

1 *Legal Standard*

2 A state prisoner may not appeal the denial of a section 2254 habeas petition unless he
3 obtains a certificate of appealability from a district or circuit judge. 28 U.S.C. § 2253 (c)(1)(A);
4 *see also United States v. Asrar*, 116 F.3d 1268, 1269-70 (9th Cir. 1997) (holding that district
5 courts retain authority to issue certificates of appealability under AEDPA). In deciding whether
6 to grant a certificate of appealability, a court must either indicate the specific issues supporting a
7 certificate or state reasons why a certificate is not warranted. *See id.* at 1270. A certificate of
8 appealability is authorized “if the applicant has made a substantial showing of the denial of a
9 constitutional right.” 28 U.S.C. § 2253(c)(2). To meet this standard, Petitioner must show that:
10 (1) the issues are debatable among jurists of reason; (2) a court could resolve the issues in a
11 different manner; or (3) the questions are adequate to deserve encouragement to proceed further.
12 *Lambright v. Stewart*, 220 F.3d 1022, 1024-25 (9th Cir. 2000) (*citing Slack v. McDaniel*, 529
13 U.S. 473 (2000)); *Barefoot v. Estelle*, 463 U.S. 880 (1983). Petitioner does not have to show
14 “that he should prevail on the merits. He has already failed in that endeavor.” *Lambright*, 220
15 F.3d at 1025 (*citing Barefoot*, 463 U.S. at 893 n.4).

16 *Discussion*

17 Petitioner asks the Court to grant him a certificate of appealability on two issues: whether
18 the prosecutor offered a sufficient race-neutral reason for striking prospective juror Howard; and
19 whether the reasons given by the prosecutor were pretextual.

20 At the evidentiary hearing in this case, the prosecutor in Petitioner’s criminal trial gave
21 several reasons for striking prospective juror Howard, but she also testified that, prior to reading
22 the voir dire transcript, she had no independent recollection of Mr. Howard or her reasons for
23 dismissing him from the juror pool. (Evidentiary Hr’g Tr. at 27-28.) Moreover, she agreed that
24 her “ideas about why [she] might have stricken Mr. Howard . . . are based not the particularities
25 of this case, but sort of on [her] general voir dire approach . . . during the dozens of felony cases
26 that [she] tried.” (*Id.* at 28.) The Ninth Circuit has held that “where the state has *not* put
27 forward an actual reason, ‘such a failure, or in this case an assertion of bad memory, is evidence
28 of discrimination.’” *Paulino v. Harrison (Paulino II)*, 542 F.3d 692, 702 (9th Cir. 2008) (*citing*

1 *Yee v. Duncan*, 463 F.3d 893, 900 (9th Cir. 2006). In the same case, the Ninth Circuit declined
2 to decide whether a prosecutor’s testimony about her “general principles of jury selection” could
3 satisfy the state’s burden under *Batson*. *Id.* at 701, 701 n.10. As a result, reasonable jurists
4 could disagree about whether the prosecutor’s testimony at the evidentiary hearing in this case
5 was sufficient.

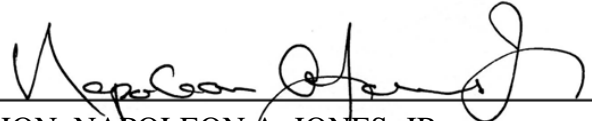
6 In its most recent order denying Petitioner a writ of habeas corpus, the Court found that
7 the race-neutral reasons offered by the prosecutor at the evidentiary hearing—Mr. Howard’s work
8 schedule, his exposure to publicity about the trial, and his knowledge of gangs—were not
9 pretextual. Petitioner argues that, with respect to the first two reasons, Mr. Howard was not very
10 different from many other jurors who have a work schedule that is not nine-to-five or who could
11 “avoid publicity by closing a paper or turning a tv channel.” In addition, the prosecutor
12 questioned Mr. Howard extensively about his knowledge of gangs but did not similarly question
13 a white juror who also likely had such knowledge. Although the Court found that the different
14 treatment was justified given the record, reasonable jurists could disagree about whether the
15 reasons given by the prosecutor were pretextual.

16 ***Conclusion***

17 Based on the foregoing, the Court **GRANTS** Petitioner’s request for a certificate of
18 appealability on the issues of whether the prosecutor gave a sufficient race-neutral reason for
19 striking prospective juror Howard, and whether the reasons given by the prosecutor were
20 pretextual.

21 **IT IS SO ORDERED.**

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23 DATED: March 20, 2009

24 
25 HON. NAPOLEON A. JONES, JR.
26 United States District Judge

27 cc: Magistrate Judge Stormes
28 All Counsel of Record