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**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

KIRK SAINTCALLE,

Petitioner,

v.

JEFFREY UTTECHT,

Respondent,

Case No. C15-0156-BJR-MAT

ORDER ADOPTING REPORT AND
RECOMMENDATION.

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I. INTRODUCTION

Before the Court is the Report and Recommendation (“R&R”) of Magistrate Judge Mary Alice Theiler (ECF No. 31), which recommends that Petitioner’s habeas petition (ECF No. 23) be DENIED, a certificate of appealability (“COA”) be GRANTED, and Petitioner’s action be dismissed with prejudice. After reviewing the R&R, Petitioner’s Objections, Respondent’s Response to Petitioner’s Objections, and the record, the Court ADOPTS Magistrate Judge Theiler’s R&R.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Kirk Saintcalle (“Petitioner”) filed an amended petition for writ of habeas corpus under 28 U.S.C. § 2254. (ECF No. 23.) Petitioner, an African-American man, challenges his state court convictions on the grounds that, under *Batson v. Kentucky*, 476 U.S. 79 (1986), the peremptory strike of the only African-American venire member violated his Fourteenth Amendment right to equal protection. *See State v. Saintcalle*, 178 Wash. 2d 34, 35 (2013).

On October 16, 2009, Petitioner was sentenced to 579 months in prison after being

1 convicted of one count of first degree felony murder and three counts of second degree assault.
2 (ECF No. 23.) “[He] was accused of entering an apartment in the city of Auburn with two
3 companions, holding three people at gunpoint, and shooting and killing Anthony Johnson.”
4 *Saintcalle*, 178 Wash. 2d at 36. On direct appeal, the Washington Supreme Court provided the
5 following summary of facts relevant to Petitioner’s *Batson* claim:

6 ¶5 During jury selection at Saintcalle’s trial, the prosecution used a peremptory
7 challenge to strike the only black juror in the venire, juror 34, Anna Tolson. This
8 challenge came after the prosecution questioned juror 34 extensively during voir
9 dire—far more extensively than any other juror. Indeed, most of the prosecution’s
10 interactions with jurors were quite brief, usually consisting of only a few short
11 questions, but not the interaction with juror 34. The State began questioning juror
12 34 after another juror made a comment about race:

13 [JUROR 72]: I feel there are some areas of unfairness in our system.
14 I am aware, for example, that a jury of their peers [sic], yet as you
15 look around this panel, all of the faces are white.

16 [JUROR 34]: No, not quite.

17 (Laughter.)

18 [PROSECUTOR]: You know what, you kind of bring a very
19 important topic to light. If you were seated here in this chair and you
20 looked out at this panel, would you have any concern about whether
21 or not people are going to be able to relate to you or listen to you or
22 feel for you? Juror number—What is your number? Juror number
23 34, I am going to ask you a little bit about your background. You
24 work at the YMCA?

25 [JUROR 34]: I work in a middle school.

[PROSECUTOR]: So tell me how that works. So you are a
counselor?

[PROSECUTOR]: Which means you see a whole lot.

[JUROR 34]: Yes.

[PROSECUTOR]: And where do you work? What school do you
work in?

1 [JUROR 34]: Do I really need to say that?

2 [PROSECUTOR]: How about you just tell me the city. Is it an inner
3 city school?

4 [JUROR 34]: Yes.

5 [PROSECUTOR]: You see a whole lot?

6 [JUROR 34]: Yes.

7 [PROSECUTOR]: I am interested to hear from you—I mean, do you
8 have impressions about the criminal justice system?

9 [JUROR 34]: Yes.

10 [PROSECUTOR]: You are not going to hurt my feelings if you talk
11 about them a little bit. What are your thoughts?

12 [JUROR 34]: Gosh, I feel like I am on the spot here.

13 But being a person of color, I have a lot of thoughts about the
14 criminal system. I see—I have seen firsthand—and a couple people
15 have already mentioned that if you have money, you tend to seem to
16 work the system and get over. And regardless if you are innocent or
17 guilty, if you want to be innocent, your money says you are innocent.

18 And a person of color, even if you do have an affluent lawyer who
19 has the background, the finance to get you off, because you are a
20 person of color, a lot of times you are not going to get that same kind
21 of opportunities.

22 And especially with this person being a person of color and being a
23 male, I am concerned about, you know, the different stereotypes.
24 Even if we haven't heard anything about this case, we watch the
25 news every night. We see how people of color, especially young
men, are portrayed in the news. We never hardly ever see anyone of
color doing something positive, doing something good in their
community.

So kind of like what the person behind me is saying, since most of
the people in this room are white, I am wondering what's running
through their mind as they see this young man sitting up here.

[PROSECUTOR]: Right. How about for you, do you think—I mean,
you've got a whole lot that you are feeling as you sit here and that

1 you are going to be asked to sit in judgment of somebody. How do
2 you think you are going to be able to handle that?

3 [JUROR 34]: I think number one, because I am a Christian, I know
4 I can listen to the facts and, you know, follow the judge's instruction.
5 But also it's kind of hard, and I haven't mentioned this before
6 because none of those questions have come up for me to answer, but
7 I lost a friend two weeks ago to a murder, so it's kind of difficult
8 sitting here. Even though I don't know the facts of this particular
9 case, and I would like to think that I can be fair because I am a
10 Christian, I did lose someone two weeks ago.

11 [PROSECUTOR]: Was that in Seattle?

12 [JUROR 34]: Yes.

13 [PROSECUTOR]: Was that [the] Tyrone case?

14 [JUROR 34]: Yes.

15 Report of Proceedings (RP) (Mar. 9, 2009) at 65–68. After a stretch break, the
16 prosecutor resumed questioning juror 34:

17 [PROSECUTOR]: Juror number 34, I am going to move on to the
18 group, but I wanted to close the loop with you. You have a lot that
19 is going through your mind currently both that would give you a lot
20 of empathy for someone who is charged with a crime and also
21 empathy for someone who may be a victim of a crime. In that way,
22 you may be representative of the perfect juror.

23 At the same time, we don't put people in a position where it's going
24 to cause them a lot of emotional pain. At this point do you think you
25 could sit in this case and listen to the facts and make a decision based
solely on the evidence presented in trial here and be fair to both
sides?

[JUROR 34]: I'd like to think that I could be, but kind of what you
just mentioned just with the freshness and the rawness of the death
of a friend, I am wondering if that would kind of go through my
mind. I like to think that I am fair and can listen, be impartial, but I
don't know. I have never been on a murder trial and have just lost a
friend two weeks prior to a murder.

[PROSECUTOR]: What I am going to do, I am going to ask
questions. I am going to kind of move on to the rest of the group so
that you have time to think, and then we'll come back and ask you

1 maybe tomorrow to make your final decision about whether or not
2 you think you can be fair. I am sorry for your loss.

3 *Id.* at 69–70. The next day, a different deputy prosecuting attorney followed up with
4 juror 34:

5 [PROSECUTOR]: Go back to [a] couple [of] people juror number
6 34 sorry [to] focus on you again after yesterday but I just want to try
7 and go back [and] touch base with you. I know[] you mentioned
8 yesterday that you had some recent events in your life that may make
9 it difficult for you to serve as jurors [sic] in [this case]. Have you
10 done anymore thinking about that? How are you feeling today?

11 [JUROR 34]: Yes. I thought about it last night as well as this
12 morning. And, you know, my thought is I don't want to be a part of
13 this jury because of the situations, and the circumstances that I just
14 went through. But I'm thinking if ever I was put in a situation where
15 I needed twelve people who could be honest and look through all
16 the facts or I guess I'm saying who could be like me I would want
17 me. So sometimes you have to do things that you don't want to do.

18 [PROSECUTOR]: I guess my only concern is do you feel like
19 maybe some of the emotions that dredge up could cloud your
20 judgment at all on either side. Either you know against the
21 defendant, against the State or I'm just concerned about that
22 particular issue?

23 [Court inquires whether juror 34 would like to answer the question
24 in private, but juror 34 declines.]

25 [PROSECUTOR]: So is that something you can set aside or worried
at all about the emotions kind of clouding in? I mean, it's just so new
in terms of your life?

[JUROR 34]: I mean, I have never been in this situation where I
have lost someone. You just went to the funeral. He is young. Only
24. And to be called to jury duty to perhaps be on a jury of a murder
suspect. I don't know how I'm going to react. You know, I don't
know. I'm—I'm not an emotional person, but I'm thinking as we go
through it, and I hear the testimony, and I see the pictures, I don't
know. I mean, I'm just being honest. I don't know how I'm going to
feel.

RP (Mar. 10, 2009) at 41–43.

1 ¶ 6 After this exchange, the prosecution challenged juror 34 for cause. The judge
2 denied the challenge, and the prosecution announced its intent to exercise a
peremptory strike. At that point, Saintcalle raised a *Batson* challenge.

3 ¶ 7 As required by *Batson*, the judge first found that Saintcalle had made a prima
4 facie showing of purposeful discrimination. Next, the prosecution presented race-
5 neutral reasons for striking juror 34: the reasons were (1) juror 34's "inattention"
6 during voir dire and (2) the recent death of juror 34's friend. *Id.* at 101–02. The
prosecutor claimed to have spent "a lot of time watching juror 34" and asserted that
juror 34 was "very checked out." *Id.* at 101.

7 ¶ 8 The judge denied the *Batson* challenge, stating on the record that he accepted
8 the recent death of juror 34's friend as a proper race-neutral reason for the strike.
9 Near the end of jury selection, the prosecution peremptorily struck juror 34,
excusing her from the jury.

10 ¶ 9 The prosecution also attempted to exercise a peremptory against the sole
11 Mexican–American juror in the venire, juror 10, but the judge sustained Saintcalle's
12 *Batson* challenge to that strike, rejecting each of the prosecutor's proffered reasons
as pretextual. *Id.* at 119–20.

13 ¶ 10 After Saintcalle was convicted, he appealed, alleging that the peremptory strike
14 of juror 34 (Ms. Tolson) violated the Fourteenth Amendment's guaranty of equal
15 protection. The Court of Appeals rejected his argument finding there was no
16 purposeful discrimination and accepting the State's race-neutral explanation. *State*
v. Saintcalle, noted at 162 Wash.App. 1028, 2011 WL 2520000 (2011). We granted
review only on the *Batson* issue. *State v. Saintcalle*, 172 Wash. 2d 1020, 268 P.3d
224 (2011).

17 *Saintcalle*, 178 Wash. 2d at 36-41 (alteration in original).

18 The Washington Supreme Court affirmed Petitioner's conviction, stating that "the trial
19 court's finding that there was no purposeful discrimination here [was] not clearly erroneous." *Id.*
20 at 35. The court argued that *Batson* protections need to be strengthened, but it ultimately found
21 that *Batson* was not violated, reasoning:
22

23 Ms. Tolson said she might have trouble sitting on the jury of a murder trial because
24 someone she knew had recently been murdered.

25 . . .

In light of Ms. Tolson's statements throughout voir dire, we defer to the trial court's
factual finding that the prosecutor was justified in believing there was a realistic

1 possibility that she might have been “lost” as a juror before the end of the case. The
2 record does not compel a contrary conclusion. The trial court observed the juror
3 and agreed that she was having difficulties. Losing jurors during a lengthy trial is
4 always a possibility, and justice is not served when a mistrial is declared or a juror
5 is unable to view and process the evidence. Here, it was entirely reasonable for the
6 court to conclude that the prosecutor’s concerns were legitimate and race-neutral,
7 and there was no clear error. We affirm the trial court’s finding that there was no
8 purposeful discrimination.

9 ¶ 48 We do, however, acknowledge that Ms. Tolson was questioned far more than
10 any other juror, perhaps in part because she was black. This conclusion is supported
11 by a statistical analysis of the prosecution’s voir dire that appears in Appendix A,
12 attached to this opinion. [footnote omitted] These statistics are rather striking, and
13 in general, disparate questioning of minority jurors can provide evidence of
14 discriminatory purpose because it can suggest that an attorney is “fishing” for a
15 race-neutral reason to exercise a strike. *See Miller-El*, 545 U.S. at 241, 125 S. Ct.
16 2317; *Reed v. Quarterman*, 555 F.3d 364, 379 (5th Cir. 2009). However, disparate
17 questioning does not itself prove purposeful discrimination. In some cases, there
18 may be good reasons to question minority jurors more than nonminority jurors.
19 Here, for example, the prosecutor began by eliciting Ms. Tolson’s views on race in
20 the criminal justice system and later spoke with her regarding the recent death of
21 her friend. These were legitimate topics to explore. [footnote omitted] We defer to
22 the trial court that the disparate questioning in this case, while it may have been
23 motivated in part by race, did not necessarily amount to purposeful discrimination.

24 ¶ 49 We also acknowledge that the prosecution attempted to strike the only
25 Mexican-American juror in the venire, juror 10. RP (Mar. 10, 2009) at 119-20. And
while it is true that a court’s finding of discrimination against one juror is evidence
of discrimination against others, it does not follow that one *Batson* violation
necessarily implies another. *Snyder*, 552 U.S. at 478, 128 S. Ct. 1203.

¶ 50 Under *Batson*, we defer to the trial court’s ruling.

Id. at 56-57. The Washington Supreme Court’s decision included three concurrences and one
dissenting opinion, in which Justice Chambers stated that he was “not convinced that Kirk
Saintcalle received a fair trial before a truly representative jury.” *Id.* at 119.

Petitioner filed his amended petition for writ of habeas corpus on June 23, 2017. (ECF No.
23.) On October 12, 2017 Magistrate Judge Theiler issued the instant R&R recommending that
24 this Court deny Petitioner’s habeas petition, grant Petitioner a COA, and dismiss Petitioner’s action
25 with prejudice. (ECF No. 31.) Petitioner filed timely objections, and Respondent filed a timely

1 response to Petitioner’s objections. (ECF Nos. 32, 33.)

2 **III. STANDARDS OF REVIEW**

3 **A. Report and Recommendation**

4 When a party objects to an R&R, the district court must review *de novo* those portions of
5 the R&R to which objection is made. Fed. R. Civ. P. 72(b)(3); *see Communications Capital Group*
6 *LTD. v. Tabb Assocs.*, No. 89-15043, 1990 WL 90311 at *3 (9th Cir. June 27, 1990) (citing *United*
7 *States v. Raddatz*, 447 U.S. 667, 675 (1980); *North Amer. Watch v. Princess Ermine Jewels*, 786
8 F.2d 1447 (9th Cir.1986)). The district court may accept, reject, or modify, in whole or in part,
9 the findings and recommendations made by the Magistrate Judge. 28 U.S.C. § 636 (b)(1)(C); *see*
10 *Communications Capital Group LTD. v. Tabb Assocs.*, No. 89-15043, 1990 WL 90311 at *3 (9th
11 Cir. June 27, 1990) (citing *United States v. Raddatz*, 447 U.S. 667, 675 (1980); *North Amer. Watch*
12 *v. Princess Ermine Jewels*, 786 F.2d 1447 (9th Cir.1986)).

14 **B. Habeas Corpus Petition**

15 The Anti-Terrorism and Effective Death Penalty Act (“AEDPA”) “bars relitigation of any
16 claim ‘adjudicated on the merits’ in state court,” *Harrington v. Richter*, 562 U.S. 86 (2011), “unless
17 the adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an
18 unreasonable application of, clearly established Federal law, as determined by the Supreme Court
19 of the United States; or (2) resulted in a decision that was based on an unreasonable determination
20 of the facts in light of the evidence presented in the State court proceeding,” 28 U.S.C.
21 § 2254(d)(1)-(2). For the purposes of the AEDPA, clearly established federal law means “the
22 governing legal principle or principles set forth by the Supreme Court at the time the state court
23 renders its decision,” *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003), and includes only the
24 Supreme Court’s holdings, not its dicta, *id.* (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)
25

1 (Justice O'Connor's opinion)).

2 The AEDPA creates a standard that is "difficult to meet." *Cullen v. Pinholster*, 563 U.S.
3 170, 181 (2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)). While it does not
4 "complete[ly] bar federal-court relitigation of claims already rejected in state proceedings,"
5 *Harrington*, 562 U.S. at 102 (citing *Felker v. Turpin*, 518 U.S. 651, 644 (1996)), it limits relief to
6 those cases where "the state court's ruling [...] was so lacking in justification that there was an
7 error well understood and comprehended in existing law beyond any possibility for fairminded
8 disagreement," *id.* at 103. The AEDPA's high standard "reflects the view that habeas corpus is a
9 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for
10 ordinary error correction through appeal." *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 332,
11 n.5 (1979) (Stevens, J. concurring)).

13 When considering a petition for habeas corpus brought pursuant to 28 U.S.C. § 2254(d),
14 the federal court's review "is limited to the record that was before the state court that adjudicated
15 the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011). The federal court
16 must also give the "benefit of the doubt" to state court decisions, and the burden of proof lies with
17 the petitioner. *Id.* at 181 (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) (per curiam)
18 (citation and internal quotation marks omitted)). "When more than one state court has adjudicated
19 a claim, [the federal court] analyze[s] the last reasoned decision." *Barker v. Fleming*, 423 F.3d
20 1085, 1091-92 (9th Cir. 2005) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991)).

22 To grant a writ of habeas corpus under 28 U.S.C. § 2254(d)(1), the state court's decision
23 must meet either the requirements of the AEDPA's "contrary to" clause or the requirements of its
24 "unreasonable application" clause.
25

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of

1 law or if the state court decides a case differently than this Court has on a set of
2 materially indistinguishable facts. Under the “unreasonable application” clause, a
3 federal habeas court may grant the writ if the state court identifies the correct
governing legal principle from this Court's decisions but unreasonably applies that
principle to the facts of the prisoner’s case.

4 *Williams v. Taylor*, 529 U.S. at 412–13 (Justice O’Connor’s opinion). In its analysis, “a habeas
5 court must determine “whether it is possible fairminded jurists could disagree that [the state
6 court’s] arguments or theories are inconsistent with [clearly established federal law].” *Harrington*
7 *v. Richter*, 562 U.S. 86, 102 (2011). “A state court’s determination that a claim lacks merit
8 precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of
9 the state court’s decision.” *Id.* at 101 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).
10 Further, to qualify as an “unreasonable application,” the state court’s application of clearly
11 established law must be “objectively unreasonable.” *Lockyer v. Andrade*, 538 U.S. 63, 69 (2003)
12 (citing *Williams v. Taylor*, 529 U.S. at 409 (Justice O’Connor’s opinion)).

14 Separately, a habeas court may grant the writ under 28 U.S.C. § 2254(d)(2) if the state
15 court’s decision “was based on an unreasonable determination of the facts in light of the evidence
16 presented in the State court proceeding.” A habeas court may not “substitute[] its evaluation of
17 the record for that of the state trial court,” nor “use a set of debatable inferences to set aside the
18 conclusion reached by the state court.” *Rice v. Collins*, 546 U.S. 333, 337-38, 342 (2006). In the
19 *Batson* context, to grant relief under 28 U.S.C. § 2254(d)(2) a court must demonstrate that the trial
20 court acted unreasonably when it credited the prosecutor’s race-neutral explanation. *See id.* at 338.
21 “[A] decision adjudicated on the merits in a state court and based on a factual determination will
22 not be overturned on factual grounds unless objectively unreasonable in light of the evidence
23 presented in the state-court proceeding.” *Miller-El v. Cockrell*, 537 U.S. 322, 324 (2003) (citing
24 28 U.S.C. § 2254(d)(2)).
25

1 Finally, “in a proceeding instituted by an application for a writ of habeas corpus by a person
2 in custody pursuant to the judgment of a State court,” 28 U.S.C. § 2254(e)(1) requires “a
3 determination of a factual issue made by a State court shall be presumed to be correct,” and the
4 petitioner “shall have the burden of rebutting the presumption of correctness by clear and
5 convincing evidence.” *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (quoting 28 U.S.C.
6 § 2554(e)(1)).

7 Sections 2554(d)(2) and 2554(e)(1) of the AEDPA have at times been read together,
8 requiring federal habeas courts to “presume the [state] court’s factual findings to be sound unless
9 [the petitioner] rebuts the ‘presumption of correctness by clear and convincing evidence.’” *Miller-*
10 *El v. Dretke*, 545 U.S. 231, 240 (2005) (quoting 28 U.S.C. § 2254(e)(1)); *see Miller-El v. Cockrell*,
11 537 U.S. 322, 340 (2003) (citing 28 U.S.C. § 2254(e)(1); 28 U.S.C. § 2254(d)(2); *Williams v.*
12 *Taylor*, 529 U.S. at 399 (2000) (Justice O’Connor’s opinion)) (“Where 28 U.S.C. § 2254 applies,
13 ... [f]actual determinations by state courts are presumed correct absent clear and convincing
14 evidence to the contrary.”); *Hernandez v. New York*, 500 U.S. 352, 366 (1991) (plurality opinion).

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16
17 However, the Supreme Court and the Ninth Circuit have questioned the relationship
18 between (e)(1) and (d)(2). In *Wood v. Allen*, the Supreme Court granted certiorari to resolve
19 “whether, in order to satisfy § 2254(d)(2), a petitioner must establish only that the state court
20 factual determination on which the decision was based was ‘unreasonable,’ or whether
21 § 2254(e)(1) additionally requires a petitioner to rebut a presumption that the determination was
22 correct with clear and convincing evidence.” 558 U.S. 290, 299 (2010). The Supreme Court noted
23 that the question “has divided the Courts of Appeals”:

24
25 *See, e.g., ... Taylor v. Maddox*, 366 F.3d 992, 999–1000 (9th Cir. 2004), *cert. denied*, 543 U.S. 1038 (2004) (where a habeas petitioner challenges state-court factual findings “based entirely on the state record,” the federal court reviews those findings for reasonableness only under § 2254(d)(2), but where a petitioner

1 challenges such findings based in part on evidence that is extrinsic to the state-court
2 record, § 2254(e)(1) applies); *Lambert v. Blackwell*, 387 F.3d 210, 235 (3rd Cir.
3 2004) (“§ 2254(d)(2)'s reasonableness determination turns on a consideration of the
4 totality of the ‘evidence presented in the state-court proceeding,’ while § 2254(e)(1)
5 contemplates a challenge to the state court's individual factual determinations,
6 including a challenge based wholly or in part on evidence outside the state trial
7 record”); *Trussell v. Bowersox*, 447 F.3d 588, 591 (8th Cir. 2006) (federal habeas
8 relief is available only “if the state court made ‘an unreasonable determination of
9 the facts in light of the evidence presented in the State court proceeding,’ 28 U.S.C.
10 § 2254(d)(2), which requires clear and convincing evidence that the state court's
11 presumptively correct factual finding lacks evidentiary support”), *cert. denied*, 549
12 U.S. 1034 (2006); *Ben-Yisrayl v. Buss*, 540 F.3d 542, 549 (7th Cir. 2008)
13 (§ 2254(d)(2) can be satisfied by showing, under § 2254(e)(1), that a state-court
14 decision “rests upon a determination of fact that lies against the clear weight of the
15 evidence” because such a decision “is, by definition, a decision so inadequately
16 supported by the record as to be arbitrary and therefore objectively unreasonable”
17 (internal quotation marks omitted)).

18 *Id.* at 299 n.1.

19 Ultimately, the Supreme Court determined that “the reasonableness of the state court’s
20 factual determination in [*Wood v. Allen*] [did] not turn on any interpretative difference regarding
21 the relationship between [the] provisions,” declined to resolve the issue, and assumed “for the sake
22 of argument” that § 2254(e)(1) did not apply. 558 U.S. 290, 300 (2010). In 2014, the Ninth Circuit
23 recognized that this question remains unsolved. *Murray v. Schriro*, 745 F.3d 984, 1001 (9th Cir.
24 2014) (“We believe any tension between [*Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004)] and
25 our cases or between *Taylor* and limited statements by the Supreme Court will have to be resolved
by our court en banc, or by the Supreme Court.”). While the facts of this case approach the
undetermined space between the two standards, the Court ultimately need not choose between
them because it holds that the state court ruling can be affirmed under either standard.

IV. DISCUSSION

A. *Batson* Standard

“The Equal Protection Clause guarantees the defendant that the State will not exclude

1 members of his race from the jury venire on account of race....” *Batson*, 476 U.S. at 86 (citing
2 *Strauder v. West Virginia*, 100 U.S. 303, 305 (1880)). The prosecutor is also forbidden to exclude
3 members of the defendant’s race based on the “false assumption that members of his race as a
4 group are not qualified to serve as jurors.” *Batson*, 476 U.S. at 86 (citing *Norris v. Alabama*, 294
5 U.S. 587, 599 (1935)). When analyzing a *Batson* claim, a trial court must conduct a “three-step
6 inquiry.” *Rice v. Collins*, 546 U.S. 333, 338 (2006).

7
8 First “the trial court must determine whether the defendant has made a prima facie showing
9 that the prosecutor exercised a peremptory strike on the basis of race.” *Id.* (citing *Batson*, 476 U.S.
10 at 96-97). Next, if a prima facie case has been established, the trial court must determine whether
11 the prosecutor has successfully “present[ed] a race-neutral explanation for striking the juror in
12 question.” *Id.* (citing *Batson*, 476 U.S. at 97-98). At this second stage, the prosecutor’s
13 explanation need not be “persuasive, or even plausible.” *Id.* (quoting *Purkett v. Elem*, 514 U.S.
14 765, 767-68 (1995) (per curiam)). “So long as the reason is not inherently discriminatory, it
15 suffices.” *Id.* At the third stage of the *Batson* analysis, however, a trial court must consider the
16 “persuasiveness of the [prosecutor’s] justification,” and the prosecutor’s credibility, in order to
17 “determine whether the defendant has carried his burden of proving purposeful discrimination.”
18 *Rice v. Collins*, 546 U.S. at 338-39 (first quoting *Purkett*, 514 U.S. at 768 (per curiam); then
19 quoting *Batson*, 476 U.S. at 98). In reaching its determination, it “may rely on ‘all relevant
20 circumstances,’” *Miller-El v. Dretke*, 545 U.S. at 240-41, 261 (quoting *Batson*, 476 U.S. at 96-97),
21 and “must evaluate not only whether the prosecutor’s demeanor belies a discriminatory intent, but
22 also whether the juror’s demeanor can credibly be said to have exhibited the basis for the strike
23 attributed to the juror by the prosecutor,” *Snyder v. Louisiana*, 552 U.S. 472 (2008).
24
25

When examining a trial court’s determination during the third and final stage of its *Batson*

1 analysis “[o]n appeal, a trial court’s ruling on the issue of discriminatory intent must be sustained
2 unless it is clearly erroneous.” *Snyder v. Louisiana*, 552 U.S. at 477 (citing *Hernandez v. New*
3 *York*, 500 U.S. 352, 369 (1991) (plurality opinion)). Further, when considering the credibility and
4 demeanor of jurors and prosecutors, “in the absence of exceptional circumstances” the trial court
5 should receive deference. *Snyder v. Louisiana*, 552 U.S. at 477 (quoting *Hernandez*, 500 U.S. 366
6 (plurality opinion)). This is, in part, because the prosecutor’s “race-neutral reasons for peremptory
7 challenges often invoke a juror’s demeanor (*e.g.*, nervousness, inattention), making the trial court’s
8 firsthand observations of even greater importance.” *Id.*

9
10 In the instant case, all parties agree that Petitioner successfully stated a prima facie case
11 that juror 34 was struck on the basis of race. They also agree that the prosecutor’s proffered excuse
12 for this strike was race-neutral on its face. The issues remaining are whether the Washington
13 Supreme Court identified and applied the correct *Batson* standard as required by 28 U.S.C.
14 § 2554(d)(1), and whether it made a reasonable determination of the facts as required by 28 U.S.C.
15 § 2554(d)(2).
16

17 **B. The state court decision was not contrary to clearly established federal law.**

18 Petitioner argues that the state court required him to show that racism, as opposed to
19 purposeful discrimination, was the reason for the preemptive strike of juror 34. In requiring
20 this, he argues, it imposed a higher burden than that imposed by the Supreme Court’s *Batson*
21 standard. As support for his argument he points to the state court’s opinion:
22

23 The main problem is that *Batson*’s third step requires a finding of “purposeful
24 discrimination,” which trial courts may often interpret to require conscious
25 discrimination. This is problematic because discrimination is often unconscious. A
requirement of conscious discrimination is especially disconcerting because it
seemingly requires judges to accuse attorneys of deceit and racism in order to
sustain a *Batson* challenge. See Robin Charlow, *Tolerating Deception and*
Discrimination After Batson, 50 Stan. L. Rev. 9, 11 (1997) (noting that one judge

1 “had the uncomfortable feeling that she had just rendered an official ruling that the
2 attorney was lying to the court”). Imagine how difficult it must be for a judge to
3 look a member of the bar in the eye and level an accusation of deceit or racism.
4 [footnote omitted]

5 *Saintcalle*, 178 Wash. 2d at 53.

6 In analyzing Petitioner’s challenge, the R&R first notes that the Supreme Court has not
7 defined “purposeful discrimination” in this context, and so it cannot be contrary to clearly
8 established federal law to state that the standard requires a showing of racism. (*See* ECF No. 31
9 at 14 (quoting ECF No. 23 at 16).) This is in keeping with Supreme Court precedent stating that
10 “it is not an unreasonable application of clearly established Federal law for a state court to decline
11 to apply a specific legal rule that has not been squarely established by this Court.” *Id.* at 101
12 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) (internal quotation marks omitted)).
13 Petitioner takes issue with this reasoning, arguing that a term used by the Supreme Court should
14 be presumed to have its plain meaning, and the plain meaning of racism when compared to the
15 plain meaning of purposeful discrimination clearly reveals that it would be “much more
16 burdensome” for a defendant to prove racism. (ECF No. 32 at 15.)

17 The R&R also reasons that the Washington Supreme Court’s statement about “deceit and
18 racism” was meant to inform a larger discussion focusing on the treatment of conscious versus
19 unconscious bias in the *Batson* context. The R&R points out that, although the state court
20 examined this issue at length, it ultimately determined that the facts of Petitioner’s case would not
21 “compel a finding of purposeful discrimination,” whether the “purposeful discrimination” required
22 by *Batson* encompassed unconscious bias or not. (ECF No. 31 at 14 (citing *Saintcalle*, 178 Wash.
23 2d at 53 n.8).) The R&R also states that any discussion of a “crippling burden” potentially created
24 by *Batson* was used in support of the state court’s conclusion that *Batson* protections should be
25 strengthened, rather than in application to the facts of Petitioner’s case. Petitioner argues that this

1 conclusion is irrelevant, because the Washington Supreme Court identified the lower courts'
2 “profound misunderstanding” of *Batson* (that it seems to require judges to accuse attorneys of
3 deceit and racism) and, instead of dispelling it, embraced it. (ECF No. 32 at 6.)

4 The AEDPA does not require that state courts refrain from discussing misunderstandings
5 of clearly established federal law or critiquing it. The “contrary to” clause states only that federal
6 courts “may grant the writ [of habeas corpus] if the state court arrives at a conclusion opposite that
7 reached by [the Supreme Court] on a question of law or if the state court decides a case differently
8 than [the Supreme Court] has on a set of materially indistinguishable facts.” 28 U.S.C.
9 § 2254(d)(1). Petitioner offers no case with “materially indistinguishable facts” and so he must
10 demonstrate that the state court arrived at a conclusion opposite to that reached by the Supreme
11 Court on a question of law.
12

13 The Washington Supreme Court explored the context surrounding *Batson* in depth. It
14 lamented that if trial courts interpret *Batson*’s standard of “purposeful discrimination” as requiring
15 “conscious discrimination,” that would be “disconcerting because [a requirement of conscious
16 discrimination] seemingly requires judges to accuse attorneys of deceit and racism.” *Saintcalle*,
17 178 Wash. 2d at 53. However, footnote 8 in the same paragraph made it clear that the Washington
18 Supreme Court was not necessarily subscribing to this interpretation; it stated, “it could be argued
19 (although none of the parties make this argument) that ‘purposeful discrimination’ already
20 encompasses unconscious bias.” *Id.* at 53 n.8. The state court opinion also proposed ideas for
21 new requirements that could replace *Batson*. These discussions were of an academic nature,
22 examining shortcomings of, possible interpretations of, and alternatives to *Batson*. They do not
23 appear to be an identification of the principle that was to be applied.
24
25

Further, the *Batson* standard was not “unreasonably applied” to Petitioner’s case. As stated

1 in the R&R:

2 The [state] court correctly explained three elements of the “purposeful
3 discrimination” analysis that have been articulated by the Supreme Court:
4 comparative juror analysis, which “entails examining whether the proffered race-
5 neutral explanation could apply just as well to a nonminority juror who was allowed
6 to serve”; disparate questioning of minority jurors, which “can provide evidence of
7 discriminatory purpose because it creates an appearance that an attorney is ‘fishing’
8 for race neutral reason to exercise a “strike”; and a proffer of pretextual reasons,
9 which “gives rise to an inference of race discrimination, and a court’s finding of
10 discrimination against one juror is evidence of discrimination of against [sic] other
11 jurors.”

12 (ECF No. 31 at 10 (citing *Saintcalle*, 178 Wash. 2d at 43).)

13 After providing these factors, the state court proceeded to discuss the context surrounding
14 *Batson* in depth, but ultimately returned to the existing framework in its application to the case at
15 hand. *See Saintcalle*, 178 Wash. 2d at 43, 55-56. The state court weighed the factors on either
16 side of the argument, and ultimately decided that “the trial court’s finding that there was no
17 purposeful discrimination was not clear error.” *Saintcalle*, 178 Wash. 2d at 55. In applying this
18 analysis (as opposed to a heightened standard requiring a showing of racism), the state court’s
19 application of *Batson* was not objectively unreasonable. At the very least, it is likely that
20 “fairminded jurists could disagree” on whether the state court decided Petitioner’s case correctly.
21 *See generally Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541
22 U.S. 652, 664 (2004)) (finding “a state court’s determination that a claim lacks merit precludes
23 federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state
24 court’s decision”).

25 **C. The state court decision was not based on an unreasonable determination of the facts.**

Petitioner’s second argument challenges the state court’s factual finding that the
peremptory challenge of juror 34 was not based on purposeful discrimination. He claims that the

1 state court both failed to address certain evidence that was before the trial court and analyzed the
2 evidence incorrectly, pointing to a number of factors that he claims demonstrate a *Batson* violation.
3 While the petition identifies this alleged error as an “unreasonable application of law” under
4 § 2554(d)(1), (ECF No. 23 at 24), the R&R correctly identifies this argument as a challenge to the
5 state court’s factual finding, to be analyzed under § 2554(d)(2), (ECF No. 31 at 15).

6 A trial court’s decision to credit the prosecutor’s explanation “represents a finding of fact
7 of the sort accorded great deference on appeal,” *Hernandez v. New York*, 500 U.S. 352, 364 (1991)
8 (plurality opinion), and its ruling “must be sustained unless it is clearly erroneous,” *Snyder*, 552
9 U.S. at 477 (citing *Hernandez*, 500 U.S. at 369 (plurality opinion)). This high level of deference
10 to the trial court rests on the notion that “determinations of credibility and demeanor lie ‘peculiarly
11 within a trial judge's province.’” *Snyder*, 552 U.S. at 477 (quotation marks omitted) (quoting
12 *Hernandez*, 500 U.S. at 365 (plurality opinion)). “In addition, race-neutral reasons for peremptory
13 challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's
14 firsthand observations of even greater importance.” *Id.*

15
16
17 In determining whether a trial court’s decision to believe a prosecutor’s proffered race-
18 neutral explanation meets this standard, an appellate court may analyze a number of factors, among
19 them whether the explanation would apply equally to a white juror who was not struck, whether
20 the explanation was highly speculative, the disparate questioning of non-white jurors, and any
21 previous *Batson* violations. *E.g.*, *Snyder v. Louisiana*, 552 U.S. at 477 (citing *Hernandez*, 500
22 U.S. at 369 (plurality opinion)) (holding that the Louisiana Supreme Court’s rejection of the
23 petitioner’s *Batson* claim was clearly erroneous where the prosecutor’s explanation was highly
24 speculative and applied equally to white jurors who were not struck); *Miller-El v. Dretke*, 545 U.S.
25 231 (2005) (holding that the state court’s decision to credit the prosecutor’s race-neutral

1 explanation was unreasonable and clearly erroneous where prosecutors engaged in disparate
2 questioning of black jurors, provided black jury members with more graphic information regarding
3 the death penalty, offered an explanation that “reek[ed] of afterthought,” and worked in a district
4 attorney’s office that was known to exclude black venire members). The use of pretextual
5 explanations also “gives rise to an inference of discriminatory intent.” *Snyder*, 552 U.S. at 485
6 (citing *Miller-El v. Dretke*, 545 U.S. at 252). Petitioner highlights a number of these factors in his
7 objections.

8
9 First, he argues that the prosecutor’s race-neutral explanation for the strike of juror 34 was
10 unduly speculative, which the Supreme Court identified as evidence of a *Batson* violation in
11 *Snyder v. Louisiana*. 552 U.S. 472, 482 (2008) (finding the race-neutral reason, that a juror would
12 be inclined to find the defendant guilty of a lesser verdict to minimize the number of student
13 teaching hours he would miss, to be highly speculative because the trial was anticipated to be short,
14 the juror had received permission from his dean to make up missed time, and, if what the juror
15 wanted was a short trial, he might have agreed with a verdict of first degree murder if the other
16 jurors favored it).

17
18 The R&R distinguishes *Snyder*, explaining that while the prosecutor’s excuse in *Snyder*
19 was “illogical [and] contradicted by the record,” the Washington Supreme Court acted reasonably
20 in believing that the prosecutor was concerned juror 34 would be lost due to the recent murder of
21 her friend, the anticipated use of explicit photos of bodies and blood in the trial, and juror 34’s
22 statement that she “was not sure how she was going to respond.” (ECF No. 31 at 18.) Petitioner
23 contends that juror 34 was “unequivocal” in stating that she could serve as a juror, and that
24 “nothing about the conversation that the prosecutor had with juror 34” could justify the
25 prosecutor’s concerns. (ECF No. 32 at 7.) However, as the R&R highlights, “rather than being

1 ‘unequivocal,’ [juror 34] vacillated between asserting that she could be fair and expressing concern
2 about her abilities given the recent murder of her friend.” (ECF No. 31 at 16.)

3 The trial court judge observed the prosecutor and juror 34 throughout *voir dire* and heard
4 the arguments of both the prosecution and the defense. The trial court’s ability to make these
5 “firsthand observations” is precisely the reason that its decision is owed deference. It was within
6 the trial court judge’s discretion to credit the prosecutor’s race-neutral explanation.

7 Petitioner also argues that disparate questioning of juror 34, comparative juror analysis,
8 and the prosecutor’s attempt to strike the only other non-white juror in the venire provide evidence
9 of purposeful discrimination against juror 34. Petitioner correctly identifies these factors as
10 elements of a purposeful discrimination analysis, which must be considered together with “all of
11 the circumstances that bear upon the issue of racial animosity.” *See Snyder*, 552 U.S. at 478 (citing
12 *Miller-El v. Dretke*, 545 U.S. at 239). However, Petitioner’s arguments are insufficient to compel
13 the conclusion that the use of a peremptory challenge on juror 34 was the result of purposeful
14 discrimination.
15

16 In reviewing the trial court’s judgement, the Washington Supreme Court was required to
17 sustain the determination “unless it [wa]s clearly erroneous.” *Felkner v. Jackson*, 562 U.S. 594,
18 598 (2011) (quoting *Snyder*, 552 U.S. at 477). It was also required to defer to the trial court on
19 findings of credibility and demeanor. *See Snyder*, 552 U.S. at 477. Moreover, the AEDPA’s
20 “highly deferential standard for evaluating state-court rulings,” *Felkner*, 562 U.S. at 598, requires
21 this Court to give the benefit of the doubt to the state court’s decision, *see Cullen v. Pinholster*,
22 563 U.S. at 181. Accordingly, the Court determines that the Washington Supreme Court
23 reasonably deferred to the trial judge’s factual finding, and denies the petition for writ of habeas
24 corpus.
25

1 **D. Petitioner’s request for an evidentiary hearing is denied.**

2 This Court adopts Magistrate Judge Theiler’s recommendation that Petitioner’s request that
3 the Court hold an evidentiary hearing be denied. “An evidentiary hearing is not required on issues
4 that can be resolved by reference to the state court record.” *Totten v. Merkle*, 137 F.3d 1172, 1176
5 (9th Cir. 1998) (citing *Campbell v. Wood*, 18 F.3d 662, 679 (9th Cir. 1994)). “If the record refutes
6 the applicant's factual allegations or otherwise precludes habeas relief, a district court is not
7 required to hold an evidentiary hearing.” *Schriro v. Landrigan*, 550 U.S. 465, 474 (1933). In this
8 case, the record that was before the state court does preclude relief, and Petitioner’s request for an
9 evidentiary hearing is therefore denied.
10

11 **E. The Court grants a Certificate of Appealability (“COA”) because Petitioner’s claims are**
12 **debatable.**

13 The R&R recommends that a COA be granted to Petitioner. “Before an appeal may be
14 entertained, a prisoner who was denied habeas relief in the district court must first seek and obtain
15 a COA....” *Miller-El v. Cockrell*, 537 U.S. at 335-36. “A motion for a [COA] must first be
16 considered by the district court. If the district court grants a COA, the Court shall state which issue
17 or issues satisfy the standard set forth in 28 U.S.C. § 2253(c)(2).” Ninth Circuit Rule 22-1. Under
18 28 U.S.C. § 2253(c)(2), “the applicant [must have] made a substantial showing of the denial of a
19 constitutional right.” To meet this standard, “a petitioner must ‘sho[w] that reasonable jurists
20 could debate whether (or, for that matter, agree that) the petition should have been resolved in a
21 different manner or that the issues presented were “adequate to deserve encouragement to proceed
22 further.””” *Miller-El v. Cockrell*, 537 U.S. at 336 (alteration in original) (quoting *Slack v.*
23 *McDaniel*, 529 U.S. 473, 484 (2000)).
24
25

1 In this case, Petitioner has made a substantial showing that his Fourteenth Amendment rights
2 were violated when the trial court judge allowed the state to strike the only African-American
3 member of the venire. Further, he has shown that reasonable jurists could debate whether the state
4 court based its decision on an unreasonable determination of the facts, and therefore whether the
5 petition for habeas corpus should have been granted. Accordingly, this Court adopts Magistrate
6 Judge Theiler's recommendation and grants Petitioner a COA.

7
8 **V. CONCLUSION**

9 Petitioner has not demonstrated that the state court's decision was contrary to, or involved
10 an unreasonable application of, clearly established federal law, nor that it was based on an
11 objectively unreasonable determination of facts. Having reviewed the R&R, Petitioner's
12 Objections to the R&R, Respondent's Response to Petitioner's Objections to the R&R, and all
13 other material properly before the Court, it is hereby ordered that:
14

- 15 (1) The Court ADOPTS the R&R, (ECF No. 31), and DENIES Petitioner's petition for writ of
16 habeas corpus, (ECF No. 23);
17
18 (2) The Court GRANTS a certificate of appealability; and
19
20 (3) The Clerk of the Court shall send copies of this Order to Petitioner and dismiss this action
with prejudice.

21 **IT IS SO ORDERED.**

22 Dated this 16th day of January, 2018.

23
24 

25
Barbara Jacobs Rothstein
U.S. District Court Judge