casey *for cause*, and one of those motivations was bias.
8 The court will not repeat the previous analysis of the pros and cons for the existence of that bias,
9 but the “XXXX” rating of Mrs. Casey as a suitable juror, especially as analyzed by the district
10 judge, could only lead one to a conclusion of significant bias. In addition, the district judge
11 compared marks given to other jurors and found that Mrs. Casey’s grade could not be justified in
12 light of the similarity or dissimilarity of compared juror attributes. The fact of bias has been
13 previously established and will not be revisited here. And, based on the analysis of the district
14 judge, as well as the undersigned, one would have to ascribe a substantiality to it at the time the
15 challenge for cause was made.

16 However, additional, significant circumstances existed at the time of the
17 *peremptory* challenge. As set forth previously herein, those circumstances were the composition
18 of the prospective jury panel at the time of the challenge. If juror comparison is an important
19 aspect of analyzing juror challenges, and it unquestionably is, the most important comparison at
20 issue occurred *at the time of the challenge*, and involved the other jurors who could be stricken at
21 the time of the challenge. It is that panel composition which could most likely lead one to
22 believe that bias substantially motivated the challenge, or did not.

23 Both the undersigned and the district judge found that the marking system was *the*
24 standard on which the prosecutor was exercising challenges. One can debate the precise attributes

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26 ²⁰Nothing in the record of this case, and nothing at the evidentiary hearing, indicated that
the prosecutor had a bias against African Americans in all aspects of his life.

1 which would have placed a particular juror with a higher or lower mark, but for the vast number
2 of jurors who had received marks, the grades were justifiable. Given Mrs. Casey's ambivalence
3 as to whether she could ultimately vote for death if warranted, it is indisputable that Mrs. Casey
4 was not a good juror for the prosecution's sentencing case (as opposed to liability). It is further
5 not reasonably disputable that *all* actors present at the time of the challenge viewed Mrs. Casey
6 as a poor prosecution juror (sentencing phase), and the defense counsel expressly conceded so.
7 Both the undersigned and the district judge (and inferentially the trial judge and defense counsel)
8 found that Mrs. Casey could easily have been found "X" by this prosecutor or any non-biased
9 prosecutor. Comparing the then sitting jurors with Mrs. Casey, her unacceptability even at a
10 lower level than four "X"'s, *in view of the clear acceptability of the other jurors*, had to be the
11 clearly predominant reason for the prosecutor's peremptory challenge in this case.

12 Did this conclusion have to be so if other jurors had been in place at the time of
13 the challenge? No. If a number of the jurors at the time of the challenge had been rated as low
14 as Mrs. Casey in the range found appropriate, i.e., one "X," and Mrs Casey had *still* been
15 stricken, *then* one could come to a conclusion that the striking of Mrs. Casey had more to do with
16 race than the bona fide reason, or at the very least, the strike would have been substantially
17 motivated by race because one could not find a bona fide reason that clearly predominated. This
18 conclusion was also found in the previous Findings. See footnote 17 herein. However, the
19 opposite set of circumstances actually existed, and one can say given the circumstances at the
20 time, that the bona fide reason clearly predominated in the prosecutor's mind.

21 There is some contemporaneous corroboration for this conclusion. Most
22 importantly, the prosecutor knew at the time he was making the peremptory challenge that the
23 defense was lying in wait for him to make the challenge; the prosecutor knew that his life was
24 going to get complicated with a collateral issue if he made the challenge. This had been
25 announced by the defense. See Findings and Recommendations dated January 29, 1999, Docket
26 #62 at 38; see also RT 4403-4404. Even the trial judge had been sensitive to the potential Batson

1 issue and made notations concerning such at the time of the Casey questioning. RT 7302. It is
2 reasonable to infer, and the inference chosen by the undersigned, that the prosecutor had to have
3 reassessed just how strongly he felt about Mrs. Casey's death penalty views in light of the
4 accusations of bias that would inexorably be made against him. Such must have given him pause
5 because he did not strike Mrs. Casey right away. He struck another juror, but when a "sure
6 strike" replaced this person, , i.e., a person with greater than one "X" unacceptability, the jury
7 was getting sour for the prosecutor and he went ahead and struck Mrs. Casey, and thereafter as
8 soon as possible, the newer, and equally or greater poor replacement.

9 The undersigned concedes that petitioner can fashion other inferences unfavorable
10 to the prosecutor. For example, petitioner could speculate that the prosecutor waited one round
11 to challenge Mrs. Casey "just to look good" so as to hide his true motivation. But that
12 speculation cannot match the proven facts about how the prosecutor used his grading system
13 throughout the jury selection process. *He did not fail to strike an "X" if he had a chance to do*
14 *so.*

15 At hearing, petitioner's counsel could not address the scenario that actually
16 existed at the time Mrs. Casey joined the potential jurors in the box; rather, his argument was that
17 the peremptory challenge had also been made, in effect, when the prosecutor made the challenge
18 for cause. But this argument ignores that the prosecution had bona fide motivations for not
19 desiring Casey even at time of cause challenge, and assumes that the circumstances afterwards
20 facing the prosecutor in balancing his motivations at the actual time of making the peremptory
21 challenge were irrelevant in assessing substantiality. Again, this balancing of motivations is not
22 static, but is rather a dynamic process dependent on the circumstances at which time the
23 balancing would be made.

24 Petitioner correctly focused the undersigned on his comments, and those of the
25 district judge in adopting the previous Findings and Recommendations, that the prosecutor's bias
26 motivation was termed "significant." Use of the word "significant" can be fairly synonymous

1 with the word “substantial.” As seen above, the district judge at one point used them in close
2 proximity. However, the focus must be made in the proper context. In employing the now
3 discarded “mixed-motivation test, i.e. the Mt. Healthy doctrine, the undersigned used the word
4 “significant” as that quantum of evidence necessary to compel the state (respondent) at the
5 second step of that analysis to show that the challenge would have been made for “good” reason
6 and not the bad. See also Crittenden at 958. This was certainly more than a *de minimis*
7 quantum, but not viewed in the context of what would be substantial or insubstantial in the final
8 analysis. In the undersigned’s thinking, the quantum involved in “significant” was more or less
9 establishing the prima facie case in the first place. See Gattis v. Snyder, 278 F.3d 222, 233 (3rd
10 Cir. 2002) referring to test used by lower court. Indeed, the evidence favoring petitioner at the
11 pretext stage was essentially the same evidence used to establish the prima facie case. However,
12 unlike the Batson first step in which the strength of the inferences are not weighed, the key part
13 of the Batson third step is weighing the various inferences that can be drawn. The evidence
14 favoring respondent was fully developed for the first time at the evidentiary hearing, i.e., the
15 rating system. The district judge adopted the undersigned’s “significant” finding—but indeed
16 found that discriminatory bias was *not* the motivating factor. Order at 33 (“Where such a valid
17 and well supported race-neutral reason exists for Casey’s challenge, the court cannot find that the
18 “real” or “motivating” reason for Casey’s removal was her race.”)

19 In any event, it is not the undersigned’s task here to speculate how the previously
20 assigned district judge might view the “substantiality” of the prosecutor’s bias motivation at this
21 time. The undersigned has been given the assignment to arrive at his own conclusion, and this
22 conclusion will receive *de novo* review from the newly assigned judge.

23 The undersigned, the trier of fact at the evidentiary hearing, has conscientiously
24 reviewed the evidence and his thought pattern in reassessing the evidence in light of the
25 analytical paradigm directed by the Ninth Circuit. In sum, although the finding that the
26 prosecutor harbored bias was “significant,” it was not “substantial” in terms of the motivating

1 factor at the time of the exercise of the peremptory challenge.

2 *Conclusion*

3 Accordingly, the undersigned recommends that the third factor of the Batson
4 analysis be found in favor of respondent and adverse to petitioner. Claims 1 and 2 of the
5 operative petition should be finally denied. This conclusion, if adopted, finishes the district court
6 work in this case.

7 These findings and recommendations are submitted to the United States District
8 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
9 one (21) days after being served with these findings and recommendations, any party may file
10 written objections with the court and serve a copy on all parties. Such a document should be
11 captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the
12 objections shall be served and filed within fourteen (14) days after service of the objections. The
13 parties are advised that failure to file objections within the specified time may waive the right to
14 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

15 Dated: June 29, 2011

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17 /s/ Gregory G. Hollows
18 UNITED STATES MAGISTRATE JUDGE
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