IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. FLOYD DANIEL SMITH Defendant and Appellant.	No. S065233 (San Bernadino County Sup. Ct. No. FWV08607) **DEATH PENALTY CASE**

Honorable John W. Kennedy, Judge

APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

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XIII.

PEOPLE V. GUTIERREZ MANDATES REVERSAL DUE TO THE PROSECUTOR'S DISCRIMINATION DURING JURY SELECTION

This Court has frequently reiterated that, in reviewing the denial of a *Batson*/*Wheeler*[1] motion, it applies a deferential standard of review. The heart of *Gutierrez* was the foundational requirement that, before such deference may be afforded, court and counsel must create a record "worthy of deference." (*People v. Gutierrez, Ramos and Enriquez* (2017) 2 Cal.5th 1150, 1171 (*Gutierrez*).) To describe as "worthy of deference" the record in this case – one in which the prosecutor had twice stricken all African Americans from the jury –would do violence to the principles this Court set forth in *Gutierrez.*

Juror Kimbrough was allegedly excused because she was a "leader" (RT 9:2697) though another black juror was excluded because she was a "follower." (RT 8:2602.) The prosecutor said that Kimbrough was potentially a "good member of the panel" who he initially planned to accept. Moments later he contradicted himself, levelling repeated and baseless accusations that she was concealing a "hidden agenda." She was simultaneously a "good member of the panel" and the "lowest possible grade" of juror he would ever accept. (RT 9:2699.)

The prosecutor cited numerous innocuous responses by Kimbrough (e.g. "I don't know how often [the death penalty] is used" or LWOP "can be appropriate punishment depending upon the facts/specific case"), and claimed these answers were somehow disqualifying. These unremarkable responses were shared, unsurprisingly, by numerous seated jurors. The prosecutor even

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

found Kimbrough undesirable because she answered a yes-or-no question with a legally correct, yes-or-no response. The prosecutor's explanation was that "invariably" good jurors added an uninvited "prose" response, and the "people I have problems with, and check more closely, are the people who simply use the check boxes." (RT 9:2703.) This was simply a fabrication. No seated juror provided such a response.

The justifications for striking Prospective Juror Dredd (who supported the Briggs initiative and had a close relative in law enforcement) followed a similar pattern. Dredd was excused because – with respect to a category of news he did not try to follow – he didn't have an opinion about the news stories. Eleven out of twelve seated jurors similarly provided no opinion. The prosecutor explained that "[i]t is not difficult to see why [Dredd] is no longer in this group. He is not a person involved in the community. He is not involved in any community activity." (RT 8:2616.) Dredd's lifelong community involvement, as pointed out by defense counsel, was manifest from his questionnaire. The prosecutor asserted Dredd was excused because he was "extremely confused as to his opinions" and "feelings about this case." (RT 8:2595.) There was no evidence of any such confusion. The prosecutor claimed that Dredd was excused because he was 70, but then provided no explanation for why an older juror would be biased against him.

Dredd was excused because he did not identify problems with the criminal justice systems and proposals for fixing them, but failure to do so was common among seated jurors. Dredd was supposedly excused because he criticized the wording of a question. Multiple seated jurors criticized questions. The question at issue used awkward syntax; the prosecutor later admitted at a separate hearing that the question's language was "somewhat difficult in its wording." (RT 9:2701.)

The justifications for excusal of Prospective Juror Sam[2] were likewise suspicious. She was allegedly excused because she had "some or very very little college or higher education." (RT 8:2594.) As noted by the defense, Sam had two degrees: an A.A. degree and a B.S.M. Even after the prosecutor stood corrected by the record, he continued to inexplicably insist Sam was excused due to her "limited education." (RT 8:2602.) But the four black jurors excused (one with a master's degree and two others with bachelor's degrees) actually had a far higher educational attainment than the relatively uneducated seated jurors, only two of whom had bachelor's degrees. In fact, the prosecutor disproportionately struck jurors with higher education.

Sam was excused because she was not a "stable person in the community" based upon her housing and job history. (RT 8:2594) But Sam had lived in the same home for three years, worked as a data entry representative for five years, and had been married to an electrical engineer for eleven years. Sam was also allegedly excused because of lack of community volunteer activity with children. It is entirely unclear why lack of community volunteer activity with children would bias Sam against the prosecution, but, again, lack of such experience was common among seated jurors.

The strike of Prospective Juror Davis was more easily understood. Although she voiced "strong support" for the death penalty and desire for harsher criminal punishments generally, she also expressed significant reluctance in herself imposing the death penalty. But the prosecutor's justifications for striking Davis were nonetheless frequently problematic: the

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[2] This prospective juror's name was Reginia McCalister-Sam. (7 SCT 17:4948.) Because the parties referred to her as "Sam" throughout the hearing, appellant will likewise do so. In the prior briefing by appellant and respondent, she is mistakenly referred to as "Regina Sam" or "Regina S."

justifications were at times contradicted by the record, seemingly trivial and unrelated to the case, and/or common in seated jurors.[3]

The prosecutor in this case applied a blunderbuss strategy. For the first three jurors (Davis, Sam, and Dredd), he provided an initial barrage of justifications, and, when challenged, checked his notes and provided a second set. Then, after a recess he provided a third (even more expansive) set of explanations, relying in part on a line-by-line review of the jury questionnaires. When challenged by defense counsel or the court during this process, he would frequently bring forth still other, new justifications. All told, he averaged an astonishing ten justifications per juror for the first three excusals (often with multiple underlying questionnaire responses for individual justifications). For the strike of the fourth and final African American juror (Kimbrough), the prosecutor was even more detailed, listing over *twenty* questionnaire responses. The United States Supreme Court has recently underscored its skepticism of such a "throw it at the wall and see what sticks" approach. (*Foster v. Chatman* (2016) 136 S.Ct. 1737, 1748 (*Foster*) [criticizing the prosecutor's "laundry list of [eleven] reasons"].)

But the true problem in this case is not the overwhelming number of justifications, or even the troubling fact that, for many jurors, the "reasons for the strike shifted over time." (*Foster*, *supra*, 136 S.Ct. at p. 1751.) Perhaps the most troubling aspect of the case was the trial court's refusal to grapple with the fact that so many of the justifications were demonstrably dishonest. The record in this case is saturated with the prosecutor's false claims, exaggerations and

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[3] The prosecutor alleged that she was excused based upon a non-existent prior cause challenge. (RT 8:2593.) He cited her prior divorce, a characteristic shared by several seated jurors. (RT 8:2598.) And he also complained about her educational level, which was identical to the majority of seated jurors. (*Ibid.*)

mischaracterizations, incomprehensible reasoning, unsupported speculation, shifting and contradictory justifications, and allegedly disqualifying characteristics being shared by many, or even all, seated jurors – not to mention the prosecutor's highly problematic and questionably race-neutral fixation on several black jurors' unperturbed responses to the O.J. Simpson verdict.

The trial court never addressed any of these significant problems. Instead, the trial court found, somewhere in the overwhelming array of justifications, a few which he thought the prosecutor might have honestly entertained, even though the trial court expressly observed that it did not find many of the prosecutor's justifications objectively reasonable. (RT 8:2613-2614 [trial court's statement that multiple jurors were a "much closer question" because "I would not have shared your concern"].)

If all that is required of trial courts is to accept a drop of truth in such an ocean of suspicious behavior, then there can be no viable appellate review of *Batson*/*Wheeler* claims. The trial court's analysis, though clearly affirming the trial court's belief in the honesty of the prosecutor, is simply not "worthy of deference." (*Gutierrez, supra*, 2 Cal.5th at p. 1171.) Just as in *Gutierrez,* the trial court in this case may have made a "sincere" effort to do its job but failed to perform the "reasoned" analysis that is required.

A. THE *GUTIERREZ* DECISION

In *Gutierrez,* this Court reiterated the rule that "a trial court's conclusions are entitled to deference only when the court made a 'sincere and reasoned effort to evaluate the nondiscriminatory justifications offered.' [Citation]." (*Gutierrez, supra*, 2 Cal.5th at p. 1159.)

The majority opinion in *Gutierrez* rested its analysis on the dismissal of one Hispanic female juror. The prosecutor said that the basis for striking that juror was that "'[s]he's from Wasco and she said that she's not aware

of any gang activity going on in Wasco, and I was unsatisfied by some of her other answers as to how she would respond when she hears that Gabriel Trevino [a prosecution witness] is from a criminal street gang, a subset of the Surenos out of Wasco." (*Gutierrez*, *supra*, 2 Cal.5th at p. 1160.)

This Court emphasized that the reason for the strike was suspicious because it did not make sense. Although the Attorney General argued that the juror's unawareness of gang activity in Wasco could "cause that juror to be biased against Trevino," the Court found the deduction "tenuous" because it "is not evident why a panelist's unawareness of gang activity in Wasco would indicate a bias against a member of a gang based in Wasco." (*Gutierrez*, *supra*, 2 Cal.5th at p. 1169.) This suspicion was compounded by the prosecutor's failure to question on the topic. (*Id.* at p. 1170.) Moreover, the juror was seemingly desirable because, like multiple jurors stricken in appellant's case, she had relatives in law enforcement. (*Ibid*.)

The Court underscored that in such a suspicious situation (one in which the given explanation does not render "self-evident why an advocate would harbor a concern") the trial court's duty to probe whether an explanation is genuine and made in good faith becomes "more pressing." (*Gutierrez*, *supra*, 2 Cal.5th at p. 1171.) This was "particularly so" where (as in appellant's case) the advocate used a "considerable number of challenges" against the group at issue. (*Ibid*.) Applying these principles to the case, the Court found it "difficult to lend credence to the prosecutor's concern" when his "brief questioning of this panelist failed to shed light on the nature of his apprehension or otherwise indicate his interest in meaningfully examining the topic, and the matter was far from self-evident." (*Ibid*.)

The Court ultimately founded its analysis on the rule requiring "sincere and reasoned" decisions in *Batson/Wheeler* challenges first

delineated in *People v. Hall* (1983) 35 Cal.3d 161 (*Hall*): "Because the prosecutor's reason for this strike was not self-evident and the record is void of any explication from the court, we cannot find under these circumstances that the court made a *reasoned* attempt to determine whether the justification was a credible one." (*Gutierrez, supra*, 2 Cal.5th at p. 1169, italics in original.)

Like the prosecutor's justifications in *Gutierrez*, many of the prosecutor's justifications in this case are far from self-evident. In fact, the bulk of them are belied by the record, nonsensical, internally inconsistent, and repeatedly fail comparative analysis. Because the trial court failed to address any of these shortcomings, it cannot be said to have performed a "reasoned" analysis.

B. THE JUSTIFICATIONS FOR ALL FOUR STRICKEN JURORS PRESENTED SIGNIFICANT EVIDENCE OF PRETEXT

1. PROSPECTIVE JUROR KIMBROUGH

The peremptory challenge of Juror Kimbrough put the prosecutor in an awkward position. Most obviously, she was the only black prospective juror left in the box after the prosecutor had used three of his first five peremptories to excuse the only three other African Americans who had entered. Moreover, Kimbrough's questionnaire responses were thoughtful, and steadfastly neutral on the issue most cited by the prosecutor: positions regarding the death penalty. She stated that she would affirmatively vote to retain the death penalty should the occasion present itself, and very clearly indicated that she could vote for death where the circumstances warranted it, which she believed was a "realistic and practical" possibility. (See 7 SCT 20:5747 [Q.75]; 5748 [Q.79]; 5749 [Q.83].) As a whole, her answers indicated a strong understanding of the legal principles articulated in the questionnaire and showed no overt bias for or against the death penalty. (See, e.g., 7 SCT 20:5750 [Q.88 "I don't think

positively or negatively" about the death penalty]; see also 5747 [Q.77 "I would be open to voting for the death penalty, but I wouldn't necessarily always vote for it"].)

Striking Kimbrough also presented a contextual problem for the prosecutor, who had previously excused two black jurors using the flimsy justifications that one was a "follower" and repeatedly citing supposed lack of education.[4] As defense counsel pointed out, Kimbrough embodied the opposite: she was, by the prosecutor's own admission, a highly educated individual who possessed strong leadership skills. (See RT 9:2697 [prosecutor's comments that Kimbrough was an "executive with a corporation" with "considerable experience as a leader"].) The prosecutor's attempts to finesse this apparent contradiction provided significant evidence that the prosecutor's purported concerns about Kimbrough were merely pretext.

a. The Trial Court Failed To Press The Prosecutor On His Use Of Justifications That Were Not Self-Evident, Were Contradictory, And Failed Comparative Analysis

The central focus of *Gutierrez* was the premise that when it is "not self-evident why an advocate would harbor a concern, the question of whether a neutral explanation is genuine and made in good faith becomes more pressing." (*Gutierrez, supra*, 2 Cal.5th at p. 1171.) In other words, if a justification is relatively weak and otherwise potentially suspicious, it must be treated cautiously and met with careful questioning.

The trial court here did the opposite. When faced with a citation to over *twenty* inoffensive questionnaire responses, it employed what it described as a

[4] As discussed below, these prior justifications were contradicted by the record, failed comparative analysis, were not accepted by the trial court, and/or generally made no sense.

"selective" technique. (RT 9:2714-2715.) The trial court looked at the large number of responses cited, and found three that led it to the tepid conclusion that the prosecution "could rationally conclude that [Kimbrough was] reluctant to impose the death penalty" or at least that it was "not unreasonable" for the prosecutor to assume that someone with these answers was "left of center" on the issue. (RT 9:2717.) Even these three answers, discussed in more detail below, hardly proved that Kimbrough was more reluctant to impose the death penalty than other seated jurors. But what the trial court ignored was the prosecutor's reliance on response after response that defied any rational explanation as a basis for Kimbrough's excusal. Although a prosecutor may occasionally and innocently cite a weak justification, at some point a smokescreen must be called out for what it is. (See AOB at 68-69 [collecting opinions in which courts have viewed lengthy "shopping-list" justifications with disfavor].)

i. The prosecutor's unfounded suggestions that Juror Kimbrough was providing disingenuous questionnaire responses finds no support in the record and was a strong sign of invidious discrimination

The prosecutor's repeated and unfounded accusations that Juror Kimbrough was trying to mislead the parties in her questionnaire responses provides perhaps the clearest illustration of the contradictory and often nonsensical positions taken by the prosecutor in trying to justify her excusal. Such baseless accusations not only lacked rational support, but were irreconcilable with the prosecutor's simultaneous claims that she was potentially a "good member of the panel." (RT 9:2699.)

For example, Question 48 asked "what are the biggest problems with our criminal justice system and how could it be improved," to which Kimbrough responded: "I haven't really thought about it or had much interaction with the criminal justice system." (7 SCT 20:5740.) The prosecutor

cited this response, adding "this is a woman who is on the board of directors" of a battered women's shelter. (RT 9:2700.) The trial court, quite naturally, did not understand the relevance of this justification, and asked the prosecutor to explain. (RT 9:2700.)

The prosecutor stated that Kimbrough's lack of interest in the O.J. Simpson case, "really took me quite aback," particularly because Kimbrough had been married to a former teammate of Mr. Simpson, because Kimbrough was involved in the issue of spousal abuse, and because spousal abuse was a component of the O.J. Simpson case. (RT 9:2700.) He concluded by stating that "I don't know if she is being disingenuous with me" or whether "there is something else at play" but "I simply can't believe that she did not follow that case" at least with respect to the domestic violence angle. (RT 9:2700.)

First, there is nothing to suggest that Kimbrough's response to Question 48 was "disingenuous." What could she conceivably be hiding about her thoughts regarding improvements in the criminal justice system? The only thing that suggested she had an interaction with the criminal justice system was her service on a board for a battered women's shelter. Volunteer experience assisting victims of violent crime is *precisely* the sort of experience any prosecutor should be happy to see in a prospective juror. To the extent Kimbrough's work led her to form opinions about improvements on the criminal justice system, they were almost certainly focused on the protection of victims of domestic assault.

Nor was there any evidence to suggest that Kimbrough was lying about her lack of interest in the O.J. Simpson trial. Kimbrough stated on her questionnaire that she "didn't have time to follow it closely" and that it "was in the media so much you had to hear about it. But I tuned it out after awhile." (7 SCT 20:5738.) The prosecutor brought the topic up during voir dire, and Kimbrough indicated that she had no strong feelings about the case. (RT

8:2585.) And she forthrightly explained that, since the year in which her husband played for the Buffalo Bills (which was at least 20 years prior to the Simpson trial)[5] she and her husband had no further contact with Mr. Simpson. (RT 9:2585-2586.) Other than an initial discussion about how shocking the charges were, neither of them had followed the case. (RT 9:2586.)

There is nothing to support the suggestion that Kimbrough was misleading the court. But even if the prosecutor believed his own baseless intimations, his point is still incomprehensible. Take as a given that Kimbrough was a secret O.J. Simpson supporter with hidden, pro-defense plans to improve the criminal justice system, and who was intent on misleading the prosecution with "disingenuous" answers about her lack of interest in the Simpson case. How on earth would such a conniving and deceitful juror be a "good member of the panel" who the prosecutor said he was initially willing to accept? (RT 9:2699.) The prosecutor's claim that Kimbrough was a perfectly acceptable panelist and his simultaneous suggestion that she was a liar simply cannot both be true.

Other examples of the prosecutor accusing Kimbrough of providing misleading answers were equally nonsensical and internally inconsistent. For instance, Kimbrough indicated in response to Question 96 that she hadn't changed her position on the death penalty in the last 10 years because "I have never taken a position on it one way or the other." (7 SCT 20:5751.) This was consistent with her other responses regarding the death penalty. (See, e.g., 7 SCT 20:5750 ["I have never had to face my thoughts about [the death penalty] before. I don't think positively or negatively about it."].) Yet the prosecutor

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[5] O.J. Simpson last played for the Buffalo Bills in 1977, and Kimbrough's husband had "no contact with OJ after he left Buffalo." (RT 8:2586.)

claimed this answer (along with other unspecified "voir dire" answers which appears to refer to her statements regarding lack of interest in the O.J. Simpson case, the only cited portion of the prosecutor's questioning) made him "very uncomfortable" about the prospect that Kimbrough was concealing a "hidden agenda." (RT 9:2704.) The same "hidden agenda" was somehow revealed to the prosecutor when Kimbrough wrote that she would "need to listen to the testimony in penalty phase and decide. I wouldn't automatically vote for a death sentence;" a statement which the prosecutor somehow interpreted as one which made him "strongly feel that she would lean more towards life imprisonment." (RT 9:2705; but see 7 SCT 20:5747-5748 [Questionnaire instruction: "There are no circumstances under which a jury is instructed by the court that it must return a verdict of death. No matter what the evidence, the jury is always given the option in the penalty phase of choosing either life without the possibility of parole or the death penalty."].)

Kimbrough responded to Question 99 ("Why do you think we are asking all these questions about the death penalty?") accurately and straightforwardly: "to determine if I could have difficulty making the decision if/when the time comes." (7 SCT 20:5752.) The prosecutor absurdly characterized this response as Kimbrough's attempt to "send a message," either to the defense or the prosecutor, and underscored that "I feel that it is a message." (RT 9:2704-2705.) But Kimbrough was just restating the very same legal principle that began the questionnaire section on the death penalty. (See 7 SCT 20:5746 [Q.73: "Do you understand that by asking questions concerning the death penalty it is not to suggest that the defendant should or will be convicted. . . .?"].) If Kimbrough was attempting to send any type of message, it was simply she understood the principles articulated in the questionnaire.

Kimbrough responded to Question 121 ("Do you think that you could grant the person mercy, even if they were guilty of intentional murder?") by

stating "If by 'mercy' you mean grant a less harsh sentence, I could if there were circumstances to warrant it." (7 SCT 20:5756.) The prosecutor oddly characterized this as "pure game playing" showing that Kimbrough was "equivocating, trying to conceal her true feelings." (RT 9:2707.) Of course, Kimbrough unquestionably shared her true feelings, stating that she could grant precisely the type of mercy that the question called for, so how this showed an effort to conceal her "true feelings" is difficult to understand. Nor, apparently, was it "pure game playing" when Seated Juror 317B similarly expressed some concern as to whether "mercy" had a particularized meaning. (See SCT 24:6956 ["is mercy a legal term? Not sure how it would apply?"].)

There was simply no record support in these or other answers for the speculation that Kimbrough was obscuring some anti-death penalty or anti-prosecution "agenda." But even should the prosecutor honestly entertain such a belief, it is wholly inconsistent with his simultaneous claim that he had intended to accept her as a juror earlier in the process.

ii. The prosecutor's repeated citations to innocuous answers provided by Kimbrough (shared by many other seated jurors) was overlooked by the trial court

The sheer number of instances in which the prosecutor cited Kimbrough's facially neutral answers as a reason for her excusal is remarkable. Given their innocent nature, it is perhaps unsurprising that the majority of Kimbrough's neutral answers were shared by numerous seated jurors. But the fact that so many jurors shared Kimbrough's views powerfully illustrates that these answers were not "self-evident" in showing any sort bias. (*Gutierrez, supra*, 2 Cal.5th at p. 1171; *Miller–El v. Cockrell* (2003) 537 U.S. 322, 339 ["Credibility can be measured by, among other factors, . . . how reasonable, or how improbable, the [State's] explanations are"].) The trial court's failure to examine – or even notice – this evidence of pretext was just the sort of lapse that *Gutierrez* set out to correct.

For instance, when asked in Question 74 if "you feel that the death penalty is used too often? too seldom? Randomly?" Kimbrough answered candidly: "I don't know how often it is used." (7 SCT 20:5747 [Q.74]; see also 7 SCT 20:5755 [Q.116(a) (same)].)[6] Despite this being an unproblematic answer, the prosecutor nonetheless cited it, stating that it was "[o]ne of the more uninformed answers to that particular question from the panel." (RT 9:2701.) Apparently, this answer was only a problem when a black juror provided it. (See SCT 22:6476 [Seated Juror 47B "Don't know how often it's used"]; SCT 22:6527 [Seated Juror 77B: "I really don't know!"]; SCT 23:6947 [Seated Juror 317B, no answer because "haven't followed these events closely"]; SCT 24:7171 [Seated Juror 392B "I am not sure."]; SCT 24:7128 [Alternate Juror 389B: "I personally do not know how frequently it is imposed"]; SCT 23:6655 [Alternate Juror 91B "No idea"].) Several seated and alternate jurors provided *more* troublesome responses to this question – that the death penalty was applied "To [sic] frequent" or "randomly" (See, e.g., SCT 22:6612 [Seated Juror 87B ["To frequent" because of "option for healing"]; SCT 22:6519, 6527 [Seated Juror 77B "randomly"]; SCT 23:6869 [Seated Juror 192B "Randomly"]; SCT 24:7041 [Seated Juror 370B "Randomly"]; SCT 24:7076 [Seated Juror 380B "Randomly"]), a belief that the prosecutor elsewhere indicated was disqualifying when given by a black juror. (RT 8:2603 [complaining that Prospective Juror Sam answered that the death penalty was "randomly imposed and some criminals seem to get harsher charges than others"].)

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[6] Questions 74 and 116(a) asked the essentially same question, but 116(a) provided additional space for a written response. Appellant refers to jurors' answers to both questions.

Another innocuous answer was Kimbrough's response to the question "[w]hat are your general feelings about the sentence of life without parole," in which Kimbrough stated: "I believe there are people who should never be released from prison." (7 SCT 20:5751.) Although there is nothing remotely anti-prosecution about this response, the prosecutor claimed that there was something "off" about that answer which "I did interpret . . . as a person who is really . . . much more committed to life in prison without the possibility of parole, is uncomfortable with the death penalty, and will have a strong tendency to lean towards life in prison without the possibility of parole." (RT 9:2702-2703.)

Some instances were not even about the content of the answer, but trivialities in form. The prosecutor allegedly found distasteful that Kimbrough gave a neutral "verbalization" or "prose" answer to a yes-or-no question. (RT 9:2701 [complaining about Kimbrough's response to Question 77, that she would be "open to voting for the death penalty, but I wouldn't necessarily <u>always</u> vote for it."].) At other times, the prosecutor made the opposite complaint, that Kimbrough gave simply a neutral yes-or-no response when other jurors answered with prose. (RT 9:2701 [citing Kimbrough's "no" response to Question 84, "Is there any type of person or crime that should always receive the death penalty"].) Of course, many seated jurors answered Question 84 "no," without providing a prose response, which a "no" answer would not invite in the first place. (See SCT 22:6435 [Seated Juror 37B: "no"]; SCT 22:6478 [Seated Juror 47B: "no"]; SCT 24:6992 [Seated Juror 353B "no"].)

The prosecutor even falsely claimed that "invariably" jurors "who have formed some opinions" on the death penalty "write some prose" in response to the yes-or-no Question 89, which asked if the state should "impose the death penalty on everyone" who "[k]ills another human

being," "[i]ntentionally kills another human being" or "[i]ntentionally kills another human being during the commission of a robbery." (RT 9:2703; see also 7 SCT 20:5750-5751 [Kimbrough's three "no" answers].) The prosecutor asserted that the "people I have problems with, and check more closely, are the people who simply use the check boxes." (RT 9:2703.) Of course, "no" is the legally accurate answer to these questions, and a "no" answer would not even logically invite a prose response. More importantly, the jurors did not "invariably" fail to provide "prose" responses, (RT 9:2703.) *Not a single seated or alternate juror provided such a response.* Every single seated juror answered this yes-or-no-question in precisely the same fashion as Kimbrough, with a yes-or-no response.[7] The prosecutor's elaborate criticism of Kimbrough's response was an exercise in pure fiction. (*People v. Long* (2010) 189 Cal.App.4th 826, 845 "[d]oubt may undermine deference," when "at least one of those reasons is demonstrably false within the limitations of the appellate record"].)

Similarly innocent was Kimbrough's response to Question 92 asking "[h]ow do you feel about life imprisonment as a punishment for intentional murder," which Kimbrough answered in a neutral fashion: "It can be appropriate punishment depending upon the facts/specific case." (7 SCT 20:5751.) This was hardly a biased answer, and even cursory analysis reveals that this was a relatively common response among jurors seated by the

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[7] (See SCT 22:6436-6437; 6522-6523; 6564-6565; 6607-6608; SCT 23:6692-6693; 6864-6865; SCT 24:6950-6951; 6993-6994; 7036-7037; 7079-7080; 7166-7167.) Seated Juror 47B, just like Kimbrough, answered no to all three questions, and was the only juror to add anything else, two parentheticals with the single word "depends." (22 SCT 6479-6480.) This response provides no support for the prosecution's false assertion that more favorable jurors added additional information to these yes-or-no questions.

prosecution. (See, e.g. SCT 22:6480 [Seated Juror 47B: LWOP "May be suitable/appropriate in some cases"]; SCT 22:6523 [Seated Juror 77B: "depends on the circumstances"]; SCT 22:6565 [Seated Juror 86B: ["Depends on circumstance"]; SCT 24:7080 [Seated Juror 380B "depends on the crime"].) Yet the prosecutor nonetheless alleged that it showed that Kimbrough was not among the "more thinking" jurors who have "gone through and analyzed the situation" but was instead among those who "lean towards life imprisonment without the possibility of parole." (RT 9:2704.)

The numerous unobjectionable responses listed above are just a sampling of those, cited by the prosecutor, that failed to support his conclusions. The mischaracterization of a juror's responses suggests pretext. (*Ali v. Hickman* (9th Cir. 2009) 584 F.3d 1174, 1190, 1192; *Cook v. Lamarque* (9th Cir. 2010) 593 F.3d 810, 818.) It is difficult to read the prosecutor's line-by-line review of Kimbrough's questionnaire without concluding that he subjected her unremarkable responses to extraordinarily exacting scrutiny. Yet the trial court made no effort to address this unusually detailed, disparate – and manifestly dishonest – review.

b. The Trial Court Erroneously Embraced The Prosecutor's Self-Contradictory And Implausible Claims Regarding His Initial Willingness To Seat Prospective Juror Kimbrough

The trial court "d[id]n't have any trouble accepting" the prosecutor's repeatedly exaggerated or unfounded speculations regarding Juror Kimbrough's alleged (though unexpressed) anti-death penalty bias. (RT 9:2699.) The "reason" for this conclusion was that the trial court "assume[d]" that otherwise the prosecutor "would have tried to excuse her sooner" and "because he passed a number of times" with her on the panel. (RT 9:2711.) The court even reiterated this point when it concluded its ruling: "if he was

doing it just for racial purposes he would have done it much sooner. . . . having passed . . . really does suggest to me that what he says is true." (RT 9:2716.) The centrality placed by the trial court on the prosecutor's temporary passing on Kimbrough – and the fact that the trial court ignored unmistakable evidence that the prosecutor was always intent on excusing her – undermine any basis for deferring to the trial court with respect to the elimination of Ms. Kimbrough.

i. The trial court's heavy reliance on the passes ignored the factual inconsistencies in the prosecutor's argument

The prosecutor argued that, at the time she entered the box, he felt Kimbrough had "tremendous" group ability, a "strength" and "I felt that she could be a good member of the panel" provided that there were "people who could interrelate with her on her level." (RT 9:2699.) To emphasize this point, the prosecutor underscored that he had accepted a panel including Kimbrough three times. (RT 9:2697.) As the prosecutor's story went, however, after having accepted panels including Kimbrough, the "character of the overall panel has changed dramatically" and the defense had "knock[ed] out my leaders." (RT 9:2697.) Thus, "by herself, with the present group on the panel" the prosecutor felt that her alleged (though unexpressed) bias against the death penalty would result in her following her "true feelings" of "life without parole, except in very extreme cases, and only if there are other jurors who could interact with her to lead her to that approach." (RT 9:2707.) The prosecutor's story simply does not withstand analysis.

The first problem with this explanation is that it is internally inconsistent. In one breath, the prosecutor stated Kimbrough "could be a good member of the panel" who he was happy to have on the jury, as evinced by his passing with her on the panel. (RT 9:2699.) However, in the very same hearing – only a few lines of transcript later – Kimbrough was described as

getting a "C-" grade, which the prosecutor explained was the "*lowest* grade I would accept on a panel. . . *I'm trying to remove C minus people*." (RT 9:2699, italics added).

Even more jarring, the prosecutor's subsequent psychoanalysis of Kimbrough's neutral questionnaire responses led him to the conclusion that she was a conniving liar: her answers were "disingenuous" assertions he "simply can't believe" (RT 9:2700), statements concealing a "hidden agenda" (RT 9:2704, 2705), or possibly contained a secret "message to the Defense" or warning to the prosecution (RT 9:2705), and involved "pure game playing" which illustrated that she was "trying to conceal her true feelings" (RT 9:2707). In other words, the prosecutor's attestation that he believed, when Kimbrough arrived in the box, that she "could be a good member of the panel" was a transparent falsehood. Accepted as true, the prosecutor's statements on their face support *only* the conclusion that the prosecutor believed – and had always believed – Kimbrough was a bad member of the panel, was attempting to mislead the parties, and would require pressure from pro-death penalty "leaders" to keep a spot on his jury. (RT 9:2707.)

But there was additional evidence that the prosecutor never intended to keep Kimbrough. The prosecutor had specifically and suspiciously singled out Kimbrough's questionnaire for a special "blind"[8] review with one of his colleagues ("Mr. Kochis") – *the very day he accepted her.* (RT 9:2699.)[9] By

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[8] By "blind" the prosecutor did not mean that Mr. Kochis did not know the race of Kimbrough, which appears on her questionnaire, (7 SCT 20:5742) but that he had removed his own notes from the questionnaire so that his colleague "wouldn't be influenced by my previous markings." (RT 9:2700.)

[9] All three acceptances occurred on May 12, 1997. (RT 8:2638; RT 9:2672, 2674.) The *Batson*/*Wheeler* hearing on the strike of Kimbrough (during which he stated that he conducted the review of Kimbrough with a fellow prosecutor "yesterday") (RT 9:2699), occurred on the following morning.

the prosecutor's own admission, during this allegedly "blind" review, both he and Mr. Kochis expressed "very strong, negative feelings" about this black juror's answers. (RT 9:2702.)[10] In other words, the prosecutor never had any intention of accepting Kimbrough, but instead had been specially preparing for her removal – either prior to or immediately after the prosecutor's temporary acceptance of the panel the day before. (RT 8:2638; RT 9 2672, 2674.) And, as the defense pointed out, the prosecutor made it clear that he had planned to strike Kimbrough: "it's obvious that he was prepared, and . . . came ready here with full barrels with Kimbrough's questionnaire, ready to make grounds." (RT 9:2713.)

The prosecutor's citation to his temporary acceptance of Kimbrough as support for his claim that she could be an acceptable juror, much less a "good member of the panel" was at best highly misleading. (RT 9:2699.) Such obfuscation should have lead the court not only to discount the prosecutor's temporary acceptance of Kimbrough, but was itself evidence that the prosecutor was providing pretextual excuses. Instead, the trial court completely ignored these contradictions. At a bare minimum, the prosecutor's protestations that he would have been happy to seat Kimbrough should have been met with extreme skepticism and probing questions. Instead, the trial court found them essentially conclusive of good faith: they were "*the reason*" that the trial court "d[id]n't have any trouble accepting" the prosecutor's highly flawed justifications. (RT 9:2711, italics added.) And it was likely in part because of this analytical error that the trial court overlooked the significant

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[10] Tellingly, the very same response which gave rise to "very strong, negative feelings" when provided by Kimbrough, (RT 9:2702) was word for word identical to a response given by a seated juror. (Compare 7 SCT 20:5750 [Kimbrough did not support the principle of "eye for an eye" because "two wrongs don't make a right"] with SCT 24:7079 [Juror 380B (same)].)

evidence that the prosecutor was singling Kimbrough out for particularly tough scrutiny.

ii. *Gutierrez* undermines the trial court's singular focus on temporary acceptance of an African-American juror

One critically important component of the *Gutierrez* opinion was its finding of a *Batson*/*Wheeler* violation despite the fact that "prosecutor passed on challenges *five times*" with the questioned juror on the panel. (*Gutierrez*, 2 Cal.5th at p. 1170, italics added.) *Gutierrez* thus underscores what this Court has long recognized, and what defense counsel below specifically pointed out (RT 9:2712-2713): temporarily accepting a juror prior to the defense indicating a similar inclination to accept the panel may have no meaning at all, and may even provide evidence of a prosecutor's race-conscious jury selection practices. "[O]ffending counsel who is familiar with basic selection and challenge techniques could easily accept a jury panel knowing that his or her opponent will exercise a challenge against a highly undesirable juror." (*People v. Motton* (1985) 39 Cal.3d 596, 608 (*Motton*).) "If, for instance, three people on the panel exhibit a proprosecution bias, then the prosecutor could pass the jury with at least three members of the group which he ultimately wishes to exclude still remaining on the jury - knowing that he will have a later opportunity to strike them." (*Ibid*.)

To be sure, passing on a panel with an African-American juror does not *necessarily* mean that the prosecutor is merely strategizing. Not every pass involves an instance where the prosecutor knows that strongly pro-prosecution jurors remain on the panel (and are virtually certain to be stricken by the defense), which is why passing *may* also be a sign of good faith. (*Gutierrez*, *supra*, 2 Cal.5th at p. 1170.) But the record establishes that this case involves the scenario envisioned in *Motton*, one in which a prosecutor is acutely aware that strongly pro-prosecution jurors remain on the panel.

By his *own admission*, the prosecutor only accepted a panel including Kimbrough prior to the defense striking his "leaders," i.e. the pro-death penalty jurors the prosecutor believed could influence even reluctant fellow jurors to vote death. (RT 9:2697, 2707.) In other words, the prosecutor knew and conceded that the panels on which he accepted Kimbrough contained jurors who would almost certainly be unacceptable to the defense.[11] The prosecutor also *admitted on the record* that he consciously delayed striking Kimbrough out of fear that the trial court would find it suspicious (RT 9:2698) – the very tactic warned of in *Motton*. The prosecutor's own admissions thus gave the

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[11] The prosecutor's admission finds strong support in the record. Immediately after the prosecutor's first acceptance of a panel including Kimbrough, the defense struck Susan Hitt. (RT 9:2638.) Hitt came from a family of police officers, believed that the death penalty should always be inflicted upon someone who committed intentional murder, and stated that LWOP is probably "too little" a punishment for intentional murder. (7 SCT 10:2930, 2954, 2955 [Q.12, Q.89, Q.93].) After the second temporary acceptance, the defense immediately struck juror Diane Griott. (RT 9:2672.) Griott worked at Chino State Prison, where she had spent fifteen years as a correctional officer. (7SCT 5:1209.) She stated that she supported the Briggs initiative because she "believes in the death penalty" and that the "good of society is served" when a death sentence is carried out, which is "something I feel positive about." (7SCT 5:1234 [Q.87, Q.88].) Defense counsel had even tipped its hand that it did not find Griott desirable, by earlier raising the possibility of disqualifying Griott because she was a peace officer. (RT 8:2255.) The prosecutor then accepted the panel and the defense struck juror Gilbert Kelley. (RT 9:2674-2675.) Kelley, who notably was on the panel during each of the prosecutor's prior acceptances, "strongly" favored the death penalty, wrote that the death penalty is used "not enough," would not take into consideration a defendant's childhood experiences, believed in "eye for an eye," thought the death penalty should always be imposed for intentional murder, and was "against" LWOP as a punishment for intentional murder. (7SCT 5:1274, 1276, 1277-1278, 1280 [Q.74, Q.81, Q.89, Q.92, Q.106].) In emphasizing the death penalty is used "too seldom," he wrote that a "message must be sent to criminals that if you take a life there is a strong probability that you will be sentenced to death." (7SCT 5:1282 [Q.116(a)].)

trial court every reason not to place significant weight on his passes. But beyond not being entitled to significant weight, the implausibility of the prosecutor's stated willingness to accept Kimbrough provided affirmative evidence of pretext. Under these circumstances, the trial court's narrow focus on early passes undermines confidence in its ruling and demonstrates that its finding with respect to Kimbrough is not worthy of deference.

c. Even The Three Responses Embraced By The Trial Court As Showing Reluctance To Impose Death Are Questionable In Context

A court need not find all nonracial reasons pretextual in order to find racial discrimination. "[I]f a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination." (*Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 830.) Stated differently, even when existing justifications "would normally be adequately 'neutral' explanations taken at face value, the fact that [multiple] proffered reasons do not hold up under judicial scrutiny militates against their sufficiency." (*United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 699.) Thus, even if the responses credited by the trial court were relatively unambiguous and would ordinarily suffice, the numerous failings of the prosecutor's justifications should have given the trial court pause.

But Kimbrough's answers did not show anything like clear bias against the prosecution's case. The trial court, under its admittedly "selective" approach (RT 9:2714-2715), went through the extraordinary number of responses cited by the prosecutor and found three which rationally supported the conclusion that Kimbrough could be considered "resistant to the death penalty." (RT 9:2716.) Critically, however, in none of these answers did Kimbrough unambiguously express opposition to the death penalty itself or a belief that she would be unlikely to vote for the death penalty in this case. Such unambiguous bias is of course not required before a prosecutor can exercise a

peremptory. But when ambiguity is present, the need to probe whether an explanation is genuine and made in good faith becomes "more pressing." (*Gutierrez, supra*, 2 Cal.5th at p. 1171.) The trial court here failed to do so.

The focus of the entirety of the prosecutor's protracted analysis was his conclusion that Kimbrough might be reluctant to vote for death. There was, in fact, a direct question about reluctance to vote for death, Question 105, which asked: "If you conclude that the defendant is guilty of first degree murder and that one or more of the special circumstances is true, and that a sentence of death is legally warranted in this case, would you be reluctant to personally vote for a sentence of death?" (7 SCT 20:5753.) Critically, Kimbrough did *not* state she would be reluctant to vote for death, instead writing "I would need to listen to the testimony in the penalty phase & then decide. I wouldn't automatically vote for a death sentence." (*Ibid*.)

The trial court found that this could show Kimbrough's reluctance, because the question "presupposes all the predicates for the imposition of the death penalty" and yet Kimbrough did not simply state she would not be reluctant. (RT 9:2715.) Thus, the trial court thought the prosecutor could have believed she was "waffling" by answering that she would need "to listen to the testimony in the penalty phase." (RT 9:2715-2716.) Assuming that this answer led the prosecutor to believe that Kimbrough would be reluctant to vote for death ignores the fact that Kimbrough's answer was less problematic than many of the seated jurors, who *expressly stated they would be reluctant*. (SCT 22:6439 [Seated Juror 37B]; SCT 22:6525 [Seated Juror 77B]; SCT 22:6610 [Seated Juror 87B]; SCT 23:6695 [Seated Juror 199].)

The trial court also found that the prosecutor's position was supported by the fact that Kimbrough stated in response to Question 74 (regarding her general feelings on the death penalty) that: "In general, I do not believe people should decide who gets to live and who has to die. However, I recognize there

may be times that this difficult choice must be made. It should not be made lightly." (7 SCT 20:5746.) On the one hand, everything that Kimbrough stated in this response was likely an opinion shared by most, if not all, of the seated jurors. Most people do not believe that people should generally decide who lives or dies. A death sentence is also undeniably a "difficult choice" and one that should "not be made lightly." On the other, it is at least possible that a statement volunteering thoughts on the difficulty of the choice subtly betrayed Kimbrough's unstated reluctance to vote for death.

In other words, like all the questionnaire responses cited by the trial court, the conclusion that it showed any anti-death penalty bias was at best ambiguous and open to interpretation. The central question is whether the trial court meaningfully tested the possibility that prosecutor's concern about this questionnaire response was not genuine. But with respect to Question 74 in particular, the prosecutor asked Kimbrough nothing about the meaning behind her answer, or indeed any of her questionnaire responses about the death penalty. In fact, the prosecutor did not ask Kimbrough a *single* question regarding her views on the death penalty. Instead, when given the opportunity to question Kimbrough, the prosecutor spent five pages of transcript, focusing almost exclusively on Kimbrough's interest in the O.J. Simpson case, the meaning of a defendant's failure to testify, and a potential scheduling conflict. (RT 8:2585-2590; see *People v. Huggins* (2006) 38 Cal.4th 175, 235 ["failure to engage in any meaningful voir dire examination on a subject a party asserts it is concerned about is evidence suggesting that the stated concern is pretextual"].)

According to the prosecutor, at the point he engaged in voir dire with Kimbrough he was still open to considering her as a "good member of the panel" whom he would ultimately accept, and allegedly did intend to accept. (RT 9:2699.) Yet for a juror whose numerous answers the prosecutor had

"interpreted" as one who would likely "vote for life imprisonment without the possibility of parole, except in very extreme cases" and only if led to a death verdict by pro-death penalty leaders (RT 9:2707), the failure to actually inquire about her reluctance to vote for death is telling. Wouldn't any prosecutor be interested in gathering information on whether the juror he was supposedly willing to seat *actually* held a deep-seated reluctance to impose death?

The trial court finally cited Kimbrough's response to question 107 (asking about the "benefit" of a death sentence), in which she stated she did not "see a benefit in sentencing someone to death. I just don't think of it in those terms." (7 SCT 20:5753; RT 9:2716.) The prosecutor claimed that this statement was the "ultimate capper" with respect to her reluctance to vote for death. (RT 9:2706.) But Seated Juror 47B was showed a more explicit distaste for the term "benefit." (See SCT 22:6482 ["I don't like the term 'benefit'"].) And if the prosecutor truly found Kimbrough's response as the "ultimate capper" exposing unacceptable reluctance, surely he would have never seated Juror 86B, who directly stated "[t]here is no benefit in death." (SCT 22:6567.) Kimbrough's statement, given the context, was less troubling. In isolation, Kimbrough statement might be interpreted as suggesting that the death penalty is a pointless endeavor, suggesting a bias towards LWOP. But in the very next response, Kimbrough described LWOP in precisely the same fashion. (7 SCT 20:5754 ["Once, again, I don't think of imposing sentences in those terms."].) In other words, it appears Kimbrough objected to the term "benefit" to describe any sentences, and was not trying to express reluctance towards either sentences' imposition.

2. PROSPECTIVE JUROR DREDD

Prospective Juror Dredd was a seemingly desirable prosecution juror. He had a cousin who worked for the Los Angeles County Sheriff. (7 SCT 10:2758.) He had a master's degree (7 SCT 10:2756), and the prosecutor

repeatedly asserted that he was seeking high educational attainment. (RT 8:2598, 2602; but see AOB at 79 [three seated jurors only graduated high school, one did not graduate high school, and the majority of the remaining jurors had limited or no college education.].) Dredd also had significant community-based charitable and volunteer experience with youth (7 SCT 10:2760), which the prosecutor also claimed was characteristic of "the type of person that I want involved in this case, quite frankly." (RT 8:2620; but see ARB at 16 ["only one [seated juror] volunteered for an organization that served children"].)

Dredd's attitudes towards the death penalty were generally pro-prosecution. He had supported the Briggs initiative because he believed it would "deter serious crime" and wrote that he would vote to keep the death penalty, if again presented with the option. (7 SCT 10:2779, 2782 [Q.75, Q.86.].) He did believe that consideration should be used in imposing the death penalty, stating: "the death penalty should be imposed in extreme cases where their [sic] is no doubt." (7 SCT 10:2782 [Q.88]; see also 7 SCT 10:2778 [death penalty "does have a place in the system . . . I feel that without it, crime could be worse. I also feel that care should be used in sentencing someone to death. There should be no doubt"].) However, he wrote that he would vote for death in the appropriate case, which he believed was a practical and realistic possibility. (7 SCT 10:2780-2781 [Q.79, Q.83].) His repeatedly stated position was that "sometimes [the death penalty] is needed" and that it would "hopefully deter crime." (7 SCT 10:2783 [Q.95 & Q.96].)

a. The Trial Court Ignored The Fact That The Prosecutor Cited Numerous Justifications For Striking Dredd That Were Contradicted By The Record, Not Self-Evident, Were Characteristics Shared By Seated Jurors, And Generally Made Little Sense

As noted above, the central focus of *Gutierrez* was the premise that when it is "not self-evident why an advocate would harbor a concern, the question of whether a neutral explanation is genuine and made in good faith becomes more pressing." (*Gutierrez, supra*, 2 Cal.5th at p. 1171.) With respect to Dredd, the prosecutor provided a litany of justifications that were red flags: either because they contradicted the record, applied equally to seated jurors, or were simply illogical. Yet none of these concerns was addressed by the trial court – despite the fact that many of the flaws in the justifications were raised by the defense.

For instance, the prosecutor made the unfounded allegation that "[i]t is not difficult to see why [Dredd] is no longer in this group. He is not a person involved in the community. He is not involved in any community activity." (RT 8:2616.) But as defense counsel retorted, this allegation was demonstrably false: Dredd had spent a lifetime highly engaged in his community, and was a member of "several" community-based organizations. (RT 8:2618-2619.) In particular, Dredd was involved with the very sort of youth charitable organizations that the prosecutor claimed was valuable to him. (RT 8:2620; see, e.g., 7 SCT 10:2759 [Dredd was a current member of the Omega Psi Phi Fraternity whose purpose was to "provide leadership and scholarships"]; 2760 [Dredd spent nearly 40 years volunteering for the Parent Teachers Association, volunteered for the South Area Boys Club to "provide support for boys," and also volunteered for the Black Student Association].) Dredd's questionnaire not only listed these four separate community organizations, but suggested that

these might only be a brief summary. (See 7 SCT 10:2759 [Q.19 "I have served on many committees, held office, and have served on boards"].)

Equally unsupported by the record was the prosecutor's allegation that Dredd's questionnaire showed that he was "extremely confused as to his opinions" and "feelings about this case." (RT 8:2595.) Perhaps this justification was meant to support the prosecutor's otherwise inexplicable reference to Mr. Dredd being undesirable because he was 70 years old. (RT 8:2595, 2599; cf. Cal. Civil. Proc. 231.5 [stereotypes about age now prohibited in jury selection].) But the prosecutor's allegation that Dredd was "confused" finds no basis in either his questionnaire responses, which were generally quite thoughtful, or in his voir dire. (*Foster*, *supra*, 136 S.Ct. at p. 1754 [allegation that juror was "confused" about death penalty questions was sign of pretext when unsupported by the record].)

In fact, in attempting to bolster this unsupported argument about alleged "confusion," the prosecutor plainly mischaracterized the record – stating that Dredd "is a person who showed confusion by defense counsel's own admittance." (RT 8:2616.) Defense counsel made no such admission. (ARB at 19; *Ali v. Hickman*, *supra*, 584 F.3d at pp. 1190, 1192 [mischaracterization of the record is evidence of pretext].) All defense counsel did was request voir dire about a single questionnaire response to the question "Why do you think we are asking all these questions about the death penalty" which Dredd answered "I hope this will be explained sometime soon." (7 SCT 10:2784; RT 8:2579.) Although defense counsel said that it didn't want to insult the juror's intelligence by conducting voir dire on possible confusion in front of other jurors (RT 8:2579), nothing in the subsequent voir dire revealed any confusion on Mr. Dredd's part or a defense admission that he was confused. (RT 8:2580-2581.)

Nor was there record support for the prosecutor's characterization that Dredd was "extremely weak concerning the death penalty." (RT 8:2595; see also RT 8:2599 [Dredd had "great reservations about the death penalty"].) Dredd specifically *supported* the death penalty. He voted for the Briggs initiative and would vote for the death penalty again if given the opportunity, and repeated again and again that he would be willing to impose the death penalty in the appropriate case. (7 SCT 10:2779-2782 [Q.75, Q.79, Q.83 Q.86].) Yes, Dredd confirmed his belief – shared by this Court and the United States Supreme Court – that the death penalty should be reserved for "extreme cases." (*Gregg v. Georgia* (1976) 428 U.S. 153, 182.) But the prosecutor did not find similar responses disqualifying in non-black jurors. (See, e.g., SCT 24:6990 [Seated Juror 353B, Q.74: death penalty "should be reserved for very vicious crimes"].) As the United States Supreme Court has held, a juror can be "unambiguously in favor" of the death penalty, and nonetheless express that it should be applied "only in an extreme case[.]" (*Miller-El v. Dretke* (2005) 545 U.S. 231, 258 & fn. 19.) And despite an opportunity to do so, the prosecutor asked Dredd no questions about his feelings regarding which type of "extreme cases" were suitable for death. (*Gutierrez, supra*, 2 Cal.5th at p. 1169 [failure to ask follow up questions on area of purported concern is evidence of pretext].)

Like with Kimbrough, the prosecutor latched on to seemingly trivial details as somehow evincing bias on Dredd's part. (*Purkett v. Elem* (1995) 514 U.S. 765, 768 [implausible and fantastic justifications are strong evidence of pretext].) The prosecutor cited the fact that Dredd criticized the wording of Question 76, "[a]re your feelings about the death penalty such that, if a juror in a murder case, you would never be able to vote for the penalty of death of a defendant?" (RT 8:2605; 7 SCT 10:2779 ["I really have problems as to how this question is asked"].) Other seated jurors criticized the wording of

questions, sometimes in ways that were more clearly interpreted. (See, e.g., SCT 22:6482 [Seated Juror 47B: "I don't like the term 'benefit'" when applied to a death sentence]; SCT 24:6956 [Seated Juror 317B confused by the wording of Q.121]; see also AOB at 84-85 [various jurors complained about questions and the confusing questionnaire process].)

Other than claiming that the "majority" of jurors had answered the question (RT 8:2605), the prosecutor provided no explanation whatsoever as to why Dredd's difficulty with this question evinced any form of bias. This is precisely the sort of justification which is "not self-evident" because no one provided even speculation as to the reason why Dredd found the question problematic. In fact, the prosecutor at a later hearing admitted that the nearly identical Question 77 (with the same awkward clause), was "somewhat difficult in its wording." (RT 9:2701; see *Foster*, *supra*, 136 S.Ct. at p. 1754 [prosecutor's allegation that juror was "confused" by certain questions severely undermined by the fact that the trial court expressed that the questions were poorly worded].)

Numerous justifications for Dredd's excusal were based upon answers widely shared by other jurors. As with Kimbrough, the prosecutor complained about Dredd's response to question 48, "what are the biggest problems with our criminal justice system and how could it be improved?" to which Dredd responded "I cannot think of a better way to solve serious problem[s] and I have no suggestions on how to improve it." (RT 8:2605; 7 SCT 10:2772.) Failure to identify problems and solutions in this question was relatively commonplace among seated jurors. (SCT 22:6426 [Seated Juror 37B: "I really am not very knowledgeable with our criminal justice system"]; SCT 24:6983 [Seated Juror 353B:"[d]on't know"]; SCT 24:7069 [Seated Juror 380B: blank].) And the idea that the prosecutor disliked jurors without concrete plans for criminal justice reform is in itself not particularly credible.

Similarly, the prosecutor claimed that Dredd's "sense of [the] reasons for crime" was "anti law enforcement, or at least weak law enforcement." (RT 8:2599.) Dredd wrote that the "cause for the increase in crime" in recent years was "lack of jobs and proper supervision of youth." (7 SCT 10:2773.) Again, the prosecutor mischaracterized Dredd's responses. Nothing in this statement remotely suggests any hostility to law enforcement. And if these responses were a reason to eliminate him, the prosecutor would have eliminated most of his seated jurors. Lack of jobs and proper parental supervision as the cause of crime were the two most widely shared views on this question.[12]

As with Kimbrough, the prosecutor made the baseless suggestion that Dredd was concealing his true feelings. For instance, the prosecutor noted that the jurors were asked about recent major newspaper stories involving crime. (RT 8:2604; 7 SCT 10:2769 [Q.40(d)].) The prosecutor complained that Dredd answered the second part of Question 40(d) (concerning his opinions about these stories) "I really don't have an opinion, which for a person who has a Masters Degree, and his retired job, I found to be very interesting." (RT 8:2604-2605; 7 SCT 10:2769.)

The prosecution's entire line of criticism falls apart with the slightest examination of the record. The question to which the prosecutor was referring, Question 40(d), preliminarily asked "Do you try to follow major crime stories in the current news?" to which Dredd had answered "No." (7 SCT 10:2769.) It was only *then* that the question asked his "opinion about any of these stories"

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[12] (SCT 22:6427 [Seated Juror 37B: "Parents don't spend time with their children"]; 6470 [Seated Juror 47B: causes included "not enough jobs"]; SCT 23:6683 [Seated Juror 119B: causes included "Lack of parenting"]; 6855 [Seated Juror 192B: "unemployment"]; SCT 24:6984 [Seated Juror 353B: "Poverty, lack of jobs, breakdown of the family"]; 7157 [392B: "Lack of jobs, lack of family togetherness."].)

and Dredd responded "I really do not have an opinion." (*Ibid.*) That Dredd would respond that he didn't have an opinion about news stories that he had just stated he did not try to follow is not surprising, much less did it support the prosecutor's unfounded suggestion that Dredd might have been concealing his true opinions. This justification also fails comparative analysis so spectacularly that it can only be characterized as makeweight. *Eleven out of twelve* seated jurors, like Dredd, answered 40(d) "No" and, like Dredd, expressed no opinion when asked to elaborate.[13]

The near-continuous failure in comparative analysis, the weak or nonexistent record support for various justifications, and the nonsensical nature of several justifications provided every reason for the trial court not to credit them. And, indeed, the trial court did not expressly credit nine out of the ten justifications the prosecutor provided. But in light of this strong evidence of pretext, the one reason for Dredd's excusal that the trial court did credit simply cannot bear the weight.

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[13] (SCT 22:6423 [Seated Juror 37B: no; "I don't have any opinion. The jury did the job they had to do."]; SCT 22:6466 [Seated Juror 47B: no; "N/A"]; SCT 22:6509 [Seated Juror 77B: no; blank]; SCT 22:6594 [Seated Juror 87B: no; blank]; SCT 23:6679 [Seated Juror 119B: no; blank]; SCT 23:6851 [Seated Juror 192B: no; blank]; SCT 24:6937 [Seated Juror 317B: no; blank]; SCT 24:6980 [Seated Juror 353B: no; blank]; SCT 24:7023 [Seated Juror 370B: no; blank]; SCT 24:7066 [Seated Juror 380B: no; blank]; SCT 24:7153 [Seated Juror 392B: no; blank];

b. The Reason Tepidly Accepted By The Trial Court, The Threat That Dredd Would Hold The Prosecutor To An Unacceptable Burden Of Proof, Was Insufficient To Overcome The Significant Evidence Of Pretext

Although the court saw a "much closer question" with respect to the prosecutor's removal of both Ms. Sam and Mr. Dredd, it "accept[ed] the truth of [the prosecutor's] statement that he was concerned about those jurors[']statements about [their] sense of the degree of proof required that exceeds proof beyond a reasonable doubt." (RT 8:2613-2614.) The trial court specifically found that it "I would not have share[d] your concern about Mr. Dredd," but also did not wish to substitute its own assessment of the juror with the prosecutor's subjective judgment. (RT 8:2614.) It found the prosecutor's concerns were validly rooted in Dredd's statement that "the death penalty applies in extreme cases where there's quote, 'no doubt.'" (RT 8:2615.)

First, the burden of proof justification, like most others, was based upon beliefs also expressed by other seated jurors. Juror 47B provided a similar statement expressing a need to "be <u>absolutely</u> sure of guilt" (22 SCT 6475) and was retained by the prosecution, suggesting that concern for such a response was merely pretext. (AOB at 99-100; ARB at 21.) Also suggestive of pretext was the fact that concerns regarding the burden of proof were not even among the prosecutor's initial justifications for excusing Dredd, which the prosecutor initially described as "all the problems we had with Mr. Dredd." (RT 8:2595; *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 245 [fact that one justification arose only after prosecutor stated "[t]hose are our reasons" and one was challenged by the defense was sign of pretext].)

Second, Dredd never indicated in his questionnaire that he believed that he desired a "degree of proof required that exceeds proof beyond a reasonable doubt," as the trial court found. (RT 8:2613-2614.) All Dredd stated in his

questionnaire was that he thought the death penalty was appropriate in cases where there was "no doubt." (7 SCT 10:2778, 2782 [Q.74, Q.88].) The entire idea that there is a difference between "doubt" and "reasonable doubt" is a fine lawyerly distinction, but not one that is often subject to rigorous contemplation by the average juror. When Dredd said that he believed the death penalty was warranted in cases where there was "no doubt," he almost certainly meant in cases where there existed no reasonable doubt. His description of the non-capital O.J. Simpson case – that Dredd was not upset with the verdict because "I felt there was doubt" (7 SCT 10:2772) – strongly suggests that Dredd simply used the term "doubt" and "reasonable doubt" interchangeably, not that he believed a different standard applied in capital and non-capital cases.

When asked about the topic during voir dire, Dredd simply affirmed the prosecutor's characterization of his questionnaire, that it stated Dredd wanted "absolute proof" (although his questionnaire never mentioned this term). (RT 8:2582.) Immediately after the prosecutor reaffirmed that the beyond a reasonable doubt burden applied in criminal cases, Dredd stated he would accept this burden. (RT 8:2582.) Questionnaire responses such as Dredd's were hardly uncommon. As the prosecutor himself previously admitted, "many people" had stated that they "were concerned with whether or not the evidence was going to show absolute guilt." (RT 8:2552-2553.) At that time, all prospective jurors affirmed that they would accept the reasonable doubt burden. (*Ibid*.) Why Dredd's willingness to accept the reasonable doubt burden was any less believable than the rest of the prospective jurors was entirely unexplained, and certainly never confronted by the trial court.

In sum, although it is certainly conceivable that a prosecutor might be concerned with a juror's strong desire to apply a heightened burden of proof in a death penalty case, the justification in this case was a very weak one. It was based upon interpretation of Dredd's questionnaire and voir dire that was not

shared by the trial court. (RT 8:2614.) And the idea that the prosecutor strongly objected to Dredd's responses was severely undercut by the prosecutor's acknowledgement that such statements were so commonplace as to merit group voir dire. (RT 8:2553.) Finally, the prosecutor only chose to take specific issue with this response when it came from one of two black jurors – one who in this instance had affirmed that he would accept the appropriate burden of proof. In light of the significant other evidence that the prosecutor was fabricating reasons to exclude Dredd, this justification is insufficient to overcome the conclusion that it was simply pretext.

c. The Prosecutor's Focus On, And Mischaracterization Of, Dredd's Attitudes Towards The O.J. Simpson Verdict Smacks Of Race-conscious Jury Selection

The juror at issue in *Gutierrez* was stricken because of what was characterized by the trial court as the "Wasco issue" – the juror's residence in the town of Wasco and her unawareness of gang activity in that area. (*Gutierrez*, *supra*, 2 Cal.5th at p. 1161.) Although the convoluted explanation for the "Wasco issue" was ultimately rejected by this Court because it was not "self-evident," lingering beneath the surface of this justification was the fact that the town of Wasco was 76.7% Hispanic, as were the defendants and the many stricken jurors at issue. (*Gutierrez*, 2 Cal.5th at p. 1167.) A reason may be sufficiently race-neutral to satisfy the prosecutor's stage two burden (*ibid.*), but when a justification, such as neighborhood, threatens to serve as a proxy for race, this is "a factor ultimately to be weighed into the determination whether a proffered reason is pretextual." (*People v. Payne* (1996) 88 N.Y.2d 172, 187 fn. 2; see also *Gutierrez*, *supra*, 2 Cal.5th at p. 1169, fn. 7 [such proxies may be "guided by . . . ungrounded assumption[s]" based on group stereotypes].) As this Court has recently framed the issue, when a particular response is provided disproportionately by the protected group at issue, this circumstance may be

"relevant to the inquiry as to whether the reasons were sincere and not merely pretextual." (*People v. Melendez* (2016) 2 Cal.5th 1, 18.). This is such a case.

Like the "Wasco issue" in *Gutierrez*, this case presents a justification that threatens to function as a proxy for race – black jurors' failure to be "upset with" the O.J. Simpson verdict, a response which the prosecutor characterized as "extremely negative" and "anti prosecution." (RT 8:2599; see also RT 8:2594 ["my main concern was [Davis's] feelings about the OJ Simpson case"].) Every single black juror struck by the prosecution answered "no" when asked if they were "upset with" the verdict. (7 SCT 10:2772 [Dredd]; 7 SCT 20:5740 [Kimbrough]; 7 SCT 15:4321 [Davis]; 7 SCT 17:4966 [Sam].) In fact, so did every other black prospective juror.[14] Yet the prosecutor justified his exclusion of all four jurors based on various responses to questions on the O.J. Simpson case. (RT 8:2594, 2599, 2603; RT 9:2700.)

Perhaps unsurprisingly given the racially polarizing facts of the Simpson trial, the non-black seated juror's feelings about the case were considerably more mixed. (Compare SCT 22:6426 [Juror 37B upset with verdict]; accord SCT 22:6512 [Juror 77B]; SCT 24:6940 [Juror 317B]; SCT 24:6983 [Juror 353B]; see also SCT 22:6469 [Juror 47B "somewhat" upset]; SCT 24:7069 [Juror 380B checking "yes" but explaining "not really upset -- just surprised on outcome"] with SCT 22:6554 [Juror 86B not upset]; accord, SCT 22:6597 [Juror 87B]; SCT 23:6682 [119B]; SCT 24:7026 [Juror 370B]; SCT 24:7156 [Juror 392B].)

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[14] See RT 9:2709 [identifying all remaining black prospective jurors]; 7 SCT 9:2600 [Daniel Coates]; 7 SCT 19:5654 [Robert Hoffman]; 7 SCT 16:4579 [Ardell Hurst]; 7 SCT 3:708 [Delores Jones].

But, just like Dredd (and Sam), there were seated non-black jurors who indicated they were not upset by the Simpson verdict because guilt had not been proven. (See SCT 22:6595, 6597 [Seated Juror 87B learned from case that prosecution has to "prove [beyond] reason of doubt if he's guilty" and was not upset by the verdict "[b]ecause the prosecution have to prove if O.J. Simpson was guilty of a crime"]; SCT 24:7156 [Juror 392B not upset because "I felt that the prosecutors did not present enough good evidence before the court"]; SCT 23:6640 [Alternate Juror 91B, not upset because he "[d]id not think he was guilty."].)

Given the racial divide in responses, the O.J. Simpson justification posed a substantial risk of allowing the prosecutor to use a thinly veiled facially neutral justification relating to a racially polarized issue as a proxy for race. Defense counsel strongly objected to the prosecutor's citation to the O.J. Simpson questionnaire responses, arguing that it was "not a factor to be considered" because it did not "relate to this particular case" and because she felt it was inappropriate as "a ground or justification for the prosecution to dismiss" a juror. (RT 8:2610.)

The trial court not only overlooked the problematic use of the Simpson questionnaire responses in the first place, but also overlooked the prosecutor's gross mischaracterization of Dredd's views on the case as "extremely negative" and "pro OJ and anti prosecution." (RT 8:2599.) In reality, Dredd had simply stated that coverage of the case taught him what he "already knew" – that there are "many sides to a story" and that he was not upset with the verdict because "I felt that their [*sic*] was doubt." (7 SCT 10:2770, 2772 [Q.41(b) & Q.49].) Nothing in these statements is either "pro OJ" or "anti prosecution." The prosecutor, though citing these responses, (RT 8:2605) provided no explanation for why he took them as "extremely negative" (RT 8:2599). And given that he accepted several jurors who held precisely the same views as Dredd, his

citation to Dredd's staid response to the Simpson verdict appears race-conscious.

3. PROSPECTIVE JUROR SAM

To all appearances, prospective juror Sam was a strong pro-prosecution juror. She repeatedly stated that criminal laws were enforced too leniently, particularly with respect to sex crimes (which were notably present in the aggravation alleged against appellant). (See, e.g., 7 SCT 17:4967 [Q.52 [defendants accused of sex crimes treated too leniently; people convicted of rape should get "much more" prison time].) She believed that the cause of the recent increase in crime was that sometimes the "laws are too lenient" and that solutions should include "harsher" punishment. (7 SCT 17:4967 [Q.53, Q.54].) She wrote separately to state that the laws should "be more strict especially for under 18 year olds" because "they're getting more dangerous than adults because they get off." (7 SCT 17:4986. [Q.144].) Notably, the aggravation introduced during the penalty phase centered on alleged incidents of violence – a robbery/sexual assault and a murder – that occurred when appellant was a minor. (AOB at 39; RB at 32-36.)

Sam's general feeling regarding the death penalty was "I'm for it, but we must absolutely prove guilt." (7 SCT 17:4972 [Q.74[15]].) She stated that the death penalty was used "not enough," a pro-prosecution sentiment expressed by only two other seated jurors. (7 SCT 17:4974 [Q.74]; see also SCT 22:6561; SCT 24:7163.) She believed in the concept of "eye for an eye," even "strongly" so in some cases. (7 SCT 17:4976 [Q.87].) That included murder: she opined that the death penalty should be imposed on everyone who for any

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[15] The questionnaire mistakenly contains two questions numbered "74," one about general feelings toward the death penalty and another about the frequency of its imposition. (See, e.g., 7 SCT 17:4972-4973.)

reason intentionally kills another human being or did so during the commission of a robbery. (7 SCT 17:4976-4977 [Q.89].) And she specifically stated that she could not grant mercy to someone guilty of intentional murder. (7 SCT 17:4982 [Q.121].) Sam said she would not be reluctant to either vote for death, or face the defendant and state such a verdict. (7 SCT 17:4979 [Q.105, Q.106].) She thought that the benefit of imposing a death sentence would be that "criminals will think twice befor [sic] they commit a crime." (7 SCT 17:4979 [Q.107].)

She "strongly" agreed with the proposition that adult criminals "must be punished to the full extent of the law, no matter how badly they were treated as children" and stated she would not even take into consideration a criminal's childhood experience in "order to understand what may have influenced him later in life." (7 SCT 17:4975 [Q.80, Q.81].) She separately stated that childhood background should not be considered in deciding between a death sentence and LWOP, volunteering that this type of mitigating evidence is "used too much lately." (7 SCT 17:4976 [Q.85].) Sam's lack of interest in childhood mitigation would be a benefit to any prosecutor. The bulk of appellant's penalty-phase defense focused on his horrific childhood history. (See AOB at 34-38.)

a. The Trial Court Ignored The Fact That The Prosecution's Justifications For Striking Sam Suspiciously Evolved Over The Course Of The Hearing

The United States Supreme Court has recently emphasized that one important factor in assessing the genuineness of a justification is evidence that "reasons for the strike shifted over time." (*Foster, supra,* 136 S.Ct. at p. 1751.) Shifting justifications are particularly troublesome when they are made in response to the exposure of another justification as unsupported. (See, e.g., *Miller-El v. Dretke, supra,* 545 U.S. at p. 245 ["When defense counsel called

him on his misstatement, he neither defended what he said nor withdrew the strike. [] Instead, he suddenly came up with [a new justification] as another reason for the strike"].) This tell-tale sign of pretext occurred repeatedly during the hearing and specifically in regard to Sam.

Initially, the prosecutor listed five reasons for striking Sam: 1) her brother was a "juvenile delinquent," 2) her informal attire, 3) the fact that she lacked "children or family in this area," 4) that she had "some or very, very little college or higher education," and 5) that "she's [not] a stable person in the community, based upon her housing history and job history." (RT 8:2594.) Three of these (her purported lack of education, lack of "stability," and the absence of family members in the area) were manifestly contradicted by the record. Another, her attire, was wholly unrelated to the case. None of these initial justifications was ultimately credited by the trial court.

After defense counsel challenged "in particular" the prosecutor's weak reasons for striking Sam (RT 8:2596), the prosecutor added a sixth justification: her statement that race sometimes "plays a part" in the criminal justice system and "it shouldn't be." (7 SCT 17:4966 [Q.50]; RT 8:2598.) Again, this reason was not credited by the trial court.

After a recess, the prosecutor added three more justifications: 7) Sam's statement that "I'm for the death penalty" but "we must absolutely prove guilt" and similar statements concerning the importance of proof; 8) her statements about the O.J. Simpson case (that she was not upset because "if they couldn't prove he murdered Nicole, the verdict was fair. We should keep race out of it"); and 9) her statement regarding the death penalty being "randomly imposed." (RT 8:2603; 7 SCT 17:4981 [Sam's actual response in Q.116(a) was that the death penalty "maybe randomly [imposed.] Again, some criminals seem to get harsher charges than others. It seem [*sic*] to depend on the

situation, the person, the crime"]; see also 7 SCT 17:4973 [Sam's response in Q.74 that the death penalty was *not* imposed randomly, but "not enough"].)

When the trial court noted that he would "not have shared [the prosecutor's] concern" about Dredd and Sam, the prosecutor added yet another reason: 10) a nebulous "group effort, versus individual effort" justification. (RT 8:2615.) The trial court then challenged the validity of this conclusion, and also criticized the prosecutor's prior justification regarding Sam's allegedly "limited education," saying "Take Ms. Sam, I don't reach that conclusion." (See RT 8:2615-16.) Overlooking the fact that the prosecutor had actually mischaracterized Sam's educational level (she had a bachelor's degree), the trial court noted that San Bernadino County had a disproportionately low level of college degrees, at 12 percent. (RT 8:2616.) This suggested that the court believed that the prosecutor's concern for Sam's educational level was invalid. (RT 8:2616; *see Lewis, supra,* 321 F.3d at 832 ["The court's statements regarding the invalidity of some of the prosecutor's reasons suggests that the court's evaluation of the prosecutor's credibility was low"].) In response to this last challenge by the trial court, the prosecutor came up with two more justifications: 11) Sam's lack of "social activities in groups with children or some type of charitable organization" and her 12) "very, very limited newspaper contact." (RT 8:2620.)

It was the prosecutor's seventh reason that was ultimately credited by the trial court. (RT 8:2613-2614 ["I will accept the truth of his statement that he was concerned about [Sam and Dredd's] statement about they're [sic] sense of the degree of proof required that exceeds beyond a reasonable doubt]".) As discussed in detail below, a great number of the twelve justifications were unsupported by the record, made little sense, and/or were shared by seated jurors. And many of the purported reasons seem implausibly trivial when held up against Sam's strong death penalty and tough-on-crime views. But even

leaving aside those defects, the continual evolution of the prosecutor's reason for striking Sam is inherently suspect.

b. The Trial Court Failed To Confront Numerous Instances In Which The Prosecutor's Justifications Were Contradicted By The Record, Were Based On Characteristics Shared By Seated Jurors, And Made Little Sense

Many of the justifications provided for the excusal of Sam were plainly contradicted by the record. For instance, among the first reasons given by the prosecutor for excluding Sam was her purported lack of education. (RT 8:2594.) He initially stated that she had "some, or very, very little college or higher education." (*Ibid*.) This allegation was false, as Sam had an A.A. degree and a B.S.M. degree. (7 SCT 17:4949.) During his review of Sam's questionnaire, the prosecutor downplayed his mistake, claiming that he "didn't see" that Sam had the B.S.M. from Pepperdine. (RT 8:2598.) However, even after noting this alleged oversight, the prosecutor continued to insist that the education of which he *was* aware was "limited" and thus justified her elimination. (RT 8:2602.)

The prosecutor specifically *invited* the court to assess the current panel, but the trial court simply stated he did not know the educational level of the current panel. (See RT 8:2616.) Had the court done so, it would have learned that there was no substance to the prosecutor's claimed concern. Regardless of the alleged mistake regarding Sam's B.S.M. degree, Sam's A.A. degree was *still* more formal education than two thirds of the other jurors, only two of whom had four-year college degrees.[16] The prosecutor's pattern of strikes

[16] (SCT 22:6409-6410 [Seated Juror 37B: 1 semester community college]; 6452-6453 [Seated Juror 47B: 1 year junior college]; 6495-6496 [Seated Juror 77B: 2 classes at community college]; SCT 23:6665-6666 [Seated Juror 119B: 11th grade]; 6837 -6838 [Seated Juror 192B: high school];

directly undercut his claimed concern for education: he had disproportionately stricken jurors with college degrees, using nearly half of his strikes to eliminate jurors with bachelor's degrees or higher.[17] Even had the prosecutor ventured to explain why less-educated jurors would be biased against him (which, notably, he did not), the fact that he focused his strikes on jurors with higher educational attainment signals pretext.

Similarly, the prosecutor's allegation that Sam was not a "stable person in the community" (RT 8:2594), was not supported by the record. Given that she had been married for eleven years, lived at her current home for three years, and had held two jobs in the preceding 16 years, this reason is insupportable. (See ARB at 10-11.) Defense counsel at trial cited the same facts (RT 8:2608), and the prosecutor didn't even bother to rehabilitate this justification. Respondent, even with the benefit of months to come up with something to substantiate this concern, could not. (ARB at 10; see *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 245 ["When defense counsel called him on his misstatement, he neither defended what he said nor withdrew the strike" but instead came up with a new justification].)

SCT 24:6923-6924 [Seated Juror 317B: M.A.]; 6966-6967 [Seated Juror 353B: B.A.]; 7009-7010 [Seated Juror 370B: some community college]; 7052-7053 [Seated Juror 380B: trade school]; 7139-7140 [Seated Juror 392B: high school].)

[17] Although the seated jurors had one M.A., one B.A. and one A.A. degree among them, see fn. 16, *supra*, the prosecutor's twelve peremptories included no less than five strikes against jurors with bachelor degrees, one of whom also had a masters degree, and two strikes of jurors with degrees/certificates from community colleges. (7 SCT 15: 4304-4305 [Davis: "certificate" from community college]; 7 SCT 17:4949-4950 [Sam: A.A. & B.S.M.]; 7 SCT 10:2755-2756 [Dredd: M.A.]; 7 SCT 9:2540-2541 [Chin: B.S.]; 7 SCT 20:5852-5853 [McElhoe: B.S.]; 7 SCT 20:5723-5724 [Kimbrough: B.S.M]; 7 SCT 7:1981-1982 [Toler-Guell: B.S.].)

The prosecutor also cited the fact that Sam lacked "children or family" in the area. It is entirely unclear why not having children or family in the area was relevant. (*People v. Fuentes* (1991) 54 Cal.3d 707, 714 [race neutral explanation must be "related to the particular case to be tried"]; *Gutierrez, supra*, 2 Cal.5th at p. 1172 [justification questionable where "the prosecutor's reason for this strike was not self-evident and the record is void of any explication from the court"].) Regardless, this justification was likewise false: Sam had a brother who was working in Southern California at Rockwell International. (See 7 SCT 17:4984 [Q.134, Q.137].)

With respect to Sam's "delinquent" brother, the weakness of this justification has already been addressed in the briefing. (See AOB at 80 [two alternate jurors had close relatives who had been arrested or convicted]; ARB at 6 [Sam's questionnaire showed no concern about unfairness towards her brother and showed affirmative desire for harsher treatment of juvenile offenders].) And Sam's attire is likewise, at best, a tepid justification, unrelated to the facts of the case. (See *People v. Moss* (1986) 188 Cal.App.3d 268, 279 ["clothing would [not] suffice in and of itself to indicate 'specific bias'"]; *Sifuentes v. Brazelton* (9th Cir. 2016) 825 F.3d 506, 530 [although "race neutral on their face" explanations based on "appearance and personal characteristics are not persuasive"].) While *Wheeler* itself recognizes that appearance suggesting an "unconventional lifestyle" may serve as a justification (RB at 52, citing *People v. Wheeler*, *supra*, 22 Cal.3d at p. 275), the chain of inference is that such jurors may be anti-authoritarian, anti-law enforcement, or otherwise biased against the prosecution. Sam's tough-on-crime, pro-death penalty questionnaire refutes such an interpretation. Regardless, the fact that three of the prosecutor's first five justifications were contradicted by the record is strong evidence of pretext, and is certainly not overcome by vague concerns about attire and a brother with childhood run-ins with the law. (See *Miller-El v.*

Dretke, *supra*, 545 U.S. at p. 246 [citation to brother's recent conviction pretextual where there existed "other reasons rendering it implausible"].)

Although the prosecutor subsequently offered numerous additional justifications, none fares particularly well when subject to meaningful scrutiny. The prosecutor complained that Sam had limited newspaper contact. (RT 8:2620.) So did other several seated jurors. (See SCT 22:6465 [Seated Juror 47B: "I don't usually read newspapers or magazines" "Sports and Entertainment if I read at all"]; SCT 23:6678 [Seated Juror 119B: "I don't read newspapers"]; SCT 24:6936 [Seated Juror 317B: none listed; questions left blank].)

The prosecutor repeatedly cited Sam's concern about race and the criminal justice system. (RT 8:2598, 2602-2603.) Perhaps most critically, the acknowledgement that race unfortunately sometimes plays a role in the criminal justice system is both true and was a view shared by seated jurors. (AOB at 81-82 [multiple seated jurors stated on their questionnaires that blacks were not treated as fairly by the criminal justice system].)

Moreover, Sam's viewpoint was very clearly that race should play *no* role in the system. (See 7 SCT 17:4966 [Q.48 "the system is not always fair, sometimes race seems to play a part. That definitely needs to be changed," Q.51 "sometimes race play a part and it shouldn't be"]; see also 4968 [Q.58 "I don't judge by any one race, there's good + bad in all races"].) Sam's questionnaire hardly suggested that appellant's race would play a mitigating role: she stated that the solution to the crime problem was to make the system "harsher" "when deserved" and "we must put race behind." (7 SCT 17:4967.) Her suggestion that "jury selection should include all races not just one race," was a sentiment that surely no ethical prosecutor should question. (7 SCT 17:4970.)

When all others failed to cut off criticism, the amorphous "group dynamics" or "group effort versus individual effort" justification was volunteered as specifically encompassing Sam (RT 8:2615), but without any explanation as to why she would not function well as a member of the group. A cynical observer might suspect that this entire justification, which was applied globally to all strikes (RT 8:2616) was merely something the prosecutor was taught to do at a conference to insulate the record on review when a *Batson*/*Wheeler* claim had been made. Astoundingly, the record indicates exactly that.

During the *Batson*/*Wheeler* hearing at the first trial (at which the prosecutor similarly eliminated all of the black jurors (RT 4:1039)), the prosecutor noted that: "I just attended a conference on Saturday on this [*Batson/Wheeler*] issue." (RT 4:1039.) He explained that the conference provided certain "recommend[ations]" to prosecutors. (*Ibid*.) At the conclusion of this hearing, the prosecutor explained "since we're putting it on the record and I'm filled with the things that I learned this Saturday, all of my jury selection is based upon who I think is a cohesive group, who will be a part of a cohesive group." (RT 4:1045.) This was precisely the same justification leveled against the jurors stricken here. (RT 8:2616 ["I'm picking from people from this panel that will form a well working, cohesive group, not the – I'll repeat that again, not individual people. Are these leaders? Are they followers? Will this conflict with a leader? Will these be people working in a group?"].) The fact that the prosecutor was seemingly parroting – for the second time – a justification recommended at a conference on how to respond to *Batson/Wheeler* motions does not inspire confidence that his "group dynamics" justification was genuine. (See Bright & Chamblee, Litigating Race Discrimination Under *Batson v. Kentucky* (2017) 2-SPG Crim. Just. 10, 11 [noting that North Carolina prosecutor "was found to have used the list [of

justifications from prosecutor training] to justify striking black jurors in four different capital cases"].)

The prosecutor's reliance on Sam's response to the O.J. Simpson verdict – that she was not upset because "if they didn't prove he killed Nicole then the verdict was fair, we should keep race out of it" (7 SCT 17:4966) – suffers from the same flaws that it did with Dredd. Using such a racially divisive question, wholly unrelated to the case, as a reason to excuse black jurors poses an unacceptable risk of discrimination. And that risk is realized when a prosecutor asserts that this justification suffices to disqualify three of four black jurors even though multiple seated jurors and alternate jurors expressed the same feelings without being eliminated. (See SCT 22:6595, 6597; SCT 24:7156; SCT 23:6640.)

c. The Burden Of Proof Justification Credited By The Trial Court Is Insufficient In Light Of The Significant Evidence Of Pretext

Sam provided several responses explaining that she wanted to be certain of a defendant's guilt prior to sentencing him to death. (See, e.g., 7 SCT 17:4972 [Q.74: "I'm for [the death penalty] but we must absolutely prove guilt"], 4973 [Q.78: "It must be proven carefully if he did it. That's where the evidence is very helpful. We want to know everything"], 4974 [Q.79: death sentence appropriate "If it can be proven without a doubt by evidence the crime was committed. We must be very careful to listen"].) She also stated that LWOP may be appropriate in a circumstance in which "there's one thing we may not be able to prove but we still feel he is guilty w/ reasonable doubt." (7 SCT 17 :4974 [Q.79].) The judge ultimately "accept[ed] the truth of [the prosecutor's] statement that he was concerned about [Sam and Dredd's] statements about [their] sense of the degree of proof required that exceeds proof beyond a reasonable doubt." (RT 8:2613-2614.) However, the trial court

specifically stated that it "would not have shared your concern about Ms. Sam." (RT 8:2614.)

Like with Dredd, the prosecutor's purported concern about Sam's views on the burden of proof simply do not overcome the evidence that this justification was pretextual. Evidence of pretext included the fact that a juror who expressed a similar view was seated by the prosecutor, the prosecutor's admission that a desire to prove absolute guilt was a commonly held view, the prosecutor's failure to ask Sam questions about her purportedly troubling responses, and the fact that the prosecutor did not even provide the burden of proof justification until his third attempt to explain her elimination. (See ARB at 12-16.)

Nor did the record actually support the trial court's finding. Sam specifically cited the term "reasonable doubt" as the appropriate burden and nothing in Sam's questionnaire supported the conclusion that she would hold the prosecutor to a burden that "exceeds proof beyond a reasonable doubt." (RT 8:2614.) The fact that the trial court did not share the prosecutor's concern reveals that this was a weak justification to begin with. Given that the justification was premised on responses which did even support the purported conclusion –and was surrounded by evidence of pretext never considered by the trial court – it is not worthy of deference.

4. PROSPECTIVE JUROR DAVIS

Unlike the other black jurors stricken by the prosecution, Davis expressed views that were sufficiently problematic that they would have provided a ready, race-neutral basis for a peremptory challenge. She stated that although she strongly believed the death penalty should always be imposed for intentional murder, she did not want to be the one who made that decision. (7 SCT 15:4329 [Davis would not vote for either death or LWOP in an appropriate case because "I don't want to make that decision on anyone" and "I

feel if you kill someone you don't have the right to live, but I wouldn't want to be the one to make the decision"]; 7 SCT 15:4330 [Q.83 checking "no" to death and "yes" to LWOP when asked if she could realistically sentence someone to these terms and explaining "I would feel like I killed them. It would bother me. But if he did it he deserves the death penalty"]; [Q.84 "anyone who kills someone" should "always" get the death penalty but "I don't want to be the one to say that's what they get"].) The prosecutor's long list of justifications for striking Davis are nonetheless illuminating.

Had the prosecutor simply explained that Davis's responses indicating a distaste for personally sentencing an individual to death led him to strike Davis, her excusal would have been unworthy of further comment. Instead, the prosecutor pulled out a kitchen sink of justifications, several of which were unsupported by the record, and others which were inscrutable and illogical. A prosecutor's "willingness to make up nonracial reasons" for striking a juror, simply "undercuts his credibility." (*Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 369 (en banc).) As the trial court itself admitted, other jurors in this case presented a "much closer question." (RT 8:2613.) At the very least, the prosecutor's explanations for his excusal of Davis provide support for the conclusion that he subjected black jurors to unusually rigorous scrutiny, holding even seemingly trivial flaws (shared by several seated jurors) against them.

The prosecutor's first justification for striking Davis was the fact that he had previously tried to eliminate her with a for cause challenge. (RT 8:2593.) This challenge had never occurred. (RT 8:2341.) After citing the non-existent cause challenge, the prosecutor launched into his "main concern" for Davis: her "feelings about the OJ Simpson case, which I felt was undefined. I thought it was sympathetic to Mr. Simpson." (RT 8:2594.) This was a mischaracterization of Davis's questionnaire response, which was in no way

"sympathetic" to O.J. Simpson. Davis had checked the box indicating she was "not upset" with the verdict, explaining "I really don't know if he did it. I feel he know who did it, but I really don't know." (7 SCT 15:4321.) When previously asked whether she even followed the O.J. Simpson case, Davis stated she did not. (7 SCT 15:4318.)[18] Given her manifest unfamiliarity with the details of Simpson trial, that her responses to the O.J. Simpson verdict nonetheless rose to the level of the prosecutor's "main concern" showed a troubling focus on a racially polarizing question and a disregard for her actual answers.[19]

The prosecutor later explained that it was neither Davis's death penalty views nor her views on the Simpson case that resulted in her elimination. Instead, Davis was stricken based on her status as a "follower" within the "group dynamics" methodology:

> I did not see the type of community leadership that I would hope for in a leader of group dynamics of the thing. I labeled [Davis] as a probably follower within the group or the committee that I'm trying to form in this particular instance, and I felt that even though she was probably somewhat below average, I still felt that she was the average realm. But in -- we had gone out, trying to form a strong committee or group. In this particular group, she *was eliminated on that process.*

(RT 8:2602, italics added.)

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[18] Davis had fairly limited contact with the news. (See 7 SCT 15:4317 [Q.40: Davis read no newspapers frequently]; 4318 [Q.40 "I don't watch the news"].)

[19] As explained above with respect to Dredd, examination of the seated jurors reveals that many were not upset with the Simpson verdict. (SCT 22:6554 [Juror 86B not upset]; accord, SCT 22:6597 [Juror 87B]; 23SCT 6682 [119B]; 24SCT 7026 [Juror 370B]; 24SCT 7156 [Juror 392B]; SCT 23:6640 [Alternate Juror 91B].)

Why any prosecutor would strike a "follower" juror is hard to understand. Unless the prosecutor was hoping for a mistrial, a "follower" juror would seem to be ideal. And for Davis in particular, it was extremely clear that her underlying belief was that "if you kill someone, you deserve to die." (7 SCT 15:4329.) If she was a follower, it would seem to mitigate against her stated reluctance to decide on punishment.

And assuming that Davis's "extremely scrambled opinions" regarding the death penalty were strongly disqualifying, why was the prosecutor citing so many seemingly trivial justifications completely unrelated to the case? The prosecutor cited the fact that Davis was divorced. (RT 8:2598; cf. Code Civ. Proc. 231.5 [use of stereotypes about marital status now prohibited in jury selection].) How or why Davis's marital status biased her against the prosecution remains a mystery. What is not a mystery is that other seated jurors had been divorced. (SCT 22:6572 [Juror 86B had been divorced]; SCT 24:7138 [Juror 392B was divorced].). The prosecutor also cited Davis's lack of education. Again, the record is devoid of explanation as to why this would bias her against the prosecutor's case. Examination of the seated jury shows that the prosecutor was happy to seat relatively uneducated jurors. And the prosecutor's pattern of strikes reveals that the prosecutor actually disproportionately targeted educated jurors. (See, *supra*, section B.3.b.)

All in all, the prosecutor's strike of Davis provides significant support for the conclusion that the prosecutor was untroubled by citing justifications that were wholly contradicted by the record, were based on characteristics shared by seated jurors, or were otherwise suspicious. His laundry list of justifications for Davis also illustrates that that he subjected black jurors to a type of exacting questionnaire scrutiny that would ultimately disqualify any juror.

CONCLUSION

The trial court in this case ignored an overwhelming amount of evidence that the prosecutor was placing a thumb on the scale against African-American jurors. Perhaps individual false statements, mischaracterizations, exaggerations, shifting explanations, internal contradictions, or trivial excuses could be explained away. But in their totality, they paint a damning a picture of a prosecutor employing pretextual justifications to eliminate (for the second time in two trials) every black juror. For this reason, the decision below must be reversed and petitioner must be afforded a new trial.

For the reasons argued above, and in Mr. Smith's supplemental opening brief, the prior-murder special-circumstance verdict and the death sentence must be reversed.

DATED: January 29, 2018

Respectfully submitted,

MARY K. McCOMB
State Public Defender

/s/ Elias Batchelder
ELIAS BATCHELDER
Deputy State Public Defender

CERTIFICATE OF COUNSEL

(CAL. RULES OF COURT, RULE 8.630(b)(2))

I, Elias Batchelder, am the Deputy State Public Defender assigned to represent appellant, Floyd Daniel Smith, in this automatic appeal. I counted the words in this brief with the computer program used to prepare the brief and certify that it is 15,240 words, excluding the tables and certificates.

Dated: January 29, 2018

/s/ Elias Batchelder

ELIAS BATCHELDER

DECLARATION OF SERVICE

Re: People v. Floyd Daniel Smith Cal. Supreme Ct. No. S065233
San Bernardino Sup Ct. No. FWV08607

I, Jon Nichols, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, 10th Floor, Oakland, California 94607; that I served a true copy of the attached:

APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed respectively, as follows:

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Each said envelope was then, on January 29, 2018, sealed and deposited in the United States Mail in Alameda, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on January 29, 2018, at Oakland, California.

/s/ Jon Nichols
JON NICHOLS