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 OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

The Court has directed appellant Gabriel Ramos to address the following issue:

Did the Court of Appeal err in upholding the trial court's denial of defendants' *Wheeler/Batson*[1] motions?

INTRODUCTION

During the jury selection, the prosecutor exercised peremptory challenges to ten of eleven Hispanic prospective jurors in the jury panel. The three Hispanic co-defendants joined in a *Wheeler/Batson* motion. The trial court found a prima facie case under the *Batson* rubric,

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

considered the prosecutor proffered explanations for the challenges, and denied the motion. The Court of Appeal affirmed the trial court's ruling.

Appellant asserts that the Court of Appeal committed error under *Purkett v. Elem* (1995) 514 U.S. 765 (*Purkett*) by combining the second and third steps of the *Batson* analysis as a result of only requiring the prosecutor to have offered race-neutral reasons and avoiding inquiry into evidence on the appellants' part challenging the prosecutor's credibility, including comparative evidence. It committed error under *People v. Lenix* (2008) 44 Cal.4th 602 (*Lenix*) by refusing to consider comparative evidence on review at all. By adopting the trial court's ruling containing unsupported factual findings and legal errors, the Court of Appeal also committed error. The trial court erred by employing a "global" theory of decision. (*People v. Fuentes* (1991) 54 Cal.3d 707 (*Fuentes*).) Individual juror-by-juror analysis was avoided as to voir dire of the panelists' experience with gangs or relationships to gang members, and such nexus in the form of residence and personal relations was employed as a proxy for race. The trial court erred by accepting a justification based on a non-existent potential scheduling hardship of an excused Hispanic panelist and speculative and unsupported justifications regarding a potential adverse reaction by two panelists to a prosecution witness. (*People v. Silva* (2001)

25 Cal.4th 345 (*Silva*).) The trial court erred in its rejection of comparative juror arguments. It failed to conduct a "sincere and reasoned" (*People v. Hall* (1983) 35 Cal.3d 161 (*Hall*)) analysis of the totality of circumstances supporting the appellants' case in order to determine if appellants had met their burden of proof that the justifications were not persuasive. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 251-252 (*Miller-El II*), quoting *Batson, supra*, 476 U.S. at pp. 96-97.) With deference unwarranted, the record as a whole supports a finding that the prosecutor's challenges were "because of" race. Lastly, the trial court denied appellants their *Wheeler* right to a representative cross-section in the petit jury under the California Constitution, article I, section 16, based on the systematic exclusion of Hispanic jurors.

Appellant Ramos begins with a review of the *Wheeler/Baston* jurisprudence regarding the standard of review before turning to analysis of the trial court's ruling and explanation of the Court of Appeal's errors in affirming that ruling.

STATEMENT OF THE CASE

Sometime after 11:00 p.m. on July 29, 2011, appellants Rene Gutierrez and Ramiro Enriquez were driven by Kyle Fuller to the Western Nights Motel in Bakersfield for a drug party. (2RT 367-384, 502, 519;

3RT 622-633.)[2] Enriquez and Gutierrez were members of a Sureno gang subset, Varrio West Side Shafter, based in Shafter. (7RT 1759-1760; 9RT 2363-2364, 2442, 2461.)

Appellant Gabriel Ramos worked at the motel and helped make a room available. (3RT 706; 6RT 1516, 1680; 7RT 1841; 8RT 2029-2030.) Ramos was a member of another Sureno subset, the Varrio Bakers gang, based in Bakersfield. (7RT 1759-1760; 9RT 2366.)

Gabriel Trevino, a member of Varrio Wasco Rifa, a Sureno subset based in Wasco, joined the group. (6RT 1682-1683; 7RT 1753, 1758, 1808, 1841.) Trevino had committed some non-violent offenses that earned him some "juice" (a reputation) in Wasco. (7ART 1754-1756, 1773.)

Clarence Langston II arrived at the motel on his bicycle. (1RT 108-109.) Langston is African American with no gang affiliation at the time. (1RT 147, 212; 3RT 628.) Langston went there looking for his wife, who was conducting some business with a friend as a "free woman" in a room Langston had rented. (1RT 117, 148, 196-197.) The couple

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2 Throughout this brief the following abbreviations are used: "RT" (Reporter's Transcript), "ART" (Augmented Reporter's Transcript); "CT" (Clerk's Transcript).

lived elsewhere, but Langston's wife was a frequent customer at the motel. (1RT 197, 248.)

An argument ensued between Ramos and Langston. (1RT 109-110; 2RT 335-339; 6RT 1685-1686.) Trevino saw Langston approach Ramos aggressively. (7RT 1947.) Trevino heard Langston get on his cellphone and loudly say "get that thing ready" as he prepared to leave the motel. (6RT 1686-1687; 7RT 1855.) Trevino interpreted the street-language to mean Langston was going to get a firearm. (6RT 1687.)

Ramos beckoned to Gutierrez and Enriquez, who were observing from the second floor balcony, and said, "Southside homies come down." (6RT 1687, 1689, 1694.) In the hospital after the shooting Langston told a Bakersfield police officer that Ramos yelled to someone in the SUV to "get the Cuete," which is a slang term for a firearm. (2RT 284-285, 293-296.) Fuller and Trevino denied hearing such a statement. (3RT 710; 7RT 1869.)[3] At trial, Langston did not testify he made that statement. Ramos told Trevino he was going to get a gun to defend himself and left the motel on foot. (6RT 1691-1693.) In the meantime, Langston rode off on his bicycle. (1RT 112-113, 118.)

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3 There was no other evidence through the prior statement or through Langston at trial that placed anyone in the vehicle at the time this statement was allegedly made.

After Ramos had departed but before he returned, Gutierrez, Enriquez, Trevino, and Fuller got into Fuller's vehicle. (6RT 1692.) Langston was spotted on a street nearby. (6RT 1703-1704.) Gutierrez got out of the vehicle and fired a sawed-off shotgun two to three times at Langston, striking him with numerous shot-gun pellets. (1RT 121-122, 235; 3RT 624, 632, 655-656, 740.) No gang statements were made during the assault. (6RT 1704-1705.)

The prosecution's gang expert opined that Ramos was an "active" member of Varrio Bakers. (9RT 2382-2384, 2462.) Ramos has a "Bakers" tattoo on his back, a "13" tattoo on his forearm, and has a gang moniker. (9RT 2392, 2394.) Aside from the current offenses, as to which the expert stated Ramos had no choice as a gang member other than respond to Langston's act of disrespect, the expert's only other source of information regarding Ramos's gang activity came from two officers and four police incident reports. (9RT 2382-2284, 2386-2387, 2465-2467.)[4] On two occasions in August and September 2008, Ramos admitted membership in Varrio Bakers to officers. On both occasions his admission was equivocal, and on only one of those occasions was he in

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4 The expert spoke to one officer regarding one of the four field checks, and the other was involved in the current case. (9RT 2382.)

the presence of another Varrio Bakers member. (9RT 2387-2388, 2467, 2469-2471, 2491.) He told an officer he had never been jumped into the gang. (9RT 2470.) On the other two occasions in February and March 2011, he was simply in the presence of the girlfriend of a Varrio Bakers member. (9RT 2388, 2471-2473.) On five occasions during custodial bookings, Ramos has claimed the need to be kept away from Nortenos. (9RT 2389-2390.) On those occasions, he was asked if he either "belonged" to a gang or "associated with" gang members. (9RT 2446.)[5]

The gang expert opined that Varrio Bakers and Varrio West Side Shafter were Sureno criminal street gangs. (9RT 2356-2359, 2363-2367.) In closing argument, the prosecutor argued the gang to which all the defendants belonged was the Sureno gang that covered the area from Delano to San Diego.[6] (9BRT 2600:169-171.)

Gutierrez and Enriquez were convicted by a jury of attempted pre-meditated murder (Pen. Code, secs. 664/187, subd. (a), sec. 189 - Count 1)[7], assault with a firearm (sec. 245, subd. (a) - Count 2), and active

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5 See *People v. Elizalde* (2015) 61 Cal.4th 523.

6 See *People v. Prunty* (2015) 62 Cal.4th 59.

7 Hereafter all statutory references are to the Penal Code unless otherwise indicated.

participation in a criminal street gang (sec. 186.22, subd. (a) - Count 3), together with a section 12022.53, firearm enhancement (subds. (d) and (e)(1)) as to Count 1, and a section 186.22, subdivision (b)(1) gang enhancement as to Counts 1 and 2. (2CT 431-432, 437-438, 443-444; 10RT 2628-2632.) Ramos was only found guilty of Count 3. (2CT 522-84, 671; 10RT 2626.) With the jury deadlocking on Counts 1 and 2 as to Ramos, the court declared a mistrial as to those counts. (3CT 584, 671; 10RT 2626.)

After consolidating the appeals of Ramos, Ramirez and Gutierrez, the Court of Appeal affirmed the judgment in all respects in an unpublished opinion dated January 31, 2015.

ARGUMENT

I. THE COURT OF APPEAL ERRED BECAUSE IT ADOPTED THE TRIAL COURT'S ERRONEOUS REASONING IN DENYING THE *WHEELER/BATSON* MOTIONS AND BECAUSE SUBSTANTIAL EVIDENCE WAS LACKING TO SUPPORT THE FINDING OF NO DISCRIMINATORY INTENT.

Employing the *Wheeler/Batson* burden-shfiting process, the trial court found a prima facie case of discrimination but denied the appellants' motions after ordering the prosecutor to explain the bases for his peremptory challenges. (5ART 1070-1074.) Because the prosecutor

presented race neutral justifications, the issue here only concerns the trial court's analysis of the genuineness of the prosecutor's explanations.

A. The Burden-Shifting Inquiry When Challenging the Prosecutor's Peremptory Challenges of Members of Cognizable Groups.

The prosecutor's exercise of peremptory challenges to the jury panel being chosen for a criminal defendant's trial in a manner that discriminates against a "cognizable" group violates the federal constitution's equal protection guarantee under the Fourteenth Amendment. (*Batson, supra*, 476 U.S. 79; *Wheeler*, *supra*, 22 Cal.3d 258, 276-277; U.S. Const. 14th Amd.) Hispanics are a cognizable group. (*People v. Trevino* (1985) 39 Cal.3d 667, 683-684 (*Trevino*), overruled on other grounds in *People v. Johnson* (1989) 47 Cal.3d 1994; *Hernandez v. New York* (1991) 500 U.S. 352, 363.)

Batson sets out a three-step procedure as follows: (1) the defendant must make out a prima facie case by "showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose"; (2) if a prima facie case has been made, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes; and (3) "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the

opponent of the strike has proved purposeful racial discrimination." (*Johnson v. California* (2005) 545 U.S. 162, 168.)

Once the trial court makes the prima facie case finding and the prosecutor offers race-neutral justifications for each challenge, the third step involves evaluating "the persuasiveness of the justification[s]." (*Rice v. Collins* (2006) 546 U.S. 333, 338, citing *Purkett, supra*, 514 U.S. at p. 768.) The burden of persuasion on the ultimate fact question regarding racial motivation "'rests with, and never shifts from, the opponent of the strike. (*Ibid.*) The legitimacy of the justification is determined on the basis of the preponderance of the evidence. (*People v. Hutchins* (2007) 147 Cal.App.4th 992, 997-998.)

It has also been stated that at the third step, the issue is whether the trial court finds the prosecutor's race-neutral explanations to be credible. (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339 (*Miller-El I*).) The prosecutor's credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable or how improbable the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy. (*Ibid.*)

While courts typically conflate the *Batson* and *Wheeler* analysis in terms of the procedure (see, e.g., *People v. Reynoso* (2003) 31 Cal.4th

903, 913-917 (*Reynoso*)), *Wheeler* construes article I, section 16, of the state constitution to bar peremptory challenges which deny the defendant's his right to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits. *Wheeler* interprets this as effectuating the Sixth Amendment right to fair trial. (*Wheeler*, *supra*, 22 Cal.3d at pp. 276, 278; see also *Smith v. Texas* (1940) 311 U.S. 128, 130; cf. *Atkins v. Texas* (1945) 325 U.S. 398.)[8] Although the same prima facie and burden shifting procedure applies (*People v. Bonilla* (2007) 41 Cal.4th 313, 341), *Wheeler* emphasizes that the prosecutor's burden is to persuade the court that the peremptory challenges in question were exercised "on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses – i.e., for reasons of specific bias as defined herein." (22 Cal.3d at pp. 281-282; see *People v. Johnson*, *supra*, 47 Cal.3d at p. 1215.) Significantly, *Wheeler* arises out of a case of systematic exclusion of minority panelists prior to *Batson*, where the discriminatory intent finding, while required, was implied. The two tests have become indistinguishable for practical purposes because the rule of single unlawful exclusion

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8 The U.S. Supreme Court does not find *Wheeler*'s cross-sectional requirement within the Sixth Amendment. (*Holland v. Illinois* (1991) 493 U.S. 474.)

eclipses the rule against systematic exclusion. (*Silva*, *supra*, 25 Cal.4th at p. 385.) *Wheeler* assumes that subjective bias in peremptory challenges is generally consistent with the cross-section right because when randomly exercised, these challenges do not skew the racial composition of the venire. (*Wheeler*, *supra*, 22 Cal.3d at p. 276.) However, systematic exclusion violates the cross-section rule because diversity achieved by the innocent exercise of peremptory challenges is thwarted. (*Ibid.*)

The duty to prevent impermissible group bias from infecting the jury selection process lies with the courts. (*Trevino*, *supra*, 39 Cal.3d at p. 680.) The prosecutor, in his dual role as adversary for the state and protector of the constitution, shares in this responsibility. (*Ibid.*) The courts' role is critical because the equal protection guarantee extends beyond the rights of the particular litigants involved to the jury venire. *Wheeler*'s fair cross-section rule serves to "legitim[ize] the judgments of the courts, promot[e] citizen participation in government, and prevent[] further stigmatizing of minority groups." (*Wheeler*, *supra*, 22 Cal.3d at p. 267.) Similarly, when minority panelists are removed for spurious reasons in violation of equal protection, the community's confidence in the judicial system is undermined. (*Batson*, *supra*, 476 U.S. 87-88; *Miller-El*

II, *supra*, 545 U.S. at pp. 237-238; *J. E. B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 142, 145-146.)

Wheeler/Batson error is reversible per se. (*Wheeler*, *supra*, 22 Cal.3d at p. 283.)

The standard of review in *Wheeler/Batson* claims is deferential. (*Lenix*, *supra*, 44 Cal.4th 602, 613-614.) The court examines whether substantial evidence supports the trial court's conclusions and does so with "great restraint," so long as the trial court makes a "sincere and reasoned" effort to evaluate the nondiscriminatory justifications offered. (*Ibid.*)

B. The Anti-Discrimination Principle.

Under equal protection jurisprudence the state's decisionmaking having a disproportionate impact on a protected class violates the constitution when it is shown that the state acted with discriminatory intent. (*Washington v. Davis* (1976) 426 U.S. 229; see also *Korematsu v. United States* (1944) 323 U.S. 214 [racial categorization subjected to strict scrutiny]; *J. E. B. v. Alabama ex rel. T. B.*, *supra*, 511 U.S. at p. 135.)

Courts have struggled to achieve the proper accommodation between the "historical privilege of peremptory challenge free of judicial control" and the "constitutional prohibition on exclusion of persons from

jury service on account of race." (*Batson, supra*, 476 U.S. at p. 91.) "The rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences, whatever the race of the individual on the panel from which jurors are selected." (*Miller-El II, supra*, 545 U.S. at p. 238.)[9] "While subjective factors may play a legitimate role in the exercise of challenges, reliance on such factors alone cannot overcome strong objective indicia of discrimination." (*Burks v. Borg* (9th Cir. 1994) 27 F.3d 1424, 1429.)[10]

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9 In *Batson*, Justice Marshall, in his concurring opinion, doubted that the equal protection guarantee would ever be fulfilled without elimination of the peremptory challenge. (*Batson, supra*, 476 U.S. at pp. 105-108.) More recently Justice Breyer, reprised the concern: "The complexity of this process reflects the difficulty of finding a legal test that will objectively measure the inherently subjective reasons that underlie use of a peremptory challenge." (*Miller-El II, supra*, 545 U.S. at p. 267.) Justice Breyer cited a journal article counseling trial attorneys to "rate" potential jurors "demographically (age, gender, marital status, etc.) and mark who would be under stereotypical circumstances [their] natural enemies and allies." (*Id.* at pp. 270-271, citing Page, *Batson's Blind–Spot: Unconscious Stereotyping and the Peremptory Challenge* (2005) 85 B.U.L. Rev. 155, 161.)

10 In other contexts, including both criminal and race discrimination cases, subjective intent is rejected by the courts as speculative and unreliable. (*Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 270-271; *Brant v. California Dairies* (1935) 4 Cal.2d 128, 133; *People v. Shelton* (2006) 37 Cal.4th 759, 767; see also *People v. Souza* (1994) 9 Cal.4th 224 [reasonable suspicion for *Terry* stop]; *Grano v. Dept. of Dev. of City of Columbus* (6th Cir. 1983) 699 F.2d 836, 837 ["subjective evaluation processes intended to recognize merit provide ready mechanisms for discrimination"]; *Thurman v.*

Since discriminatory intent requires proof of intent, which is actually known by the prosecutor alone, the *Batson* test recognizes and facilitates the use of circumstantial evidence. (*Batson, supra*, 476 U.S. at pp. 93-96; *Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252.) *Batson* adopted the three-step burden-shifting process from Title VII litigation. (*Batson, supra*, 476 U.S. at p. 94, fn. 18; *Hernandez v. New York, supra*, 500 U.S. at pp. 359-360.) Under the framework of *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, the plaintiff is allowed to demonstrate that the reason proffered is a pretext and that race was the real reason for the adverse employment action. In *Batson* cases, the pretext analysis leads to the focus on the prosecutor's credibility: Is his/her denial of racial animus to be rejected as implausible? (*Batson, supra*, 476 U.S. at p. 98, fn. 21; see also *Miller-El I, supra*, 537 U.S. at p. 339.)

When a prosecutor offers a race neutral justification but is also operating under an unlawfully discriminatory motive, the issue of "mixed-motive" and "but for" causation issues arise, as in employment discrimination cases. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 276

Yellow Freight Systems, Inc. (6th Cir. 1996) 90 F.3d 1160, 1167 [employer's justification is subjected to "particularly close scrutiny" when the basis for the decision is subjective and the decisionmakers are white].)

[declining to reach the mixed-motive, but-for cause issue].)[11] Presently *Batson* jurisprudence only requires that the discriminatory motive be a substantially motivating factor for the charging party to prevail. (*Snyder v. Louisiana* (2008) 552 U.S. 472, 485 (*Snyder*); see also *Wilkerson v. Texas*, *supra*, 493 U.S. at pp. 926-928; *EEOC v. Abercrombie & Fitch Stores, Inc.* (2015) __ U.S. __ [135 S.Ct. 2028, 2032], dis. opn. of Ginsburg, J.)[12] Under either a substantial-motivating-factor or mixed-motive test, the defendant is not required to demonstrate that every offered justification was disingenuous. (*Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 359.)

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11 Mixed-motive, but-for causation analysis would appear impractical in *Batson* cases because there is little or no tactical benefit to mounting a defense based on a concession of some discriminatory intent. (But see *Wilkerson v. Texas* (1990) 493 U.S. 924, 926-928 (dissent from denial of certiorari, Marshall, J.)

12 Some state courts follow a "taint" rule, which is closer to a "substantial motivating" factor test, but more favorable to defendants. (*State v. King* (Wis.Ct.App. 1997) 215 Wis.2d 295, 307 [572 N.W.2d 530, 535] [interpreting *"Batson* and *J.E.B.* [*v. Alabama ex rel. T.B.*] to preclude striking a juror based on a prohibited characteristic, even if other non-prohibited characteristics were also used."]; *Payton v. Kearse* (1998) 329 S.C. 51, 59-60 [495 S.E.2d 205, 210] [rejecting approval of a strike with nondiscriminatory factors so long as discriminatory factor was not the substantial motivating factor]; *Rector v. State* (1994) 213 Ga.App. 450, 453-454 [444 S.E.2d 862, 865]; *McCormick v. State* (Ind. 2004) 803 N.E.2d 1108, 1112-1113; *State v. Lucas* (2001) 199 Ariz. 366, 369 [18 P.3d 160, 163].)

Batson seized on the point that, because the inquiry focuses on ferreting out pretextual reasons, the credibility of the prosecutor is what is principally at issue, and deference is required because this issue is highly dependent on demeanor. (*Batson*, *supra*, 476 U.S. at p. 98, fn. 21; *Hernandez v. New York*, *supra*, 500 U.S. at p. 365; *Snyder*, *supra*, 552 U.S. at p. 477.) However, the emphasis on demeanor and plausibility of the justification diminishes the real issue in *Batson* cases. Whether the prosecutor lied is not the ultimate issue in third-stage *Batson* analysis. (*Snyder*, *supra*, 552 U.S. at p. 485, citing *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 510-511; *Lenix*, *supra*, 44 Cal.4th at p. 621, citing *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133; *People v. Hudson* (2001) 195 Ill.2d 117, 137 [745 N.E.2d 1246, 1258] [credibility of prosecutor is "one relevant aspect" but the "factual inquiry" must "take[] into account all possible explanatory factors," citing *Batson* and *Hernandez*].) The emphasis on the plausibility of the denial devalues the affirmative circumstantial evidence of discriminatory intent in the record. (*Riley v. Taylor* (3d Cir. 2001) 277 F.3d 261, 278 [reviewing courts need not accept a trial judge's findings based on credibility determinations if the witness has not told a "coherent and facially plausible story" *or* if his story is "contradicted by extrinsic evidence"].)

On appeal the inquiry examines *all* of the circumstances relevant to the question of intent. (*Miller-El II, supra*, 545 U.S. at pp. 251-251, quoting *Batson, supra*, U.S. at pp. 96-97.)

Moreover, credibility in the *Batson* context does not rely simply, or even predominantly, on demeanor. (*Miller-El I, supra*, 537 U.S. at p. 339.) To the extent the prosecutor's credibility is in issue, there are any number of factors bearing on credibility that can be determined on the appellate record. (Evid. Code, sec. 780.) Demeanor is only one of the factors listed in the statute. (Evid. Code, sec. 708, subd. (a).) Trial courts rarely, if ever, rely on demeanor evidence *as to the prosecutor*. (See *Lenix, supra*, 44 Cal.4th at pp. 634-635, conc. opn. of Moreno, J. [when a trial court fails to base its decision on demeanor, the appellate court has a legitimate basis to reject the trial court's finding].)

Fundamentally, *Wheeler/Batson* cases are concerned with whether the prosecutor has eliminated prospective jurors "because of" their race. (*Hernandez v. New York, supra*, 500 U.S. at p. 360; *Batson, supra*, 476 U.S. at p. 85.) In considering these cases on appellate review, courts should be mindful that the stronger the inference of discriminatory intent, the more searching the inquiry should be. (*Kesser v. Cambra, supra*, 465 F.3d at p. 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]"].)

Moreover, cases of systematic exclusion compel review that is both comprehensive and individualized so as to avoid overlooking the interrelationship between both types of showings in such cases. (*Batson*, *supra*, 476 U.S. at p. 96-97.) As the court in *Riley v. Taylor*, *supra*, 277 F.3d 261, 283, stated:

> [E]ach piece of evidence should not be viewed in isolation. It is clear that "[a]n explanation for a particular challenge need not necessarily be pigeon-holed as wholly acceptable or wholly unacceptable. The relative plausibility or implausibility of each explanation for a particular challenge . . . may strengthen or weaken the assessment of the prosecution's explanation as to other challenges." [Citation.] In short, "[a] reviewing court's level of suspicion may . . . be raised by a series of very weak explanations for a prosecutor's peremptory challenges. The whole may be greater than the sum of its parts." [Citation.]

(Accord *Thurman v. Yellow Freight Systems, Inc.*, *supra*, 90 F.3d 1160, 1166 [same as to Title VII].)

Additionally, current *Wheeler/Batson* jurisprudence fails to acknowledge the growing evidence of how unconscious stereotyping influences decision-making by prosecutors, who may appear to be genuine

in setting forth their justifications. (See *Crittenden v. Chappell* (9th Cir. 2015) 804 F.3d 998, 1019[declining to reach unconscious bias claim].)

As explained by the commentator cited by Justice Breyer in *Miller-El II*:

> A peremptory challenge results from the attorney's decision, often by the "seat of the pants," [fn.] that potential juror would not be good [for] her side at trial. . . .
>
> A challenge may, however, have been caused by a racial or gender-based stereotype that affects the way the attorney (decision-maker) processed information about the potential juror, in this case, the stereotype, or scheme, acted as an implicit theory that affected how the attorney perceived, registered, stored, assigned meaning, and remembered information about the venire person, all without the attorney's awareness of intention.[fn.] Put slightly differently, stereotypes can lead to a peremptory challenge by altering the way an attorney unconsciously sees and uses information.[fn.] "[T]he activated stereotypic concepts serve to simplify and structure the process of social perception by providing a ready-made framework for conceptualizing the [other person]."[fn.]
>
> Moreover, the decision-maker will generally assume that her perception of the world is its truthful representation, as opposed to a subjectively construed presentation.[fn.] The automatic use of these stereotypes is not necessarily related to whether the decision-maker consciously agrees or disagrees with the particular stereotype.[fn.] "[S]cores of studies

> now support the essentially automatic aspect of stereotyping."[fn.]

(Page, *Batson's Blind–Spot: Unconscious Stereotyping and the Peremptory Challenge*, *supra*, 85 B.U.L.Rev. at pp. 207-208.)

Enforcing the equal protection principle is too important to criminal defendants and the public's confidence in the judiciary, to allow the standard of review in *Wheeler/Batson* cases to be diluted by concerns of judicial economy (allocation of work load between appellate and trial courts) or judicial integrity (avoiding the appearance of second-guessing the trial courts). (*Miller-El II*, *supra*, 545 U.S. at p. 238; Peters, *The Meaning, Measure, and Misuse of Standards of Review* (2009) 13:1 Lewis & Clark L. Rev. 233, 240.); *Donovan v. RRL Corp.*, *supra*, 26 Cal.4th 261, 271 [appellate court can review issue de novo if trial court failed to make factual findings relevant to the issue].)[13] As Justice Stevens wrote

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13 This Court has indicated that despite being a mixed law-fact issue, the discriminatory intent issue is not subject to independent review. (*People v. Alvarez* (1996) 14 Cal.4th 155, 196-197; but see *Riley v. Taylor*, *supra*, 277 F.3d at pp. 277-278 [*Batson* error reviewed as a mixed law-fact question]; *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888 [mixed law-fact question "concerns the application of the rule to the facts and the consequent determination whether the rule is satisfied"]; *Cobb v. Hartenstein* (1915) 47 Utah 174 [152 P. 424, 431] [intent to violate usury laws is a mixed law-fact question].) Appellate courts engage in de novo analysis of mixed law-fact questions when constitutional issues are involved. (*People v. Cromer* (2001) 24 Cal.4th 889, 894; *In re George T.* (2004) 33 Cal.4th 620, 630-634; *People v. Tran*

in concurrence in *Brecht v. Abrahamson* (1993) 507 U.S. 619: "In the end, the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied." (*Id.* at p. 643.)

The "sincere and reasoned" rule of deference originated in *Hall, supra*, 35 Cal.3d 161. The phrase was intended as a general exhortation to trial judges to bring their local knowledge and experience to bear and to consider the issue under a totality-of-circumstances analysis. (*Id.* at p. 167.) It was stated three years before *Batson* announced its deference rule that was based on the trial court's traditional role in making credibility

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(2013) 215 Cal.App.4th 1207, 1217-1218.) The *Batson* issue is a mixed law-fact question because the discriminatory-intent/pretext question is resolved by the application of legal indicia which define what constitutes circumstantial evidence of unlawful motive, and not simply the question of the prosecutor's credibility. The state and federal labor boards conduct de novo review of questions of discriminatory intent, deferring only to demeanor evidence relied upon by the hearing examiner. (29 U.S.C.A., sec. 160(c); *Goldblatt Bros. Inc.* (1962) 135 NLRB 153, 156-157; *California Teachers Assn. v. Public Employment Relations Bd.* (2009) 169 Cal.App.4th 1076, 1086-1087, citing *Beverly Hills Unified School Dist.* (1990) PERB Dec. No. 789 [14 PERC para. 21042].) The appellate courts' "corrective function" is particularly weighty in *Wheeler/Batson* cases because their duty to enforce equal protection extends beyond the interests of the litigants themselves to the community at large. (Coles, *Mixed Up Questions of Fact and Law: Illinois Standards of Appellate Review in Civil Cases Following the 1997 Amendment To Supreme Court Rule 341* (2003) 28 So. Illinois Univ. L.J. 13, 42-43 ["[A] review system that gives complete deference to fact-findings below may lead to an unacceptable number of incorrect decisions and may ultimately undermine the public's faith in the fairness of the judicial system."].)

determinations. (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1216, citing *Batson*, 476 U.S. at p. 98, fn. 21.)

The rule's current emphasis of deference based on credibility and demeanor issues has led to disagreement within the Court, particularly after *Silva*, *supra*, 25 Cal.4th 345, added to the rule with the statement: "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings." (*Id.* at p. 386; see *Reynoso*, *supra*, 31 Cal.4th 903; *People v. Mai* (2013) 57 Cal.4th 986, 1058, conc. opn. of Liu, J.) With this focus deference turns on the characterization of a justification as plausible or implausible.[14] But the rule invites subjective labeling by the appellate courts, while countenancing vague and subjective reasoning by the prosecutor.[15] This labeling debate distracts from real issue whether

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14 In the wake of *Batson*, the sincere and reasoned standard is superfluous and confusing when contrasted with the federal standard borrowed from *Arlington Heights*, which is that a trial court is to undertake "a *sensitive inquiry* into such circumstantial and direct evidence of intent as may be available." (*Batson*, *supra*, 476 U.S. at p. 93, quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at p. 266; see *Kesser v. Cambra*, *supra*, 465 F.3d at p. 360.)

15 In *Reynoso*, *supra*, the majority conceded that the description of a panelist as an "inattentive customer service representative" was of "questionable persuasiveness" and a "dubious notion viewed in isolation," but it was not implausible (31 Cal.4th at pp. 924-926), while the dissenters characterized it as "highly implausible" (*id.* at p. 932, dis. opn. of

substantial evidence supports the court's finding, and whether the trial court has made a sufficient record of the supporting evidence. (See *Lenix*, supra, 44 Cal.4th at pp. 625-626.) Giving wide berth to vague and conclusory justifications and subjective reasoning merely because the justifications are not implausible seriously undermines the concepts of the prima facie case and the totality-of-circumstances analysis of discriminatory intent.

C. The Trial Court's Finding of No Discriminatory Intent.

1. Prima Facie Showing.

During the eighth voir dire panel, the prosecutor exercised his sixteenth peremptory challenge. That challenge was to a Hispanic, making it the tenth such challenge against a member of the group. (5ART 1047, 1051-1052.) Ramos joined in Gutierrez's *Wheeler/Batson* motion. (5ART 1049.)

Kennard, J.) and "lacking in any reasonable foundation in common knowledge or common sense." (*Id.* at p. 941, dis. opn. of Moreno, J.) Regardless whether inherently implausible or inherently plausible, the appellate court's role is to consider the persuasiveness of the justification and whether it is supported by the record. (31 Cal.4th at p. 920, majority quoting the court of appeal opinion: "The critical question becomes whether the record supports this reasoning."].)

The trial court concluded that a prima facie showing was established based on the high percentage of challenges against Hispanics and the fact that four were removed consecutively.[16] (5ART 1051-1053.) Although the prosecutor passed the panel with Juror No. 2723471, a Hispanic, still seated on the fourth panel, Juror No. 2723471 was removed by the prosecutor on the fifth panel. (3ART 695, 743; 4ART 805; cf. 5ART 1052-1053.)[17] Only one Hispanic remained on the panel when the motion was made.[18] (5ART 1053.) She was No. 2478882. No. 2478882

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16 The four panelists removed consecutively were Jurors No. 2468219, No. 2547226, No. 2291529, and No. 2723471. (3ART 572-573, 695; 4ART 805.) Subsequently, the prosecutor excused three more Hispanics consecutively: No. 2408196, No. 2732073, and No. 2632053. (4ART 897, 930; 5ART 1046.)

17 The prosecutor disputed that No. 2647624 was Hispanic based on appearance, but the court agreed she was based, at least in part, on her name. (5ART 1050-1051, 1058.)

18 Acceptance of the panel at an early phase of the selection with protected members seated is of little significance on the ultimate question. (*People v. Motton* (1985) 39 Cal.3d 596, 607-608 [accepting one or two protected members provides an easy means of justifying a pattern of discrimination stopping only slight short of total exclusion]; see also *People v. Snow* (1987) 44 Cal.3d 216, 225; cf. *Reynoso*, *supra*, 31 Cal.4th at p. 926 [prosecutor passed 14 times with a later-challenged Hispanic on the panel].) The fact that one or more jurors of the cognizable group remain on the panel is not conclusive but is an appropriate factor for the court to consider. (*People v. Ward* (2005) 36 Cal.4th 186, 203.)

was added *after* No. 2723471was removed.[19] (4ART 897.) No. 2478882 was a divorced mother of two high school aged children. She was a sign language specialist working with deaf children, lived in East Bakersfield, and had served on a criminal trial where a verdict had been reached. (4ART 909-910.) No. 2478882 was deaf and received interpretation from a sign language interpreter during the proceedings. (4ART 910.)

2. The Selection Procedure.

The court began the selection by announcing it would seek an initial group of 80 prospective jurors free of excuses based on hardship or prior knowledge of the trial participants. (1ART 4, 20, 28, 48, 62.) Hardship questioning took place in random groups of eight. (1ART 62-63.) With the larger group gathered, the court began by randomly drawing a panel of 18 for individual voir dire. (2ART 285-287.) The court explained that the case involved gun violence, attempted murder, and criminal street gang allegations. (2ART 292.) The first question to the first panel was whether the juror or "anyone close to you" "live in a neighborhood where criminal street gang activity" is considered a problem

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19 The court stated that the prosecutor passed "several times" with two Hispanics, No. 2723471 and No. 2478882, seated. This was erroneous. No. 2723471 was passed only once. No. 2478882 was not added to the panel until the very last panel and passed only after the motion was heard. (4ART 909.) Overall, no excused panelist lasted more than one panel.

that would prevent impartiality. (2ART 299-300.) The court did not define "criminal street gang activity." The second question was whether anyone had any "special knowledge or expertise about criminal street gangs" as a result of a job, special training, reading, or watching documentaries. (2ART 304-305.)

After the first session, the court excused three members, and they were replaced by three new panelists. (2ART 397-398.) The court called a group of seven to help replenish the vacancies. (2ART 398.) From this group three new members were seated in the jury box. (2ART 398.) They as well as the original 15 were reminded of the questions from the previous day. (2ART 398-399.) The three new members were asked the criminal street gang question and none volunteered a response. (2ART 401.) The court admonished the panelists not to withhold information on the basis of a personal belief that the prior experience would not affect their impartiality. (2ART 402-403.) Other canvassing gang questions included whether the juror or anyone close had ever been the victim of criminal street gang violence, been accused of being a gang member, and whether such contact would prevent impartiality. (2ART 308-309.) Non-gang canvassing questions included being a victim of a non-gang related crime or accused of such a crime, having associations with law

enforcement or the legal profession, and personal information (occupation, residence location, and prior jury experience). (2ART 312, 423, 444, 449-450.) The questioning proceeded in like fashion over the course of eight panels, at which time the *Wheeler-Batson* motion was made and heard. (5ART 1046.)

After individual voir dire by the court and counsel, the parties made challenges for cause and exercised peremptory challenges alternately until the panel was passed by all parties. (3ART 514-518.)

3. Jury Panelists' Profiles and the Prosecutor's Justifications.

The prosecutor exercised peremptory challenges against ten Hispanic panelists. Because the question of discriminatory intent exams the totality of the circumstances, and because in cases of systematic exclusion the relative plausibility or implausibility of each explanation for a particular challenge may strengthen or weaken based on assessment of the prosecution's explanations as to other challenges (*Riley v. Taylor*, *supra*, 277 F.3d at. p. 283), a summary of the questioning and the justifications will be set out for each juror, regardless of whether every juror is claimed to be wrongfully excluded. The panelists are listed in the order the prosecutor excused them.

a. No. 2852410.

No. 2852410 was a Sam's Club employee and his significant other was a Juvenile Hall correctional officer. (2ART 454.) An uncle and step-cousin were in law enforcement, and he maintained contact with them. (2ART 432.) No. 2852410 also socialized with employees of the Bakersfield Police Department two or three times a month. (2ART 432, 454-455.) He admitted having an unpleasant experience four years previously with law enforcement when he was subjected to a vehicle stop under suspicion of possessing a stolen vehicle; his vehicle was searched, and he was placed in the police car. (2ART 432-433; 3ART 493-494.) Nevertheless, he was not bothered by the search of his vehicle, as he was released after producing his license and registration. He did find the officers be untrustworthy. (2ART 433; 3ART 494.) Except for the particular officers in question, however, No. 2852410 would find police officers to be credible. (3ART 495.) No. 2852410 also admitted to being upset about an incident when he was eating lunch in the same restaurant with Bakersfield police officers present. (2ART 316-318.) While he was eating his vehicle was burglarized and a stereo and laptop stolen valued at $3,000 were stolen. (2ART 317-318.) When he told the officers about the incident, instead of taking a report, they told him to call a number and

drove away. (2ART 317.) Six days later someone responded to his home and provided a police report. (2ART 317.) He implied the situation was a common one, stating that others would simply "put it in some sort of perspective." (2ART 317-318.) Notwithstanding the incident, No. 2852410 stated it would not impact his ability to be fair. (2ART 318.)

The prosecutor claimed No. 2852410 bore resentment toward law enforcement as a result of the slow response to the burglary he suffered and the vehicle stop. (5ART 1062.)

b. No. 2468219.

No. 2468219 was a letter carrier for the U.S. Postal Service, with two adult children, and a husband employed as a welder. (2ART 460.) No. 2468219's mother had a home next to her grandmother's that was located in an area of gang activity. No. 2468219 lived there a "couple" of years before moving out to start her own family. Although she had not personally seen any gang violence, she had viewed news reports of shootings in the area. (2ART 300-301.) She denied that anything related to gang activity would render her impartial. (2ART 311.) No. 2468219 could be impartial about tattoos, recognizing they could be innocuous. (3ART 502.) Her brother was currently being processed for a probation violation. (3ART 327-328.) No. 2468219 had been a member of criminal

jury with charges not at a similar, which ended in a hung jury. (3ART 461.)

The prosecutor asserted that No. 2468219 lived in an area with a lot of gang activity, her brother had been prosecuted, and she was a member of a hung jury in a criminal matter. (5ART 1061.)

c. No. 2547226.

No. 2547226 was a service coordinator in a program for mentally disabled children. Her significant-other was a truck driver. She had two minor children. She had no prior jury experience. (2ART 462.)

When the prosecutor asked for her understanding of jury deliberations she answered: "The discussion of – after everything is presented, and that the whole case to see if everything is found – the case to be proven." (3ART 490.) The prosecutor's next question was where the jury deliberates, to which she answered: "After everything – all the evidence and all the stuff has been presented to the case, and take the jurors to a room or a section by themselves." (3ART 490.) He informed her that was called the jury room. (3ART 490.) The prosecutor then asked her how many jurors would have to agree for a verdict. (3ART 491.) When she said she did not know, the prosecutor told her the judge would instruct her on that. (3ART 491.) The prosecutor asked these

questions about how the jury functions knowing No. 2547226 had no prior jury experience. (2ART 462.)

After the jury questions, the prosecutor asked if there was anything "differential about her," which he rephrased to "want[ing] to sit in the background and listen to other people." (3ART 492.) She answered no. (3ART 492.) He asked whether she had the ability to listen and speak her mind at the same time. (3ART 492.) She answered she was a better listener. (3ART 492.) When asked whether she would have any problem letting other jurors know about her disagreements, she said she would not. (3ART 492.)

Going strictly from a single note he had written, the prosecutor stated he believed he asked her about "12 votes, each independent of the others and her being able to . . . take on the task which is obviously the difficult task of any juror of both standing their own ground whether they believe they are right, and also listening to other people." The prosecutor was "concerned about her articulation about that role" and "quite frankly if she felt strongly to be heard in the course of jury deliberations." (5RT 1062.)

d. No. 2291529.

No. 2291529 was a City of Bakersfield mechanic and a single father of an adult child. Neither he nor anyone close to him had experiences with criminal street gangs. His brother was the unintended victim of a homicide in a bar 20 years ago. The perpetrator was apprehended and No. 2291529 had no opinion regarding how the matter was resolved. (3ART 535-536.)

The prosecutor asked No. 2291529 about only one subject in detail. It pertained to possible resentment toward law enforcement as a result of a stop by sheriff deputies due to expired registration tags observed on his truck. (3ART 536-537, 558, 567.) No. 2291529's truck was parked when the tags were noticed. No. 2291529 agreed to speak with the officers. After back-up units were called, six sheriff's deputies ultimately searched his vehicle. The deputies gave No. 2291529 a ticket for the expired tags, but never given an explanation for the search. No. 2291529 described the scene as "getting out of hand," but that "it turned out okay." (3ART 536-537.) Both during questioning by the court and again by the prosecutor, No. 2291529 stated he could set the incident aside as a juror, that he bore no ill will over the matter, and that it would not cause him to doubt law enforcement testimony. (3ART 538, 567.)

The prosecutor asserted that No. 2291529 seemed more affected by the sheriff's incident than his brother's death. (5ART 1059-1060.)

e. No. 2723471.

No. 2723471 was a teacher from Wasco, divorced and without children. Her ex-husband was a correctional officer, and she had other relatives in correctional careers, including an uncle who was a highway patrol. (3ART 720-721.) Neither she nor any one close to her had any connection to "gangs." (3ART 720.)

The prosecutor asked No. 2723471 only one question: whether she was aware of any gangs active in Wasco. She answered no. (3ART 731.)

In explaining his challenge, the prosecutor admitted his choice was difficult – as evidenced by passing the panel with her still on it – but ultimately decided to remove her for the same reason he did for No. 2408196, who denied knowledge of gang activity in Wasco. (5ART 1058-1059; see discussion, *infra*.) He added that he was also "dissatisfied by some of her other answers as to how she would respond when she hears that Trevino is from a criminal street gang . . . out of Wasco." (5ART 1058-1059.)

f. No. 2647624.

No. 2647624 was a high school food services worker, and a widow with four adult children. No. 2647624 had two nephews (with whom she had only been close in the past until they were age 13), who were incarcerated for gang related crimes similar to the instant case, and had nieces whose sons were involved in gangs. (4ART 772-773, 798.) No. 2647624 averred that she could separate these circumstances from the case and be impartial in deliberations. (4ART 773-774.)

The prosecutor elicited from No. 2647624 that she did not know to what gangs her nephews belonged and that she had not had any conversations about gang activities with the one nephew with whom she maintains contact. She also had heard some things about gangs related to her niece. (4ART 798.) No. 2647624 conceded that because of the gang charges, this might not be the right case for her, though it was not because she had any sympathy for the defendants. After further exploration, it appeared that No. 2647624 was merely uncomfortable with the violent subject matter of the case. (4ART 799-801.)

The prosecutor justified his challenge on the basis of No. 2647624's association with family members involved with gangs and doubts she could separate this from her deliberations. (5ART 1058.)

g. No. 2510083.

No. 2510083 is an instructional aide at an elementary school. She was single and had no children. She had two cousins employed as highway patrols. She had no experiences with gangs. (4ART 818-819.) The prosecutor asked no questions of No. 2510083.

No. 2510083 had posed a possible hardship concerning a job interview. When offered the opportunity to explain her hardship, No. 2510083 stated that she was a regular elementary school employee who was already in the process of looking for summer employment with only two weeks left during the school year. She had some interviews scheduled, one of which she had already missed and another which was scheduled for Friday, May 11, 2012.[20] (2ART 388.) The court advised her to request that the interview be rescheduled on the basis of his instruction, and No. 2510083 agreed. (2ART 388-389.) The court told No. 2510083 it would also be possible to achieve some accommodation to allow the interview to occur during court days, including "maybe at the end of the day," and advised No. 2510083 to report back the next day, Thursday, May 10, 2012. (2ART 389.) The court also obtained No. 251008's assurance that she would be paid during the next two weeks of

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20 The Court can take judicial notice of the calendar for May 2012.

jury service by her employer. (2ART 389.) On Thursday afternoon, No. 2510083 reported that the interview had been rescheduled for 4:00 p.m. on Friday, May 12. (3ART 603.)

The prosecutor objected to No. 2510083 because of her youth and lack of life experience. While conceding that these factors alone would not be reason enough, he added that some of her answers lacked sophistication. The prosecutor called it a "tough call" because she had relatives in law enforcement. He also cited concern about her hardship request. (5ART 1057.)

h. No. 2408196.

No. 2408196 was Wasco State Prison records technician, married to a juvenile correctional officer, with three minor children, living in Wasco. (4ART 812.) A number of her friends worked in corrections. (4ART 821-813.) She had no prior jury experience. (4ART 812.) Through her work she annually received short 30 minute training sessions on prison gangs, but she had no contact with inmates. (4ART 814.) When she was young, No. 2408196 figured out her uncle was involved in gangs. (4ART 813.) Otherwise, she had no special knowledge about gangs. (4ART 813-814.) No. 2408196 had mixed views about law enforcement, being very pleased with the way they prosecuted the

perpetrator of her cousin's (non-gang-related) murder, and less pleased with the investigation of a home burglary. When asked directly if she was displeased with the burglary investigation, she answered, "I think they could have tried to get fingerprints." (4ART 814-816.) No. 2408196 believed she could be impartial. (4ART 818.)

In response to questioning from the prosecutor about gang activity in Wasco, No. 2408196 answered: "I think back when I was younger, I would see more of the graffiti and the tagging than I do now. I guess you randomly see stuff – graffiti, but I can't say that I know that's gang related." (4ART 864.)[21] She was not close with a murdered cousin and had fully come to terms with his passing. Having attended a lot of hearings involving murderers with life sentences through her work, she became anesthetized to the event. She was happy that the murderer was successfully prosecuted. (4ART 866-867.) She was not close to the out-of-state uncle who was in a gang and had never spoken to him about his gang activities. (4ART 864-865.)

The prosecutor challenged No. 2408196 based on the uncle and the cousin's murder. In addition, because Trevino was a member of Wasco

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21 The question posed to all jurors regarding possible conflicts or bias related to criminal street gangs, not gangs in general. (2ART 299-300.)

Varrio Rifas, the prosecutor was concerned with No. 2408196's denial of knowledge of gang activity in Wasco. (5ART 1056.)

i. No. 2732073.

No. 2732073 was married with three adult children. (4ART 905.) Her father and permanently disabled husband were ex-gang members from Los Angeles County. Her husband had not been in jail for 25 years. No. 2732073 learned of gang activities through her husband who had been active in high school. (4ART 906.) No. 2732073 had moved into the projects after the divorce of her parents, when she came into contact with her husband. (4ART 925.) She learned little other than the creed of "do[ing] the time if you do the crime." (4ART 926.) No. 2732073 believed her husband had been treated fairly by the criminal justice system for his involvement with drugs and for spousal abuse. (4ART 906.) She affirmed that her past experiences would not interfere with her ability to be impartial. (4ART 926.)

The prosecutor challenged No. 2732073's based on her long association with her husband. He added this was "probably not the right type of case for her to sit as a juror on." (5ART 1055.)

j. No. 2632053.

No. 2632053, a call center supervisor for a cell phone company with three children. Her significant other was an automotive worker. (4ART 941-942.) No. 2632053 had been exposed to Sureno gang life in Idaho as an adolescent through her brother and ex-husband. (4ART 942; 5ART 1017-1018, 1020, 1022-1024.) No. 2632053 recognized that not all gangs engage in criminal activities and some are just "trying to be cool." (5ART 1021-1022.) Her ex-husband went to prison for accessory to murder. (4ART 942; 5ART 1018.) She did not consider him deeply into the gang life, but more trying to be "cool" and he had placed himself in the wrong environment. (5ART 1024.) Her brother was arrested on multiple gang charges, ten years after she had left Idaho. (4ART 942; 5ART 1017, 1024.) She thought both were treated fairly in the criminal justice system. (5ART 1023.) Three close friends of hers had been murdered by gang members. (4ART 942, 5ART 1018.) While she had been involved in gang activity when she was 15, she began removing herself from the life after the death of her friends. (5ART 1020-1021.) No. 2632053 had left Idaho for California to get away from her past and start a new life. (5ART 1019.) She believed this was a proper case for her because she believed in the capacity of people to change their lives,

and she had changed hers "completely" after her youthful poor judgment. (5ART 1018.) Her children knew absolutely nothing about her prior experiences. (5ART 1018.) No. 2632053 stated emphatically that she could be impartial. She added that if nothing else her prior experience might bring a perspective from "both sides of the issue." (5ART 1019.)

The prosecutor sought information about current contact with gang members, which she denied. (5ART 1022.) No. 2632053 stated she would not try to speak with any authority on gang issues in deliberations. (5ART 1023-1024.)

The prosecutor objected to No. 2632053's on the basis of her brother and the ex-husband being the in gang life and having been convicted of gang crimes. (5ART 1054.) He believed that No. 2632053 had been in immersed in gang life as a teenager, and while she "was trying to change her life . . . that cast a heavy shadow over her life experiences." (5ART 1054.)

4. Comparative Analysis Argument.

Counsel for Enriquez raised comparative analysis arguments. (5ART 1067-1068.) No. 2861675 was cited for being non-Hispanic yet having exposure to gangs and no prior jury experience. (5ART 1067.) No. 2861675 was young with no prior jury experience. (3ART 701, 705.)

He was unemployed but with plans to begin studying toward a career as an emergency medical technician, policeman, or firefighter. (3ART 701.) He had a mentor from church who worked in corrections. (3ART 705.) When he worked as a security guard at an apartment complex in the Cottonwood area, he once called police to respond to what he believed was a gang fight. (3ART 702.) He received some training from his employer on gangs, but was dismissive of it as being unprofessional. (3ART 702-703.) His brother had been accused of setting off a homemade explosive in Kern County. (3ART 703.) He thought the $500,000 bail amount was excessive in light of the charges. (3ART 704.) From the accounts offered by the police, No. 2861675 believed they "acted very unprofessionally" towards his brother. (3ART 704.) The brother received probation, and No. 2861675 believed the case ended "very well." (3ART 704.)

No. 2581907[22] was cited for having exposure to gang members. (5ART 1068.) No. 2581907 was a retired aerospace research engineer, married, with two adult children, including one who is a superintendent of schools. He had no prior jury experience. (4ART 900.) There was no

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22 No. 2581907 was incorrectly identified as No. "2581097" at 5ART 1068.

gang presence in his neighborhood that "[he was] aware of." (4ART 900-901.) No. 2581907 volunteered through his church at adult and juvenile correctional facilities teaching offenders life skills. (4ART 901.) Through this activity he came in contact with "a number" of juvenile gang members identified for him by the program, some as young as 13, and it "bothered him." (4ART 901-902.) He "felt really kind of bad for them," attributing their gang activity to coming from broken families. (4ART 901.) Despite his sympathy for these young gang members, he asserted he would not be biased against the prosecution. (9ART 902.)

The prosecutor contended that No. 2581097 and No. 2861675's exposure to gangs was "hardly the same" as No. 2632053 in Utah. (5ART 1069.) He did not attempt to distinguish No. 2581097 and No. 2861675 from the other jurors he challenged based on exposure to gangs.

Counsel for Gutierrez cited No. 2589394, whom the prosecutor passed on the seventh panel, for having potential anti-law-enforcement bias. (4ART 896, 931; 5ART 1064-1065.) No. 2589394 had a son convicted of an abuse charge nine years previously and a nephew presently charged with second degree murder. (4ART 822-823.) In addition, No. 2589394 worked as a correctional officer, had training on gangs, and reported a Crips gang hit had been placed on her, but claimed

she could be impartial. (3ART 821-822.) In objecting to the defense's challenge for cause, the prosecutor asserted that No. 2589394 was someone who had experiences and opinions but would not try to be an expert in deliberations, and who should be taken at her word after she "kept coming back [to] her ability to be fair." (4ART 888, 892.)

5. The Trial Court's Ruling.

Upon conclusion of argument, the trial court ruled. (5ART 1062-1068.) The court began by indicating that an important factor was whether there were Hispanics "similarly situated" with Hispanic panelists that were excused, by which it meant whether the prosecutor had been "consistent" in terms of excusing like-situated Hispanic panelists. (5ART 1070.) The court observed that the prosecutor was consistent in excusing panelists who were "involved in gang activity" or "grew up in areas where there was gang activity." (5ART 1070-1071, 1073, citing Nos. 2632053, 2732073, 2647624, 2408196, and 2723471.) This included panelists who lived in Wasco. The court found that No. 2408196 was properly excused because her uncle was a gang member and she did not believe there was any gang activity in Wasco. (5ART 1072.) No. 2723471 was properly excused "as a result of the Wasco issue" and lack of life experience. (5ART 1072.) The court rejected the comparative juror analysis argument

as to other non-Hispanic panelists because their contact was not based on having relatives in gangs or living in gang areas. (5ART 1071.)

The court found another consistent ground for exclusion of Hispanic panelists to be youth or lack of life experience, and rejected comparative analysis with a non-Hispanic panelist, No. 2861675, because there were other reasons voiced as to the Hispanic panelists, No. 2723471 and No. 2510083. (5ART 1072.)

The court believed that there was nothing irregular about the nature of the questions posed to the challenged panelists. (5ART 1053, 1072.)

The court found that No. 2291529 and No. 2852410 were properly excused because of negative encounters with law enforcement. (5ART 1072.)

The court made no findings with regard to No. 2468219 or No. 2547226.

D. The Court of Appeal Committed *Purkett* Error.

In *Purkett*, *supra*, 514 U.S. 765, the high court reversed the court of appeals' decision after finding the prosecutor's justification to be implausible. The justification was the panelist's hirsute, unkempt appearance that placed him outside the "mainstream," and his experience as a victim of a robbery at gun-point which might prevent him from

following a robbery instruction in a case where a gun was not used. This implausibility required a finding of discriminatory intent. The high court held that at step two of the *Batson* procedure the persuasiveness of the justification is not to be determined; that for the inquiry to proceed to step three, the prosecutor need only offer a race-neutral justification, and the justification offered below met that standard. The court of appeals erred by collapsing steps two and three.

Here, the Court of Appeal erred because it, too, truncated the process at step two. Indeed, as a foundational matter, the court erred by reading the record as failing to establish a prima facie case, even though the trial court found otherwise. (Slip opn., p. 9 ["The trial court found a prima facie case to be established . . ."]; p. 10 ["Our duty afer a denial of *Batson/Wheeler* motion *without a finding of a prima facie case* is to consider the entire voir dire record before us." (Italics added.)]; p. 11 ["That the prosecutor used many peremptory challenges to excuse Hispanics from the jury *does not by itself establish a prima facie case*." (Italics added.)].) That error aside, the opinion reveals that the Court of Appeal never considered whether the prosecutor's justifications were persuasive and genuine as to each challenged juror, based on the totality of the circumstances in the case. Instead, the court concluded it was

sufficient that the record showed all of the justifications were merely race neutral. This was error. (*People v. Tapia* (1994) 25 Cal.App.4th 984, 1014-1018; see also *People v. McDermott* (2002) 28 Cal.4th 946, 971; *Miller-El II, supra*, 545 U.S. at pp. 265-266.)

At page 11 of the opinion, the court does state that the "party seeking to justify a suspect excusal need only offer a *genuine*, reasonably specific race- or group-neutral explanation related to the particular case being tried" (italics added), citing, inter alia, *Fuentes, supra*, 54 Cal.3d at p. 718. But in the very next paragraph, the court states: "Here, *race neutral reasons* for excusing the jurors are apparent from the record, and the prosecutor articulated *race-neutral reasons for excusing each of the challenge jurors*. That the prosecutor used many peremptory challenges to excuse Hispanics from the jury does not by itself establish a prima facie case." (Slip opn., p. 11; italics added.) Immediately thereafter the court proceeds to discuss each of the ten excused panelists and in nearly every instance finds that the prosecutor offered a "race-neutral" reason, which therefore made the justification "valid." (Slip. opn., pp. 12-14.) Throughout its panelist-by-panelist analysis, the Court of Appeal states that these "race-neutral" reasons were "apparent from the record." (Slip opn. at pp. 11-14.) Later, in concluding its analysis, and after

acknowledging that the "subjective genuineness of the reason, not the objective reasonableness" is the focus of the analysis, the court states that the "trial court analyzed the prosecutors' responses and the challenged jurors' responses to voir dire and found the prosecutor had *race-neutral reasons* for dismissing the challenged jurors." (*Id.* at p. 15, italics added.)

From this repeated language and the substance of the analysis undertaken it is evident that the Court of Appeal failed to review the record as a whole to determine if substantial evidence supported the prosecution's denial of discriminatory intent. (*Lenix*, *supra*, 44 Cal.4th at pp. 625-627; *People v. Maury* (2003) 30 Cal.4th 342, 403.) The court merely added to its analysis by asserting that all of the challenges were justified, whether trivial (citing *People v. Arias* (1996) 13 Cal.4th 92, 136), based on mere hunches (citing *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1122), claimed hardship of service, or negative experiences with law enforcement. (*People v. Turner* (1994) 8 Cal.4th 137, 171.) Nevertheless, the court failed to consider the *persuasiveness* of each of the challenges. (*Miller-El II*, *supra*, 545 U.S. at p. 240 ["If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain* [*v. Alabama* (1965) 380 U.S. 202]."].) Presenting a race-neutral reason only allows the prosecutor to

shift the burden at step two of the analysis. (*Rice v. Collins*, *supra*, 546 U.S. at p. 338.) At step three, the court must consider this issue in light of the totality of the circumstances supporting discriminatory intent. (*Lenix*, *supra*, 44 Cal.4th at p. 622 ["*all* of the circumstances that bear upon the issue of racial animosity *must* be consulted" (original italics)], p. 626, citing *Miller-El II*, *supra*, 545 U.S. at pp. 252-253, 266.)

As this Court has stated in another context, the substantial evidence test poses the question whether the evidence contrary to the challenged finding is "of such weight and character" that the factfinder "could not reasonably reject it." (*People v. Drew* (1978) 22 Cal.3d 333, 351.) *Lenix* cautions that, despite being deferential, review must be "meaningful." (*Id.* at p. 621.)

E. The Court of Appeal Committed *Lenix* Error.

In *Lenix*, *supra*, 44 Cal.4th 602, this Court held that when the defendant relies on comparative evidence and the record is adequate to permit juror comparisons, the appellate court must perform a comparative juror analysis, even if not performed at the trial court. (*Id.* at p. 622.) The ruling was mandated by *Miller-El II* and *Snyder* and went against prior California precedent. (*People v. Johnson*, *supra*, 47 Cal.3d at pp. 1219-1220; *People v. Johnson* (2003) 30 Cal.4th 1302, 1318-1325,

overruled on other grounds in *Johnson v. California*, *supra*, 545 U.S. 162.)

Here, the Court of Appeal refused to undertake comparative analysis despite the appellants' request therefor. The court stated: "We do not engage in a comparative analysis of various juror responses to evaluate the good faith of the prosecutor's stated reasons for excusing a particular juror 'because comparative analysis of jurors unrealistically ignores "the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar." ' " (Slip opn., p. 14, citing *Fuentes*, *supra*, 54 Cal.3d at pp. 714-715, quoting *People v. Johnson*, *supra*, 47 Cal.3d at pp. 1219-1220.) *Fuentes* was decided in 1991. *Lenix* was decided in 2008. This case was decided in 2015.

The comparative arguments that were made on the record and additional ones apparent in the record will be set forth, *infra*, in relation to the particular challenges that were erroneously upheld or which impeached the prosecutor's denial of discriminatory intent.

F. As a Result of the Trial Court's Failure To Conduct Individualized Analysis and Failure To Recognize Racial Stereotyping, the Court of Appeal Committed *Fuentes* Error.

Fuentes, supra, 54 Cal.3d 707, held that the trial court does not satisfy the "sincere and reasoned" requirement if it merely evaluates the reasons proffered "in the abstract." (*Id.* at p. 718.) The court must determine whether the reasons were disingenuous as "actually applied to particular challenged jurors." (*Ibid.*) In *Fuentes*, the prosecutor exercised 19 peremptory challenges. Of the 13 prospective trial jurors challenged, 10 were African American. Of the six prospective alternates challenged, four were African American. As finally constituted, the trial jury included three African American jurors and three African American alternates. (Id. at pp. 711-712.) After hearing the prosecutor's justifications to all 14 challenges, the trial court made "global" findings that some of the justifications were legitimate and others spurious. (*Id.* at p. 719.) But because the trial court failed to analyze application of the justifications to each individual juror presumably because they were so numerous, the court committed error. (*Id.* at pp. 718-719.) This did not constitute sincere and reasoned attempt to determine their validity. (*Id.* at p. 720; accord *People v. Tapia, supra*, 25 Cal.App.4th at p. 1019.)

1. The "Consistency" Theory.

Here, the trial court employed global reasoning based on the theory that if the prosecutor was "consistent" in the utilizing particular grounds for excluding Hispanics he was not acting with discriminatory intent. The trial court began stating that it had been closely observing whether the prosecutor had been "consistent" in excluding Hispanic jurors. The court had been observant of "Hispanics that seem to be similarly situated to the Hispanic jurors that were excused in this case." (5ART 1070.) The court believed if the prosecutor could articulate a justification(s) for excluding Hispanics and was consistent in adhering to that strategy his motives must have been pure. (5ART 1070-1071.) The court's rationale rested on discerning if the prosecutor failed to dismiss any Hispanics that fit the pattern of those he had already excused. If the prosecutor adhered to a recognizable pattern in removing Hispanic jurors then all such removals were legitimate. At face value, regardless of the basis for the justification, the prosecutor could legitimately remove *all* Hispanics so long as he adhered to the pattern. The heuristic device of "consistency" proved nothing. It was an abstract, overbroad approach that permitted the court to avoid analysis on a juror-by-juror basis and without considering comparative analysis. (*Fuentes*, *supra*, 54 Cal.3d at p. 718; *People v.*

Turner (1986) 42 Cal.3d 711, 726 [unclear and unpersuasive was prosecutor's explanation that he excused a panelist "along with quite a few other people, too, for the same reason"].)

The methodology was a classic non-sequitur. The court assumed, without actually considering, whether the particular grounds were legitimate as applied to each individual juror. This tautological, "free pass" to the prosecutor was a short-hand for avoiding a "sensitive inquiry" into the persuasiveness of the justification as to every individual panelist. Because it qualifies objectively as neither "sincere," nor "reasoned," nor sensitive, the overarching "consistency" theory vitiates *Hall*'s rule of deference as to the entire set of challenges. (*Id.* at p. 728; *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1220 [explanation unsupported by the record].)

Additionally,, the trial court failed to make any individual findings as to No. 2468219, who had previously lived in a community with some gang activity, and No. 2547226, whom the prosecutor asserted was poor in articulating the function of the jury. This demonstrates error without more. By adopting the application of this erroneous application of *Wheeler/Batson*, the Court of Appeal erred. (*People v. Tapia, supra*, 25

Cal.App.4th 984, 1014-1015, 1020 [reversal required where trial court uses the wrong legal standard].)

2. Gang Connections as Proxy for Race.

Even examining the "global" justification theories on their merits fails to save the court's faulty syllogism. This becomes apparent from considering the ground which resulted in the most challenges: the fact that a panelist had relationships with gang members or lived in gang areas; or who "have gang ties, so to speak." (5ART 1071.) The appellants' argument comparing non-struck jurors with contact to gangs through employment was rejected with the vacuous rejoinder: "It's not just question of whether they came into contact with a gang member. He's essentially excused jurors that have been [sic] themselves grown up in gang areas or certainly relatives that have been involved in criminal gang activities, so I think he certainly been consistent in terms of excusing those jurors for those reasons." (5ART 1071.) This does not constitute a "reasoned" attempt at inquiry and therefore is not entitled to deference.

As a result of the broad gang disqualifier, the prosecutor was allowed to employ a stereotype, with evident ethnic overtones and unrelated to specific issues in the case, demonstrating that the justification itself had an inherently racial component. (See *Collins v. Rice* (9th Cir.

2003) 348 F.3d 1082, 1089, citing *Stubbs v. Gomez* (9th Cir. 1999) 189 F.3d 1099, 1105.) A disingenuous reason includes those based on group bias and stereotyping. (*Reynoso, supra*, 31 Cal.4th at p. 925.) Even if the gang justification is not inherently racial, a prosecutor may only justify exclusion based on the expression of skeptical attitudes toward the criminal justice system if that attitude is *actually expressed* and does not arise from a prosecutorial assumption of such an attitude based on stereotyping. (*People v. Calvin* (2008) 159 Cal.App.4th 1377, 1387-1388; *People v. Turner* (2001) 90 Cal.App.4th 413, 416; *Snyder*, *supra*, 552 U.S. 472; *McCormick v. State*, *supra*, 803 N.E.2d at p. 1111 [difficulty of "passing judgment on a member of ones [sic] own community" not race neutral].)

Stereotyping is more likely to be present where as here the defendants are of the same ethnicity as the excluded panelists. (*People v. Turner*, *supra*, 42 Cal.3d at p. 719.) The crimes here were by their nature "ethnic" since they involved crimes by reputed Hispanic gang members. (*Batson*, *supra*, 476 U.S. at p.97; *Miller-El I*, *supra*, 537 U.S. at pp. 334-335 [reputation of Mexicans being anti-prosecution].)

Often the most potent circumstantial evidence of discriminatory intent is a highly disproportionate adverse effect on a protected class.

(*Batson, supra*, 475 U.S. at p. 94 ["Proof of systematic exclusion from the venire raises an inference of purposeful discrimination because the 'result bespeaks discrimination.' "]; *Hernandez* v. *Texas,* (1954) 347 U.S. 475, 482 [court's credulity taxed to say that the result was explained by mere chance].)[23] Its impact in jury selection cases with racial implications is well recognized. (*Swain v. Alabama, supra*, 380 U.S. 202; *Overton v. Newton* (2d Cir. 2002) 295 F.3d 27, 278-279 & fn. 9; *Wheeler, supra*, 22 Cal.3d at p. 280.)

> Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact – in the jury cases, for example, the total or seriously disproportionate exclusion of Negroes from jury venires – may for all practical purposes demonstrate unconstitutionality because, in various circumstances, the discrimination is very difficult to explain on nonracial grounds.

(*Washington v. Davis, supra*, 426 U.S. at p. 242.)

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23 Kern County covers 8,132 square miles and has 864,000 residents. Hispanics comprise 51 percent and whites comprise 37 percent of the population. Asians and African Americans account for 5 percent or less. Spanish is spoken in the home by a large percentage of the population. The poverty rate is 1.4 times the California average. (Census Reporter, at https://censusreporter.org/profiles/ 05000US06029-kern-county-ca/, as of 1/12/2016; *Trevino, supra*, 39 Cal.3d at p. 685, fn. 14 [judicial notice taken].)

The prosecutor used 10 of 16 challenges to remove Hispanics. (*People v. Snow*, *supra*, 44 Cal.3d 216, 226 [use of six of 16 peremptory challenges against a cognizable group sufficient for prima facie case].) He removed four consecutively, and later, three consecutively. (3ART 572-573, 695; 4ART 805, 897, 930; 5ART 1046, 1052.) As a result, ten of eleven Hispanics were removed. (*Miller-El II*, *supra*, 545 U.S. at pp. 240-241 [nine of ten African Americans disqualified]; *United States v. Esparza-Gonzalez* (9th Cir. 2005) 422 F.3d 897, 904; *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083 [pattern of strikes against one group].) All of the evidence that supported the prima facie case needs to be considered by the appellate court. (*Miller-El I, supra*, 537 U.S. at pp. 340-341.)

The open-ended gang questions directed to all panelists would have had, and did appear to have, a disproportionate adverse impact on Hispanic panelists.[24] (1ART 151, 245; 2ART 303) Due to patterns of residential segregation of Hispanics and African Americans in this country, the prosecutor would, or should have known that this question

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24 The California Department of Justice's 2010 Annual Report to the Legislature reveals that 66 percent of all gang members in the state are Hispanic compared to eight percent for whites. Similar statistics appear for Kern County (63 percent Hispanic members; 12 percent white members). (https://www.oag.ca.gov/sites/all/files/agweb/pdfs/publications/org.crime2010.pdf, as of 1/15/2016.)

based on location of residence or family ties would disproportionately impact Hispanics.[25] There is a strong correlation between neighborhoods of lower socio-economic status and the prevalence of gangs.[26] While at

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25 Social science research concludes that minorities disperse from segregated communities as their socio-economic status improves, allowing them to enter the mainstream of society. For immigrant communities, like Hispanics, an increase in rates of immigration raises racial isolation, while historically Hispanics suffer a lesser degree of segregation than African Americans whose isolation is original and historical. (Massey, "Residential Segregation and Neighborhood Conditions in U.S. Metropolitan Areas" in America Becoming: Racial Trends and Their Consequences (Smelser, Wilson, Mitchell, eds., 2001), vol. 1, [https://www.asu.edu/courses/aph294/total- readings/massey–residentialsegregation.pdf, p. 11, (as of 1/11/2016)]. The Massey study showed that between 1970 and 1990 segregation rates for Hispanics in Bakersfield was more severe than Anaheim-Santa Ana and Oxnard-Simi Valley, and exceeded only by Los Angeles. (*Id.* at p. 12.) Setting aside cities with high percentages of Hispanics in the population overall as anomalous, Massey cites Los Angeles and Anaheim as showing segregation "increasing substantially" between 1970 and 1990. (*Id.* at p. 13.)

26 Hofwegen, *Unjust and Ineffective: A Critical Look at California's STEP Act* (2009) 18 So. Calif. Interdisciplinary L.J. 679, 695-696 [the economic and social marginalization of low income and minority communities is the major factor that leads juveniles to join gangs; statistics reveal an inverse correlation between gang prevalence in a particular area and the income of that community].) A disproportionate number of gang members are from the African American and Hispanic communities. (Yoshino, *California's Criminal Gang Enhancements* (2008) 18:1 Univ. So. Cal. Rev. of Law & Social Justice 117, 127-128 [90 percent of all field identification cards in the 2000 in the California gang database were for minority youth]. A national study of nearly 7,000 school districts in 2009-2010 found that 17.7 percent of African American and 7.5 percent of Hispanic students suspended from school during the school year (in contrast to 2.1 percent for Asians and 5.6 percent for whites) and a majority of these cases involve actions for acting disrespectful or defiant (as opposed to serious offenses

least a couple of panelists answered this question in the affirmative in terms of exposure through residence or family ties (e.g., No. 2549787 and No. 2852182) (2ART 301-302, 308-309) and their race was not established, by far the largest proportion were the Hispanics excluded by the prosecutor. Those non-Hispanic jurors for which the defendants urged comparative analysis had exposure to gangs through employment, not residence. For all the foregoing reasons, the gang contact questions were used as a proxy for race. (*United States v. Bishop* (9th Cir. 1992) 959 F.2d 820, 825.) In *Bishop*, the prosecutor excluded an African American because she lived in Compton and therefore was more likely to be "anesthetized" to violence as a result of living in "poor and violent" community. (Accord *People v. Turner*, *supra*, 90 Cal.App.4th at p. 420.)

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like fighting or drugs). (Losen and Gillespie (2012) *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion From School* (https://www.civilrightsproject. ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research/losen-gillespie-opportunity-suspended-2012.pdf (as of 1/6/16).) This disparity of suspension rates leads to the "school to prison pipeline." (Steele & Cohn-Vargas, *Identity Safe Classrooms* (2013) p. 4.) African American and Hispanic gangs predominate in terms of their actual and perceived presence in California. Their genesis was and continues to be a protest by marginalized youth, living in impoverished communities and deprived of employment opportunities. (See, e.g., Cummings & Monti, *Gangs: The Origins and Impact of Contemporary Youth Gangs in the United States* (1993) pp. viii, 8-9, 11-12, 13-14.)

3. No. 2468219 and No. 2647624.

The substantial evidence test must be concretely applied to each challenged Hispanic panelist. (*Fuentes*, *supra*, 54 Cal.3d at p. 718.) Although No. 2468219 was not the only panelist excluded on the basis of the tainted gang exclusion, she illustrates the strongest example of the stereotyping. No. 2468219 had only briefly lived in a neighborhood that had experienced gang crime, at a time very attenuated from this case. (See *Hall*, *supra*, 35 Cal.3d at p. 168 [African American defendant and African American excluded panelist both from Texas, but panelist had lived mostly in California].) The prosecutor failed to ask No. 2468219 any questions to determine if her experience would actually impart some bias. (*Miller-El II*, *supra*, 545 U.S. at p. 244 [lack of follow-up questions]; *People v. Turner*, *supra*, 42 Cal.3d at p. 727 [same]; *Emerson v. State* (1993) 851 S.W.2d 269, 274 [failure to confirm suspicion that person from a college environment would be a liberal].) Asking about living in a neighborhood, as opposed to actually witnessing gang activity, is discriminatory in the same way that the disproportionate polling of African Americans on their death penalty views was in *Miller-El II,* albeit in the obverse manner (asking too few questions as opposed to asking a biased question). (*Miller-El II*, *supra*, 545 U.S. at p. 255.)

The ostensible purpose for the gang question was to determine if the jurors had prior knowledge of gangs that could be set aside in deciding the case, if they might be partial to gang members, or if they had affinity to a victim of gang violence. (See, e.g., 2ART 330; 3ART 484-485, 506, 540, 736.) The prosecutor did not explicate why mere knowledge of gang activity through residence would render No. 2468219 biased. (*People v. Turner, supra*, 42 Cal.3d at pp. 725-726 [failure to articulate any *specific* bias].) The trial court failed to challenge this assumption. (Compare *Rector v. State* (1994) 213 Ga.App. 450, 453-454.)

While more appropriate questions would have related to contact, experience, and knowledge of STEP gang activity, the court never confined questioning to gang activity defined as such. (2ART 299.) The prosecutor acknowledged that simply being a member of gang did not equate with being involved in criminal gang activity. (4ART 791-792.) He acknowledged that the case was not about gangs in general, but about gangs who commit criminal acts with "certain criteria in furtherance of the gang," which constitutes "illegal activity" in "its own separate way." (3ART 791.) The prosecutor's failure to adhere to this distinction in his questioning of panelists demonstrates a lack of credibility. (Evid. Code, sec. 780, subd. (h).) There was implicit stereotyping by the prosecutor's

belief that a Hispanic with even passing knowledge of gang activity could not be impartial in a case requiring the juror to pass judgment on another Hispanic accused of a gang crime. (*McCormick v. State*, *supra*, 803 N.E.2d at p. 1111.)

No. 2647624 was similarly situated as No. 2468219 in that her familial ties to gang members were very attenuated: she had nephews with whom she was not close. (4ART 772-773, 798.) No. 2647624 had no sympathy for gang members and actually expressed discomfort with the violent nature of the charges. (4ART 799-801.)

Absent sympathy – or actually suspected sympathy – for gang members engaged in criminal street gang activity, there would have been no reason for the prosecutor to excuse an otherwise impartial Hispanic panelist. (*People v. Calvin*, *supra*, 159 Cal.App.4th at p. 1386 [despite disproportionate degree of cynicism by African Americans against the judicial system, one cannot presume all have formed such opinions, thus specific bias must be identified]; *People v. Turner*, *supra*, 90 Cal.App.4th at p. 416.) An unbiased prosecutor would recognize the possibility that a Hispanic juror would view Hispanic STEP gang activity as a scourge on their community, geographically and existentially. As to none of these

jurors were there actual expressions of bias toward the appellants based on the charges in the case. (*Trevino, supra*, 39 Cal.3d at p. 688.)

4. No. 2723471 and No. 2408196.

The elimination of the two panelists who lived in Wasco were also subject to the race by gang-proxy device because the prosecutor relied on the fact that Trevino was a gang member who committed crimes there, However, establishing discriminatory intent as to these panelists requires demonstrating the implausibility of the prosecutor's, non-gang-related justification.

To justify the exclusion of No. 2723471 and No. 2408196, who both had strong law enforcement connections, the prosecutor asserted that they would be biased against Trevino because he would claim his gang was active in Wasco contrary to their lack of awareness of any "criminal" gang activities.[27] The prosecutor relied on an unwarranted assumption, that was not even implied in any answer given by these panelists. (*People v. Johnson* (1978) 22 Cal.3d 296 [stereotyping African American panelists based on their supposed reaction to witness using the word "nigger"].)

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27 No. 2408196 admitted to seeing possibly gang-related graffiti in Wasco. (4ART 864.) She did not deny that there were gangs in Wasco.

The trial court's to challenge this proposition as implausible means deference is unwarranted.

Further, the anticipated testimony of Trevino had no material bearing on issues in the case and was of the most passing nature. (*People v. Turner, supra*, 42 Cal.3d at pp. 725-726; *Trevino, supra*, 39 Cal.3d at p. 691.) The only real point to be established about Trevino's Sureno gang ties was that he had committed gang crimes and knew the appellants' gang affiliations. (7ART 1758-1760.) He did this by testifying he had been convicted of various low-level offenses (sec. 496, subd. (a) [misdemeanor], sec. 487, subd. (d) [misdemeanor], sec. 12021, subd. (a)(1), Health & Saf. Code, sec. 11378; Veh. Code, sec. 10851) and earned some "juice" in the gang as a result (i.e., gained a reputation). (7ART 1754-1757, 1769, 1773.) He also admitted he kept these crimes on the down low, except within his gang subset. (7ART 1765.) The prosecutor knew that there would be no evidence of open and notorious criminal gang activities in Wasco presented at the trial that would even conflict with the panelists' impressions. (*People v. Turner, supra*, 42 Cal.3d at pp. 726-727 [justification belied by record]; Evid. Code, sec. 780, subd. (h).) On appellate review it is irrelevant that the trial court may

not have been aware of this background information because the issue is credibility of the prosecutor, pretext, and ultimately, discriminatory intent.

The prosecutor's justification on this point was also exaggerated as to No. 2723471. He stated he was "dissatisfied by some of her *other* answers as to how she would respond when she hears that Trevino is from a criminal street gang . . . out of Wasco." (5ART 1058-1059, italics added.) The prosecutor asked No. 2723471 only *one* question. (3ART 731.)[28]

The justification for excluding a Hispanic from Wasco with no personal experience with gang activity must also be considered suspicious because it would be inconceivable for the prosecutor to remove a white panelist from Wasco with strong law enforcement connections and no exposure to gang crime. (*People v. Turner, supra*, 42 Cal.3d at p. 719.)

The trial court cited "lack of life experience" as an additional justification for No. 2723471, but no such reason was offered by the prosecutor as to this panelist. The prosecutor stated: "She's from Wasco. . . . That was what informed my decision on Ms. 2723471." (5ART 1059.) Lack of evidence supporting a trial court's approval of a

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28 Again labor cases are instructive. (*Republic Aviation Corp.* (1945) 61 NLRB 397, 411-412 [vague justifications]; *Frances House, Inc.* (1996) 322 NLRB 516, 520-522 [contradictory and shifting justifications].)

single justification is error. (*Snyder*, *supra*, 552 U.S. at p. 479; *Silva*, *supra*, 25 Cal.4th at p. 385.)

Accepting the prosecutor's claim, the court also incorrectly noted that the prosecutor twice passed his peremptory right with No. 2723471 on the panel (he only passed once). (5ART 1058, 1071.) When the fifth panel was called and No. 2647624, the food services worker with a nephew serving time for a gang-related murder, was voir dired, the prosecutor removed the more favorable No. 2723471 as well. (3ART 743; 4ART 805; cf. *Reynoso*, *supra*, 31 Cal.4th at p. 926; *People v Johnson*, *supra*, 47 Cal.3d at p. 1220.)

As to No. 2408196, the prosecutor cited the panelist's uncle who was in a gang, but the "important" point was that Trevino would testify about gang activity in Wasco and she professed no awareness of gang activity in the town. (5ART 1056.) Again, the presence of the gang relative was accepted uncritically by the trial court. No. 2408196 was not close with an out-of-state uncle involved in gangs when No. 2408196 was young. (4ART 813-814; 864-865.) Regardless, the existence of other non-discriminatory justifications does not cure the offering of one based on racial stereotyping if discriminatory motive is a substantial motivating factor. (*Kesser v. Cambra*, *supra*, 465 F.3d 351, 358-359, citing *Johnson*

v. Vasquez (9th Cir. 1993) 3 F.3d 1327, 1331 ["Once an inference of race-based challenges has been established, the court need not accept any nonracial excuse that comes along."]; *Riley v. Taylor*, *supra*, 277 F.3d at p. 283 [level of suspicion raised by a series of very weak explanations]; *McCormick v. State*, *supra*, 803 N.E.2d at p. 1111.)

5. Comparative Analysis.

Comparative analysis demonstrates that non-Hispanic panelists, No. 2581907, No. 2861675, and No. 2801041, were retained who had similar, though non-residence-based exposure to gang activity. (*Miller-El II*, supra, 545 U.S. at p. 248 [plausibility "severely undercut" by comparative analysis]; *People v. Johnson*, *supra*, 22 Cal.3d at p. 300 [importance of *Wheeler*'s cross-section requirement demonstrated by failure of court to consider the impact of the word "nigger" on white jurors thus inevitably injecting some degree of bias – whether conscious or unconscious – in the deliberations of white jurors].) The court specifically asked for experience "as a result of your job," or "some special training," but ignored consideration of it as a basis for gang-based bias by non-Hispanic panelists. (2ART 304-305.)

The trial court gave a conclusory, content-less rationale for rejecting the comparative analysis based on the prosecutor being

"consistent" in term of their exposure to gangs. (5ART 1071.) Again, this does not qualify as a "reasoned" analysis and therefore deference is unjustified.

No. 2581907 was a good candidate for exclusion. No. 2581907 expressed sympathy for the juvenile gang members he had mentored through his church outreach program. He felt "really bad for them." (4ART 901.) He understood how juveniles entered gangs because they came from homes with broken marriages. (4ART 901.) If this activity were his primary profession, No. 2581907 would likely be excluded by a prosecutor because for being in one of the "giving" professions. (*Reynoso*, *supra*, 31 Cal.4th at p. 911 [panelist working with at-risk youth properly excluded].) No. 2581097, an educated elder, could take leadership in articulating a view sympathetic to the defendants. No. 2581907 also represented the privileged sector of the community (former aerospace engineer with school superintendent son) as opposed to the relatively less-well off Hispanic community.

The court attempted to dismiss No. 2861675's work as apartment security as not qualifying as real experience. Even though he only reported the one street fight he helped break up, this shows exposure to gang activity. He viscerally witnessed a violent gang incident. No.

2861675 worked as a security guard in an area apparently known for criminal gang activity. (*Hall, supra*, 35 Cal.3d at p. 721.) As with both Hispanics with scant exposure to gangs, the prosecutor asked very few questions of this panelist to elicit potential bias.

The prosecutor's failure to exclude No. 2581907 and No. 2861675 showed the prosecutor was *not* "consistent" *across racial lines* because he professed to be interested in excluding all those with prior knowledge of gang activities. (*Trevino, supra*, 39 Cal.3d at p. 692.) Inconsistent justifications are probative of intentional discrimination. (*EEOC v. Sears Roebuck and Co.* (4th Cir. 2001) 243 F.3d 846, 852-853 [shifting justification probative]; *EEOC v. Ethan Allen, Inc.* (2d Cir. 1994) 44 F.3d 116, 120 [justification that shifts over time to counter evidence suggesting discrimination].)

Substantial evidence was lacking to support the trial court's findings as to No. 2468219, No. 2723471, and No. 2408196. By adopting the erroneous factual finding, the Court of Appeal erred. (*Snyder, supra*, 552 U.S. at p. 474.)

G. As a Result of the Trial Court's Reliance on a Fact Unsupported in the Record, the Court of Appeal Committed *Snyder/Silva* Error.

In *Snyder*, *supra*, 553 U.S. 472 and *Silva*, *supra*, 25 Cal.4th 345, the court found reversible *Batson* on the basis of a single instance of the record contradicting the prosecutor's proffered justifications. In *Silva*, comparative analysis was unnecessary, as contrasted with *Snyder* where it bolstered the finding of error.

No. 2510083 was a single, instructional aide, whom the prosecutor struck for three reasons: (1) being young and lacking life experience, (2) giving answers that lacked sophistication, and (3) raising a hardship issue. (5ART 1057.)

The trial court stated that No. 2510083 was primarily excluded based on youth and lack of life experience. (5ART 1057.)[29] However, the prosecutor asked no questions of No. 2510083 and never articulated how this factor would work against his case. (*Miller-El II*, *supra*, 545 U.S. at p. 244 [lack of follow-up questions]; *Collins v. Rice*, *supra*, 348 F.3d at p. 1091; *People v. Turner*, *supra*, 42 Cal.3d at p. 722-728; *Snyder*, *supra*,

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29 The court stated that youth or lack of experience was factor applied to more than one panelist, but in fact was asserted only as to No. 2510083.

552 U.S. at p. 479.)[30] No. 2510083 would otherwise have a been a strong prosecution juror, having two cousins working as highway patrols.

No. 2861675, who went unchallenged, was also young, and like No. 2510083, was still deciding on a career goal, was unmarried and without children, and had no prior jury experience. (4ART 818-819; 5ART 701, 705.) No. 2861675 displayed immaturity, given the gravity of the case, when he explained he called the police to break up the gang fight because he did not think his "flashlight and his dashing smile" would be enough. (3ART 702.) The trial court rejected comparative analysis evidence because there were "other reasons" for the dismissal of No. 2510083. (5ART 1072.) This is unpersuasive and unfair. A panelist who has not been excused cannot be compared in relation to those "other reasons" because the prosecutor has never been asked to explain his negative views about a panelist he has allowed to remain. (*Wilkerson v. Texas*, *supra*, 493 U.S. at pp. 926-927 (dissent from denial of certiorari of Marshall, J.) Nevertheless, No. 2861675 told the prosecutor he thought police acted "very unprofessionally" toward his brother who was charged

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30 In cases involving labor union activity, discrimination may be inferred when an employer's investigation of an employee's misconduct is cursory and where its justification for adverse action is exaggerated. (*Delta Gas, Inc.* (1987) 283 NLRB 391, 406-407; *Complete Carrier Services, Inc.* (1998) 325 NLRB 565, 569.)

with detonating a homemade explosive and held on $500,000 bail. (3ART 703-704.)

No. 2581907 was another non-Hispanic panelist who went unchallenged. (7ART 1192-1193.) No. 2581907 complained more strenuously about the potential hardship of jury service than No. 2510083, citing a medical appointment, graduation ceremony, art show, and "just a number of obligations." (7ART 1039-1041.)

The prosecutor conceded that he would not have excused No. 2510083 on the youthfulness alone, citing the lack of sophistication in some of her answers as the additional necessary ground. But he asked no questions of No. 2510083. The only answers No. 2510083 gave pertained to the hardship issue. Therefore, this justification is directly contradicted by the record. (Evid. Code, sec. 780, subd. (i); *Snyder*, *supra*, 552 U.S. at pp. 482-483; *Silva*, *supra*, 25 Cal.4th at p. 385.)

Lastly, the prosecutor cited No. 2510083's hardship request related to work. (5ART 1057.) No. 2510083's hardship issue was resolved. (2ART 388-389; 3ART 603.) The case is on all fours with *Snyder*, which involved an unsubstantiated hardship issue. (Evid. Code, sec. 780, subd. (i).) That the prosecutor would attempt to rely on a justification without

factual basis simply deepens suspicion about his two other claims as to No. 2510083. (*McClain v. Prunty*, *supra*, 217 F.3d at p. 1221.)

Substantial evidence was lacking to support the trial court's findings as to No. 2510083. By adopting the erroneous factual finding, the Court of Appeal erred. (*Snyder*, *supra*, 552 U.S. at p. 474.)

H. As a Result of the Trial Court Accepting a Justification Lacking in Content, the Court of Appeal Committed *Turner* Error.

In *People v. Turner*, *supra*, 42 Cal.3d 711, the African American defendant was convicted by an all white jury, where the prosecutor dismissed three African American panelists on the basis of explanations that were implausible or suggestive of bias. (*Id.* at p. 722-728 [a "truck driver" whose marginal intelligence was belied by his answering a dozen difficult to follow questions; a woman based on "something in her work"; a "mother who had children" and might be "emotional" yet the prosecutor failed to explore the point].) The trial court failed to conduct a "reasoned" evaluation of the "genuineness and sufficiency in light of all the circumstances of the trial." (*Ibid.*) Because of the weakness of the explanations, those explanations "demanded further inquiry on the part of the court." (*Ibid.*, citing *Hall*, *supra*, 35 Cal.3d at p. 169.)

No. 2547226 represents a particularly weak justification because the prosecutor initially had no recollection for why he exercised his challenge. (*People v. Turner*, *supra*, 42 Cal.3d at p. 725 ["I don't remember exactly, but I think it as something in her work . . ."].) After reviewing his notes, the prosecutor objected to No. 2547226's poor articulation of the role of the jury.

The prosecutor asked No. 2547226 questions he should have expected would prove difficult for her because she had revealed no prior jury experience. (2AT 462.) The prosecutor asked her how many votes were required for a verdict and where the jury deliberates. The prosecutor's embarrassment provoking question explains why No. 2547226 may have been nervous and a bit tongue-tied. No. 2547226 was the only panelist subjected to this line of questioning. Hispanics are more likely to come from an immigrant background, less fluent in English, and less assimilated into civil society. The record is silent as to whether the trial court considered any such factor. Given her lack of prior jury experience, No. 2547226's articulation of the role of the jury was unremarkable. (*Trevino*, *supra*, 39 Cal.3d at p. 692, fn. 25 [mode of answering did not support opinion of inability to form own opinion].) She

understood her role was to deliberate with the other jurors in sequestration after all the evidence had been submitted.

The prosecutor also expressed concern about No. 2547226's ability to "stand her ground." In answer to the jurors' "difficult task" of both standing their ground and listening to others, No. 2547226 volunteered that she was a better listener. By this answer she merely demonstrated candor in response to the question in its unrefined form. On the lone follow-up question, she immediately responded that she would not have any problem letting others know of her disagreements. (*Miller-El II*, *supra*, 545 U.S. at p. 244 [lack of follow-up questions].) Furthermore, if No. 2547226 was indeed a timid panelist, there was no urgency in excluding her after passing only once on her, particularly when there was no other reason that the prosecutor could summon. (*Lenix*, *supra*, 44 Cal.4th at p. 623; cf. *People v Johnson*, *supra*, 47 Cal.3d at p. 1220.) The trial court made no findings on the record as to the demeanor of No. 2547226.

The justifications were suspect and required additional sensitive inquiry by the trial court. The trial court failed to conduct that inquiry, and thus deference to its finding is unwarranted. (*Turner*, *supra*, 42 Cal.3d at p. 728.)

I. As a Result of the Trial Court's Rejection of Comparative Analysis Borne of Unconscious Race Bias, the Court of Appeal Committed *Miller-El II/Snyder* Error.

No. 2291529 was a "close call" for the prosecutor, but he concluded that No. 2291529 was "disproportionately" affected by his "encounters" with law enforcement as compared with his brother's death in a bar fight. (5ART 1059-1060.) The record contains no demeanor finding by the court supporting this claim of "disproportionate" emotional response.

The trial court accepted the prosecution's justification that No. 2291529 was upset with the vehicle stop that resulted in a search of his vehicle by six sheriff deputies, finding no comparable experience by non-challenged jurors. (5ART 1072.) That is not a fair characterization of the record. While no white panelist had been subjected to a case of probable racial profiling (and existentially speaking, none would), the trial court was obligated to fairly consider non-Hispanic jurors with negative law enforcement events in order to fulfill its comparative analysis obligation.

No. 2291529 unequivocally stated he bore no ill will toward law enforcement as a result of the incident. This claimed ground is distinguishable from the justification in *People v. Walker* (1988) 47

Cal.3d 605, an oft-cited case finding that antipathy for law enforcement is a valid basis for exclusion. (*Id.* at pp. 635-626 [African American panelist complained of being repeatedly stopped and harassed by police for being "an average black man"].)

As noted above, the prosecutor accepted No. 2861675 who believed the police acted "very unprofessionally" toward his brother who was charged with detonating a homemade explosive. (3ART 703-704.) No. 2546044, who was not excused, cited an experience with law enforcement in Imperial County where he did not feel law enforcement had done enough. (3ART 505.) The prosecutor also accepted No. 2859437, whose son was convicted for abuse and whose cousin was charged with murder. (*Snyder*, *supra*, 552 U.S. at pp. 483-484 [impeachment of prosecutor's credibility based on accepting white jurors with at least as strong a hardship claim as the minority juror excused].)

Even if No. 2291529 had been upset by the vehicle search, the fact that deputies would search his vehicle in the manner described without disclosing any reasonable suspicion would give any Hispanic male cause to consider racial profiling was involved.[31] A prosecutor in the modern

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31 The likelihood that it was racial profiling rests not simply on what he reported, but the fact that he was a Hispanic male living in an economically challenged county with a disproportionately large Hispanic population.

era should be able to overlook an incident of this nature and more carefully inquire with the panelist, instead of reflexively dismissing him. The prosecutor's inability to do so reflects a failure to uphold his obligation to enforce the *Batson* principle. (*Trevino*, *supra*, 39 Cal.3d at pp. 680-681 [prosecutor requires conscientious efforts to efficiently discharge his duty not to exalt peremptory challenge right over the defendant's constitutional right to a jury drawn from a representative cross-section of the community]; *Batson*, *supra*, 476 U.S. at p. 106, conc. opn. of Marshall, J. ["Assuming good faith on the part of all involved, *Batson*'s mandate requires the parties 'to confront and overcome their own racism on all levels.' "].)[32]

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32 Comparative analysis demonstrates that the prosecutor could accept a juror who believed that racial-profiling could exist. No. 2801041, a retired correctional officer at the Tehachapi prison, had received regular classes on gangs. (2ART 306, 363.) After the initial canvassing the gang question, the court held private, individual voir dire for panelists who responded affirmatively. (3ART 310.) In this session, No. 2801041, who had no prior jury service, revealed reservations about his own impartiality though claiming he could be a fair juror. (3ART 365-366.) In answer to the question whether he could actually be fair he answered: "Boy, that's – I honestly believe I could be a fair juror for sure, but I think everybody – and when you talk about racial profiling, et cetera, how can you – how can a person not walk down the street and go, if I see you dressed in your robe, I probably think of you differently than somebody who else [sic] is dressed like – he looks like a hoodlum. If you look like a hoodlum then you could be, but you are probably not, so I am racial profiling when I say that with two different people?" (3ART 366.) Asked a second time about impartiality, No. 2801041 admitted he thought might be "a little" biased.

As his principal justification for excusing No. 2852410, the prosecutor cited the dismissive treatment he received when he reported his in-progress car burglary and was waved off by the on-duty officers. Secondarily, the prosecutor mentioned the vehicle stop. As to this panelist, the trial court did make a demeanor finding, stating No. 2852410 was "clearly upset." The court did not state as to which of the two incidents it applied, or to both. (5ART 1072-1073.) If the principal objection was the panelist's objection to the burglary, No. 2852410 was similarly situated to No. 2546044. If the principal objection was as to the vehicle stop, he was similarly situated to No. 2861675. Moreover, No. 2852410, unlike No. 2546044 and No. 2861675, had very strong ties to law enforcement, and was therefore favorable. (*People v. Turner*, *supra*, 42 Cal.3d at p. 719; *Hall*, *supra*, 35 Cal.3d at pp. 168-169 [disparate

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(3ART 367.) After questioning by each of the three defense counsel, the prosecutor declined to ask any questions. (3ART 375.) The defendants made a challenge for cause, to which the court ultimately granted, but for a different reason: he had discussed the case with his wife who happened to be in the same jury panel. (3ART 383.) The prosecutor opposed the challenge for cause, stating: "It's not like he's coming in here without any preconceived ideas and biases and life experiences. I think he showed us an enormous candor on that point. And I think all he really needs as far as the question, as far as bias and fairness is maybe a tutorial on a different challenge for cause and a peremptory challenge [sic]. I think on that issue, his ability to be fair that he should not be kicked for cause." (3ART 378.) The prosecutor also accepted No. 2589394's assurances of impartiality despite a gang hit being put out on her. (4ART 888, 892.)

treatment of some panelists demands more searching inquiry of others for which such disparate treatment is not apparent].)[33]

Again, the court attempted to justify the exclusion of these two panelists because the prosecutor had been "consistent." (5ART 1072-1073.) While the systematic exclusion of Hispanic panelists as a whole speaks of either conscious or unconscious race bias, or both, the exclusion of these two panelists for negative law enforcement experiences involving racial profiling highlights the latter because of the court and prosecutor's blind-spot to appreciating their own bias, having never experienced racism in that form. (*People v. Johnson*, *supra*, 22 Cal.3d at p. 300.)

J. As a Result of Failing To Consider Other Circumstances Undermining the Prosecutor's Credibility, the Court of Appeal Committed *Miller-El II /Snyder* Error.

In conducting the substantial evidence test, the Court of Appeal was required to consider all factors that bore on the issue of the prosecutor's credibility. (*Miller-El II*, *supra*, 545 U.S. at p. 240; *Snyder*, *supra*, 552 U.S. at pp. 482-483.) Nothing in the record suggests the trial

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33 The Hispanics in the jury venire could not avoid being suspicious of the prosecutor's motives when a juror like No. 2852410 with very strong ties to law enforcement community is deemed unqualified to serve in a trial involving three Hispanic defendants. (Cf. *Silva*, *supra*, 25 Cal.4th at p. 345.)

court considered evidence of impeachment of the prosecutor. When counsel for Gutierrez made the *Batson* motion and the trial court offered the prosecutor an opportunity to respond, the prosecutor reminded the court he was not required to respond and would await a prima facie ruling, a tactic explainable as zealous advocacy. But he went further, doubling down on his position, asserting he had never faced a *Wheeler/Batson* motion his entire (20-year) career spanning "50,000" criminal trials.[34] (5ART 1050.) If the prosecutor were truly pure of intention he would not have reacted with such exaggeration or umbrage. (Evid. Code, sec. 780, subd. (j).) The prosecutor's statement betrayed bias in the outcome. (Evid. Code, sec. 780, subd. (f); *Thurman v. Yellow Freight Systems, Inc.*, *supra*, 90 F.3d 1160, 1167 [attempts to hide discriminatory actions undermine credibility].)

It is highly unlikely this was a case of misspeaking. (Cf. *Rice v. Collins*, *supra*, 546 U.S. at p. 340.) At best it could have been an attempt at sarcasm. But such sarcasm would only demonstrate a lack of understanding of the duty to uphold the equal protection principle. (Evid. Code, sec. 780, subd. (j).)

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34 The prosecutor was admitted to the bar in 2002. (State Bar of California website [https://www.members. calbar.org.ca.gov/ fal/Member/Detail/219856, as of 1/11/2016].)

On its face, the statement must also be factually untrue, since the prosecutor would have had to conduct approximately 416 trials per month to achieve this total. The prosecutor placed into issue his reputation for honesty and veracity and misstated a material fact. (Evid. Code, sec. 780, subds. (e), (i); *Silva*, *supra*, 25 Cal.4th at p. 385 [prosecutor's credibility rejected on the basis of one material misstatement].)

The other piece of evidence arises from the sequence of exclusion of Hispanics. Even as to those for whom the claims of bias were more superficial than others, the prosecutor wasted no time removing them. No. 2723471, whom the prosecutor admitted was a close call, only survived one panel, and was excused just as No. 2647624 with a less suspicious ground for exclusion (two nephews convicted of gang-related crimes) was subjected to voir dire outside of the box. (4ART 758, 770-771, 805.) The one Hispanic who remained on the panel at the time the *Wheeler/Batson* motion was addressed, No. 247882, was deaf. (4ART 909-910.) Though not clear from the record, if the deafness was congenital it would have meant she was also mute. It is easy to understand why the prosecutor would permit this panelist to remain: as the lone Hispanic, she was not likely to be vociferous in expressing her opinion, assuming she harbored sympathy for the appellants. As the lone

Hispanic, she would, of all the Hispanic panelists, have been the least likely to hold out for acquittal.

The record demonstrates that the trial court failed to make a sincere and reasoned attempt to consider the discriminatory intent question and so the ruling is not entitled to deference. Whether the substantial evidence or independent judgment standard of review applies, appellants have carried their burden that more likely than not race was a substantial motivating factor for the challenges to the 10 of 11 Hispanic jurors who made it to the jury box. Therefore, the Court of Appeal erred by failing to reverse the trial court's ruling denying the *Wheeler/Batson* motion.

K. By Failing To Reverse for the Representative Cross-Section Violation, the Court of Appeal Committed *Wheeler* Error.

The systematic exclusion of a particular ethnic group is prejudicial per se. (*Wheeler*, *supra*, 22 Cal.3d at p. 283.) The courts have a duty to guarantee the defendant's right to a jury that is as close as possible to an ideal cross-section of the community. (*Hall*, *supra*, 35 Cal.3d at p. 167.)

The prosecutor reduced the jury to 8.3 percent Hispanic compared to 51 percent in the county population. The prosecutor used biased screening questions that disproportionately impacted Hispanic panelists,

rejected Hispanic panelists with strong ties to law enforcement, conducted cursory voir dire of Hispanics, then dismissed them for superficial reasons, demonstrated a lack of understanding for minor indignities suffered by Hispanics as a result of community policing, and retained non-Hispanic jurors with many of the same features as non-Hispanics based on comparative analysis. (*People v. Bonilla, supra*, 41 Cal.4th at p. 342 [racial motive suspected when prosecutor excuses a heterogenous collection of cognizable group and thus only have race in common].)[35]

In the late stages of the process, the jury composition was either zero percent, in the case of No. 2647624 and No. 2408196[36], or 8.3 percent Hispanic, in the cases of No. 2732073 and No. 2632053. There can be no doubt that prosecutors are aware of disparities between their petit jury and the jury venire in terms of racial composition. Under *Wheeler's* representative cross-section guarantee and guarantee against systematic exclusion on the basis of race, the prosecutor can not have it

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35 Discrimination against minority jurors is also a form of wealth discrimination. (*Serrano v. Priest* (1971) 5 Cal.3d 584; *Theil v. Southern Pacific Co.* (1946) 328 U.S. 217, 224 [improper to "breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged"].)

36 No. 2408196 was the lone Hispanic on the sixth panel, when she was removed. On the seventh panel, two new Hispanics were added (No.2732073 and No. 2478882), of which one, No. 2732073 was removed.

both ways even with the peremptory challenge right: eliminating those with both weak and strong indicators of potential bias. *Hall, supra,* 35 Cal.3d 161, explained: "[T]he constitutional right to a jury drawn from a representative cross-section of the population is denied only when peremptory challenges are used to exclude from the jury members of a group who share perceptions gained through life experiences as members of the group, which perceptions and attitudes cannot be represented by other members of the community." (*Id.* at p. 170.) The court added that no violation of the cross-section requirement if the prosecutor allows for minority views to find expression in the jury through non-minority members. (*Ibid.*) Here the overbroad strategy of systematically eliminating Hispanics violated article I, section 16 because there were an insufficient number of jurors capable of representing the Hispanic community. This case reveals that the state constitution must impose an additional burden on the prosecutor that does not otherwise come into play in a *Batson* case.[37]

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37 See *Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74, 81 [different free speech analysis than U.S. Supreme Court]; *New Ice State Co. v. Liebman* (1932) 286 U.S. 262, 311, dis. opn. of Brandeis, J. ["It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country."]; *State v Novembrino* (1987) 105 N.J. 95 [519 A.2d 820] [rejecting *United States v.*

While the courts have not identified any specific ratio of inclusion that satisfies the article I, section 16 guarantee, the disparity here between the number of Hispanics seated on appellants' jury in relation to their proportion of the total population, clearly satisfies whatever test is ultimately devised by this Court to remedy systematic exclusion of minority jurors. (See Page, *Batson's Blind–Spot: etc.*, *supra*, 85 B.U.L.Rev. at p. 248 [identifying proposals for (1) a minimum of half the jury of the same race, (2) a minimum of three, or (3) percentage mirroring the community composition].)

The cross-section requirement should be viewed as the necessary complement, or check, on the peremptory challenge limitation of *Batson*. Even assuming all race neutral justifications withstand scrutiny under the current standard of review, the defendant's jury must contain some minimum number of like-cognizable-group members so as to counteract unconscious, stereotypical biases within the group of white or non-Hispanic panelists sought by the prosecutor.

CONCLUSION

For all of the foregoing reasons, appellant Ramos respectfully requests that the Court conclude that the Court of Appeal erred by

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Leon (1987) 468 U.S. 897 as too restrictive of search and seizure law].

upholding the trial court's ruling denying the *Wheeler/Batson* motion.

Dated: March 21, 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 OPENING BRIEF ON THE MERITS** was produced using a 13-point Times New Roman type and contains 18,872 words. Because the brief exceeds the limit of 14,000 words, appellant is simultaneously filing a request for permission to file an oversized brief.

Dated: March 21, 2016

Respectfully submitted,

DONN GINOZA
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GABRIEL RAMOS

CERTIFICATE OF SERVICE BY MAIL BY ATTORNEY
(C.C.P., sec. 1013a(2))

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 OPENING BRIEF ON THE MERITS** by depositing a true copy thereof in the United States Mail in Palo Alto, California, on March 21, 2016, enclosed in envelopes with postage thereon fully prepaid, addressed as follows:

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