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United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

PATRICK J. HIGGINS,
Petitioner,

No. C 11-4323 YGR (PR)

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

v.

W.J. SULLIVAN,
Respondent.

INTRODUCTION

Petitioner seeks federal habeas relief from his state convictions. For the reasons set forth below, the petition for such relief is DENIED.

BACKGROUND

In 2008, an Alameda County Superior Court jury found Petitioner guilty of murder, consequent to which he was sentenced to 25 years-to-life in state prison. Evidence presented at trial shows that in 2006 Petitioner and his friend Alfred Roberts robbed and killed Joseph Briggs:

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1 Briggs came up [to Petitioner and Roberts] and asked if anyone had heroin.
2 Someone told Briggs to go around the corner. He did. [¶] After Briggs left,
3 Roberts said to [Petitioner], “We gonna get him.” “He may have some money
4 on him.” Roberts told [Petitioner] to stop Briggs. [Petitioner] agreed. He
5 stopped Briggs and started talking to him. As he did, Roberts hit Briggs in the
6 jaw. Briggs spun, hit a wall, and fell to the ground as if he was asleep. Roberts
7 then went through [Briggs’s] pockets and took his wallet. [Petitioner] also went
8 through [Briggs’s] pockets but he could not find anything.

6 (Ans., Ex. G at 2.) Petitioner, who did not testify at trial, admitted to police that he and
7 Roberts had attacked and robbed Briggs, but that neither he nor Roberts were responsible for
8 Briggs’s death. (*Id.* at 3–4.)

9 Petitioner was denied relief on state judicial review. This federal habeas petition
10 followed. As grounds for federal habeas relief, Petitioner claims: (1) insufficient evidence
11 existed to support his conviction for first degree murder, in violation of due process;
12 (2) admission at trial of Petitioner’s involuntary out-of-court statement violated his right to
13 due process; (3) the prosecutor’s peremptory challenges of two prospective jurors was race-
14 based and violated the Equal Protection Clause; (4) the imposed sentence was excessive, in
15 violation of the Eighth Amendment; and (5) defense counsel rendered ineffective assistance.

17 STANDARD OF REVIEW

18 Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”),
19 this Court may entertain a petition for writ of habeas corpus “in behalf of a person in custody
20 pursuant to the judgment of a State court only on the ground that he is in custody in violation
21 of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). The
22 petition may not be granted with respect to any claim adjudicated on the merits in state court
23 unless the state court’s adjudication of the claim: “(1) resulted in a decision that was
24 contrary to, or involved an unreasonable application of, clearly established Federal law, as
25 determined by the Supreme Court of the United States; or (2) resulted in a decision that was
26 based on an unreasonable determination of the facts in light of the evidence presented in the
27 State court proceeding.” 28 U.S.C. § 2254(d). The state court decision to which Section
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1 2254(d) applies is the “last reasoned decision” of the state court, *see Baker v. Fleming*, 423
2 F.3d 1085, 1091–92 (9th Cir. 2005), which in the instant matter is the state appellate court
3 decision on direct review (Ans., Ex. G).

4 “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state
5 court arrives at a conclusion opposite to that reached by [the United States Supreme] Court
6 on a question of law or if the state court decides a case differently than [the] Court has on a
7 set of materially indistinguishable facts.” *Williams (Terry) v. Taylor*, 529 U.S. 362, 412–13
8 (2000). “Under the ‘unreasonable application’ clause, a federal habeas court may grant the
9 writ if the state court identifies the correct governing legal principle from [the] Court’s
10 decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at
11 413. “[A] federal habeas court may not issue the writ simply because that court concludes in
12 its independent judgment that the relevant state-court decision applied clearly established
13 federal law erroneously or incorrectly. Rather, that application must also be unreasonable.”
14 *Id.* at 411. A federal habeas court making the “unreasonable application” inquiry should ask
15 whether the state court’s application of clearly established federal law was “objectively
16 unreasonable.” *Id.* at 409.

17 DISCUSSION

18 I. Sufficiency of Evidence

19 Petitioner claims insufficient evidence existed to support his conviction for first
20 degree felony murder because the prosecutor presented no evidence that either Roberts or he
21 dealt the fatal blow. According to Petitioner, when they left the scene, Briggs was lying on
22 the street “snoring,” not dead, and that others who later happened upon the body delivered
23 the mortal blow.

24 The state appellate court found sufficient evidence to support Petitioner’s conviction
25 for first degree murder and rejected this claim:

26 [Petitioner] admitted to the police that he and Roberts intended to rob Briggs.
27 [Petitioner] also admitted that during the robbery, Roberts hit [Petitioner] in the
28 jaw causing him to fall to the ground. The doctor who performed the autopsy

1 on [Briggs's] body testified that Briggs died as the result of a hemorrhage to an
2 artery on the back of his neck. The doctor said the injury could be have been
3 caused by a punch to the head. The jurors considering this evidence reasonably
could conclude that Briggs was killed by the blow to the jaw that Roberts
inflicted.

4 (Ans., Ex. G at 3–4.) The state appellate court also found unpersuasive Petitioner's assertion
5 that the evidence "strongly suggests" other persons delivered the fatal blow:

6 We reject this argument for two reasons. First, the evidence [Petitioner] cites
7 does not definitively prove that a second post-robbery beating in fact occurred.
8 For example, [Petitioner] cites evidence from a witness, Steve Lewis, who told
9 police on the night of the crime that he saw as many as eight people kicking a
10 person who was on the ground. However, Lewis recanted his statement at trial
11 and he denied telling the police that he saw anyone being beaten. [Petitioner]
12 cites his statement to the police that Briggs began "snoring" after being
13 punched by Roberts. He argues that if Roberts's blow was fatal, Briggs would
14 have not been snoring. Although, the doctor who performed the autopsy said
15 the type of injury Briggs suffered would not cause immediate death. Some
persons will die within three to five minutes. Others will live an even longer
period of time. Thus, even if we were to assume that Briggs was snoring after
being hit, that did not rule out the possibility that Briggs was killed by the blow
Roberts threw. [Petitioner] cites evidence from the autopsy that indicated
Briggs suffered many injuries including some to his head and face. However,
the doctor who performed the autopsy said he had no way of knowing precisely
when those injuries were inflicted and that they could have occurred as many
as three days before Briggs's death. In sum, the evidence that a second beating
occurred was, at most, equivocal.

16 Second and more importantly, even if we were to assume that a second
17 post-robbery beating did occur, that would not undermine the judgment. As we
18 have said, the issue on appeal is whether the record contains substantial
19 evidence from which a reasonable trier of fact could have found the essential
elements of the crime proved beyond a reasonable doubt, and that standard has
been met here. The fact that the record also contains other evidence that might
have supported a different conclusion is irrelevant.

20 (*Id.* at 4–5.)

21 A federal court reviewing collaterally a state court conviction does not determine
22 whether it is satisfied that the evidence established guilt beyond a reasonable doubt. *Payne v.*
23 *Borg*, 982 F.2d 335, 338 (9th Cir. 1992). Nor does a federal habeas court in general question
24 a jury's credibility determinations, which deserve near-total deference. *Jackson v. Virginia*,
25 443 U.S. 307, 326 (1979). Indeed, if a record supports conflicting inferences, a federal
26 habeas court "must presume — even if it does not affirmatively appear in the record — that
27 the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that
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1 resolution.” *Id.* The federal court “determines only whether, ‘after viewing the evidence in
2 the light most favorable to the prosecution, *any* rational trier of fact could have found the
3 essential elements of the crime beyond a reasonable doubt.’” *Payne*, 982 F.2d at 338
4 (quoting *Jackson*, 443 U.S. at 319). Only if no rational trier of fact could have found proof
5 of guilt beyond a reasonable doubt, may the writ be granted. *See Jackson*, 443 U.S. at 324.
6 “[T]he only question under *Jackson* is whether that [jury] finding was so insupportable as to
7 fall below the threshold of bare rationality.” *Coleman v. Johnson*, No. 11-1053, slip op. 7
8 (U.S. May 29, 2012).

9 Petitioner’s claim fails. A rational trier of fact could have found from Petitioner’s
10 own confession and the doctor’s testimony that Roberts dealt the fatal blow when he knocked
11 Briggs unconscious. Because such a conclusion does not fall below the threshold of bare
12 rationality, Petitioner is not entitled to habeas relief on this claim. Furthermore, his
13 contention that evidence showed that others may have dealt the mortal blow is unavailing.
14 First, the evidence of a second beating was, as the state appellate court concluded, at best
15 subject to multiple interpretations. Second, even if this evidence was strong and
16 unambiguous, the record shows that the jury did not credit such evidence, and that it had
17 sufficient grounds to do so. Third, this Court must assume that the jury resolved any
18 conflicts in the evidence in favor of the prosecution, and defer to that resolution.
19 Accordingly, Petitioner’s claim is DENIED.

20 **II. Admission of Confession**

21 Petitioner claims that the trial court’s denial of his motion to exclude his involuntary
22 confession to police violated his Fifth Amendment right against self-incrimination.
23 Petitioner bases his argument on four portions (A, B, C & D) of the interrogation, and on
24 (E) his age and other personal characteristics. The state appellate court rejected these claims,
25 finding that the officers “did not cross the line from proper exhortations to tell the truth into
26 impermissible threats of punishment or promises of leniency,” nor was the confession
27 otherwise involuntary. (Ans., Ex. G at 7.)
28

1 The Fourteenth Amendment prohibits the admission of involuntary confessions in
2 state criminal cases. *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960). A court on direct
3 review is required to determine, in light of the totality of the circumstances, “whether a
4 confession [was] made freely, voluntarily and without compulsion or inducement of any
5 sort.” *Withrow v. Williams*, 507 U.S. 680, 689 (1993) (internal quotation marks and citation
6 omitted). A federal habeas court must review de novo the state court’s finding that a
7 confession was voluntarily given. *Derrick v. Peterson*, 924 F.2d 813, 818 (9th Cir. 1990).
8 But a state court’s subsidiary factual conclusions are entitled to the presumption of
9 correctness. *Rupe v. Wood*, 93 F.3d 1434, 1444 (9th Cir. 1996) (deferring to state appellate
10 court’s conclusion that challenged statement did not constitute threat or promise).

11 “[C]oercive police activity is a necessary predicate to the finding that a confession is
12 not ‘voluntary’ within the meaning of the Due Process Clause.” *Colorado v. Connelly*, 479
13 U.S. 157, 167 (1986). The interrogation techniques of the officer must be “the kind of
14 misbehavior that so shocks the sensibilities of civilized society as to warrant a federal
15 intrusion into the criminal processes of the States.” *Moran v. Burbine*, 475 U.S. 412, 433–34
16 (1986). Generally encouraging a Petitioner to tell the truth does not amount to police
17 coercion. *Amaya-Ruiz v. Stewart*, 121 F.3d 486, 494 (9th Cir. 1997). Police deception alone
18 “does not render [a] confession involuntary,” *United States v. Miller*, 984 F.2d 1028, 1031
19 (9th Cir. 1993), nor is it coercive to recite potential penalties or sentences, including the
20 potential penalties for lying to the interviewer, *United States v. Haswood*, 350 F.3d 1024,
21 1029 (9th Cir. 2003). The pivotal question in cases involving psychological coercion, “is
22 whether [, in light of the totality of the circumstances,] the defendant’s will was overborne
23 when the defendant confessed.” *Miller*, 984 F.2d at 1031.

24 **A. First Passage**

25 The state appellate court summarized the facts and its holding as follows:

26 First, [Petitioner] relies on a passage during the first session that occurred just
27 after he admitted he patted Briggs down as he was lying on the ground.
28 [Petitioner] told the sergeants he did not take anything from Briggs and he was

1 reluctant to say whether Roberts took anything either. The sergeants
2 questioned him on those points as follows:

3 ‘[Sergeant Cruz]: No, it don’t sound right at all, you know? You’re lookin
4 in the man’s pockets. We know he’s got money. His partner says they got there
5 with the money, okay, to buy heroin. You know, they admit that . . . he admits
6 that. He admits what that money was there for, okay? He admits that money
7 was there to buy heroin. Who got the money, okay? Like my partner’s sayin’
8 . . . we have come this far, okay? To stop now, you know . . . it’s like you’re
9 hidin’ somethin’ that’s huge. It’s like you’re hidin’ somethin’ that’s huge.
10 And folks are gonna wonder, well, how can . . . how can we believe him about
11 this other stuff, when he’s hidin’ somethin’ so big? When he’s hidin’ a pink
12 elephant in the room? Everybody sees it. Everybody sees it, okay?
13 Everybody sees it.

14 ‘[Sergeant Morris]: And *we ain’t even trippin’ over it.*

15 ‘[Sergeant Cruz]: No.

16 ‘[Sergeant Morris]: We’re just (inaudible)

17 ‘[Sergeant Cruz]: — *It’s not what killed him.*

18 ‘[Sergeant Morris]: No, exactly.

19 ‘[Sergeant Cruz]: It’s not what killed him, okay? But it goes to your
20 credibility, okay? It goes to you[r] credibility.’ (Italics added.)

21 Relying on the portions of the passage above that we have italicized,
22 [Petitioner] argues that the ‘implication’ from the ‘trippin’ comment was that
23 he ‘should feel free to admit his involvement in the robbery, since even the
24 police themselves were unconcerned about it.’ [Petitioner] argues the ‘It’s not
25 what killed him’ comment ‘implied that [he] would not be charged with
26 murder, since his conduct was not what killed Briggs.’

27 (Ans., Ex. G at 7–8.) The state appellate court rejected Petitioner’s interpretation:

28 It is not entirely clear what the “trippin” comment meant in context, but it
cannot reasonably be interpreted as appellant suggests. Sergeant Cruz
repeatedly described the robbery and appellant’s possible involvement in it as
“huge” and “big” and the “pink elephant in the room.” Read in context, those
comments would have to convey to appellant that the sergeants were keenly
interested in the robbery and appellant’s possible involvement in it. They
could not reasonably have been interpreted to mean that the sergeants were
unconcerned about the robbery.

As for the “[i]t’s not what killed him” comment, it falls far short of expressing
a promise of lenient treatment in exchange for cooperation. The sergeants did
not represent that they, the prosecutor, or the court would grant appellant any
particular benefit if he told them the details of the robbery. To the extent the
comment implied that it would work to appellant’s advantage if he told the
truth, they did nothing more than explain to him the benefits that might “flow
[] naturally from a truthful and honest course of conduct.” [Citation omitted.]

1 (*Id.* at 8.)

2 Petitioner’s claim is without merit. It simply not plausible that the officers’ comments
3 constituted promises of leniency or improper interrogation tactics, nor is there any other
4 evidence that the confession was involuntary. The state appellate court reasonably
5 determined that the officers were permissibly encouraging Petitioner to tell the truth (“it goes
6 to your credibility”) about a robbery they certainly found significant. As for “trippin,” it is
7 at worst subject to multiple interpretations. Read on its own, it could have meant “we are
8 unconcerned about the robbery.” Read in context, however, the more plausible meaning was
9 that “we are unconcerned about the robbery because we have so much evidence to prove it
10 that you might as well tell the truth about it.” Whatever its exact meaning, Petitioner has not
11 shown, or even shown a reasonable possibility, that under the totality of the circumstances
12 that improper tactics were used, or that his will was overborne. Petitioner’s claim is
13 DENIED.

14 **B. Second Passage**

15 The second passage reads:

16 Q. [Sergeant Cruz] All right. I wanna go back to where this guy falls against
17 the wall and then collapses down, okay? There’s another thing that we gotta
18 talk about here, dude, okay? Remember we talked about neighbors, and we
19 talked about people on the street, okay? You know . . . I do believe . . . that
20 even [Roberts], when he hits [the] dude . . . how many times does he hit him?

19 “A. Once.

20 “Q. One time?

21 “A. One time. Once.

22 “Q. I do believe . . . that when he hits him, it’s just to rob him. It ain’t to kill
23 him. I do . . . I do *firmly believe* that, okay? It’s just to rob him. It’s not to kill
24 him, okay? But . . . these are the things we gotta answer right now []. Things
25 that I gotta explain to the D.A. And here’s the things I gotta explain about:
26 People are saying — people in that ‘hood there are seeing — and other people
27 who are standin’ near the smoke shop-are also seeing you, and others — doin’
28 some things.” (Italics added.)

26 (Ans., Ex. G at 8–9.) On appeal and here, Petitioner asserts that “firmly believe” looks
27 “suspiciously like an assurance that this was only a robbery investigation and not a homicide
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1 case.” (*Id.* at 9.)

2 The state appellate court rejected this claim for reasons this Court finds reasonable:

3 We simply disagree with [petitioner’s] interpretation of the record. Read in
4 context, the thrust of the comment is clear. Sergeant Cruz was acknowledging
5 that when Roberts hit Briggs, he probably did not intend to kill him. He only
6 intended to rob him. That straightforward comment cannot reasonably be
7 interpreted as an effort to “downplay” [Briggs’s] murder, nor can it be
8 interpreted as an assurance that this was only a robbery investigation and not a
9 homicide case.

7 (*Id.*)

8 Petitioner’s claim entirely lacks merit. The state court’s interpretation was reasonable
9 and warrants deference. His claim would fail even if his interpretation was correct. Such
10 slight (alleged) downplaying does not support a finding of promised leniency or that his will
11 was overborne. Furthermore, even if the police were being deceptive, such deception is not
12 impermissible. See *Miller*, 984 F.2d at 1031. This claim is DENIED.

13 **C. Third Passage**

14 The state appellate court summarized the relevant facts and its rejection of Petitioner’s
15 claim as follows:

16 [Petitioner]’s next argument is based on comments Sergeant Morris made
17 during the first session when he was trying to determine whether [Petitioner]
18 and Roberts had discussed robbing Briggs before the actual crime.

18 “Q. [Sergeant Morris]: What my partner’s tryin’ to tell you in so many words
19 is that this thing is too well-orchestrated for it to be haphazard. In other words,
20 the way this whole thing is goin’ down, we believe it happened the way it
21 happened. And that was, this guy walks up . . . he’s not from the
22 neighborhood, obviously . . . guy walks up, ‘Go around the corner.’ Well, who
23 said it? If you didn’t say, then [Roberts] said it. If [Roberts] didn’t say it,
24 somebody said it. And it seems like you’re still hidin’ little tidbits from us. So
25 in other words, if I’m standin’ on the cor — well, just hear me out before you
26 start shakin’ your head . . . ‘cause I used to be a robbery investigator, and so
27 was my partner.

24 “[Sergeant Cruz]: Yeah.

25 “[Sergeant Morris]: We’re standin’ out there . . . dude walks up . . . ‘Go
26 around the corner.’ Well, if it wasn’t — and we know that’s not the heroin
27 spot right there. The heroin spot is a little further down. And that guy — they
28 sell crack there, obviously . . . they sell weed there. They don’t sell (inaudible)
29 right there. So when he went around the corner, was the . . . the intent was,
30 ‘Okay, let’s go around and rob this guy.’ *That’s the whole ... the whole issue*

1 *here is about a robbery — it's not about a homicide . . . it's not about a*
2 *murder. The guy goes around the corner . . . it sounds like somethin' was said .*
3 *. . like [Roberts] could a said something to you, hey, whatever. Whatever that*
4 *conversation was, we need to know about it.” (Italics added.)*

5 [Petitioner] suggests the comment we have italicized would have conveyed the
6 message to [Petitioner] that because this was a robbery investigation, he did not
7 need to worry about being charged with murder. Again, we think [Petitioner]
8 has misread the record. Sergeant Cruz did not state nor did he imply that
9 [Petitioner] did not have to worry about being charged with murder. He simply
10 acknowledged the likely fact that when the plan to rob Briggs was hatched, the
11 intent was simply to rob. The comment [Petitioner] challenges could not
12 reasonably have been interpreted as he suggests.

13 (Ans., Ex. G at 9–10.)

14 Petitioner's claim fails for the same reasons noted above. First, the state court
15 reasonably interpreted the interaction. This Court must therefore defer to this interpretation.
16 Second, Petitioner's claim would fail even if his interpretation was correct. The interaction
17 does not support a finding that his will was overborne or that the officers either promised
18 leniency, or used impermissible tactics. This claim is DENIED.

19 **D. Fourth Passage**

20 The state appellate court's factual summary and rejection of the claim are as follows:

21 “[Sergeant Morris]: . . . Just tell us what happened. We need to know the
22 truth. That's what he's tryin' to get you to say, man. We like pullin' teeth
23 now. We got the elephant out there. We tryin' to get the little-the little
24 piece-the gnats now — the little pieces of it.

25 “[Sergeant Cruz]: *As scared as you are of the truth, man . . . as scared as you*
26 *are of the truth . . . it's the truth, okay, that's gonna help us make a decision*
27 *about you.*

28 “[Sergeant Morris]: *Exactly. A major decision.*” (Italics added.)

[Petitioner] contends the portion of the passage we have italicized “suggested”
that “if [Petitioner] told [the sergeants] what they wanted to hear, he would be
permitted to go home and would not be charged at all.” We are not persuaded.
The sergeants told [Petitioner] that the “truth” would help them make a
decision about him. They did not say or suggest that if [Petitioner] told the
truth, [he] would be permitted to go home or that he would not be charged.
[Petitioner] has read far more into the comments in question than is reasonable.

(Ans., Ex. G at 10–11.)

1 Petitioner’s claim fails. The officers merely encouraged Petitioner to tell the truth.
2 They did not promise, threaten or coerce. This claim is DENIED.

3 **E. Personal Characteristics**

4 Petitioner contends that his youth, lack of education, and the conditions of the
5 interrogation show that under the totality of the circumstances his confession was
6 involuntary:

7 He contends his statement must be deemed involuntary because at the time of
8 his arrest he was “just” 20 years old, his stature was slight, he was “still living
9 with his parents,” he had dropped out of high school in the 10th grade, and that
10 he had “little experience” with the criminal justice system. [Petitioner] also
11 complains that during his “eight hours in police custody” he was kept in two
small rooms, “interviewed three separate times, handcuffed to a table for at
least part of the time, never offered either food or water, and given just one
short break to go to the bathroom and smoke a cigarette.” Finally, [Petitioner]
complains that Sergeant Cruz denied his request to make a phone call.

12 (Ans., Ex. G at 11.) The state appellate court rejected this claim because (1) it is not unusual
13 for persons of Petitioner’s age to live with their parents, (2) his assertion of a lack of criminal
14 experience is uncut by the fact of his two prior arrests, (3) the length of the two
15 interrogations was a little over three hours, with an hour and 45 minute break in between
16 them, (4) the circumstances of the interrogation (denial of a phone call) were not “pivotal”
17 considering that he was being questioned about a serious crime, and (5) police granted him a
18 smoke and a bathroom break when he asked for them. (*Id.* at 11–12.)

19 Petitioner’s claim is without merit. The totality of the circumstances does not indicate
20 that his confession was involuntary. Petitioner was an adult, not a juvenile, had had prior
21 experience with law enforcement, was actually interrogated (as opposed to detained at the
22 police station) for about three hours, and never asked for the privileges he says police never
23 offered. Police allowed him to smoke upon request. Furthermore, being handcuffed, in
24 small rooms for hours, and denied privileges during a criminal interrogation, without more,
25 does not offend reasonable sensibilities, suggest coercion, or show that police took
26 advantage of Petitioner. The record confirms that Petitioner understood his rights and
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1 voluntarily waived them by talking to police.¹ As there has been no showing that his
2 confession was involuntary, Petitioner’s claim is DENIED.

3 **III. Peremptory Challenges**

4 Petitioner claims that the trial court violated his equal protection rights by denying his
5 motion objecting to the prosecutor’s use of his peremptory challenges to exclude three
6 African-Americans from the jury, of which only two, V.M. and J.H.P., concern this Court.

7 The relevant facts are as follows:

8 The prosecutor used three of his peremptory challenges to remove African
9 American jurors. Immediately after the third challenge, defense counsel
10 advised the court that he needed to discuss an issue privately. The court made
note of counsel’s request, but continued with jury selection. Twelve jurors and
three alternates were selected.

11 After jury selection was completed, the court addressed defense counsel’s
12 motion. Defense counsel noted that African Americans are a protected class
and that the prosecutor had used his challenges to remove three of them.
13 Counsel acknowledged that an African American was on the panel that had
been sworn, but he argued that did not “excuse what happened previously . . .”

14 The trial court found defense counsel had made a prima facie case. It asked the
15 prosecutor to explain his challenges.

16 The prosecutor denied using his challenges to remove jurors based on their
17 race. He noted that there was an African American woman on the jury when
he passed initially, who the defense had then removed. He also noted there
18 was an African American on the panel that had been sworn. The prosecutor
then went on to explain his reasons for excusing the jurors in question. Only
two of those explanations are relevant here. The prosecutor stated as follows:

19 “Regarding Juror No. 20, [J. H.P.], she was currently a psychology or studying
20 psychology at College of Alameda. She answered in her questionnaire that she
would disregard the testimony of a drug user. I anticipate that one of the
21 witnesses I’ll be calling in this case will be an admitted drug user.

22 “She also expressed great displeasure with the police, saying she doesn’t
23 believe they have citizens best interests at heart. She said most of her friends
have had very negative experiences with police officers. She said that her
ex-boyfriend had a very bad experience with a police officer. And while she

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25 ¹ Petitioner asserts that at the interrogation he was “still feeling intoxicated” from his
26 ingestion of marijuana, alcohol, and Ecstasy. (Pet., P. & A. at 29.) According to him, this
27 intoxication made him unable to understand the *Miranda*-waiver form he initialed. (*Id.*) A
28 review of the record shows that petitioner had sufficient understand of his rights and of the
circumstances in which he was present. There is no showing that he was so intoxicated that it
interfered with his decision to waive his rights.

1 said that she felt she could put that aside, I didn't believe that the body
2 language that she was exhibiting in court expressed those views. She had her
3 arms crossed and was not looking directly at me during some of her
questioning. She appeared angry to be here and [it] did not appear that she
wished to be a juror in this case.

4 "She also answered in her questionnaire that she felt that African-Americans
5 and minorities are treated differently by the criminal justice system and they're
6 not treated fairly, which leads me cause to believe she may at some point feel
some sympathy towards the defendant given this position.

7 "I believe that's regarding No. 20.

8 ". . . [R]egarding Miss [V. M.], Juror No. 11, on her questionnaire, when asked
9 do you have any religious beliefs, moral feelings, or philosophical principles
10 that may interfere with your ability to sit in judgment of another person, she
checked the box yes and explained that she felt she can't be that sure that a
person is innocent or guilty.

11 "I felt based on her answers, both here an in court, that she would have
12 difficulty in making a decision. And I asked for her to be excused for the same
13 reasons that I had asked prior jurors to be excused based on their similar
14 answer that they did not feel that they could sit or be comfortable sitting in
15 judgment of another person.

16 "In addition, Miss [M.] disclosed that her son-in-law had been arrested for
17 selling marijuana in Oregon. She answered that she did not think that he was
18 treated fairly by the criminal justice system and she felt that the punishment did
19 not fit the crime. Based on that I did not feel that she would be able to fully put
20 aside the issue of penalty or punishment in this case because of her
21 son-in-law's case.

22 "Finally, she answered question No. 38 regarding her attitude in general
23 towards law enforcement officers: Sometimes they use too much force and too
24 much-they use too much force, and my impression was that they shoot in some
25 cases where it didn't seem necessary.

26 "In addition she said that if a person had made a false statement on a previous
27 occasion, she would automatically disregard anything else they had to say. She
28 said that they cannot be trusted to tell the truth if they're doing so under oath.

"As the Court's aware there is going to be a witness that testified under oath at
a preliminary hearing that gave testimony that was very different from what he
had initially said to the police, and I didn't think that she would be able to
fairly judge his testimony.

"Finally, she indicated that it was her belief that African-Americans and other
minorities are treated differently by the criminal justice system and that in
many cases that's because they don't have the resources to get the best lawyer.
And that led me to believe she may at some point develop some sympathy
towards [Petitioner] and not be able to put that aside."

1 The trial court accepted the prosecutors explanations and denied the motion
2 explaining its decision as follows: “All right. Then the Court is satisfied that
3 [the prosecutor] has given nonrace-based reasoning that was very sound for the
4 exclusion of these three potential jurors. So the motion, *Wheeler-Batson*
5 motion was denied.”

6 (Ans., Ex. G at 13–15.) The state appellate court found substantial evidence to support the
7 trial court’s denial of Petitioner’s motion, and rejected the claim. (*Id.* at 17–20.)

8 The Equal Protection Clause forbids the challenging of potential jurors solely on
9 account of their race. *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986). *Batson* permits
10 prompt rulings on objections to peremptory challenges pursuant to a three-step process.
11 First, the defendant must make out a prima facie case that the prosecutor has exercised
12 peremptory challenges on the basis of race “by showing that the totality of the relevant facts
13 gives rise to an inference of discriminatory purpose.” *Id.* at 93–94. Second, if the requisite
14 showing has been made, the burden shifts to the prosecutor to articulate a race-neutral
15 explanation for striking the jurors in question. *Id.* at 97; *Wade v. Terhune*, 202 F.3d 1190,
16 1195 (9th Cir. 2000). Finally, the trial court must determine whether the defendant
17 has carried his burden of proving purposeful discrimination. *Batson*, 476 U.S. at 98; *Wade*,
18 202 F.3d at 1195. A federal habeas court need not dwell on the first step of the *Batson*
19 analysis if the matter has proceeded to the second or third step. “Once a prosecutor has
20 offered a race-neutral explanation for the peremptory challenges and the trial court has ruled
21 on the ultimate question of intentional discrimination, the preliminary issue of whether the
22 defendant had made a prima facie showing becomes moot.” *Hernandez v. New York*, 500
23 U.S. 352, 359 (1991).

24 In evaluating an explanation of racial neutrality, proof of discriminatory intent or
25 purpose is required to show a violation of the Equal Protection Clause. *See Hernandez*, 500
26 U.S. at 355–62. Such a finding turns largely on the trial court’s evaluation of the
27 prosecutor’s credibility, *Rice v. Collins*, 546 U.S. 333, 340–42 (2006). To fulfill its duty, the
28 court must evaluate the prosecutor’s proffered reasons and credibility in light of the totality
of the relevant facts, using all the available tools including its own observations and the

1 assistance of counsel. *Mitleider v. Hall*, 391 F.3d 1039, 1047 (9th Cir. 2004). A legitimate
2 reason “is not a reason that makes sense, but a reason that does not deny equal protection.”
3 *Purkett v. Elem*, 514 U.S. 765, 769 (1995). What matters is the “*genuineness* of the motive”
4 behind the racially-neutral explanation, not “the *reasonableness* of the asserted nonracial
5 motive.” *Id.* “To accept a prosecutor’s stated nonracial reasons, the court need not agree
6 with them. The question is not whether the stated reason represents a sound strategic
7 judgment, but whether counsel’s race-neutral explanation for a peremptory challenge should
8 be believed.” *Gaston v. Curry*, 406 Fed.App’x. 144, 145 (9th Cir. 2010) (quoting *Kesser v.*
9 *Cambra*, 465 F.3d 351, 359 (9th Cir. 2006)).

10 AEDPA “imposes a highly deferential standard for evaluating state-court rulings” and
11 “demands that state-court decisions be given the benefit of the doubt.” *Felkner v. Jackson*,
12 131 S. Ct. 1305, 1307 (2011) (quoting *Renico v. Lett*, 130 S. Ct. 1855, 1862 (2010)). More
13 specifically, the findings of the state trial court on the issue of discriminatory intent are
14 findings of fact entitled to the presumption of correctness in federal habeas review, *see Elem*,
15 514 U.S. at 769, as are the findings of the state appellate court, *see Mitleider*, 391 F.3d at
16 1050; *Williams v. Rhoades*, 354 F.3d 1101, 1108 (9th Cir. 2004). Under AEDPA, this means
17 that a state court’s findings of discriminatory intent are presumed sound unless a Petitioner
18 rebuts the presumption by clear and convincing evidence. *Miller-El v. Dretke*, 545 U.S. 231,
19 240 (2005). “[W]e must defer to the [California Court of Appeal’s] conclusion that there was
20 no discrimination unless that finding was based on an unreasonable determination of the facts
21 in light of the evidence presented in the State court proceeding.” *Gaston*, 406 Fed. App’x at
22 144 (quoting *Cook v. LaMarque*, 593 F.3d 810, 816 (9th Cir. 2010)). A federal habeas court
23 may grant habeas relief only “if it was unreasonable to credit the prosecutor’s race-neutral
24 explanations for the *Batson* challenge.” *Rice*, 546 U.S. at 338–41.

25 Applying these legal principles to the instant matter, the Court concludes that
26 Petitioner has not rebutted the presumption that the state court’s conclusion was a reasonable
27 one. *See Miller-El*, 545 U.S. at 240. The Court need not dwell on the first step of the *Batson*
28

1 analysis, whether Petitioner made a prima facie case, because (a) the prosecutor offered
2 racially-neutral explanations for striking the jurors, and (b) the trial court ruled on the
3 ultimate question of intentional discrimination.

4 With respect to the second *Batson* step, the record does not support Petitioner’s
5 assertion that the prosecutor’s decision was based on constitutionally offensive
6 considerations. As the state appellate court found, the record supported the prosecutor’s
7 stated nondiscriminatory reasons for the peremptory challenges. As for V.M., she indicated
8 that (1) her religious beliefs might interfere with her ability to sit in judgment on another
9 person, a reason both the prosecutor and defense had used to excuse other possible jurors;
10 (2) she believed her brother-in-law was not treated fairly by the justice system; (3) she had
11 negative views about the police, who, she believed, often used excessive force; (4) she would
12 not believe a witness credible if he had lied on a prior occasion; and (5) she believed African-
13 Americans were not treated fairly in the justice system. Such statements gave the prosecutor
14 reason to believe that she would not be an “impartial, indifferent” juror. *Irvin v. Dowd*, 366
15 U.S. 717, 722 (1961) (internal quotation marks omitted).

16 As for J.H.P., (1) she indicated that she would disregard the testimony of a drug
17 dealer; (2) she believed the criminal justice system treated African-Americans differently,
18 (3) she had negative views about the police; and, (4) according to the prosecutor, her “body
19 language” and demeanor showed that that she was “angry” to be at court. Such statements,
20 which were similar to those given by V.M., gave the prosecutor reason to believe that J.H.P.
21 would not be an impartial juror.

22 As to the third *Batson* step which queries whether there was intentional
23 discrimination, Petitioner has not shown clear and convincing evidence to rebut the
24 presumption that the trial court’s determination was correct, or shown why this Court should
25 favor Petitioner’s interpretation of the record over the trial court’s credibility determination.

26 A comparative juror analysis, which was conducted by the state appellate court in its
27 review of Petitioner’s claims and which Petitioner urges this Court to engage in, further
28

1 supports this conclusion. The relevant facts are:

2 Next, [Petitioner] notes that many of the characteristics cited by the prosecutor
3 [] when explaining his challenge of V.M. were shared by other jurors who
4 actually served. For example, jurors 1, 6, and 7 also indicated they had
5 reservations about sitting in judgment of others. Juror 8 also had a relative who
6 had a negative experience with the criminal justice system. Jurors 1, 2, 4, 7,
7 and 10 also indicated they would disregard the statement of a witness who had
8 testified falsely on a prior occasion. Juror 9 also said he held negative views of
9 the police. Jurors 7 and 9 and alternate jurors 1 and 2 also said minorities were
10 treated differently by the criminal justice system. According to [Petitioner],
11 this “comparative juror analysis” plainly demonstrates that the prosecutor’s
12 challenge of V.M. was pretextual.

13 (Ans., Ex. G at 17–18.) The state appellate court rejected this claim because “none of the
14 seated jurors had the same combination of characteristics as V.M.” (*Id.* at 18.) For example:

15 [J]uror 1 [] stated in her questionnaire that “murder should be punished so the
16 society will be peaceful.” The prosecutor may well have believed that juror 1’s
17 belief that murder should be punished made her a desirable juror in a murder
18 case even though she had given other responses that could be viewed as
19 negative. Similarly, juror 7 shared three of the characteristics that the
20 prosecutor cited when excusing V.M. However, juror 7, also said he viewed
21 law enforcement officers positively and that he “appreciate[d] them doing that
22 kind of work.” Given the pivotal role that law enforcement personnel were to
23 play in this case, the prosecutor may well have concluded that juror 7’s
24 positives outweighed his negatives.

25 (*Id.* at 19.) Petitioner’s claim is without merit. The state appellate court’s decision was both
26 reasonable and amply supported. In sum, no other juror had the same combination of factors
27 that deterred the prosecutor from accepting V.M. as a juror. Accordingly, Petitioner’s claim
28 is DENIED.

29 **IV. Sentence**

30 Petitioner claims that his sentence of 25 years-to-life violated the Eighth Amendment
31 because no weapon was used and he did not hit the victim. Further, Roberts received a
32 sentence only 11 years.² The state appellate court determined that Petitioner had

33 ² Respondent asserts that this disparity in sentences was “solely due to petitioner’s own
34 choices.” (Ans., Ex. G at 22 n.5.) Accordingly to respondent, petitioner rejected a plea offer
35 that would have resulted in a “much shorter sentence” because he did not want to testify against
36 Roberts. Respondent also points out that the evidence was weaker against Roberts, who, unlike

1 procedurally defaulted his claim, and that the claim lacked merit. (Ans., Ex. G at 20–23.)

2 A criminal sentence that is not proportionate to the crime for which the defendant was
3 convicted violates the Eighth Amendment. *Solem v. Helm*, 463 U.S. 277, 303 (1983). Yet
4 “[o]utside the context of capital punishment, *successful* challenges to the proportionality of
5 particular sentences [are] exceedingly rare.” *Id.* at 289–90. Eighth Amendment
6 jurisprudence “gives legislatures broad discretion to fashion a sentence that fits within the
7 scope of the proportionality principle — the precise contours of which are unclear.” *Lockyer*
8 *v. Andrade*, 538 U.S. 63, 76 (2003) (internal quotations and citations omitted). “The Eighth
9 Amendment does not require strict proportionality between crime and sentence. Rather, it
10 forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” *Ewing v.*
11 *California*, 538 U.S. 11, 23 (2003) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001
12 (1991) (Kennedy, J ., concurring)). Where it cannot be said as a threshold matter that the
13 crime committed and the sentence imposed are grossly disproportionate, it is not appropriate
14 to engage in a comparative analysis of the sentence received by the defendant to those
15 received by other defendants for other crimes. *See United States v. Harris*, 154 F.3d 1082,
16 1084 (9th Cir. 1998).

17 In *Harmelin*, the Supreme Court upheld a life sentence without the possibility of
18 parole for an offender who had no prior felony convictions and whose sole conviction was
19 for possessing 672 grams of cocaine. 501 U.S. at 961, 995. In *Andrade*, the Supreme Court,
20 under the highly deferential AEDPA standard, upheld a sentence of two consecutive 25-year
21 terms for the nonviolent theft of \$150 worth of videotapes. 538 U.S. at 77.

22 Under these precedents, Petitioner has not stated a claim that is remediable under
23 federal habeas review. Petitioner was sentenced to 25 years-to-life for his participation in a
24 robbery that resulted in a killing. If, as in *Harmelin*, a *life* sentence for a *nonviolent*
25 drug possession conviction was found not to violate the Eighth Amendment, then Petitioner’s

26 _____
27 petitioner, did not confess to the crime. Because of this, Roberts received a favorable plea
28 bargain. (*Id.*)

1 sentence, which contains the possibility for parole, for his participation in a violent homicide
2 crime similarly will not rise to a violation of the Eighth Amendment. Petitioner's claim is
3 DENIED.

4 **V. Assistance of Counsel**

5 Petitioner claims that defense counsel rendered ineffective assistance by failing to
6 object to the length of his sentence. The state appellate court rejected this claim because
7 Petitioner's sentence did not violate the Eighth Amendment. (Ans., Ex. G at 23 n.5.)

8 This claim fails. Twenty-five years-to-life is the statutory term for first degree
9 murder. *See* Cal. Penal Code § 190(a). The trial court had no choice but to impose such a
10 sentence after the jury returned its verdict. Any objection by counsel would have been
11 meritless, and, presumably, denied. Because it is both reasonable and not prejudicial for
12 defense counsel to forgo a meritless objection, *see Juan H. v. Allen*, 408 F.3d 1262, 1273
13 (9th Cir. 2005), Petitioner's claim is DENIED.

14 **CONCLUSION**

15 The state court's adjudication of the claim did not result in a decision that was
16 contrary to, or involved an unreasonable application of, clearly established federal law, nor
17 did it result in a decision that was based on an unreasonable determination of the facts in
18 light of the evidence presented in the state court proceeding. Accordingly, the petition is
19 DENIED. A certificate of appealability will not issue. Reasonable jurists would not "find
20 the district court's assessment of the constitutional claims debatable or wrong." *Slack v.*
21 *McDaniel*, 529 U.S. 473, 484 (2000). Petitioner may seek a certificate of appealability from
22 the Court of Appeals. The Clerk shall enter judgment in favor of Respondents and close the
23 file.

24 **IT IS SO ORDERED.**

25 DATED: August 23, 2012


YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE