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

HERMAN JOHNSON,

Petitioner,

No. CIV S-08-2995 GEB CHS

vs.

MICHAEL KNOWLES,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____ /

I. INTRODUCTION

Petitioner Herman Johnson is a state prisoner proceeding pro se with a petition for writ of habeas corpus brought pursuant to 28 U.S.C. §2254. The pending petition challenges the constitutionality of petitioner’s conviction entered in Sacramento County, case 04F05543, for robbery with use of a firearm.

II. FACTUAL AND PROCEDURAL BACKGROUND

The facts of petitioner’s offense were set forth in the unpublished opinion of the California Court of Appeal, Third District, case C050093:

On June 21, 2004, at the Madison Inn, a “party” motel, several Russian immigrants were drinking. When they went outside three Black men approached; when one man nodded, another pulled a gun and robbed the immigrants; the third Black man did nothing. David Johnson and Mitchell Green were arrested within the hour;

1 David Johnson was wearing one victim's watch and another
2 victim's wallet was in the vehicle. Herman Johnson was found
hiding days later.

3 Mitchell Green was discharged at the preliminary hearing, due to
4 insufficient evidence that he aided the other defendants in the
robbery, although he was present.

5 At trial David Johnson argued that the victims were so intoxicated
6 that they lacked the ability to perceive and recollect what actually
7 happened that night; he also argued no gun was involved. Herman
8 Johnson argued that the witnesses misidentified him in one of two
9 ways: Either the partiers saw him at the hotel and mistook him for
a robbery participant, or they mistook him for the robber who
signaled the gunman, but instead he was the passive bystander with
the robbers, not one of the two robbers- in other words, the victims
confused him for Mitchell Green.

10 (C050093 opinion at 1-2.)

11 A jury found petitioner guilty of two counts of second degree robbery while a
12 principal was armed. It was also found that petitioner had incurred a prior robbery conviction.
13 He was sentenced to a determinate term of fourteen years and four months in state prison. The
14 California Court of Appeal, Third Appellate District, affirmed the convictions on direct appeal
15 and the California Supreme Court denied review. A petition for review to the California
16 Supreme Court was likewise denied.

17 Petitioner and David Johnson's state appeals were heard at the same time and
18 under the same case numbers. David Johnson is not a party to this proceeding.

19 III. APPLICABLE LAW FOR FEDERAL HABEAS CORPUS

20 An application for writ of habeas corpus by a person in custody under judgment of
21 a state court can be granted only for violations of the Constitution or laws of the United States.
22 28 U.S.C. §2254(a); *see also Peltier v. Wright*, 15 F.3d 860, 861 (9th Cir. 1993); *Middleton v.*
23 *Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985) (*citing Engle v. Isaac*, 456 U.S. 107, 119 (1982)).
24 This petition for writ of habeas corpus was filed after the effective date of, and thus is subject to,
25 the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Lindh v. Murphy*, 521
26 U.S. 320, 326 (1997); *see also Weaver v. Thompson*, 197 F.3d 359 (9th Cir. 1999). Under

1 AEDPA, federal habeas corpus relief is not available for any claim decided on the merits in state
2 court proceedings unless the state court’s adjudication of the claim:

3 (1) resulted in a decision that was contrary to, or involved an
4 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

5 (2) resulted in a decision that was based on an unreasonable
6 determination of the facts in light of the evidence presented in the
State court proceeding.

7 28 U.S.C. § 2254(d); *see also Penry v. Johnson*, 532 U.S. 782, 792-93 (2001); *Williams v.*

8 *Taylor*, 529 U.S. 362, 402-03 (2000); *Lockhart v. Terhune*, 250 F.3d 1223, 1229 (9th Cir. 2001).

9 A reviewing court such as this one looks to the last reasoned state court decision in order to make
10 this determination. *Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir. 2002), *cert. dismissed*, 538 U.S.
11 919 (2003).

12 Under the “contrary to” clause of §2254(d)(1), a federal habeas court may grant
13 the writ only if the state court arrives at a conclusion opposite to that reached by the Supreme
14 Court on a question of law or if the state court decides the case differently than the Supreme
15 Court has on a set of materially indistinguishable facts. *Williams*, 529 U.S. at 405. The state
16 court is not required to cite the specific controlling test or Supreme Court authority, so long as
17 neither the reasoning nor the result of the state court decision contradict same. *Early v. Packer*,
18 537 U.S. 3, 8-9 (2002).

19 The court may grant relief under the “unreasonable application” clause if the state
20 court correctly identifies the governing legal principle but unreasonably applies it to the facts of
21 the particular case. *Williams*, 529 U.S. at 410. The focus of this inquiry is whether the state
22 court’s application of clearly established federal law is objectively unreasonable. *Id.* “[A]
23 federal habeas court may not issue the writ simply because that court concludes in its
24 independent judgment that the relevant state-court decision applied clearly established federal
25 law erroneously or incorrectly. Rather, that application must also be unreasonable.” *Id.*

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1 IV. ISSUES PRESENTED

2 Petitioner claims that his constitutional rights were violated when (A) the trial
3 court improperly denied his request for a continuance; (B) his challenge to the prosecutor's use
4 of peremptory challenges was overruled; and (C) the prosecutor committed misconduct during
5 presentation of evidence and closing argument.

6 V. DISCUSSION

7 A. Denial of Request for Continuance

8 First, petitioner claims that the trial court deprived him of his due process right to
9 a fair trial and his right to present a defense when it denied his attorney's motion for a
10 continuance.

11 1. Background

12 Jury selection for petitioner's trial commenced on April 21, 2004, and petitioner's
13 attorney moved for a continuance two days prior, on April 19, 2004. (Reporter's Transcript
14 ("RT") at 55-56.) The prosecutor objected to the requested continuance.

15 Petitioner's attorney sought the continuance because he had just learned that the
16 identification expert he had planned to call was not available until after May 4, 2004. Counsel
17 explained that he did not have the witness under subpoena because the witness was available and
18 had agreed to appear in mid March when it was originally anticipated that trial would commence,
19 however, the trial had been continued. Counsel went on vacation, first sending a letter to the
20 witness asking if he was available by April 14, 2004. When counsel returned from vacation on
21 April 14, 2004, he learned that the expert would not be available to testify until after May 4,
22 2004.

23 Counsel argued that the expert was essential to petitioner's case because there
24 were discrepancies in the identification of the active members of the robbery, and he anticipated
25 the expert would testify "that Caucasians do have trouble identifying people of other races." (RT
26 at 56-57.) He also informed the court that he had met with his client on April 17, 2004 to explain

1 that a continuance would be needed so the expert could testify; petitioner had indicated that he
2 was not willing to “waive time” and wished to proceed without the expert’s testimony. Although
3 it appears that the issue of petitioner’s competency was not previously raised, counsel indicated
4 to the court his doubts about whether petitioner fully understood the need for the expert. (RT at
5 58-59.)

6 The trial court indicated that it did not agree with the notion that an eyewitness
7 expert was essential to petitioner’s case, observing:

8 THE COURT: I think we would all agree that there are-- every
9 case is different. And there are all different kinds of experts. And
10 depending on the facts of the case, some experts are absolutely
11 essential. It’s the whole case. It might be a DNA issue. ID
experts, although they can in some circumstances be important,
this case does not strike me that he’s basically essential to your
case. I disagree with you on that.

12 This is a situation where, as I understand it from our conversations,
13 and some of the remarks that you’ve made here today, your
14 argument’s going to be, yes my client’s there, but he’s the guy
that’s standing around doing nothing.

15 So these people that identify him as being there, the argument is
16 not that they have misidentified him as being there, but they are
getting people mixed up as to who’s doing what.

17 [PETITIONER’S COUNSEL]: Which is crucial, Judge.

18 THE COURT: I know, but that happens to everybody. But that’s a
19 matter for cross-examination. You don’t need cross-racial or
20 anything else. People are running around. You have four victims
and three defendants, and there’s a lot of people to keep track of.
21 So I just don’t think it’s a question of ID. I mean, they show him a
photo ID, do they not? And they are able to pick him out. As I
22 understand it, also he gives a statement to the police admitting he
was there ... [¶] The idea is not that, you know, “I’m not even
there, I’ve got an alibi, I’m somewhere else.”

23 [PETITIONER’S COUNSEL]: Judge, he admitted being at the
24 hotel, not necessarily at the scene of the robbery.

25 THE COURT: All right. But nonetheless, just based on our
26 discussion, I did not get the impression that the ID is that crucial in
this case.

The other thing is that -- well, it seems to me that there are various

1 ID experts around besides the one that you've got. Have you tried
2 other people?

3 [PETITIONER'S COUNSEL]: No, Judge, because I had already --
4 the panel had approved this individual, and we had an
5 understanding with him.

6 THE COURT: I know. But you learned on the 14th. Couldn't you
7 find out what other experts are available?

8 [PETITIONER'S COUNSEL]: The 14th was Thursday.

9 THE COURT: I don't want to denigrate them or anything, but they
10 are not allowed to come in and testify as to their opinion about
11 what happened in this case. They basically have this same thing to
12 say, which was okay'd by the Supreme Court in McDonald as to
13 the problems with eyewitness identification. You don't need any
14 certain expert for that. You don't need the doctor who examined
15 your client. Anybody could come in. Any expert could come in.
16 Doesn't have to be that person.

17 (RT at 60-61.)

18 After further discussion, the court issued its ruling:

19 I am trying to weigh the prejudice that's involved here. If you
20 conclude that you can't get another eyewitness expert, I just don't
21 feel that, based on what I know about this case, that it's all that
22 crucial.

23 Having said that, I would hope that you'd continue your efforts. I
24 mean, the ICDP has already approved the money, so the money has
25 been allocated. Doesn't seem to me that they would care whether
26 you want to say, "Instead of Mr. Smith, I want to use Jones." I'd
27 contact them and get your investigator on it, find out who else --
28 who the other eyewitness experts are. Get a copy of the reports, if
29 you can get them back -- what's the doctor's name?

30 [PETITIONER'S COUNSEL]: Blender.

31 THE COURT: If you can get the reports back from his office, get
32 them for the new guy. You've got to try.

33 You're shaking your head. You don't think it can be done?

34 [PETITIONER'S COUNSEL]: I think it can be done. But again,
35 it's based on the relationship, as I indicated, that I had already
36 established, and it is based on the fact that it was a surprise to me
37 when I got back, you know, from my vacation.

1 THE COURT: Right. And I'm not saying that every case is just --
2 you don't even need to talk to your expert, because one case is like
3 every other case. No. I think you need to sit down with this expert
and talk to him and say, "Here's what the issues are, here's why
I'm calling you," just as you would any witness.

4 [PETITIONER'S COUNSEL]: I just want the record to be clear
5 that I think that this part of the matter is crucial, and that based on
that, I'm making that request.

6 THE COURT: All right.

7 [PETITIONER'S COUNSEL]: I don't want the record to indicate
8 in the future that I have not tried, and that as a consequence I'm --
you know, ineffective assistance of counsel has been rendered in
this case.

9 THE COURT: All right. I have heard and considered the
10 arguments by [petitioner's counsel] with respect to the motion to
11 continue on behalf of his client, Herman Johnson, and that motion
is denied.

12 (RT at 65-67.)

13 On direct appeal, the California Court of Appeal, Third District, held that the trial
14 court had not abused its discretion in denying the motion for a continuance or the subsequent
15 new trial motion as to this issue. The state appellate court reasoned:

16 Before jury selection, Herman Johnson moved for a continuance to
17 obtain an expert on cross-racial identification. The motion was
denied. He renewed the matter in a motion for a new trial, which
18 was also denied.

19 Whether to grant a continuance rests within the broad discretion of
the trial judge and defendants, as the appellants, bear the burden to
20 demonstrate the trial court abused his discretion. (See *People v.*
Panah (2005) 35 Cal.4th 395, 423.)

21 "When a continuance is sought to secure the attendance of a
22 witness, the defendant must establish 'he had exercised due
diligence to secure the witness's attendance, that the witness's
23 expected testimony was material and not cumulative, that the
testimony could be obtained within a reasonable time, and that the
24 facts to which the witness would testify could not otherwise be
proven.' [Citation.] The court considers 'not only the benefit
25 which the moving party anticipates but also the likelihood that such
benefit will result, the burden on other witnesses, jurors and the
26 court and, above all, whether substantial justice will be
accomplished or defeated by a granting of the motion.'" " (*People*

1 *v. Jensen* (2000) 22 Cal.4th 900, 1037.)

2 On Tuesday, April 19, 2005, Herman Johnson's counsel moved for
3 a continuance, stating as follows: He had an understanding with
4 Dr. Blender, an identification expert, that he would be available for
5 the trial, which had been scheduled to begin in mid-March, 2005.
6 Counsel had not subpoenaed Dr. Blender, but had written him a
7 letter asking if he would be available by mid-April; counsel then
8 went on vacation. When counsel returned from vacation on
9 Thursday, April 14, 2005, he found a message from Dr. Blender,
10 stating he would not be available until after May 4, 2005. Counsel
11 asserted that issues about cross-racial identification were
12 significant in this case because the victims were Russian
13 Caucasians and the defendants were Black: In particular, one
14 defense would be that the victims mistook Herman Johnson for
15 Mitchell Green, who had been identified as an active participant in
16 the robbery before trial but exonerated when a victim identified
17 Herman Johnson at the preliminary hearing instead of Green as a
18 participant.

19 However, Herman Johnson *refused to waive time to accommodate*
20 *counsel's motion.*

21 The court clarified that the defense would be that Herman Johnson
22 was present but the victims were confused about who did what.
23 The court found the defense could find a new expert on the subject
24 and-based on an offer of proof-found the identification was
25 corroborated. The court encouraged counsel to try to find another
26 expert and denied the motion.

 When the trial court suggested counsel try to find another expert
 counsel conceded, "I think it can be done," but explained that he
 already had a relationship with Dr. Blender. The court stated that
 an expert would not be allowed to testify as to identifications *in*
 this case but only about cross-racial identifications in general (see
 People v. McDonald (1984) 37 Cal.3d 351, 366-369, overruled on
 other grounds by *People v. Mendoza* (2000) 23 Cal.4th 896, 914),
 therefore there was no reason why another expert would not do.

 On appeal counsel states, "It was not for appellant (who has, in any
 event, a history of mental illness) ... to make the tactical decision
 about whether to call an expert and the importance of having an
 expert testify." The passing claim of mental illness is unsupported
 and although the decision to call an expert may have been
 counsel's, the decision to waive time is not ordinarily counsel's.
 (See 5 Witkin & Epstein, Cal.Crim. Law (3d ed. 2000) Crim. Trial,
 §§ 317-323 [counsel cannot waive *constitutional* speedy trial
 rights, only *statutory* speedy trial rights, and even that ability is
 limited].)

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1 The record indicates trial counsel conceded he could have obtained
2 another expert, although that was not his preference, and it might
3 involve some administrative difficulty. At no time later in the trial
4 did counsel report back on his efforts to obtain another expert,
5 therefore it appears he made none. Instead, counsel emphasized the
6 problems with the identifications through cross-examination and
7 argument. (See *People v. Sanders* (1995) 11 Cal.4th 475, 510 [no
8 prejudice in excluding expert testimony on identifications where
9 “counsel extensively cross-examined eyewitnesses concerning the
10 accuracy and reliability of their testimony,” instructions pointed
11 out factors to consider in evaluating eyewitness testimony, and
12 counsel argued the matter to the jury].)

13 Thus, counsel did not establish that the continuance was *necessary*,
14 his client refused to waive time for trial, and counsel had not
15 subpoenaed Dr. Blender or otherwise ensured his availability for
16 trial. In these circumstances we cannot say the trial court abused its
17 discretion in denying the motion for a continuance or the
18 subsequent new trial motion on this point.

19 (C050093 opinion at 3-6.)

20 2. Discussion

21 The matter of whether to grant a trial continuance is traditionally within the
22 discretion of the trial judge. *Avery v. Alabama*, 308 U.S. 444, 446 (1940). There are no specific
23 tests for deciding when a denial of a continuance is so arbitrary as to violate due process. *Ungar*
24 *v. Sarafite*, 376 U.S. 575, 589 (1964). “The answer must be found in the circumstances present
25 in every case, particularly in the reasons presented to the trial judge at the time the request is
26 denied.” *Ungar*, 376 U.S. at 589. Depending on the circumstances, a denial of a request for
more time may not violate due process “even if the party fails to offer evidence or is compelled
to defend without counsel.” *Id.*

On direct appeal from a federal criminal conviction, the Ninth Circuit Court of
Appeals balances four factors in determining whether a trial court unreasonably denied a criminal
defendant’s motion to continue: (1) the appellant’s diligence in preparing his case; (2) the
likelihood that the continuance would serve a useful purpose; (3) whether the continuance would
inconvenience the parties, the court, or other witnesses; and (4) whether the appellant was
prejudiced by the district court’s refusal to grant the request for a continuance. *United States v.*

1 *Rivera-Guerrero*, 426 F.3d 1130, 1138-39 (9th Cir. 2005); *see also United States v. Flynt*, 756
2 F.2d 1352, 1359 (9th Cir. 1985). In the context of a collateral challenge to a state court
3 conviction, this court is not required to apply the same test; nonetheless, the criteria applied by
4 the Ninth Circuit in reviewing federal convictions on appeal is useful in analyzing the
5 constitutional claim posed here.

6 It does not appear that the trial court unreasonably denied petitioner’s counsel’s
7 request for a continuance. First, diligence in securing the witness’ testimony was not shown.
8 The witness was not under subpoena, and at the time the continuance was requested, petitioner
9 refused to waive time and wished to proceed without the expert testimony. The record is unclear
10 whether the defense attempted to contact another expert.

11 In order for habeas relief to be warranted a petitioner must show actual prejudice
12 to his defense resulting from the trial court’s improper refusal to grant a continuance. *Gallego v.*
13 *McDaniel*, 124 F.3d 1065, 1072 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 2299 (1998). Here, the
14 trial court observed that the desired witness would not have been permitted to offer an opinion as
15 to what happened in this particular case. The trial court also indicated it’s belief that such expert
16 testimony was not essential to petitioner’s defense, and that the issue of witness identification
17 was, rather, a matter for cross-examination. Petitioner makes no argument to the contrary here.
18 Other than the simple fact that witnesses often have trouble identifying people of other races, it is
19 not apparent what beneficial testimony, if any, this or another eyewitness identification expert
20 would have offered had the continuance been granted.

21 Petitioner has not shown actual prejudice to his defense resulting from the lack of
22 expert testimony at trial. Although there was no expert testimony about cross-racial witness
23 identification, petitioner’s counsel effectively attacked the witnesses’ version of events on cross-
24 examination. (RT 362-99, 419-22, 521-46, 582-86.) The jury was instructed that the “cross-
25 racial or ethnic nature of [an] identification” is one factor to be considered in determining the
26 weight to be given to eyewitness identification testimony. (RT at 1018.) Counsel also

1 highlighted in closing argument the fact that the eyewitness identification in this case was cross-
2 racial in nature. (RT at 978-79).

3 Here, the trial court's ruling did not preclude petitioner's attorney from preparing
4 or presenting an adequate defense. Under these circumstances, the California Court of Appeal's
5 decision that the trial court properly denied the motion for continuance is not contrary to, or an
6 unreasonable application of clearly established federal law. *See Gallego*, 124 F.3d at 1072-73.
7 Petitioner's claim regarding the trial court's denial of a continuance before trial should be denied.

8 B. Prosecutors' Use of Peremptory Challenges

9 For his next claim, petitioner contends that the trial court improperly denied his
10 motion for a mistrial based on the prosecutor's misuse of peremptory challenges to excuse a
11 prospective African-American juror in violation of his rights under the Sixth and Fourteenth
12 Amendments of the United States Constitution.

13 1. Background

14 During voir dire, the prosecutor asked prospective Juror J. about his educational
15 background. (Augmented RT at 230.) Mr. J indicated that he had attended some college and that
16 his particular field of study was psychology. Mr. J indicated that he was still interested in
17 psychology. When asked whether he did anything to pursue the area of psychology in his own
18 time or in the community, he responded:

19 [MR. J]: What I more or less do, after going through the school and
20 the college, is really helping people, and more or less like the
homeless and young kids in my area and on my block.

21 [PROSECUTOR]: Okay.

22 [MR. J.]: The kids.

23 [PROSECUTOR]: So are you trying to learn more about human
24 psychology to assist --

25 [MR. J.]: Not trying to learn, more just trying to help more.

26 [PROSECUTOR]: Okay.

1 [MR. J.]: Because I know the situations that they're in and stuff
2 like that. And yeah, just to help.

3 (Augmented RT at 230-31.) Mr. J. clarified that he was referring to homeless people both in
4 Sacramento and in Indiana, where he is apparently from, and stated that he also takes care of his
5 family. Mr. J. affirmed that pursuing or studying the field of psychology helps him in these
6 endeavors. When asked if he volunteered in any programs to help homeless people, Mr. J.
7 responded:

8 [MR. J.]: No. What I do is not volunteer - yes, I more or less
9 volunteer to help. It's a few companies that I help out.

10 [PROSECUTOR]: That you help out?

11 [MR. J.]: Yes.

12 [PROSECUTOR]: That in turn help out the homeless?

13 [MR. J.]: Uh-huh. Young kids and families and stuff like that.

14 [PROSECUTOR]: And how do you assist them?

15 [MR. J.]: Like over the weekends, when I'm off of work, or when I
16 take my vacation, just go to those situations.

17 [PROSECUTOR]: And you're helping people in the community
18 that are homeless?

[MR. J.]: Uh-huh.

19 (Augmented RT at 231-32.) Mr. J. agreed that some of the homeless people he helped suffered
20 from mental illness or had contact with the criminal justice system. Mr. J. said that he did not
21 obtain a degree in psychology; he was drafted into the military. (Augmented RT at 233-34.)
22 While in the military Mr. J. participated in two court-martial proceedings. Mr. J. was questioned
23 and responded as follows regarding his experiences:

24 [PROSECUTOR]: ...And you indicated that you did serve on at
25 least two court-martials while in the Air Force.

26 [MR. J.]: (Nods head.)

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[PROSECUTOR]: Yeah?

[MR. J.]: Yeah.

[PROSECUTOR]: And that, from my limited understanding of it, it is a lot smaller of jurisdictional venue or jury than in this case?

[MR. J.]: Oh, yes.

[PROSECUTOR]: Than in our country or even in state law?

[MR. J.]: Uh-huh.

[PROSECUTOR]: Sometimes you people who are under a court-martial can be judged by a group of people in the military as small as four?

[MR. J.]: Right.

[PROSECUTOR]: Like four or six people are judging the facts. Right?

[MR. J.]: Yes.

[PROSECUTOR]: Nothing like the twelve that we talk about here?

[MR. J.]: Uh-huh. That's right. Really don't have no one. More or less told to -- just standing there, working there. And the whole situation came out. What had happened, I can't talk about.

But in those situations, you have to more or less go back to, you know -- before it goes bad, you know. You don't have -- it's something that, you know, someone else is doing. Not help them, it can hurt them. And he was doing something wrong, the person was, so -- but the reason why that happened, he was drinking that night, and so that's what -- pretty much what happened.

[PROSECUTOR]: So when you think about the court-martial process, were you being asked to listen to the facts of another soldier or officer --

[MR. J.]: Uh-huh.

[PROSECUTOR]: -- who was being court-martialed?

[MR. J.]: Yes.

[PROSECUTOR]: Had you ever been on the other side of that, like where you were the one sort of on trial?

[MR. J.]: No.

1 [PROSECUTOR]: Okay, so you've always been sort of a fact
finder?

2 [MR. J.]: Yes.

3 [PROSECUTOR]: And how did you feel about that process?

4 [MR. J.]: Like you says, one that I had to be at. But you know, I
5 had to be there.

6 [PROSECUTOR]: Okay. And is there any feelings that linger
7 from those experiences? We're talking a little while ago. Right?

8 [MR. J.]: Uh-huh.

9 [PROSECUTOR]: That make you hesitant to sort of join a larger
group along the same lines and listen to the facts in this case?

10 [MR. J.]: No. Not any more. No. Just maintain my business, and
that's it in the service.

11 [PROSECUTOR]: And in court-martials, is it a situation where
12 you knew the person being court-martialed?

13 [MR. J.]: Uh-huh.

14 [PROSECUTOR]: Okay. And is that -- does that -- did that make
it worse or better as far as your ability to sit in judgment?

15 [MR. J.]: More or less like you was saying, and like they was
16 indicating, everybody knew each other. So it wasn't that you
17 didn't know what was going on in situations like that. Just more or
18 less, honestly, tell the truth. Didn't have no choice. It wasn't make
up a situation. The military doesn't work like that, because there's
19 only so many people there. You can't be saying situations -- stuff
like you can hear out of the services. You just don't go for that,
because it doesn't exist, and you can't say it does.

20 [PROSECUTOR]: Okay. Are you talking like excuses?

21 [MR. J.]: Yeah. Exactly.

22 [PROSECUTOR]: Okay. Things that may happen or excuse
conduct outside of military court [don't] seem to apply?

23 [MR. J.]: Yes.

24 [PROSECUTOR]: Is what you're saying?

25 [MR. J.]: Yes.
26

1 [PROSECUTOR]: And how do you have -- how do you feel about
2 that, given this scenario?

3 [MR. J.]: This is much better. The situations is you have more
4 freedom, because like I was indicating there, there you're there.
5 Get locked up, you're locked up. And that's a lock up you don't
6 want, put in that situation.

7 [PROSECUTOR]: Very good. Thank you.

8 (Augmented RT at 233-36.) After further questioning of all the prospective jurors, all attorneys
9 passed for cause. (Augmented RT at 256.)

10 During peremptory challenges, the prosecutor excused Mr. J. (Augmented RT at
11 258.) Co-defendant D. Johnson's attorney asked to approach. After the jury was excused, co-
12 defendant D. Johnson's attorney stated she was making a "*Batson/Wheeler*" challenge, and was
13 also challenging the jury pool as a whole for lack of diversity. Co-defendant D. Johnson's
14 attorney argued that Mr. J. was present throughout selection process and appeared to be
15 interested in what was going on, and was responsive to questions. She argued that there was
16 "nothing exciting" about Mr. J.'s questionnaire in that he had no contact with law enforcement,
17 no victimization history, no arrest history, and was a member of the military. (Augmented RT at
18 260.) She also stated that the prosecutor spent the majority of her individual questioning
19 focusing on Mr. J. Petitioner's attorney noted that Mr. J. Was the only African-American left in
20 the panel at the time of challenge and joined in the motion. (Augmented RT at 262.)

21 The court made several observations, including that the questioning of Mr. J. was
22 not desultory when compared to questioning of the other members of the panel, that the
23 defendants are of the same racial group as the challenged jurors, and that the victims are of a
24 different racial group. (Augmented RT at 268-69.) The court further observed:

25 THE COURT: We just lost a female Asian juror, Ms. K., because
26 of her medical problems. And I think [co-defendant D. Johnson's
counsel] is correct, and I don't - that we have lost several minority
jurors. And I don't think she's - and she hasn't contended that
there was anything improper or unreasonable about the excuses in
those cases, although I think that she had some concerns about -
which one was it?

1 [PROSECUTOR]: Mr. S.

2 THE COURT: Mr. S. It may have been Mr. S. That she voiced an
3 objection to, and he was African American.

4 [CO-DEFENDANT JOHNSON'S COUNSEL]: From memory,
5 there were - I believe there were four African American jurors
6 who, besides Mr. S., through no fault of anyone's, had legal
7 excuses to leave this jury panel.

8 (Augmented RT at 269-70.)

9 The court noted that besides Mr. J., there were other minority jurors remaining,
10 and that no pattern of challenges existed against a particular cognizable group. (Augmented RT
11 at 270-71.) The court asked the prosecutor to explain her reasons for excusing Mr. J.:

12 [PROSECUTOR]: Certainly. On Mr. [J.'s] questionnaire, there are
13 at least four misspelled words, one of which is the word that
14 inquires whether or not he has earned any degrees. And you'll
15 recall that I asked Mr. J. whether he had a degree -- or what area
16 did he study, because I cannot tell from the way it's misspelled
17 whether its psychology or physics or something.

18 He ended up saying that the field of study was psychology. The
19 way he's written it on his juror questionnaire is P-S-H-Y-I-C.

20 It is my intention in this case, given the potential for an
21 identification expert to testify in this case, to stay away from any
22 juror from a background in psychology. That was one of the areas
23 I was going to voir dire about, and the Court told me that I was not
24 going to be allowed to get into that. So I left it at an inquiry of
25 people with backgrounds in psychology or those who are trained in
26 psychology or have an over-familiarity with the topic, which Mr. J.
seemed to have.

In addition, I'm generally always interested in people who have
been in the military. However, I got more confused after I inquired
of Mr. J. About his experience with the court-martials. He
indicated that he was always on the side of the fact finder and
never court-martialed himself. He spoke of those people being
court-martialed as being limited by virtue of the military justice
system in the excuses that they could use. In other words, the
excuses that work in the outside world don't work in the military
world.

That concerned me for this case, because he seemed- and then
getting into the work that he said he did with-

1 THE COURT: You're saying that -- I, quite frankly, I must
2 confess, had some trouble understanding him when he was
3 speaking. Did anybody else have that situation? [Co-defendant D.
4 Johnson's counsel], did you understand everything he was saying?
5 And I don't mean in a grammatical structure sense, I just mean -

6 [PROSECUTOR]: His train of thought.

7 THE COURT: Pardon me?

8 [PROSECUTOR]: His train of thought.

9 THE COURT: I'm talking to [co-defendant D. Johnson's counsel].

10 [CO-DEFENDANT JOHNSON'S COUNSEL]: His dialect?

11 THE COURT: No, his mumbling, his not speaking distinctly. Did
12 you have any trouble understanding him?

13 [CO-DEFENDANT D. JOHNSON'S COUNSEL]: At times I did.

14 THE COURT: How about you, [PETITIONER'S COUNSEL]?

15 [PETITIONER'S COUNSEL]: Not -- I understood most of the
16 things he said.

17 THE COURT: What I'm thinking about doing is having his -- the
18 dialogue between he and [the prosecutor] read back to us all.

19 [PROSECUTOR]: I don't know if it was a function of his dialect
20 or a function of me not hearing what he was saying, but at times I
21 had difficulty, but I understood overall what he was saying. A lot
22 of jurors have spoken -- or one juror in particular, memorable
23 juror, you had to tell to speak up.

24 THE COURT: All right. So [prosecutor], are you saying when you
25 were talking to him about the court-martial, he -- his statement was
26 that, in effect, that he was concerned about the fairness, although
he didn't say it in that many words, of a military court-martial, in
that excuses that might have worked on the outside didn't work in
the military? Is that what he said?

[PROSECUTOR]: That's what I gathered, yes. And his statements
that it was like a horrible place to be, you wouldn't want to be in
that place, i.e., the person being court-martialed, I got the sense
that he felt sorry for them.

And I had a concern that perhaps then, and now in this case, he
may base a decision in this case on emotion. And I had to lean
forward quite a bit to listen to him. And I was understanding less

1 and less, and so I just kind of stopped asking him questions.

2 But I believe my conversation with him ended on how he was
3 helping the homeless and mentally ill, and what he did on his
4 weekends, and how he helped them. And again, he seemed liberal-
minded in the sense that he would base a decision on emotion
because he felt sorry for the people.

5 (Augmented RT at 275-76.) The trial court inquired whether the prosecutor had any other
6 reasons. She responded:

7 [PROSECUTOR]: Those are mainly my reasons. I'm looking for -
8 I mean, the spelling errors concern me. That's about it.

9 THE COURT: Now, the spelling error, I see where under degrees
he misspelled, what, physics?

10 [PROSECUTOR]: I think that's supposed to be psychology, an
11 abbreviation for psychology.

12 THE COURT: All right. So that's misspelled. What other
misspellings?

13 [PROSECUTOR]: Under previous employer on the right side of
14 the form, I believe it's supposed to say Unisource Company.

15 Under question number four regarding information regarding
16 information regarding spouse or other adults with whom you
reside, the occupation is listed as wild, and then it's animal spelled
A-N-A-I-M-A-L.

17 And then the employer listed right under that under question four is
18 federal. I guess that's spelled correctly.

19 (Augmented RT at 275-76.)

20 The court asked the prosecutor about the connection between people with a
21 background in psychology and whether or not the defense called an expert witness; she
22 responded:

23 [PROSECUTOR]: Yes It had been my intent to voir dire on and try
24 and seek out people who may give undue weight to an
identification expert, given that they have studied or have trained
25 in the area of psychology or have an over-familiarity with a topic.

26 Also seek out and ferret out those jurors -- potential jurors who
may be vulnerable to or be likely to be unduly influenced by the

1 testimony of a forensic psychologist.

2 THE COURT: A forensic psychologist?

3 [PROSECUTOR]: I don't even have the CV of the potential ID
4 expert in this case. I have a CV from 1999. I think he's a medical
5 doctor, but I'm not sure. This is a general outline of an area of
6 inquiry that I use in cases with identification experts. It's typed
7 out. I've used it in other cases. It's an area that I explore in voir
8 dire.

9 THE COURT: So I understand you correctly, your concern is that
10 if [petitioner's counsel] does manage to locate and have testify an
11 eyewitness expert, that to a large extent those persons have some
12 background in psychology. Is that what you are saying?

13 [PROSECUTOR]: Yes.

14 THE COURT: And you feel that people that have a background in
15 psychology themselves, as potential jurors, might tend to be more
16 empathetic toward such an expert?

17 [PROSECUTOR]: Not necessarily sympathetic, but just I don't
18 want any juror knowing any more than any other juror by virtue of
19 their background. In other words, have some outside knowledge
20 that they would tap into, because a lot of what psychology is, is
21 studies. And that's what a lot of times these identification experts
22 testify about, is statistical studies.

23 (Augmented RT at 276-77.)

24 Petitioner's attorney and co-defendant D. Johnson's attorney were heard on the
25 issue, and argued against the prosecutor's proffered reasons. Among other things, defense
26 counsel noted that the prosecutor spent more time questioning Mr. J. compared to other jurors
and argued that her reasoning was contradictory in that she implied that he was both too educated
because of his psychology background and not educated enough because of the spelling errors.

(Augmented RT at 277-80.)

The court recessed and indicated its desire to review Mr. J's entire statement due
to the difficulty understanding his responses. (Augmented RT at 280-81.) The following day the
court noted that it had received and reviewed the transcript and that copies had been provided to
the parties. The court then made the following statement:

1 THE COURT: Okay. Just while this one situation is in my mind, I
2 know the law says that you're not supposed to think of excuses for
3 the prosecutor, but back on this issue of trying to understand what
4 Mr. J. Was saying, when I looked at that transcript, it wasn't so
5 much that I couldn't hear what his words were - and the word I was
6 looking for was syntax. When you read the transcript, it's hard to
7 understand what he was saying.

8 But that's just about it as far as explanation as to some of the
9 things. Like when [the prosecutor] was making her arguments
10 yesterday, I suspected that she was right, but I couldn't really recall
11 what was said, and that's why I had the transcript typed up.

12 So you can say, "Well, Judge, you should have stopped him and
13 told him to speak up." But that wasn't the point that he wasn't
14 speaking up. I just had trouble understanding him.

15 (Augmented RT at 284.)

16 The trial court summarized the law in the area and then made the following
17 findings:

18 Number one, [the prosecutor] was concerned about three
19 misspellings on his questionnaire. This is the type of thing that
20 does not go unnoticed by the attorneys on either side of the counsel
21 table, and generally is looked upon as a negative factor in the
22 equation. Whether or not this shortcoming can be characterized as
23 relatively minor, there can be no doubt it is a legitimate concern.

24 This court is not required then to perform a comparative analysis of
25 the other jurors' questionnaires to determine how many of them
26 have misspellings and whether the jurors that she excuses have or
27 have not misspellings in their questionnaires. This does not note as
28 a comparative analysis. In that regard it's not required. This does
29 not mean that the defense is precluded from making relevant
30 arguments in that regard.

31 The prosecutor has stated that from her perspective, she has
32 misgivings about Mr. J.'s background in psychology, because if the
33 defense were to produce an expert in the area of eyewitness
34 identification, that expert's background normally is based, to a
35 large extent, upon psychology, which, in her opinion, then would
36 appeal more to a person with a similar type background, such as
37 Mr. J.

38 There's nothing inherently or patently disingenuous about her
39 explanation in this regard.

40 [The prosecutor] mentions and is concerned that Mr. J. is very

1 interested and involved in helping the homeless and volunteers his
2 time to help them. Commendable as that is, this prosecutor's
3 concerned this activity evinces a liberal mind-set, which, in her
4 opinion, does not make a good juror for the prosecution.

5 Again, this court finds that this is a legitimate reason for the
6 exercise of the challenge, and is not a sham or pretext to cover a
7 desire to deprive the defendant of the equal protection of the law.

8 Regarding the juror's experience on two court-martials while in the
9 military, the prosecutor felt that, even though he wasn't the one
10 being prosecuted, that he had concerns about -- arguably about the
11 fairness of the military court-martial process.

12 In this regard I did have the transcript prepared. It's somewhat
13 difficult to discern from the cold transcript what Mr. J.'s concerns
14 were, but it seems like he was stating that, in effect, that the
15 military situation is not -- seemed not as fair as what we have here.
16 And again, from the prosecutor's perspective, she indicated that
17 she's concerned that this is a juror who might be inclined to judge
18 the evidence emotionally rather than objectively.

19 There's nothing inherently suspect about the prosecutor's
20 reasoning. Some might disagree with her conclusions, but the
21 court finds they are genuine and not contrived.

22 Accordingly, the court finds that the defense has failed to establish
23 or satisfy their burden of proof that the prosecutor impermissibly
24 excused Mr. J. for reasons prohibited by the prescriptions of
25 Wheeler/Batson and their progeny. So the defense motion to
26 dismiss the venire is denied.

(Augmented RT at 288-90.)

On direct appeal, the state appellate court found no error:

The trial court found defendants established a prima facie case of racial discrimination in the prosecutor's exercise of a peremptory challenge to juror J, a Black male who had served on two court-martial panels while in the Air Force. In response to the trial court's invitation, the prosecutor explained that J misspelled words on his questionnaire (including "pshyic" for "psychology"), had a psychology background, seemed "sorry" for people who had been court-martialed and, based on J's work with mentally ill and homeless people, "seemed liberal-minded in the sense that he would base a decision on emotion because he felt sorry for the people." In particular, since it was at that point not known whether or not Herman Johnson was going to have a psychologist testify as to the problems with cross-racial identification, the prosecutor was leery of having any jurors with psychology backgrounds serve in this case.

1 The trial court stated that J was hard to understand due to his
2 mumbling, and the prosecutor at one point said, “I was
3 understanding less and less, and so I just kind of stopped asking
4 him questions.” Because the trial court found J so hard to
understand he wanted a readback or transcript of J's voir dire so the
court could consider it before ruling on the defense motion.

5 The next morning the court had reviewed a transcript of J's voir
6 dire and realized the problem was not so much J's mumbling but
7 his syntax. We give an example. When the prosecutor asked J
whether knowing the person being court-martialed had made
serving on a court-martial “worse or better” he replied:

8 “More or less like you was saying, and like they was indicating,
9 everybody knew each other. So it wasn't that you didn't know what
10 was going on in situations like that. Just more or less, honestly, tell
11 the truth. Didn't have no choice. It wasn't make up a situation. The
12 military doesn't work like that, because there's only so many people
there. You can't be saying situations-stuff like you can hear out of
the service. You just don't go for that, because it doesn't exist, and
you can't say it does.”

13 When the prosecutor tried to clarify if J meant that more excuses
14 worked outside of the military he seemed to agree and when she
asked how he felt about that J said:

15 “This is much better. The situations is you have more freedom,
16 because like I was indicating there, there you're there. Get locked
up, you're locked up. And that's a lock up you don't want, put in
that situation.”

17 The trial court denied the motion, finding each of the prosecutor's
18 stated reasons was legitimate and race-neutral; in particular the
court mentioned J's comparisons of serving on court-martial juries
with serving on this jury.

19 In upholding a challenge, a trial court need not *agree* with the
20 reasons, but must find that they are genuine, specific and free of
21 bias. They can be subjective or trivial, including body language,
attitude, lack of attention and so forth. (*People v. Arias* (1996) 13
22 Cal.4th 92, 136; *Wheeler, supra*, 22 Cal.3d at p. 275; *People v.*
Allen (2004) 115 Cal.App.4th 542, 547; *People v. Walker* (1998)
23 64 Cal.App.4th 1062, 1067.)

24 The ultimate issue is the persuasiveness of the reasons in light of
25 the record, that is, whether the record supports the trial court's
finding that the challenge was lawful. (See *Miller-El v. Cockrell*
26 (2003) 537 U.S. 322, 338-339 [154 L.Ed.2d 931, 951] (*Miller-El*
D); *People v. Reynoso* (2003) 31 Cal.4th 903, 907-908 (*Reynoso*).)
Formal findings are not needed:

1
2 “Where ... the trial court is fully apprised of the nature of the
3 defense challenge to the prosecutor's exercise of a particular
4 peremptory challenge, where the prosecutor's reasons for excusing
5 the juror are neither contradicted by the record nor inherently
6 implausible [citation], and where nothing in the record is in
7 conflict with the usual presumptions to be drawn, i.e., that all
8 peremptory challenges have been exercised in a constitutional
9 manner, and that the trial court has properly made a sincere and
10 reasoned evaluation of the prosecutor's reasons for exercising his
11 peremptory challenges, then those presumptions may be relied
12 upon, and a *Batson/Wheeler* motion denied, notwithstanding that
13 the record does not contain detailed findings regarding the reasons
14 for the exercise of each such peremptory challenge.” (*Reynoso*,
15 *supra*, 31 Cal.4th at p. 929.)

16
17 The *trial court* determines whether the stated reason is genuine and
18 free from discriminatory intent, upon a reasoned evaluation of the
19 prosecutor's explanation. (*People v. Hall* (1983) 35 Cal.3d 161,
20 167-168.) The appellate court gives great deference to the trial
21 court's finding. (*People v. Ervin* (2000) 22 Cal.4th 48, 74-75;
22 *Reynoso, supra*, 31 Cal.4th at pp. 918-919.) But deference is not
23 abdication:

24 “When the prosecutor's stated reasons are both inherently plausible
25 and supported by the record, the trial court need not question the
26 prosecutor or make detailed findings. But when the prosecutor's
27 stated reasons are either unsupported by the record, inherently
28 implausible, or both, more is required of the trial court than a
29 global finding that the reasons appear sufficient.” (*People v. Silva*
30 (2001) 25 Cal.4th 345, 386.)

31 Defendants argue *Miller-El v. Dretke* (2005) 545 U.S. 231 [162
32 L.Ed.2d 196] (*Miller-El II*) wrought fundamental changes in this
33 area of law. We agree that *Miller-El II* is a significant case, but it
34 did not change the *Batson* framework:

35 “The fundamental inquiry remains the same after [*Miller-El II*] as
36 before: Is there substantial evidence to support the trial court's
37 ruling that the prosecutor's reasons for excusing prospective jurors
38 were based on proper grounds, and not because of the prospective
39 jurors' membership in a protected group? If so, then defendant is
40 not entitled to relief. In undertaking this inquiry, we note that the
41 question is not whether we as a reviewing court find the challenged
42 prospective jurors similarly situated, or not, to those who were
43 accepted, but whether the record shows that the party making the
44 peremptory challenges honestly believed them not to be similarly
45 situated in legitimate respects.” (*People v. Huggins* (2006) 38
46 Cal.4th 175, 233.)

47 Contrary to the defense view, the trial court did not state that “any

1 trivial explanation” was enough; the trial court explicitly found that
2 the explanations given were legitimate, that is, sincere and race-
3 neutral. The record supports the prosecutor's concern that J viewed
4 himself as a do-gooder who might take pity on a defendant for
5 extra-legal reasons.

6 Further, although acknowledging at one point that the trial court
7 should *not* “view[] each of the prosecutor's stated reasons in
8 isolation[,]” defendants dissect each reason and advance alternative
9 interpretations or inferences. For example, while poor spelling may
10 be a trivial reason in many circumstances, here J misspelled
11 “psychology,” which was a subject he supposedly had studied.
12 Further, J's study of psychology and his social work support the
13 prosecutor's concern that he could have a “liberal” mindset, and a
14 prosecutor may choose to strike “do-gooders” off of a jury without
15 running afoul of the *Batson* rules. (See, e.g., *People v. Landry*
16 (1996) 49 Cal.App.4th 785, 790-791; *People v. Perez* (1996) 48
17 Cal.App.4th 1310, 1315.)

18 Defendants separately claim the trial court erred by failing to
19 engage in “comparative juror analysis.” However, they failed to
20 develop such an argument in the trial court and nothing in *Miller-*
21 *El II, supra*, 545 U.S. 231 [162 L.Ed.2d 196] requires a trial court
22 to perform such an analysis *on its own motion*. The trial court
23 indicated the defense was free to make a comparative analysis.
24 Further, defendants do not fairly develop their appellate claims by
25 reference to truly comparable factors, no doubt because of the lack
26 of a record to support valid comparisons. For example, appellate
counsel states, “It is highly likely that other jurors made
comparable spelling errors[,]” but because the issue was not
explored in the trial court, there is no record to support such
assertion.

Further, the Attorney General has illustrated other flaws in the
comparative points proffered on appeal. The prosecutor struck the
only other two jurors who indicated they had studied psychology.
Whether other jurors who had college degrees or otherwise seemed
educated might have taken some psychology courses is not
revealed by the record, because trial counsel failed to make a
comparative analysis in the trial court. Another juror who had
served in the military had also served on two civilian juries, one
civil and one criminal, and did not express unusual sentiments
about that experience. Thus, his background was not comparable to
J's in this regard.

The fact the prosecutor spent more time questioning J is explained
by the confusion in J's answers, as the trial court impliedly found.
Therefore, the record does not support the claim that the prosecutor
improperly singled J out for disparate questioning. That the
prosecutor did not question a juror who believed her son had been
treated too harshly on drug charges, a juror whose sister was a

1 public defender, a juror who was a probation officer and a juror
2 who had a drunk-driving conviction does not reflect any nefarious
3 purpose in her questioning of J nor in her decision to challenge J,
4 despite counsel's assertion that these factors should have raised
5 "red flags" about those other jurors. Had a comparative analysis
6 been made in the trial court, perhaps a record supporting the
7 assertion of disparate questioning could have been made, but on
8 this record the claim is untenable.

9 On this record we uphold the trial court's ruling.

10 (C050093 opinion at 6-11.)

11 2. Discussion

12 As set forth by the California Court of Appeal, the Equal Protection Clause
13 prohibits a prosecutor from exercising peremptory challenges to strike a venire person on the
14 basis of race. *Batson v. Kentucky*, 476 U.S. 79 (1986). In order to prevail on a *Batson* claim, a
15 defendant must first establish a prima facie case of purposeful discrimination. *Batson*, 476 U.S.
16 at 96-97; *Lewis v. Lewis*, 321 F.3d 824, 830 & n.18 (9th Cir. 2003); *United States v. DeGross*,
17 960 F.2d 1433, 1442 (9th Cir. 1992) (en banc). Where, as in this case, the trial court finds a
18 prima facie case has been established, "the burden shifts to the State to come forward with a
19 neutral explanation for challenging" the juror in question. *Batson*, 476 U.S. at 97. *DeGross*, 960
20 F.2d at 1442; *Stubbs*, 189 F.3d at 1104. The trial court must then decide whether the defendant
21 has carried his burden of proving purposeful discrimination. *McClain v. Prunty*, 217 F.3d 1209,
22 1220 (9th Cir. 2000) (quoting *Hernandez*, 500 U.S. at 359); *see also Batson*, 476 U.S. at 98. As
23 with any credibility determination, the court's own observations are of significant importance.
24 *Batson*, 476 U.S. at 98, n.21; *see also Lewis*, 321 F.3d at 830.

25 The issue at the final inquiry is the facial validity of the prosecutor's explanation.
26 *McClain*, 217 F.3d at 1220 (quoting *Hernandez*, 500 U.S. at 359); *see also Batson*, 476 U.S. at
98. The prosecution's challenges need not rise to the level justifying use of a challenge for
cause. *United States v. Power*, 881 F.2d 733, 740 (9th Cir. 1989) (citing *Batson*, 476 U.S. at 97-
98). Rather, a neutral explanation in this context means "an explanation based on something

1 other than the race of the juror.” *McClain*, 217 F.3d at 1220 (quoting *Hernandez v. New York*,
2 500 U.S. 352, 360 (1991)).

3 If a review of the record undermines the prosecutor’s stated reasons, or many of
4 the stated reasons, the explanation may be deemed a pretext. *Id.* On the other hand, “[e]vidence
5 in the record of objective reasons to strike a juror implies that racial bias did not motivate the
6 prosecutor.” *Boyd v. Newland*, 393 F.3d 1008, 1013 (9th Cir. 1987). The fact that a prosecutor’s
7 reasons may be “founded on nothing more than a trial lawyer’s instincts about a prospective
8 juror” does not diminish the scope of acceptable invocation of peremptory challenges, so long as
9 they are the actual reasons for the prosecutor’s actions.” *Power*, 881 F.2d at 740 (quoting *United*
10 *States v. Chinchilla*, 874 F.2d 695, 699 (9th Cir. 1989)).

11 In this case, the prosecutor articulated several reasons for excusing Mr. J.,
12 including that (1) he had misspelled and/or incorrectly abbreviated the field of study which he
13 reportedly pursued in college; (2) that field of study was psychology, which concerned the
14 prosecutor because of the potential for expert witness testimony from an identification expert; (3)
15 he had twice served as a fact finder in military court martial proceedings and gave vague and
16 confusing responses when asked about these experiences; and (4) he worked with and/or
17 volunteered time helping homeless and mentally ill individuals, and appeared to the prosecutor to
18 be a “liberal type” person who might base a decision on emotion.

19 The prosecutor’s concern about petitioner’s background in psychology and his
20 interest in helping the homeless and mentally ill falls within the well-settled rule that both
21 occupation and interest or experience in social service or similar fields are permissible, non-
22 discriminatory reasons for exercising peremptory challenges. *See generally Hall v. Luebbers*,
23 341 F.3d 706, 713 (8th Cir. 2003) (“Occupation is a permissible reason to defend against a
24 *Batson* challenge, and being a social worker could be a legitimate basis to strike a prospective
25 juror.”), *cert. denied*, 541 U.S. 996, 124 S.Ct. 2031, 158 L.Ed.2d 505 (2004); *United States v.*
26 *Smith*, 223 F.3d 554, 569 (7th Cir. 2000) (prosecutor’s stated reason to strike a potential juror

1 because she was “a social worker type” who would be “too sympathetic towards the defendants”
2 was found non-racial); *United States v. Thompson*, 827 F.2d 1254, 1260 (9th Cir. 1987)
3 (“Excluding jurors because of their profession, or because they acquitted in a prior case, or
4 because of a poor attitude in answer to voir dire questions is wholly within the prosecutor’s
5 prerogative.”).

6 It is also well settled that a previous negative experience with law enforcement or
7 the judicial system constitutes an acceptable, race-neutral explanation for striking a potential
8 juror. *See Mitleider v. Hall*, 391 F.3d 1039, 1048 (9th Cir. 2004). The prosecutor’s concern that
9 Mr. J. appeared to feel sorry for people involved in court martial proceedings is valid based on
10 this general rule. *See Tolbert v. Gomez*, 190 F.3d 985, 989 (9th Cir. 1999) (“Challenging a
11 prospective juror on the basis of his expressed opinions about the judicial system does not violate
12 *Batson*.”).

13 The reasons articulated by the prosecutor are facially valid. Moreover, a review of
14 the record does not indicate that any of those reasons were pretextual. In such a situation, a
15 comparative juror analysis is an additional tool that may be useful in evaluating the plausibility
16 of a prosecutor’s stated reasons in light of all the evidence. *Miller-El v. Dretke*, 545 U.S. 231
17 (2005); *see also Kesser v. Cambra*, 465 F.3d 351, 361 (9th Cir. 2006) (“in *Miller-El*, the
18 [Supreme] Court made clear that the comparative analysis is required even when it was not
19 requested or attempted in state court”).

20 Here, a comparative juror analysis is beneficial to examining some, but not all of
21 the prosecutor’s given reasons. For example, the fact that Mr. J. misspelled what appeared to be
22 an abbreviation for psychology, his field of study in college, is a circumstance that was isolated
23 and unique to him. Likewise, there is no indication that any other juror reported working with
24 the homeless or mentally ill.

25 On the other hand, the record indicates that two other jurors had backgrounds in
26 psychology. Prospective Juror M. indicated that she had obtained a bachelor’s degree in

1 psychology, while Juror S. had studied art/psychology but had not obtained a degree.
2 (Augmented RT at 322, 354.) The prosecutor exercised peremptory challenges as to both Juror
3 M. and Juror S. (Augmented RT at 357-58.)

4 Another potential juror reported prior service in the military. This potential juror,
5 identified in the relevant portion of the record as Juror Number Eight, indicated that he had
6 retired from the Air Force; it was also discussed that he had previously served on two juries in
7 superior court. (Augmented RT at 316.) Unlike Mr. J., however, there was nothing vague or
8 confusing about Juror Number Eight's responses regarding these past experiences. Accordingly,
9 similar concerns to those the prosecutor had regarding Mr. J. did not arise from Juror Number
10 Eight's responses about the military and the criminal justice system.

11 Petitioner has failed to carry his burden of proving the existence of unlawful
12 discrimination with respect to the prosecutor's challenge to Mr. J. Put simply, Mr. J.'s
13 responses during voir dire were difficult to follow. In addition, he had completed some years of
14 college, and reported a background and current interest in psychology, yet misspelled what
15 appeared to be an incorrect abbreviation of that word. Mr. J. also volunteered his time helping
16 less fortunate members of the community, and did not appear to have a positive memory of his
17 prior experience in the military criminal justice system. The prosecutor expressed reasonable
18 bases for her use of a peremptory challenge against Mr. J., and those reasons are not undermined
19 by anything in the record. The California courts' rejection of petitioner's claim is not contrary to,
20 or an unreasonable application of the *Batson* standard, nor based on an unreasonable
21 determination of the facts in light of the evidence. Petitioner's claim regarding the prosecutor's
22 use of peremptory challenges should be denied.

23 C. Prosecutorial Misconduct

24 For his third and final ground, petitioner claims that the prosecutor committed
25 prejudicial misconduct. Based on the arguments petitioner presented to the California Supreme
26 Court, it appears he is claiming, specifically, that the prosecutor (1) implied that an absent

1 witness would have identified petitioner as one of the perpetrators; (2) improperly vouched for
2 witnesses; and (3) interjected racial stereotypes into closing argument.

3 The law applicable to each of petitioner’s allegations of prosecutorial misconduct
4 is the same: the narrow standard of due process applies on habeas corpus review. *Darden v.*
5 *Wainwright*, 477, U.S. 168, 181 (1986). A prosecutor’s error or misconduct does not, per se,
6 violate a petitioner’s constitutional rights. *See Jeffries v. Blodgett*, 5 F.3d 1180, 1191 (citing
7 *Darden*, 477 U.S. at 181 and *Campbell v. Kincheloe*, 829 F.2d 1453, 1457 (9th Cir. 1987)). A
8 criminal defendant’s due process rights are violated only if the error or misconduct renders the
9 trial fundamentally unfair. *Darden*, 477 U.S. at 181.

10 The question to be resolved is “whether the prosecutor’s remarks ‘so infected the
11 trial with unfairness as to make the resulting conviction a denial of due process.’” *Hall v.*
12 *Whitley*, 935 F.2d 164, 165 (9th Cir. 1991) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637,
13 643 (1974)). In order to determine whether prosecutorial misconduct occurred, it is necessary to
14 examine the entire proceedings and place the prosecutor’s remarks in context. *See Greer v.*
15 *Miller*, 483 U.S. 756, 765-66 (1987). Relief is limited to cases in which the petitioner can
16 establish that the misconduct resulted in actual prejudice. *Johnson v. Sublett*, 63 F.3d 926, 930
17 (1995) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637-38). Put another way, prosecutorial
18 misconduct violates due process when it has a substantial and injurious effect or influence in
19 determining the jury’s verdict. *See Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899 (9th Cir. 1996).

20 1. Reference to the absent witness

21 a. Background

22 Prior to trial, it became apparent that two of the robbery victims, Alex Alekseyev
23 and Geouard Dauterive, would not appear to testify, despite having been validly subpoenaed.
24 (RT at 161-68.) Petitioner’s requests that the court take judicial notice of this fact were denied.
25 (RT at 173; 249.)

26 ////

1 Detective Chris Wilder testified at trial. Detective Wilder said that he created a
2 photographic line-up which included petitioner's photograph. (RT at 827.) During his direct
3 examination the following exchange occurred:

4 Q: On that same date, June 23rd of last year, did you meet with
5 Geouard Dauterive?

6 A: Yes, I did.

7 Q: Where did you meet with him?

8 A: In the lobby of the Madison Inn.

9 Q: And what was the purpose of your meeting with Geouard at
10 that time at that location?

11 [CO-DEFENDANT D. JOHNSON'S COUNSEL]: Your
12 Honor, I'm going to object.

13 THE COURT: Sustained.

14 Q: [BY PROSECUTOR]: When you met with him, was he
15 alone?

16 A: Yes, he was.

17 Q: Did you show him the photographic lineup containing --

18 [CO-DEFENDANT D. JOHNSON'S COUNSEL]:
19 Objection, Your Honor. This is calling for hearsay.

20 [PROSECUTOR]: No, it doesn't. I'm not asking his
21 responses. I'm asking did he do something.

22 (RT at 828.)

23 Outside the presence of the jury, co-defendant D. Johnson's attorney argued that
24 the issue of Dauterive's unavailability for trial had been discussed at length, and that in light of
25 the court's earlier rulings, the prosecutor's attempt to get into evidence the alleged fact that he
26 had identified petitioner in the lineup reflected prosecutorial misconduct. (RT at 829-31.) This
was especially damaging, she explained, given that the trial court had ruled that defendants could
not explain to the jury that the witness was uncooperative and had failed to appear at trial.
Petitioner's counsel asserted additionally that the testimony was hearsay, and requested a

1 mistrial. (RT at 830.)

2 The prosecutor explained her position, stating that she was merely trying to show
3 Dauterive had been cooperative two days after the robbery and that she had not been planning to
4 ask about “anything that came out of Dauterive’s mouth,” including whether he made an
5 identification. The discussion continued:

6 THE COURT: You can’t go there. And what you did was try and
7 create an inference in the minds of the jurors that he showed him a
8 lineup, and if there was anything bad, if he couldn’t ID, then the
9 defense would bring it up.

10 So you know, what’s the relevance? What’s the import of showing
11 him a photo lineup? So what? If you can’t show what happened,
12 what’s the relevance of it?

13 [PROSECUTOR]: That two days after the robbery he’s
14 cooperative.

15 THE COURT: [Co-defendant D. Johnson’s counsel] is absolutely
16 correct. She’s been trying to show that he’s uncooperative.
17 You’ve been objecting, and I sustained your objection. In my
18 mind, you’ve gone where you shouldn’t go in having this officer
19 testify that, “I showed him a lineup,” under the argument, “Well,
20 this is just to show that he’s cooperative.”...

21 (RT at 834.)

22 Ultimately the court ruled:

23 All right. Here’s my impression on this. This does not rise to the
24 level of a mistrial. A mistrial- in most situations, granting a
25 mistrial should be seen as a remedy of last resort. If possible, the
26 improper conduct should be cured by admonishing the jury.

 It is very helpful for the judge to inquire early in the trial process as
to any problem areas in order to avoid [or] anticipate a situation
like this. This is why I spent so much time with you folks in
chambers in limine before we got rolling.

 There are certain grounds for mandatory mistrial under the
Evidence Code. This is not one of those.

 So the question is: What to do about it. I don’t have any problem
with admonishing the jury to disregard the last statement- question
and answer by the prosecutor about, “Did you show him a photo
lineup?” They are to disregard that...

1 ...My opinion is, based upon the totality of the evidence in this
2 case, what's gone on before regarding photo lineups and in-person
3 identification, et cetera, et cetera, that the confusion on the various
4 witnesses' parts, I do not think that this is the type of prejudice
5 which rises to the level of a mistrial. I think an admonition can
6 cure it.

7 The only question I'm considering now is whether or not to re-visit
8 the issue of allowing them -- or however it was originally
9 proposed, to take judicial notice of the fact that Mr. Dauterive has
10 had a bench warrant out for his arrest and has failed-- because he
11 has failed to appear... [¶] All right. I'm going to go ahead and
12 make that ruling, that you'll be allowed to do that...

13 (RT at 837-38; 40-41.)

14 When the jury returned, the court admonished:

15 ...Ladies and gentlemen, right at the break there was an objection
16 lodged with respect to the last part of the prosecutor's line of
17 questioning with this officer, and I'm sustaining the objection. It's
18 with respect to questions and answers that had to do with this
19 officer allegedly showing a photographic lineup.

20 I'm ordering that not only is the objection sustained, but those
21 questions and answers are stricken from the record, and I'm
22 admonishing each and every one of you to disregard those
23 questions and those answers.

24 Now, this is something that was mentioned when we were in jury
25 selection -- or actually, called the pretrial admonition, that if the
26 Court rejects certain evidence, you're not to speculate as to why
it's rejected or what the reason for the objection was.

But what it further means, you're to disregard it completely, not to
take it into account, and don't talk about it at any time during the
deliberations.

Do all of you understand that? All right. Thank you.

(RT at 844-45.)

Then, at the conclusion of the People's case, the court stated to the jury:

[Co-defendant D. Johnson's counsel] has properly asked the Court
to take judicial notice of the Court's own file. And that is proper in
certain cases under the Evidence code for the judge to look in their
own file and say, yeah, that's true, and then tell the jury what it is.
Okay.

////

1 So in this case, what she is asking that the Court take judicial
2 notice of is that on a prior date wherein this case was originally
3 scheduled to start, which was January 13th of this year, the person
4 Geouard Dauterive, and that's spelled D-A-U-T-E-R-I-V-E, had
5 been personally served with a subpoena to appear in court on that
6 date, and failed to appear in court pursuant to that subpoena. And
7 as a result, the court issued a bench warrant for Geouard
8 Dauterive's arrest, and as of today, that warrant is still outstanding.
9 And that is reflected in the court's file, and the Court will take
10 judicial notice of that.

11 (RT at 878-79.)

12 On direct appeal, the state appellate court rejected the claim, reasoning:

13 Defendants assert the prosecutor's questions effectively conveyed
14 that Dauterive identified Herman Johnson.

15 “To prevail on a claim of prosecutorial misconduct based on
16 remarks to the jury, the defendant must show a reasonable
17 likelihood the jury understood or applied the complained-of
18 comments in an improper or erroneous manner.... In conducting
19 this inquiry, we “do not lightly infer” that the jury drew the most
20 damaging rather than the least damaging meaning from the
21 prosecutor's statements.” (People v. Brown (2003) 31 Cal.4th
22 518, 553-554.)

23 No evidence about any identification Dauterive may have made
24 was admitted, due to defense counsel's prompt objections. Further,
25 we presume that jurors follow instructions and admonitions except
26 in very limited circumstances. (See, e.g., People v. Abbaszadeh
(2003) 106 Cal.App.4th 642, 648.) For example, a question
including inflammatory and irrelevant content about a defendant
(e.g., references to child molestation or terrorist activities) might
cause prejudice even if the question is not answered. But in this
case the questions merely asked the officer what he had done, not
what Dauterive had said or done, and did not imply any
inflammatory facts about Herman Johnson. The trial court
promptly and thoroughly admonished the jury. We see no reason
why the jury would have any inherent difficulty following the
admonition, and therefore uphold the trial court's ruling denying
the mistrial motion.

27 (C050093 opinion at 14-15.)

28 ////

29 ////

1 2. Vouching for witnesses

2 a. Background

3 In the rebuttal portion of the prosecutor's closing argument, she stated:

4 And one would ask, would the victims of this case, Lev Maslov
5 and Mike Linsky, put themselves through nearly six hours of
6 testifying here, probably about half as much at the preliminary
7 hearing last September, and then, you know, hanging out and
8 giving a statement to the police on the night of the robbery if there
9 was no gun? That's a significant investment and follow-through
10 on this crime that these victims have put forth in this case.

11 Why did they come here and subject themselves to six hours of
12 questioning by three different lawyers? Do you think they did that
13 for the heck of it? Do you think the people in the construction
14 industry are paid when they are not at work? Usually they're not.
15 So there's a lot at stake coming here, and they took the prospect of
16 testifying seriously.

17 Why did they come here and endure the hours of testifying that
18 they did? It's because there was a gun on that night, on that
19 morning, in that hallway.

20 And think about it. Mike Linsky got his keys back, and Lev
21 Maslov got some of the property that was in his wallet back. And
22 so wouldn't you think, well, you know, hey, there was no gun, and
23 we got our stuff back, so it's not -- why are we going to bother
24 with this prosecution? Keep it under the rug.

25 And I'll tell you, ladies and gentlemen, that's not the case here at
26 all. If they were -- if this was a robbery with no gun and they got
27 their property back, what would be their motive? And that's what
28 the defense is saying, is that they're here, they're saying that this
29 robbery happened with a gun. And they repeated over and over
30 there is no evidence of a gun.

31 (RT at 994.) Later the prosecutor continued:

32 Now, some comments were made about the victims being coached
33 or being told what to say. And I would like to say that if that were
34 the case, then if -- you know, because there's nothing wrong with
35 the DA meeting with the witnesses prior to putting on the case. I
36 mean, you would want to be prepared before you hit the stand if
37 you had never testified before, so there's nothing wrong with
38 that....

39 [¶] ...And you can tell right now that the witnesses were not
40 coached, because if they had been coached, wouldn't Lev Maslov
41 have said everything under oath that Mike Linsky said? There

1 would be no discrepancies, no inconsistencies.

2 And if Mike Linsky had been coached, wouldn't he have pointed
3 out the right person as the chubby one with the braids? No. That's
4 how you know that these witnesses weren't coached, because there
are fine lines. There are discrepancies. There are inconsistencies.
And that does not make a witness incredible.

5 (RT at 1004.)

6 On direct appeal, the state appellate court rejected petitioner's claim that the
7 prosecutor improperly vouched for witnesses:

8 Defendants contend the prosecutor improperly vouched for the
9 victim-witnesses. This claim is based on statements made during
10 the prosecutor's rebuttal argument, *to which no objections were*
interposed. The failure to object forfeits the contention of error.
(*People v. Ward* (2005) 36 Cal.4th 186, 215 (*Ward*)). In any event
11 it lacks merit.

12 “ “[A] prosecutor is given wide latitude during argument. The
13 argument may be vigorous as long as it amounts to fair comment
14 on the evidence, which can include reasonable inferences, or
15 deductions to be drawn therefrom. [Citations.] It is also clear that
16 counsel during summation may state matters not in evidence, but
17 which are common knowledge or are illustrations drawn from
18 common experience, history or literature.” [Citation.] “A
19 prosecutor may ‘vigorously argue his case and is not limited to
20 “Chesterfieldian politeness” ‘ [citation]....’ ‘ [Citation.]
21 Nevertheless, ‘[a] prosecutor is prohibited from vouching for the
22 credibility of witnesses or otherwise bolstering the veracity of their
23 testimony by referring to evidence outside the record. [Citation.]
24 Nor is a prosecutor permitted to place the prestige of [her] office
25 behind a witness by offering the impression that [she] has taken
26 steps to assure a witness's truthfulness at trial. [Citation.] However,
so long as a prosecutor's assurances regarding the apparent honesty
or reliability of prosecution witnesses are based on the “facts of
[the] record and the inferences reasonably drawn therefrom, rather
than any purported personal knowledge or belief,” [her] comments
cannot be characterized as improper vouching.’ “ (*Ward, supra*, 36
Cal.4th at p. 215.)

23 In this case the prosecutor did not express her personal belief in the
24 truth of the victim-witnesses. She asked rhetorically why they
25 would put themselves through the trouble of coming to court “if
26 there was no gun;” she also referred to their construction jobs,
which would not pay them for coming to court, arguing “there's a
lot at stake coming here, and they took the prospect of testifying
seriously.” She later argued they were not coached, because if they

1 had been “[t]here would be no discrepancies, no inconsistencies.”

2 Read in context, the prosecutor tethered the claims that the victims
3 were truthful to facts in the record. The record citations supplied do
4 not support the defense claim that the prosecutor improperly
vouched for their honesty.

5 (C050093 opinion at 15-16.)

6 b. Discussion

7 Respondent asserts that this ground is procedurally barred since no
8 contemporaneous objection was made at trial to this portion of prosecutor’s argument, and the
9 state appellate court found that a procedural rule barred the claim.

10 As a general rule, a federal habeas court ““will not review a question of federal
11 law decided by a state court if the decision of that court rests on a state law ground that is
12 independent of the federal question and adequate to support the judgment.”” *Calderon v. United*
13 *States District Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996) (quoting *Coleman v. Thompson*,
14 501 U.S. 722, 729 (1991)). Even if the state rule is independent and adequate, a claim may be
15 still reviewed by the federal court if a petitioner demonstrates: (1) cause for the default and actual
16 prejudice as a result of the alleged violation of federal law; or (2) that failure to consider the
17 claims will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750.

18 Since procedural default is an affirmative defense, respondent bears the burden of
19 pleading and proving that the state procedural bar is adequate and independent while petitioner
20 bears the interim burden of placing the adequacy of the defense at issue. *See Bennett v. Mueller*,
21 322 F.3d 573, 585 (9th Cir. 2003). Here, respondent has met the initial burden by pleading that
22 this claim is procedurally defaulted for petitioner’s failure to object at trial. Indeed, California’s
23 contemporaneous objection rule has previously been found by the Ninth Circuit to be
24 independent and adequate. *See Melendez v. Pliler*, 288 F.3d 1120, 1125 (9th Cir. 2002); *see also*
25 *Rich v. Calderon*, 187 F.3d 1064, 1069-70 (9th Cir. 1999).

26 Thus, the burden has shifted to petitioner to place the adequacy of the

1 contemporaneous objection rule into question as “the scope of the state’s burden of proof
2 thereafter will be measured by the specific claims of inadequacy put forth by the petitioner.”
3 *Bennett*, 322 F.3d at 584-85. Petitioner did not file a traverse, and made no specific allegations
4 as to the adequacy of the state procedure. Petitioner has failed to satisfy his interim burden under
5 *Bennett* and it must be concluded that the state procedural bar applied to petitioner’s case rests on
6 an adequate and independent state procedural ground. *See generally King v. Lamarque*, 464
7 F.3d 963, 967 (9th Cir. 2006) (“*Bennett* requires the petitioner to ‘place [the procedural default]
8 defense in issue” to shift the burden back to the government”). Although petitioner is pro se, and
9 has recently requested the appointment of counsel, the interests of justice do not require that
10 counsel be appointed in order for petitioner to challenge the adequacy of the asserted procedural
11 bar because this ground and the one that follows, which respondent likewise asserts is
12 procedurally barred, are both without merit.

13 Petitioner’s allegations of improper vouching are not supported in the record.
14 “Vouching consists of placing the prestige of the government behind a witness through personal
15 assurances of the witness’s veracity, or suggesting that information not presented to the jury
16 supports the witness’s testimony.” *United States v. Necochea*, 986 F.2d 1273, 1276 (9th Cir.
17 1993); *see also United States v. Simtob*, 901 F.2d 799, 805 (9th Cir. 1990).

18 Improper vouching has been found, for example, where the prosecutor “plainly
19 implied that she knew [a Federal agent] would be fired for committing perjury and that she
20 believed no reasonable agent in his shoes would take such a risk.” *United States v.*
21 *Weatherspoon*, 410 F.3d 1142, 1146 (9th Cir. 2005). The *Weatherspoon* court held that
22 prosecutor’s urging that legal and professional repercussions served to ensure the credibility of
23 the officers’ testimony sufficed for the statement to be considered improper vouching based upon
24 matters outside the record. *Id.*; *see also United States v. Pungitore*, 910 F.2d 1084, 1124 (3rd
25 Cir. 1990) (prosecutor’s statement that federal agents would not have coached witnesses because
26 they would have “jeopardized our jobs, our careers, our right to practice law, they’re [sic] right to

1 continue as FBI agents...” found improper).

2 Here, in contrast, the prosecutor did not express her own belief in the credibility
3 of any witness, or imply that any information not in evidence supported their accounts or assured
4 their credibility. Rather, the prosecutor summarized facts in the record and used them to offer
5 reasonable inferences therefrom which supported her case, including that the victims had no
6 motivation to lie, that they would not have bothered to testify if there was no gun involved as the
7 defense claimed, and that discrepancies in their testimony demonstrated that they were not
8 coached. In this regard, the jury was obviously aware that both men had taken the time to appear
9 to testify at trial. There was evidence in the record that on the night of the robbery a wallet and
10 watch were returned to the victims (RT at 733), and that Mr. Maslov recovered his wallet and
11 Mr. Linsky’s keys after someone contacted his father and demanded \$100 for return of the
12 property (RT at 471, 483-84).

13 There was also evidence that both men worked in construction. (RT at 257; 422-
14 23.) While no evidence was admitted at trial regarding whether construction workers are
15 typically paid when they are not at work, the prosecutor’s statement that people working in the
16 construction industry are “[u]sually” not paid when they are not at work is not comparable to the
17 prosecutors’ improper statements in *Weatherspoon* or *Pungatore* that no federal agent or
18 prosecutor would ever risk being fired by committing perjury or coaching a witness. The latter
19 implied that government testimony was inherently credible because of the possibility of legal or
20 professional repercussions, while the former simply drew an inference based on the common
21 sense notion that construction workers are typically paid for their labor as opposed to being
22 salaried employees.

23 All of the prosecutor’s references were based on evidence that was in the record or
24 upon inferences that could be reasonably drawn therefrom. Moreover, nothing the prosecutor
25 said gave the impression that she was personally aware of the witness’ truthfulness. The
26 complained of statements did not constitute improper vouching.

1 Additionally, petitioner has not shown that he suffered actual prejudice. In light
2 of the evidence at trial against petitioner, there is no likelihood that the prosecutor's comments
3 had a substantial and injurious effect or influence in determining the jury's verdict. In addition to
4 the testimony of Mr. Maslov and Mr. Linsky, there was testimony from police officers regarding
5 the events on the night of the robbery. Additionally there was evidence that both Mr. Maslov and
6 Mr. Linsky identified petitioner as one of the robbers in a photographic lineup.

7 In sum, the complained of remarks during the prosecutor's closing argument
8 about the victims' testimony did not make petitioner's trial so unfair that his resulting conviction
9 constituted a denial of due process. Rejection of this claim by the California Court of Appeal
10 was not contrary to or an unreasonable application of clearly established federal law.

11 3. Racial stereotypes

12 a. Background

13 During closing argument, petitioner's attorney pointed out that no gun was
14 introduced into evidence and argued that there was no reliable evidence of the use of a gun
15 during the robbery. (RT at 948-52; 994-95.) On rebuttal, the prosecutor sought to counter the
16 claim:

17 [The defense] repeated over and over there is no evidence of a gun.
18 [¶] Incorrect. There is evidence before you that a gun was in that
 hallway. There just isn't a gun on the evidence table.

19 And what is the evidence that you heard that there was a gun
20 present? Well, I went over that this morning. Both Lev and Mike
21 testified to how it looked, what type they thought it was. And by
22 that I mean nine millimeter or .45. And that both of them said it
23 was a real gun. [¶] And while Mike Linsky admitted that he's seen
24 guns on TV, he's also seen them in real life. So whatever
25 knowledge that he has about guns doesn't just come from
26 television. He said that he had friends with guns. He's seen them
before. He knows that nine millimeters and .45s are pretty close.
[¶] Lev, on the other hand, said he didn't really know much about
guns, and he didn't look all that attentively at this one, but he saw
enough of it to know that it was a real gun.

 And you have to think about the context of what was happening in
this hallway. It was a robbery, ladies and gentlemen, an armed

1 robbery. And when you commit a robbery on multiple victims and
2 in a public place like that, you are going to use a gun, because the
3 thing is, we're not talking about a back yard barbecue, a couple
4 twelve-year-olds, you know, toy gun or whatever. That's the
5 context, you know, where there are toy guns.

6 But when you're going to take over multiple people in a public
7 place, and you're going to do it in less than two minutes, you're
8 going to do it with a real gun.

9 Now, this is a picture of David Johnson taken when he was
10 booked. And in that photograph -- you know, booking photos are
11 not flattering. And but it goes to show you that people on the day
12 they commit crimes don't look like they do in court. And I submit
13 to you that that is the face of somebody that can put a gun to Lev
14 Maslov's head and tell everybody in the hallway to empty their
15 pockets.

16 Does he look like he would have used a fake gun or no gun, or that
17 the victim, if they say that there was a gun, that he, in fact, used it?
18 And you'll see those photographs.

19 And the victims in this case are young Russian men. And I believe
20 that Lev did tell us that he was scared while this was happening.
21 And the fact that Deputy Miller didn't say that they looked scared
22 doesn't mean that they were not scared. It's just not an emotion
23 that Deputy Miller remembers seeing. He felt that it was more of
24 an angry, shock kind of thing. And that's the same thing that Les
25 Maslov said, "I was shocked. I stood there. I didn't even go into
26 my own pockets. I had never been told to do that before. And this
guy goes into my pockets for me, and I've got a gun, you know, on
my chin or on the side of my face or my jaw bone or on the back of
my head."

(RT at 996-97.)

Subsequently, also during rebuttal, the prosecutor stated:
Much was made about the scenario in which Mike Linsky got his
keys back and Les Maslov got some of the property back from his
wallet. Counsel found that bizarre.¹ It's just another tale or some
of the fallout related to this robbery.

And I'd have to say that that's probably just the way the

¹ This was apparently in response to co-defendant D. Johnson's attorney's argument that the evidence about Mr. Maslov's dad recovering some of his property after receiving a phone call and paying one-hundred dollars "makes this case entirely bizarre." (RT at 967.)

1 neighborhoods in North Highlands work. It's an area of
2 Sacramento County where it's a shame that somebody who found
3 somebody's lost property on their lawn is going to turn around and
4 charge somebody to get it back.

5 But you'll recall that at the time that Lev Maslov's father got the
6 call, Lev hadn't told him that he had been robbed. So you can just
7 picture the father going, "Oh, you found by son's stuff on the
8 lawn?"

9 "Yeah."

10 "I'll pay you to get it back because I want my son to have his stuff
11 back."

12 After that, Lev was like, "hey, I got robbed, and that's why this
13 stuff is on the person's front yard, or whatever. As bizarre as that
14 may be to counsel, it is the fallout of a robbery. You can picture
15 that these defendants wouldn't have any use for, you know,
16 somebody's Safeway Club Card or, you know, any other of the
17 miscellaneous papers or receipts that Lev Maslov had in his wallet.

18 They would take cash if there was any. And it doesn't sound like
19 there was. And they didn't want the picture of the girlfriend -- or
20 they did want the picture of the girlfriend. I don't know. That's
21 the only thing that was in the wallet. That just ended up on
22 somebody's lawn. And you can't fault the victims for trying to get
23 their property back.

24 As you'll recall, Lev Maslov never got the keys to his Jetta back,
25 despite his father going to this location and getting the property
26 back.

(RT at 1001-02.)

On direct appeal, this claim was rejected:

Defendants contend the prosecutor injected racial stereotypes into
the trial. Defendants concede they interposed no objection to this
alleged conduct. "Accordingly, [they have] not preserved [their]
claims." (*People v. Ochoa* (1998) 19 Cal.4th 353, 427-428.) In any
event, the claims fail.

The first claim is that at one point in *rebuttal* argument the
prosecutor held up a booking photograph of David Johnson and
made a comment that was a veiled racial inference. Otherwise
improper arguments may be fair if made in response to a defense
argument. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026;
People v. Hill (1967) 66 Cal.2d 536, 560-562 ["a prosecutor is

1 justified in making comments in rebuttal, perhaps otherwise
2 improper, which are fairly responsive to argument of defense
3 counsel and are based on the record”].) However, tactics
4 “appealing to or likely to incite racial prejudice” are improper.
5 (*People v. Cudjo* (1993) 6 Cal.4th 585, 625-626.)

6 In the prosecutor's *opening* argument, she had held up or referred
7 to photographs in evidence of Mitchell Green, Herman Johnson
8 and David Johnson, arguing witnesses had consistently identified
9 David Johnson as the person with the gun, that Herman Johnson
10 helped, and that Mitchell Green was present but was the person
11 who did not participate in the robbery. She argued the testimony
12 and reasonable inferences therefrom showed David Johnson used a
13 real gun.

14 David Johnson's counsel argued no gun was ever found and the
15 story told by the victims and their demeanor indicated no gun was
16 involved, that they were angry when the police arrived, but not
17 afraid. *David Johnson's attorney held up his booking photo*,
18 arguing it did not match the description given by the victims.

19 In partial response, the prosecutor commented that “people on the
20 day they commit crimes don't look like they look in court. And I
21 submit to you that that is the face of somebody that can put a gun
22 to Lev Maslov's head and tell everybody in the hallway to empty
23 their pockets. [¶] Does he look like he would have used a fake gun
24 or no gun, or that the victims, if they say that there was a gun, that
25 he, in fact, used it? And you'll see those photographs. [¶] And the
26 victims in this case are young Russian men. And I believe that Lev
did tell us that he was scared while this was happening.” She then
argued that nobody could predict what a person's reactions would
be after being held up at gunpoint.

Defendants contend the quoted passage, particularly the
juxtaposition of “young Russian men” against the photograph of a
Black defendant, was an effort to appeal to racial stereotypes on the
part of the all-White jury. We disagree. The reference was to the
youth and immigrant status of the victims, and the prosecutor was
attempting to rebut the defense claim that the victims had not been
scared when the police arrived. Defense counsel had herself
referred to the same photograph, in an effort to show the image
depicted did not match descriptions given to the police. It was quite
proper for the prosecutor to refer to the same photograph and invite
the jury to draw a different inference therefrom.

The second claim is that the prosecutor referred to a neighborhood
in such a way as to portray it as a crime-ridden Black ghetto. The
record does not support the claim.

Victim Linsky testified that his car keys had been taken but he got
them back about a week later through Maslov. Maslov testified that

1 a day or so after the robbery someone left a message with his father
2 stating they had found some identification papers and receipts in
3 front of their house and wanted \$100 for them; Maslov's father
4 retrieved the papers and Linsky's car keys.

5 The defense argued this was “entirely bizarre” and “just crazy,”
6 and suggested Maslov made up the robbery tale. In response, the
7 prosecutor argued, “that's probably just the way neighborhoods in
8 North Highlands work. It's an area of Sacramento County where it's
9 a shame that somebody who found somebody's lost property on
10 their lawn is going to turn around and charge somebody to get it
11 back.”

12 The lack of objection not only precludes our review of the claimed
13 error, it suggests that trial counsel did not interpret the comment, in
14 context, as a racist comment. In our view the remark was at worst a
15 reference to *poverty*, not race. Nothing in the record shows this was
16 designed to appeal to any racist stereotypes on the part of jurors.
17 The remark was tied to the evidence and fairly responded to a
18 specific defense argument about that evidence. We find no error.

19 (C050093 opinion at 16-19.)

20 2. Discussion

21 The state appellate court indicated that this claim, too, was barred because of
22 petitioner's failure to object at trial. Again, respondent sufficiently pleads that this ground is
23 procedurally defaulted. Based on petitioner's failure to contest the affirmative defense, the state
24 procedural bar will be found independent and adequate.

25 In any event, this claim also lacks merit. “The Constitution prohibits racially
26 biased prosecutorial arguments.” *McCleskey v. Kemp*, 481 U.S. 279, 310 (9th Cir. 1987) (*citing*
Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). But the prosecutor made no racially
biased arguments in this case.

The prosecutor held up co-defendant D. Johnson's booking photo and stated “that
is the face of somebody that can put a gun to Lev Maslov's head and tell everybody in the
hallway to empty their pockets.” This was in response to D. Johnson's attorney's argument that
his booking photo did not match the description given by the victims. As noted by the state
appellate court, it was proper for the prosecutor to refer to the same photograph as defense

1 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 20 days
2 after being served with these findings and recommendations, any party may file written
3 objections with the court and serve a copy on all parties. Such a document should be captioned
4 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
5 shall be served and filed within ten days after service of the objections. The parties are advised
6 that failure to file objections within the specified time may waive the right to appeal the District
7 Court’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

8 DATED: April 13, 2010

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10 CHARLENE H. SORRENTINO
11 UNITED STATES MAGISTRATE JUDGE
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