

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA

Allen v. Phillips

Allen · No. 2:22-CV-0011-DAD-DMC-P · Decided July 18, 2025

SUMMARY

Findings and recommendations in a federal habeas corpus action under 28 U.S.C. § 2254. The magistrate judge recommends denying relief on claims concerning the denial of a Marsden motion to replace appointed counsel and alleged jury bias, concluding that the petitioner failed to provide sufficient factual support and did not demonstrate an unreasonable application of clearly established federal law.

CASE DETAILS

COURT	United States District Court for the Eastern District of California
WRITING FOR THE COURT	Dennis M. Cota
JURISDICTION	United States District Court for the Eastern District of California
DECIDED	July 18, 2025
DOCKET	2:22-CV-0011-DAD-DMC-P
DISPOSITION	other
PROCEDURAL POSTURE	Petitioner sought federal habeas relief under 28 U.S.C. § 2254 from a California state conviction. The magistrate judge considered the operative third amended petition and respondent's answer and issued findings and recommendations that the petition be denied.
STANDARD OF REVIEW	Under AEDPA, relief under 28 U.S.C. § 2254(d) is unavailable for claims adjudicated on the merits in state court unless the state-court decision was contrary to, or involved an unreasonable application of, clearly established Supreme Court law, or was based on an unreasonable determination of the facts. Factual determinations are presumed correct under 28 U.S.C. § 2254(e)(1). A state decision is not an unreasonable application merely because it is erroneous or clearly wrong. When a state court adjudicates a claim on the merits without explanation, the federal court independently reviews the record to determine whether the result constituted an unreasonable application of clearly established federal law.

PRECEDENTIAL VALUE	nonprecedential
PARTIES	Anthony L. Allen, Jr. v. Bryan D. Phillips

TOPICS

federal habeas corpus post-conviction relief right to counsel jury selection due process

PRACTICE AREAS

federal habeas corpus criminal procedure constitutional law post-conviction relief

QUESTIONS PRESENTED

1. Whether Allen was entitled to federal habeas relief because the state trial court allegedly denied his Marsden motion to replace appointed counsel without a constitutionally adequate inquiry.
2. Whether Allen was entitled to federal habeas relief on his claim that the jury was biased because jurors shared an ethnic background with one of the alleged victims.
3. Whether Allen's failure to plead supporting facts and develop the record barred relief and an evidentiary hearing under Rule 2(c) of the Rules Governing Section 2254 Cases and 28 U.S.C. § 2254(e)(2).

HOLDINGS

1. Federal habeas relief was not warranted on the Marsden claim because Allen failed to allege facts showing what grounds he presented to the trial court, what ruling the court made, or why the hearing was constitutionally inadequate.
2. Federal habeas relief was not warranted on the jury-composition claim because Allen's allegation that the jury shared an ethnic background with a victim, without additional facts concerning jury selection or peremptory challenges, did not establish a prima facie Batson violation or an unreasonable application of clearly established federal law.
3. Allen was not entitled to an evidentiary hearing because he failed to allege the factual bases of his claims and neither statutory exception under 28 U.S.C. § 2254(e)(2) applied.

KEY QUOTATIONS

“What matters are the holdings of the Supreme Court, not the holdings of lower federal courts.” (at 3)

“The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness.” (at 4)

“Without more, an allegation alone cannot establish a prima facie case of purposeful discrimination.” (at 10)

FACTUAL BACKGROUND

At trial, witnesses testified that Allen entered a liquor store, took food and drinks without paying, and pointed a gun at two employees after one employee confronted him with a bat. Surveillance video of the incident was

shown to the jury. Allen was convicted of firearm possession and two counts of second-degree robbery and sentenced to eleven years and four months. In federal habeas proceedings, he alleged that the trial court improperly denied his request to replace appointed counsel and that the jury was biased because its members shared an ethnic background with one of the alleged victims.

PROCEDURAL HISTORY

Allen was convicted in Sacramento County Superior Court of felony possession of a firearm and two counts of second-degree robbery and received an aggregate sentence of eleven years and four months. The California Court of Appeal affirmed the conviction and sentence following a *People v. Wende* brief, and the California Supreme Court denied a habeas petition citing *In re Dixon*. In federal court, the district judge limited the case to claims concerning denial of a Marsden motion and an allegedly biased jury, finding those claims adequately exhausted. The magistrate judge recommended denial of both claims because Allen failed to plead sufficient supporting facts and failed to show that the state-court decisions were contrary to or unreasonable applications of clearly established federal law.

DISPOSITION

other

REMAND INSTRUCTIONS

No remand instructions. The magistrate judge recommended that the third amended petition be denied and directed that the findings and recommendations be submitted to the assigned district judge for review after any objections.

CASES CITED

- *Lindh v. Murphy*, 521 U.S. 320, 336 (1997)
- *Calderon v. United States Dist. Ct. (Beeler)*, 128 F.3d 1283, 1287 (9th Cir. 1997), cert. denied, 522 U.S. 1099 (1998)
- *Carey v. Musladin*, 549 U.S. 70, 74, 76-77 (2006)
- *Williams v. Taylor*, 529 U.S. 362, 405-410 (2000)
- *Plumlee v. Mastro*, 512 F.3d 1204 (9th Cir. 2008) (en banc)
- *Benn v. Lambert*, 283 F.3d 1040, 1052 n.6 (9th Cir. 2002)
- *Wiggins v. Smith*, 539 U.S. 510, 520 (2003)
- *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003)
- *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003)
- *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000)
- *Green v. Lambert*, 288 F.3d 1081, 1088-89 (9th Cir. 2002)
- *People v. Wende*, 25 Cal. 3d 436 (1979)
- *People v. Marsden*, 2 Cal. 3d 118 (1970)
- *In re Dixon*, 41 Cal. 2d 756, 759 (1953)

- Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000) (en banc)
- Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)
- Gonzalez v. Pliler, 341 F.3d 897, 903 (9th Cir. 2003)
- Van Lynn v. Farmon, 347 F.3d 735, 738 (9th Cir. 2003)
- Batson v. Kentucky, 476 U.S. 79, 101, 103 (1986)
- United States v. DeGross, 960 F.2d 1433, 1442
- United States v. Chinchilla, 874 F.2d 695, 698 (9th Cir. 1989)
- United States v. Esparsen, 930 F.2d 1461, 1467 (10th Cir. 1991)
- Martinez v. Yist, 951 F.2d 1153 (9th Cir. 1991)

OPINION

1 2 3 4 5 6 7 8 IN THE UNITED STATES DISTRICT COURT 9 FOR THE EASTERN
DISTRICT OF CALIFORNIA 10 11 ANTHONY L. ALLEN, JR., No. 2:22-CV-0011-DAD-DMC-
P 12 Petitioner, 13 v. FINDINGS AND RECOMMENDATIONS 14 BRYAN D. PHILLIPS, 15
Respondent. 16 17 Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of
18 habeas corpus pursuant to 28 U.S.C. § 2254.

Pending before the court are Petitioner’s third 19 amended petition for writ of habeas corpus, ECF
No. 23, and Respondent’s answer, ECF No. 59. 20 Petitioner did not file a traverse. 21 Because
this action was filed after April 26, 1996, the provisions of the 22 Antiterrorism and Effective
Death Penalty Act of 1996 (“AEDPA”) are presumptively 23 applicable.

See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Calderon v. United States Dist. Ct. 24 (Beeler),
128 F.3d 1283, 1287 (9th Cir. 1997), cert. denied, 522 U.S. 1099 (1998). Under 25 AEDPA,
federal habeas relief under 28 U.S.C. § 2254(d) is not available for any claim decided 26 / / / 27 / /
/ 28 / / / 1 on the merits in state court proceedings unless the state court’s adjudication of the claim:
2 (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly
established Federal law, as 3 determined by the Supreme Court of the United States; or 4 (2)
resulted in a decision that was based on an unreasonable determination of the facts in light of the
evidence presented in the 5 State court proceeding.

6 Under § 2254(d)(1), federal habeas relief is available only where the state court’s 7 decision is
“contrary to” or represents an “unreasonable application of” clearly established law. 8 Under both
standards, “clearly established law” means those holdings of the United States 9 Supreme Court as
of the time of the relevant state court decision. See Carey v. Musladin, 549 10 U.S. 70, 74 (2006)
(citing Williams, 529 U.S. at 412). “What matters are the holdings of the 11 Supreme Court, not
the holdings of lower federal courts.” Plumlee v. Masto, 512 F.3d 1204 (9th 12 Cir.

2008) (en banc). For federal law to be clearly established, the Supreme Court must provide a 13
“categorical answer” to the question before the state court. See id.; see also Carey, 549 U.S. at 14

76-77 (holding that a state court's decision that a defendant was not prejudiced by spectators' 15 conduct at trial was not contrary to, or an unreasonable application of, the Supreme Court's test 16 for determining prejudice created by state conduct at trial because the Court had never applied the 17 test to spectators' conduct).

Circuit court precedent may not be used to fill open questions in the 18 Supreme Court's holdings. See *Carey*, 549 U.S. at 74. 19 In *Williams v. Taylor*, 529 U.S. 362 (2000) (O'Connor, J., concurring, garnering a 20 majority of the Court), the United States Supreme Court explained these different standards. A 21 state court decision is "contrary to" Supreme Court precedent if it is opposite to that reached by 22 the Supreme Court on the same question of law, or if the state court decides the case differently 23 than the Supreme Court has on a set of materially indistinguishable facts.

See *id.* at 405. A state 24 court decision is also "contrary to" established law if it applies a rule which contradicts the 25 governing law set forth in Supreme Court cases. See *id.* In sum, the petitioner must demonstrate 26 that Supreme Court precedent requires a contrary outcome because the state court applied the 27 wrong legal rules.

Thus, a state court decision applying the correct legal rule from Supreme Court 28 cases to the facts of a particular case is not reviewed under the "contrary to" standard. See *id.* at 1 406. If a state court decision is "contrary to" clearly established law, it is reviewed to determine 2 first whether it resulted in constitutional error. See *Benn v. Lambert*, 283 F.3d 1040, 1052 n.6 3 (9th Cir.

2002). If so, the next question is whether such error was structural, in which case federal 4 habeas relief is warranted. See *id.* If the error was not structural, the final question is whether the 5 error had a substantial and injurious effect on the verdict, or was harmless. See *id.* 6 State court decisions are reviewed under the far more deferential "unreasonable 7 application of" standard where it identifies the correct legal rule from Supreme Court cases, but 8 unreasonably applies the rule to the facts of a particular case.

See *Wiggins v. Smith*, 539 U.S. 9 510, 520 (2003). While declining to rule on the issue, the Supreme Court in *Williams*, suggested 10 that federal habeas relief may be available under this standard where the state court either 11 unreasonably extends a legal principle to a new context where it should not apply, or 12 unreasonably refuses to extend that principle to a new context where it should apply.

See 13 *Williams*, 529 U.S. at 408-09. The Supreme Court has, however, made it clear that a state court 14 decision is not an "unreasonable application of" controlling law simply because it is an erroneous 15 or incorrect application of federal law. See *id.* at 410; see also *Lockyer v. Andrade*, 538 U.S. 63, 16 75-76 (2003). An "unreasonable application of" controlling law cannot necessarily

be found even 17 where the federal habeas court concludes that the state court decision is clearly erroneous.

See 18 *Lockyer*, 538 U.S. at 75-76. This is because “[t]he gloss of clear error fails to give proper 19 deference to state courts by conflating error (even clear error) with unreasonableness.” *Id.* at 75. 20 As with state court decisions which are “contrary to” established federal law, where a state court 21 decision is an “unreasonable application of” controlling law, federal habeas relief is nonetheless 22 unavailable if the error was non-structural and harmless.

See *Benn*, 283 F.3d at 1052 n.6. 23 The “unreasonable application of” standard also applies where the state court 24 denies a claim without providing any reasoning whatsoever. See *Himes v. Thompson*, 336 F.3d 25 848, 853 (9th Cir. 2003); *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000). Such decisions 26 are considered adjudications on the merits and are, therefore, entitled to deference under the 27 AEDPA.

See *Green v. Lambert*, 288 F.3d 1081 1089 (9th Cir. 2002); *Delgado*, 223 F.3d at 982. 28 The federal habeas court assumes that state court applied the correct law and analyzes whether the 1 state court’s summary denial was based on an objectively unreasonable application of that law. 2 See *Himes*, 336 F.3d at 853; *Delgado*, 223 F.3d at 982. 3 4 I. BACKGROUND 5 A. Facts1 6 Addressing Petitioner’s direct appeal, the California Court of Appeal recited the 7 following facts, and Petitioner has not offered any clear and convincing evidence to rebut the 8 presumption that these facts are correct: 9 At defendant Anthony Lee Allen’s jury trial, witnesses testified to defendant entering a liquor store on October 5, 2020, taking food and 10 drink, and walking out without paying.

When he was confronted by two store employees, one wielding a bat, defendant took out a gun and pointed 11 it at the employees, who backed off; defendant then biked away. Video of the incident from the store’s surveillance cameras was shown to the jury. 12 ECF No. 58-7, pg. 1. 13 14 B. Procedural History 15 Petitioner was convicted in the Sacramento County Superior Court of felony 16 possession of a firearm and two counts of second-degree robbery and sentenced to a total prison 17 term of 11 years and four months.

See *id.* Petitioner was appointed counsel for direct appeal 18 who filed a brief pursuant to *People v. Wende*, 25 Cal. 3d 436 (1979), requesting that the Court 19 of Appeal independently review the entire record on appeal for arguable issues. See ECF No. 20 58-6. Petitioner’s conviction and sentence were affirmed on direct appeal by the California 21 Court of Appeal in a decision issued on June 28, 2022.

See ECF No. 58-7. 22 While Petitioner’s direct appeal was still pending, Petitioner filed a post- 23 conviction action in the Sacramento County Superior Court on January 3, 2022, arguing that the

24 trial court erred in denying his motion to relieve defense counsel under *People v. Marsden*, 2 Cal. 2d 118 (1970). See ECF No. 58-8, pg. 6.

The Sacramento County Superior Court denied the 26 27 1 Pursuant to 28 U.S.C. § 2254(e)(1), “... a determination of a factual issue made by a State court shall be presumed to be correct.” These facts are, therefore, drawn from the state 28 court’s opinion(s), lodged in this court. Petitioner may also be referred to as “defendant.” 1 petition in a reasoned decision issued on March 3, 2022.

See *id.* at 2-4. While both the direct 2 appeal and post-conviction action were pending, Petitioner filed a habeas petition in the 3 California Supreme Court on January 5, 2022, also arguing that the trial court had improperly 4 denied his Marsden motion. See ECF No. 58-9.

The California Supreme Court denied the 5 petition on June 1, 2022, citing *In re Dixon*, 41 Cal. 2d 756, 759 (1953), which is a California 6 procedural rule barring consideration of habeas corpus claims which could have, but were not, 7 raised on direct appeal. 8 Petitioner filed his federal habeas petition on January 3, 2022. See ECF No. 1. 9 This action currently proceeds on the third amended petition, filed on January 6, 2023.

See ECF 10 No. 23. On March 31, 2024, the District Judge issued an order addressing Respondent’s motion 11 to dismiss for lack of exhaustion and limiting the remaining claims in this case. See ECF No. 52. 12 Pursuant to that order, this case proceeds on the third amended petition as to the following two 13 claims: (1) the trial court improperly denied Petitioner’s Marsden motion; and (2) Petitioner was 14 denied an unbiased jury.

See *id.* at 6. In ruling that these two claims were adequately exhausted 15 in state court, the District Judge stated as follows: 16 The court pauses to emphasize the limited nature of this order. The court is concluding only that two of petitioner’s claims for federal 17 habeas relief presented in his operative third amended petition are exhausted; a conclusion reached in large part based upon the liberal 18 construction to be given state-court habeas petitions filed by pro se petitioners when evaluating the question of exhaustion.

The court 19 expresses no view as to the merits of the two exhausted claims or even whether they are otherwise sufficient. Indeed, the court notes that 20 petitioner has alleged very few facts in support of these claims for federal habeas relief.... 21 *Id.* at 7, n.2. 22 23 Respondent’s motion for reconsideration of the District Judge’s order was denied 24 on October 28, 2024, see ECF No. 56, and Respondent filed an answer to the third amended 25 petition on December 4, 2024, see ECF No. 59.

Petitioner has not filed a traverse. 26 / / / 27 / / / 28 / / / 1 II. DISCUSSION 2 Pursuant to the District Judge’s March 31, 2024, order, this case proceeds on the 3 following claims: (1) the trial court improperly denied Petitioner’s Marsden motion to relieve 4 defense counsel; and (2) Petitioner was denied an unbiased jury.

For the reasons discussed 5 below, the Court finds that federal habeas relief is not available on either claim. 6 A. Denial of Marsden Motion 7 Petitioner claims that he is entitled to a writ of habeas corpus because his motion 8 under *People v. Marsden*, 2 Cal. 3d 118 (1970), seeking to relieve his public defender was denied 9 without a fair hearing. See ECF No. 23.

This claim was addressed by the Sacramento County 10 Superior Court, which denied the claim. See ECF No. 58-8. The Superior Court stated as 11 follows: 12 Allen has not provided adequate factual allegations or documentation to allow for a meaningful review of the trial court's denial 13 of his Marsden motion.

The petition is bereft of factual allegations regarding the basis for the motion and the court's ruling. In the absence of 14 these facts, the Court cannot find the trial court abused its discretion by denying the motion. 15 ECF No. 58-8, pg. 4. 16 17 The California Supreme Court was also presented with this claim in a habeas petition filed prior 18 to the Sacramento County Superior Court's ruling.

See ECF No. 58-9. The California Supreme 19 Court denied the claim, citing to *In Re Dixon*, which bars review of claims which could have 20 been raised on direct appeal. 21 The denial without a hearing of a motion to substitute appointed counsel under 22 Marsden based on allegations of an irreconcilable conflict implicates the Sixth Amendment right 23 to counsel.

See *Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000) (en banc). "...[T]he state trial 24 court's summary denial of a defendant's motion for new counsel without further inquiry violate[s] 25 the Sixth Amendment." It is well established and clear that the Sixth Amendment requires on the 26 record an appropriate inquiry into the grounds for such a motion, and that the matter be resolved 27 on the merits before the case goes forward.

See *id.* (citing *Smith v. Lockhart*, 923 F.2d 1314, 28 1320 (8th Cir. 1991)). 1 In his third amended petition, Petitioner states as follows: 2 There was a Marsden motion filed and denied without a fair trail [sic] (conflict of interest). 3 The P.D. made sure people didn't have to identify me by making certain "stips" that I never knew the meaning of and when I ask for a 4 different attorney I was denide [sic].

5 ECF No. 23, pg. 4. 6 Petitioner offers nothing more to support this claim. 7 In this case, the trial court heard and denied Petitioner's Marsden motion on April 8 20, 2021, after the jury was sworn but prior to commencement of presentation of evidence. See 9 ECF No. 58-1, pgs. 21, 127.

The motion was heard outside of the presence of the prosecuting 10 attorney and the jury. See *id.* at 127. The transcript of the hearing was sealed and has not been 11 included with the state court record lodged with this Court. See *id.* 12 The Court finds that federal habeas relief is not appropriate. Petitioner has failed 13 to comply with Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District 14 Courts.

Rule 2(c) requires Petitioner to specify all grounds for relief and state the facts 15 supporting each ground. Here, as with Petitioner's state court filings, Petitioner has not stated 16 any facts supporting federal habeas relief based on denial of his Marsden motion. Specifically, 17 Petitioner has not described what arguments he made to the trial court or what rulings the trial 18 court made in response to those arguments.

Petitioner simply states that his Marsden motion was 19 denied without a "fair trial." Petitioner offers no additional facts to indicate why the April 20, 20 2021, hearing on Petitioner's Marsden motion was not "fair." 21 It is clear from the state court record which is available that the trial court in fact 22 held a hearing on Petitioner's Marsden motion.

That hearing was held prior to the 23 commencement of presentation of evidence. Petitioner has not presented any factual allegations 24 to suggest that the trial court's consideration failed to include an appropriate inquiry into the 25 bases for Petitioner's Marsden motion.

Thus, Petitioner cannot show that the Marsden motion was 26 summarily denied without a hearing, and Petitioner has not shown that the April 20, 2021, 27 hearing failed to include a proper inquiry. 28 / / / 1 Petitioner's failure to allege the factual bases of his Marsden claim also precludes 2 this Court from conducting an evidentiary hearing. See *Gonzalez v. Piller*, 341 F.3d 897, 903 (9th 3 Cir.

2003); see also 28 U.S.C. § 2254(e)(2). Exceptions exist where the claim relies on a new rule 4 of constitutional law made retroactive on collateral review by the United States Supreme Court, 5 see 28 U.S.C. § 2254(e)(2)(A)(i), or where the factual predicate of the claim could not have been 6 previously discovered through due diligence, see 28 U.S.C. § 2254(e)(2)(A)(ii).

Neither 7 exception applies in this case. First, Petitioner's claim is not based on a new rule of constitutional 8 law. Second, the claim is not based on facts which could not have been previously discovered 9 because the factual predicate of Petitioner's Marsden claim was known to Petitioner as of the date 10 of the April 20, 2021, hearing when the Marsden motion was denied.

11 B. Jury Composition 12 Petitioner claims that he did not receive an unbiased jury trial because the jurors 13 all had the same ethnic background as one of the alleged victims. See ECF No. 23, pg. 5. While 14 the California Court of Appeal affirmed on direct appeal, thus providing a decision on the merits, 15 it did not provide any reasoning as to Petitioner's jury composition claim.

The California Court 16 of Appeal appointed counsel for Petitioner who then filed a brief pursuant to *People v. Wende*, 25 17 Cal. 3d 436 (1979). See ECF No. 58-7, pg. 2. Based on the Wende brief, and Petitioner's failure 18 to supplement that brief, the Court of Appeal affirmed the conviction and sentence without 19 offering a reasoned opinion on either of the claims remaining in this case.

See ECF No. 58-7, pg. 20 2. 21 In conducting review of a state court decision, the federal courts “look to the last 22 reasoned state-court decision.” *Van Lynn v. Farmon*, 347 F.3d 735, 738 (9th Cir. 2003). Where, 23 as here, the state courts have provided an adjudication on the merits of a habeas claim, but 24 without any underlying reasoning, the federal courts will conduct an independent review of the 25 record to determine whether the state court’s final resolution of the case constituted an 26 unreasonable application of clearly established federal law.

See *Greene v. Lambert*, 288 F.3d 27 1081, 1088-89 (9th Cir. 2002) (setting out prerequisites for application of AEDPA deference 28 standard). The Court will do so here. 1 In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court held 2 that the Equal Protection Clause prohibits a prosecutor from exercising peremptory challenges to 3 strike a venireperson on the basis of race.

In order to prevail on the so-called *Batson* claim, 4 petitioner must first establish a *prima facie* case of purposeful discrimination. See *United States v. DeGross*, 960 F.2d 1433, 1442. If a *prima facie* case is made out the burden passes to the 6 party asserting the peremptory challenge to establish a neutral explanation for the action. See *id.* 7 A *prima facie* case is established by showing that a peremptory challenge was exercised against a 8 member of a constitutionally cognizable group and by demonstrating that the fact of the challenge 9 and any other relevant circumstances demonstrate that an inference has been raised that the 10 peremptory challenge was exercised because of membership in the cognizable group.

See *id.* 11 Under *Batson*, the totality of the circumstances of the particular case must be examined to 12 determine whether a *prima facie* case of prosecutorial discrimination has been established. 13 In making this decision, the trial court “should consider all relevant 14 circumstances.” These could include a “pattern” of strikes against members of a constitutionally 15 cognizable group and the “prosecutor’s questions and statements during voir dire examination.” 16 *Batson*, 476 U.S. at 103.

Although a criminal defendant may establish a *prima facie* case of 17 purposeful discrimination on the discriminatory strike of just one venire member, numbers alone 18 do not create a *prima facie* case of purposeful discrimination.

In *United States v. Chinchilla*, 874 19 F.2d 695, 698 (9th Cir. 1989), the court determined that the challenge of all Hispanic jurors did 20 not, in and of itself, create a *prima facie* case of purposeful discrimination. *Chinchilla* rejected 21 the view that there is a “magic number of challenged jurors which shifts the burden to the 22 government to provide a neutral explanation for its actions.

Rather, the combination of 23 circumstances taken as a whole must be considered.” *Id.* at 698; see also *Batson*, 476 U.S. at 101 24 (White, J., concurring) (noting that it is not *per se* unconstitutional, without more, to strike one or 25 more blacks from a jury).

Accordingly, the record must contain something more, so that the 26 numbers take on significance in the context of other facts, such as the racial composition of the 27 entire venire, the race of others struck by the prosecution, or the answers of prospective jurors 28 given in voir dire. See *United States v. Esparsen*, 930 F.2d 1461, 1467 (10th Cir. 1991).] Here, Petitioner alleges that the jury was biased because the jury was of the same 2 || ethnic background as one of the victims.

Petitioner states: “[T]he jury was the same ethnic 3 || background [as the victim].” ECF No. 23, pg. 5. Petitioner has offered no facts to support this 4 | claim, again in violation of Rule 2(c). Without more, an allegation alone cannot establish a prima 5 || facie case of purposeful discrimination. And, as with Petitioner’s Marsden claim, Petitioner’s 6 || failure to develop the facts supporting his claim precludes this Court from conducting an 7 || evidentiary hearing.

Therefore, after an independent review of this claim, this Court cannot find 8 | that the state court’s resolution of the case constituted an unreasonable application of clearly 9 || established federal law. 10 1] IH. CONCLUSION 12 Based on the foregoing, the undersigned recommends that Petitioner’s third 13 || amended petition for a writ of habeas corpus, ECF No. 23, be denied.

14 These findings and recommendations are submitted to the United States District 15 || Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days 16 | after being served with these findings and recommendations, any party may file written 17 || objections with the court. Responses to objections shall be filed within 14 days after service of 18 || objections.

Failure to file objections within the specified time may waive the right to appeal. See 19 | *Martinez v. Yist*, 951 F.2d 1153 (9th Cir. 1991). 20 21 || Dated: July 17, 2025 ☐☐ Co 22 DENNIS M. COTA
33 UNITED STATES MAGISTRATE JUDGE 24 25 26 27 28 10