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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

TYWAN LEONAR JOHNSON,  
Petitioner,  
v.  
JOHN SUTTON, Warden,  
Respondent.

No. 2:17-cv-00958 KJM AC P

FINDINGS AND RECOMMENDATIONS

Petitioner is a California state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The action proceeds on the petition at ECF No. 1, which challenges petitioner’s 2015 conviction for second-degree murder and related offenses. Respondent has filed an answer, ECF No. 26; petitioner did not file a traverse.

BACKGROUND

I. Proceedings In the Trial Court

A. Pretrial Proceedings and Jury Selection

Petitioner was charged in Sacramento County with first-degree murder, torture, and a deadly weapon use enhancement.

Petitioner is black, and the victim was white. During jury selection, the prosecutor exercised peremptory challenges against three black prospective jurors. Defense counsel made a

1 Batson/Wheeler<sup>1</sup> motion, which was denied. Details regarding the Batson issue are provided  
2 below in relation to that claim.

3 B. The Evidence Presented at Trial<sup>2</sup>

4 1. Prosecution Case

5 The jury heard evidence of the following facts. On November 26, 2012, petitioner ran  
6 into his friend Cedric Mason and Mason’s girlfriend at a light rail station. The trio then ran into  
7 Mason’s friend Jeff Rozenski. All four went to Mason’s mother’s house to get high. After some  
8 time, petitioner gave Rozenski money to buy more drugs. Eventually Mason’s girlfriend left,  
9 and the other three walked to a nearby veterinary clinic parking lot to smoke the  
10 methamphetamine Rozenski had obtained. Believing the drug to be “fake,” petitioner became  
11 angry at Rozenski and demanded his money back. Mason was frightened by the ensuing  
12 argument and ran home. He heard screams as he fled. Later Mason and his mother drove around  
13 trying to find Rozenski, and eventually saw his bicycle reflector. They flagged down some  
14 passing firefighters, who saw Rozenski’s body in the parking lot and themselves flagged down a  
15 police officer.

16 Rozenski’s body was found on its back on top of a bicycle, with a large laceration across  
17 the neck. There was blood on his face and neck and cuts on his hands. Splattered blood formed  
18 a large pattern on the wall behind his head. Drug paraphernalia was found at the scene.

19 Detectives Tom McCue and Jeffrey Wallace interviewed petitioner the day after  
20 Rozenski’s death. McCue observed cuts on petitioner’s fingers, some of which appeared to be  
21 recent. Neither McCue nor Wallace observed any bruises, cuts, or other marks on petitioner’s  
22 face to indicate he had been in a fight. Nor did the detectives observe anything to lead them to  
23 believe petitioner was under the influence of alcohol.

24 A videotape of the interview was played for the jury. When first asked if he had heard  
25 about the events of the previous evening, petitioner responded: “I’m gonna just tell you what

26 \_\_\_\_\_  
27 <sup>1</sup> Batson v. Kentucky 476 U.S. 79 (1986); People v. Wheeler 22 Cal.3d 258 (1978).

28 <sup>2</sup> This summary is adapted from the opinion of the California Court of Appeal, Lodged  
Doc. 4 at 2-8. The undersigned has independently reviewed the trial transcript and finds  
the appellate court’s recitation of the facts to be accurate.

1 happened. I was drunk and I ran into some dude. He was tripping on me so we were scuffling  
2 and then we're fighting and then it just escalated." He had never met the man before that  
3 evening, and the man appeared to be on "some crystal or something." Petitioner himself began  
4 to drink that day at 3:00 o'clock in the afternoon and ended up drinking a fifth of vodka and a tall  
5 can of beer.

6 Petitioner initially told the detectives he had run into a man he knew as "Bo" (Cedric  
7 Mason) at the light rail station, and they decided to go buy cigarettes. As they walked in the  
8 vicinity of the veterinary clinic, a white guy on a bike bumped into petitioner. Petitioner said  
9 something to the man, and the man got off of his bike and walked up to him. After petitioner  
10 punched the man, the two began to fight. As they fought, petitioner began stumbling because he  
11 was drunk. The pair fell to the ground and the man began to pull petitioner's hair. Petitioner  
12 told the man to let him go, and then remembered he had a knife in his pocket. Petitioner got out  
13 the knife and warned the man he would stab him if he did not let go. The man kept pulling  
14 petitioner's hair and punching him. Petitioner began to stab him. Petitioner kept stabbing the  
15 man, at one point dropping and then recovering the knife, until petitioner pushed the man off and  
16 the man finally let go of petitioner's hair. Petitioner stabbed the man five or six times. He threw  
17 the knife down a storm drain and went home.

18 Petitioner said that several family members were there when he got home. He was  
19 "really shaky" and "scared." He told his family he "got into it with somebody and I think I killed  
20 somebody." Petitioner "really got all shaky" when he watched the news and discovered the man  
21 had died. Petitioner "just couldn't believe" what he had done because he had been drunk when it  
22 happened.

23 In response to questioning by Detective McCue, petitioner acknowledges that he had  
24 been at Bo's house before the fight and that the "white guy" had been with them when they left  
25 the house. Petitioner did not know the man but thought he was Bo's friend.

26 Petitioner subsequently provided additional details. He stated the man had stolen \$13  
27 from him, taking advantage of him because he was drunk. The three men smoked "crystal"  
28 together. Petitioner had given the man \$13 to buy crystal methamphetamine, but the man

1 returned with only a small quantity of the drug. They all smoked two “bowls” together, using a  
2 glass pipe provided by petitioner. After they smoked the drug, the three men walked toward the  
3 light rail station. Bo said the man should return petitioner’s money, but the man refused. As  
4 they approached the veterinary clinic, the man walked up to petitioner. After the man grabbed  
5 petitioner’s hair and punched him, petitioner stabbed the man. Petitioner acknowledged that he  
6 had been “a little bit” angry when he stabbed the man. Detective Wallace asked if petitioner had  
7 been unable to stop once he began stabbing the man, and petitioner replied, “I just wanted him to  
8 let me go.”

9 A forensic pathologist performed an autopsy on Rozenski and determined that he died  
10 from a combination of sharp and blunt injuries to the head and neck. There were a total of 57  
11 sharp injuries to his head and neck, 21 injuries to his hands, two sharp injuries to the back of his  
12 left forearm, and two sharp injuries to the back of his left wrist. The pathologist determined  
13 most of the sharp injuries were “incisions, meaning they go across the body for a greater distance  
14 than they go deep into the body.” Some of the sharp injuries combined an incision injury with a  
15 stab injury; the latter “goes deeper into the body for a greater distance than it goes across the  
16 body.” Five of the injuries to Rozenski’s head and neck were stab injuries. Rozenski also  
17 suffered blunt trauma to his head and “had multiple bruises and scrapes to his head to both sides  
18 of the head, to the right eyebrow region, to the cheek bones, to the tip of the nose. As well he did  
19 have some scrapes and bruises of his upper chest[,] his left abdomen and his left leg.”

## 20 2. Defense Case

21 A criminalist testified that she tested a sample of Rozenski’s blood, which contained 0.03  
22 milligram per liter of amphetamine and 0.29 milligram per liter of methamphetamine.

23 Another criminalist testified she tested a blood sample drawn from petitioner the  
24 afternoon after the murder. The criminalist confirmed the presence of “Delta 9 THC,” which is  
25 the parent drug for marijuana. However, she could not say when petitioner had ingested the  
26 marijuana. Petitioner’s blood sample screened negative for the presence of methamphetamine  
27 and amphetamine, but given the half-life of the drugs, the test could not conclusively determine  
28 whether petitioner ingested methamphetamine in the 24-hour period prior to the blood draw.

1 Alan Estep testified that he had been best friends with petitioner for about 13 years.  
2 Estep was at petitioner's mother's house when petitioner arrived there the afternoon prior to the  
3 murder. Petitioner appeared intoxicated, slurring his speech and carrying a bottle of alcohol.  
4 Petitioner and Estep finished the rest of a half-full bottle of whiskey. Then the pair drank four or  
5 five shots of vodka. Petitioner left around 4:30 that afternoon, staggering and speaking  
6 incoherently. Estep believed petitioner was drunk.

7 Mason testified he did not see petitioner consume alcohol on the day of the murder,  
8 although petitioner did have a bottle of alcohol when they first met up at the light rail station.  
9 Petitioner offered Mason and his girlfriend a drink, which they declined. That afternoon and  
10 evening petitioner appeared to be sober, and Mason had no difficulty understanding him.

### 11 C. Outcome

12 The jury found petitioner not guilty of first-degree murder but guilty of the lesser  
13 included offense of second-degree murder and guilty of torture. In addition, the jury found the  
14 weapon use allegation associated with each count to be true. The trial court sentenced petitioner  
15 to 15 years to life in prison on the murder count, plus one year for the weapon use enhancement,  
16 for a total term of 16 years. The trial court sentenced petitioner to life in prison for the torture  
17 count, plus one year for the weapon use enhancement, stayed pursuant to California Penal Code  
18 section 654.

### 19 II. State Post-Conviction Proceedings

20 Petitioner timely appealed, and the California Court of Appeal affirmed the judgment of  
21 conviction on August 17, 2016. Lodged Doc. 4. The California Supreme Court denied review  
22 on November 11, 2016. Lodged Doc. 6. Petitioner filed no applications for state habeas relief.

### 23 III. Proceedings in this Court

24 The instant federal petition was filed May 5, 2017. ECF No. 1. Respondent answered on  
25 January 19, 2018, ECF No. 26, and petitioner did not file a traverse.

### 26 STANDARDS GOVERNING HABEAS RELIEF UNDER THE AEDPA

27 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of  
28 1996 ("AEDPA"), provides in relevant part as follows:

1 (d) An application for a writ of habeas corpus on behalf of  
2 a person in custody pursuant to the judgment of a state  
3 court shall not be granted with respect to any claim that  
was adjudicated on the merits in State court proceedings  
unless the adjudication of the claim—

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

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

9 The statute applies whenever the state court has denied a federal claim on its merits,  
10 whether or not the state court explained its reasons. Harrington v. Richter, 562 U.S. 86, 99  
11 (2011). State court rejection of a federal claim will be presumed to have been on the merits  
12 absent any indication or state-law procedural principles to the contrary. Id. (citing Harris v.  
13 Reed, 489 U.S. 255, 265 (1989) (presumption of a merits determination when it is unclear  
14 whether a decision appearing to rest on federal grounds was decided on another basis)). “The  
15 presumption may be overcome when there is reason to think some other explanation for the state  
16 court’s decision is more likely.” Id. at 99-100.

17 The phrase “clearly established Federal law” in § 2254(d)(1) refers to the “governing  
18 legal principle or principles” previously articulated by the Supreme Court. Lockyer v. Andrade,  
19 538 U.S. 63, 71-72 (2003). Only Supreme Court precedent may constitute “clearly established  
20 Federal law,” but courts may look to circuit law “to ascertain whether...the particular point in  
21 issue is clearly established by Supreme Court precedent.” Marshall v. Rodgers, 569 U.S. 58, 64  
22 (2013).

23 A state court decision is “contrary to” clearly established federal law if the decision  
24 “contradicts the governing law set forth in [the Supreme Court’s] cases.” Williams v. Taylor,  
25 529 U.S. 362, 405 (2000). A state court decision “unreasonably applies” federal law “if the state  
26 court identifies the correct rule from [the Supreme Court’s] cases but unreasonably applies it to  
27 the facts of the particular state prisoner’s case.” Id. at 407-08. It is not enough that the state  
28 court was incorrect in the view of the federal habeas court; the state court decision must be

1 objectively unreasonable. Wiggins v. Smith, 539 U.S. 510, 520-21 (2003).

2 Review under § 2254(d) is limited to the record that was before the state court. Cullen v.  
3 Pinholster, 563 U.S. 170, 180-181 (2011). The question at this stage is whether the state court  
4 reasonably applied clearly established federal law to the facts before it. Id. at 181-182. In other  
5 words, the focus of the § 2254(d) inquiry is “on what a state court knew and did.” Id. at 182.  
6 Where the state court’s adjudication is set forth in a reasoned opinion, §2254(d)(1) review is  
7 confined to “the state court’s actual reasoning” and “actual analysis.” Frantz v. Hazey, 533 F.3d  
8 724, 738 (9th Cir. 2008) (en banc). A different rule applies where the state court rejects claims  
9 summarily, without a reasoned opinion. In Richter, supra, the Supreme Court held that when a  
10 state court denies a claim on the merits but without a reasoned opinion, the federal habeas court  
11 must determine what arguments or theories may have supported the state court’s decision, and  
12 subject those arguments or theories to § 2254(d) scrutiny. Richter, 563 U.S. at 102.

## 13 DISCUSSION

### 14 I. Claim One: Prosecutorial Misconduct

#### 15 A. Petitioner’s Allegations and Pertinent State Court Record

16 Petitioner claims that the prosecutor engaged in misconduct when he misstated  
17 the heat of passion standard during his closing argument. ECF No. 1 at 5.

18 The jury was instructed on provocation and heat of passion. The defense theory  
19 was that petitioner was guilty of manslaughter rather than murder because he stabbed  
20 Rozenski in the heat of passion, and not guilty of torture because he acted in the heat of  
21 passion rather than with intent to cause cruel or extreme pain.

22 The prosecutor’s closing argument included the following statements regarding  
23 the jury’s determination whether the victim’s conduct would have caused a person of  
24 average disposition to act rashly and without due deliberation:<sup>3</sup>

25 \_\_\_\_\_  
26 <sup>3</sup> The jury was instructed pursuant to CALCRIM No. 570 that a killing that would  
27 otherwise be murder is reduced to voluntary manslaughter if (1) the defendant was  
28 provoked; (2) as the result of provocation, he acted rashly and under the influence of  
intense emotion that obscured reason and judgment; and (3) the provocation would have  
caused a person of average disposition to act rashly and without due deliberation.

1 So the question you have to ask in this case is having your  
2 money, your \$13 taken from you and smoking bad dope the  
3 average person, average disposition would take out a knife  
4 and slice somebody up....

5 ... You can't take out a knife. The average person of  
6 average disposition is not going to take out a knife and  
7 slice somebody up. They are not over \$13. No. The average  
8 person may act rashly. Maybe, maybe punch somebody,  
9 maybe, maybe. And that's stretching it.

10 But the average person of average disposition who loses  
11 \$13 does not act rashly and slice, slice, slice, slice....

12 ... They don't. That's why it is not heat of passion  
13 voluntary manslaughter because the average person of  
14 average disposition wouldn't act rashly over \$13 and do  
15 that.

16 Reporter's Transcript ("RT") at 441-442.

17 Petitioner's counsel objected to all these statements, and the trial court overruled the  
18 objections.

19 Petitioner alleges here that the state courts "ignored the evidence that the victim had  
20 called me a [racial slur] and was hitting me in the head and pulling my hair..." ECF No. 1 at 5.

#### 21 B. The Clearly Established Federal Law

22 In reviewing prosecutorial misconduct claims, "[t]he relevant question is whether the  
23 prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a  
24 denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (internal quotations  
25 omitted). "To constitute a due process violation, the prosecutorial misconduct must be of  
26 sufficient significance to result in the denial of the defendant's right to a fair trial." Greer v.  
27 Miller, 483 U.S. 756, 765 (1987). "[T]he touchstone of due process analysis in cases of alleged  
28 prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith  
v. Phillips, 455 U.S. 209, 219 (1982). "[I]t is not enough that the prosecutors' remarks were  
undesirable or even universally condemned." Darden, 477 U.S. at 181.

#### 29 C. The State Court's Ruling

This claim was raised on direct appeal. Because the California Supreme Court denied  
discretionary review, the opinion of the California Court of Appeal constitutes the last reasoned



1 decision on the merits and is the subject of habeas review in this court. See Ylst v. Nunnemaker,  
2 501 U.S. 797 (1991); Ortiz v. Yates, 704 F.3d 1026, 1034 (9th Cir. 2012).

3 The Court of Appeal ruled in relevant part as follows:

4 Defendant urges reversal of his convictions for second  
5 degree murder and torture due to the prosecutor's  
6 misconduct in misstating the heat of passion standard. He  
7 argues the court erred in overruling his final two objections  
8 to the prosecutor's argument on heat of passion, violating  
9 his right to due process. The prosecutor, defendant  
10 contends, told the jury that for provocation to be sufficient  
11 for heat of passion to apply, it would have to provoke a  
12 reasonable person in defendant's position to stab Rozenski  
13 repeatedly in the face and neck, a misstatement of the law.

14 Sudden quarrel or heat of passion occurs when the  
15 defendant kills because of a legally sufficient provocation.  
16 A provocation is legally sufficient if it would cause a  
17 reasonable person of average disposition to act rashly. We  
18 focus on the provocation, the surrounding circumstances,  
19 and whether they were sufficient to cause a reasonable  
20 person to act rashly. How the specific defendant responded  
21 to the provocation and the reasonableness of the response is  
22 not relevant to sudden quarrel or heat of passion. (People v.  
23 Beltran (2013) 56 Cal.4th 935, 942, 157 Cal. Rptr. 3d 503,  
24 301 P.3d 1120 (Beltran); People v. Najera (2006) 138  
25 Cal.App.4th 212, 223, 41 Cal. Rptr. 3d 244 (Najera).

26 Therefore, if the prosecution argues that the jury focus on  
27 the reasonableness of the defendant's specific response to  
28 the provocation, it amounts to misconduct. (Najera, supra,  
138 Cal.App.4th at p. 223.) Such misconduct may be  
intentional or inadvertent; a misstatement of the standard  
amounts to misconduct. (People v. Hill (1998) 17 Cal.4th  
800, 822-823, 72 Cal. Rptr. 2d 656, 952 P.2d 673 & fn. 1.)

...

21 In the present case, the prosecutor repeatedly argued the  
22 "average person of average disposition who loses \$13 does  
23 not act rashly and slice, slice, slice, slice." However, as set  
24 forth in Beltran, provocation is not measured by whether  
25 the average person would act in a certain way; the question  
26 is whether the average person would react in a certain way,  
27 with reason and judgment obscured. (Beltran, supra, 56  
28 Cal.4th at p. 949.) The prosecutor misstated the law during  
argument.

29 We must consider the consequences of the prosecutor's  
30 statements. Defendant argues we analyze any prejudice  
31 under Chapman v. California (1967) 386 U.S. 18, 24 [87 S.  
32 Ct. 824, 17 L.Ed.2d 705] (Chapman) and consider whether  
33 the error is harmless beyond a reasonable doubt. The

1 People contend we employ the standard set forth in People  
2 v. Watson (1956) 46 Cal.2d 818, 836-837, 299 P.2d 243  
3 (Watson) and determine whether there is a reasonable  
4 probability that but for the error the jury would have  
5 returned a verdict of voluntary manslaughter rather than  
6 second degree murder. We find the error harmless under  
7 either standard.

8 At trial, defendant argued he was guilty of manslaughter,  
9 not murder, because he acted in the heat of passion when  
10 Rozenski cheated him out of the money defendant had  
11 given him to buy drugs. However, the mere fact Rozenski  
12 failed to return defendant's \$13 would not provide the jury  
13 with evidence an average person would experience a  
14 sudden heat of passion causing him to act rashly and  
15 without deliberation.

16 On appeal, defendant asserts two additional examples of  
17 Rozenski's provocation that could have convinced the jury  
18 to find him guilty of manslaughter.

19 First, defendant states that following his arrest he told  
20 officers he "stabbed Rozenski because Rozenski would not  
21 stop pulling his dreadlocks and hitting him in the head after  
22 the two began quarreling." However, during the interview  
23 defendant stated he struck Rozenski first after demanding  
24 repayment of the \$13. "A defendant may not provoke a  
25 fight, become the aggressor, and, without first seeking to  
26 withdraw from the conflict, kill an adversary and expect to  
27 reduce the crime to manslaughter by merely asserting that  
28 it was accomplished upon a sudden quarrel or in the heat of  
passion." People v. Oropeza (2007) 151 Cal.App.4th 73,  
83, 59 Cal. Rptr. 3d 653.)

Second, defendant states that in his interview with officers,  
Mason stated that Rozenski asked Mason, "[D]o you know  
this nigga - do you know this nigga - do you know this  
nigga," referring to defendant. However, none of the  
evidence presented at trial reveals that defendant ever  
heard Rozenski's statements, much less reacted to them.  
Despite the prosecutor's misstatement of the law of heat of  
passion, we find no error under either Watson or Chapman.

Lodged Doc. 4 at 13-15.

D. Objective Reasonableness Under § 2254(d)

When a state court denies a constitutional claim on harmless error grounds, the question on review under AEDPA is the reasonableness of the harmless error determination. Mitchell v. Esparza, 540 U.S. 12, 17-18 (2003) (per curiam). This court must defer to the court of appeal's harmless error determination unless it was in conflict with the reasoning or the holdings of

1 Supreme Court precedent, or if it applied harmless error review in an objectively unreasonable  
2 manner. Inthavong v. Lamarque, 420 F.3d 1055, 1058-59 (9th Cir. 2005), cert. denied, 547 U.S.  
3 1059 (2006).

4 Here the state appellate court found that the prosecutor had indeed misstated the law  
5 during closing argument, but that the error was harmless under Chapman v. California, 386 U.S.  
6 18 (1967). This is the correct standard for evaluating errors of constitutional dimension. See id.  
7 Thus the state court held that even if the closing argument rose to the level of a due process  
8 violation, the error was harmless.

9 The appellate court’s harmless error determination is not in conflict with the reasoning or  
10 the holdings of any Supreme Court precedent, nor did the court conduct harmless error review  
11 under Chapman in an objectively unreasonable manner. There is nothing unreasonable about the  
12 state court’s evaluation of the evidence, as that evidence simply did not present a plausible heat  
13 of passion defense. The court of appeal did not, as petitioner alleges, “ignore” evidence that the  
14 victim was hitting petitioner and pulling his hair, or that the victim had used a racial slur. The  
15 court noted and addressed these issues in a reasonable way. Because the jury heard a statement  
16 from petitioner admitting that he threw the first punch, the ensuing fight cannot constitute  
17 provocation under California law absent facts not present here.<sup>4</sup> And the racial slur, while  
18 referring to petitioner, was not directed at him. There was no evidence before the jury showing  
19 that petitioner actually heard those comments, let alone that they triggered or contributed to the  
20 fatal encounter. To the contrary, petitioner’s own statements indicated that the fight had been  
21 about the drugs and the money he paid for them.

22 Because the decision of the California Court of Appeal is not objectively unreasonable,  
23 federal habeas relief is unavailable on this claim.

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28 <sup>4</sup> This issue is addressed below regarding petitioner’s second claim for relief.

1           II.       Claim Two: Instructional Error Regarding Imperfect Self-Defense

2               A. Petitioner's Allegations and Pertinent State Court Record

3           Petitioner alleges that the trial court improperly instructed the jury that self-defense and  
4 imperfect self-defense were unavailable to an initial aggressor. ECF No. 1 at 7. He contends  
5 that notwithstanding that general rule, self-defense and imperfect self-defense are available to an  
6 initial aggressor when the victim responds with unlawful force. Petitioner claims that the jury  
7 should have been so instructed, because there was evidence (in petitioner's statements to police)  
8 that he had stabbed Rozenski in order to get Rozenski to stop hitting him and pulling his hair.  
9 Petitioner argues that because he was responding to an illegal use of force by Rozenski  
10 (presumably assault in the course of a theft), the homicide constituted manslaughter rather than  
11 murder under the doctrine of imperfect self-defense.<sup>5</sup> *Id.* at 36-40.

12           The jury was instructed pursuant to CALCRIM No. 505 on the elements of self-defense,  
13 and pursuant to CALCRIM No. 571 on imperfect self-defense. The trial court also gave a  
14 slightly modified version of CALCRIM No. 3471, in pertinent part as follows:

15                   A person who engages in mutual combat or who starts a  
16 fight has a right to self-defense or imperfect self-defense  
17 only if, one, he actually and in good faith tried to stop  
fighting.

18                   Two, he indicated by words or by conduct to his opponent  
19 in a way that a reasonable person would understand that he  
wanted to stop fighting and that he had stopped fighting.  
And three, he gave his opponent a chance to stop fighting.

20                   If the defendant meets these requirements, he then had a  
21 right to self-defense or imperfect self-defense if the  
opponent continued to fight.

22                   A fight is mutual combat when it began or continued by  
23 mutual consent or agreement. That agreement may be  
expressly stated or implied and must occur before the claim  
24 to self-defense or imperfect self-defense arose.

25 \_\_\_\_\_  
26 <sup>5</sup> Imperfect self-defense reduces murder to voluntary manslaughter. It applies where the  
27 defendant actually believed that (1) he was in imminent danger of suffering great bodily  
28 injury, and (2) the immediate use of deadly force was necessary to defend against that  
danger. At least one of these subjective beliefs must be reasonable. CALCRIM No.  
571.

1 RT 388.

2 The court also instructed pursuant to CALCRIM No. 3472, modified as follows:  
3 “A person does not have the right to self-defense or imperfect self-defense if he or she  
4 provokes a fight or quarrel with the intent to create an excuse to use force.” RT 388.

5 The phrase “imperfect self-defense” was added to the term “self-defense” in these  
6 two instructions at the prosecutor’s request. RT 389.

7 B. The Clearly Established Federal Law

8 Error in instructing a jury violates due process only where the infirm instruction so  
9 infects the entire trial that the resulting conviction violates due process. Estelle v. McGuire, 502  
10 U.S. 62, 72 (1991) (citing Cupp v. Naughten, 414 U.S. 141, 147 (1973)). It must be established  
11 not merely that the instruction is undesirable, erroneous, or even universally condemned, but that  
12 it violated some constitutional right. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). The  
13 challenged instruction may not be judged in artificial isolation but must be considered in the  
14 context of the instructions as a whole and the trial record overall. Estelle, 502 U.S. at 72.  
15 Moreover, relief is only available if there is a reasonable likelihood that the jury has applied the  
16 challenged instruction in a way that violates the Constitution. Id. at 72-73.

17 C. The State Court’s Ruling

18 This claim was raised on direct appeal, and the opinion of the California Court of Appeal  
19 constitutes the last reasoned decision on the merits and is the subject of habeas review in this  
20 court. See Ortiz, 704 F.3d at 1034.

21 The appellate court ruled as follows:

22 Defendant contends the trial court improperly modified  
23 CALCRIM No. 3471 and No. 3472 to apply to imperfect  
24 self-defense as well as to self-defense. The People argue  
25 defendant failed to object in the trial court to the instruction  
26 and therefore forfeited the issue on appeal. However, in the  
alternative, defendant argues defense counsel performed  
ineffectively in failing to preserve the issue. We will  
address the issue.

27 Defendant faults the given instructions as incorrectly  
28 informing the jury that a person does not have the right to  
imperfect self-defense if he or she is the initial aggressor or  
a mutual combatant, or if the defendant provokes a fight

1 with the intent to create an excuse to use force.

2 Defendant notes that self-defense and imperfect self-  
3 defense are available to a defendant who initiates a fight if  
4 the victim's use of force in response was unlawful. (People  
5 v. Ramirez (2015) 233 Cal.App.4th 940, 947-953, 183 Cal.  
6 Rptr. 3d 267.) Defendant contends that after he reached  
7 into Rozenski's pocket to get back his \$13, "Rozenski's  
8 resistance and grabbing back at Johnson, was unlawful  
9 because it amounted to a theft or robbery." In the  
10 alternative, defendant alleges Rozenski escalated the fight:  
11 "[Rozenski] lunged at Johnson escalating the confrontation  
12 from one involving grabbing to one involving fists.  
13 Rozenski further escalated that fistfight by beginning to  
14 pull Johnson's dreadlocks and punch him in the head  
15 despite Johnson's pleas for him to stop. At that point  
16 Johnson did not believe he could stop Rozenski's assault  
17 with his hands. Accordingly, there is a reasonable  
18 probability that had the jury been properly instructed to  
19 focus on whether Rozenski's use of force was lawful, the  
20 jury would have concluded that it was not and found that  
21 Johnson retained the right to claim imperfect self-defense."

22 The record does not support defendant's gloss on the  
23 evidence. Defendant fails to explain exactly how  
24 Rozenski's response to defendant's grabbing constituted  
25 robbery or theft. Even if the jury believed defendant's  
26 statements to officers after his arrest, the evidence did not  
27 support perfect or imperfect self-defense. Defendant did  
28 not plead for Rozenski to stop pulling his hair: he  
threatened to stab him if he did not stop. Nothing before  
the jury would support a finding that defendant believed,  
reasonably or not, that he was in imminent danger of  
Rozenski's killing him or inflicting great bodily injury and  
that it was necessary for defendant to respond with deadly  
force to stop Rozenski. There was no evidence Rozenski  
was armed, and there was no basis for concluding that  
defendant stabbed Rozenski out of fear for his own life.  
The court's instructions were correct in light of the  
evidence presented.

22 Lodged Doc. 4 at 19-20.

23 D. Objective Reasonableness Under § 2254(d)

24 The state appellate court decided this issue as a matter of California law, and its ruling on  
25 the state law issue is not subject to review here. See Lewis v. Jeffers, 497 U.S. 764, 780 (1990)  
26 (federal habeas corpus relief does not lie for errors of state law); Bradshaw v. Richey, 546 U.S.  
27 74, 76 (2005) (a federal habeas court is bound by a state court's interpretation of state law).  
28 Where there is no instructional error under the governing state criminal law, there can be no due

1 process violation. See Spivey v. Rocha, 194 F.3d 971, 976 (9<sup>th</sup> Cir. 1999).

2 Moreover, nothing about the appellate court’s review of the claim is objectively  
3 unreasonable. Petitioner has identified no United States Supreme Court precedent holding that  
4 the instructions given here are unconstitutional, and this court is aware of none. Absent such  
5 precedent, the state court cannot have unreasonable applied clearly established federal law and  
6 petitioner cannot prevail. See Wright v. Van Patten, 552 U.S. 120, 125-26 (2008) (per curiam).  
7 The state court evaluated the challenged instructions in their context, as due process requires.  
8 See Estelle, 502 U.S. at 72. Furthermore, the appellate court’s rejection of petitioner’s theory of  
9 the evidence is far from objectively unreasonable. The evidence before the jury failed to support  
10 imperfect self-defense with or without consideration of petitioner’s theory that Rozenski’s use of  
11 force was unlawful. Accordingly, the failure to instruct on that theory—or the giving of  
12 instructions that precluded that theory—can hardly be found to have rendered the entire trial  
13 fundamentally unfair. The state courts’ rejection of petitioner’s due process claim based on this  
14 alleged error was not objectively unreasonable and therefore may not be disturbed.

15 III. Claim Three: Instructional Error Regarding Torture

16 A. Petitioner’s Allegations and Pertinent State Court Record

17 Petitioner challenges the trial court’s rejection of his proposed torture instruction. ECF  
18 No. 1 at 8. Specifically, he argues that the jury should have been instructed that severe wounds  
19 can be consistent with a killing in the heat of passion, not only consistent with an intent to  
20 torture. Id.

21 At trial, petitioner requested the following modified instruction, which incorporated  
22 CALCRIM No. 810:

23 An intent to inflict extreme pain may be inferred from the  
24 circumstances of the crime, the nature of the killing and the  
25 condition of the body. But you are cautioned against  
26 giving undue weight to the severity of Mr. Rozenski’s  
wounds, because horrible wounds may be as consistent  
with a killing in the [heat] of passion as with intent to  
inflict cruel suffering.

27 Clerk’s Transcript (“CT”) 146.

28 The trial court denied the instruction because the cases petitioner relied upon for the

1 modification dealt with torture as a special circumstance alleged in relation to a murder charge,  
2 or torture as a theory of first-degree murder. The court explained, “The People’s theory for first  
3 degree murder was premeditation. There was no other theory the [P]eople are relying on.  
4 Torture is a separate charge. And otherwise the torture instruction as it is presented by the Cal  
5 Crim is the proper statement of the law. And I find that it is an adequate instruction for the jury  
6 in the case.” RT 349-350.

7 The jury was instructed pursuant to CALCRIM No. 810, without modification, as  
8 follows:

9 To prove that the defendant is guilty of this crime, the  
10 People must prove that, one, the defendant inflicted great  
bodily injury on someone else.

11 And two, when inflicting the injury, the defendant intended  
12 to cause cruel or extreme pain and suffering for the purpose  
of revenge, extortion, persuasion, or for any sadistic  
13 purpose.

14 Great bodily injury means significant or substantial  
physical injury. It is an injury that is greater than minor or  
15 moderate harm.

16 Someone acts with a sadistic purpose if he or she intends to  
17 inflict pain on someone else in order to experience pleasure  
himself or herself.

18 RT 386.

19 B. The Clearly Established Federal Law

20 Error in instructing a jury violates due process only where the infirm instruction so  
21 infects the entire trial that the resulting conviction violates due process. Estelle, 502 U.S. at 72  
22 (citing Cupp, 414 U.S. at 147). It must be established not merely that the instruction is  
23 undesirable, erroneous, or even universally condemned, but that it violated some constitutional  
24 right. Donnelly, 416 U.S. at 643. The challenged instruction may not be judged in artificial  
25 isolation but must be considered in the context of the instructions as a whole and the trial record  
26 overall. Estelle, 502 U.S. at 72. Moreover, relief is only available if there is a reasonable  
27 likelihood that the jury has applied the challenged instruction in a way that violates the  
28 Constitution. Id. at 72-73.



1                   C. The State Court’s Ruling

2                   This claim was raised on direct appeal, and the opinion of the California Court of Appeal  
3 is thus the subject of habeas review in this court. See Ortiz, 704 F.3d at 1034.

4                   The appellate court ruled as follows:

5                   Defendant contends the trial court erred in refusing the  
6 modification to the instruction on torture to advise the jury  
7 that severe wounds can be consistent with a killing in the  
8 heat of passion. He argues the modification was a proper  
9 statement of the law and was crucial to his theory of  
10 defense. According to defendant, “Numerous cases have  
11 cautioned against giving undue weight to the severity of a  
12 victim's wounds in a torture prosecution because such  
13 wounds could have been inflicted in the heat of passion or  
14 during a mindless rage.” In support, defendant relies on  
15 People v. Cole (2004) 33 Cal.4th 1158, 17 Cal. Rptr. 3d  
16 532, 95 P.3d 811 (Cole) and People v. Pensinger (1991) 52  
17 Cal.3d 1210, 278 Cal. Rptr. 640, 805 P.2d 899 (Pensinger).

18                   However, both Cole and Pensinger concerned murder by  
19 means of torture under section 189, not torture as alleged in  
20 the present case, section 206. (Cole, supra, 33 Cal.4th at  
21 pp. 1207-1208; Pensinger, supra, 52 Cal.3d at p. 1239.)  
22 Murder by means of torture is murder committed with a  
23 willful, deliberate, and premeditated intent to inflict  
24 extreme and prolonged pain. (People v. Steger (1976) 16  
25 Cal.3d 539, 546, 128 Cal. Rptr. 161, 546 P.2d 665.

26                   Torture under section 206 does not require willful,  
27 deliberate, and premeditated intent. (People v. Massie  
28 (2006) 142 Cal.App.4th 365, 371, 48 Cal. Rptr. 3d 304  
(Massie); People v. Aguilar (1997) 58 Cal.App.4th 1196,  
1206, 68 Cal. Rptr. 2d 619.) However, defendant argues  
that Massie, “which is not a torture-murder case, similarly  
held that the severity of the victim’s wounds should not be  
dispositive of an intent to cause cruel suffering and that a  
defendant who was acting in a mindless rage lacks the  
requisite intent necessary to uphold a torture conviction  
under section 206.” In Massie we stated, “if the jury  
believes the accused acted in such a mindless rage that  
thought processes were impossible, then it may conclude  
he did not harbor the intent to inflict injury.” (Massie, at p.  
372.)

In Massie we rejected the defendant’s contention that  
evidence of anger precludes a conviction for torture, since  
the intent required need not be formed as a result of  
premeditation and deliberation. We noted: “An explosion  
of anger may be inconsistent with the reflection necessary  
for premeditation and deliberation, but it is not at all  
inconsistent with an intent to inflict cruel or extreme pain  
and suffering, which may be the result of ‘mere  
unconsidered or rash impulse hastily executed.’ [Citation.]”

1 (Massie, supra, 142 Cal.App.4th at p. 372.) We noted the  
2 role anger may have played in a criminal attack is a jury  
3 question. The jury may logically determine that anger was  
4 the reason the defendant formed the intent to inflict injury.  
5 In contrast, if the jury believes the defendant acted in a  
6 mindless rage obliterating thought processes, it may  
7 logically conclude the defendant did not harbor the intent  
8 to inflict injury. (Ibid.) This final observation does not, as  
9 defendant argues, require that the court instruct on the  
10 severity of the victim's wounds. CALCRIM No. 810, the  
11 instruction given by the trial court, adequately instructed  
12 the jury that it must find that "[w]hen inflicting the injury,  
13 the defendant intended to cause cruel or extreme pain and  
14 suffering for the purpose of revenge, persuasion, or for any  
15 sadistic purpose." Accordingly, we find no instructional  
16 error.

17 Lodged Doc. 4 at 21-23.

18 D. Objective Unreasonableness Under § 2254(d)

19 As with the previous claim, the state appellate court resolved this issue as a matter of  
20 state law. To the extent the appellate court found that California law did not support the  
21 requested modification to the torture instruction, this court may not revisit the question.  
22 Bradshaw, 546 U.S. at 76. Even if the proposed instruction was legally sound, petitioner has  
23 identified no U.S. Supreme Court precedent holding that the failure to give such an instruction  
24 violates due process. The undersigned is aware of none. Accordingly, the AEDPA precludes  
25 relief. See Wright, 552 U.S. at 125-26.

26 Finally, nothing in the trial court's rejection of the proposed instruction prevented  
27 defense counsel from arguing that the evidence of Rozenski's wounds was consistent with  
28 petitioner acting in the heat of passion, and therefore did not prove the specific intent element of  
torture beyond a reasonable doubt. Indeed, counsel did make that argument. RT 422-423. The  
jury was properly instructed about the reasonable doubt standard, the inference of facts from  
circumstantial evidence, and other principles pertinent to fact-finding about intent. Accordingly,  
in light of the record as a whole, see Estelle, 502 U.S. at 72, the state courts did not unreasonably  
reject this due process claim.

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1 IV. Claim Five:<sup>6</sup> *Batson/Wheeler* Motion

2 A. Petitioner's Allegations and Pertinent State Court Record

3 Petitioner alleges that jury selection in his case was infected by racial prejudice. During  
4 jury selection, the prosecutor exercised peremptory challenges against three black prospective  
5 jurors. Defense counsel made a Batson/Wheeler<sup>7</sup> motion after dismissal of the third of these  
6 prospective jurors. This claim rests on the dismissals of prospective Jurors No. 1 and No. 3.  
7 ECF No. 1 at 8.

8 During voir dire, Juror No. 1 stated that her first thought upon seeing the defendant,  
9 based on her previous experience of jury service in a murder case, was "I hope that the trial is  
10 fair and objective." Reporter's Augmented Transcript ("RAT") at 104. When asked to elaborate  
11 outside the presence of the other prospective jurors, she stated "[I]t's another African American  
12 male, you know, another African American male, and that was the same as my last trial." RAT  
13 117. Juror No. 1 noted that there had been some "racial undertones" during jury deliberations in  
14 the previous case, but expressed confidence that this would not affect her ability to swerve  
15 impartially in petitioner's case. RAT 117-119. She denied thinking that a black defendant was  
16 at greater risk than others of being wrongly charged or convicted. RAT 119.

17 Juror No. 3 was a young high school graduate who worked as an auto technician and  
18 lived in North Highlands. He did not raise his hand when the judge asked potential jurors to  
19 identify themselves if they had been arrested, witnessed a crime, or been the victim of a crime;  
20 his questionnaire indicated negative responses to these questions. Clerk's Augmented Transcript  
21 ("CAT") at 13. The only time that Juror No. 3 spoke in voir dire was a brief exchange with  
22 defense counsel:

23 Q: We haven't heard anything from you, [Juror No. 3].  
24 What was the first thing you thought of when you saw my  
client?

25 A: There weren't any initial thoughts. I only want to know  
26 what happened.

27 <sup>6</sup> The federal petition presents Claims Four and Five out of Order. The court addresses  
them in the order presented.

28 <sup>7</sup> Batson v. Kentucky 476 U.S. 79 (1986); People v. Wheeler 22 Cal.3d 258 (1978).

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Q: Okay, when you heard the charges read by the judge, what was your thought?

A: Wondering, because this is all new to me, I just wondering what going to happen [sic], if he's found guilty or not.

Q: Can you speak up please.

A: I don't know. I said, this is all new to me, so I wasn't sure what to expect. So – I don't know. I'm curious to see – I want to see the evidence.

Q: Okay, And, sir, would it be fair to say you're a rather soft-spoken individual?

A: Yes, I am.

RAT 105.

When defense counsel objected to the strikes of African American jurors, the judge asked the prosecutor to respond. RAT 159. The prosecutor responded as follows:

In regards to [prospective Juror No. 3], since he was the most recent one, there were three [prospective] jurors, [No. 3], [No. 4] and. . . [No. 5]. When the Court initially asked all of the questions, those witnesses had no responses to anything. That's the first thing that I noted with those two witnesses.

Then . . . [defense counsel] asked questions in regards to jurors['] first impression of those and questions regarding drugs. [prospective Jurors No. 5] and [No 4] piped up. [Prospective Juror No. 3], no response.

My concern with [prospective Juror No. 3] is this. One, Juror No. 3's] age, lack of experience. [Juror No. 3] ... he's never been a victim of a crime, he's never been arrested for a crime. He doesn't know anybody who's been a victim of a crime. He doesn't know anybody who was arrested for a crime. [Juror No. 3] also lives in North Highlands, which is a high crime area.

I don't think [prospective Juror No. 3] has any type of experience regarding life. So I don't think he'll be able to understand the complexities of the law, or that [Juror No. 3] is simply lying about the knowledge he has about victims, arrests, et cetera.

So I don't think he's credible or a very good juror for the People because he lacks any experience in anything.

RAT 159-160.

1 The prosecutor went on to address his dismissal of prospective Juror No. 1:

2 [O]ne of the very first things [Juror No. 1] said was, she's  
3 wondering if the petitioner is going to get a fair trial now,  
4 something to that effect, which puts me on the defense that  
5 I have to prove my case more than something beyond a  
6 reasonable doubt. Her . . . concern that the petitioner gets a  
7 fair trial based upon her prior experience in a jury where  
8 other people had those issues.

9 My concern is those issues are going to come to play in my  
10 trial.

11 So that's one thing she's concerned about, is whether or not  
12 this petitioner, an African American petitioner, is going to  
13 get a fair trial. I don't want her to bring those biases,  
14 opinions to the courtroom.

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21 RAT 161.

22 The trial court ruled as follows:

23 I find that there has not been an exercise of a challenge to  
24 any of the three that are being challenged here... that is  
25 based on race basis.

26 And what [the prosecutor] has outlined as far as his  
27 challenges are, in fact, true, that those things did happen  
28 during the course of jury selection as far as what their  
statements are, or in the case of [Juror No. 3], his lack of  
experience, and those are proper bases for any attorney,  
whether they are on the prosecution side or the defense  
side, to exercise a challenge on a particular juror.

So I don't find that there is a basis to grant a Wheeler  
motion as to any of the three individuals challenged.

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22 B. The Clearly Established Federal Law

23 Purposeful discrimination on the basis of race in the exercise of peremptory challenges  
24 violates the Equal Protection Clause of the United States Constitution. See Batson, 476 U.S. 79;  
25 Johnson v. California, 545 U.S. 162 (2005). In considering whether a state court's decision is  
26 "contrary to" or "an unreasonable application of" Batson under § 2254(d)(1), the U.S. Supreme  
27 Court has recognized that Batson clearly establishes the requirement that courts perform a  
28 "sensitive inquiry into such circumstantial and direct evidence of intent as may be available."

1 Murray v. Schriro, 745 F.3d 984, 1004 (2014) (quoting Batson, 476 U.S. at 93). State courts  
2 disobey this clearly established requirement if they “‘rubberstamp’ a prosecutor’s proffered race-  
3 neutral explanation for exercising a disputed peremptory strike,” or “misstate[ ] the test,” or  
4 “impermissibly rel[y] on an erroneous factor.” Id. at 1005.

5 Batson claims are evaluated under a three-step test:

6 First, the defendant must make out a prima facie case “by  
7 showing that the totality of the relevant facts gives rise to  
8 an inference of discriminatory purpose.” [Citations].  
9 Second, once the defendant has made out a prima facie  
10 case, the “burden shifts to the State to explain adequately  
11 the racial exclusion” by offering permissible race-neutral  
justifications for the strikes. [Citations.] Third, “[i]f a  
race-neutral explanation is tendered, the trial court must  
then decide . . . whether the opponent of the strike has  
proved purposeful racial discrimination.” [Citation.]

12 Johnson, 545 U.S. at 168 (footnote omitted); see also Tolbert v. Gomez, 190 F.3d 985, 987-88  
13 (9th Cir. 1999) (en banc).

14 At the third step of Batson, “the trial court determines whether the opponent of the strike  
15 has carried his burden of proving purposeful discrimination.” Purkett v. Elem, 514 U.S. at 765,  
16 768 (1995). Although the burden remains with the defendant to show purposeful discrimination,  
17 the third step of Batson primarily involves the trier of fact. After the prosecution puts forward a  
18 race-neutral reason, the court is required to evaluate “the persuasiveness of the justification.” Id.  
19 To accept a prosecutor’s stated nonracial reasons, the court need not agree with them. The  
20 question is not whether the stated reason represents a sound strategic judgment, but “whether  
21 counsel’s race-neutral explanation for a peremptory challenge should be believed.” Hernandez  
22 v. New York, 500 U.S. 352, 365 (1991) (plurality opinion). This credibility determination must  
23 be made in light of the totality of the relevant facts about a prosecutor’s conduct. Batson, 476  
24 U.S. at 94; see also Hernandez, 500 U.S. at 363.

25 C. The State Court’s Ruling

26 This claim was raised on direct appeal, and the opinion of the California Court of Appeal  
27 is thus the subject of habeas review in this court. See Ortiz, 704 F.3d at 1034.

28 The state appellate court ruled as follows:

1 The exclusion of prospective jurors based on their race,  
2 religion, or ethnicity violates the state and federal  
3 Constitutions. A defendant must raise the issue in a timely  
4 fashion and make a prima facie showing of racial  
5 motivation. The burden then shifts to the prosecution to  
6 present a race-neutral explanation for the challenged  
7 strikes. (Batson, supra, 476 U.S. at pp. 89, 97; Wheeler,  
8 supra, 22 Cal.3d at pp. 276-277, 280-281.) Once the  
9 prosecution states race-neutral reasons, the burden is on the  
10 defendant to show the reasons were pretextual and the  
11 prosecution's actual motivation was race. (Purkett v. Elem  
12 (1995) 514 U.S. 765, 768 [115 S. Ct. 1769, 131 L.Ed.2d  
13 834]; People v. Reynoso (2003) 31 Cal.4th 903, 924, 3 Cal.  
14 Rptr. 3d 769, 74 P.3d 852 (Reynoso).)

15 On appeal, we defer to the trial court's finding of a lack of  
16 purposeful discrimination if the finding is supported by  
17 substantial evidence. Unless the record contradicts the  
18 prosecution's stated reasons, we uphold the court's finding  
19 of a lack of discriminatory intent. (People v. Alvarez  
20 (1996) 14 Cal.4th 155, 196-197, 58 Cal. Rptr. 2d 385, 926  
21 P.2d 365; Reynoso, supra, 31 Cal.4th at pp. 923-924.)

22 Defendant argues the prosecution "stated a race-based  
23 reason for striking potential juror [No. 1]. He said he  
24 believed he would have to prove his case to her 'more than  
25 something beyond a reasonable doubt' because 'she's  
26 concerned about . . . whether or not this defendant, an  
27 African American defendant, is going to get a fair trial. I  
28 don't want her to bring those biases, opinions to the  
courtroom.'" Defendant labels the prosecution's reason  
"explicitly based" on race and thus the trial court erred in  
finding the reason race neutral. We disagree.

#### Prospective Juror No. 1

19 Prospective juror No. 1 expressed her concern that  
20 defendant would not receive a fair trial because he was a  
21 young African American male. She did not explicitly say  
22 she would hold the People to a higher standard of proof  
23 than beyond a reasonable doubt. However, given juror No.  
24 1's comment, it was not unreasonable for the prosecution  
25 to be concerned that she would, in fact, require a higher  
26 standard of proof given defendant's age and race. The  
27 prosecution dismissed juror No. 1 because of this concern  
28 over the burden of proof, not because of defendant's race.  
The prosecutor's challenge need not be based on a ground  
that we approve of. A peremptory challenge may be based  
on an idiosyncratic or arbitrary reason, or even on a hunch.  
The question is whether the challenge was based on group  
bias, such as race or ethnicity. Here we find no such bias.  
(People v. Aleman (2016) 247 Cal.App.4th 660, 674, 202  
Cal. Rptr. 3d 563.)

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1                   Prospective Juror No. 3

2                   Defendant also argues the prosecutor’s stated reasons for  
3                   excusing prospective juror No. 3 were not credible. In  
4                   support, defendant contends a comparative analysis of juror  
5                   No. 3 and seated jurors No. 1 and No. 12 reveals the  
6                   prosecution struck a potential black juror for reasons that  
7                   applied to nonblack jurors he did not strike.

8                   In dismissing prospective juror No. 3, the prosecutor cited  
9                   the juror’s lack of experience: “he’s never been a victim of  
10                  a crime, he’s never been arrested for a crime. He doesn’t  
11                  know anybody who’s been a victim of a crime. He doesn’t  
12                  know anybody who was arrested for a crime.” Defendant  
13                  points out that seated jurors No. 1 and No. 12 shared this  
14                  lack of experience and were not dismissed.

15                  However, in addition to prospective juror No. 3’s lack of  
16                  experience, the trial court also noted the juror’s quiet  
17                  demeanor. The court inquired of juror No. 3, “[w]e haven’t  
18                  heard anything from you” and asked him to “speak up.”  
19                  The court also asked juror No. 3 if it would “be fair to say  
20                  you’re a rather soft-spoken individual.” After juror No. 3  
21                  agreed he was, the court asked whether despite being “soft-  
22                  spoken or potentially younger than your other 12 jurors” he  
23                  would be able to speak up during deliberations and discuss  
24                  the evidence presented at trial. The prosecutor, in  
25                  explaining his decision to strike prospective juror No. 3,  
26                  referenced his quiet demeanor as well as his youth. These  
27                  additional concerns differentiate prospective juror No. 3  
28                  from seated jurors No. 1 and No. 12.

                  Accordingly, we find no Batson/Wheeler error during jury  
                  selection.

Lodged Doc. 4 at 27-29.

D. Objective Unreasonableness Under § 2254(d)

                  The California Court of Appeal correctly stated and reasonably applied Batson standards  
at the third step, regarding the prosecutor’s actual motivation for the strikes.<sup>8</sup> As to Jurors 1 and  
3, the reviewing court considered petitioner’s arguments in light of the totality of relevant facts  
regarding prosecutor’s conduct. See Batson, 476 U.S. at 94.

                  Regarding Juror No. 1, the court reasonably rejected the argument that the strike was

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<sup>8</sup> This court need not consider whether the preliminary portion of the three-step analysis  
was correctly conducted in the trial court, because the ultimate question was reached and  
decided.



1 inherently “race-based” because motivated by the juror’s skepticism of the criminal justice  
2 system. Such skepticism is not limited to African Americans by any means, and thus cannot be  
3 considered a proxy for race. Even if Juror No. 1 had stated explicitly that she doubted the  
4 fairness of the criminal justice system vis-à-vis black defendants as a class—which she did not,  
5 in fact she denied such an opinion—the strike would have been based on her views regarding  
6 racism rather than her own race. This is not an objectively unreasonable distinction, and there is  
7 nothing improper in the exercise of a peremptory challenge based on the view that the system is  
8 unfair. See Tolbert, 190 F.3d at 985, 989 (strike based on a prospective juror’s opinions about  
9 the judicial system does not, without more, raise an inference of racial discrimination at Batson’s  
10 first step even when the opinion involves the racism of the system). Petitioner has presented no  
11 evidence that this basis for the strike was pretextual. See McClain v. Prunty, 217 F.3d 1209,  
12 1221 (2000) (prosecutor’s justification for a strike may be revealed as pretext for discrimination  
13 where a given explanation is equally applicable to a juror of a different race who was not  
14 stricken). As the appellate court noted, a reviewing court need not approve of a strike to find that  
15 a Batson challenge fails for lack of proof.

16         Regarding Juror No. 3, the undersigned is troubled by the prosecutor’s passing intimation  
17 that a young black man from North Highlands must be lying about not knowing anyone who has  
18 been the victim of a crime or arrested for a crime. The appellate court did not address the  
19 question whether this specific comment reflected racial bias.<sup>9</sup> However, to the extent that  
20 petitioner argued other jurors without personal experience of crime were not similarly excluded,  
21 the appellate court correctly noted that neither of those other jurors were so soft-spoken that their

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22 <sup>9</sup> The undersigned finds that any suggestion of bias raised by the prosecutor’s comment  
23 would have supported a prima facie case of discrimination at step one of the Batson  
24 analysis. This does not change analysis of the step three determination, however, which  
25 turns on the credibility of the prosecutor’s inexperience and demeanor rationales in light  
26 of the record as a whole. Any inference of implicit racial bias in the prosecutor’s  
27 suspicion that Juror No. 3 was untruthful about his lack of experience is too weak to  
28 render the courts’ credibility and demeanor determinations objectively unreasonable. It  
is clear from the record that both the prosecutor and defense counsel were concerned that  
Juror No. 3 might be passive in deliberations and unable to speak up and discuss the  
evidence. See RAT 105-106 (defense counsel asking whether Juror No. 3’s soft-spoken  
nature and youth would cause him to hesitate to express himself in deliberations).

1 demeanor presented questions about the ability to participate during deliberations.<sup>10</sup> The record  
2 of voir dire supports this distinction between Juror No. 3 and the jurors identified by the defense,  
3 making the appellate court’s rejection of petitioner’s comparative juror analysis reasonable.  
4 Accordingly, Juror No. 3’s demeanor was reasonably found not to have been asserted as a  
5 pretext for invidious discrimination. See McClain, 217 F.3d at 1221. There is no basis in the  
6 record for this court to find that the state appellate court unreasonably affirmed the trial court’s  
7 credibility and demeanor determinations. See Miller-El v. Dretke, 545 U.S. 231, 240 (2005); see  
8 also Snyder v. Louisiana, 552 U.S. 472, 477, 479 (2008).

9 In sum, the state courts applied the correct standard under Batson, reasonably evaluated  
10 the challenged strikes in the context of the circumstances as a whole, considered petitioner’s  
11 arguments rather than rubberstamping the prosecutor’s proffered reasons, and relied on no  
12 impermissible factors. Accordingly, there was no objectively unreasonable adjudication of the  
13 issue. See Murray, 745 F.3d at 1005. The AEDPA therefore precludes relief on this claim.

14 V. Claim Four: Cumulative Error

15 Petitioner alleges that the combination of trial errors asserted in his other claims violated  
16 his Fifth and Fourteenth Amendment rights. ECF No. 1 at 42. The U.S. Supreme Court has  
17 clearly established that the combined effect of multiple trial court errors violates due process  
18 where it renders the resulting criminal trial fundamentally unfair. Chambers v. Mississippi, 410  
19 U.S. 284, 298, 302-03 (1973). The cumulative effect of multiple errors can violate due process  
20 even where no single error rises to the level of a constitutional violation or would independently  
21 warrant reversal. Id. at 290 n.3.

22 On direct appeal, the state court concluded summarily that it “found any error harmless,  
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24 <sup>10</sup> The appellate court misstated the record in attributing defense counsel’s comments at  
25 RAT 105 to the trial judge. The court seems to have followed the uncorrected  
26 misattribution of the statement in Respondent’s Brief on Appeal, Lodged Doc. 2 at 63.  
27 This error has no effect on the Batson analysis, however. The fact remains that the  
28 prosecutor was not the only one to comment on Juror No. 3’s quietness. Arguably, it  
weighs even more strongly against the Batson claim that defense counsel recognized the  
possibility that the juror’s demeanor and age presented legitimate questions about his  
suitability to serve on the jury.

1 and any errors combined do not compel the conclusion that [petitioner] was denied a fair trial.”  
2 Lodged Doc. 4 at 23 n.6. There is nothing objectively unreasonable about this conclusion. The  
3 appellate court identified a single trial error—the prosecutor’s misstatement of the law in his  
4 closing argument—but found it harmless beyond a reasonable doubt. Because there cannot be a  
5 cumulative effect from a single error, this claim fails. United States v. Solorio, 669 F.3d 943,  
6 956 (9th Cir. 2012) (“There can be no cumulative error when a defendant fails to identify more  
7 than one error.”).

8 VI. Petitioner’s Reliance on *United States v. Johnson*

9 Petitioner filed a motion for relief from judgment based on United States v. Johnson, 576  
10 U.S. 591 (2015), ECF No. 14, which the undersigned denied without prejudice as a  
11 housekeeping matter and deferred for consideration on the merits here. ECF No. 19.  
12 Respondent was directed to address petitioner’s argument in his answer to the petition, and  
13 petitioner was provided an opportunity to respond in his reply brief. Id. Respondent briefed the  
14 issue, ECF No. 26 at 46, but petitioner did not file a traverse.

15 Petitioner argues that Johnson renders his conviction for second degree murder  
16 unconstitutional. ECF No. 14. Johnson did not involve the constitutionality of the California  
17 second degree murder rule, however. Rather, Johnson found the residual clause of the Armed  
18 Career Criminal Act (“ACCA”) to be unconstitutionally vague. The ACCA provides for  
19 increased sentences in federal cases where the defendant has prior convictions for crimes of  
20 violence. The now-invalidated residual clause provided for increased sentences where the  
21 federal defendant had a prior conviction for a felony that “otherwise involves conduct that  
22 presents a serious potential risks of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii).  
23 The Court held that this language was so indeterminate that it “produce[d] more unpredictability  
24 and arbitrariness than the Due Process Clause tolerates.” Johnson, 576 U.S. at 592.

25 Johnson provides no basis for relief in this case. Petitioner was not sentenced in federal  
26 court under the ACCA, so its holding is entirely inapposite. To the extent petitioner means to  
27 suggest that the California second-degree murder rule is itself unconstitutionally vague, other  
28 courts have rejected the argument that Johnson compels such a conclusion. See, e.g., Renteria v.

1 Asunson, No. CV 16-6874 R (FFM), 2016 WL 7336558, at \*3, 2016 U.S. Dist. LEXIS 174456,  
2 at \* 6-7 (C.D. Cal. Dec. 16, 2016); Lively v. Spearman, No. CV 18-02760-TJH (AGR), 2018  
3 WL 7457934, \*8, 2018 U.S. Dist. LEXIS 221783 \*21-22 (C.D. Cal. Dec. 18, 2018). In any  
4 event, the only way in which Johnson might be even arguably relevant to California second-  
5 degree murder is in the felony murder context, in which a second-degree conviction requires  
6 proof that the defendant was engaged in felonious conduct that was “inherently dangerous to  
7 human life.” See People v. Chun, 45 Cal. 4<sup>th</sup> 1172, 1182 (2009) (second-degree felony murder is  
8 an unlawful killing in the course of the commission of a felony that is inherently dangerous to  
9 human life but is not included among the felonies enumerated in Cal. Penal Code section 189).  
10 In this case, petitioner was not prosecuted for felony murder, and the jury was not instructed as  
11 to conduct “inherently dangerous to human life.” Because petitioner was not convicted under a  
12 standard even arguably analogous to the ACCA’s residual clause, Johnson has no applicability  
13 here.

14 To the extent that petitioner asserts Johnson as a free-standing basis for relief, the claim is  
15 unexhausted and therefore could not provide a basis for relief even if it were colorable. See 28  
16 U.S.C. § 2254(b) (no federal relief unless applicant has exhausted state court remedies); Castille  
17 v. Peoples, 489 U.S. 346 (1989) (exhaustion requires presentation of claim to state’s highest  
18 court). Neither a Johnson claim nor any challenge to the constitutionality of second-degree  
19 murder was presented to the California courts following petitioner’s conviction. To the extent  
20 that petitioner presents Johnson as supplemental authority in support of his exhausted claims, it  
21 is inapposite for the reasons explained above.

#### 22 CONCLUSION

23 For all the reasons explained above, the state courts’ denial of petitioner’s claims was not  
24 objectively unreasonable within the meaning of 28 U.S.C. § 2254(d). Accordingly, IT IS  
25 HEREBY RECOMMENDED that the petition for writ of habeas corpus be denied.

26 These findings and recommendations are submitted to the United States District Judge  
27 assigned to the case, pursuant to the provisions of 28 U.S.C. §636(b)(1). Within twenty-one days  
28 after being served with these findings and recommendations, any party may file written

1 objections with the court and serve a copy on all parties. Such a document should be captioned  
2 “Objections to Magistrate Judge’s Findings and Recommendations.” If petitioner files  
3 objections, he shall also address whether a certificate of appealability should issue and, if so,  
4 why and as to which issues. See 28 U.S.C. § 2253(c)(2). Any reply to the objections shall be  
5 served and filed within fourteen days after service of the objections. The parties are advised that  
6 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: June 13, 2022

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10 ALLISON CLAIRE  
11 UNITED STATES MAGISTRATE JUDGE  
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