SUPREME COURT NO: S224724

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	) CASE NO. S224724
Plaintiff and Respondent,	) (5DCA F065288/F065481 F065984) Kern Co. Superior Court No. LF9190C/LF9190A)
v.	
RAMIRO ENRIQUEZ,	
Defendant and Appellant AND CONSOLIDATED CASES	

Appeal From The Judgment Of The Superior Court
County Of Kern

Honorable Michael E. Dellostritto, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

JANET J. GRAY, Esq.
STATE BAR NO. 99723
P.O. Box 51962
Pacific Grove, CA 93950
(831) 375-6263
Attorney for Appellant
Independent Appointment

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

Constitutional Provisions

SUPREME COURT NO: S224724

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	CASE NO. S224724
	)	
Plaintiff and Respondent,	)	(5DCA F065288/F065481
	)	F065984)
	)	Kern Co. Superior Court
	)	No. LF9190C/LF9190A)
v.	)	
	)	
RAMIRO ENRIQUEZ,	)	
	)	
Defendant and Appellant	)	
AND CONSOLIDATED CASES	)	
	)	

APPELLANT'S OPENING BRIEF ON THE MERITS

Appeal From The Judgment Of The Superior Court
County Of Kern
The Honorable Michael Dellostritto, Judge

TO: THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

STATEMENT OF THE CASE

On June 6, 2012, appellant Ramiro Enriquez was found guilty following a jury trial of one count of premeditated and deliberated, attempted murder, a violation of section 664/187 and one count of assault with a firearm on a person, a violation of section 245, subdivision (a) (2).

(2CT 443-448.) [1] The jury found true as to both of these counts that appellant committed the offenses for the benefit, or in association with a criminal street gang with the specific intent to assist criminal conduct by gang members within the meaning of section 186.22, subdivision (b)(1) (c). (2CT 446, 448.) Appellant was also convicted of one count of active participation in a criminal street gang, a violation of section 186.22, subdivision (a). (2CT 450.)

In a bifurcated court trial, the court found that appellant had suffered a strike, a violation of section 12031, subdivision (a)(2)(c), pursuant to section 1170.12, subdivision (a) through (d), as well as a single prior pursuant to section 667, subdivision (a). (2CT 451-452; 1SCT 23.)

At his July 6, 2012, sentencing hearing appellant was sentenced to an aggregate term of life with the possibility of parole, plus 25 years. Appellant was sentenced to a life term on the attempted murder count, which was enhanced with a consecutive, section 12022.53, subdivision (c)(e)(1) gang/firearm enhancement of 20 years and a five-year term in regards to the section 667, subdivision (a) prior. (2CT 466.)

---

[1] The Record consists of a two-volume Clerk's Transcript, hereinafter, "CT," a twelve-volume Reporter's Transcript, hereinafter, "RT", an augmented Reporter's Transcript hereinafter "ART" and a one-volume Supplemental Clerk's Transcript, hereinafter, "SCT." Note that the Reporter's Transcript does not contain a volume four or five, but contains three, separate Volume "9s", including volumes 9, 9A and 9B.

Appellant was tried with Rene Gutierrez, and Gabriel Ramos. (1CT 207.) Gutierrez was convicted of the same substantive counts as appellant. (10RT 2630-2632.) The jury found true as to Gutierrez that he had personally discharged a firearm, within the meaning of §§ 12022.53, subdivision (c) and 12022.5, subdivision (a)(1). (10RT 2631.) The jury was unable to come to an agreement on the attempted murder or assault with a deadly weapon counts as to Ramos, resulting in a mistrial. (10RT 2626.) He was convicted of the substantive gang offense. (10RT 2626.)

A notice of appeal was filed on July 9, 2012. (2CT 461.)

The Fifth District Court of Appeal issued its unpublished opinion on January 30, 2015. A petition for review was filed in this court on March 3, 2015.

ISSUE PENDING BEFORE THE COURT

Briefing was previously deferred pending further order of the court and decision in *People* v. *Elizalde* (2015) 61 Cal.4th 523 and *People* v. *Prunty* (2015) 62 Cal.4th 59. On November 18, 2015, the court ordered briefing on the following issue: Did the Court of Appeal err in upholding the trial court's denial of defendants' *Batson/Wheeler* motions?

RELEVANT CONSTITUTIONAL PROVISIONS

This case involves the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It also involves the Sixth Amendment to the United States Constitution, which provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

FACTUAL SUMMARY OF THE JURY SELECTION PROCEEDINGS

This case arises from a non-fatal shooting that occurred on July 20, 2011, in Bakersfield, California. (1RT 105, 107, 108.) Inasmuch as the issue before this Court concerns jury selection, appellant summarizes those facts here.

Co-counsel for Gutierrez initiated the *Batson/Wheeler* motion, and appellant joined in that motion. (5RT 1048, 1049.) Ten juror strikes were designated by the trial court as being Hispanic, all of whom were listed with their juror numbers: 273-2073, 240-8196, 251-1083, 272-3471, 264-7624,

229-1529, 254-7226, 260-8698 [2], [246-8219], 285-2410, 263-2053. (5ART 1048.) The court noted that ten of the 16 strikes were Hispanic, and found a prima facie case of discrimination. (5ART 1051, 1052.)

The court also noted that there were two Hispanics remaining on the jury, 246-8219 and 263-2943, which appears to be partially incorrect. 5ART 1048.) Prospective juror Mr. 246-8219, was excused by the prosecutor earlier in the proceedings. (3ART 1572.) Note that the number assigned to Juror 263-2943, was apparently assigned twice during this trial, inasmuch as a prospective juror with the same number, Ms. 263-2943, stated that she needed an interpreter, and was excused for cause earlier during the voir dire proceedings. (3ART 450, 484, 515, 556.) The seated Hispanic juror, likewise referred to as Mr. 263-2943, was called up to sit on the jury later in the voir dire proceedings. (4ART 935.) Mr. 263-2943, was identified as Hispanic, with a job in retail, had no children, no prior jury experience. He had seen graffiti in his neighborhood, was aware of gang activity, but he was not directly impacted by gangs. (4ART 935.) Mr. 263-2943, had seen people beaten up though did not thing it was necessarily

---

[2] This juror identification number appears to be in error. The correct juror number is 246-8219, based on actual peremptories and reasons cited by the prosecutor. Juror 260-8698 was excused for cause earlier in the proceedings. (3ART 515, 556; 5ART 1048, 1061.)

associated with gang activity. A cop stopped him once, apparently just to check on him. (4ART 936, 937)

The Hispanic Strikes

Mr. 285-2410 worked for Sam's Club, while his partner worked for the probation department as a juvenile correctional officer. They had no children together (2ART 454.) His truck broken into while he was eating in a restaurant, where there were police present. He returned to the restaurant to report the crime to police, and they told him to call the department to make the report. He called, and it took six days for officers to respond to his report. He was mad, because he lost three thousand dollars in goods, but could still be fair. (2ART 316-318.) He knew what a snitch was, which would not diminish the person's credibility, but would decide the case by the evidence. (2ART 469.) He had been pulled over by the Bakersfield Police Department some four years earlier because the two officers mistakenly believed that he was in a stolen car. (2ART 481.) He was put into the back of a police car, and was told his description matched a suspect. He did not believe that those two officers involved were trustworthy. He normally thinks that officers are credible because of their status as officers, but not the two that arrested him. (3ART 494, 495.)

Ms. 254-7226 is a service coordinator for the mentally disabled, and her partner was a truck driver. They had two minor children, with no prior jury service. (2ART 461.) The prosecutor poised several leading questions presuming that she knew "a little bit about the criminal justice system" from school and television. (3ART 489-492.) She knew a jury had 12 people, deliberated in a secluded room and was capable of being involved in the case by listening and voicing her opinions. She understood that she had a vote. (3ART 490-492.)

Ms. 246-821, a postal service worker, was married to a welder. She had two children, and had served on two juries, the most recent of which was a criminal case that ended in a hung verdict. A verdict was reached on the civil case. (2ART 460-461.) She believed that lots of people had tattoos and that they had different meanings. (3ART 582.)

Mr. 229-1529 worked as a mechanic for the City of Bakersfield. He was unmarried with one adult child. (3ART 534.) He had no prior jury experience. (3ART 534.) He had no gang impacts to him or others close to him. Twenty years earlier his brother was killed when he happened to be somewhere when the responsible party was after someone else. His killer was captured. (3ART 535.) Mr. 229-1529 had no opinion as to whether it was handled fairly. He had no friends in law enforcement or the legal

profession. He had one bad experience a few years earlier when he was pulled over by two Kern County Sheriff Department officers, and then six arrived to search his truck. He was able to judge all witnesses by the same standards. (3ART 536-538, 558.) He agreed that sometimes they do their job well and at others, not. (3ART 547.) He had no ill will toward law enforcement as a result of this experience, and he would not discredit testimony from officers. (3ART 567.) He recognized that both sides deserve a fair trial, would not make a decision until all evidence was in, and would vote guilty if there was evidence of each element of the charged offenses. (3ART 565-566.)

Ms. 251-0083 worked as an instructional aid in an elementary school with children who were nine or ten years old. She was not married and had no jury experience. (4ART 818, 868.) Prior to that she worked in customer service full time. (4ART 869.) Her cousin was a California Highway Patrolman, and another cousin was in law enforcement. One cousin was a paralegal who worked in worker's compensation law. (4ART 818-819.) She thought she might miss out on a job interview, but was able to change her job interview to a time to allow jury service. (3ART 603.)

Ms. 272-3471 is a divorced schoolteacher with no children. She lived in Wasco, and had no jury experience. Her ex-husband was a

correctional officer. She also had some relatives in corrections. She was not impacted by any gang activity. Her uncle was a California Highway Patrolman. None of her relatives were accused of crime. (3, ART 720.)

Ms. 264-7624 worked for the Kern High School District in food services, was widowed and had four adult children. This juror did not know any law enforcement personnel and had no previous jury experience. Her daughter had her car stolen; when the person was caught, she had to pay the towing fees because the police did not call her to pick up the car. She had a nephew with a life sentence for attempted murder that was gang related. (4ART 770-771.) Another nephew was imprisoned for seven years on a murder that was gang related. (4ART 771.) She did not know which gangs they were involved with, they had grown apart after they became teenagers and did not have much contact with them when their legal troubles started. She had seen one of them infrequently after he had been released. (4ART 797-798.)

Ms. 240-8196 works as a record technician for Wasco State Prison. She lived in Wasco, had three children and no prior jury service. She knows correctional officers. (4ART 811.) When she was young she had an uncle who was in a gang, who had been in and out of prison until he was deported. She did not believe that he was treated unfairly. A cousin was

murdered in a matter unrelated to gang activity. The Kern County authorities handled the matter well. Her home had been burglarized two years earlier; the police asked for a list of the items missing, and that was the end of it. She thought they should have taken prints. (4ART 815-816.) She thought they did a poor job, because the lack of effort shown. She felt that it was an individual case and did not think that all officers were like that. She had no negative feelings about law enforcement at all. Her husband works in Lerdo, at a former juvenile center. She did not discuss his work with her. (4ART 857, 858.)

She had lived in Wasco all her life and was not aware of gang activity in that location. She had seen graffiti but could not say that she knows it is gang related. She used to see more tagging in the area when she was younger. She had never been close to her uncle, whose gang ties were in Los Angeles; he was usually in jail. (4ART 865.) She would be able to find guilty if the prosecutor proved all elements beyond a reasonable doubt. (4ART 868.)

Ms. *273-2073* was married; her husband was disabled. (4ART 905.) Her husband was a former gang member, as was her father. It was not an issue for her. (4ART 905.) Her husband had not been jailed since 1987.

They grew up in the projects together. (4ART 906.) She did not think her husband had been treated unfairly. (4ART 906-907.)

Ms. *263-2053* is a supervisor at the call center for a cell phone company. She had three kids. She had no prior jury experience. (4ART 942.) He brother had been arrested and her ex-husband had been imprisoned for accessory to murder. (4ART 942.)

The Prosecutor's Reasons for Excusing the Hispanic Jurors

The prosecutor stated the following reasons, for making his peremptories:

Mr. 285-2410: This juror had two issues with law enforcement, one in which he thought it took too long for the Bakersfield Department to take a report, and that he was still resentful as a victim of a crime. (5ART 1061-1062.)

Ms. 254-7226: This juror's friends and relatives were correctional officers, and worked as a service coordinator for the mentally disabled. The prosecutor could not specifically state why he kicked her off, but would look at his notes some more. (5ART 1060.) He later offered that he was concerned with her understanding of being an independent vote with one of 12 on the jury. (5ART 1062.)

Mr. 229-1529: His brother was killed in a bar fight. The juror did not seem affected by that death, and had bad experiences with law enforcement. The juror seemed more affected by experiences with law enforcement than his brother's death. (5ART 1059-1060.)

Ms. 251-0083: The prosecutor was concerned about her life experience as an instructional aid at an elementary school, as well as her lack of sophistication. (5ART 1057.) He noted that her relatives were involved in law enforcement, including a cousin who was a paralegal. And she had also asked for a hardship because of her situation. (5ART 1057.)

Ms. 246-8219: The prosecutor thought that this was a close one. The juror lived in a area where there is lots of gang activity but says she had not seen any. She had not seen any relatives in law enforcement, and brother had been "accused." She was also on a criminal jury that was hung. (5ART 1061.)

Ms. 272-3471: The prosecutor commented that this peremptory was a "tough one." The prospective juror was from Wasco, and not aware of gang activity in Wasco. He was concerned as to how this juror would respond to its witness Trevino, who was from a street gang in Wasco. (4ART 1059.)

Ms. 264-7624: The prosecutor did not think this juror did not appear to be Hispanic. The juror had two nephews with prison terms, and her niece's sons were in gangs. (5ART 1058.) The prosecutor believed that this juror was biased because of criminality in the family. (5ART 1058.)

Ms. 240-8196: This juror has an uncle that is in a gang, and she lives in Wasco. She was unaware of any activity in Wasco, and had a cousin murdered in 2004. (5ART 1056.)

Ms. 273-2073: This juror's husband was involved in gangs, and knew the streets. He was an active gang member with time in jail. (5ART 1055.)

Ms. 263-[2052]/ 2053: This juror had a brother in a criminal street gang, and her former boyfriend, and father of her child, was in a gang. She had been immersed in street gangs between the ages of 13-19. (5ART 1054.)

The Trial Court's Ruling

After the prosecutor gave reasons for his dismissal of the jurors, attorneys for Gutierrez and Ramos pointed out factual inconsistencies with the prosecutor's reasons. (5ART 1063-1067.) Enriquez's counsel asked the court to compare the strikes to the seated jurors, pointing out three jurors as examples, 286-1675, 258-1097 and 267-4226, seated jurors with

similar characteristics as the Hispanics removed from the jury. (5ART 1067, 1068.)

The court prefaced his evaluation of the prosecutor's justification, stating;

> "In any event, obviously, the things that I would look for in a situation like this, in particular, are if there are jurors that don't belong to the group. And in this case, we're talking about Hispanics that seem to be similarly situated to the Hispanic jurors that were excused in this case, and that's the type of thing that I can stick [sic] out in these type of situations. I don't really have that with possibly one exception at this point. And that is—I think Mr. Schlaerth has been specific." (5ART 1070.)

The trial judge focused on three of ten of the strikes with the most gang contact, finding that the prosecutor was "consistent in terms of people that have gang ties." (5ART 1071.) As to the younger jurors, 240-8196 and 272-3471, the trial court noted that the prosecutor had passed several times before excusing them. (5ART 1071.) The court agreed that Ms. 272-3471 and 251-0083 were similar to Mr. 286-1675, in lack of life experience, but there "were other reasons he gave as well." (5ART 1072.) The court noted that both 229-1529 and 285-2410 had bad experiences with law enforcement. (5ART1072.)

The court reiterated that seated juror, Mr. 286-1675 was not Hispanic and was similar to two of the younger jurors stricken, but there were additional reasons for the younger jurors. (5ART 1073.) The court found the reasons given to be group neutral, denying the motion. (5ART 1074.)

The Seated Jurors

Details pertaining to seated jurors seated at the time of the *Batson/Wheeler* motion are noted in the course of discussion below. These jurors include Mr. 254-6044, Mr. 286-1675, Ms. 271-9513, 258-1907, 267-4226, 277-4314, 260-1741, 278-6650, 263-2943, 235-8219, 272-7030, 268-9647. (1ART 126, 133; 2ART 322, 328; 3ART 574, 669, 671, 701-703, 711-713; 723, 730, 4ART 809, 809, 810, 900, 901, 931, 935, 943; 5ART 1033, 1048, 1067-1068, 1076, 1077, 1078-1081, 1084; 6ART 1301, 1303, 1304.) [3] Alternate jurors seated after the motion were 260-5661 and 256-0870. (6ART 1268, 1270, 1299.)

---

[3] Appellant's motion to augment the motion with a redacted copy of the jury ladder was denied by this court on March 9, 2016. Appellant requested that only the numbers assigned to the seated jury be released, redacting actual identities, so as to simplify citation to the record of the various seated jurors and to simplify the task of determining jury composition based on a meticulous reading of the record. The superior court sealed all information regarding the seated jury, including the numbers assigned associated with their identities. (2CT 326.) All panel members, both prospective and seated jurors were assigned a seven-digit number.

ARGUMENTS

I

THE TRIAL COURT ERRONEOUSLY DENIED THE DEFENSE *BATSON/WHEELER* MOTION INASMUCH AS THE PROSECUTOR'S REASONS FOR EXCUSING THE HISPANIC JURORS WERE PRETEXTUAL

A. Introduction

The prosecutor removed ten Hispanic jurors with his preemptory challenges, thus denying appellant his right to Equal Protection of the law under the Fourteenth Amendment. (*Batson* v. *Kentucky* (1986) 476 U.S. 79 [90 L. Ed. 2d 69, 106 S. Ct. 1712]; *People* v. *Wheeler* (1978) 22 Cal.3d 258.) The trial court denied the defense motion, noting that the prosecutor was excused people with gang ties, had excused jurors who have grown up in gang areas and the reasons did not appear to be pretextual. (5ART 1071-1074.)

The prosecution used these preemptory challenges to purposely discriminate in jury selection.

A careful analysis of the Hispanic jurors removed with the jurors retained on the jury, and a close look at the questioning of the challenged prospective jurors as opposed to that of the jurors who remained,

demonstrates the prosecutor's stated reasons were pretexts to cover his purposeful discrimination in selecting this jury.

This Court reviews the record de novo to resolve the legal question "whether the record supports an inference that the prosecutor excused a juror on the basis of race." (*People* v. *Cornwell* (2005) 37 Cal.4th 50, 73; *People* v. *Gray* (2005) 37 Cal.4th 168, 187.)

The factual findings by the trial court are normally accorded deference. (*Miller-El* v. *Cockrel* (2003) 537 U.S. 322, 329 [123 S.Ct. 1029, 154 L.Ed.2d 931].) Here, however, appellant should be entitled to de novo review, as the trial court did not conduct a complete and thorough analysis of all of these factors so that factual deference should not apply. (*People* v. *Bonilla* (2007) 41 Cal.4th 313, 341-42; *People* v. *Lenix* (2008) 44 Cal. 4th 602, 624-25.)

B. Applicable Principles Regarding Exclusion of Jurors Based on Race

The Sixth Amendment guarantees the defendant in a criminal case is entitled to a fair and impartial jury. (U.S. Const, 6th Amend.) The California Constitution likewise guarantees the accused the right to trial by a fair and impartial jury. (Cal. Const., art. I, § 16.) Additionally, California Code of Civil Procedure, section 231.5, provides that a peremptory challenge may not be used to remove a potential juror on the basis of race,

color, religion, sex, national origin, sexual orientation, or similar ground. A criminal defendant also has a right to trial by a jury drawn from a representative cross-section of the community. (*People* v. *Wheeler*, *supra*, 22 Cal.3d at p. 272.)

The exercise of peremptory challenges to remove prospective jurors on the basis of group bias is a violation of the fundamental right to trial by a representative jury. (*People* v. *Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) Group bias is "a presumption that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds." (*People* v. *Johnson* (1989) 47 Cal.3d 1194, 1215.) Hispanic-Americans are considered a "cognizable group" for purpose of *Batson* analysis. (*Hernandez* v. *New York* (1991) 500 U.S. 352.)

Batson clarified that the federal constitution protects the rights of both defendants who are on trial, and citizens who desire to participate in the administration of the law as jurors. (*Johnson* v. *California* (2005) 545 U.S. 162, 171-72 [125 S.Ct. 2410, 162 L.Ed.2d 129].) The basis for this principle is the "overriding interest in eradicating discrimination from our civic institutions . . . ." (*Id.* at p. 172.) The discriminatory exclusion of people from serving on juries adversely affects society as a whole by

"undermin[ing] public confidence in the fairness of our system of justice." (*Ibid*, quoting *Batson* v. *Kentucky*, *supra*, 476 U.S. at p. 87.)

United States v. *Collins* (9th Cir. 2009) 551 F.3d 914, 919, summarized the three-stage analysis required by *Batson* as follows:

> [T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." [Citation.] When a defendant alleges a *Batson* violation, a three-part, burden-shifting test is used to determine if the potential juror was challenged on the basis of impermissible discrimination. At the outset, the defendant must make a prima facie showing that the challenge was based on an impermissible ground, such as race. [Citation.] "This is a burden of production, not a burden of persuasion." [Citations.] "Second, if the trial court finds the defendant has made a prima facie case of discrimination, the burden then shifts to the prosecution to offer a race-neutral reason for the challenge that relates to the case." [Citations.] "Third, if the prosecutor offers a race-neutral explanation, the trial court must decide whether the defendant has proved the prosecutor's motive for the strike was purposeful racial discrimination." [Citations.]

"Ideally, a trial court faced with a *Batson* challenge undertakes a clearly-delineated three step inquiry." (*Derrick* v. *Lewis* (9th Cir. 2003) 321 F.3d 824, 830.) In the first step, when a challenge is made, the trial court determines whether there is a prima facie showing of purposeful

discrimination. (*Batson* v. *Kentucky*, *supra*, 476 U.S. at pp. 96-97; *People* v. *Wheeler*, *supra*, 22 Cal.3d at 278-280.) "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.]." (*Johnson* v. *California*, *supra*, 545 U.S. at p. 168 [125 S.Ct. 2410, 162 L.Ed.2d 129]; in accord *People* v. *Lewis* (2008) 43 Cal.4th 415, 469.) A trial court's request for an explanation of contested peremptory challenges establishes at least an implicit finding that a prima facie case has been made. (*People* v. *Lewis*, *supra,* 43 Cal.4th at pp. 470-471; *People* v. *Hayes* (1990) 52 Cal.3d 577, 605.

In the instant case, the trial court found that the defense had established a prima facie case, requiring that the prosecutor state his reasons for the ten Hispanic strikes. As such, the case advanced to the second stage, at which time, the burden of proof shifted to the prosecutor to justify the peremptory challenges with a race-neutral explanation. (*Johnson* v. *California*, *supra*, 545 U.S. at 168; *Batson* v. *Kentucky*, *supra*, 476 U.S. at 96-98; *People* v. *Lewis*, *supra*, 43 Cal.4th 469; *People* v. *Wheeler*, *supra*, 22 Cal.3d at 280-282.) Unless a discriminatory intent is apparent from the explanation, the reason offered will be deemed race-neutral. (*Derrick* v. *Lewis*, *supra*, 321 F.3d at 830.)

Third, "'[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.'" (*Johnson* v. *California*, *supra*, 545 U.S. at p. 168; see also *Snyder* v. *Louisiana* (2008) 552 U.S. 472, 476-477 [128 S.CT. 1203, 170 L.ED. 2d 175]; *Miller-El* v. *Dretke* (2005) 545 U.S. 231, 239 [125 S.Ct. 2317].) The trial court must evaluate the explanation offered by the prosecution to satisfy itself that the explanation is genuine.

The appellate court proceeds to the third stage of the *Batson* inquiry and any implausible or pretextual reason gives rise to an inference of purposeful discrimination. (*Id.* at 1212.) It is not required that all the members of a cognizable group be removed from the jury. (*Miller-El* v. *Cockrel*, *supra*, 537 U.S. 322; *People* v. *Fuentes* (1991) 54 Cal.3d 707, 715 716; see also *Batson* v. *Kentucky*, *supra*, 476 U.S. at p. 98.)

As part of its evaluation at this final stage of the analysis, the court must necessarily take the step of asking whether the reasons proffered by the prosecutor actually applied to the particular jurors challenged. (*People* v. *Fuentes*, *supra*, 54 Cal.3d at p. 721.) "[T]he critical inquiry in determining whether [a party] has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." (*Miller-El* v. *Dretke*, *supra*, 537 U.S. at pp. 338-339.)

All of the circumstances bearing upon the issue of racial animosity must be considered. Among other things, a court must consider the strike of one juror for the bearing it might have on the strike of another. (*Snyder* v. *Louisiana*, *supra*, 552 U.S. at pp. 472, 478.) "The credibility of a prosecutor's stated reasons for exercising a peremptory challenge 'can be measured by, among other factors . . . how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.'" (*People* v. *Lewis*, *supra*, 43 Cal.4th at p. 469, quoting *Miller-El* v. *Dretke*, *supra*, 537 U.S. at p. 339.) In addition, the trial court "should not attempt to bolster legally insufficient reasons offered by the prosecution with new or additional reasons drawn from the record." (*People* v. *Ervin* (2000) 22 Cal.4th 48, 77.)

Finally, in evaluating the sufficiency of the prosecutor's explanations, a reviewing court should compare the reasons given for excusing the challenged jurors with the characteristics of those jurors who were allowed to serve. As explained by the United States Supreme Court: "More powerful than [] bare statistics [] are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that

is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Miller-El* v. *Dretke*, *supra*, 545 U.S. at p. 241.) A comparative juror analysis is appropriate where the record is sufficient to permit the comparisons. (*People* v. *Lenix*, *supra*, 44 Cal.4th at p. 687.) An appellate record, which includes a transcript of the voir dire, is sufficient to permit review of this legal issue, even where a comparative analysis was not expressly undertaken below. (*Miller-El* v. *Dretke*, *supra*, 545 U.S. at 241, fn. 2.)

C. The Number of Hispanic Strikes Suggests That The Prosecutor's Reasons Are A Pretext For Racial Discrimination

Another consideration in determining whether the reasons for the strikes are pretextual, are the numbers involved, which in this case is very high, 10 of 16 strikes. (*People* v. *Jones* (2011) 51 Cal.4th 346, 362-363 [numbers of racial strikes relevant are relevant to the third stage of the *Wheeler/Batson* inquiry, as well as to the question of whether a prima facie case has been made].)

Statistical disparity can show a prima facie of group bias even if the disparity can be rebutted by other circumstances. (*Paulino* v. *Castro* (9th Cir. 2004) 371 F.3d 1083, 1091, 1097.) This Court explained in *People* v. *Motton* (1985) 39 Cal. 3d 596:

> As one method of proving a prima facie case, *Wheeler* noted that the moving party "may show that his opponent has struck most or all the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group." [] [Fn. Omitted] In *Wheeler* itself we found a prima facie case based on a showing that the prosecutor had used seven peremptory challenges to exclude all Blacks from the jury. (Our opinion did not state the total number of peremptory challenges exercised by the prosecutor.) A prima facie case was found in *People* v. *Hall, supra*, [1983] 35 Cal. 3d 161, 169, when five of eight challenges were used to remove all Black jurors; in *People* v. *Clay* (1984) 153 Cal. App. 3d 433, 456, when four of ten challenges removed all Blacks; in *Holley v. J & S Sweeping Co.* (1983) 143 Cal. App. 3d 588, 590, when three of six challenges removed three out of four Black jurors; and in *People* v. *Fuller*, *supra*, [1982] 136 Cal.App.3d 403, 415, when three challenges were used to remove the only three available Black jurors. The figures in the present case are equally persuasive.
>
> At the time of the initial *Wheeler* motion, the prosecutor had used five of eight challenges to remove all Black jurors (or four of eight to remove all Black women jurors). By the close of jury selection he had used seven of thirteen challenges to eliminate Black jurors. (*Id.* at p. 607.)

In the instant case, the prosecutor struck 10 Hispanics out of 16, thereby leaving a single Hispanic male on the jury. These numbers come close to those cited in *Snyder* v. *Louisiana*, *supra*, 552 U.S. 472, 476 [128

S.Ct. 1203, 170 L.Ed.2d 175], where the prosecutor challenged all five prospective African-American jurors, resulting in none on the actual jury, or in *Miller-El* v. *Dretke*, *supra*, 545 U.S. at pp. 240-241, where the prosecutor challenged nine of 10 prospective African-American jurors, resulting in only one on the actual jury.

Thus, the large number of strikes suggests that the reasons given for them were pretextual.

D. The Record Does Not Support Many of the Reasons Given By The Prosecutor For the Strikes

This Court explained a reviewing court's duty at step three of the *Batson/Wheeler* process includes an obligation to "be suspicious when presented with reasons that are unsupported or otherwise implausible." (*People* v. *Silva* (2001) 25 Cal.4th 345, 385.)

Here, some of the reasons given were either not supported by the record, or otherwise implausible. As to Ms. 254-7226, the prosecutor was initially unable to articulate any reason for excusing this potential juror. Her friends and relatives were correctional officers and worked as a service coordinator for the mentally disabled. He later offered that he was concerned about her understanding of being an independent vote with one

of 12 on the jury. (5ART 1062.) There was no evidence to support this nebulous concern, and is entirely speculative.

The inability to articulate any reason for striking a Hispanic prospective juror, who by all appearances would be an ideal prosecution juror, more than evidences a discriminatory purpose in striking her from the jury. As in *Miller-El,* in regards to the challenged Juror Fields, this reason "reeks of afterthought." There was no meaningful voir dire examination on the subject, "suggesting that the explanation is a sham and a pretext for discrimination." (*Miller-El* v. *Dretke, supra*, 545 US. at p. 245 [court found that added reason, that stricken juror had a brother with a conviction, after the first reason was pointed out as being unsupported by record was a sham, finding that, "There is no good reason to doubt that the State's afterthought about Fields' brother was anything but makeweight."].)

Further, Ms. 254-7226 would likely have been a desirable juror for the prosecution, absent her group status, in light of her favorable law enforcement connections. (See, e.g. *People* v. *Allen* (1979) 23 Cal.3d 286, 294.) This is a strong factor because it can be difficult for the prosecution to explain why it would want to exclude such prospective jurors.

The same can be said for Ms. 251-0083, whom the prosecutor said had limited life experience as an instructional aid in elementary school, as

well as a "lack of sophistication." She also had relatives in law enforcement, as well as a cousin who was a paralegal. (5ART 1057.)

In *People* v. *Allen* (2004) 115 Cal.App.4th 542, reversal was mandated under *Batson* concepts, where the prosecution excused the only two African-Americans in the jury box, "both of whom had experiences or contacts that would normally be considered favorable to the prosecution" (one had been the victim of a residential burglary; the other had two cousins who worked in law enforcement), this established a prima facie case even under the now-overruled "strong likelihood" standard. (*Id.* at p. 550.)

There is simply no factual basis to conclude that Ms. 251-0083 had limited life experience in light of her work in the school system and with the public in retail. (*McClain* v. *Prunty* (9th Cir. 2000) 217 F.3d 1209, 1220; *People* v. *Silva*, *supra*, 25 Cal.4th at p. 385; See also, e.g., *Miller- El*, *supra*, 545 U.S. at p. 265 ["The prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny."])

Two of the jurors, Mr. 229-1529 and Mr. 285-2410 were excused for the stated reasons, negative experiences with law enforcement. Mr. 229-1529 was also excused because he seemed to be more concerned about his

treatment by police than his deceased brother. Both the trial court and prosecutor overlooked--this juror's brother had been gone for two decades, the other incident had occurred in the past two years. (3ART 1059-1060.) Further, Mr. 285-1529 had no ill will toward the Kern County Sheriff officers, after his truck was searched by a total of eight of them for no apparent reason after being pulled over. (3ART 536-538.) These facts alone indicate that these reasons do not pass a minimum of scrutiny.

The prosecutor's reasons as to the Hispanic strikes themselves demonstrates internal inconsistencies within those strikes. Compare Hispanic strikes 246-8219 and 272-3471, who were not impacted by gang activity but were unacceptable, to the last four listed above, 264-8196, 240-8196, 273-2073 and 263-2053, who had relatives with some gang connections or history, were likewise unacceptable. The implausibility of these reasons are apparent in light of the contrary concerns regarding the jurors who have no gang impact and actual law enforcement familial connections, to those who had known some relations who were gang members, some of whom were distant relatives, or had occurred years, if not decades earlier. The comparison of both sets of stricken Hispanic jurors supports a finding of discriminatory purpose in excusing them from the jury.

The trial court has committed an error of law by failing to "evaluate meaningfully the persuasiveness of the prosecutor's [group]-neutral explanations," and to "make a deliberate decision whether purposeful discrimination occurred." (*United States* v. *Alanis* (9th Cir. 2003) 335 F.3d 965, 968-969 &fns. 2-3; *Barnes* v. *Anderson* (2d Cir. 1999) 202 F.3d 150, 157; *People* v. *Fuentes* (1991) 54 Cal.3d 701, 718-721.) This was the rationale the California Supreme Court used, in two of its three post- 1987 reversals based on *Batson* or *Wheeler* grounds. (*People* v. *Silva*, *supra*, 25 Cal.4th at p. 386; *People* v. *Fuentes*, *supra*, 54 Cal.3d at pp. 718-721.)

The trial court initially seemed to think that its duty was to look at Hispanics that that were similarly situated to Hispanics that were stricken from the jury, even though the task was to compare the Hispanic strikes to the seated non-Hispanic jurors. (5ART 1070.) The court also gave credence to two strikes because the prosecutor had passed them a few times before striking them. (5ART 1071.)

Further the fact that the trial court merely referred to the prosecution's explanations without giving any indication that it considered the credibility of the explanation or engaged in the third-stage process required by *Batson*, is an error of law which may warrant reversal or remand. (See, e.g., *United States* v. *Hill* (6th Cir. 1998) 146 F.3d 337, 342;

Coulter v. *Gilmore* (7th Cir. 1998) 155 F.3d 912, 920-922; *Montiel* v. *City of Los Angeles* (9th Cir. 1993) 2 F.3d 335, 340.)

Diligent and inquisitive evaluation is "imperative, if the constitutional guarantee is to have real meaning." (*People* v. *Fuentes*, *supra*, 54 Cal.3d at p., 718.) "Implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." (*Purkett* v. *Elem* (1995) 514 U.S. 765, 768.)

As will be seen below, these errors are more apparent when considering many of the similarities of seated jurors, to the stricken jurors also suggesting pretextual reasons for striking the Hispanic jurors.

II

THE TRIAL COURT ERRONEOUSLY DENIED THE *BATSON/WHEELER* MOTION HAVING FAILED TO EXERCISE A VALID COMPARATIVE ANALYSIS OF THE JURORS THAT WERE STRICKEN TO THE SEATED JURORS AND FAILING TO FIND THAT IN SOME INSTANCES THE PROSECUTOR USED A DIFFERENT SCRIPT FOR QUESTIONING HISPANIC JURORS

A. Introduction

In *Miller-El* v. *Dretke*, *supra*, the court described the comparative analysis required for a constitutional claim of discrimination in jury selection. There, the Supreme Court compared the panelists challenged by the prosecution with the panelists who were allowed to serve. The court looked at the record of voir dire to determine if the reasons given by the prosecutor for excusing the jurors were based upon factors equally applicable to the jurors who were not excused. (*Miller-El* v. *Dretke*, *supra*, 545 U.S. 231..)

The United States Supreme Court looked not only at the percentage of challenged prospective jurors out of the total number eligible to serve, but also the individual characteristics of the challenged jurors compared to those not challenged and not of the challenged jurors' race. (*Miller-El* v. *Dretke*, *supra*, 545 U.S. at p. 238.) The court also looked at additional circumstances relevant here: whether some jurors received more or less

questioning than others with similar responses and whether the prosecution chose to question the African-American jurors more extensively or by using a different "script" than that used for the non-black jurors. (*Ibid.*)

On appeal, the court looks at the record and comparative juror analysis to determine if the prosecutor offered pretextual reasons for excusing the minority juror; if the trial court made specific findings based on demeanor or other percipient, first-hand observations, those factual findings must be given deference on appeal. (*Snyder* v. *Louisiana*, *supra*, 552 U.S. 472.)

This court has held that evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by the defendant and the record is adequate to permit the urged comparisons. (*People* v. *Lenix*, *supra*, 44 Cal. at p. 622.) The *Lenix* decision explains that there are still inherent limitations in conducting "comparative analysis" on a cold appellate record, and why it was much better for trial court litigants to make as complete a record as possible, including arguments of "comparative analysis" when appropriate. (*Id.* at pp. 622-625.)

As the Supreme Court has explicitly concluded, "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an

otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Miller-El* v. *Dretke*, *supra*, 545 U.S. 231, 125 S.Ct. 2317, 2325.) Since *Miller-El* was decided, this Court has consistently relied on this type of comparative-juror analysis in determining whether a prosecutor's stated reasons were pretexts for discrimination. (See, e.g., *People* v. *Lewis* (2006) 39 Cal.4th 970, 1017-1024; *People* v. *Ledesma* (2006) 39 Cal.4th 641, 688; *People* v. *Avila* (2006) 38 Cal.4th 491, 547-548; *People* v. *Huggins* (2006) 38 Cal.4th 175, 232; *People* v. *Jurado* (2006) 38 Cal.4th 72, 105-106; *People* v. *Schmeck* (2005) 37 Cal.4th 240, 270-273.)

B. An Objective Comparison of The Reasons Given for the Hispanic Strikes To Some of the Seated Jurors Supports The Conclusion That There Was A Discriminatory Purpose In Striking Hispanics From The Jury

The *Snyder* facts are of interest here, because one of the strikes who was compared to a seated juror had similar facts surrounding the need for a hardship as in the instant case. The *Snyder* court focused on only one of two strikes discussed on review, Mr. Brooks, inasmuch as it found that the reason given for that one juror was inadequate. (*Snyder* v. *Louisiana*, *supra*, 552 U.S. at p. 478.) There the prosecutor explained that Brooks, a college senior attempting to fulfill his student teaching obligation, was

nervous and was going to miss class; he might decide the case quickly so there would not be a penalty phase. (*Ibid.*) The *Snyder* court rejected this explanation because the court allowed the challenge without explanation. (*Id.*, at p. 479.) Thus, the court was unable to "presume that the trial judge credited the prosecutor's assertion that Mr. Brooks was nervous."

The *Snyder* majority found that the second reason offered, the student teaching obligation, failed under the "highly deferential standard," noting that Brooks was one of more than 50 members who had indicated that jury service would interfere with some aspect of their work or other obligations. (*Id.* at 480.) Brooks cleared his absence with the Dean of his department, reporting the outcome with the court. The court found that the scenario of Brooks being in a hurry to resolve the case was "highly speculative." Considering other factors regarding Brooks ability to make up the time for his program, the court found the explanation to be suspicious. When it compared the reason to white jurors who disclosed conflicting obligations that appeared to have been at least as serious as Brooks, found the explanation implausible and unbelievable. (*Id.* at p. 485.)

Similarly, in the instant case, one of the reasons given for striking Ms. 251-0083, was that she had requested a hardship. (5ART 1057.) The prosecutor did not discuss how that might impact his case. Yet a seated

juror, 271-9513, who identified herself has a tennis coach, was denied a hardship even though she mentioned her team was in the playoffs. (1ART 126; 5ART 1076, 1077.) And in contrast to Ms. 251-0083, she also knew several police officers, including one on the prosecutor's witness list. (5ART 1077, 1078.)

In contrast to other reasons given for Hispanic strikes, Ms. 251-0083 also mentioned that her home had been burglarized and the police did not do much, nor did they catch the person responsible. (5ART 1079.) This contrasts with stricken Hispanic Juror Mr. 285-2410, who the prosecutor stated that he had stricken based on his statement that it took too long for the Bakersfield Department to take a report, and thus concluded, "he was still resentful as a victim of a crime." (5ART 1061-1062.) Mr. 285-2410 stated upon extended questioning by the prosecutor that he was upset because the crime occurred in the proximity to two officers who were present, who referred him to the police department, which in turn took six days to respond. He had lost three thousand dollars in property, but could still be fair. (2ART 469.) He had also been pulled over by police who mistakenly believed that he was in a stolen car, placed in custody until later cleared. He normally thought that officers were credible, but not the two that had arrested him. (3ART 494, 495.) Appellant discusses in detail

below, how these explanations for striking this venire member are factors relating to racial discrimination that likewise should be rejected as valid reasons for excusing this juror.

Meanwhile seated juror Ms. 271-9513, had three brothers she described as being "in and out of jail" including her oldest brother for drunk and disorderly conduct, her middle brother, who was in Lerdo State Prison for drug reasons, and her younger one, who had legal problems because of an assault charge. (5ART 1080.) Police had spoken to her about an accusation against her, but that matter had been dropped. And similar to other stricken Hispanics, Ms. 271-9513, was aware of gangs in the McFarland area, and some of her students had been jumped into gangs. (5ART 1081.)

Compare Ms. 271-9513 known gang members who were her students, to stricken Hispanics members who despite having no personal connection to a gang, were excluded because they knew gang members, such as his Hispanic strike, Ms. 264-7624, who had two nephews with prison terms and gang ties, excluding her because of "criminality in the family." (5, ART 1058.) Given that Ms. 271-9513, had three brothers with criminality, including one in Lerdo State Prison, and her day to day involvement with students who were jumped into gangs, she was actually in

a position to have more direct involvement with family criminality and gangs, than the stricken juror, Ms. 264-7624, whose infrequent involvement with her nephews was not questioned.

Similarly, seated juror 268-9647, had both her children arrested for drug use. (5ART 1076, 1084, 1085, 1086, 1087.)

Likewise, seated juror Mr. 254-6044, had had a negative experience with law enforcement because he believed that they did not do enough when he contacted them. (3ART 505.) Juror 286-1675, was white, young and unemployed, with some exposure to gangs, yet was not stricken from jury service. His lack of life experience or exposure to gangs was not a detriment. (3ART 701.) Then again juror 267-4226 did not believe he had any exposure to gangs while living in Kern County and he remained on the jury. (5ART 1033, 1068.) The offered justifications were thus not credible. The inference arises that the race-neutral reasons were pretextual when the prosecutor left on the panel several jurors in light of the jurors stricken from the panel.

Another seated juror who had less than optimum success in getting results from the police with a burglary include Ms. 267-4226, who was burglarized 20 to 25 year earlier, nobody was caught, but believed the police did all they could do. (4ART 931, 943.)

Another telling discrepancy with the prosecutor's explanations lies in the implausible reason that two of the Hispanic jurors were kicked off the jury because they did not have awareness of gang activity in the areas where they lived, was not applied to other jurors. Recall that this reason was given as to Ms. 246-8219 and Ms. 272-3471. (5ART 1059, 1061.) Yet juror 258-1907 was not aware of gang issues in his neighborhood, though he had been bothered young gang member when he taught chess at a detention center. (4ART 900; 6ART 1303; 5ART 1048; 6ART 1303.)

Snyder v. *Louisiana*, *supra*, 552 U.S. 472, considered the foregoing type of comparison between challenged black prospective jurors and white ones who served and rejected the prosecutor's claimed, "race-neutral" explanation for challenging a black juror. (*Id.* at pp. 478-480; see also *People* v. *Kelly* (2007) 42 Cal.4th 763, 779 [challenged jurors heterogeneous as community in all respects other than race or gender].) As the Ninth Circuit has explained, "The fact that [a proffered] reason also applied to . . . other panel members, most of them white, none of them struck, is evidence of pretext." (*Ali* v. *Hickman* (9th Cir 2009) 571 F.3d 902, 916, citing *Miller-El* v. *Dretke*, *supra*, 545 U.S. at p. 248.) An effective comparison requires only that the challenged and unchallenged jurors are "similarly situated." (See *Miller-El* v. *Dretke*, *supra*, 545 U.S. at

p. 247, fn. 6.). Finally, it matters not that some of the prosecutor's reasons might have been good ones. *Johnson* v. *California* explained, "'It does not matter that the prosecutor might have had good reasons . . . what matters is the real reason they were stricken." (*Johnson* v. *California*, *supra,* 545 U.S. at p. 172, quoting *Paulino* v. *Castro* (9th Cir. 2004) 371 F.3d 1083, 1090.)

C. The Trial Court's Decision Is Not Entitled To Limitless Deference

The trial court neglected its duty to make " 'a sincere and reasoned effort to evaluate' " the proffered justifications. (*People* v. *Lenix*, *supra*, 44 Cal.4th 602, 614; see also *People* v. *Silva*, *supra*, at p. 385.) Accordingly, the trial court's decisions to accept the prosecutor's reasons and to deny defendant's motion are not entitled to deference on appeal. (*People* v. *Lenix*, *supra*, at p. 614; *People* v. *Silva*, at pp. 385-386.)

This court, however, has not been unanimous in its approach on the issue regarding deference. Justice Liu has written separately in recent cases, arguing the court's approach contradicts recent United States Supreme Court precedents, precludes meaningful review, and frustrates *Batson's* purpose of preventing racial discrimination in jury selection. (*People* v. *Mai* (2013) 57 Cal.4th 986, 1058-1060 (conc. opn. of Liu, J.) and *People* v. *Williams* (2013) 56 Cal.4th 630, 717 (dis. opn. of Liu, J.).) He pointed out that the United States Supreme Court has required a reviewing

court to evaluate a prosecutor's removal of a juror according to the "plausibility of the reasons" the prosecutor provides. (*Miller-El* v. *Dretke*, *supra*, 545 U.S. at p. 252; *Mai*, *supra*, 57 Cal.4th at p. 1074 (conc. opn. of Liu, J.).) For example, a reviewing court may not affirm a *Batson/Wheeler* motion denial based upon a prosecutor's demeanor-based explanation unless the trial court actually made findings as to the juror's demeanor. (*Snyder* v. *Louisiana*, *supra*, 552 U.S. at p. 479; *Mai*, *supra*, at p. 1073 (conc. opn. of Liu, J.).) Blind deference is not appropriate because "jury selection can be a complex process, and in the context of a particular strike, a trial court may have 'stopped taking notes', it may have neglected to consult the record of voir dire, it 'may not have recalled [a juror's] demeanor', it may have declined to engage in comparative juror analysis despite the urging of counsel, it may have applied an erroneous legal standard in assessing a *Batson* claim, or it may have made an unreasonable judgment under the totality of the circumstances." (*Mai*, *supra*, at p. 1075 (conc. opn. of Liu, J.; see also *People* v. *Chism* (2014) 58 Cal. 4th 1266, 1352.)

Regardless of this court's interpretation of the level of deference that should be accorded the trial court's determination, the instant case is such an extreme example of implausible and speculative reasons given for the

many of the strikes, as explained above, that reversal is mandated. The trial court's inability to address many of these variances or incorrect understanding of the record, suggests that it is not entitled to any level of deference as to its decision to deny the *Batson/Wheeler* motion.

Deference does not mean abdication. (*People* v. *Gonzales* (2008)) 165 Cal.App.4th 620, 629.) "[W]hen the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (*People* v. *Stevens* (2007) 41 Cal.4th 182, 193.) Thus a reviewing court must consider "any evidence demonstrating that, despite the neutral explanation of the prosecutor, the peremptory strikes in the final analysis were race based." (*Miller-El* v. *Cockrell* (2003) 537 U.S. 3225, 338–339 [154 L. Ed. 2d 931, 123 S. Ct. 1029]; see also *People* v. *Lenix*, *supra*, 44 Cal.4th 602, 626 [in terms of appellate review, "the question of purposeful discrimination continues to involve an examination of all relevant circumstances."].)

D. The Prosecutor Relied On A "Different Script" To Question Some Of The Hispanic Jurors

Other indicators of pretext for discrimination arise when a prosecutor uses a different pattern of questioning a juror, or a "different script," to

disqualify a minority juror. There is some indication in the record that this process was undertaken. (See, *Miller-El* v. *Dretke*, *supra*, 54 U.S. at p. 244-245.)

An example of this variation of questioning is evident reviewing the questioning of stricken juror 285-2410. (2ART 316.) When initially describing the theft incident, Mr. 285-2410, simply stated that his truck had been broken into two years earlier, and that four years before that, his dad's office. (2ART 316.) When questioned he indicated that nobody was apprehended for the truck break in. (2ART 316.) The ensuing questioning went as follows:

> A. With regards to either of those situations, do you feel law enforcement did what they could or they could have done more?
>
> Q. I don't feel my truck—because it took about six days to get a police report.
>
> Q. So you weren't happy it took so long to get a police report?
>
> A. It happened at lunch and I was eating with BPD in the same building. And then I don't know—I was done, and every time we go out together and nothing they just drove away.
>
> Q. All right. So I mean, you were having lunch with police officers?

A. Not physically with them, but in the same restaurant.

Q. Oh, okay. And then when you went out and told them about it?

A. Yeah. They told me to call and that somebody did.

Q. Somebody did show up?

A. Six days later at my house, yeah.

Q. And that's –I mean, some people get upset about that and rightfully so, because I think in some cases some people put it in some sort of perspective, and it doesn't really bother them. How do you feel about that that it took that long to get back to you?

A. I was pretty mad, because I had my laptop, my brother's laptop, my stereo, so I lost about $3,000 worth of stuff.

Q. Who—all right. Any other crimes you have been the victim or anybody close to you?

A. No.

Q. Does that experience you had in the way you feel about what took place, do you think that would impact your ability to be a fair juror in this particular case?

A. No. (2ART 317, 318.)

Compare that extensive questioning, which suggested it was perfectly understandably to be upset about being treated dismissively by police, to two seated jurors experience about their experience with police, involving a burglary and prosecution for a DUI. Ms. 267-4226's house had been burglarized 20-25 years earlier, volunteered that nobody was ever apprehended, the police did all they could do, and was friends with the retired chief of police. (4ART 943.) The only follow-up question asked by the prosecutor was whether that occurred in Bakersfield or the juror's residence in Bear Valley Springs. (4ART 943.) Mr. 254-6044, told the prosecutor that he had a conviction for driving under the influence, which inspired only a single follow-up question whether his experience had led him to believe he had been treated improperly by police. (2ART 328.)

Recall that the prosecutor stated after unable to articulate a reason for excusing Ms. 254-7226, that he was concerned with her understanding of being an independent vote with one of 12 on the jury. (5ART 1062.)

Her questioning also stands out as a different script:

> Q. Ms. 254-7226, how are you this afternoon?
>
> A. Good.
>
> Q. You know a little bit about the criminal justice system I'm sure from what you learned in school and what you watched on TV shows?

A. No, not from school.

Q. Maybe even simple things, like, how many people there are on a jury?

A. Yes.

Q. So, your understanding that there are [sic] 12 people on a jury?

A. Yes.

Q. And you're up here as one of the people that's being asked questions to see if you're right for this case and you're right for participation as a juror to hear the facts in this case; is that correct?

A. Yes. And you've heard terms like deliberations; is that correct:

A. Yes.

Q. What is your understanding of what a jury deliberation is?

A. The discussion of –after everything is presented and that the whole case to see if everything is found—the case to be proven.

Q. Ok. And where do you –is your understanding of where that happens?

A. After everything –all the evidence and all the stuff has been presented to the case and take the jurors to a room or a section by themselves.

Q. It's actually called the jury room. And that's when you talk about the case together if you're on

this jury or you're on any jury, you and 11 other members would discuss the case; is that correct?

A. Yes.
Q. How many jurors have to agree for there to be a verdict of guilty or not guilty?

A. I don't know.

Q. Well, the Judge is going to instruct you that it has to be unanimous. You understand that?

A. (Juror nods head.)

Q. And that's sort of the functions of these deliberations. You talk to each other, and you hear what people hear about the evidence, and you see where everyone is, and then ultimately you try to reach a verdict as best you can, do you understand that?

A. Yes.

Q. As one of 12 jurors you would have a vote, do you understand that?

A. Yes.

Q. Okay. You also understand that your vote is your, you have a duty to listen to and talk to other jurors, but how you vote if you're impaneled on this jury it's yours, it's your responsibility, and it's what you believe that law that the judge gives you and the facts and the evidence that you heard in court indicated as the truth, do you understand that?

A. Yes.

Q. Would you be able to do that? Would you be able to participate in deliberations and listen to everyone else in speaking your own mind?

A. Yes.
Q. You don't think that there's anything about you that's differential [sic] or, you know, want to sit in the background and listen to other people?

A. No, I don't think so.

Q. Okay. You have no problem with speaking your mind and listening to other people at the same time?

A. I think I do better at listening than speaking my mind out.

Q. What happens if you don't agree?

A. Then the vote is mine. So I just—what I'm not in agreement with and decide what I want to say.

Q. Would you have any problem letting other people on the panel know that you don't agree and here's why?

A. I don't think so. (3ART 489-492.)

A fair reading of the dialogue suggests the prosecutor was speaking to this juror with a patronizing tone, which suggested without basis that she had no fundamental knowledge of the jury system and that she had trouble understanding basic information. (3ART 490-492.) The record does not support the prosecutor's concern that she could not be an independent vote.

The manner of his questioning of this juror suggests that he was using a "different script" than other seated jurors that were not similarly questioned with such extensive questioning about their participation in the deliberations process. (See, *Miller-El* v. *Dretke*, *supra*, 54 U.S. at pp. 244-245.)

The use of different questioning methods with the stricken Hispanic jurors also supports the conclusion that their being removed from the jury was based on racial bias, requiring reversal.

III

THE TRIAL COURT ERRONEOUSLY DENIED THE *BATSON/WHEELER* MOTION INASMUCH AS SOME OF THE REASONS FOR STRIKING FOR TWO OF THE JURORS AMOUNTED TO IMPERMISSIBLE RACIAL PROFILING

A. Facts/Introduction

Two of the jurors, Mr. 229-1529 and Mr. 285-2410 were excused for the stated reasons that they had had negative experiences with law enforcement. (3ART 1059-1060.)

Recall that Mr. 285-had his truck broken into while he was eating in a restaurant, where there were police present, who refused to take a report, referring him to the department, which took six days to respond. (2ART 316-318.) He had also been pulled over by the Bakersfield Police Department some four years earlier because the two officers mistakenly believed that he was in a stolen car. (2ART 481.) He was put into the back of a police car, and was told his description matched a suspect. (3ART 494, 495.)

Similarly, Mr. 285-2410 was pulled over when the Bakersfield Police Department mistakenly believed he was in a stolen car. (2ART 461.) He was placed in the back of a police car and told that his description matched

a suspect; he thought these two officers involved were untrustworthy. (3ART 494, 495.)

Both of these asserted reasons, unwarranted detention and apparent false arrest, raise the additional issue of elements of racism as a basis of juror discrimination, inasmuch as these incidents are themselves suggestive of racial profiling, a form of racial discrimination that has been recognized by our courts.

B. Relying on Instances of Racial Profiling To Strike Jurors Permeates Racial Bias That Is Prohibited By Batson Principles When Considered In That Context

Justice Souter penned the following in *Miller-El* v. *Dretke*, *supra*, 545 U.S. at pp. 237-238:

> ...[R]acial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice," *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994).
>
> Nor is the harm confined to minorities. When the government's choice of jurors is tainted with racial bias, that "overt wrong . . . casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial. . . ." *Powers* v. *Ohio*, 499 U.S. 400, 412 (1991). That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination "invites cynicism respecting the jury's neutrality," *id.* at

> 412, and undermines public confidence in adjudication, *Georgia* v. *McCollum*, 505 U.S. 42, 49 (1992); *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 628 (1991); *Batson* v. *Kentucky*, *supra*, at 87.)

Racial profiling, which has been defined as "the practice of detaining a suspect based on a broad set of criteria which casts suspicion on an entire class of people without any individualized suspicion of the particular person being stopped" [Pen. Code, §13519.4, subd. (e)] is expressly prohibited by statute (*id.*, subd. (f)). (*Claremont Police Officers Assn* v. *City of Claremont* (2006) 39 Cal.4th 623, 632-633.) In the instant case, there was no explanation given as to for why these particular men were stopped and subjected to this treatment, though the record does indicate that both men are Hispanic. (See, *People* v. *McKay* (2002) 27 Cal.4th 601, 640.) However, the facts as stated by the two Hispanic jurors suggest racial profiling as to the incidents described.

Justice Brown writes in her concurring and dissenting opinion in *McKay*:

> Gallup Poll released in December 1999 indicated more than half of the Americans polled believed police actively engage in racial profiling, and 81 percent of them said they disapprove of the practice. (U.S. Dept. of Justice, A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned (Nov.

> 2000) p. 4 (DOJ).) Anecdotal evidence and empirical studies confirm that what most people suspect and what many people of color know from experience is a reality: there is an undeniable correlation between law enforcement stop-and-search practices and the racial characteristics of the driver. (*Ibid.*)

It is unsettling that their reaction to being mistaken for criminal suspects and detained by police, can be the basis of yet further exclusion from society's institutions, participation in jury service. In the context of jury peremptories, reliance on group bias as a basis for exclusion has been referred to as "proxy for bias." (*United States* v. *Bishop* (9th Cir. 1992) 959 F.2d 820.) In that case, the prosecutor said he wasn't challenging the prospective juror because she was African- American; but rather, because she lived in Compton, allegedly "a poor and violent community whose residents are likely to be 'anesthetized to such violence' and 'more likely to think that the police probably used excessive force' " (*Id.* at p. 825) - which also happens to be overwhelmingly minority, mostly African- American. The Ninth Circuit held that this "amounted to little more than the assumption that one who lives in an area heavily populated by poor black people could not fairly try a black defendant." (*Ibid.*)

Race discrimination in the selection of jurors "offends the dignity of persons and the integrity of the courts." (*Powers* v. *Ohio* (1991) 499 U.S.

400, 402.). "A venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character." (*Id.* at 413-14.) In addition, this type of discrimination "casts doubt on the integrity of the judicial process" and places the fairness of a criminal proceeding in doubt. (*Rose* v. *Mitchell* (1979) 443 U.S. 545, 556.) It is not only unconstitutional but also unseemly that Hispanic citizens who were called to do their civic duty were sent away because they had the misfortune of being profiled by officers, and reported the incident during voir dire when asked to do so.

Racial minorities are harmed more generally, for prosecutors [545 U.S. 238] drawing racial lines in picking juries establish "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice," (J.E.B. v. Alabama ex rel. T.B. (1994) 511 U.S. 127, 128.)

In dissenting from a denial of certiorari in *Wilkerson* v. *Texas* (1989) 423 U.S. 924, Justice Marshall addressed a related question. Justice Marshall concluded that *Batson's* requirement of a race "neutral explanation for challenging an Afro–American juror means just what it says -- that the explanation must not be tainted by any impermissible factors."

Further, language from Supreme Court decisions subsequent to *Batson* also supports the notion that the decision to discharge a juror may

not "be tainted by any impermissible factors." Thus, in describing *Batson* error a majority of the Court has noted that "[w]hen the government's choice of jurors is tainted with racial bias, that 'overt wrong casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial.'" (*Miller–El* v. *Dretke*, *supra*, 545 U.S. at p. 238 [emphasis added].) Similarly, in describing its own attempts to eradicate jury discrimination from the criminal justice system, the Court has noted that "[d]espite the clarity of these commands to eliminate the taint of racial discrimination in the administration of justice, allegations of bias in the jury selection process persist." (*Powers* v. *Ohio*, *supra*, 499 U.S. at p. 402 [emphasis added].)[4]

Most state courts that have addressed the issue have taken a different approach. These courts have explicitly adopted Justice Marshall's view and held that "[r]egardless of how many other nondiscriminatory factors are considered, any consideration of a discriminatory factor directly conflicts

---

[4] In addition to these cases the Supreme Court in numerous other areas has refused to permit actors to base any part of a decision on race. (See *Arlington Heights* v. *Metropolitan Housing Development* (1977) 429 U.S. 252, 265 [in seeking to establish that zoning decision was motivated by racial bias in violation of the Equal Protection Clause, challenger need not establish "that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body . . . made a decision motivated by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."]; *Price Waterhouse* v. *Hopkins* (1989) 490 U.S. 228, 241, 258 [in action under title VII of the federal Civil Rights Act of 1964, plaintiff need not prove that unlawful discrimination was the sole factor motivating an employment decision in order to establish a violation of the act].)

with the purpose of *Batson* and taints the entire jury selection process." (*Arizona* v. *Lucas* (Ariz. Ct. App. 2001) 18 P.3d 160, 163. Accord *Robinson* v. *United States* (D.C. Cir. 2005) 878 A.2d 1273, 1284; *McCormick* v. *State* (Ind. 2004) 803 N.E.2d 1108, 1113; *South Carolina* v. *Shuler* (S.C. 2001) 545 S.E.2d 805, 811 ["[A] racially discriminatory peremptory challenge in violation of *Batson* cannot be saved because the proponent of the strike puts forth a non-discriminatory reason."]; *Wisconsin* v. *King* (Wisc. Ct. App. 1997) 572 N.W.2d 530, 535 ["[W]here the challenged party admits reliance on a prohibited discriminatory characteristic, we do not see how a response that other factors were also used is sufficient rebuttal under the second prong of *Batson*."]; *Rector* v. *Georgia* (Ga. 1994) 444 S.E.2d 862, 865 ["[T]he trial court erred in ruling that other purportedly race neutral explanations cured the element of the stereotypical reasoning employed by the State's attorney in exercising a peremptory strike."]; *Moore* v. *Texas* (Tex. Ct. App. 1991) 811 S.W.2d 197, 200 [finding a *Batson* violation where a juror would have a problem assessing punishment (valid) and was member of a minority club (invalid)].)

These state courts are entirely correct. The goal of *Batson* is to free the jury selection process from the taint of discrimination. A system that specifically allows prosecutors to discriminate in the jury selection process

-- even in part -- can never accomplish this goal. Accordingly, this Court should finally resolve this issue under California law and join the state courts in Arizona, Indiana, South Carolina, Texas and Wisconsin. Under this approach, of course, reversal is required here.

This brings up a point that pertains to any of the prosecutor's stated reasons. Discrimination in our society is often unintentional or subconscious. "A growing body of social science recognizes the pervasiveness of unconscious racial and ethnic stereotyping and group bias." (*Chin* v. *Runnels* (N.D. Cal. 2004) 343 F.Supp.2d 891, 906-907 [citing numerous works].) Often, "[w]e do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation." (Lawrence, "*The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*" (1987) 39 Stan. L. Rev. 317, 322 [quoted in *United States* v. *Bishop* (9th Cir. 1992) 959 F.2d 820, 827-828].) The same is true for other forms of discrimination as well; as one court observed three decades ago, "[o]ne familiar aspect of sex discrimination is the practice, whether conscious or unconscious, of subjecting women to higher standards of evaluation than are applied to their

male counterparts." (*Sweeney* v. *Board of Trustees* (1st Cir. 1979) 604 F.2d 106, 114.)

The problem of attitudinal or subconscious discrimination is exacerbated in the *Batson* context, because lawyers have little information on which to base peremptory challenges – and the very arbitrariness of peremptory challenges may also promote decision making by stereotype. (See, e.g., Page, "*Batson's Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*" (2005) 85 B.U.L. Rev. 155, 261-262.) For example, "A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically." (*United States* v. *Milan* (3d Cir. 2002) 304 F.3d 273, 283, fn. 11 [quoting *Batson*, 476 U.S. at p. 106 [conc. opn. of Marshall, J.].) "[C]ourts must [also] be aware that an attorney may lie even to himself in an attempt to convince himself that his motives for a strike are nondiscriminatory." (*Somerville* v. *State* (Tex. Ct. App. 1990) 792 S.W.2d 265, 269.)

As one commentator recently summarized the problem of subconscious discrimination, in a *Batson* context:

> In our society race and gender, because they are highly salient characteristics, still unconsciously form and trigger the use of stereotypes. These stereotypes, once triggered, can greatly affect how we process information and thus ultimately affect our decision- making. Stereotyping almost inevitably introduces categorization related errors in social perceptions. Worst of all, these processes are rarely accessible to our conscious minds. (Page, "*Batson' s Blind Spot*," *supra*, 85 B.U.L. Rev. at p. 261.)

These principles underline that a finding of discrimination *Batson* does not necessarily mean the prosecutor is lying or under engaging in a deliberately racist act. The third-stage *Batson* question that courts must decide is not whether the prosecutor's explanation is a pretext, but rather, whether the prosecutor has committed an act of discrimination in jury selection.

IV

JOINDER IN CO-APPELLANT RAMOS AND GUTIERREZ'S OPENING BRIEFS ON THE MERITS

Pursuant to California Rules of Court, rule 8.200, subdivision (a)(5), ["(5) Instead of filing a brief, or as part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related appeal.]" Appellant joins in co-appellants' opening briefs on the merits, as to all issues raised regarding the *Batson/Wheeler* motion on review in this court.

CONCLUSION

The "Constitution forbids striking even a single prospective juror for a discriminatory purpose." (*United States* v. *Vasquez-Lopez* (9th Cir. 1994) 22 F.3d 900, 902.) The trial court's erroneous denial of appellant's *Wheeler/Batson* motion is reversible per se. *(People* v. *Wheeler*, *supra*, 22 Cal. 3d at p. 283 ["[N]o inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside."].) This Court need not determine whether the trial court erred in denying the *Batson/Wheeler* motion as to all ten of the challenged, Hispanic prospective jurors. The exclusion of a single juror by peremptory challenge on the basis of race is an error of constitutional magnitude requiring reversal. (*People* v. *Fuentes*, *supra*, 54 Cal. 3d 707, 716, fn. 4; *People* v. *Montiel* (1993) 5 Cal. 4th 877, 909.)

Dated: April 4, 2016,

Respectfully submitted,

Janet J. Gray
Attorney for Appellant

PEOPLE OF THE STATE OF CALIFORNIA,	)	CASE NO. S224724
	)	
Plaintiff and Respondent,	)	(5DCA F065288/F065481
	)	F065984)
	)	Kern Co. Superior Court
	)	No. LF9190C/LF9190A)
v.	)	
	)	
RAMIRO ENRIQUEZ,	)	
	)	
Defendant and Appellant	)	
AND CONSOLIDATED CASES	)	
	)	

CERTIFICATE OF WORD COUNT

Pursuant to California rules of Court, rule 33, subdivision (b), appellant Ramiro Enriquez certifies, by his counsel of record, Janet J. Gray, that there are 12,735 words in his Opening Brief On The Merits, commencing with the title page of the brief, though excluding the tables, filed in the above-entitled matter. The word count was undertaken with the Mac version of Microsoft Word, version 14.5.5, the same program used to create the brief.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on April 4, 2016.

Janet J. Gray
Attorney for Appellant

PROOF OF SERVICE

People v. Enriquez, S224724
I, Janet J. Gray certify.

I am an active member of the State Bar of California and am not a party to this cause. My business address is P.O. Box 51962, Pacific Grove, California, 93950. On April 4, 2016, I served the foregoing document described as ***APPELLANT ENRIQUEZ'S OPENING BRIEF ON THE MERITS*** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Pacific Grove, California, addressed as follows:

Ramiro Enriquez
AL9276
Pelican Bay State Prison
P.O. Box 7500
Crescent City, CA 95532

Kern County Superior Court
1415 Truxton Ave # 212
Bakersfield, CA 93301

Kern County District Attorney
1215 Truxtun Ave
Bakersfield, CA 93301

Fifth District Court of Appeal
2424 Ventura Street
Fresno, CA 93721
Served electronically via TrueFiling

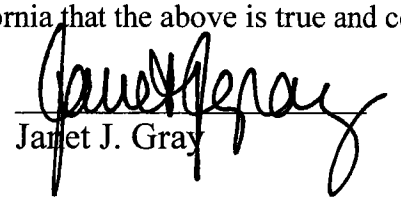
Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

CCAP
2150 River Plaza Dr. Ste 300
Sacramento, CA 95833

Donn Ginoza, Esq.
660 4th Street, #279
San Francisco, CA 94107
Attorney for G. Ramos

Scott Conklin, Esq.
2205 Hilltop Drive, No. PMB-116
Redding, CA 96002
Attorney for R. Gutierrez, Jr.

I caused such envelope with postage thereon, fully prepared to be placed in the United States mail at Pacific Grove, California.
Executed on April 4, 2016, at Pacific Grove, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



Janet J. Gray