IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **RAMIRO ENRIQUEZ, et al.** Defendants and Appellants.	Case No. S224724 Ct. of App. Case Nos. F065288 [Enriquez]; F065984 [Gutierrez]; F065481 [Ramos]) (Super. Ct. Case No. BF127853A)

Appeal from the Judgment of the Kern County Superior Court

The Honorable Michael E. Dellostritto, Judge Presiding

APPELLANT GABRIEL RAMOS'S REPLY BRIEF ON THE MERITS

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REPLY BRIEF ON THE MERITS

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ARGUMENT

I. THE COURT OF APPEAL ERRED BY AFFORDING DEFERENCE TO THE TRIAL COURT'S RULING UNDER THE "SINCERE AND REASONED" STANDARD.

In his opening brief appellant Enriquez argues that the trial court's *Batson/Wheeler*[1] ruling was not entitled to deference and independent review was required because the trial court failed to make a "sincere and reasoned" effort to evaluate the proffered justifications for challenging Hispanic prospective jurors as a result of using an incorrect legal standard.

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1 *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

(EB 23; ERB 22.)[2] Respondent contends the trial court satisfied the test by observing the entire voir dire, taking into consideration the prosecutor's reasons for excusing each potential juror and the appellant's contrary arguments, and conducting a sincere and well-reasoned evaluation of the prosecutor's stated reasons. (RB 27.) As a result, it argues, the proper standard of review was whether substantial evidence supported the trial court's denial of the motion. (RB 26-28.) Having joined in the arguments of his co-appellants, appellant adds the following points in support of Enriquez's argument.

First, deference is unwarranted because the trial court failed to make individual findings for two excluded prospective jurors, No. 2468219 and No. 2547226. Respondent does not dispute this fact. (RB 40-45, 48-49, 61.) An absence of a ruling means there is no reasoning for the appellate court to review. (*Snyder v. Louisiana* (2008) 552 U.S. 472, 479 (*Snyder*); *United States v. McMath* (7th Cir. 2009) 559 F.3d 657, 656-666; *McGahee*

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2 Throughout this brief the following abbreviations are used: "AOB" (Appellant's Opening Brief on the Merits); "LB" (Appellant Ramos's Letter Brief); EOB (Appellant Enriquez's Opening Brief on the Merits); ERB (Appellant Enriquez's Reply Brief on the Merits); GOB (Appellant Gutierrez's Opening Brief on the Merits); "GRB" (Appellant Gutierrez's Reply Brief on the Merits); "RB" (Respondent's Answering Brief on the Merits); "CT" (Clerk's Transcript); "ART" (Augmented Reporter's Transcript); "CAO" (Court of Appeal opinion).

v. Ala. Dept. of Corrections (11th Cir. 2009) 560 F.3d 1252, 1259-1260.)

Second, deference is unwarranted as a result of the trial court's improper use of "global" reasoning (i.e., the prosecutor's reasons for excluding Hispanics adhered to a "consistent" pattern) in violation of *People v. Fuentes* (1991) 54 Cal.3d 707 (*Fuentes*). (*United States v. McMath*, *supra*, 559 F.3d 657, 666; *McGahee v. Ala. Dept. of Corrections*, *supra*, 560 F.3d at p. 1259.)

Third, deference is unwarranted because the trial court failed to demonstrate that it considered "all relevant circumstances" on the question of discriminatory intent. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 240 (*Miller-El*); *McGahee v. Ala. Dept. of Corrections*, *supra*, 560 F.3d at pp. 1261-1266; *Harris v. Hardy* (7th Cir. 2012) 680 F.3d 942, 952-953.) The trial court failed to articulate how the cumulative evidence of suspicious circumstances fell short of meeting the substantial-motivating-factor requirement. It made no mention of the "sheer mathematics" of the exclusion of all but one of the Hispanic prospective jurors to enter the box and gave no indication it recognized there were multiple justifications that were particularly weak. (*Ibid.*) An appellate court is not to defer to a trial court ruling when it incorrectly recounts much of the record while failing to note material portions thereof without explanation. (*United States v.*

Stephens (7th Cir. 2008) 514 F.3d 703, 712-713, citing *McGahee*, *supra*.)

Fourth, deference is unwarranted because the trial court incorrectly engaged in comparative analysis by attempting to distinguish non-challenged white prospective jurors as having received their gang exposure through employment rather than residence or family relations. (*Miller-El v. Dretke*, *supra*, 545 U.S. 231; *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 358; see also GRB 22-28 [as to No. 2510083]; ERB 26-34 [as to No. 2468219, No. 2723471, No. 2510083, No. 2852410, and No. 2719513.)

Fifth, deference is unwarranted because some of the trial court's rulings on individual prospective jurors were persuasively contradicted by the record. (*Snyder*, *supra*, 552 U.S. at p. 479; *People v. Silva* (2001) 25 Cal.4th 345 (*Silva*); *Harris v. Hardy*, supra, 680 F.3d 942, 952-953.)

These outcomes are consistent with the general principle of appellate review that refuses deference where there is legal error in a trial court ruling otherwise committed to its discretion. (*United States v. Stephens*, *supra*, 514 F.3d at p. 712, citing *Koon v. United States* (1996) 518 U.S. 81, 100 ["A district court by definition abuses its discretion when it makes an error of law."]; *People v. Knoller* (2007) 41 Cal.4th 139, 156 [same]; see also

People v Bonilla (2007) 41 Cal.4th 313, 341-342 [*Batson* step one error].)[3]

Respondent contends that the substantial evidence test must apply because the trial court's ruling was sincere and reasoned. (RB 27.) Appellant agrees that this standard of review applies in all cases except where deference must be denied and independent review ensues. But the sincere-and-reasoned test should afford no greater deference than afforded by the substantial evidence test. The sincere-and-reasoned test was effectively merged with the substantial evidence test in *Silva*, which stated that deference will be afforded if the prosecutor's justification is (1) inherently plausible *and (2) supported by the record.* (25 Cal.4th at p. 386, italics added.)[4]

If the sincere-and-reasoned test was satisfied, appellant submits that California's substantial evidence test requires an updated rule statement in *Batson* cases for the following reasons.

First, the deferential federal clearly erroneous standard applied in previous high court *Batson* decisions involves more scrutiny than

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3 Independent review is only precluded when a trial court relies on demeanor evidence. (AOB 18; see also *Snyder*, *supra*, 552 U.S. at p. 479; *People v. Clark* (2011) 52 Cal.4th 856, 1012 [a failure by the defense to contest may suffice despite the lack of an on-the-record finding].)

4 Because in only a rare case will the trial court fail to meet the "sincere" element of the test, the "reasoned" aspect becomes critical. (See *People v. People v. Mai* (2013) 57 Cal.4th 1048, 1061, conc. opn. of Liu, J. (*Mai*).)

California's substantial evidence rule. (*Concrete Pipe & Products Inc. v. Constr. Laborers Pension Trust* (1960) 508 U.S. 602, 623 [review under the clearly erroneous standard is "significantly deferential," while review under the substantial evidence or reasonableness standard is "even more deferential"].)[5] "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (*Anderson v. Bessemer City* (1985) 470 U.S. 564, 573, cited in *Batson, supra*, 476 U.S. at p. 98, fn. 21, quoting *United States v. United States Gypsum Co.* (1948) 333 U.S. 364, 395; see also *Miller-El, supra*, 545 U.S. at p. 266 [trial court finding wrong to a "clear and convincing degree"].) Although not explicating the standard of review applied, *Miller-El*, *Snyder*, and *Foster v. Chatman* (2016) 578 U.S. __ [136 S.Ct. 1737] (*Foster*) all set out findings from the record as a whole, including evidence not recognized by the lower courts, that support the conclusion that there was clear error. (Accord *Silva, supra*, 25 Cal.4th at pp. 385-386 [no deference because justification was factually unsupported].)

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5 Similar to the state rule, the federal standard does not shield findings that rest on erroneous interpretations of law or misapplication of a legal standard. (*Pullman-Standard v. Swint* (1982) 456 U.S. 273, 284-285; *United States v. Singer Mfg. Co.* (1948) 374 U.S. 174, 193.)

Second, appellant respectfully submits that the substantial evidence test applied to factual determinations in criminal trials is not an appropriate standard in *Batson* cases. (See *People v. Lenix* (2008) 44 Cal.4th 602, 627-628 (*Lenix*).) Following the form instruction that a jury in a criminal prosecution must accept a reasonable inference leading to innocence when assessing circumstantial evidence underlying the prosecution's case, *Lenix* states that the prosecution is entitled to the benefit of this rule in *Batson* cases. (*Ibid.*, citing *People v. Bean* (1988) 46 Cal.3d 919, 933.) But *Batson* claims are governed by the preponderance-of-the-evidence standard. (*People v. Hutchins* (2007) 147 Cal.App.4th 992, 997-998; *Reeves v. Sanderson Plumbing Products* (2000) 530 U.S. 133, 153.) The current rule's deferential standard cannot rest on principles ensuring the defendant's constitutional right to jury factfinding and proof-beyond-a-reasonable-doubt because those rights are not implicated in decisions made by judges. (U.S. Const., 6th Amd,, 7th Amd.; 14th Amd.; Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion* (1986) 64 N.C.L. Rev. 993, 997, fn. 19.) The prosecutor has no Sixth or Seventh Amendment rights when accused of *Batson* discrimination.

II. THE COURT OF APPEAL ERRED UNDER *PURKETT* BY MERELY RECITING SUPERFICIALLY RACE-NEUTRAL REASONS AND FAILING TO UNDERTAKE REVIEW OF THE PERSUASIVENESS OF THOSE REASONS IN LIGHT OF ALL THE EVIDENCE OF DISCRIMINATORY INTENT.

Appellant argues that the Court of Appeal committed error under *Purkett v. Elem* (1995) 514 U.S. 765 (*Purkett*) because it did not actually analyze the persuasiveness of the prosecutor's reasons under the substantial evidence standard but merely recited the reasons and stated they were likely race neutral.

Respondent characterizes appellant's argument as a misinterpretation of the words of the opinion because he "parses" them "too closely." (RB 32.) Respondent answers that the justifications were individually plausible and supported by substantial evidence. Nevertheless, respondent concedes that the Court of Appeal only "implicitly" found these justifications to be persuasive. (RB 32.) It also states that there was substantial evidence that the prosecutor "could reasonably [have been] concerned" with the challenged prospective jurors. (*Ibid.*)

The Court of Appeal does explains how the prosecutor *could* reasonably have been concerned with the challenged jurors, but does not explain the case for why he actually *was*. (*United States v. Alanis* (9th Cir. 2003) 335 F.3d 965, 968-969, fns. 2-3.) There was a failure at both the trial

court and appellate court to articulate how the cumulative evidence of suspicious circumstances was outweighed by evidence of genuineness and persuasiveness. Further, respondent concedes the error of the Court of Appeal of failing to consider comparative analysis. (RB 88.)

Green v. LaMarque (9th Cir. 2008) 532 F.3d 1028, previously cited by appellant (LB 4), rejected an equivalent argument made by respondent in this case, concluding:

> The California Court of Appeal's analysis did not remedy the trial court's error. The majority simply found the prosecutor had offered race-neutral reasons, cited and discussed several cases deferring to the trial court's evaluation of witnesses, and stopped there. It failed to reach step three in the *Batson* analysis. By merely reiterating the prosecutor's stated reasons, and then finding they were race-neutral, without analyzing the other evidence in the record to determine whether those reasons were in fact the prosecutor's genuine reasons, the California Court of Appeal made exactly the same mistake for which the Supreme Court criticized the California courts in *Johnson v. California*, 545 U.S. at 172-73 [subsequent history citation].

(*Id.* at p. 1031.)[6] As in *Green*, respondent argues that the appellate court

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6 *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 831, emphasizes that the trial court should "step back and evaluate all of the reasons together," and solicit input based on review of the jury selection transcripts from both defense counsel and the prosecutor. "Thus, a court engaging in the third step of *Batson* has various tools at its disposal in order to fulfill its duty to determine whether purposeful discrimination has occurred." (*Ibid.*) In

should presume the race neutral reasons were genuine based on the trial court's denial of the motion. (*Ibid.*) The *Green* court stated: "Yet we must not make such a presumption where 'the court never fulfilled its affirmative duty to determine if the defendant had established purposeful discrimination.' " (*Ibid.*, citing *Lewis v. Lewis*, *supra*, 321 F.3d at p. 832.) An appellate court fails to fulfill its review function when it simply accepts proffered justifications as race-neutral without considering whether they were actually persuasive in light of the totality of the circumstances. (*McGahee v. Ala. Dept. of Corrections*, *supra*, 560 F.3d 1252, 1263; *Kesser v. Cambra*, *supra*, 465 F.3d 351, 368 [" 'The stronger the objective evidence of discrimination, the more we will require by way of verifiable facts to sustain a trial court's finding upholding the exercise of challenges.' [Citation]"]; *United States v. Alanis*, *supra*, 335 F.3d at pp. 968-969 [mere assertion by trial court that each justification was plausible insufficient]; *United States v. Rutledge* (7th Cir. 2011) 648 F.3d 555, 560 ["asking whether something is race-neutral is analytically distinct from determining whether the asserted reason is believable or pretextual"]; *Bellamy v. Crosby* (Fla.Ct.App. 2010) 31 So.3d 895, 900; *People v. Tennille* (Mich.Ct.App.

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complex cases like the present one, this stepping back may be critical to a fair resolution of the issues.

2016) __ Mich.App. __ [2016 Mich.App.SEXIS 742], pp. 17-19.)

The Court of Appeal opinion contains insufficient analysis to conclude that it actually conducted a review of the trial court's step three findings that the proffered reasons were genuine.

III. THE COURT OF APPEAL ERRED UNDER *FUENTES* AS TO THE RULINGS ON NO. 2468219, NO. 2547226, NO. 2323471, AND NO. 2408196 DUE TO A LACK OF INDIVIDUALIZED FINDINGS, RACIAL-ETHNIC STEREOTYPING, AND IMPLAUSIBLE JUSTIFICATIONS.

A. Lack of Individualized Findings.

Appellant contends that the Court of Appeal erred in affirming the trial court's ruling because it relied on a premise that led to sweeping in several of the challenges without analysis, or sufficient analysis, rather than fulfilling its duty to make individualized findings as to each challenge. Respondent contends that appellant's reliance on *Fuentes*, *supra*, 54 Cal.3d 707 (*Fuentes*) is unsupported and that the trial court never employed "global reasoning" because it mentioned prospective jurors by name and associated specific reasons for each. (RB 36.)

Appellant's argument is well supported in the record. The trial court admitted it was looking carefully to observe whether the prosecutor removed Hispanic jurors based on common justifications: (1) they were involved in gang activity, or had relatives involved, or grew up in gang

areas, (2) they were "younger" (No. 2510083[7] and No. 2723471), (3) they had the "Wasco issue" (No. 2723471 and No. 2408196), or (4) they had bad experiences with law enforcement (No. 2852410 and No. 2291529). (*People v. Turner* (1986) 42 Cal.3d 711, 726 (*Turner*) [unpersuasive was prosecutor's explanation that he excused a prospective juror "along with quite a few other people, too, for the same reason"].) This construct was clearly stated and corroborated by what transpired during the proceedings. (5ART 1070-1074.) This reasoning was nothing more than a vacuous empirical observation that avoided constitutionally required individualized analysis. (AOB 52.) Respondent's argument essentially is that the cited reasoning was harmless because the trial court appropriately conducted the individual analysis.

Yet respondent concedes that the trial court never made on-the-record findings of genuineness as to No. 2468219 and No. 2547226. (RB 40-45, 48-49, 61; AOB 53; 5ART 1070-1074.) The substantial evidence test must be concretely applied to each challenged prospective juror. (*Fuentes*, *supra*, 54 Cal.3d at p. 718.)

Conceding that no individualized findings were made as to these prospective jurors, respondent relies on *Mai*, *supra*, 57 Cal.4th 1048 and

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7 The prosecutor did not actually cite youthfulness as his justification.

People v. Reynoso (2003) 31 Cal.4th 903 (*Reynoso*) for the proposition that trial courts are not required in every instance to explain their ruling on the record, so long as the prosecutor's justifications are plausible and supported by the record. (RB 57.)

Even if this Court rejects the argument that independent review was required, *Reynoso* and *Mai* are distinguishable because the defendants there had much less of a showing of error. They were also not cases with the type of systematic exclusion that occurred here.

In *Reynoso*, jury selection lasted less than one day. The prosecutor used four peremptory challenges in total, the last two being Hispanic prospective jurors who were seated when the prosecutor passed the panel multiple times. But their removal in quick succession at the end caused the defense to argue that the prosecutor had waited to the last minute to cleanse the jury. (31 Cal.4th at p. 909.) *Reynoso* was a case of elimination of two Hispanics prospective jurors, but did not involve a repetitive, systematic removal of Hispanics. (*Id.* at p. 911 [trial court found no systematic exclusion in *Wheeler* terms]; 5ART 1049.)

Here, 10 Hispanics were removed with at least one removed in each round of the peremptories except for one. (3ART 517, 572, 573, 695, 744; 4ART 805, 807, 897, 930; 5ART 1047-1048.) Appellant's jury selection

was conducted over eight days, with the *Batson/Wheeler* motion coming in the seventh day with the prosecutor using 10 of 16 challenges against Hispanics. This included times when the Hispanics were removed seriatim. (2CT 523, 525, 531-532, 534, 537, 541; 5ART 1052; AOB 26, fn. 19.)

In *Reynoso*, the prosecutor accepted the panel 14 times with one of the two Hispanics in the jury box. (31 Cal.4th at pp. 910, 926; cf. AOB 26, fn 19.) The *Reynoso* appeal dealt with the ruling as to this lone prospective juror. Tthere was nothing in the record to contradict the trial court's finding that the juror appeared inattentive (a demeanor-based finding) so as to justify application of *Silva* to find the proffered justification implausible. (31 Cal.4th at p. 929.) The rule that the trial court is not required to place detailed findings on the record in every instance also grew out of the notion that inattentiveness, or other similar demeanor-based characteristics, may be based on a collage of impressions. At the time the demeanor issue was raised, defense counsel could articulate nothing to dispute the demeanor evidence. (*Id.* at pp. 911, 929.) Here, no demeanor findings of any import exist.

In *Mai*, the trial court ruled on a motion after extremely brief argumentation, stating, "Well, the court finds that no discriminatory intent is inherent in the explanations, and the reasons appear to be race neutral,

and on those grounds the court will deny the *Wheeler* motion." (57 Cal.4th at pp. 1047-1048.) All three prospective jurors were black and not of the same racial group as the defendant, and the trial court found the prima facie case to be "marginal." (*Id.* at pp. 994, 1047.)

Mai was not a case of systematic exclusion of the same minority group as the defendant, nor was it a case where the trial court employed an abstract rationale to justify a suspiciously large number of challenges while failing to make specific findings as to each prospective juror. (*Fuentes*, *supra*, 54 Cal.3d at p. 718; *Turner*, *supra*, 42 Cal.3d at p. 726.) *Mai* was a capital case in which the challenges to three prospective jurors all involved reservations about the death penalty, and one had demeanor-based justifications. (57 Cal.4th at pp. 1047, 1050-1054.) On appeal the defendant in *Mai* asserted that the one-line ruling "addressed only the facial plausibility of the reasons claimed by the prosecutor, and failed to properly assess, under all the relevant circumstances, whether the prosecutor's explanations were credible." (*Id.* at p. 1054.)

Here, the strength of the evidence of discriminatory intent is significantly stronger here. Yet both courts below failed to adequately consider and explain that evidence. (See *United States v. Stephens*, *supra*, 514 F.3d at pp. 712-713.)

B. The Gang Exposure Justification.

In opposing appellants' claim of error under *Fuentes*, respondent states that the trial court was explaining that the prosecutor was "*consistent* in challenging jurors with *significant* gang exposure." (RB 36, italics added.) Later, respondent contends that it was reasonable for the prosecutor to suspect that any prospective juror "who had experienced gang activity would be sympathetic to the defendants or may be desensitized to the gravity of the gang-related crimes." (RB 39.) This reflects stereotypical thinking. (AOB 62.)

Respondent asserts that there was a "*direct link* between Ms. 2468219's exposure to gang activity and concerns about this case, an attempted murder case with gang enhancements." (RB 40, italics added.) No. 2468219 was the very first prospective juror in the first group of 18 who volunteered her connection to gang activity. (2ART 299-300.) She had answered the questionnaire with the statement that her mother (not she) was a resident of a community with gang activity. (2ART 300.) She was not likely hiding any sympathy for the defendants. No. 2468219 never revealed any "personal gang experiences" or knowledge resulting in predisposition. The prospective juror did not currently live in such a community, having moved elsewhere to start her family. (2ART 300.) She

had previously lived with her mother for two years, and at the time only went there to visit her. (2ART 300.) The prosecutor asked: "Have you personally saw [sic] anything that you thought was related to criminal street gang activity?" (2ART 301.) She answered: "Not really, I haven't." (2ART 301.) No further questions were asked. Nothing demonstrates No. 2468219 had been exposed to gang violence. There is no demeanor evidence she was untruthful.

The prosecutor excused No. 2468219 "in part because she had lived in an area where there is a lot of gang activity" (5ART 1061), proving that No. 2468219 was stigmatized for having briefly lived in a community with gang problems. (*Reynoso*, *supra*, 31 Cal.4th at p. 925 [disingenuous reason is one based on group bias and stereotyping]; AOB 58, fn. 25.)[8] She took her seat in the box during the first round of peremptory challenges, and the prosecutor removed her in the very next round. (3ART 516, 572.) The fact that No. 2468219's removal reflects a natural trial strategy of the prosecutor – or "consistency" of approach – fails to justify it.

While acknowledging that a lack of questioning of a prospective

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8 Allowed to persist, this also skews jury selection against persons of low socio-economic status since gang crimes are typically committed in such neighborhoods. (See *Theil v. Southern Pacific Co.* (1946) 328 U.S. 217, 224.)

juror could suggest unlawful intent, respondent argues the prosecutor was not required to question No. 2468219 in detail and that her answer about hearing news reports of a lot of gang-related shootings was sufficient. (RB 42.) Still, this did not amount to any "experience and knowledge of gang activity." (RB 42.)

The stereotyping that involved residence as a proxy for ethnicity was introduced by the screening question: "Do you or *anyone close to you* live" in a neighborhood with gang activity? (2ART 299-300, italics added.) This question will inevitably sweep in gang connections based on familial relations in disproportionate numbers based on racial/ethnic background. (AOB 54-59.)

People v. Watson (2008) 43 Cal.4th 652 and *People v. Williams* (1997) 16 Cal.4th 153, are distinguishable because the records there disclosed actual, not mere hypothetical exposure. (RB 41.) In *People v. Watson*, *supra*, 43 Cal.4th 642, the prospective juror expressed reluctance to impose the death penalty in a drive-by shooting case because "being the age that I am, I hear it. I'm around it," and her exposure to gangs was "substantial" (i.e., she had gone to school with members of a gang allied with the victim's gang). (*Id.* at pp. 658, 673-674.)

In *People v. Williams*, *supra*, 16 Cal.4th 153, the prospective juror

was challenged due to suspected sympathy toward the defendant because he attended a high school in the territory of the defendant's gang. (*Id.* at p. 191.) The prosecution's theory was that the defendant, a Blood, killed a Crip. (*Id.* at p. 177.) The prospective juror confirmed he had gone to school with gang members and that "the *whole* school would get together and run [the Crips] out" if they came to the school. (Italics added.)

Respondent's next claim is that No. 2468219's exposure to gang activity might have made her "empathetic to gang activity and retaliation." (RB 42.) A prospective Hispanic juror could have been victimized by gangs and therefore be sympathetic to the prosecution. (See *Bellamy v. Crosby*, *supra*, 31 So.3d at p. 899.)[9]

Respondent contends that the court was evenhanded in asking all jurors about the location of their residence. (RB 43.) Respondent cites to a portion of the record where the court informs the prospective jurors to refer

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9 See Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias* (2012) 44 Conn. L. Rev. 827, 834 ("habitual stereotype-congruent responses" in the courtroom may distort legal judgments); Lee, *A New Approach to Voir Dire on Racial Bias* (2015) 5 U.C. Irvine L. Rev. 843, 866 ("Implicit racial bias . . . even among people who explicitly disavow racial prejudice contributes to inaccurate perceptions of race and crime because it encourages individuals to associate all or most Blacks and Latinos with crime when only some Blacks and Latinos are engaging in criminal behavior."). Stigmatization, or the gathering of a negative connotation, arises almost by necessity in the criminal justice system as a result of the disproportionate incarceration of racial minorities.

to their questionnaire in terms of the questions relating to occupation, residence, and prior jury experience. (2ART 449-450.) In the cited portion of the record a number of prospective jurors volunteered their residences during their self-introductions. But residential location never was an issue – except as it related to the gang question with the prospective jurors from Wasco.[10]

That there were other reasons (potential anti-law enforcement bias and being on a hung jury) (RB 44-45) is immaterial because appellant is only required to demonstrate that improper motive was a substantial motivating factor for the challenge. (*Batson*, *supra*, 476 U.S. at p. 85; *Williams v. City of Santa Monica* (2013) 56 Cal.4th 203, 225 [rejecting "same decision" rationale under the state anti-discrimination law analogous

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10 Neighborhood location only came into play when the two Hispanic Wasco residents were excluded, again resulting in a common exclusionary factor based on residence that had no actual impact on white jurors in this case. Though the prosecutor may have distinguished the Wasco residents in his own mind based on the (implausible) fear of a credibility issue for his witness Trevino (AOB 64-65; GRB 27-31), the rationale was not exposure to gang activity but lack of exposure thereto. This simply strengthens appellant's argument because it demonstrates an inconsistent justification that serves to remove an otherwise homogenous group of prospective jurors who belong to the same group as the defendant. (*People v. Bell* (1989) 40 Cal.4th 502, 697; *Wheeler*, *supra*, 22 Cal.3d at p. 276 [group bias is evident when the specific grounds for bias are not exercised equally across racial or ethnic lines]; *Foster v. Chatman*, *supra*, 578 U.S. __ [136 S.Ct. at p. 1751 [shifting justification suggests pretext]; *Turner*, *supra*, 42 Cal.3d at p. 719; GOB 27-29.)

to Title VII].) Significantly, the gang issue was the *first* of the three justifications proffered by the prosecutor. (5ART 1061.)

C. The Wasco Residency Justification.

Appellant argues that the improper exclusions on the basis of residency in Wasco applied to both No. 2723471 and No. 2408196. (AOB 63-67.) Gutierrez focuses on No. 2723471, perhaps because her case is the stronger of the two, given that No. 2408196 had an uncle involved in gang activity.

As to the common reason of the witnesses not being likely to find Trevino credible, respondent cites to nothing in the record to support this hunch or suspicion other than the fact that they professed no awareness of criminal street gang activity in Wasco. (4ART 864.)

Respondent relies on *People v. Williams*, *supra*, 16 Cal.4th at p. 190, where the court relied on dicta in *Wheeler*, *supra*, 22 Cal.3d at p. 275, for the point that a peremptory challenge may rely on a broad spectrum of evidence suggestive of impartiality ranging from the "virtually certain to the highly speculative." (RB 66.) But *Batson/Wheeler* is the check on such unfettered peremptory challenges. As noted above, *Williams* is distinguishable because the record demonstrated that the prosecutor had a legitimate basis to believe the prospective juror may have been biased

toward the defendant.

Respondent asserts that the "nexus" that linked Bussey to the Bloods gang in Inglewood in *Williams* was similar to No. 2723471 and her experiences in Wasco, leading to potential bias against Trevino. (RB 67.) In other words, the bias against Trevino as a witness was that No. 2723471 was "unfamiliar" criminal street gang activity in her own community. The explanation rings hollow. There is nothing to demonstrate her lack of such familiarity would make her unable to "fairly judge the credibility of Trevino." (RB 67.) Gutierrez pointed out that the prosecutor failed to ask the prospective juror how she might react to Trevino's testimony. (GOB 31-32; cf. 3ART 507-508 [prosecutor sought assurances from school psychologist that he would not bring special expertise to judging witness credibility].) Appellant has noted that there was nothing to suggest that Trevino's low-level crimes for pecuniary gain ever gained notoriety in Wasco as gang-related crimes. (AOB 64; 7ART 1765.) Given that the low-level crimes of Trevino are known from the record, it is significant that the prosecutor never claimed that he was personally aware that Wasco had a history of notorious gang crimes.

Respondent's answer to Gutierrez is that No. 2723471's answers, regardless of what they were, would not alter the analysis because he was

entitled to doubt her. (RB 69.) On what basis? As Gutierrez has argued, the justification was vague and whatever answer she gave (awareness or lack of awareness), the prosecutor would have excluded No. 2723471 for the same reason he excluded No. 2468219. (See *Abramson v. William Paterson College of New Jersey* (3d Cir. 2001) 260 F.3d 265, 289 [suspiciousness of vague justifications][11].)

As to No. 2408196, respondent argues that the prosecutor reasonably "could" have been concerned that this prospective juror was sympathetic to the defendants or to gang activity in general because it was gang activity that prevented her from being in close contact with her uncle. (RB 46-47.) The suspicion correlates with racial/ethnic bias (e.g., "sympathetic to gang activity in general"). No. 2401896 denied having ever been close to the uncle and denied any desire to remain close to him. He lived out of the

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11 *Abramson*, involving employment discrimination on the basis of religion, is useful and apposite to explain how pretext is shown. It states: "Hence, to make a sufficient showing of pretext, Abramson must 'demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions' in WPC's reasons that 'a reasonable factfinder could rationally find them "unworthy of credence." ' ." (*Ibid.*) Employment discrimination cases are appropriate in *Batson* cases because the three-step analysis is derived from the same Fourteenth Amendment source. (*Batson*, *supra*, 476 U.S. at pp. 93, 98, fn. 21 [citing a Title VII sex discrimination case, *Anderson v. Bessemer City*, *supra*, 470 U.S. at p. 573, as appropriate analysis for step three]; *Foster* articulates "shifting justification" which is a recognized indicium of discriminatory intent in employment cases. (578 U.S. __ [136 S.Ct. at p. 1751].)

state, his gang was in Los Angeles, and she only knew him when she was young. (4ART 864-865.) Respondent cites the fact that her cousin had been murdered. (RB 47.) The murder was not gang-related, and she was "very happy" with how law enforcement handled the case. (4ART 814-815.) She and her husband both worked in corrections. (4ART 812.)

IV. THE COURT OF APPEAL ERRED UNDER *SILVA/SNYDER* AND *TURNER* AS TO THE RULING ON NO. 2547226 DUE TO THE PROSECUTOR'S VAGUE AND CONTENTLESS JUSTIFICATION.

Respondent asserts that the trial court properly accepted the prosecutor's justification as to No. 2547226 regarding her potential difficulty discussing the case with fellow jurors and understanding her role as a juror. (RB 58.) Appellant incorporates by reference the arguments of appellant Gutierrez and appellant Enriquez in their reply briefs as to this prospective juror. (GRB 5-15; ERB 9-14.)

Appellant adds these further points. The prosecutor could not independently recall a reason for this prospective juror, forcing him to rely on a single note he had taken. (GB 9.) This raises suspicion as to the genuineness of his proffered reason. The fairest reading of the explanation is that the prospective juror might be reticent in deliberations, not that she wasn't equipped to fulfill her role as a juror. (5ART 1062.) Speaking one's

mind more than listening is not a prerequisite for fulfilling the role of a juror. (*People v. Allen* (2004) 115 Cal.App.4th 542, 546, 551; *Foster*, *supra*, 578 U.S. __ 136 S.Ct at p. 1754; *Harris v. Hardy*, *supra*, 680 F.3d at p. 965 [demeanor-based explanations are particularly susceptible to serving as pretexts]; *People v. Tennille*, *supra*, __ Mich.App. __ [2016 Mich.App.SEXIS 742], p. 15 [demeanor-based reasons deserve particularly careful scrutiny].) Respondent cites only one instance of a prospective juror, No. 2386215, who was queried about juror duties, specifically the reasonable doubt standard. There, actual duties of a juror were addressed. (RB 60-61.) Possible reticence in the jury deliberations room was never explored with any other prospective juror. Comparative analysis demonstrates that No. 2861675 had no prior jury experience. (5ART 702-703.) In addition, based on the pattern of systematic exclusion suggesting bias on the prosecutor's part, a lone *passive* Hispanic on a jury would likely have been an ideal juror for the prosecution because she would be less likely to hang a jury favoring conviction. (See *Miller–El*, *supra*, 545 U.S. at p. 247; *Harris v. Hardy*, *supra*, 680 F.3d at p. 957.)

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V. THE COURT OF APPEAL ERRED UNDER *SILVA/SNYDER* AS TO THE RULING ON NO. 2510083 DUE TO THE FACTUALLY UNSUPPORTED JUSTIFICATION.

Respondent contends that there was no error as to No. 2510083, notwithstanding a potential hardship that never materialized. Respondent asserts that this reason was an "genuine mistake" and that she was validly excused due to her lack of life experience. (RB 76-84.) Appellant incorporates by reference the arguments from the reply briefs of appellant Gutierrez and appellant Enriquez as to this prospective juror. (GRB 22-30; ERB 14-20.)

Appellant contends that the cases cited by respondent on the question of mistake are inapposite. In support of its argument that this was a long trial and mistakes are bound to happen in such trials, respondent relies on *People v. Jones* (2011) 51 Cal.4th 346 and *People v. Elliott* (2012) 53 Cal.4th 535; RB 77-80.) They are distinguishable. In *Jones*, the prosecutor mistakenly described a prospective juror as having a son accused of a murder or attempted murder (an exaggeration since the prospective juror had never described the offense on the questionnaire). The court found the error harmless because, regardless of the degree of the offense, the prosecutor would have challenged the prospective juror. (51 Cal.4th at p.

366.) Here the respondent identifies no particular circumstances that would justify an inference that the prosecutor made an innocent mistake. The court reminded the parties they were waiting for the prospective juror's report back as to her interview. (3ART 573.) The prosecutor was informed at the *end* of the *next* court day that No. 25100083's hardship was resolved. (2ART 389; 3ART 603.) The prosecutor appeared to challenge two non-Hispanic prospective jurors with possible hardships due to low levels of income. (2ART 459; 3RT 503-504; 4RT 769-770; 5ART 1048 [No. 2231912 and No. 2624830].) No. 2510083 was a regular elementary school employee seeking summer employment to fill out her income-earning year and was only voicing concern about missing one interview.[12] (2ART 388.) The alternative grounds (lack of life experience and sophistication in some of her answers) (5ART 1057) cannot result in the application of the harmless-mistake excuse because the prosecutor conceded that youth was not a disqualifier. (See *Foster*, *supra*, 578 U.S. __ [136 S.Ct. at p. 1752] [contemplating possible mistake but rejecting it based on other weak justifications, including one based on youth that was belied by comparative

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12 Respondent claims another mistake for which the prosecutor was blameless: the court reporter's error in recording the "50,000" prior trials statement by the prosecutor. (RB 110.) Nothing in the record is cited in support of that conclusion. (See *Foster*, *supra*, 578 U.S. __ [136 S.Ct. at pp. 1754-1755] [state's indignant response to the claimed violation].)

analysis].) "Some other answers" is a reason without content.

Respondent also contends that the mistake pertained not to the resolution of the hardship but to believing she *asked to be released* (regardless of whether the hardship could be resolved), which reason was a mistake and therefore race neutral. (RB 80-81; 5ART 1057.) Respondent cites nothing in the record to corroborate this hypothesis.

People v. Elliott, *supra*, 53 Cal.4th 535 is distinguishable because it was a capital trial in which the jurors completed a 27-page questionnaire with 125 questions. (*Id.* at p. 565.) Nothing supports a similarity between the two cases. The mistakes in *Elliott* did not pertain to the prosecutor's recollection of the basis for his justification, as here.

People v. Barber (1998) 200 Cal.App.3d 378, 398 and *People v. Landry* (1996) 49 Cal.App.4th 785, 789, cited by respondent, simply acknowledge that hardship is a plausible race neutral justification. That is conceded here. The problem is that there were no facts supporting a hardship. When No. 2510083 reported the resolution of the conflict, the prosecutor undertook no further inquiry into possible bias from the matter.

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VI. THE COURT OF APPEAL'S ERROR UNDER *LENIX* CONCEDED BY RESPONDENT WAS NOT HARMLESS.

Respondent concedes that the Court of Appeal failed to review the trial court's comparative analysis and thereby committed error under *Lenix*. But it claims the trial court adequately conducted that analysis. (RB 88, 90-105.) The Court of Appeal's failure to consider comparative analysis should result in the same open review of the record that occurs in cases under *Johnson v. California* (2005) 545 U.S. 162. (*People v. Gray* (2005) 37 Cal.4th 168, 186.)

As the appellants have argued, the comparative analysis undertaken by the trial court was flawed, and the error is not cured based on substantial evidence. (RB 91-105.) Appellant argues that No. 2581907 (church-based counselor with sympathy for juvenile gang members) and No. 2861675 (security guard in neighborhood with gang violence) were non-Hispanics who had gang exposure through employment-type activities. Respondent does not address appellant's argument as to these two prospective jurors. (AOB 67-69.) Appellant's comparative analysis argument as to these two prospective jurors is persuasive and unrebutted.

VII. EVEN IF THERE WAS *BATSON* ERROR, THE COURT OF APPEAL ALSO ERRED BY IGNORING THE *WHEELER* CLAIM BECAUSE THERE WAS CLEAR EVIDENCE OF SYSTEMATIC EXCLUSION OF HISPANIC PROSPECTIVE JURORS.

Appellant argues that the record supports an independent *Wheeler* violation.

As a preliminary matter, appellant disputes respondent's assertion that there were two Hispanics remaining in the jury box at the time of the motion, as opposed to appellant's contention that there was one. (RB 113, citing 5ART 1048, 1051-1054.) Respondent reads counsel for Gutierrez as stating that two Hispanics, No. 2468219 and No. 2632943, were ones who remained at the time of the motion. But counsel was referring to prospective jurors who had been removed. (2ART 450-451; 3ART 515, 572.) If counsel had intended to identify Hispanics remaining he would have identified No. 2478882. (5ART 1053.)

As to the merits, respondent contends that the cross-section right is co-extensive with the "federal" guarantee, meaning *Batson*. If there is no *Batson* violation, then there is no *Wheeler* violation. (RB 112-113.) Respondent's reliance on *People v. Bell*, *supra*, 49 Cal.3d 502 is of no assistance. It states that the Sixth Amendment right embodies the representative cross-section right and therefore is the same as the article I,

section 16 right. The *Batson* right is a Fourteenth Amendment right, not a Sixth Amendment right.

Moreover, *Wheeler* interprets the state constitutional provision through the lens of U.S. Supreme Court Sixth Amendment cases, confirming it is not Fourteenth-Amendment-based. (22 Cal.3d at pp. 265-270.) *Wheeler* also finds that the cross-section right is "equally and independently" guaranteed by article I, section 16. (*Id.* at p. 272.)

The article I, section 16 right is derived from the common law: from the "American system" and the "American tradition" of which California is a descendent. (*Wheeler*, *supra*, 22 Cal.3d at pp. 265-266, 272.) In *Burtis v. Universal Pictures Co.* (1953) 40 Cal.2d 823, dissenting Justice Carter explained that the tradition of the American jury dates to the Magna Carta in 1215 and the notion that a defendant is entitled to have his/her fate decided by "his equals – his fellow citizens – taken indiscriminately from the mass." (*Id.* at pp. 841-842.) William Penn, who was convicted by a judge while demanding a jury of citizens for aiding the Quakers (a persecuted religious minority), emigrated to America after being released from custody. In Pennsylvania he helped adopt a bill of rights for the colony that included a trial "by 12 men, and as near as may be peers or equals of the neighborhood and men without just exception." (*Id.* at p.

843.)

Twenty four years ago, the Rodney King trial caused this state to suffer a crisis of confidence related to jury composition along racial lines. Today there is a national debate over police use-of-force issues that strikes at the public's confidence in the criminal justice system. When minorities lose confidence in the criminal justice system, the country as a whole suffers.[13] *Wheeler* should be read as requiring the prosecutor to recognize the state's obligation to seek proportional representation on the petit jury of the defendant's own cognizable group, despite its peremptory challenge right. (*People v. Trevino* (1985) 39 Cal.3d 667, 680.)

In *Peters v. Kiff* (1972) 407 U.S. 493, Justice Marshall wrote:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be

13 See *Utah v. Strieff* (2016) 579 U.S. __ [136 S.Ct. 2056, 2070], dis. opn. of Sotomayor, J.; Richardson and Goff, *Implicit Racial Bias in Public Defender Triage* (2013) 122 Yale L. J. 2626; [study showing even public defenders who regularly advocate on behalf of minorities are affected by racial bias when using their gut instincts to manage heavy caseloads].)

presented.

(407 U.S. at pp. 503-504, quoted in *Wheeler*, *supra*, 22 Cal.3d at p. 269.)

In appellant's trial Hispanic jurors may have viewed appellant's call to his "Southside homies" as signifying multiple possible intentions. Was it a call for solidarity in defense of appellant who was working as the assistant to the motel manager, a spontaneous reaction to a threat of violence borne of cultural tradition (machismo),[14] or an exhortation to promote the activities of a particular criminal street gang? (See *People v. Prunty* (2015) 62 Cal.4th 59; *United States v. Alanis*, *supra*, 335 F.3d. 965.)

Wheeler explained that group bias is evident when the specific grounds for bias are not exercised equally across racial or ethnic lines – meaning comparative analysis. (22 Cal.3d at p. 276.) Hispanic prospective jurors with marginal issues were challenged and non-Hispanics with similar issues were not, as the comparative analysis arguments reveal. This coupled with the great disparity between appellant's jury and the Hispanic

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14 "Machismo" is: "A strong or exaggerated sense of traditional masculinity placing great value on physical courage, virility, domination of women, and aggressiveness." (Amer. Heritage Dictionary (5th ed. 2011) p. 1051.) "Machos in Iberian-descended cultures are expected to possess and display bravery, courage and strength as well as wisdom and leadership, and ser macho (literally, 'to be a macho') was an aspiration for all boys." (Wikipedia Encyclopedia, "Machismo" [https://en.wikipedia.org/wiki/Machismo (as of Aug. 25, 2016)].)

population in the county demonstrates systematic exclusion within the meaning of *Wheeler*.

CONCLUSION

For all of the foregoing reasons, appellant Ramos respectfully requests that the Court conclude that the Court of Appeal erred by upholding the trial court's ruling denying the *Batson/Wheeler* motion.

Dated: September 5, 2016

Respectfully submitted,

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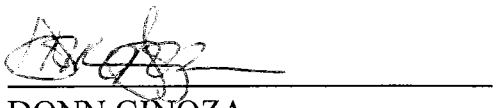
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to California Rules of Court, rule 8.504(d)(1) that the attached **APPELLANT GABRIEL RAMOS'S REPLY BRIEF ON THE MERITS** was produced using a 13-point Times New Roman type and contains 7,355 words.

Dated: September 5, 2016

Respectfully submitted,



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CERTIFICATE OF SERVICE BY ATTORNEY

I, Donn Ginoza, hereby certify that I am an active member of the State Bar of California and not a party to the within action; that my business address is 660 Fourth Street, #279, San Francisco, California 94107; that I served the foregoing **APPELLANT GABRIEL RAMOS'S REPLY BRIEF ON THE MERITS** by depositing a true copy thereof in the United States Mail in Palo Alto, California, on September 6, 2016, enclosed in envelopes with postage thereon fully prepaid, addressed as follows:

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