IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JAMELLE EDWARD ARMSTRONG, Defendant and Appellant.	**CAPITAL CASE** No. S126560 (Los Angeles County Superior Court No. NA051938-01)

APPELLANT'S THIRD SUPPLEMENTAL BRIEF

On Automatic Appeal From a Judgment of Death
of the Superior Court of the State of California
for the County of Los Angeles

HONORABLE TOMSON T. ONG, JUDGE

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By appointment of the California
Supreme Court

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A. INTRODUCTION.

In *People v. Gutierrez* (2017) 2 Cal.5th 1150, this Court reversed a conviction because at least one of the prosecutor's peremptory challenges was improperly racially motivated in violation of *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258. In 2016, the United States Supreme Court in *Foster v. Chatman* (2016) 578 U.S. ___, 136 S.Ct. 1737 re-emphasized the fundamental principles behind *Batson* and its progeny. As these two major cases directly pertain to appellant's Argument II, he files this Third Supplemental Brief.

Gutierrez did not change the law of *Batson/Wheeler*. Instead, as this Court made clear, "[T]his case offers us the opportunity to clarify the constitutionally required duties of California lawyers, trial judges, and appellate judges when a party has raised a claim of discriminatory bias in jury selection." (*People v. Gutierrez*, *supra,* 2 Cal.5th at p. 1154.) A discussion of those duties follows.

B. SUMMARY OF *GUTIERREZ*.

Before this Court even discussed the current status of the law, this Court set forth two overarching principles that must be considered in all *Batson* cases. Firstly, it made clear that it was the primary responsibility for assuring the "integrity" of our jury system lay with the courts. (*Gutierrez, supra,* 2 Cal.5th at p. 1154.) This will be discussed below.

Secondly, this Court also reaffirmed,

> It is not only litigants who are harmed when the right to trial by impartial jury is abridged. Taints of discriminatory bias in jury selection—actual or perceived—erode confidence in the adjudicative process, undermining the public's trust in courts. (*Ibid*; *Miller-El v. Dretke* (2005) 545 U.S. 231, 238; *Powers v. Ohio* (1991) 499 U.S. 400, 412.)

It is, and has been, appellant's position that the peremptory challenges of all of the four black male prospective jurors were racially motivated. In this Brief, appellant will demonstrate how both this Court's clarification of the *Batson* law and the high court's decision in *Foster* confirms this.

1. Burden of Proof.

Gutierrez confirmed that the *Batson* inquiry was a three step process, as discussed in appellant's Opening Brief. (*Gutierrez*, *supra,* 2 Cal.5th at p. 1158; AOB at pp. 143 et seq.) This is a "third-stage" case; that is a prima facie case has been made and the prosecutor articulated her "race-neutral" reasons for the challenge of the jurors. The question remaining is whether appellant has proved purposeful discrimination in that it was "more likely than not the challenge was improperly motivated." (*Gutierrez, supra,* at p. 1158, citing to *People v. Mai* (2013) 57 Cal.4th 986, 1059.)

2. Subjective Genuineness Not Objective Reasonableness / "Sincere Reasoned Attempt".

Gutierrez reaffirmed that the central tenant of this process was the determination of the "subjective genuineness of the reason, not the objective reasonableness." (*Gutierrez, supra,* at p. 1158, citing to *People v. Reynoso* (2003) 31 Cal.4th 903, 924.)

> To assess credibility, the court may consider, "'among other factors, the prosecutor's demeanor; . . . how reasonable, or how improbable, the explanations are; and . . . whether the proffered rationale has some basis in accepted trial strategy.'" [Citations.] To satisfy herself that an explanation is genuine, the presiding judge must make 'a sincere and reasoned attempt' to evaluate the prosecutor's justification, with consideration of the circumstances of the case known at that time, her knowledge of trial techniques, and her observations of the prosecutor's examination of panelists and exercise of for-cause and peremptory challenges. [Citation.] Justifications that are "implausible or fantastic . . . may (and probably will) be found to be pretexts for purposeful discrimination."

(*People v. Gutierrez, supra,* 2 Cal.5th at p. 1159; citations omitted.)

This Court then reviewed what constitutes a "sincere and reasoned attempt."

> What courts (trial and appellate) should not do is substitute their own reasoning for the rationale given by the prosecutor, even if they can imagine a valid reason that would not be shown to be pretextual. "[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. ... If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false."

(See *People v. Gutierrez, supra,* 2 Cal.5th at p. 1159 citing to *Miller-El v. Dretke* (2005) 545 U.S. 231, 252. (*Miller-El II*).)

3. State of the Record.

Further, the trial court's review of the *genuineness* of these reasons must rely on "evidence of solid value." (*People v. Gutierrez, supra,* 2 Cal.5th at p. 1172.) This mandate does not allow for the courts to accept the prosecutor's "tenuous" deductions arrived from the questioning nor justifications that lack "lucidity." (*Id.* at p. 1169.) This Court made clear that the prosecution cannot rely on vague, generalized, attenuated, or even poorly phrased "race-neutral" excuses. (*Ibid.*) When it is not "self-evident" why an advocate would harbor a concern about a panelist, the question of whether a neutral explanation is genuine and made in good faith becomes more pressing. That is particularly so when, as here, an advocate uses a considerable number of challenges to exclude a large proportion of members of a cognizable group. (*Ibid.*, see *People v. Jones* (2011) 51 Cal.4th 346, 362.)

The *Gutierrez* court then emphasized a principle that while inherent in prior *Batson* law was never so specifically articulated; the necessity for creating the type of record on which the trial court could conduct its sincere and reasoned attempt at judging the genuineness of the prosecutor's allegedly race neutral explanation; in short, a record "worthy of deference." (*People v. Gutierrez, supra,* 2 Cal.5th at pp. 1169-1171.)

> Advocates and courts both have a role to play in building a record worthy of deference. Advocates should bear in mind the record created by their own questioning—where the court and opposing counsel have failed to elicit panelist responses in a certain area of interest—as well as their explanations for peremptory challenges.

(*Id.* at p. 1171.)

It is clear that this Court has placed the prosecution on notice that it can no longer rely on the trial court to "fill in the blanks" of an inadequate record. Once a prima facie case of racially motivated challenge has been made, the proponent of that challenge has but one chance to make her race neutral explanation. Both this Court, and the Supreme Court of the United States have made it crystal clear that there will be no second bites of the apple, either by the trial court, the reviewing court, or the attorney general in their briefings. If the prosecutor is going to rely on answer of a panelist to provide a genuine race-neutral reason for the peremptory challenge, that answer must either directly evidence that reason or work to create a *clear inference* as to its genuineness.

However, the primary responsibility for assuring the integrity of the jury system lies with the courts. (*People v. Gutierrez, supra,* 2 Cal.5th at p. 1175.) Therefore, "when the prosecutor's reasons are unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (*Id.* at p. 1171, citation omitted.) The trial court must make a record as to why it believed the prosecutor's reason to be a genuine race neutral reason and further must assure itself that these reasons are "borne out by the record." (*Id.* at p. 1172.) Further, if the trial court does believes that the prosecutor's race-neuteral justification is clear, it has the responsibility of demanding a further inquiry of the panelist. (*Ibid*.)

This Court then summed up the importance of the making of an adequate record.

> Though we exercise great restraint in reviewing a prosecutor's explanations and typically afford deference to a trial court's *Batson/Wheeler* rulings, we can only perform a meaningful review when the record contains evidence of solid value. Providing an adequate record may prove onerous, particularly when

> jury selection extends over several days and involves a significant number of potential jurors. It can be difficult to keep all the panelists and their responses straight. Nevertheless, the obligation to avoid discrimination in jury selection is a pivotal one. It is the duty of courts and counsel to ensure the record is both accurate and adequately developed.

(*People v. Gutierrez, supra,* 2 Cal.5th at p. 1172.)

4. Comparative Juror Analysis.

The next clarification to *Batson* law touched upon by this Court was the use of comparative juror analysis to ascertain the genuineness of the prosecutor's proffered race neutral explanations. (*Gutierrez, supra,* 2 Cal.5th at p. 1173.) The concept of comparative juror analysis and its application to the ultimate issue of subjective genuineness was discussed by the United States Supreme Court in *Miller-El II.* "When a court undertakes comparative juror analysis, it engages in a comparison between, on the one hand, a challenged panelist, and on the other hand, similarly situated but unchallenged panelists who are not members of the challenged panelist's protected group." (*Ibid.*; *See Miller-El II, supra*, 545 U.S. at p. 241.)

As further stated in *Gutierrez*, "The high court has held that comparative analysis may be probative of purposeful discrimination at *Batson*'s third stage." (*Gutierrez, supra,* 2 Cal.5th at p. 1173; see *Miller-El II, supra*, 545 U.S. at p. 241.) "The individuals compared need not be identical in every respect aside from ethnicity: A per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." (*Gutierrez, supra,* 2 Cal.5th at p. 1173; see *Miller-El II, supra,* 545 U.S. at p. 247.)

The *Gutierrez* court cited to the legally flawed decision of the Court of Appeal in that case to clarify the correct use of comparative juror analysis.

> On direct appeal, defendants urged the Court of Appeal to engage in comparative juror analysis. The court declined, stating that "[w]e do not engage in a comparative analysis of various juror responses to evaluate the good faith of the prosecutor's stated reasons for excusing a particular juror 'because comparative analysis of jurors unrealistically ignores "the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar.

(*People v. Gutierrez, supra,* 2 Cal.5th at pp. 1173-1174.)

This Court rejected such an analysis, holding:

> By avoiding comparative juror analysis in this context, the Court of Appeal went against the grain of established holdings from both our court and the high court, which recognize comparisons between panelists who are challenged and those who are not to be valuable tools in determining the credibility of explanations.

(*Gutierrez, supra,* 2 Cal.5th at p. 1174; see, e.g., *People v Lenix* (2008) 44 Cal.4th 602, 622.)

By so stating, *Gutierrez* reaffirmed the powerfulness of comparative juror analysis as a tool to determine plausibility of the race neutral reason. (*Snyder v. Louisiana* (2008) 552 U.S. 472, 483.) Simply put, if the prosecutor claims a race neutral reason that the challenge of a panelist who is the subject of a *Batson* motion that reason should apply with equal force to other panelists that have been accepted by the prosecution. (*Gutierrez, supra,* 2 Cal.5th at p. 1174.) In doing so, the *Gutierrez* court specifically overruled that part of its holding in *People v. Johnson* (1989) 47 Cal.3d 1194, 1220 which "suggested that comparative analysis performed by a

reviewing court is disfavored as impractical and insufficiently deferential to the trial court." (*Ibid.*) As part of its clarification of the current state of *Batson* law, the *Gutierrez* court rejected this concept, stating:

> Our subsequent decisions have superseded *Johnson* in this respect. What we held in *Lenix* is 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 defendant and the record is adequate to permit the urged comparisons. [Citation omitted] We are mindful that comparative analysis is subject to inherent limitations, especially when performed for the first time on appeal. But it was error for the Court of Appeal to categorically conclude that a court should not undertake a comparative analysis for the first time on appeal—regardless of the adequacy of the record. ...We overrule *People v. Johnson* (1989) 47 Cal.3d 1194, 255 Cal.Rptr. 569, 767 P.2d 1047 to the extent it is inconsistent with this opinion.

(*People v. Gutierrez, supra,* 2 Cal.5th at pp. 1174-1175.)

C. PERTINENT PARTS OF *FOSTER V. CHATMAN*.

There are two facets of the High Court's decision in *Foster v. Chatman, supra,* 136 S.Ct. 1737 that deserve special consideration in this case. First, is the strong emphasis on the "totality of circumstances test. "We have made clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." (*Foster v. Chatman, supra,* 136 S.Ct. at p. 1738, citing to *Snyder v. Louisiana, supra,* 552 U.S. at p. 478.)

Secondly, the *Foster* court made clear to what extent racially motivation needed to be a consideration in the prosecutor's decision to strike. In doing so, the High Court relied on its decisions in other types of cases dealing with discriminatory motives. "As we have said in related

context, determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial evidence of intent as may be available." (*Foster v. Chatman, supra,* 136 S.Ct. at p. 1748, citing to *Arlington Heights v. Metropolitan Housing* (1977) 429 U.S. 252, 266.)

Arlington Heights discussed the meaning of the term "motivating factor":

> [*Washington v.*] *Davis*[1] does not require a plaintiff to prove that the challenged actions rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision based upon a single concern, *or even that a particular purpose was the* '*dominant*' *or even* '*primary*' *one.* [See fn 11.] In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is not longer justified.

(*Arlington Heights, supra,* at pp. 265-266.)

D. APPLICATION OF *GUTIERREZ* AND *FOSTER* TO THE FACTS OF THE INSTANT CASE.

Appellant's briefings in this case fully discuss all of the above cited recent clarifications in the law cited in both *Gutierrez* and *Foster*. The reasons for the challenge of *all* the black male panelists were always

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[1] *Washington v. Davis* (1976) 426 U.S. 229 was an earlier case that discussed the state of mind necessary to show discriminatory purpose.

pretextual, and at times utterly fantastical. The prosecutor consistently misrepresented their stated views, twisted their words, and, in regard to Mr. Cook, actually baited the panelist into a verbal altercation to create a "personality conflict." Throughout the voir dire she focused on certain aspects of these panelists' answers to the point of obsession, yet completely ignored these lines of inquiry when it came to white sitting jurors. Comparative juror analysis revealed that many of the attitudes cited to justify the excusal of these four men were perfectly acceptable in many of the white sitting jurors.

The trial court also failed to conduct a reasoned and sincere inquiry as to the reasons given by the prosecutor, instead relying on a record that failed in any way to justify these four challenged. The trial court made no attempt to expand upon this record to truly discern the prosecutor's motives. Instead, it simply agreed that the prosecutor was "right."

The record so created was not entitled to deference. The totality of circumstances clearly demonstrate that race was a motivating factor in all four challenges. The judgment must be reversed.

* * * * * *

CONCLUSION

For the reasons stated above and in Appellant's Opening Brief and Second Supplemental Brief, appellant requests that this Court reverse the judgment against him.

Dated: November 13, 2017

Respectfully submitted,

/s/ *Glen Niemy*
GLEN NIEMY

Attorney for Appellant
JAMELLE EDWARD ARMSTRONG

CERTIFICATION OF WORD COUNT

I hereby certify that Appellant's Third Supplemental Brief was composed in a 13 point font, Times New Roman Type and consists of a total of 2,756 words.

I declare under the penalty of perjury that the foregoing is true and correct, and that this certificate was executed on November 13, 2017, at Salem, Massachusetts.

/s/ *Glen Niemy*
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PEOPLE v. JAMELLE EDWARD ARMSTRONG
Automatic Appeal No. S126560
Los Angeles County Superior Court No. NA051938-01

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I, GLEN NEAMY, declare that I am over the age of 18 years and not a party to the within action. My business address is 257 Washington St., Unit 6, Salem, Massachusetts 01970. My electronic service address is gniemy@yahoo.com.

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