IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. FRANCIS MATA, Defendant and Appellant.	No. S201413 Court of Appeal No. B226256 Los Angeles County Superior Court No. BA366071

APPELLANT'S ANSWER BRIEF ON THE MERITS

Appeal from the Judgment of the Superior Court
of the State of California for the
County of Los Angeles

Honorable Norman Shapiro, Judge

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STATEMENT OF ISSUES

1. After appellant successfully objected to the prosecutor's peremptory challenge as being impermissibly race based (see *People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79), did the trial court err when, without obtaining appellant's consent, it reseated the prospective juror rather than quash the venire?
2. If the trial court erred in reseating the challenged prospective juror following defendant's successful *Wheeler/Batson* motion, was the error reversible per se or subject to harmless error analysis?
3. If the error is subject to harmless error analysis, was the error prejudicial under *People v. Watson* (1956) 46 Cal.2d 818?

INTRODUCTION

This appeal concerns the remedies available for *Wheeler/Batson* error. Although a party who brings a successful *Wheeler/Batson* motion is entitled to an order dismissing the jurors already selected and quashing the remaining venire (*Wheeler*, *supra*, 22 Cal.3d at p. 282), the trial court has discretion to select a different remedy, but only if the moving party waives its right to quash the venire and consents to the alternative remedy (*People v. Willis* (2002) 27 Cal.4th 811, 821, 823-824).

Here, appellant brought a successful *Wheeler/Batson* motion after the prosecutor exercised a peremptory challenge against an African-American woman. Without consulting with appellant's counsel, and making no reference to the default remedy of quashing the venire, the trial court ordered the prospective juror reseated on the jury. The Court of Appeal reversed appellant's convictions, holding there was no proof that appellant's counsel expressly or impliedly waived appellant's right to quash the venire. This court should uphold the Court of Appeal decision and reverse the trial court's judgment.

First, respondent cannot carry its burden to prove that appellant's counsel intentionally relinquished or abandoned appellant's right to quash the venire. Counsel's mere silence in the face of the court's order, without more, cannot constitute a waiver of his client's rights because it is too ambiguous to prove that counsel intentionally relinquished or abandoned a known right. This court has consistently evaluated the totality of the circumstances, not simply counsel's mere silence, in determining whether a waiver can be implied.

On this record, an implied waiver cannot be proven from the totality of the circumstances. Nothing about the court's order reseating the juror shows that counsel intentionally relinquished appellant's right to quash the venire. The court and parties did not discuss quashing the venire – indeed, that remedy was never mentioned – and before ordering the juror reseated, the court did not solicit counsel's comment on the remedy it selected. Finding waiver in these circumstances would be contrary to precedent that puts the burden on the party seeking waiver "to prove it by evidence that does not leave the matter to speculation" and requires that "doubtful cases . . . be resolved against a waiver." (*People v. Mitchell* (2011) 197 Cal.App.4th 1009, 1015, quoting *People v. Vargas* (1993) 13 Cal.App.4th 1653, 1662.)

Second, the trial court's error is structural error requiring automatic reversal because the nature of the error renders harmless error analysis "necessarily unquantifiable and indeterminate." (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 150, quoting *Sullivan v. Louisiana* (1993) 508 U.S. 275, 282.) In light of the diversity of jurors' personal backgrounds and experiences, it simply is not possible to determine how hypothetical jurors selected from a new venire would have evaluated the evidence and whether all of them would have voted to convict appellant of all the charges. Such a determination improperly involves a "speculative

inquiry into what might have occurred in an alternate universe." (*Gonzalez-Lopez*, *supra*, 548 U.S. at p. 150.)

Even if harmless error analysis were feasible, the jury-trial guarantee in the Sixth Amendment bars an appellate court from determining whether a hypothetical jury selected from a new venire would have found appellant guilty. (U.S. Const., 6th Amend.; *Sullivan*, *supra*, 508 U.S. at pp. 279-280.) Because the Sixth Amendment does not permit "appellate speculation about a hypothetical jury's action" (*id.* at p. 280), the error is structural and reversible per se.

Third, even if subject to harmless error analysis, the trial court's error is prejudicial.

STATEMENT OF THE CASE AND FACTS

The Convictions. On December 21, 2009, police officers in an observation post saw appellant Francis Mata and Earl Early walking on San Julian Street in the Skid Row area of Los Angeles. (3 RT 1220-1222.)[1] Early appeared to be holding money. (3 RT 1223.) At one point, Early stopped to speak with Anthony Coleman. (3 RT 1224-1225.) Coleman spit out a clear, plastic-wrapped item, opened it, and put a "rock" of cocaine into Early's hand. (3 RT 1226.) Coleman then took the money from Early. (3 RT 1235.)

Police soon arrested Coleman and found five dollars and several cocaine rocks weighing a total of 0.52 grams. (4 RT 1527, 1808, 1839-1841.) When other officers approached Early, he smashed a glass pipe on the ground. (4 RT 1545-1546, 1577.) In the debris, police found a cocaine rock weighing 0.0264 grams. (4 RT 1547-1548, 1579, 1807-1808.) Police also arrested Mata, and found in his pocket a cocaine rock weighing 0.0200 grams. (4 RT 1580, 1808.) The prosecution's criminalist did not know the

[1] "CT" refers to the Clerk's Transcript and "RT" refers to the Reporter's Transcript.

concentration of the cocaine in the rock found in Mata's pocket. (4 RT 1812-1814.)

During the booking process, Mata became hostile and struggled with two officers, bruising one officer on his right cheek. (4 RT 1848, 1850-1853, 1884, 1886.)

A jury convicted Mata of one count of possession of cocaine (Health & Saf. Code, § 11350, subd. (a)), and two counts of resisting arrest (Pen. Code, § 148, subd. (a)(1)). (1 CT 126-128, 131-132; 6 RT 2719-2720.) The jury acquitted Coleman of sale of cocaine and possession of cocaine for sale, but found him guilty of possession of cocaine. (6 RT 2718-2719.)[2]

Immediately following the verdicts, the court sentenced Mata to a determinate term of two years. (1 CT 132-134, 144; 6 RT 2728.)

Appellant's Wheeler/Batson Motion. During jury selection, the prosecutor exercised a peremptory challenge against prospective juror No. 2473, an African-American woman. (3 RT 943-944.) She was the second African-American struck by the prosecutor "within the last few challenges." (3 RT 945.)

When the prosecutor excused No. 2473, Mata's counsel said, "I ask for a side bar after she leaves." (3 RT 943.) The court asked the juror to remain in her seat. (3 RT 943.) At sidebar, counsel brought a *Wheeler/Batson* motion challenging the prosecutor's strike. (3 RT 943-944.) After hearing from defense counsel and the prosecutor (3 RT 944-946), the court granted Mata's motion and said, "And I'd order that the juror remain seated." (3 RT 946; see also 3 RT 948.) Defense counsel did not comment on the court's order, and jury selection continued.

Later, the prosecutor exercised a peremptory challenge against prospective juror No. 0207, also an African-American woman. (3 RT 965.)

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[2] Early was not a defendant in this trial.

Defense counsel said, "Your Honor, I'd ask that she remain while we have a side bar." (3 RT 965.) At sidebar, defense counsel made a *Wheeler/Batson* motion. (3 RT 966.) After hearing from both sides and finding no prima facie case (3 RT 966-972), the court denied the motion: "Your request to have this juror remain seated is denied. The [peremptory] challenge is accepted." (3 RT 972.) Defense counsel did not comment on the court's ruling.

The Court Of Appeal Decision. The Court of Appeal reversed Mata's convictions on the ground that the trial court erred in reseating No. 2473 without obtaining defense counsel's consent, rather than quashing the venire. (Slip opn. pp. 6-8.) On May 9, 2012, this court granted review.

ARGUMENT

I. The Convictions Should Be Reversed Because Defense Counsel Neither Waived Appellant's Right To Quash The Venire Nor Consented To The Alternative Remedy Of Reseating The Stricken Juror.

Respondent contends that appellant's waiver of the default remedy to quash the venire following a successful *Wheeler/Batson* motion can be implied from defense counsel's mere silence, without reference to any other facts or context, after the court ordered a different remedy. Alternatively, respondent contends that counsel's waiver can be implied from the totality of the circumstances in this case. Neither contention withstands scrutiny.

First, counsel's mere silence cannot constitute a waiver of his client's rights because it is too ambiguous to prove that counsel intentionally relinquished or abandoned a known right. (*Mitchell*, *supra*, 197 Cal.App.4th at p. 1015 [a waiver requires an "intentional relinquishment or abandonment of a known right or privilege" and "[t]he burden is on the party claiming the existence of the waiver to prove it by evidence that does not leave the matter to speculation, and doubtful cases will be resolved against a waiver"], quoting *Vargas*, *supra*, 13 Cal.App.4th

at p. 1662.) Moreover, in analogous cases, on which respondent relies, this court has consistently evaluated the totality of the circumstances, not simply counsel's silence, in determining whether waiver can be implied.

Second, respondent cannot sustain its burden to prove, from the totality of the circumstances, that counsel intended to relinquish or abandon the default remedy of quashing the venire. In contrast to the cases on which respondent relies, counsel's silence was not in context of a discussion about remedy or in the face of the court's request for counsel to put objections on the record. The trial court here simply ordered the juror reseated without consulting with counsel. In these circumstances, no waiver can be implied.

A. Following A Successful *Wheeler/Batson* Motion, A Trial Court May Impose A Remedy Other Than Quashing The Venire Only If The Complaining Party, Through Counsel, Knowingly And Intentionally Waives That Default Remedy.

The remedies available for *Wheeler/Batson* violations have evolved. In *People v. Wheeler*, *supra*, this court held that where one party exercises a peremptory challenge based on impermissible group bias, in violation of the state and federal constitutions (22 Cal.3d at p. 272 [citing Cal. Const., art. I, § 16, and U.S. Const., 6th Amend.]), the trial court "must dismiss the jurors thus far selected. So too it must quash any remaining venire." (*Id.* at p. 282.) The court deemed this remedy necessary because "the complaining party is entitled to a random draw from an entire venire – not one that has been partially or totally stripped of members of a cognizable group by the improper use of peremptory challenges." (*Ibid.*) Although the *Wheeler* court permitted only one remedy, it also signaled its willingness to consider making other remedies available if experience showed that quashing the venire proved "ineffective to deter such abuses of the peremptory challenge." (*Id.* at p. 282, fn. 29.)

In *Batson v. Kentucky*, *supra*, decided almost eight years after *Wheeler*, the U.S. Supreme Court held that racial discrimination in the exercise of peremptory challenges violated the federal equal protection clause. (476 U.S. at p. 89; see also *Holland v. Illinois* (1990) 493 U.S. 474, 487 [holding that racial bias in exercising peremptory challenges does not violate a defendant's Sixth Amendment right to an impartial jury].) The high court identified two permissible federal remedies, but left the states and federal trial courts to decide "whether it is more appropriate in a particular case . . . for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case [citation], or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire [citation]." (476 U.S. at p. 99, fn. 24.)

In *People v. Willis*, *supra*, this court revisited the remedy issue. There, defense counsel sought to provoke a mistrial because he was unhappy with its racial composition. After the trial court rejected defense counsel's argument that the venire was not fairly constituted (27 Cal.4th at pp. 814-815), defense counsel systematically excluded white male prospective jurors with peremptory challenges (*id.* at p. 815). When the trial court granted the prosecutor's *Wheeler/Batson* motion, *defense counsel* moved for a mistrial, arguing that *Wheeler* left the trial court no other choice. (*Id.* at p. 816.) After the trial court denied his requested remedy, defense counsel used eight of his next nine peremptory challenges to strike white males, thereby precipitating a second successful *Wheeler/Batson* motion. The defendant was convicted and appealed on the ground that the trial court should have quashed the venire. (*Ibid.*)

This court understandably was troubled both by defense counsel's effort to manipulate the jury selection process and also by the danger that

Wheeler's one-size-fits-all remedy gave counsel an incentive to violate *Wheeler/Batson* as a means to postpone trial or avoid it altogether.

> To remedy that improper course of conduct by dismissing the remaining venire not only would reward such conduct and encourage similar conduct in future cases, but also would frustrate the court's substantial and legitimate interest in the expeditious processing of cases for trial.

(*Id.* at p. 818; see also *id.* at p. 819 [discussing *People v. Williams* (1994) 26 Cal.App.4th Supp. 1, in which defense counsel committed *Wheeler/Batson* error with two successive venires in an effort to postpone trial indefinitely].)

This court then held that, "with the assent of the complaining party," and where the remedy prescribed in *Wheeler* would only reward the party committing the *Wheeler/Batson* violation, a trial court had discretion to use remedies other than quashing the venire.

> As the present case demonstrates, situations can arise in which the remedy of mistrial and dismissal of the venire accomplish nothing more than to reward improper voir dire challenges and postpone trial. Under such circumstances, and with the assent of the complaining party, the trial court should have the discretion to issue appropriate orders short of outright dismissal of the remaining jury, including assessment of sanctions against counsel whose challenges exhibit group bias and reseating any improperly discharged jurors if they are available to serve.

(*Id.* at p. 821.) This court emphasized the need for the trial court to obtain the complaining party's waiver or consent before imposing an alternative remedy.

> We stress that such waiver or consent is a prerequisite to the use of such alternative remedies or sanctions, for *Wheeler* made clear that "the complaining party is entitled to a random draw from an entire venire" and that dismissal of the remaining venire is the appropriate remedy for a violation of that right. (*Wheeler*, *supra*, 22 Cal.3d at p. 282.) Thus, trial courts lack discretion to impose alternative procedures in the absence of consent or waiver by the complaining party. On

> the other hand, if the complaining party does effectively waive its right to mistrial, preferring to take its chances with the remaining venire, ordinarily the court should honor that waiver rather than dismiss the venire and subject the parties to additional delay.

(*Id.* at pp. 823-824.)

Thus, following a successful *Wheeler/Batson* motion, quashing the venire is the default remedy, unless the complaining party waives that right and consents to an alternative remedy. Implicit in this court's use of the words "waiver" and "consent" are that the complaining party had *knowledge* of the right being relinquished or abandoned, and that the complaining party *intentionally* relinquished or abandoned the right. (See, e.g., *Mitchell*, *supra*, 197 Cal.App.4th at p. 1015.) By establishing a default remedy from which the court can depart only with counsel's waiver, *Willis* ensures that power to select the remedy rests with the person best situated to identify the most useful remedy for the injury inflicted by the *Wheeler/Batson* violation – namely, the injured party.

Willis, however, did not decide what evidentiary showing would be necessary to demonstrate the complaining party's waiver or consent. Although appellant does not contend here that a trial court must obtain the defendant's personal waiver or consent, and does not contend that defense counsel's waiver or consent must be express, he submits that counsel's mere silence cannot constitute a waiver and that, on this record, there is an insufficient basis to conclude that defense counsel impliedly waived appellant's right to quash the venire.

B. Counsel's Mere Silence Does Not Constitute Waiver Or Consent.

Respondent contends that defense counsel's mere silence is sufficient to satisfy the "waiver or consent" prerequisite for the trial court to use an alternative remedy (such as reseating a juror) rather than the default

remedy of dismissing the venire. (ROBM 12-18.) This contention should be rejected.

Waiver has both substantive and procedural aspects. Substantively, waiver requires an "intentional relinquishment or abandonment of a known right or privilege." (*Mitchell*, *supra*, 197 Cal.App.4th at p. 1015, quoting *Vargas*, *supra*, 13 Cal.App.4th at p. 1662.) Procedurally, the party claiming a waiver has the burden to prove waiver "by evidence that does not leave the matter to speculation, and doubtful cases will be resolved against a waiver." (*Ibid.*)

Silence alone – with no context or other facts, such as whether the court solicited the parties' objection to a proposed remedy, or whether the question of imposing the default remedy of quashing the venire was discussed in counsel's presence – is susceptible to multiple interpretations. Counsel may have been silent because he was unaware that appellant had a right to quash the venire; counsel may have been silent because, although he did not intend to relinquish that remedy, he felt that the trial court already had ruled and any objection would be futile; or counsel's silence may have signified his intentional relinquishment of his client's right. In other words, any finding that counsel here intentionally relinquished a known right necessarily would rest on speculation. (*Mitchell*, *supra*, 197 Cal.App.4th at p. 1015 [the evidence of waiver must be sufficiently strong that it "does not leave the matter to speculation" and doubt].) Because of the inherent ambiguity of counsel's silence, respondent cannot carry its burden of proof on that fact alone.

Respondent's argument, that defense counsel should not be allowed to "gamble" on an acquittal only to raise the issue on appeal in the event of a conviction (ROBM 17), does not justify a "mere silence" standard for waiver. The argument assumes the very issue in dispute – namely, whether counsel intended to waive the default remedy. Here, there is no evidence

that defense counsel made such a gamble. If there were such evidence – which would be more than mere silence – counsel would be deemed to have intentionally relinquished his client's right to quash the venire.

Respondent's implied waiver cases do not support the proposition that mere silence is sufficient to find an implied waiver. Instead, they find implied waiver from the totality of the circumstances. For example, in *People v. Haskett* (1982) 30 Cal.3d 841 (cited at ROBM 13), the defendant complained that he was denied his right to have a magistrate, rather than a commissioner, preside over his preliminary hearing. The court rejected his complaint out of hand – the defendant had orally consented, and his counsel had stipulated in writing, to the commissioner. (*Id.* at p. 858.)

In *People v. Horton* (1991) 54 Cal.3d 82 (cited at ROBM 13), the defendant appealed on the ground that he had been tried by a commissioner. Although the defendant and counsel did not expressly stipulate to a commissioner (*id.* at pp. 87-89), counsel's statements and conduct left no doubt that he had impliedly stipulated to the commissioner. (See *id.* at pp. 98-100 [counsel knew the judge was a commissioner, stated his intention to file a stipulation, failed to file it through an oversight, and never objected to the commissioner].) Counsel's "conduct," this court held, was "tantamount to a stipulation" that a court commissioner could try the case. (*Id.* at p. 91.)

In *People v. Mayfield* (1997) 14 Cal.4th 668 (cited at ROBM 14), the defendant moved to disqualify the trial judge and requested a particular judge to hear the motion. (*Id.* at pp. 810-811 [citing Code Civ. Proc., §170.3, subd. (c)(5), which requires the parties to agree on the judge hearing the disqualification motion].) However, when the trial judge instead referred the matter to the presiding judge, the defendant did not repeat his request. This court held that these facts were sufficient to infer the defendant's agreement to have the presiding judge hear the motion. (*Id.*

at p. 811.) In particular, the record showed that the defendant knew about his statutory right to request a particular judge, knew that the matter was sent to a different judge despite his prior request, and decided not to repeat his request. Thus, far from being a "mere silence" case, *Mayfield* reflects that the defendant's agreement to have the matter heard by the presiding judge could be inferred from the totality of the circumstances.

Respondent also cites a number of cases for the proposition that waiver or consent can be implied from the failure to object. (ROBM 14.) The cases, however, show that waiver or consent is implied not just from counsel failure to object, but from the totality of the circumstances, including counsel's statements and actions in context. In *Barsamyan v. Appellate Division of the Superior Court* (2008) 44 Cal.4th 960, defense counsel had two unrelated cases pending trial. The calendar court sent one case out for trial with counsel's agreement, and continued Barsamyan's case over counsel's objection (who had wanted to trail it for one day). (*Id.* at pp. 966-968.) The question on appeal was whether, under these circumstances, counsel could be deemed to have consented to the delay or whether the delay violated the defendant's statutory speedy trial right. Observing that counsel cannot be ready for trial in two cases simultaneously (*id.* at pp. 972, 975), this court held that "counsel necessarily consents to postponement when he or she is not unconditionally ready for immediate trial due to conflicting commitments to other clients" (*id.* at p. 970). Thus, the case did not turn on counsel's silence, but her deliberate choice to proceed on one case rather than another.

In *People v. Gutierrez* (2003) 29 Cal.4th 1196, on the second day of trial, the defendant refused to leave his cell to go to court despite counsel's urging, and he unequivocally told counsel and the bailiff that he did not want to attend trial. (*Id.* at pp. 1199-1200.) The question on appeal was whether the defendant's words and actions constituted a "voluntary waiver"

of his right to attend trial or whether the court needed to go into lockup to inform the defendant of his right and obtain a waiver. (*Id.* at pp. 1201-1202.) This court held that, under the "totality of the facts," the defendant's words and conduct were sufficient to constitute a waiver. (*Id.* at pp. 1206-1207.)

In *People v. Toro* (1989) 47 Cal.3d 966, disapproved on another point in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3, the trial court instructed the jury on a lesser related offense not listed in the information; it was the sole offense on which the defendant was convicted. (*Id.* at p. 971.) Although counsel did not expressly consent to the instruction, his consent was readily implied from the totality of the circumstances: the court held a jury instruction conference with counsel; after the conference, the court listed the instructions it planned to give, including the lesser related instruction; the court inquired whether counsel had any objection to the instructions; and, receiving no objection (and no objection to the verdict forms which also listed the lesser related offense), the court instructed the jury about the lesser related offense. (*Id.* at pp. 977-978.) Thus, counsel's consent was not based just on his failure to object (i.e., mere silence), but also on the context in which the instruction was brought to counsel's attention in different ways and in which the court solicited counsel's objection to the instructions.

Finally, respondent relies on cases invoking the forfeiture rule to argue by analogy that mere silence constitutes a waiver. (ROBM 16-17.) The analogy fails. As this court observed, "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' [Citations.]" (*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6, quoting *United States v. Olano* (1993) 507 U.S. 725, 733.) Forfeiture does not require either knowledge of a potential legal claim or an intent to

abandon that claim on appeal. (See, e.g., *King v. Superior Court* (2003) 107 Cal.App.4th 929, 938 [in contrast to a waiver, "forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right"], quoting *United States v. Goldberg* (3rd Cir. 1995) 67 F.3d 1092, 1100.) Silence, by itself, says nothing definitive about the knowledge or intention of the person standing silent.

Under *Wheeler* and *Willis*, the trial court may impose an alternative remedy only if it first obtains the complaining party's "waiver or consent." (*Willis*, *supra*, 27 Cal.4th at p. 823; see also *id.* at p. 824 [a court lacks discretion to impose an alternative remedy in the absence of a "waiver"].) Nothing in *Willis*, which was decided well after *Saunders* and other cases carefully distinguishing waiver and forfeiture (see, e.g., *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371), suggests that this court required anything less than evidence of an intentional relinquishment of the default remedy. Rather, by requiring the trial court to obtain the complaining party's "waiver" or "consent," terms it used interchangeably, this court manifested its determination that the party claiming waiver prove by evidence in the record that the other party intentionally relinquished or abandoned the right to quash the venire. The meaning of mere silence is too ambiguous to satisfy respondent's burden.

Although respondent cites forfeiture cases, respondent does not contend here (and did not contend in the Court of Appeal) that appellant forfeited his argument on appeal by failing to make a proper objection in the trial court.[3] Consequently, respondent itself has forfeited any such contention and may not make such a contention in the reply brief. (See, e.g., *People v. Zamudio* (2008) 43 Cal.4th 327, 353-354; *People v. Bonilla*

[3] Respondent also did not raise this issue in the petition for review, and this court did not grant review on this issue.

(2007) 41 Cal.4th 313, 349-350; see also *People v. Tully* (2012) 54 Cal.4th 952, 1075 ["arguments made for the first time in a reply brief will not be entertained because of the unfairness to the other party"].) This rule applies to the People as well as defendants. (See, e.g., *People v. Superior Court (Maury)* (2006) 145 Cal.App.4th 473, 485, overruled on another ground in *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901.)

C. The Record Does Not Compel The Conclusion That Defense Counsel Impliedly Waived The Default Remedy Or Consented To The Alternative Remedy Of Reseating The Stricken Juror.

Alternatively, respondent contends that this court must infer from the spare record in this case that defense counsel impliedly waived his right to have the venire quashed and consented to the remedy of reseating No. 2473. (ROBM 18-21.) That contention does not withstand analysis – there is no evidence that counsel *knew* that quashing the venire was an available remedy or that he *intentionally* relinquished appellant's right to this remedy.

A valid waiver requires evidence that the person waiving the right knew the existence of the right being waived. (See *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053 [a valid waiver exists only if the person has knowledge of the right being waived], superseded by statute on another ground as stated in *Eller Media Co. v. City of Los Angeles* (2001) 87 Cal.App.4th 1217, 1219, fn. 3; *Mitchell*, *supra*, 197 Cal.App.4th at p. 1015 ["the valid waiver of a right presupposes an actual and demonstrable knowledge of the very right being waived"], quoting *Vargas*, *supra*, 13 Cal.App.4th at p. 1662.)

Here, there is no evidence that defense counsel knew the default remedy for a *Wheeler/Batson* error was quashing the venire. Neither the three lawyers (the defendants' attorneys and the prosecutor) nor the court mentioned, much less discussed, the remedy of dismissing the venire.

Nothing else that occurred in the courtroom brought the remedy to counsel's attention or revealed that he already knew about it. Speculation that, because defense counsel was a member of the Bar, he knew about this remedy does not satisfy respondent's burden to show that *this* defense counsel knew about the dismissal remedy. "The burden is on the party claiming the existence of the waiver to prove it by evidence that does not leave the matter to speculation, and doubtful cases will be resolved against a waiver." (*Mitchell*, *supra*, 197 Cal.App.4th at p. 1015, quoting *Vargas*, *supra*, 13 Cal.App.4th at p. 1662; *People v. Smith* (2003) 110 Cal.App.4th 492, 500-501 [same].)

A valid waiver also requires evidence that counsel subjectively intended to relinquish the dismissal remedy. (*Mitchell*, *supra*, 197 Cal.App.4th at p. 1015 [a waiver requires an "intentional relinquishment or abandonment"]; see also *People v. McKinnon* (2011) 52 Cal.4th 610, 636, fn. 16 [using the same language to distinguish waiver from forfeiture].) In *People v. Willis*, *supra*, after finding defense counsel had committed a *Wheeler/Batson* violation, the trial court asked the prosecutor, "So now what do you want me to do about it?" (*Willis*, *supra*, 27 Cal.4th at p. 815.) The prosecutor expressly said he did not want the court to quash the venire because that would simply achieve defense counsel's goal of getting a new venire. Instead, the prosecutor asked the court to admonish defense counsel and to impose monetary sanctions if he continued to violate *Wheeler/Batson*. (*Ibid.*) In accordance with the prosecutor's request, the court admonished counsel and threatened monetary sanctions. (*Ibid.*) When counsel committed further *Wheeler/Batson* violations, the court imposed monetary sanctions. (*Id.* at p. 816.) Here, by contrast, the trial court did not solicit defense counsel's view about an appropriate remedy, defense counsel did not tell the court that he wanted to relinquish the dismissal remedy, and the remedy imposed was not one that counsel

requested. As a result, this court must look to the context in which the trial court ordered the No. 2473 reseated to determine whether counsel knowingly and intentionally relinquished appellant's right to quash the venire, keeping in mind that doubtful cases are resolved against a finding of waiver.

A comparison with *People v. Overby* (2004) 124 Cal.App.4th 1237 illustrates why, in this case, respondent cannot show that defense counsel knew about and intended to relinquish or abandon the dismissal remedy. In *Overby*, as in the present case, defense counsel successfully brought a *Wheeler/Batson* motion, and the trial court ordered the stricken juror reseated. In *Overby*, counsel never expressly relinquished the dismissal remedy, but her statements and silence in response to the court's and prosecutor's statements consistently revealed her knowledge and intent to relinquish the defendant's right to quash the venire and instead to reseat the stricken juror. No such evidence exists in the current case. Instead, the evidence is at best ambiguous.

First, when defense counsel brought the *Wheeler/Batson* motion in *Overby*, she asked the court to order the juror to remain in the courtroom. (*Id.* at p. 1242.) The Court of Appeal found this to be strong evidence of counsel's intent to waive the dismissal remedy.

> As the only reason to ask that the juror remain was so that she could be reseated if the *Batson-Wheeler* motion were successful, it is clear that Overby's attorney intended at least to preserve the possibility of reseating the challenged juror. Counsel acted to ensure that the remedy ultimately selected was available to the court.

(*Id.* at p. 1244.) In the present case, by contrast, defense counsel said, "I ask for a side bar after she leaves." (3 RT 943.) This sentence cannot be reasonably understood as signaling counsel's intention to have the No. 2473 reseated in the event the court granted the *Wheeler/Batson* motion.

Second, the trial court in *Overby* explicitly discussed with counsel the dismissal and reseating remedies. "So at this point I'm going to grant the [*Wheeler/Batson*] motion as to Number 9 formally. And I'm going to elect the remedy to reseat Number 9 rather than the remedy to kick the entire panel." (*Id.* at pp. 1242-1243.) Thus, there could be no doubt from the record that defense counsel in *Overby* was aware of the dismissal remedy. Moreover, the trial court invited counsel to present argument on its proposed remedy, but defense counsel only said "submit" and did not request dismissal of the venire. (*Id.* at p. 1243.) As the Court of Appeal observed, "counsel's express repudiation of the court's offer to comment or argue about the appropriate remedy can only be understood as an indication of consent to the remedy the court suggested." (*Id.* at p. 1245.)

Here, however, the trial court did not invite comment on the proposed remedy, and defense counsel did not expressly repudiate the court's invitation to request a different remedy and did not signal his agreement with the chosen remedy by saying "submit." Rather, the trial court asked the juror to remain in her seat while it heard the *Wheeler/Batson* motion at sidebar (3 RT 943), and after granting the motion ordered the juror to be reseated (3 RT 946). Although defense counsel said nothing at that point, his silence is too ambiguous to constitute evidence of his knowing and intentional relinquishment of appellant's right to quash the venire. On the contrary, precisely because the court imposed the reseating remedy without inviting discussion, counsel just as likely believed that requesting a different remedy was futile. (Cf. *People v. Tuggles* (2009) 178 Cal.App.4th 1106, 1123 [in a forfeiture case, holding that an objection is not required it if would be futile].) Whether or not such belief was legally correct is irrelevant here – the point is that counsel's silence in the face of the court's imposition of the remedy without the opportunity to discuss it is

not evidence of counsel's subjective intention to relinquish the dismissal remedy.

Third, in *Overby* the prosecutor – who had committed the *Wheeler/Batson* violation – sought reconsideration of the court's earlier ruling on the ground that she wanted the venire dismissed. Although the prosecutor explicitly re-raised the issue of quashing the venire, thus bringing the remedy to defense counsel's attention, defense counsel did not join in that request or otherwise express concern about reseating the juror. (124 Cal.App.4th at p. 1243.) The Court of Appeal in *Overby* concluded that this fact "reinforced" its conclusion that defense counsel implicitly consented to reseating the juror. (*Id.* at p. 1245.)

Here, however, the issue of quashing of venire never came up once, much less twice as in *Overby*. When defense counsel made a second *Wheeler/Batson* motion, the question of remedy arose more obliquely. After the prosecutor used a peremptory challenge against a different juror, No. 0207, defense counsel stated, "Your Honor, I'd ask that she remain while we have a side bar." (3 RT 965.) The court subsequently denied the motion stating, "Your request to have this juror remain seated is denied." (3 RT 972.) Unlike *Overby*, where the court explicitly revisited whether the venire should be quashed or the juror reseated, the court here did not revisit the remedy imposed with respect to No. 2473. Moreover, as the Court of Appeal below stated, counsel's statement in connection with No. 0207 "may have reflected nothing more than a recognition of, and decision to comply with, the earlier procedure that the trial court followed pending its ruling upon a *Wheeler* motion." (Slip opn. 7.)

Stanley v. Superior Court (2012) 206 Cal.App.4th 265, which respondent also cites (ROBM 19), further supports the conclusion that waiver cannot be implied here. In *Stanley*, before opening statements several jurors were dropped from the jury for cause and/or hardship,

ultimately leaving the jury without any alternates. (*Id.* at pp. 271-276.) The question was whether appellant (through counsel) impliedly consented to a mistrial and the discharge of a jury, thereby barring a claim of double jeopardy. (*Id.* at p. 269.) The facts in *Stanley* amply demonstrate counsel's implied consent. Defense counsel participated in extended discussions about how to deal with the risk of beginning a lengthy trial without alternates, leading the court to believe that he consented to the mistrial. Counsel, moreover, was aware, or should have been aware, that he had given the trial court that impression. Finally, the trial court gave defense counsel opportunities to correct any misimpression that the court may have had, but he failed to do so. (*Id.* at p. 289; see also *id.* at pp. 291-294 [setting forth the evidence that through his words and actions counsel impliedly consented to the mistrial].) Nothing of the sort occurred in this case.

Absent a clear record on the issue of waiver, an appellate court should be chary of making a finding about counsel's subjective knowledge and intent. (See *Mitchell*, *supra*, 197 Cal.App.4th at p. 1015 ["doubtful cases will be resolved against a waiver"].) The reason is that facts that would and should bear heavily on those determinations – e.g., whether or not counsel smiled, nodded his head affirmatively, or otherwise physically signaled his assent when the court said it would reseat the juror – are not in this record. Left only with the thinnest indicia of counsel's knowledge and intent about the dismissal remedy, an appellate court cannot conclude that the question of waiver is free from doubt.

For the foregoing reasons, this court should hold that counsel did not impliedly waive appellant's right to dismiss the venire, and should hold that the trial court erred when it reseated juror No. 2473.

II. The Trial Court's Error Is Reversible Per Se.

The wrong factfinder rendered the verdicts in this case. The trial court should have quashed the venire, re-commenced jury selection with a new venire, and submitted the case to a jury selected from the new venire. For that reason, any harmless analysis necessarily would require this court to gauge the effect of the error not on the jury that rendered the verdicts, but instead on the jury that should have heard the case. Respondent seems to acknowledge as much when it asserts, "it is not reasonably probable any other jury would have acquitted appellant had it been presented with the same evidence presented to this jury." (ROBM 26.)

Such a harmless error analysis, however, is both infeasible and unconstitutional. Consequently, the trial court's decision to reseat No. 2473 without obtaining appellant's waiver or consent, rather than to quash the venire and select a new jury, requires automatic reversal.

First, the trial court's error is structural because the nature of the error renders a prejudice analysis "necessarily unquantifiable and indeterminate." (*Gonzalez-Lopez*, *supra*, 548 U.S. at p. 150, quoting *Sullivan*, *supra*, 508 U.S. at p. 282; *People v. Aranda* (2012) 55 Cal.4th 342, 364 [one basis for deciding a type of error is structural is "the difficulty of assessing the effect of the error"], quoting *Gonzalez-Lopez*, *supra*, 548 U.S. at p. 149, fn. 4.) Here, it is not possible to determine how a hypothetical jury selected from a new venire would have evaluated the evidence and whether any juror would have voted to acquit on any of the charges. Jurors bring to bear their personal backgrounds and experiences, which necessarily and properly affect their evaluation of the trial testimony. Based on their experiences, and the experiences of friends and family members, jurors will vary in their assessment of the credibility of witnesses and in their application of imprecise legal criteria, such as a "usable amount" of drugs. Imagining how a jury that was never chosen would have

evaluated the evidence improperly invites a "speculative inquiry into what might have occurred in an alternate universe." (*Gonzalez-Lopez*, 548 U.S. at p. 150.)

Second, even if harmless error analysis were feasible, an appellate determination that a hypothetical jury selected from a new venire would have returned guilty verdicts would violate appellant's Sixth Amendment right to a jury verdict. (U.S. Const., 6th Amend.; *Sullivan*, *supra*, 508 U.S. at pp. 279-280.) The reason is that harmless error analysis does not ask whether a hypothetical reasonable jury would have rendered guilty verdicts without the error, but whether the jury that actually heard the evidence would have found the defendant guilty absent the error. (*Id.* at p. 279.) Here, however, because the error was failing to quash the venire and select a new jury, it is irrelevant what verdicts the actual jury would have rendered absent the error; only a new jury could have rendered verdicts absent the error. Because the Sixth Amendment does not permit "appellate speculation about a hypothetical jury's action" (*id.* at p. 280), in this case, an appellate court cannot conduct harmless error analysis without violating the Sixth Amendment.

A. The Trial Court's Error Is A Structural Defect Requiring Automatic Reversal Because It Is Not Possible To Assess The Impact Of The Error.

Errors requiring automatic reversal "are the exception and not the rule." (*Rose v. Clark* (1986) 478 U.S. 570, 578.) That is because most errors are "trial errors" occurring "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 307-308.) By contrast, "structural defects" "defy analysis by 'harmless-error' standards" because they "affect[] the framework within

which the trial proceeds," and are not "simply an error in the trial process itself." (*Id.* at pp. 309-310.) Structural errors are not subject to harmless error analysis; instead, they require automatic reversal.

Respondent contends that the trial court's failure to obtain counsel's consent to reseating No. 2473 was simply a "procedural error" (ROBM 22), by which it apparently means that the error was not one that rendered the trial fundamentally unfair, and thus should be amenable to harmless error analysis. Respondent reinforces this contention by noting that appellant was represented by competent counsel and tried by a neutral adjudicator. (ROBM 22, quoting *People v. Mil* (2012) 53 Cal.4th 400, 410, which quoted *Neder v. United States* (1999) 527 U.S. 1, 8.) Respondent's argument, however, fails to consider the different species of structural error, including errors for which a reviewing court will have "difficulty . . . assessing the effect of the error." (*Gonzalez-Lopez*, *supra*, 548 U.S. at p. 149, fn. 4.)

As this court recently observed in *People v. Aranda*, *supra*, the U.S. Supreme Court has identified three types of structural defects. Structural errors of the first type – on which respondent focuses – "deprive defendants of basic protections and necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." (55 Cal.4th at p. 364, quoting *Neder*, *supra*, 527 U.S. at pp. 8-9, internal quotation marks and italics omitted.) But this court pointed out that there were two other types of structural errors.

> In other pronouncements on the subject of structural error, however, the court has focused, not on the effect of the constitutional violation at trial, but on "the difficulty of assessing the effect of the error" or the "irrelevance of harmlessness."

(*Aranda*, *supra*, 55 Cal.4th at p. 364, quoting *Gonzalez-Lopez*, *supra*, 548 U.S. at p. 149, fn. 4.)

In *Gonzalez-Lopez*, the defendant had competent, retained counsel, but wanted a different retained counsel, who was not a member of the bar in which the district court sat. The district court denied the *pro hac vice* application of the counsel the defendant wanted to retain, a ruling that was later found to be erroneous under the local rules. (548 U.S. at pp. 142-143.) After holding that the district court's ruling also violated the defendant's Sixth Amendment right to counsel of choice (*id.* at pp. 144-148), the high court considered whether the error was subject to harmless error analysis. The court rejected the dissent's contention that "fundamental unfairness" was the sole basis to decide if an error was structural. (*Id.* at p. 149, fn. 4, citing *Neder*, *supra*, 527 U.S. at p. 9.) Instead, the court held that other bases are "the difficulty of assessing the effect of the error" (*id.* at p. 149, fn. 4, citing *Waller v. Georgia* (1984) 467 U.S. 39, 49, fn. 9 [right to a public trial]; *Vasquez v. Hillery* (1986) 474 U.S. 254, 263-264 [selection of grand jury on improper criteria]) and "the irrelevance of harmlessness" (*ibid.*, citing *McKaskle v. Wiggins* (1984) 465 U.S. 168, 177, fn. 8 [denial of the right of self-representation]).

The *Gonzalez-Lopez* court held that the error in denying the defendant his retained counsel of choice, like the denial of a public trial, was the type of error whose effect was difficult to assess. Indeed, the court had "little trouble concluding that erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" (548 U.S. at p. 150, quoting *Sullivan*, *supra*, 508 U.S. at p. 282.) The court explained that this was because different lawyers would approach the "myriad aspects of representation" in different ways. "It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings." (*Ibid.*)

Here, too, the consequences of having a hypothetical group of 12 jurors evaluate the evidence are "unquantifiable and indeterminate." Jurors properly bring to the jury room a wide range of life experiences; education and training; personalities; intellectual capabilities; and attitudes toward crime, the criminal justice system, police, and drug policy. (See *People v. Loker* (2008) 44 Cal.4th 691, 753 ["Jurors are expected to be fully functioning human beings, bringing diverse backgrounds and experiences to the matter before them."], quoting *People v. Leonard* (2007) 40 Cal.4th 1370, 1414, internal quotation marks omitted.) As a result, jurors may vary significantly in their evaluation of the credibility of police and other witnesses, be more or less skeptical of circumstantial evidence or expert testimony, and have different interpretations of qualitative or semi-quantitative legal standards (e.g., a "usable amount" of drugs). Jurors on one panel may assess the strength of the prosecution's case differently than jurors on another panel. In addition, the dynamics of jury deliberations will be different with different groups of jurors. Some groups of jurors work harmoniously and readily reach agreement on the verdicts, but others work contentiously and may reach compromise verdicts or no verdict at all. As in *Gonzalez-Lopez*, "[h]armless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." (548 U.S. at p. 150.)

Respondent relies on *People v. Rodriguez* (1996) 50 Cal.App.4th 1013 and *People v. Yeoman* (2003) 31 Cal.4th 93 to urge this court to engage in harmless error analysis. Both cases are inapt and readily distinguishable.[4] In *Rodriguez*, the defendant brought a *Wheeler/Batson* motion when the prosecutor used a peremptory challenge to strike a

[4] Respondent also cites *People v. Wright* (2012) 204 Cal.App.4th 1084, but after respondent's brief was filed this court granted review in that case. (*People v. Wright*, review granted July 18, 2012, S202433.)

potential alternate juror. The court granted the motion, but refused a defense request to dismiss the venire and instead ordered the prospective juror seated as an alternate. The prospective juror, however, already had left the courtroom and was never seated, and other alternates were chosen. (50 Cal.App.4th at p. 1019.) Significantly, during trial and deliberations, none of the alternates was ordered to replace a sitting juror; thus, the prospective juror, even if reseated, would not have served on the jury. (*Id.* at p. 1022.)

The Court of Appeal held the trial court erred in not dismissing the venire and re-commencing jury selection with a new panel. (*Id.* at pp. 1025-1026.) The Court of Appeal, however, was troubled that automatic reversal would waste judicial resources in the "singular scenario" (50 Cal.App.4th at p. 1017) of that case, namely, where the stricken prospective juror, even if seated as an alternate, would not have deliberated. After a lengthy review of other jury-selection cases, the court held that the error should not be reversible per se and that the error was in fact harmless. (*Id.* at pp. 1035-1036.)

> The alternate juror the court found was improperly challenged peremptorily would not have sat on defendant's case, even if she had never been challenged in the first place. She was an alternate juror and no alternate juror was called upon to serve. The concern that her exclusion would have a pervasive effect on the trier of fact in defendant's case, or that it is impossible to determine the effect on the triers of fact, is simply not present. Therefore, we conclude the trial court's error was not "structural" but a "trial error," and must be analyzed to determine if it was harmless error.

(*Id.* at p. 1035.) The court was at pains to "emphasize" that its holding "is limited to the specific facts of this case: a peremptory challenge against an alternate juror who was never called upon to sit in judgment of the defendant. Whether to apply harmless error or a reversible per se test if the error involved a venireperson who actually sat as a member of defendant's

jury is not before this court today." (*Id.* at p. 1036.) *Rodriguez* thus has no application to the current case. (See *People v. Dickey* (2005) 35 Cal.4th 884, 901 ["It is axiomatic a decision does not stand for a proposition not considered by the court"].)

Yeoman presented a different situation. It did not involve a *Wheeler/Batson* violation. Rather, the trial court denied the defendant's challenges for cause of four jurors, whom the defendant later removed with peremptory challenges. (31 Cal.4th at p. 114.) Consistent with precedent, this court held that before it could reach the merits of the trial court's rulings the defendant must demonstrate that those rulings affected his right to an impartial jury. (*Ibid.*; see also *Ross v. Oklahoma* (1988) 487 U.S. 81, 85-86.) Because the defendant in *Yeoman* made no showing that any of the sitting jurors was biased, his appeal on this issue was rejected. (31 Cal.4th at p. 114.)

Although it predated *Gonzalez-Lopez*, *Yeoman* is consistent with the reasoning in that case. In *Gonzalez-Lopez*, the high court explained that ineffective assistance of counsel (IAC), in contrast to the denial of the right to counsel of choice, was not subject to automatic reversal in part because IAC consists of "identifiable mistakes." "We can assess how those mistakes affected the outcome." (548 U.S. at pp. 150-151.) Similarly, the impact of the error in cases like *Yeoman* can be assessed by inquiring whether any of the seated jurors, for whom there was a record of their responses in voir dire (and, in many cases, jury questionnaires), were biased.

By contrast, no such prejudice analysis is possible where the error is the denial of counsel of choice or the failure to conduct jury selection with a new venire. In *Gonzalez-Lopez*, the court explained that infinite various ways in which the two different lawyers would approach a case (one of

whom whose handling of the case was hypothetical because he never appeared in the case) precluded a meaningful harmless error analysis.

> To determine the effect of wrongful denial of choice of counsel, however, we would not be looking for mistakes committed by the actual counsel, but for differences in the defense that would have been made by the rejected counsel – in matters ranging from questions asked on *voir dire* and cross-examination to such intangibles as argument style and relationship with the prosecutors. We would have to speculate upon what matters the rejected counsel would have handled differently – or indeed, would have handled the same but with the benefit of a more jury-pleasing courtroom style or a longstanding relationship of trust with the prosecutors. And then we would have to speculate upon what effect those different choices or different intangibles might have had. The difficulties of conducting the two assessments of prejudice are not remotely comparable.

(*Id.* at p. 151.)

Similarly, the trial court's error in not quashing the venire does not involve "identifiable mistakes" that would allow an appellate court to "assess how those mistakes affected the outcome." (548 U.S. at pp. 150-151.) Rather, it would involve "intangibles" in the variety of ways a different, hypothetical group of jurors would assess evidence and apply legal standards, and require the reviewing court to "speculate upon what effect those different choices or different intangibles might have had." As in *Gonzalez-Lopez*, and unlike in *Yeoman*, the difficulty of assessing the impact of the error precludes harmless error analysis.

B. The Sixth Amendment Bars Harmless Error Analysis Based On The Reviewing Court's Assessment Of What Verdicts Another Reasonable Jury Would Have Reached.

Quite aside from the practical difficulty of assessing how a hypothetical jury would evaluate the evidence at trial, a harmless error analysis by a reviewing court would violate appellant's Sixth Amendment

right to a jury verdict. For that reason alone, the trial court's error in not quashing the venire is structural error and reversible per se.

In *Sullivan v. Louisiana*, *supra*, the trial court gave a deficient reasonable doubt instruction. Although a jury rendered a verdict in *Sullivan*, there was "no jury verdict within the meaning of the Sixth Amendment" because the jury did not find the defendant guilty beyond a reasonable doubt. (*Sullivan*, *supra*, 508 U.S. at p. 280.) "There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless." (*Ibid.*, emphasis in *Sullivan*.) That is, an appellate court could not assess the impact of the instructional error on the verdict rendered by the jury because there was no valid verdict to review. Instead, harmless error analysis would necessarily, and improperly, focus on the verdict that a reasonable, hypothetical jury would have reached.

> The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt – not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. [Citation.] The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

(*Ibid.*, emphasis in *Sullivan*; see also *id.* at p. 279 ["to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee"].) Because harmless error analysis is inapplicable where the impact of the error could be measured only against a hypothetical jury, the deficient reasonable doubt instruction in *Sullivan* was structural error requiring automatic reversal.

The nature of the error here – that the trial court should have quashed the venire and selected a new jury from a new venire – also precludes the harmless error analysis demanded by the Sixth Amendment. Although a jury found appellant guilty, that jury should not have heard the case. Thus, the impact of the error cannot be measured against what the actual jury would have done absent the error because, absent the error, the actual jury would not have been the jury that rendered the verdict. Asking whether the error was harmless inevitably would force the reviewing court to ask what verdicts would have been rendered by the hypothetical jury that should have been chosen from a new venire. Because the Sixth Amendment forbids any harmless error analysis that requires "appellate speculation about a hypothetical jury's action" (*id.* at p. 280), any claim that the evidence was overwhelming or uncontested is beside the point (see *id.* at p. 279 [it would violate the Sixth Amendment to determine whether a properly chosen, hypothetical jury would render a guilty verdict, "no matter how inescapable the findings to support that verdict might be"]).

In short, the Sixth Amendment jury-trial guarantee prohibits harmless error review. For this reason, the trial court's error in not quashing the jury is reversible per se.

III. Alternatively, The Trial Court's Error Was Prejudicial.

Respondent contends that the error was harmless under the reasonable probability standard in *People v. Watson*, *supra*, 46 Cal.2d 818 (1) because there is no evidence that defense counsel wanted to dismiss the venire and that in fact he wanted to keep the jury for "tactical" reasons (ROBM 25); (2) because "any other jury" would have reached the same results (ROBM 26); and (3) because the jury that rendered the verdicts was unbiased (ROBM 25-26). Respondent's arguments are mistaken.

Respondent's first contention is beside the point because it simply attempts to re-argue, in the guise of harmless error, that the trial court did

not commit any error. The trial court's error was that it failed to quash the venire. Arguing that that error was not harmless because counsel in fact wanted to keep the jury conflates error and prejudice and consequently fails to demonstrate that the court's error was harmless. To state the matter differently, if counsel wanted to reseat No. 2473 for tactical reasons and impliedly consented to that remedy, there would be no need for harmless error analysis because there would have been no error. Moreover, respondent's speculation that counsel had "tactical" reasons should be rejected precisely because it is speculative. (Cf. *People v. Collins* (2010) 49 Cal.4th 175, 259 [in rejecting appellant's argument that the trial judge recused himself because the prosecutor deliberately goaded the judge, this court wrote, "Defendant's argument is mere speculation, and we reject it."]; *People v. Waidla* (2000) 22 Cal.4th 690, 742 [in rejecting appellant's argument that he had a right to be present at bench conferences because his presence would have contributed to the fairness of the trial, this court held, "The only possible basis for a conclusion favorable to Waidla in this regard would be speculation. Such a basis, however, is inadequate"].) There is nothing in the record about whether counsel was motivated by tactical considerations.

Respondent's second contention that any jury would have found appellant guilty is no more than a bare assertion devoid of analysis of *Watson* or the evidence. Assuming the contention is not precluded by *Sullivan*, it is based on an unwarranted assumption about jury decision-making, namely, that every impartial juror faced with the same evidence would reach the same result.

Under *Watson*, appellant need only show a reasonable chance that a single juror would have voted to acquit on one of the charges. (See *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 [a reasonable probability under *Watson* "does not mean more likely than not, but merely

a *reasonable chance*, more than an *abstract possibility*" of a different result], emphasis in original; *People v. Soojian* (2010) 190 Cal.App.4th 491, 520-521 [holding that, in the context of an appeal from the denial of a new trial motion, a "different result" would include a hung jury].)

The fallacy of respondent's assumption about jury decision-making is illustrated by the record in this case. The detective testified that, based on his training and experience, the 0.0200 grams of cocaine found on appellant was a "usable amount." (3 RT 1247-1248, 1252-1254; 4 RT 1534; see also *People v. Martin* (2001) 25 Cal.4th 1180, 1184 [an element of drug possession is that the defendant had a quantity of drugs usable for consumption or sale].) Reasonable jurors could have accepted the detective's testimony about usable amount. But nothing compels every unbiased juror to accept the officer's testimony at face value, especially in light of other testimony that Coleman, not appellant, had a pipe (3 RT 1258); that the criminalist did not know the concentration of the cocaine in the rock found in Mata's pocket (4 RT 1812-1814); and that the 0.52 grams of cocaine found on Coleman typically would result in six or seven sales, i.e., about 0.074 to 0.087 grams each, significantly more than the amount found on appellant. (3 RT 1254; see also 5 RT 2175-2177 [defense closing argument that the drugs seized from appellant did not constitute a usable amount].)

On the contrary, jurors may evaluate and reject an officer's testimony based on their own experiences. As this court observed, one of the strengths (and weaknesses) of the jury system is that "[j]urors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience." (*Leonard*, *supra*, 40 Cal.4th at p. 1414, quoting *People v. Marshall* (1990) 50 Cal.3d 907, 950.) "[I]f we allow jurors with specialized knowledge to sit on a jury, and we do, we must allow those jurors to use their experience in

evaluating and interpreting that evidence." (*Loker*, *supra*, 44 Cal.4th at p. 753, quoting *People v. Steele* (2002) 27 Cal.4th 1230, 1266.)

Thus, jurors bring to the jury room their knowledge about illegal drugs – whether gained from personal and professional experience or from friends and family members. Based on that knowledge, hypothetical reasonable jurors may assess the same evidence differently than did the jurors who actually rendered a verdict at trial. (See, e.g., *Yeoman*, *supra*, 31 Cal.4th at p. 162 ["The effect of drugs, while certainly a proper subject of expert testimony, has become a subject of common knowledge among laypersons. . . . 'Jurors cannot be expected to shed their backgrounds and experiences at the door of the deliberation room.'"], quoting *People v. Fauber* (1992) 2 Cal.4th 792, 839.) The same can be said for jurors' experiences with police officers. Jurors' personal and professional experiences with police and the experiences of jurors' friends and family members properly affect the way they may evaluate a police officer's credibility. (See, e.g., *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 819 [holding that a juror who, during deliberations "gave emotional descriptions of instances of discrimination he had seen as a reserve police officer," did not commit misconduct; "A juror does not commit misconduct merely by describing a personal experience in the course of deliberations."].) In light of the diversity of persons who serve on juries, there is no basis to argue, as respondent does, that every impartial jury panel hearing the same opinion evidence from a police officer about whether 0.02 grams constituted a "usable amount" of cocaine would unanimously vote to convict appellant of cocaine possession. On the contrary, there is a reasonable chance that a single juror on a different jury would have voted for acquittal on one of the charges.

Finally, respondent's third contention – that the jury that rendered the verdicts was unbiased – is irrelevant. Respondent's logic would compel

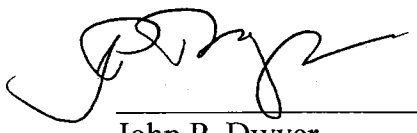
affirmance even if the court reseated No. 2473 over defense counsel's vociferous objection so long as the resulting jury was not biased. That is, respondent would effectively overrule the *Wheeler/Willis* doctrine that a defendant is entitled to dismissal of the venire following a successful *Wheeler/Batson* motion and that a court may impose a different remedy only with defense counsel's consent. Respondent, however, makes no argument to justify such a sudden departure from established law.

CONCLUSION

For the reasons discussed, this court should reverse appellant's convictions.

DATED: October 15, 2012

Respectfully submitted,

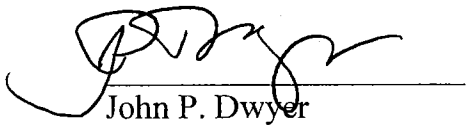


John P. Dwyer
Attorney for Appellant
FRANCIS MATA

CERTIFICATE PURSUANT TO CRC RULE 8.520(c)(1)

I, John P. Dwyer, counsel for appellant Francis Mata, certify pursuant to the California Rules of Court that the word count for this document is 10,508 words, excluding the tables, this certificate, and any attachment permitted under rule 8.504(c)(3). This document was prepared in Microsoft Word, and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at San Francisco, California, on October 15, 2012.



John P. Dwyer
Attorney for Appellant Francis Mata

PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 601 Van Ness Ave., Suite E-115, San Francisco, CA 94102. On the date shown below, I served the within **APPELLANT'S ANSWER BRIEF ON THE MERITS** to the following parties hereinafter named by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

Clerk, Court of Appeal
Second Appellate District, Div. One
300 South Spring Street, 2nd Floor
Los Angeles, CA 90013
San Diego, CA 92101

Attorney General's Office
300 South Spring Street
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Los Angeles, CA 90013

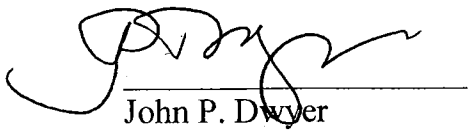
California Appellate Project/LA
520 S. Grand Ave., 4th Floor
Los Angeles, CA 90071-2608

Francis Mata, #3000170
Pitchess Detention Center East Facility
P.O. Box 86164
Terminal Annex
Los Angeles, CA 90086-0164

Clerk, Los Angeles County Superior Court
[for Judge Norman Shapiro]
210 West Temple Street
Los Angeles, CA 90012

Los Angeles County District Attorney's Office
210 West Temple Street
Los Angeles, CA 90012

I declare under penalty of perjury that the foregoing is true and correct and that I executed this declaration on October 15, 2012 at San Francisco, California.



John P. Dwyer