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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

TINO PESE,

No. C 05-4199 PJH (PR)

Petitioner,

**ORDER DENYING PETITION FOR  
WRIT OF HABEAS CORPUS**

vs.

D.L. RUNNELS, Warden,

Respondent.

\_\_\_\_\_ /  
This is a habeas corpus case filed pro se by a state prisoner pursuant to 28 U.S.C. § 2254. The court ordered respondent to show cause why the writ should not be granted based on petitioner’s four cognizable claims for relief. Respondent has filed an answer and a memorandum of points and authorities in support of it, and has lodged exhibits with the court. Petitioner has filed a traverse. For the reasons set out below, the petition is denied.

**BACKGROUND**

On August 5, 2002, a jury in Alameda County Superior Court convicted petitioner of first degree murder, second degree murder, and unlawful discharge of a firearm. The trial court sentenced petitioner to a term of 73 years to life in state prison. He unsuccessfully appealed his conviction to the California Court of Appeal, and the California Supreme Court denied his petition for review.

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Petitioner does not dispute the following facts, which are excerpted from the opinion

1 of the California Court of Appeal:

2 A. THE ROBBERY

3 After business hours on April 10, 2001, about 6:30 p.m., an armed  
4 robbery took place at the Coaster Company, a wholesale furniture importer  
5 and distributor in San Leandro. A large Polynesian man wearing sunglasses  
6 and a hooded sweatshirt entered the office and ordered the employees at  
7 gunpoint to get under their desks. The man was accompanied by a heavy-set  
8 Polynesian woman. Jane Fakava, the office manager at Coaster Company,  
9 thought she recognized the woman as Pollyann Taesali, who had previously  
10 worked at Coaster Company but had been fired a month earlier. At the time  
11 Pollyann Taesali worked there, the keys for the company safe were kept in  
12 the top desk drawer of the cashier named Ammabelle.

13 Without asking, the female robber went straight to what had been  
14 Ammabelle's desk, opened the top drawer, and took out one of two keys to  
15 the office safe. She then handed the key to Jane Fakava, and the male  
16 robber ordered Jane Fakava to open the safe. When Jane Fakava was  
17 unable to open the safe with the single key, the male robber fired his gun in  
18 her direction. Jane Fakava then got the second key, opened the safe, and  
19 turned over two money pouches that contained about \$43,000. After the  
20 robbers left, she called the police. The police located a spent .40-caliber  
21 Smith and Wesson cartridge on the floor and bullet fragments in the wall.

22 Earlier that same day, about 1:30 p.m., an employee of the Coaster  
23 Company saw Pollyann Taesali at the lunch truck outside the office building.  
24 He knew Pollyann from her days at the company, and he knew she had been  
25 fired. Pollyann was with a large Samoan man, who was sitting in a dark blue  
26 Neon. A few days after the robbery, Pollyann called the employee and told  
27 him to tell Jane (Fakava) to stop sending the police to her house.

28 The police pursued Pollyann Taesali as a suspect in the robbery. They  
went to her parents' home on the night of the robbery, but she was not there.  
The police later learned Pollyann had been taken into custody on unrelated  
drug charges and was in the San Leandro jail. After talking with the police,  
Pollyann was released from custody, only to be arrested a few days later on  
new, unrelated charges and released again.

Several months before the robbery – around Christmas 2000 –  
Pollyann Taesali asked her relative, Toaititi Sime (Pone), if he would help her  
and her friends break into the safe at the company where she worked. Pone  
Sime declined. Pone Sime had seen Pollyann in the company of appellant,  
Tino Pese, with whom Sime was acquainted. The pair were together in a  
blue sports car driven by appellant. A couple of months later, appellant, too  
asked Sime to help them steal from Pollyann's employer. Sime again  
refused. Sometime afterward, appellant gave Sime a ride to the East Bay  
and told Sime that he and Pollyann had "hit" Pollyann's workplace. Appellant  
mentioned the sum of \$40,000.

29 B. POLLYANN IN JAIL

1 Pollyann Taesali had chronic problems with drugs and alcohol. She  
2 was living with her parents, who were taking care of her two children. In May  
3 2001, Pollyann was back in custody, this time in the San Mateo County jail.  
She told two fellow inmates that she had stolen a car from a man who owed  
her money.

4 Pollyann's cousin, Nicole Saumalu, helped Pollyann make telephone  
5 calls from jail. Pollyann called Nicole collect every day. Pollyann would often  
6 instruct Nicole to make a conference call to other people, usually to a man  
7 named Tino. The number dialed to reach Tino was 415-\*\*\*-3430. Pollyann  
8 also used her friend Hope Molina to make three-way conference calls to Tino  
9 at that number.

10 Pollyann had often mentioned Tino to her cousin Nicole in the months  
11 before she was in jail. In custody, Pollyann talked to two other inmates about  
12 her boyfriend, Tino. She also told one of the sheriff's deputies about her  
13 boyfriend, and the deputy recalled hearing Pollyann on the phone with  
someone named Tino.

14 Pollyann exchanged addresses and phone numbers with one of the  
15 inmates, Susan Bowen, who was released before Pollyann. Pollyann gave  
16 415-\*\*\*-3430 as one of her phone numbers.

### 17 C. THE MURDER OF POLLYANN

18 Because the San Mateo County Jail is in an isolated location, the  
19 practice of the sheriff's department is to discharge female inmates shortly  
20 before midnight on their release date provided that the inmate has money for  
21 a cab or someone to give her a ride. Pollyann and Penny Donez were  
22 released together about 12:20 a.m. on May 29, 2001. Donez's boyfriend,  
23 Michael Perkins, told the jailers he was there to get both women. In fact,  
24 Pollyann and Penny Donez had planned a ruse so that Pollyann's boyfriend,  
25 Tino, could pick her up without having to come under scrutiny at the jail.<sup>1</sup>  
26 However, Tino was not in the parking lot when Pollyann emerged. Penny  
27 Donez sent Michael Perkins on ahead without her and accompanied Pollyann  
28 back into the jail lobby where Pollyann made a phone call.

A few minutes later, appellant drove up. Pollyann introduced the driver  
to Penny Donez as Tino. Both women got into his car, and appellant drove to  
a 7-Eleven store, where Penny said she could be dropped off. At the store,  
appellant bought two bottles of Old English Malt Liquor and some Newport  
cigarettes. Penny Donez saw appellant drive off with Pollyann in the car.

Pollyann often wore her hair in a ponytail secured by a red "scrunchy."  
The scrunchy had been crocheted for Pollyann by another jail inmate, Susan  
Bowen, who had also given Pollyann a Bible before her own release one day  
earlier.

About 7:00 a.m., some workers from the Alameda County Public  
Works Agency found Pollyann's body in a flood station parking lot located in

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<sup>1</sup>The police investigating the Coaster Company robbery had distributed a flyer to  
local law enforcement agencies with appellant's photograph.

1 an industrial area near the salt flats by the San Mateo Bridge. Pollyann had  
2 been shot once in the back of the head. At the time of her death, Pollyann  
3 had a blood alcohol level of .10. Near the body was a small Bible inscribed,  
4 "Pollyann from Susan." In her jeans pocket was slip of paper with Susan  
5 Bowen's name, address, and phone number. A red scrunchy was in  
6 Pollyann's palm, and her left hand was entwined in her hair.

7 Ballistics experts concluded that the gun fired during the robbery at the  
8 Coaster Company was the same gun used to kill Pollyann. The police found  
9 a .40-caliber Smith and Wesson bullet casing about three to five feet from  
10 where Pollyann's body was discovered. Appellant was living with Guillermo  
11 Castillo, who owned a .40-caliber Smith and Wesson VE revolver and  
12 appellant borrowed it on occasion. Pone Sime saw appellant with a handgun  
13 on the day appellant asked him to help rob Pollyann's workplace.

14 In April 2001, Guillermo Castillo established a cell phone account for  
15 appellant with the number 415-\*\*\*-3430. Phone records show that appellant's  
16 cell phone was in use during the early hours of May 29, 2001. At 12:24 a.m.  
17 appellant's phone received a call routed from the Redwood City cell site. At  
18 1:05 and again at 1:30 calls were made from appellant's phone routed from  
19 the cell site on Industrial Parkway in Hayward. Around 3:00 a.m. several calls  
20 were made to appellant's voice mail, also from Industrial Parkway in  
21 Hayward.

22 (Resp. Ex. D at 1-5.)

### 23 STANDARD OF REVIEW

24 A district court may not grant a petition challenging a state conviction or sentence on  
25 the basis of a claim that was reviewed on the merits in state court unless the state court's  
26 adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an  
27 unreasonable application of, clearly established Federal law, as determined by the  
28 Supreme Court of the United States; or (2) resulted in a decision that was based on an  
unreasonable determination of the facts in light of the evidence presented in the State court  
proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to  
mixed questions of law and fact, *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09 (2000),  
while the second prong applies to decisions based on factual determinations, *Miller-El v.*  
*Cockrell*, 537 U.S. 322, 340 (2003).

A state court decision is "contrary to" Supreme Court authority, that is, falls under the  
first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to that  
reached by [the Supreme] Court on a question of law or if the state court decides a case

1 differently than [the Supreme] Court has on a set of materially indistinguishable facts.”  
2 *Williams (Terry)*, 529 U.S. at 412-13. A state court decision is an “unreasonable application  
3 of” Supreme Court authority, falling under the second clause of § 2254(d)(1), if it correctly  
4 identifies the governing legal principle from the Supreme Court’s decisions but  
5 “unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. The  
6 federal court on habeas review may not issue the writ “simply because that court concludes  
7 in its independent judgment that the relevant state-court decision applied clearly  
8 established federal law erroneously or incorrectly.” *Id.* at 411. Rather, the application must  
9 be “objectively unreasonable” to support granting the writ. *Id.* at 409.

10 Under 28 U.S.C. § 2254(d)(2), a state court decision “based on a factual  
11 determination will not be overturned on factual grounds unless objectively unreasonable in  
12 light of the evidence presented in the state-court proceeding.” *Miller-El*, 537 U.S. 322 at  
13 340; *see also Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000).

14 When there is no reasoned opinion from the highest state court to consider the  
15 petitioner’s claims, the court looks to the last reasoned opinion. *See Ylst v. Nunnemaker*,  
16 501 U.S. 797, 801-06 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079, n. 2 (9th  
17 Cir.2000).

## 18 DISCUSSION

19 As grounds for habeas relief petitioner asserts that: (1) the prosecution struck jurors  
20 solely on account of their race, a violation of the Equal Protection Clause; (2) his  
21 Confrontation Clause rights were violated by admission of hearsay evidence; (3) his Sixth  
22 and Fourteenth Amendment rights were violated by the trial court’s giving CALJIC 2.03;  
23 and (4) the trial court’s use of the CALJIC 2.90 definition of “beyond a reasonable doubt”  
24 violated due process.

### 25 I. Jury Selection

26 Petitioner claims that the prosecutor used peremptory challenges to strike jurors  
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1 solely because they were African-American, in violation of the Equal Protection Clause.<sup>2</sup>

2 The parties do not dispute the California Court of Appeal’s description of the relevant trial  
3 court proceedings, as follows:

4           During jury selection, the prosecutor exercised three of his fourteen  
5 peremptory challenges to excuse African-American prospective jurors J.C.,  
6 H.M., and L.L. Defense counsel peremptorily challenged one African-  
7 American juror among fourteen challenges. At the prosecutor’s third  
8 peremptory challenge of an African-American prospective juror, defense  
9 counsel objected, asserting that the African-American jurors were being  
10 excluded on account of their race. At that point, one African-American juror  
11 remained in the jury box.

12           Initially, the trial court found that a prima facie case of racial  
13 discrimination had been made and that the burden had shifted to the  
14 prosecution to show neutral non-race-based reasons for the peremptory  
15 challenges. The prosecutor vigorously argued to the contrary that defendant  
16 had failed to establish a prima facie case. The trial court acknowledged that  
17 good reasons were apparent for the prosecutor’s challenges of J.C. and L.L.,  
18 the first and third of the three African-American jurors removed by the  
19 prosecutor. At the same time, the court recognized that the use of a single  
20 peremptory challenge based on race would be improper. However, the court  
21 was ultimately persuaded by the prosecutor and changed its ruling, finding  
22 that defendant had not made a prima facie showing of exclusion of potential  
23 jurors based on race.

24 (Resp. Ex. D at 5.)

25 A. Equal Protection Standard

26           The Equal Protection Clause forbids the challenging of potential jurors solely on  
27 account of their race. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). A party may raise an  
28 equal protection claim on behalf of a juror excluded because of the juror's race, regardless  
of whether the party and the excluded juror share the same race. *Powers v. Ohio*, 499 U.S.  
400, 406 (1991). A violation of equal protection under *Batson* is established in a three-step  
process: (1) the defendant must make out a prima facie case that the prosecutor exercised  
peremptory challenges on the basis of race (or gender) “by showing that the totality of the  
relevant facts gives rise to an inference of discriminatory purpose;” (2) if the prima facie  
case is made, the burden shifts to the prosecutor to articulate a race-neutral explanation for

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<sup>2</sup>Although petitioner is Samoan, he may raise an equal protection claim on behalf of jurors excluded because of the jurors’ race, regardless of the fact that the jurors and he do not share the same race. See Powers v. Ohio, 499 U.S. 400, 406 (1991).

1 striking the jurors in question; and (3) if the prosecutor carries the burden of showing a  
2 race-neutral explanation, the defendant has the burden to prove purposeful discrimination.  
3 *Batson*, 476 U.S. at 93-94, 97-98. A party establishes a prima facie equal protection  
4 violation based on race by showing that: (1) the defendant is a member of a cognizable  
5 racial group, (2) the group's members have been excluded from the jury, and (3) the  
6 circumstances of the case raise an inference that the exclusion was based on race.  
7 *Batson*, 476 U.S. at 96.

8 B. Standard of Review

9 Here, petitioner challenged the prosecutor's use of peremptory strikes by way of a  
10 motion under *People v. Wheeler*, 22 Cal. 3d 258, 280 (1978). The trial court denied the  
11 motion because it found, relying on *Wheeler*, no prima facie case of racial discrimination.  
12 The *Wheeler* motion procedure used by California courts does not satisfy the constitutional  
13 requirement laid down for the first step of *Batson*, however. *Johnson v. California*, 545 U.S.  
14 162, 168 (2005); *Wade v. Terhune*, 202 F.3d 1190, 1197 (9th Cir. 2000). Since August 3,  
15 1984, California courts have imposed the more stringent requirement that the defendant  
16 "show a strong likelihood," *Wheeler*, 22 Cal. 3d at 280, rather than merely "raise an  
17 inference," *Batson*, 476 U.S. at 96, that the prosecutor had excluded venire members from  
18 the petit jury on account of their race. *Wade*, 202 F.3d at 1196-97. Because California  
19 courts using the *Wheeler* procedure have not applied federal law as clearly established by  
20 the United States Supreme Court, a federal habeas court need not defer to the California  
21 court's findings as it would otherwise be required to do under 28 U.S.C. § 2254(d). *Wade*,  
22 202 F.3d at 1197.

23 In *People v. Johnson*, 30 Cal. 4th 1302 (2003), the California Supreme Court  
24 attempted to rectify the situation by concluding that "*Wheeler's* terms 'strong likelihood' and  
25 'reasonable inference' state the same standard" – one that is entirely consistent with  
26 *Batson*. 30 Cal. 4th at 1313. *Batson*, the state high court held, "permits a court to require  
27 the objector to present, not merely 'some evidence' permitting the inference, but 'strong  
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1 evidence' that makes discriminatory intent *more likely than not* if the challenges are not  
2 explained." *Id.* at 1316. The Supreme Court of the United States disagreed, and made  
3 clear that "California's 'more likely than not' standard is at odds with the prima facie inquiry  
4 mandated by *Batson*." *Johnson v. California*, 545 U.S. at 171-72. To satisfy *Batson*'s first  
5 step, a defendant need not persuade the judge that the challenge was more likely than not  
6 the product of purposeful discrimination; rather, he need only produce evidence sufficient to  
7 permit the trial judge to draw an inference that discrimination has occurred. *Id.* at 171.  
8 Accordingly, federal habeas courts should continue to apply *Wade*'s de novo review  
9 requirement whenever state courts use the "strong likelihood"/"more likely than not"  
10 standard, as these courts are applying a lower standard of scrutiny to peremptory strikes  
11 than the federal constitution permits. *Accord Paulino v. Castro*, 371 F.3d 1083, 1090 (9th  
12 Cir. 2004) (applying de novo review where state court applied "strong likelihood" standard);  
13 *Cooperwood v. Cambra*, 245 F.3d 1042, 1047 (9th Cir. 2001) (applying de novo review  
14 where state court applied "strong likelihood" standard).

15 Here, the California Court of Appeal upheld the trial court's finding that petitioner had  
16 not established a prima facie case of racial discrimination by the prosecutor. The appellate  
17 court's decision was announced after the United States Supreme Court had granted a  
18 petition for a writ of certiorari, but before it had announced its decision in *United States v.*  
19 *Johnson*. (Resp. Ex. D at 6-7.) Concluding that it was bound by the California Supreme  
20 Court's decision in *People v. Johnson* despite the grant of certiorari, the California Court of  
21 Appeal applied California's "strong likelihood"/"more likely than not" standard in finding that  
22 petitioner had not made a prima facie case of discrimination under *Batson*. (*Id.*) As that is  
23 the wrong standard, pursuant to *Wade*, this court will review de novo the California Court of  
24 Appeal's finding of no prima facie case of discrimination.

25 C. Analysis

26 Here, the first and second elements of the *Batson* prima facie case of discrimination  
27 are met because the prospective jurors are African-American and the prosecutor used  
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1 peremptory strikes to remove them. See *Batson*, 476 U.S. at 96. The issue is whether the  
2 third element is met, namely whether the circumstances of the case raise an inference that  
3 the challenges were based on race. See *id.*

4 In *Batson*, the Supreme Court noted that, in "deciding whether the defendant has  
5 made the requisite showing, the trial court should consider all relevant circumstances," and  
6 noted that a "prosecutor's questions and statements during voir dire examination and in  
7 exercising his challenges may support or refute an inference of discriminatory purpose."  
8 *Williams v. Runnels*, 432 F.3d 1102, 1107 (9th Cir. 2006) (quoting *Batson*, 476 U.S. at  
9 96-97). The Supreme Court reiterated in *Johnson* that "a defendant may rely on 'any other  
10 relevant circumstances' to raise an inference of discriminatory purpose." *Id.* (quoting  
11 *Johnson*, 545 U.S. at 170).

12 A principal way that a court considers a petitioner's *Batson* claim in light of the  
13 "totality of the relevant facts" is by looking at percentages. *Boyd*, 467 F.3d at 1147 (quoting  
14 *Batson*, 476 U.S. at 94). The Ninth Circuit has held that, "[t]o establish a prima facie case,  
15 [a petitioner does] not need to show that the prosecution ha[s] engaged in a pattern of  
16 discriminatory strikes against more than one prospective juror" because "the Constitution  
17 forbids striking even a single prospective juror for a discriminatory purpose." *Id.*  
18 Nonetheless, it is helpful to compare the number of minority prospective jurors stricken to  
19 non-minority prospective jurors stricken. *Id.* (citing *Miller-El v. Dretke*, 545 U.S. 231, 240  
20 (2005) (noting "remarkable" number of prosecutor's strikes of minority prospective jurors).  
21 The prosecutor struck eleven prospective jurors who were not African-American and three  
22 who were, and the prosecutor only struck three out of the five prospective African-American  
23 jurors – one African-American remained on the jury, and defense counsel struck one of  
24 them. As a relatively low percentage of the prosecutor's strikes were against African-  
25 American prospective jurors, and the prosecutor did not strike all of the prospective African-  
26 American prospective jurors, there was no statistical disparity or pattern of discrimination in  
27 the striking of African-American prospective jurors in this case. Compare, e.g., *Johnson*,

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1 545 U.S. at 162-63, 172-73 (prima facie case of discrimination found where prosecutor  
2 removed all three prospective back jurors, resulting in an all-white jury); *Williams*, 432 F.3d  
3 at 1109 (prosecutor's use of three of his first four peremptory challenges to dismiss African-  
4 American jurors enough to establish prima facie inference of racial discrimination).

5 To be sure, even where the prosecutor has not attempted to remove all members of  
6 a minority, a pattern of exclusion of minority venirepersons may still provide sufficient  
7 support for an inference of discrimination. See *Paulino v. Castro*, 371 F.3d 1083, 1090-91  
8 (9th Cir. 2004) (prima facie case established where five of six possible black jurors  
9 stricken). Nevertheless, there are other surrounding circumstances in this case that  
10 indicate there was no pattern of discrimination. To begin with, the state courts found that  
11 for two out of the three African-Americans struck by the prosecutor, the record contained  
12 race-neutral reasons that they might not be good jurors. One, juror J.C., had a brother-in-  
13 law who was a criminal defense attorney, had a son in prison whom she believed had been  
14 unfairly treated by the criminal justice system, believed that minorities are presumed guilty,  
15 and believed that the police had not properly responded to her complaints. (Resp. Ex. F,  
16 Augmented Reporter's Transcript ("ART"), Vol. 3, at 157-58, 159-61, 166; Resp. Ex. D. at  
17 7-8 n.3.) Another, juror L.L., did not believe the criminal justice system treats all races  
18 equally, responded to whether he and suffered discrimination by writing "I'm 6'2" and black,  
19 you figure it out," and had previously served on a jury that had hung. (*Id.*) In addition, race  
20 and race discrimination were not at issue in this case, and the stricken prospective jurors  
21 were not of the same race (Samoan) as the prospective jurors. These factors also weigh  
22 against the finding of an inference of discrimination in this case. Cf. *Johnson v. Campbell*,  
23 92 F.3d 951, 953-54 (9th Cir. 1996) (insufficient prima facie case for exclusion based on  
24 sexual orientation where neither sexual orientation nor other discrimination was at issue in  
25 case and there were neutral reasons for challenge).

26 Finally, in assessing "all relevant circumstances" surrounding challenged peremptory  
27 strikes, for purposes of determining whether there is an inference of discrimination under  
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1 *Batson*, “Supreme Court precedent requires a comparative juror analysis.” *Boyd*, 467 F.3d  
2 at 1149-50 (citing *Miller-El v. Dretke*, 125 S.Ct. 2317, 2325-38 & 2326 n.2 (2005)); see also  
3 *Kesser*, 465 F.3d at 360. Comparative juror analysis involves determining whether non-  
4 challenged jurors possess any of the characteristics on which the prosecution challenged  
5 jurors in the protected group. *Snyder v. Louisiana*, 128 S. Ct. 1203, 1212 (2008); *Boyd*,  
6 467 F.3d at 1150. Contrary to the view of the California courts, comparative juror analysis  
7 should take place on appeal even when the trial court did not engage in such analysis.<sup>3</sup> *Id.*  
8 at 1148-50.

9         Petitioner concedes in his petition that there were race-neutral reasons for striking  
10 juror J.C., but contends that a comparative analysis of stricken jurors L.L. and H.M. with the  
11 jurors who were not stricken raises an inference of discrimination. (Brief attached to  
12 Petition at 17 & n.8.<sup>4</sup>) The record does not support this contention, however, as it reveals  
13 unique qualities of L.L’s and H.M’s answers to the jury questionnaires and voir dire that  
14 provide race-neutral reasons for striking them. L.L was the only prospective juror whose  
15 responses to voir dire and the jury questionnaire revealed that he had previously served on  
16 a hung jury (ART Vol. 4 at 97), did not believe the criminal justice system treats all races  
17 equally, particularly with respect to the imposition of the three strikes rule (Augmented  
18 Clerk’s Transcript (“ACT”) at 1034, ART Vol. 4 at 98), and responded to whether he had  
19 suffered discrimination by writing “I’m 6’2” and black, you figure it out” (ACT at 1034). With  
20 respect to H.M., unlike any of the jurors, she disagreed in her questionnaire with the  
21 principle that a defendant does not have to testify, stating that if a defendant has evidence  
22 of his innocence he should be required to present it. (ACT at 640-41.) She was also

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25         <sup>3</sup>On this point, the Ninth Circuit in *Boyd* amended its earlier opinion which had held  
26 to the contrary. *Boyd*, 467 F.3d at 1144 (citing *Boyd v. Newland*, 393 F.3d 1008,1013 (9th  
27 Cir. 2004)). In this case, the California Court of Appeal did not conduct a comparative juror  
28 analysis because the trial court had not done so in the first instance. (Resp. Ex. D at 8-10.)

27         <sup>4</sup>Petitioner attaches, and incorporates in full, his opening brief on appeal to the  
28 California Court of Appeal.

1 younger, at age 24, than any of the other prospective jurors.<sup>5</sup> (ACT at 634; Brief Attached  
2 to Petition at 20-23.)

3 While other prospective jurors who were not struck had expressed that the criminal  
4 justice system does not treat people of different races equally, and had experienced  
5 discrimination, no jurors had previously served on a jury that hung, and none had answered  
6 the question about discrimination in as confrontational a manner as L.L.'s "you figure it out"  
7 answer. Although these distinctive aspects of L.L.'s answers are not conclusive that he  
8 would not have been a good juror, the court is mindful that at the voir dire stage lawyers are  
9 only making their best guess at how a prospective juror may act on the jury, and L.L.'s  
10 answers certainly provide a race-neutral suspicion that L.L. had a potential to be disruptive,  
11 confrontational or hostile on the jury. Similarly, no jurors other than H.M. had disagreed  
12 with the proposition that a defendant did not have to testify, and she also had a unique  
13 combination of youth and a lesser degree of education. These qualities provide a race-  
14 neutral suspicion that there was a risk H.M. would not properly apply or understand the  
15 legal concepts in the jury charge. As a result, a comparative juror analysis does not raise  
16 an inference of discrimination in this case.

17 In sum, the record in this case does not create an inference of discrimination in the  
18 prosecutor's peremptory challenges to three African-American prospective jurors. The  
19 prosecutor also struck eleven prospective jurors who were not African-American, he did not  
20 strike all of the African-American venirepersons, the state courts found race-neutral  
21 reasons for striking two out of the three African-American prospective jurors, this was not a  
22 case that involved race or race discrimination, the defendant and victim were of a different  
23 race than the struck prospective jurors, and a comparative juror analysis does not raise an  
24 inference of discrimination. As a result, petitioner has not established a prima facie case of  
25 discrimination under the first step of the *Batson* analysis, and petitioner is not entitled to

26 \_\_\_\_\_  
27 <sup>5</sup>The only juror close to her in age, at 26, had a college degree, whereas H.M. had  
28 not been to college. (ACT at 286-300.)

1 habeas relief on this claim.

2 **II. Confrontation Clause**

3 Petitioner claims that testimony by various witnesses as to statements by the victim,  
4 Pollyann Taesali, violated his rights under the Confrontation Clause. (Brief attached to  
5 Petition at 40-41, 53.)<sup>6</sup> Prior to trial, the trial court granted petitioner’s motion to exclude  
6 statements by Pollyann to the police during the robbery investigation, as well as various  
7 other statements that she made to or were overheard by other witnesses. However, the  
8 court found a limited number of her statements to be admissible as non-hearsay or under  
9 hearsay exceptions.

10 Petitioner complains about the admission of statements made by Pollyann to five  
11 different witnesses, as follows:

12 1. Nicole Saumalu

13 Pollyann’s cousin, Nicole Saumalu, testified that when she visited Pollyann in jail,  
14 Pollyann stated that wanted to “get some of her money” from petitioner, that she had  
15 “gotten over” on her old job, that petitioner is “too busy kissing my ass because I have  
16 evidence against him,” and that she was going to “take care of her money issues with him.”  
17 (RT at 691-93, 697-700.) She also testified that she overheard Pollyann on the telephone  
18 tell petitioner “not to spend all of the money,” that she would tell her mother to stop  
19 gossiping about her doing the robbery, and that she had petitioner’s “back” and would not  
20 turn against him. (RT at 702, 70-05.)

21 2. Penny Donez

22 Penny Donez testified that she was an inmate in jail with Pollyann, and Pollyann  
23 spoke about a robbery she had committed at the place she used to work, and about her

24 \_\_\_\_\_  
25 <sup>6</sup>Petitioner spends the majority of this claim arguing that such testimony was  
26 inadmissible under the California Evidence Code, and only mentions the Confrontation  
27 Clause in passing. (Brief attached to Petition at 37-54.) The California Court of Appeal  
28 found the evidence admissible under state law, and that its admission was, in any event,  
harmless, and did not address the Confrontation Clause. This court does not address the  
admissibility of the statements under state law because federal habeas relief is not  
available for a violation of state law.

1 boyfriend, Tino. (RT at 1026.)<sup>7</sup>

2 3. Iofi Taesali, Jr.

3 Iofi Taesali, Jr., Pollyann's brother, testified that before Pollyann went to jail, she  
4 "kind of blurted out that Tino jacked her." (RT at 1221.)

5 4. Hope Molina

6 Hope Molina, a friend of Pollyann's, helped Pollyann make a telephone call from jail  
7 and overheard Pollyann leave a voicemail for "Tito" or "Tino" saying "Babe, I love you. Don't  
8 do me like that. Come bail me out of jail. You got my money." (RT at 1277.) Molina  
9 testified that Pollyann told her that her boyfriend had about \$40,000 of their money. (RT at  
10 1282.)

11 5. Lemasino Taesali

12 Lemasino Taesali, Pollyann's sister, testified that before she died, Pollyann told her  
13 that she was angry with petitioner because he owed her some money. (RT at 1429, 1431.)

14 "The ultimate goal of the Confrontation Clause is to ensure reliability of evidence . . .  
15 not that evidence be reliable, but that reliability be assessed in a particular manner: by  
16 testing in the crucible of cross-examination. *Crawford v. Washington*, 541 U.S. 36, 61  
17 (2004). The Confrontation Clause prohibits all out-of-court "testimonial" statements offered  
18 for the truth of the matter asserted, i.e., "testimonial hearsay." *Id.* at 51. "Testimony . . . is  
19 typically a solemn declaration or affirmation made for the purpose of establishing or proving  
20 some fact." *Id.* While the Supreme Court has not articulated a comprehensive definition of  
21 testimonial hearsay, "[w]hatever else the term covers, it applies at a minimum to prior  
22 testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police  
23 interrogations." *Id.* at 68.

24 The statements that petitioner complains about were not "testimonial" under

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26 <sup>7</sup>She also testified, unprompted, that Pollyann "started telling me about what her and  
27 her boyfriend did." (RT at 1024.) However, this statement was not admitted into evidence:  
28 the trial court granted defense counsel's objection, ordered the testimony stricken, and  
admonished the jury not to consider it. (*Id.*)

1 *Crawford*. They were not sworn or solemn declarations made during prior testimony, at a  
2 preliminary hearing, before a grand jury, at a former trial or to the police. Nor were they  
3 made to any government official or in connection with any government proceeding or  
4 investigation. Rather, they were remarks Pollyann made in the course of ordinary  
5 conversations with her family members and friends.<sup>8</sup> See *United States v. Manfre*, 368  
6 F.3d832, 838 (8th Cir. 2004) (statements made to family members not “testimonial” under  
7 *Crawford*). Petitioner has pointed to no authority, nor is the court aware of any, suggesting  
8 that casual remarks to acquaintances are “testimonial” for purposes of the Confrontation  
9 Clause under *Crawford*. Indeed, *Crawford* suggests to the contrary. See *Crawford* at 51  
10 (“An accuser who makes a formal statement to government officers bears testimony in a  
11 sense that a person who makes a casual remark to an acquaintance does not.”)

12 In any event, where, as here, the Supreme Court has never squarely addressed  
13 whether a particular type of statement is testimonial, a state court's admission of such  
14 statement at trial is not "contrary to" clearly established Supreme Court precedent or an  
15 "unreasonable application" of *Crawford*, under 28 U.S.C. § 2254(d)(1). *Moses v. Payne*,  
16 543 F.3d 1090, 1099-1100 (9th Cir. 2008) (finding state court's admission of victim's out-of-  
17 court statements to emergency room physician as non-testimonial statements not contrary  
18 to clearly established federal law or unreasonable application thereof, because Supreme  
19 Court had never "squarely addressed" whether statements made to doctors for purposes of  
20 medical treatment and diagnosis were testimonial).

21 In sum, the admission of Pollyann’s non-testimonial statements to her family and  
22 friends did not violate petitioner’s rights under the Confrontation Clause, and petitioner is  
23 not entitled to habeas relief on this claim.<sup>9</sup>

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25 <sup>8</sup>There was no evidence that the inmates to whom she made some of these remarks  
in jail were working for the police or were confidential informants.

26 <sup>9</sup>Petitioner makes one conclusory reference to due process in this claim, stating  
27 without any explanation or elaboration that the admission of Pollyann’s statements  
28 “lightened the prosecution’s burden of proof.” (Brief attached to Petition at 53.) The court  
finds no connection between the admission of these statements and the prosecution’s

1 **III. CALJIC No. 2.03**

2 Petitioner claims that the use of a jury instruction on consciousness of guilt, pursuant  
3 to CALJIC No. 2.03, violated his constitutional right to a jury and to due process. CALJIC  
4 No. 2.03 reads as follows:

5 If you find that before this trial the defendant made a willfully false or  
6 deliberately misleading statement concerning the crimes for which he is now  
7 being tried, you may consider that statement as a circumstance tending to  
8 prove a consciousness of guilt. However, that conduct is not sufficient by  
9 itself to prove guilt, ad its weight and significance, if any, are for you to  
10 decide.

11 (Resp. Ex. D at 13 n. 9.)

12 Petitioner argues that this instruction is improper because it is a “pinpoint”  
13 instruction, meaning that it directed the jury to specific evidence favorable to the  
14 prosecution. Petitioner points to no authority from the United States Supreme Court,  
15 however, and this court is not aware of any, that prohibits the use of “pinpoint”  
16 instructions.<sup>10</sup> In the absence of “clearly established” controlling Supreme Court precedent,  
17 there is no basis for granting federal habeas relief based solely on the fact that a so-called  
18 “pinpoint” instruction was used. See 28 U.S.C. § 2254(d)(1).

19 To be sure, federal habeas relief is available when an a jury instruction so infects the  
20 trial that the trial is rendered fundamentally unfair, in violation of petitioner’s right to due  
21 process. *Estelle v. McGuire*, 502 U.S. 62, (1991). The instruction here, however, was not  
22 improper. It simply stated the common-sense proposition that any “willfully false or  
23 deliberately misleading” statement by petitioner “may” be considered as evincing  
24 consciousness of guilt. Contrary to petitioner’s argument, the instruction did not single out

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25 burden of proof. Moreover, as explained by the California Court of Appeal, the admission  
26 of this evidence was harmless because the trial court gave clear instructions limiting the  
27 evidence to its proper purposes, and there was ample other evidence showing petitioner’s  
28 involvement in the robbery and Pollyann’s plan to meet petitioner after getting out of jail in  
order to get money that she believed he owed her. (Resp. Ex. D at 11-13.)

<sup>10</sup>Petitioner only cites from the California Supreme Court (Brief attached to Petition at 55-58), which, as explained by the California Court of Appeal, has repeatedly rejected petitioner’s argument (Resp. Ex. D at 13-14 (citing cases).)



1 any particular piece of evidence or point to any statement by petitioner as tending to  
2 demonstrate guilt. The instruction did not require the jury to find *any* statement by  
3 petitioner to be false at all, and if the jury did find a false statement, the instruction simply  
4 allowed, but did not require, the jury to find that it evinced a consciousness of guilt.  
5 Moreover, there was ample evidence in this case to support giving an instruction about  
6 consciousness of guilt. *See Hopper v. Evans*, 456 U.S. 605, 611 (1982) (due process  
7 allows an instruction if the evidence supports it). As explained by the California Court of  
8 Appeal, during petitioner’s interview with the police, he denied having a cell phone, dating  
9 Pollyann Taesali, ever speaking to her on the phone, picking her up from the jail, or  
10 knowing she was in jail. (Resp. Ex. D at 13.) The jury could reasonably view these  
11 statements as “willfully false or deliberately misleading” in light of the evidence that  
12 petitioner and Pollyann were in a romantic relationship and petitioner had picked her up  
13 from jail when she was released, and the cell phone records of calls between them.  
14 Consequently, the consciousness of guilt instruction in this case did not violate petitioner’s  
15 right to due process or his right to a jury trial, and petitioner is not entitled to habeas relief  
16 on this claim.

17 **IV. CALJIC No. 2.90**

18 Petitioner claims that California’s jury instruction regarding reasonable doubt,  
19 CALJIC No. 2.90, violates the Due Process Clause by lowering the prosecutions’ burden of  
20 proof. As petitioner acknowledges (Brief attached to Petition at 59), the Ninth Circuit has  
21 rejected this claim. *See Lisenbee v. Henry*, 166 F.3d 997, 999-1000 (9th Cir. 1999) (use of  
22 term “abiding conviction” in defining reasonable doubt in CALJIC No. 2.90 is constitutionally  
23 sound). Accordingly, petitioner is not entitled to habeas relief on this claim.

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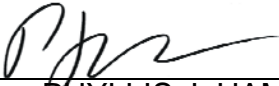
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**CONCLUSION**

For the foregoing reasons, the petition for a writ of habeas corpus is **DENIED**. The clerk shall close the file.

**IT IS SO ORDERED.**

Dated: January 29, 2009.

  
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PHYLLIS J. HAMILTON  
United States District Judge

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