

1 evidentiary hearing. (Doc. # 43, 44-1).

2 On November 30, 2009, the Magistrate Judge issued a report and recommendation
3 recommending that the Petition be granted. (Doc. # 55). On February 18, 2010, this Court
4 adopted the report and recommendation in its entirety, except for two amendments requested
5 by Petitioner. (Doc. # 60). The Court ordered “that the Petition for Writ of Habeas Corpus
6 (Doc. # 1) will be **GRANTED**, unless the State of California grants Petitioner a new trial no
7 later than 180 days from the date of this Order.” (Doc. # 60 at 11).

8 On March 15, 2010, Respondent filed a Notice of Appeal to the Ninth Circuit. (Doc.
9 # 61).

10 On March 16, 2010, Petitioner filed the Motion for Certificate of Appealability with this
11 Court. (Doc. # 64).

12 DISCUSSION

13 A certificate of appealability may issue “only if the applicant has made a substantial
14 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). It must appear that
15 reasonable jurists could find the district court’s assessment of the petitioner’s constitutional
16 claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). The Ninth
17 Circuit has stated:

18 [T]he issuance of a [certificate of appealability] is not precluded where the
19 petitioner cannot meet the standard to obtain a writ of habeas corpus.... This
20 general principle reflects the fact that the [certificate of appealability]
21 requirement constitutes a gatekeeping mechanism that prevents [an appellate
22 court] from devoting judicial resources on frivolous issues while at the same
23 time affording habeas petitioners an opportunity to persuade [the appellate court]
24 . . . of the potential merit of issues that may appear, at first glance, to lack merit.

22 *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (citing, *inter alia*, *Jefferson v.*
23 *Welborn*, 222 F.3d 286, 289 (7th Cir. 2000) (a certificate of appealability should issue unless
24 the claims are “utterly without merit”)). “Upon the filing of a notice of appeal and a request
25 for a certificate of appealability, the district court shall indicate which specific issue or issues
26 satisfy the standard for issuing a certificate, or state its reasons why a certificate should not be
27 granted.” *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997) (citing 28 U.S.C. §
28 2253(c)(3)).

1 The Court finds that Petitioner raised colorable, nonfrivolous, constitutional arguments
2 with respect to whether the following rulings cumulatively denied Petitioner due process of
3 law in fairly presenting and arguing the merits of his *Batson* claim:

4 1. The failure to treat the expansive definition of “teacher” to include teacher’s
5 aides as mandatory.

6 2. The failure to admit the transcript of the prosecutor’s pre-hearing interview
7 under Habeas Rule 7.


8 3. Assigning little weight to Petitioner’s argument that the prosecutor
9 misrepresented to the trial judge the consistency of his strikes against social
10 workers.

11 4. Assigning little weight to Petitioner’s argument that the fact that the first
12 strike was against the only African-American is highly pertinent evidence of
13 pretext.

14 CONCLUSION

15 **IT IS HEREBY ORDERED** that Petitioner’s Application for a Certificate of
16 Appealability is **GRANTED**. (Doc. # 64).

17 DATED: March 18, 2010

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19 **WILLIAM Q. HAYES**
20 United States District Judge
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