In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

RAMIRO ENRIQUEZ, et al.

Defendant and Appellant.

Case No. S224724

Appellate District Fifth, Case No. F065288
Kern County Superior Court, Case No. BF137853B
The Honorable Michael E. Dellostritto, Judge

PEOPLE'S ANSWERING BRIEF ON THE MERITS

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QUESTION PRESENTED

Did the Court of Appeal err in upholding the trial court's denial of appellants' *Batson/Wheeler* motions?

INTRODUCTION

In this gang-related, attempted murder case, the prosecutor exercised 10 peremptory challenges against Hispanic jurors out of a total of 16 total peremptory challenges used during the course of the week-long voir dire. Following the prosecutor's tenth challenge against a Hispanic juror, which left two Hispanic jurors in the jury box, defense counsel for all three defendants objected on *Batson/Wheeler* grounds. (*Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).) After the trial court found a prima facie case of discrimination based largely on the percentage of Hispanic jurors challenged, the prosecutor reviewed his notes and offered detailed reasons for excusing each of the Hispanic jurors. The trial court analyzed the prosecutor's stated reasons for excluding the jurors at issue, engaging in some comparative juror analysis, and found the prosecutor's reasons to be credible. It denied the defendants' *Batson/Wheeler* motion. The Court of Appeal affirmed the trial court's denial of the *Batson/Wheeler* motion. This Court granted review.

BACKGROUND

A. Procedural History

The Kern County District Attorney filed a consolidated information charging appellants Ramiro Enriquez, Rene Gutierrez, Jr., and Gabriel Ramos with attempted murder, assault with a firearm, and active

participation in a criminal street gang, along with firearm and gang enhancements. (1 ECT 207-225; 1 GCT 142-160; 2 RCT 430-448.)[1]

On June 6, 2012, a jury found Enriquez and Gutierrez guilty on all counts and found the special allegations to be true. (2 ECT 364, 443-450; 1 GCT 282.) Ramos was found guilty only of active participation in a criminal street gang, and ultimately pled no contest to making criminal threats and admitted prior conviction allegations. (2 RCT 584; 3 RCT 664-679.) Following a bifurcated court trial, the court found the prior strike conviction allegations to be true as to Enriquez and Gutierrez. (2 ECT 451-452; 1 GCT 408-409.)

On July 6, 2012, Enriquez was sentenced to state prison for 14 years to life, plus 25 years. (2 ECT 466-467.) On October 4, 2012, Gutierrez was sentenced to state prison for 30 years to life plus 27 years. (2 GCT 458-461.) On July 20, 2012, Ramos was sentenced to state prison for five years. (3 RCT 688-689.) Appellants appealed from the judgments. (2 ECT 461; 2 GCT 462; 3 RCT 693.)

Appellants challenged their convictions on appeal alleging the trial court erred in denying their joint *Batson/Wheeler* motion. The Court of Appeal concluded substantial evidence supported the trial court's ruling and upheld the trial court's denial of the *Batson/Wheeler* motion.

This Court granted review deferred briefing 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. The Court then ordered briefing on

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[1] Citations to the Clerk's Transcripts are differentiated by the first letter of each of the appellants' last names. Thus, the Clerk's Transcript for Enriquez is denoted as "ECT," the Clerk's Transcript for Gutierrez is denoted as "GCT," and the Clerk's Transcript for Ramos is denoted as "RCT."

the following issue: Did the Court of Appeal err in upholding the trial court's denial of defendants' *Batson/Wheeler* motions?

B. Factual Summary

Because the issues before the Court concern a pre-trial *Batson/Wheeler* motion, respondent includes only a summary of the facts of the underlying crimes.

Following an argument with some men near the Western Knights Motel in Bakersfield shortly after midnight on July 30, 2011, Clarence Langston, a prior gang member, left the hotel parking lot on his bicycle. (Slip Opinion at pp. 2-4.) Ramos, one of the men at the motel, had instructed his comrades to get a gun. (*Id.* at p. 5.) Enriquez, Gutierrez, and Gabriel Trevino, all Sureño gang members, then pursued Langston in an SUV. (*Id.* at pp. 3-4.) The SUV pulled up next to Langston. (*Ibid.*) Gutierrez jumped out of the vehicle and fired a shotgun three times at Langston as he fled on foot into a nearby backyard. (*Ibid.*) Langston was hit several times but survived. (*Ibid.*) At trial, Trevino, a long-time Sureño gang member with the Varrio Wasco Rifas subset of Sureños, testified regarding the shooting. (*Id.* at p. 6.) Trevino also testified extensively regarding the Sureño criminal street gang, its subsets, and its activities. (*Ibid.*)

THE JOINT *BATSON/WHEELER* MOTION[2]

A. Prima Facie Finding

In determining whether there was a prima facie case of discrimination, the trial court stated that out of 16 peremptory challenges exercised by the

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[2] Respondent includes here a detailed summary of the relevant facts pertaining to the trial court's ruling on the joint *Batson/Wheeler* motion. This summary, with additional facts noted in subsequent arguments as necessary, applies to all arguments.

prosecutor, 10 were individuals who either have Hispanic last names or appeared to be Hispanic. (5 ART 1051.) The court included in the 10 Ms. 2647624 but recognized that it "[is] not in a position to say whether she's Hispanic or not." (5 ART 1052.) The court stated that a high percentage of peremptory challenges, either 9 out of 16 or 10 out of 16 challenges, were made towards Hispanic jurors. (*Ibid.*) It pointed out that during jury selection the prosecutor made four consecutive challenges to potential jurors who were Hispanic. (*Ibid.*) Furthermore, the court stated:

> Additionally, in the course of excusing the jurors, at one point in time, there were four consecutive challenges made to Hispanic jurors by the People. [The prosecutor] I think has passed or passed as to or accepted the panel on more than one occasion with Hispanic jurors still seated on - - I know, for example, he passed currently with Ms. 2478882 still being seated or he accepted the panel before with Ms. 2723471 being seated. However, he ultimately did excuse Ms. 2723471, at least the record does reflect he did pass the panel with Hispanic jurors still remaining in the box at that time, in particular, Ms. 2723471 and Ms. 2478882 now seated in Seat No. 10, at least that's based on my determination of looking at my records as to what's taking place, so he has passed.
>
> I don't think the questioning of the Hispanic jurors has been disproportionate to the questioning of the other jurors by [the prosecutor] in that he's asked all the jurors the same questions. I don't think he's focused on the Hispanic jurors in terms of his questioning in this particular case, so based on the totality of the circumstances and those are the reasons I have just indicated, I do find there has been a prima facie case established in this particular incident, so I'm going to ask at this time for [the prosecutor] to justify the challenges that he's made to the Hispanic jurors in this case. . . .

(5 ART 1052-1053.) Based on the totality of the circumstances, the court found a prima facie case had been established.[3]

(5 ART 1051-1053.)

B. Information on Challenged Jurors and the Prosecutor's Stated Reasons

1. Ms. 2632053

Ms. 2632053 had three children. (4 ART 941.) She was a supervisor in a call center of a cell phone company. (*Ibid.*) Her significant other worked in automotive. (*Ibid.*) Ms. 2632053 had no prior jury experience. (4 ART 941-942.) She lived in the southwest. (*Ibid.*) She had no friends in law enforcement and had not been the victim of a crime. (4 ART 942.)

From ages 13 to 19, this juror was exposed to gangs while living in Idaho. (4 ART 942; 5 ART 1017.) She participated in gang activity herself at the age of 15. (5 ART 1020.) She knew that the activities of gangs included drugs, shootings, and assaults. (5 ART 1020-1021.) She knew about issues such as gang territory, disrespect, looking at people wrong, and fighting. (5 ART 1021.) Her daughter's father, who was a Sureño gang member, was found guilty of being an accessory to murder as a result of a drive-by shooting that was gang-related. (5 ART 1018, 1020.) He went to prison for the crime, and she felt he had been treated fairly by the system. (4 ART 942, 1023.) The person who was murdered in that case was a friend of Ms. 2632053. (5 ART 1022.) Ms. 2632053 also had three close friends who had been murdered by rival gang members. (4 ART 942; 5 ART 1015-1016, 1018.) One of the victims had been shot by her ex-boyfriend who had been charged with the murder. (5 ART 1018, 1022.) In

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[3] Ramos argues that 10 of 11 Hispanics were removed from the jury. (ROB 57.) However, Ms. 2478882 was a Hispanic and Ms. 2632943 was also Hispanic, and both were sitting on the jury at the time of the *Batson/Wheeler* motion. (5 ART 1048, 1052-1053.)

another murder, the victim had died in her brother's arms. (*Ibid.*) All of these incidents had occurred in Idaho. (5 ART 1019.) She had moved from Idaho to get away from the gang life after she had a child. (*Ibid.*) Ms. 2632053 indicated that she had changed her life and gotten away from gangs. (5 ART 1019-1020.)

In addition, Ms. 2632053 has a brother who was a member of the Eastside Locos. (5 ART 1020.) He had been arrested and charged with multiple gang violations including distributing firearms for gang members, intimidating a witness, and recruiting gang members. (5 ART 1017.) This occurred after she had moved from Idaho. (*Ibid.*) Her brother had been able to change his life and get away from gangs. (5 ART 1019.) She felt he had been treated fairly by the system. (5 ART 1023.)

Ms. 2632053 did not think that she was an expert in gangs because not all gangs are the same. (5 ART 1023-1024.) She did not claim to have special knowledge. (5 ART 1024.) She denied being afraid of gang issues and agreed that she would be able to put aside all of her life experiences and judge the facts of the case based on the law given to her. (5 ART 1025.) She believed she could be open and fair. (5 ART 1019, 1025-1026.)

When asked to explain his reasons for challenging this juror, the prosecutor explained that Ms. 2632053 has a brother who had been involved in a criminal street gang and the father of one of her children was also involved in a criminal street gang. (5 ART 1054.) Both of these men did time for convictions, the father of one of her children having been found to be an accessory to a murder. (*Ibid.*) The brother had been convicted of procuring weapons for a gang. (*Ibid.*) Ms. 2632053 had been immersed in street gangs from the time she was 13 years old until she was 19 years old. (*Ibid.*) The prosecutor commented that, although this juror

stated she was trying to change her life, her prior gang exposure cast a heavy shadow over her life experiences. (*Ibid.*)

2. Ms. 2732073

Ms. 2732073 was married with three adult children, and her husband, who is permanently disabled, had been a gang member in Los Angeles. (4 ART 905, 919.) She has been with her husband since she was 12 years old. (4 ART 906.) They grew up in the projects. (*Ibid.*) She had not been streetwise when she first moved into the projects but learned to be streetwise from her husband. (4 ART 906, 925.) He has always been affiliated with a gang. (*Ibid.*) Once he became mad because she had worn a red ribbon to his school. (4 ART 926.) She understood sayings like, "if you do the crime, you do the time." (4 ART 925-926.) Her husband had been arrested and had been in and out of jail since he was 13 years old. (4 ART 906.) He had been to jail for drug offenses and spousal abuse. (*Ibid.*) The last time he had been in jail was in 1987. (*Ibid.*) She felt that her husband had been treated fairly by law enforcement. (4 ART 906-907.)

Ms. 2732073's father was also a gang member, and she met her husband through her father. (4 ART 905, 925.) She agreed that she had a lot of experience and exposure to gangs. (4 ART 926.) She denied that the gang allegations in this case would be an issue for her. (4 ART 905.) She had been the victim of crimes when she had cars stolen but believed the police had handled it "okay." (4 ART 906.)

She had once been an alternate on a jury. (4 ART 905.) Ms. 2732073 believed that the burden of proof for the prosecution was "beyond a shadow of a doubt." (4 ART 926.) She believed this was the same thing as the burden of proving the case beyond a reasonable doubt. (4 ART 926-927.)

The prosecutor explained that Ms. 2732073 had been with her husband since she was 12 years old. (5 ART 1055.) She freely admitted that her husband had been an active member of a gang for quite some time

and that he had done time in jail. (*Ibid.*) This juror stated that her husband had taught her everything she knows about the streets. (*Ibid.*) The prosecutor challenged this potential juror for those reasons, stating that this was probably not the right type of case for this juror to sit on. (*Ibid.*) The prosecutor also pointed out that this juror did not have a Hispanic last name. (5 ART 1058.)

3. Ms. 2408196

Ms. 2408196 lived in Wasco and was a case records technician for the Wasco State Prison. (4 ART 812.) As such, she had some insight into the inmates and their past histories. (4 ART 858.) She previously had participated in hearings for life prisoners who had committed murder. (4 ART 867.) As part of her job she has attended a class once a year that involved prison gangs. (4 ART 813-814.) She was married to a juvenile correctional officer. (4 ART 812.) She also knew other correctional officers who worked in the prison. (*Ibid.*) She had a cousin who had been a public defender and with whom she was in touch monthly. (4 ART 817, 865-866.)

She has an uncle who was a gang member. (4 ART 813, 864.) He had been in and out of prison and was eventually deported. (8 ART 816.) She had not talked to him about his crimes or about his experiences. (8 ART 865.) She was not close with him because he has always been locked up. (*Ibid.*)

Ms. 2408196 had a cousin who had been brutally murdered in Kern County, and she was very happy with how law enforcement handled the case. (4 ART 814-815.) There was nothing about that experience that would make her hesitate to participate as a juror in this trial. (8 ART 866-867.) About two years prior, Ms. 2408196's house had been burglarized, and she did not think that law enforcement had handled the matter appropriately. (4 ART 815.) Law enforcement did not take fingerprints

and were "kind of in and out." (*Ibid.*) The officers had merely taken a list from her, and she never heard from the officers again. (*Ibid.*) She thought they should have tried to get fingerprints. (4 ART 816.) She felt like the officers had not done everything that they could have done under the circumstances. (4 ART 856-857.) Hers had been the ninth burglary on her street, and perhaps the officers thought the same person had been committing the burglaries. (*Ibid.*)

Ms. 2408196 did not have any prior jury experience. (4 ART 812.) She could decide the facts in this case and follow the law as given to her by the judge. (4 ART 867-868.) She could vote guilty if the People proved every element beyond a reasonable doubt. (4 ART 868.) She thought she would not have any difficulty being a fair juror and judging all the witnesses by the same standards. (4 ART 816, 851.) She did not have any negative feelings with regard to law enforcement. (4 ART 857.)

Although she lived in Wasco her entire life, Ms. 2408196 was not aware of any gang activity there. (4 ART 864.) She saw gang graffiti when she was younger but less so at the time of trial. (*Ibid.*) She could not say that she knew it was gang-related. (*Ibid.*)

The prosecutor stated that Ms. 2408196 had an uncle who had been in a criminal street gang. (5 ART 1056.) This prospective juror lived in Wasco yet was unaware that any gang activity was occurring in Wasco. (*Ibid.*) He pointed out that this was important because Trevino was going to testify under an immunity agreement that he was a Sureno gang member and a member of the Varrio Wasco Rifas, a subset of Surenos, in Wasco. (*Ibid.*) Ms. 2408196 was unaware of any gang activity in Wasco, and the prosecutor thought that Trevino's testimony would cause a moment of pause for her. (*Ibid.*) Additionally, Ms. 2408196 had a cousin who had been murdered in 2004. (*Ibid.*) For those reasons the prosecutor exercised a peremptory challenge as to Ms. 2408196. (*Ibid.*)

4. Ms. 2510083

Ms. 2510083 was an instructional aide for fourth graders. (4 ART 868.) She had previously worked in customer service for a phone company. (4 ART 869.) She informed the court that she had a hardship. (2 ART 388-389.) She had only two more weeks of school and then she would be out of work. (*Ibid.*) She had lined up an interview on Monday, but had missed it and had another one on the upcoming Friday at 10:30 a.m. (*Ibid.*) She agreed to try to reschedule it. (*Ibid.*) She later reported that she had been able to reschedule it, and the court indicated it would make arrangements so that she could keep that appointment. (3 ART 603-604.)

This potential juror was not married and had no children. (4 ART 818.) She had no jury experience. (*Ibid.*) She had a cousin who is in the California Highway Patrol and another cousin who worked for the highway patrol in Arizona. (*Ibid.*) Another cousin was a paralegal for a workers' compensation attorney in Kern County. (4 ART 818-819.) She agreed that everybody makes mistakes sometimes, even police officers. (4 ART 850.)

The prosecutor exercised a peremptory challenge as to Ms. 2510083 because he was concerned about her limited life experience, just like the questions he directed to Mr. 2868617 and Ms. 2478882. (5 ART 1057.) This juror was an instructional aid at an elementary school and had no jury experience. (*Ibid.*) She came across as being quite young. (*Ibid.*) The prosecutor stated that, although her youth was not a reason for exclusion, he thought that there was a lack of sophistication in some of her answers. (*Ibid.*) Additionally, Ms. 2510083 had asked to be released due to a hardship. (*Ibid.*) Moreover, Ms. 2510083 had relatives in law enforcement as well as a cousin who was a paralegal. (*Ibid.*) Thus, although she had some idea of the nature and the purpose of the proceedings, the prosecutor felt that this juror did not have the life experience necessary to consider

some of the charges. (*Ibid.*) The prosecutor pointed out that, other than this juror's name, she did not appear to be Hispanic. (5 ART 1058.)

5. Ms. 2647624[4]

Ms. 2647624 was a widow with four adult children. (4 ART 770.) She worked for the Kern County High School District food services and lived in southeast Bakersfield. (*Ibid.*) She had never served on a jury before and did not know any lawyers. (*Ibid.*)

Her daughter's car had been stolen about three months prior, and someone had been apprehended. (4 ART 770.) Instead of calling her daughter when officers found the car, they had it towed which caused her daughter to incur storage and towing fees. (4 ART 771.)

Ms. 2647624 has a nephew serving a life sentence for gang-related attempted murder. (4 ART 771.) A different nephew had been sentenced to seven years in prison for a gang-related murder. (*Ibid.*) The cases involved separate incidents, but both occurred in Kern County. (4 ART

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[4] The court stated for the record that, at a sidebar, the parties had discussed Ms. 2647624. (4 ART 807-808.) The court stated,

> [Gutierrez's counsel] thought that he recognized her as being a possible witness in a case involving her daughter, and that information was not revealed. There was follow-up questions by [Ramos's counsel] to try to see if that would again - - to ask that question specifically. She again did not volunteer any information. Consequently, she was not excused, because we have no evidence before the Court that leads us to believe at that time that she was not giving us some information.
>
> And then we had a second side bar conference relative to challenges for cause. Both [Gutierrez's counsel]and the [prosecutor] challenged Ms. 2647624 , and I denied the challenge at that time. . . .

(4 ART 808.)

771-772.) She made a point about the difference in sentence between the two cases, stating that the one nephew received a seven-year sentence for committing murder and the other got 25 to life for attempted murder. (4 ART 772.) She stated that this did not bother her, however. (*Ibid.*) She had been close to these nephews at one time. (4 ART 772-773.) They were the same age as Ms. 2647624's daughter and had grown up with her. (4 ART 797.) The boys had visited Ms. 2647624's house. (*Ibid.*) She also had nieces who had sons who were currently involved in gang activity in Kern County. (4 ART 773-774, 798-799.) She was not bothered by tattoos. (4 ART 784-785.)

Ms. 2647624 did not feel like this was the jury trial for her because the case involved guns and she did not like guns. (4 ART 799-800.) She did not even like seeing guns. (*Ibid.*) It also bothered her that this was a gang case. (4 ART 800.) When asked how the case bothered her, she stated, "Knowing that I have family that is also involved in gangs and all that, and I see it here. I really don't associate with the family that's involved, but to not have to see it here, it's something else. It's different." (*Ibid.*) Although she had been impacted by gang activity, she believed that she could be a fair juror and make a fair decision in the case. (4 ART 799-800.) She just felt uncomfortable. (4 ART 801.)

For this prospective juror, the court stated that it was unclear whether she was Hispanic or not. (5 ART 1057-1058.) The juror had a Hispanic last name, but it could not be determined whether she was actually Hispanic. (*Ibid.*) The prosecutor pointed out that Ms. 2647624 had white skin and red hair and that she did not appear to be Hispanic. (5 ART 1050, 1058.) With regard to exercising a peremptory challenge against this potential juror, the prosecutor stated that she had a nephew serving a life sentence and another nephew who had served seven years in prison. (5 ART 1058.) She had relatives, her niece's sons, who were in gangs. (*Ibid.*)

The prosecutor was skeptical of Ms. 2647624's answers that her exposure to criminals within her family would in fact leave her unbiased. (*Ibid.*)

6. Ms. 2723471

Ms. 2723471 was a divorced teacher with no children. (3 ART 720.) She had no prior jury experience. (*Ibid.*) Her ex-husband was a correctional officer, and she had a few relatives who worked in corrections also. (*Ibid.*) Neither she nor anyone close to her had been affected by gang activity either directly or indirectly. (*Ibid.*) She had not been the victim of a crime. (3 ART 721.) Her uncle was a CHP officer. (*Ibid.*) She could not think of anything that might lead her to believe she would not be a fair juror in the case. (3 ART 721-722.) She was not aware of any gangs that were active in the Wasco area although she lived in Wasco. (3 ART 720, 731.)

The prosecutor stated that Ms. 2723471 was similar to Ms. 2510083 or Ms. 2408196, although he may have gotten that wrong. (5 ART 1058.) The prosecutor had a hard time determining whether to use a peremptory challenge on this juror. The prosecutor passed on this juror several times. (*Ibid.*) Like one of the other jurors, Ms. 2723471 was from Wasco and was not aware of any gang activity going on in Wasco. (5 ART 1058-1059.) The prosecutor was unsatisfied by some of her other answers as to how she would respond when she heard testimony that Trevino is a gang member, part of a subset of Sureños out of Wasco. (5 ART 1059.)

7. Mr. 2291529

Mr. 2291529 was an unmarried mechanic with one 25-year-old child. (3 ART 534.) He had no prior jury experience. (*Ibid.*) Mr. 2291529 did not believe that he had been impacted by criminal street gangs. (3 ART 535.) His brother had been killed 20 years before at a bar. (*Ibid.*) His brother just happened to be at the bar and the murderer had been going after someone else. (*Ibid.*) A suspect had been arrested. (*Ibid.*) He did not

follow up to see what had happened to the suspect and did not know whether the investigation into his brother's death was handled appropriately. (3 ART 535-536.)

Mr. 2291529 described being stopped two years prior by multiple officers for his vehicle registration and stated that "it just got out of hand." (3 ART 536.) At first there were two officers, and they had called for backup which resulted in six officers on scene. (3 ART 536-537.) The officers had searched his vehicle but ended up giving him a ticket for having no registration. (*Ibid.*) The officers had never explained why they searched the vehicle. (*Ibid.*) He was not happy about the officers keeping him there and searching his vehicle. (*Ibid.*) If the officers had explained why they had searched his truck, Mr. 2291529 may have felt differently. (3 ART 537.) However, the experience did not cause him to have any ill will towards law enforcement. (3 ART 567.) He would not discredit law enforcement based on his experience or treat their testimony differently than the testimony of a civilian. (*Ibid.*)

This potential juror felt that he could judge all the witnesses by the same standards and did not think there was anything that would make him unable to be a fair juror in the case. (3 ART 538.) He agreed that both sides deserved a fair trial. (3 ART 566.) He agreed that the best way to achieve a fair trial is to follow the judge's instructions and not make a decision until all the evidence is presented. (*Ibid.*)

This potential juror was also a close call for the prosecutor. (5 ART 1059.) Mr. 2291529 had a brother who was killed in a bar fight. (*Ibid.*) The potential juror did not seem very affected by the death of his brother. (*Ibid.*) He also had bad experiences with law enforcement and appeared to be more affected by the law enforcement encounters than his brother's death. (*Ibid.*) This seemed disproportionate to the prosecutor and caused

him to exercise a peremptory challenge as to Mr. 2291529. (5 ART 1059-1060.)

8. Ms. 2547226

Ms. 2547226 was a service coordinator for the mentally disabled, had two minor children, and was married to a truck driver. (2 ART 462.) She lived in the southwest. (*Ibid.*) She spoke to the court about a potential economic hardship. (*Ibid.*) She wanted to make sure the trial would not run longer than the period of time for which her employer would pay her. (2 ART 463-464.) The court let her know that the trial would conclude before the expiration of jury duty credit given by her employer. (2 ART 463.)

She had no prior jury experience. (2 ART 462.) She once was selected to be on a jury, but the defendant ended up taking a plea. (2 ART 439.) When told that the job of the jurors is to listen to the evidence and evaluate it after hearing the law and to discuss with other jurors the facts before making a decision on what to believe, she was asked whether she thought she would have any issue with doing that in a fair and impartial manner. (*Ibid.*) Ms. 2547226 responded, "No." (*Ibid.*)

Ms. 2547226 understood that there were 12 people on a jury. (3 ART 490.) She understood that the jury deliberated after all the evidence was presented. (*Ibid.*) When asked if she knew how many of the jurors had to agree for there to be a verdict, Ms. 2547226 stated that she did not know. (3 ART 491.) She understood her duty to listen and talk to other jurors and her responsibility to vote. (*Ibid.*) She stated she would be able to participate in deliberations and listen to other jurors in speaking her own mind. (*Ibid.*) When asked if she had a problem speaking her mind and listening to others at the same time, this potential juror stated that she thought she was better at listening than at speaking her mind. (3 ART 492.) She understood that the vote was hers, however. (*Ibid.*) When asked if she

would have any problem letting other people on the panel know that she did not agree with them and explaining why, she responded, "I don't think so." (*Ibid.*)

In explaining his reasons for excusing this prospective juror, the prosecutor stated he had questioned Ms. 2547226 about the 12 votes of a jury, each of which is independent of the others. (5 ART 1062.) He was concerned whether this juror would be able to take on the task of a juror and stand her own ground when she believed she was right while also listening to other people. (*Ibid.*) The prosecutor was concerned about her articulation of that role and that Ms. 2547226 might not be able to fulfill her role as a juror. (*Ibid.*) He was concerned about her understanding of the role of a juror and her ability to be heard during deliberations if she felt strongly about something. (*Ibid.*)

9. Ms. 2468219

Ms. 2468219 was married with two children. (2 ART 460-461.) She had served twice before on a jury. (*Ibid.*) One case was criminal and resulted in a hung jury. (*Ibid.*) The other case was civil, and the jury had reached a verdict. (*Ibid.*) She lived in southwest Bakersfield. (2 ART 460.)

Ms. 2468219 reported that her mother lives in a rough neighborhood where there is criminal street gang activity. (2 ART 300.) Her mother lived on a property bought by Ms. 2468219's grandparents about 30 or 40 years prior. (*Ibid.*) Ms. 2468219 lived in the house with her mother for a couple of years when she was in her late teens. (*Ibid.*) She still went back to visit her mother. (*Ibid.*) She knew from the news that there were shootings in the area although she stated she had not personally seen anything that she thought was gang-related. (2 ART 301.) Her brother had been in trouble from time to time with law enforcement and, at the time of this trial, had a pending matter. (2 ART 327.) He had failed to turn himself

into the Kern County authorities for a probation violation for failing to fulfill a requirement to spend one year in mental health program. (*Ibid.*)

Ms. 2468219 did not feel that, if someone had a tattoo, that would be considered bad or making poor choices. (3 ART 501-502.) Sometimes tattoos are just for fun. (3 ART 502.) However, sometimes people get tattoos that have a great deal of meaning. (*Ibid.*)

When asked to reveal his reasons for excusing Ms. 2468219, the prosecutor explained that she had lived in an area where there is a lot of gang activity although she had not specifically seen any. (5 ART 1061.) Her brother had been accused of wrongdoing. (*Ibid.*) This was also a close call for the prosecutor as Ms. 2468219 had relatives in law enforcement. (*Ibid.*) But this juror was also a member of a hung jury in a criminal case. (*Ibid.*) All of these facts led to the prosecutor exercising a peremptory challenge against Ms. 2468219. (*Ibid.*)

10. Mr. 2852410

Mr. 2852410's significant other was a correctional officer who worked for the probation department in juvenile hall. (2 ART 454-455.) She saw to the daily needs of the juveniles. (*Ibid.*) Mr. 2852410 had an uncle in the sheriff's department, a step-cousin who was a sheriff's deputy, and a few friends who were in the Bakersfield Police Department (BPD). (2 ART 432.) He had regular social contact with all of these people. (*Ibid.*) He saw the BPD officers about two or three times a month. (*Ibid.*) It is possible that Mr. 2852410 would have contact with these police officers during the course of the trial. (*Ibid.*) He stated that even though he had friends in law enforcement, he thought he would be able to judge all of the witnesses by the same standards. (2 ART 432-433.)

Mr. 2852410 had a prior bad experience with law enforcement. (2 ART 433, 481; 3 ART 494.) About four years prior, BPD had pulled him over because his truck had matched the description of a stolen vehicle.

(*Ibid.*) He had been removed from his truck and placed in the back of the patrol car while officers searched his truck. (*Ibid.*) They also had asked him for his driver's license and registration to ensure that he owned the vehicle. (*Ibid.*) He agreed that this had been an unpleasant experience. (*Ibid.*) He was mad at the officers for this incident. (3 ART 494.) While Mr. 2852410 could believe his friends who were police officers, he could not believe the two police officers who had pulled him over "for no reason." (*Ibid.*) The friends and family members of Mr. 2852410 who were in law enforcement would have more credibility for Mr. 2852410 than other witnesses. (3 ART 494-495.) To Mr. 2852410, the two officers who pulled him over were not trustworthy. (*Ibid.*) Mr. 2852410 stated that the experience would not impact his ability to judge law enforcement unless he recognized the officers. (2 ART 433.) He told counsel that, if he recognized one of the officers who had pulled him over, he would notify the attorney. (3 ART 434.) He would not have a problem weighing the credibility of officers generally, but the two officers who pulled him over were not credible. (3 ART 495.)

About two years earlier, Mr. 2852410 had been eating lunch in the same building with a couple of BPD officers. (2 ART 317.) Afterwards, Mr. 2852410 had gone outside and discovered his truck had been broken into. (*Ibid.*) He told the police officers who had been eating next to him, and they had told him to call and make a report. (*Ibid.*) The officers had just driven away. (*Ibid.*) Mr. 2852410 called to report the incident. (*Ibid.*) However, an officer did not respond until six days later. (2 ART 316-317; 3 ART 493.) Mr. 2852410 was pretty mad about that. (2 ART 317-318; 3 ART 493.) No one was ever apprehended. (2 ART 316.) Mr. 2852410 had lost about $3,000 worth of goods from his truck, including computers and stereo equipment. (2 ART 318.) Nevertheless, he did not think that would impact his ability to be a fair juror. (*Ibid.*)

About four years earlier, his father's office had been burglarized. (2 ART 316.) No one had been apprehended in that case either. (2 ART 316-317.)

Mr. 2852410 stated that he did not think that, if someone was a "snitch," that would diminish their believability when testifying. (2 ART 470.) It was the job of a juror to decide the weight of the evidence even if a snitch was testifying. (*Ibid.*)

The prosecutor was concerned about this juror's two prior contacts with law enforcement. (5 ART 1061-1062.) In one incident in which he was a crime victim, he felt it took too long for BPD to get a report from him. (*Ibid.*) The juror felt "pretty mad about that." (5 ART 1062.) In another incident, Mr. 2852410 was the subject of a stop and search by BPD. The prosecutor felt that Mr. 2852410 was harboring resentment about how he was treated by law enforcement, and the prosecutor was afraid that this would affect how Mr. 2852410 considered the testimony from law enforcement in this case. (*Ibid.*)

C. The Trial Court's Denial of Appellants' Motion

The trial court denied appellants' motion, conducting comparative analysis in its ruling, as follows:

> 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 [] can stick 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 [the prosecutor] has been specific.
>
> And in terms of - - and consistent in terms of his excusing the jurors that do - - were involved and they were involved in it, or their relatives were involved in gang activity or grew up in areas where there was criminal activity, and that would include certainly Ms. 2632053, and there's no question about that. And

Ms. 2732073, Ms. 2647624, she's the one - - she has relatives that are [*sic*] led the gang life as well, so we - - he's been consistent in terms of people that have gang ties, so to speak, and that is relative to people that have been involved in gang activity and excusing those particular jurors.

I think it does go beyond what [Enriquez's counsel] is saying. It's not just a question whether they came into contact with a gang member. He's essentially excused jurors that have been [*sic*] themselves grown up in gang areas or certainly relatives that have been involved in criminal gang activities, so I think he's certainly consistent in terms of excusing those jurors for those reasons. With regards to a couple of the younger jurors that have been excused, that would be Ms. 2408196, and strike that, not Ms. 2408196. She is younger, but there was a different reason for Ms. 2408196 and Ms. 2723471 who did Mr. - - and I checked again, and Mr. Schlaerth did pass several times with Ms. 2723471 still on the panel and has passed several times with Ms. 2478882 on the panel.

I'm aware that there may be more possibly Hispanic jurors as well, but I know specifically with regards to those two. He has accepted the panel. With regards to - - as I indicated, I started to - - with regards to Ms. 2723471 and Ms. 2408196, first of all, Ms. 2408196's uncle was a gang member, and she does live in Wasco and did indicate as Mr. - - looking at my notes, she didn't believe there was any gang activity in Wasco.

And Ms. 2723471, I believe, according to Mr. Schlaerth was excused as a result of the Wasco issue and also lack of life experience. Another juror indicated he excused for the purposes of - - or excused as a result of primarily life experience, and I think it was Ms. 2510083, and both of those jurors are young. The only juror similarly situated that - - obviously, we still have - - we haven't finished the challenges, but Mr. 2861675 - - he has passed with Mr. 2861675 on the panel, and Mr. 2861675 is young. He's the only one that I find similarly situated perhaps to Ms. 2723471 and Ms. 2510083 in terms of perhaps having a lack of life experience, but there were other reasons as he gave to those jurors as well, not just the lack of life experience.

Mr. 2291529 indicated he had a bad experience with law enforcement, and I'm not sure - - any of the jurors that passed on have indicated law enforcement at least to the extent that Mr.

2291529 indicated he did. Mr. 2852410 had a bad experience with law enforcement and he was clearly upset about his contact with law enforcement as well, so I think Mr. Schlaerth has been consistent in terms of excusing jurors that have the same issues in terms of the information we received about that juror or members of their family.

Ms. 2732073, I left her out. Obviously, I did mention her - - her husband was heavily involved in gang activity as well, so I think Mr. Schlaerth has certainly addressed all of the 10 jurors that either he - - that he's challenged up to this perspective point are the subject of this particular motion. And as I indicated, but perhaps for Mr. 2861675 who I might consider him to be - - certainly he's not in that group. He's not Hispanic or doesn't appear to be. He may be on a similar level as something the two younger jurors, but there were additional reasons for the two younger jurors as well beyond simply the fact no lack of life experience, and I don't see jurors that he passed on that don't belong to the group that have any of the life experiences, gang ties, so to speak, to them or relatives - - relatives having been convicted of anything to do with gang crimes, bad experience with law enforcement that he has kept on the jury that are not Hispanic, so I really - - in looking at the totality of the circumstances and judging the reasons given by Mr. Schlaerth, I don't find his reasons to be a pretext in this particular case, and he does appear to be consistent.

As I indicated earlier, he's paid the same attention to all the jurors in terms of questioning whether they are Hispanic or not Hispanic, and he's asked appropriate questions to all the jurors, all in these particular areas trying to see if he could give some information, obviously, that he's interested in.

I do find that the reason that he has given are a group and neutral reasons [*sic*], therefore, I'm going to deny the motion at this time.

(5 ART 1070-1074.)

D. The Court of Appeal's Opinion

On appeal, Gutierrez asserted that the peremptory challenges as to three Hispanic potential jurors, Nos. 2547226, 2723471, and 2510083, were

improper. (Slip Opinion at p. 9.) Enriquez and Ramos contended that all the challenges to Hispanics potential jurors were racially motivated. (*Ibid.*) In an unpublished opinion, the Fifth District Court of Appeal disagreed and affirmed the trial court's denial of appellants' *Batson/Wheeler* claims. (*Id.* at pp. 9-15.) After acknowledging that the trial court found a prima facie case had been established, the Court of Appeal analyzed the prosecutor's reasons as to each of the challenged jurors. (*Ibid.*) It further stated as follows:

> Defendants wish us to engage in a comparative analysis regarding the prosecution's use, or failure to use, peremptory challenges on specific jurors. We do not engage in a comparative analysis of various juror responses to evaluate the good faith of the prosecutor's stated reasons for excusing a particular juror "because comparative analysis of jurors unrealistically ignores 'the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar.'" (*Fuentes*, *supra*, 54 Cal.3d at pp. 714-715, quoting *Johnson*, *supra*, 47 Cal.3d at pp. 1219, 1220.) "The purpose of peremptory challenges is to allow a party to exclude prospective jurors who the party believes may be consciously or unconsciously biased against him or her. [Citation.]" (*People v. Jackson* (1992) 10 Cal.App.4th 13, 17.)
>
> "We accord great deference to a trial court's determination of the sufficiency of a prosecutor's explanations for exercising peremptory challenges. [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 635, 666.) The focus of a *Batson/Wheeler* analysis is on the subjective genuineness of the reason, not the objective reasonableness. (*People v. Reynoso* (2003) 31 Cal.4th 903, 924.) The trial court noted the prosecutor had questioned all potential jurors in a similar fashion and had asked questions designed to elicit information regarding suitability to serve on a jury. The trial court analyzed the prosecutor's responses and the challenged jurors' responses to voir dire and found the prosecutor had race-neutral reasons for dismissing the challenged jurors. We conclude substantial record evidence

> supports the trial court's ruling. Therefore, we will not reverse the trial court's denial of the *Batson/Wheeler* motion.

(Slip Opinion at pp. 14-15.)

SUMMARY OF ARGUMENT

The Court of Appeal below properly upheld the trial court's denial of appellants' joint *Batson/Wheeler* motion. Following an analysis of the prosecutor's stated reasons for excusing the prospective jurors, the Court of Appeal held that substantial evidence supports the trial court's denial of appellants' motion and that the trial court's conclusions are entitled to deference. The Court of Appeal's ultimate conclusion, despite its error in refusing to conduct comparative juror analysis, was proper because appellants failed to meet their burden to establish purposeful discrimination in this third-step *Batson/Wheeler* case. Although the trial court here properly conducted comparative juror analysis, the Court of Appeal must also perform such analysis when the defendant relies on such evidence and the record is adequate to permit the comparisons because the analysis provides circumstantial evidence relevant to the determination of intentional discrimination, the third stage of the *Batson/Wheeler* inquiry. However, after considering, analyzing, and comparing the relevant jurors in this case in light of the totality of the circumstances, the record demonstrates the prosecutor did not engage in purposeful discrimination in his use of peremptory challenges.

Appellants attack the trial court's ruling and the opinion of the Court of Appeal on many other fronts related to their joint *Batson/Wheeler* motion. These arguments fail. The Court of Appeal did not run afoul of the various cases cited by appellants because it conducted a third-step *Batson/Wheeler* analysis (*Purkett*), evaluated whether the trial court made proper findings regarding the prosecutor's proffered reasons (*Fuentes*), and

considered (but ultimately validly rejected) whether the prosecutor engaged in improper questioning, used illegitimate justifications as a proxy for race, or offered pretextual reasons as a disguise for racial discrimination (*Bishop*, *Miller-El*, *Wheeler*). Finally, the United States Supreme Court's recent *Foster* case neither altered nor expanded *Batson* jurisprudence.

ARGUMENT

Appellants made a joint *Batson/Wheeler* motion claiming the prosecutor engaged in racial discrimination when he purposely excluded 10 out of 11 or 12 Hispanics from the jury.[5] (5 ART 1048-1049.)[6] The trial court found that a prima facie case had been established based on the totality of the circumstances. (5 ART 1052-1053.) The court noted that the prosecutor had exercised a total of 16 peremptory challenges of which 9 or 10 appeared to be against Hispanic jurors.[7] (5 ART 1051-1052.) The trial court asked the prosecutor to justify his challenges. (5 ART 1053) After

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[5] The parties were unclear as to how many Hispanic jurors remained on the panel at the time of the motion. A review of the record shows Ms. 2478882 was a Hispanic and Juror No. 2632943 was also Hispanic, and both were sitting on the jury at the time of the *Batson/Wheeler* motion. (5 ART 1048, 1052-1053.)

[6] Citations to the Reporter's Transcripts herein refer to the transcripts on appeal for Ramos and Enriquez which are numbered identically. Page citations applicable to the Gutierrez Reporter's Transcripts can be obtained by adding 124 pages to the Ramos and Enriquez citations. For example, page 100 of the Ramos and Enriquez transcripts is equivalent to page 224 in the Gutierrez transcripts.

[7] The prosecutor offered that one of the excused jurors, Ms. 2647624, may not have been Hispanic, as she had white skin and red hair. (5 RT 1050-1051.) The court indicated that although it included this juror in the count of 10 challenged Hispanic jurors based on her last name, it was not in a position to say whether the juror was in fact Hispanic. (5 RT 1051-1052.)

analyzing the prosecutor's explanations for the exclusion of the jurors at issue, the court denied appellants' motion as detailed below.

A. Legal Framework for *Batson/Wheeler* Claims

A defendant challenging the prosecution's use of peremptory strikes by way of a *Batson/Wheeler* motion must comply with the following procedures. 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.]" (*People v. Williams* (2013) 56 Cal.4th 630, 649 (*Williams II*).) Second, if the defendant succeeds in making this prima facie case,

> the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] 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."' [Citation.]

(*Id.* at p. 649; see also *People v. Johnson* (1989) 47 Cal.3d 1194, 1216 (*Johnson*).) "The proper focus of a *Batson/Wheeler* inquiry, of course, is on the subjective genuineness of the race-neutral reasons given for the peremptory challenge, not on the objective reasonableness of those reasons. [Citation.]" (*People v. Reynoso* (2003) 31 Cal.4th 903, 924 (*Reynoso.*) What matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory. "'[A] "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection. [Citations.]' [Citation.]" (*Ibid.*) Hispanics are a cognizable group for purposes of *Batson/Wheeler* analysis. (*People v. Trevino* (1985) 39 Cal.3d 667, 686, disapproved on other grounds in *Johnson, supra*, 47 Cal.3d at p. 1221.) The legitimacy of the justification is determined on the basis of the

preponderance of the evidence. (*People v. Hutchins* (2007) 147 Cal.App.4th 992, 997-998.)

"Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions." (*People v. Lenix* (2008) 44 Cal.4th 602, 613 (*Lenix*).)

> [B]ecause the trial court is 'well positioned' to ascertain the credibility of the prosecutor's explanations and a reviewing court only has transcripts at its disposal, on appeal "'the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal' and will not be overturned unless clearly erroneous." [Citations.]

(*People v. Riccardi* (2012) 54 Cal.4th 758, 787; *People v. Hamilton* (2009) 45 Cal.4th 863, 901, 903.) A reviewing court presumes that a prosecutor has used peremptory challenges in a constitutional manner and gives "great deference to the trial court's ability to distinguish bona fide reasons from sham excuses." (*People v. Burgener* (2003) 29 Cal.4th 833, 864.) Determining the genuineness of stated race-neutral reasons for a peremptory challenge often depends upon viewing demeanor and assessing the credibility of the attorney who offers the reasons, and a determination of an attorney's "state of mind" based on such factors is best left to the direct observer, i.e., the trial judge. (*People v. Stevens* (2007) 41 Cal.4th 182, 198; see also *Hernandez v. New York* (1991) 500 U.S. 352, 365 (plur. opn. of Kennedy, J.).) "As long as the court 'makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.'" (*Williams II*, *supra*, 56 Cal.4th at p. 650, quoting *People v. Burgener*, *supra*, 29 Cal.4th at p. 864.)

I. THE TRIAL COURT'S DENIAL OF APPELLANTS' *BATSON/WHEELER* MOTION IS ENTITLED TO DEFERENCE

Enriquez argues that the trial court's determination that the prosecutor's reasons were non-discriminatory is not entitled to deference on

appeal.[8] (EOB 45-47.) He argues that de novo review is appropriate in this case because the trial court did not conduct a thorough analysis. (EOB 22-23.) However, where, as here, the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered by the prosecutor, the trial court's conclusions are entitled to deference.

Here, the trial court adequately made a sincere and reasoned attempt to evaluate the prosecutor's credibility on appellants' *Batson/Wheeler* motion, observing the entire voir dire and taking into consideration the prosecutor's reasons for excusing each potential juror and the appellants' contrary arguments. The trial court's ruling on appellants' motion reflects a sincere and well-reasoned evaluation of the prosecutor's stated reasons and a proper conclusion finding the prosecutor's reasons credible. (5 ART 1070-1074.) Therefore, the proper standard of review is whether substantial evidence supports the trial court's denial of appellants' *Batson/Wheeler* motions.

Enriquez cites to *People v. Bonilla* (2007) 41 Cal.4th 313, 341-342 (*Bonilla*), for the proposition that the proper standard of review in this case is de novo review, arguing the trial court failed to make a complete and thorough analysis of the prosecutor's reasons. (EOB 23.) However, in *Bonilla*, the court instructed reviewing courts to apply a de novo standard of review to a trial court determination that a defendant had failed to make a *Batson/Wheeler* prima facie case when the trial court had not articulated the standard of proof. (*Ibid.*) Here, the trial court found that appellants had made a prima facie case and proceeded to a third step *Batson/Wheeler* analysis. Reliance on *Bonilla* is misplaced.

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[8] Respondent acknowledges that appellants have joined in each other's arguments but throughout this brief makes reference to the specific appellant who made each argument.

Enriquez also cites to the concurring opinions of Justice Liu in *People v. Hung Thanh Mai* (2013) 57 Cal.4th 986, 1058-1060 (*Hung Thanh Mai*) and *Williams II, supra*, 56 Cal.5th at p. 717, arguing that the trial court's determinations are not entitled to deference. (EOB 45-47.) Enriquez argues that Justice Liu had noted in these concurring opinions that the Court's approach to deference contradicts recent United States Supreme Court precedents, precludes meaningful review, and frustrates *Batson*'s purpose of preventing racial discrimination in jury selection. (EOB 45-46.)

Appellant has offered no reason to deviate from established precedent in this case. None of the problems Enriquez argues that preclude deference – such as where the prosecutor relied on a juror's demeanor or where the trial court stopped taking notes, neglected voir dire, failed to recall a juror's demeanor, declined to engage in comparative juror analysis, applied an erroneous legal standard in assessing the *Batson* claim or made an unreasonable judgment – are present in this case. The prosecutor did not offer demeanor as a reason for excusing any of the prospective jurors. The trial court was an active and instrumental part of voir dire. It engaged in comparative juror analysis in its ruling and applied the appropriate legal standards in analyzing the *Batson/Wheeler* motion. In sum, the trial court in this case made a sincere and reasoned effort to evaluate the prosecutor's proffered justifications. As such, the trial court's conclusions are entitled to deference on appeal. As this Court has noted, this precedent "will 'guide us until the United States Supreme Court articulates a contrary rule.' [Citation.]" (*Hung Thanh Mai, supra*, 57 Cal.4th at p. 1049, fn.26.)

II. THE COURT OF APPEAL DID NOT COMMIT ERROR UNDER *PURKETT*[9]

Ramos argues that the Court of Appeal committed error under *Purkett v. Elem* (1995) 514 U.S. 765 (*Purkett*). (ROB 45-49.) This argument lacks merit. The opinion of the Court of Appeal demonstrates that it properly considered whether the prosecutor's stated reasons were genuine and reasonable as required in the third stage of a *Batson/Wheeler* analysis.

In *Purkett*, after the filing of a *Batson* motion, the prosecutor explained the reason for exercising peremptory challenges against two black men. (*Purkett, supra*, 514 U.S. at p. 766.) He excused one of the jurors because he had long unkempt hair, a mustache, and a goatee-type beard. (*Ibid.*) The other juror was excused because he had a similar mustache and goatee. (*Ibid.*) The prosecutor did not like the way they looked, stating that their facial hair looked suspicious to him. (*Ibid.*) In addition, the latter juror had been the victim of a robbery at gunpoint, and the prosecutor was afraid the juror would believe that use of a gun was necessary for a robbery conviction. (*Ibid.*) The defendant's *Batson* motion was denied without explanation by the trial court. (*Ibid.*)

On habeas, the Court of Appeals for the Eighth Circuit reversed and remanded, finding as follows:

> '[W]here the prosecution strikes a prospective juror who is a member of the defendant's racial group, solely on the basis of factors which are facially irrelevant to the question of whether that person is qualified to serve as a juror in the particular case, the prosecution must at least articulate some *plausible* race-neutral reason for believing those factors will somehow affect the person's ability to perform his or her duties as a juror. In the present case, the prosecutor's comments, 'I don't like the way [he] look[s], with the way the hair is cut. . . . And the mustach[e]

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[9] Respondent does not adopt Ramos's labels designating types of error according to a particular case, e.g., "*Purkett* error" or "*Fuentes* error."

> and the beard[ ] look suspicious to me,' do not constitute such legitimate race-neutral reasons for striking juror 22.' [Citation.]

(*Purkett, supra*, 514 U.S. at p. 767.) It concluded that the prosecution's explanation for striking juror 22 was pretextual and that the state trial court had "'clearly erred'" in finding that striking juror number 22 had not been intentional discrimination. (*Ibid.*)

The United States Supreme Court reversed the Court of Appeals. It found that the intermediate appellate court had erred by combining *Batson*'s second and third steps into one by requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive, i.e., a "'plausible' basis for believing that 'the person's ability to perform his or her duties as a juror' will be affected." (*Purkett, supra*, 514 U.S. at p. 768.) The Court emphasized that,

> The second step of this process does not demand an explanation that is persuasive, or even plausible. 'At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.' [Citation.]

(*Id.* at pp. 767-768.) It went on to explain that "[i]t is not until the third step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." (*Id.* at p. 768.) "At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." (*Ibid.*) However, the *Purkett* Court distinguished between the court's role at each stage, explaining that

> to say that a trial judge *may choose to disbelieve* a silly or superstitious reason at step three is quite different from saying that a trial judge *must terminate* the inquiry at step two when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding

> racial motivation rests with, and never shifts from, the opponent of the strike.

(*Ibid.*, emphasis original.) The inquiry at *Batson*'s third stage requires more than a determination of inherent or apparent plausibility; it "requires the judge to assess the plausibility of [the prosecutor's stated] reason in light of all evidence with a bearing on it." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 252 (*Miller-El*).) The *Purkett* Court further found the Court of Appeals did not conclude or even attempt to conclude that the state court's finding of no racial motive was not fairly supported by the record, which it was required to do in the habeas proceeding in federal court. (*Purkett, supra*, 514 U.S. at p. 769.)

Under this backdrop, Ramos first argues that the Court of Appeal erred by reading the record as showing that the trial court found no prima facie case of discrimination. (ROB 46.) To support his argument, he points to the Court of Appeal's citation to cases articulating the court's duty where there is no prima facie finding. (*Ibid.*) While the Court of Appeal did cite to authority pertaining to first stage *Batson/Wheeler* cases when it set forth the relevant law, it undeniably recognized that the trial court in this case made a prima facie finding. The Court of Appeal indicated in its statement of the facts, "The trial court found a prima facie case to be established, based largely upon the percentage of Hispanics challenged, and the prosecutor was asked to justify the peremptory challenges against Hispanics." (Slip Opinion at p. 9.) The Court of Appeal recognized this was a third stage *Batson/Wheeler* case and went on to review the trial court's findings with regard to the prosecutor's stated reasons for excusing the challenged jurors, the third step in such a motion.

Second, Ramos argues that the Court of Appeal never considered whether the prosecutor's stated reasons were persuasive and genuine as to each challenged juror (step 3), but rather merely concluded it was sufficient

that all of the prosecutor's reasons were race-neutral (step 2, truncated). (ROB 46-47.) He points to the conclusion of the Court of Appeal as to most of the jurors that the prosecutor's stated reason was a "race-neutral reason for exercising a peremptory challenge" (Slip Opinion at pp. 12-14), arguing that this repeated language and the substance of the analysis undertaken indicate that the Court of Appeal failed to review the record as a whole to determine if substantial evidence supported the prosecution's denial of discriminatory intent and failed to consider the persuasiveness of each challenge. (ROB 48.)

In arguing the language of the Court of Appeal shows no third-step analysis, Ramos parses the court's words too closely. Despite the use of the word "race-neutral," reviewing the Court of Appeal's analysis demonstrates that it considered whether substantial evidence supported the trial court's conclusions that the prosecutor's stated reasons were genuine and reasonable. The court did so by examining each reason provided by the prosecutor and analyzing whether the record supported it and whether the reason was reasonable and plausible in light of the record, the issues of the case, and the witness testimony that would be offered in the case. (Slip Opinion at pp. 9-14.) Following this determination, the Court of Appeal implicitly concluded that the trial court properly found the prosecutor's stated reasons were persuasive reasons for excluding each of the challenged jurors. (Slip Opinion at p. 15.) It found that substantial evidence supported the trial court's findings that the prosecutor could reasonably be concerned that the challenged jurors were not well-suited to sit on this particular jury and that the peremptory challenges were based upon this concern and not on the juror's race. (*Ibid.*)

Further evidence that the Court of Appeal properly conducted a review of the third stage of a *Batson* challenge is found in the Court's citations to *People v. Williams* (1997) 16 Cal.4th 153 (*Williams I*), which

found that the prosecutor cited a legitimate reason for striking a juror which rebutted the prima facie showing. (*Id.* at p. 191.) Furthermore, the Court of Appeal concluded that substantial evidence supported the trial court's denial of the motion:

> 'We accord great deference to a trial court's determination of the sufficiency of a prosecutor's explanations for exercising peremptory challenges. [Citations.]' (*People v. Williams* (1997) 16 Cal.4th 635, 666.) The focus of a *Batson/Wheeler* analysis is on the subjective genuineness of the reason, not the objective reasonableness. (*People v. Reynoso* (2003) 31 Cal.4th 903, 924.) The trial court noted the prosecutor had questioned all potential jurors in a similar fashion and had asked questions designed to elicit information regarding suitability to serve on a jury. The trial court analyzed the prosecutor's responses and the challenged jurors' responses to voir dire and found the prosecutor had race-neutral reasons for dismissing the challenged jurors. We conclude substantial record evidence supports the trial court's ruling.

(Slip Opinion at pp. 14-15.) Nothing in the appellate decision shows the court failed to consider all the factors bearing on the prosecutor's credibility, including the plausibility of his proffered reasons, their basis in sound trial strategy, and the excused juror's voir dire. The Court of Appeal's refusal to reverse the trial court was not erroneous under *Purkett.*

Even assuming arguendo that the Court of Appeal conflated the analysis as Ramos argues and looked only at whether the prosecutor's stated reasons were non-discriminatory to the exclusion of a step three analysis, a review of the record as a whole demonstrates that substantial evidence supports the trial court's findings that the prosecutor's stated reasons for excusing the jurors were persuasive and plausible. A Court of Appeal analysis which fails to properly assess the third stage of a *Batson/Wheeler* challenge does not alter the record, the finding of a prima facie case, the prosecutor's stated reasons for excluding the prospective jurors, or the trial court's analysis of the prosecutor's stated reasons to

assess the plausibility of those reasons in light of all evidence. The trial court was in the best position to assess the credibility of the prosecutor in light of all the circumstances of the case. This Court should hold that, even if the Court of Appeal's analysis is lacking, substantial evidence supports the trial court's denial of the *Batson/Wheeler* motions.

III. THE COURT OF APPEAL DID NOT COMMIT ERROR UNDER *FUENTES*

Ramos argues that the Court of Appeal committed error under *People v. Fuentes* (1991) 54 Cal.3d 707 (*Fuentes*) because it adopted the reasoning of the trial court which had failed to make a sincere and reasoned evaluation of the prosecutor's stated reasons and failed to make findings as to each individual juror challenged by the prosecutor. (ROB 51-54.) However, as evidenced by its ruling on the motion, the trial court made a sincere and reasoned attempt to evaluate the prosecutor's explanations in light of the circumstances and clearly expressed its findings. Furthermore, the trial court was not obligated to make a specific finding as to each of the reasons given by the prosecutor that the court accepts as genuine. The Court of Appeal's ruling is not in violation of *Fuentes*.

A. The Trial Court Did Not Employ "Global Reasoning" as in *Fuentes*

Ramos relies on *Fuentes*, a case in which the prosecutor exercised 14 of 19 peremptory challenges against prospective African-American jurors. (*Fuentes*, *supra*, 54 Cal.3d at pp. 711-712.) The defendant made a *Wheeler* motion, and the court asked the prosecutor to state the reasons for the challenges. (*Ibid.*) The prosecutor stated his reasons for challenging each of the 14 prospective Black jurors at length, referring to answers in the questionnaires and reading from the transcript of the voir dire. (*Id.* at pp. 712, 714.) He offered a multitude of purported reasons—as many as a dozen or more in most cases—to justify his challenge of each juror. (*Id.* at

p. 713.) The trial court, after taking the motion under submission until the following morning, found that some of the reasons given were valid while others were "'totally unreasonable'" and "'very spurious.'" (*Ibid.*) The court then denied the motion but did not explain which reasons it found valid with respect to each of the challenges. (*Ibid.*) Except for one juror, the court did not identify any particular juror or indicate which of the purportedly "good reasons" applied to which jurors. (*Ibid.*)

On appeal, this Court found the trial court erred because it had failed to determine whether the prosecutor's reasons were bona fide with respect to each particular juror and instead made a global ruling. (*Fuentes*, *supra*, 54 Cal.3d at pp. 718-719.) "The court found some of the stated reasons genuine ('good') and some false ('spurious') and indicated which were which, but the court failed to consider which of the valid reasons applied to which jurors." (*Ibid.*) This Court noted the task was made more difficult by the trial court's failure to ask for justifications until the conclusion of voir dire. (*Id.* at pp. 718-719.) The court held:

> [A] truly 'reasoned attempt' to evaluate the prosecutor's explanations [citation] requires the court to address the challenged jurors individually to determine whether any one of them has been improperly excluded. In that process, the trial court must determine not only that a valid reason existed but also that the reason actually prompted the prosecutor's exercise of the particular peremptory challenge.

(*Id.* at p. 720.) Because the trial court failed to take the next, necessary step of asking whether the asserted reasons actually applied to the particular jurors whom the prosecutor challenged, the judgment was reversed. (*Id.* at p. 721.)

Ramos argues that the trial court employed "global reasoning based on the theory that if the prosecutor was consistent in the utilization of particular grounds for excusing Hispanics then he was not acting with discriminatory intent." (ROB 52-54.) He further contends that the trial

court, like the trial court in *Fuentes*, failed to make individual findings as to each particular juror and the appellate court in turn erred by adopting the trial court's failure to make a sincere and reasoned attempt to determine the validity of the prosecutor's justifications. (*Ibid.*) Ramos cites to the introductory remarks made by the trial court as it began to make its ruling on the record. (*Ibid.*) However, when the trial court's ruling is read as a whole, it is clear that the trial court's analysis involved examining the stated reasons as to the challenged jurors individually. Ramos's argument quickly disintegrates because the trial court analyzed the reasons pertaining to individual jurors, mentioning each by name and noting which of the prosecutor's reasons applied to each juror. (5 ART 1070-1074.)

The trial court noted that the prosecutor was consistent in excusing potential jurors who had been involved in or experienced significant gang activity and that this explanation applied to more than one excused juror. (5 ART 1070.) For example, the court stated,

> And in terms of - - and consistent in terms of his excusing the jurors that do - - were involved and they were involved in it, or their relatives were involved in gang activity or grew up in areas where there was criminal activity, and that would include certainly Ms. 2632053, and there's no question about that. And Ms. 2732073, Ms. 2647624, she's the one - - she has relatives that are [*sic*] led the gang life as well, so we - - he's been consistent in terms of people that have gang ties, so to speak, and that is relative to people that have been involved in gang activity and excusing those particular jurors.

(5 ART 1070-1071.) The point made by the trial court is that the prosecutor was consistent in challenging jurors with significant gang exposure which may affect these jurors in light of the fact that this was a gang-related attempted murder case. For example, the prosecutor reasonably could have believed that those jurors with gang exposure may sympathize with the three defendants who were gang members or would not find the charged crimes to be worthy of punishment. Those potential

jurors with minimal or insignificant interaction or knowledge of gang activities, however, were not challenged. The prosecutor was less concerned when a potential juror had insignificant exposure to gang activity likely because he felt this would not influence the juror's decision-making abilities. The trial court recognized the difference between potential jurors excused because of their gang exposure and those not challenged where they did not have significant gang exposure. The prosecutor's challenges and the court's ruling on those challenges do not support Ramos's argument that the prosecutor believed he "could legitimately remove *all* Hispanics so long as he adhered to the pattern." (ROB 52, emphasis in original.)

Furthermore, unlike *Fuentes*, the prosecutor did not state a multitude of reasons for each of the challenged jurors. For at least half of the challenged jurors, the prosecutor provided one reason for exercising a peremptory challenge as to that juror. Even with a generous reading of the record, the prosecutor at no time provided more than three reasons for excusing any individual juror. (5 ART 1054-1062.) Also unlike *Fuentes*, the trial court heard and decided the *Batson/Wheeler* motion of the defendants without delay. It did not take the matter under submission until the following day. Because the prosecutor was methodical in taking notes on his reasons for excusing each of the jurors, the trial court did not need to review a slew of reasons and decipher which was applicable to which jurors. Further, the trial court did not reject some of the prosecutor's reasons as spurious while accepting others as in *Fuentes*. Under these facts, Ramos cannot demonstrate *Fuentes* error. Rather, the trial court made a sincere and reasoned attempt to evaluate the prosecutor's reasons and clearly expressed its findings, focusing on the prosecutor's stated reasons and the applicability of those reasons to particular jurors, ultimately concluding that the prosecutor was credible.

B. Gang Exposure Was a Race-Neutral, Plausible Reason for Excluding Potential Jurors

Ramos argues that the prosecutor posed gang contact questions to the jurors and utilized the fact of gang exposure as a proxy for race, citing *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820 (*Bishop*).[10] (ROB 54-59.) Because lower federal court decisions "interpreting federal law are not binding on state courts" (*Williams*, *supra*, 16 Cal.4th at p. 190), *Bishop* is not controlling here. It is also distinguishable. In *Bishop*, the prosecutor explained his peremptory challenge was based in part on the fact that the black juror lived in a predominantly low-income, black neighborhood (Compton) and was therefore likely to believe the police "'pick on black people.'" (*Id.* at p. 821.) The Ninth Circuit Court of Appeals found that the proffered reasons (that people from Compton are likely to be hostile to the police because they have witnessed police activity and are inured to violence) were generic reasons, group-based presuppositions applicable in all criminal trials to residents of poor, predominantly black neighborhoods. (*Id.* at p. 825.) The case stands for the proposition that if the justification is tainted by impermissible generalizations regarding racial groups and their environment, the prosecutor's reason is not race-neutral but rather inherently discriminatory. (*Id.* at p. 827.)

In this case, the prosecutor utilized gang exposure to connect those potential jurors who had been exposed to significant gang activity to the facts of the case, namely, the gang-related attempted murder. As stated by this Court,

> the law recognizes that a peremptory challenge may be based on a broad spectrum of evidence suggestive of juror partiality. The

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[10] Overruled on other grounds by *United States v. Nevils* (9th Cir. 2010) 598 F.3d 1158, 1167.

> evidence may range from the obviously serious to the apparently trivial, from the virtually certain to the highly speculative.

(*Wheeler*, 22 Cal.3d at p. 275.) The prosecutor in this case reasonably could have determined that a prospective juror who had experienced gang activity would be sympathetic to the defendants or may be desensitized to the gravity of the gang-related crimes. This was recognized by the trial court early on and the topic of a potential juror's gang exposure and experience was included in the initial voir dire questions asked of each juror by the trial court. (See, e.g., 2 ART 292, 308.) Thus, the trial court properly found the prosecutor's stated reason concerning gang exposure to be genuine. The prosecutor never posited that all Hispanic persons are exposed to gang violence or that exclusion of any Hispanics was proper because they probably had been exposed to gangs. The prosecutor's stated reasons for excusing the jurors would not have extended to any Hispanic who was not exposed to gang violence, and the trial court properly concluded that this reason was genuine and reasonably related to the facts of the case. The justifications based on gang exposure were not used as a proxy for race.

Enriquez compares a group of six prospective jurors whom the prosecutor excused using peremptory challenges. (EOB 34.) He argues that it was inconsistent for the prosecutor to excuse Juror Nos. 2468219 and 2723471, who were not impacted by gang activity, but to decline to object to Juror Nos. 2648196, 2408196, 2732073, and 2632053, who were impacted by gang activity. (*Ibid.*) However, this is not an accurate portrayal of the prosecutor's reasoning for excusing the first two jurors, and a comparison among these six jurors is not useful. Ms. 2723471 was from Wasco and was not aware of any gang activity going on in Wasco. (5 ART 1058-1059.) The prosecutor was unsatisfied by some of her other answers as to how she would respond when she heard testimony that Trevino is a

gang member, part of a subset of Sureños out of Wasco. (*Ibid.*) Ms. 2468219 had lived in an area where there is a lot of gang activity, although she had not specifically seen any. (5 ART 1061.) In addition to that fact, this juror's brother had been accused of wrongdoing by law enforcement. (*Ibid.*) This juror had also been a member of a hung jury in a criminal case. (*Ibid.*) All of these facts led to the prosecutor exercising a peremptory challenge against Ms. 2468219. (*Ibid.*) Thus, these two jurors were not excused by the prosecutor solely or simply because they "were not impacted by gang activity," as Enriquez argues. The prosecutor was concerned about potential witness bias as to Ms. 2723471, and he had several reasons for excusing Ms. 2468219. These two jurors cannot fairly be compared to Juror Nos. 2648196, 2408196, 2732073, and 2632053, who were directly involved and/or directly impacted by gang activity. (See 5 ART 1054-1062.)

C. The Prosecutor's Challenges to Ms. 2468219 and Ms. 2647624 Were Proper

Ramos argues that the prosecutor's peremptory challenge against Ms. 2468219 illustrates the strongest example of stereotyping. (ROB 60-62.) He bases his argument on the assertions that this juror had only briefly lived in a neighborhood that had experienced gang crime and at a time very attenuated from this case. (ROB 60.) Contrary to appellant's argument, the prosecutor here did not use gang experiences and exposure as a surrogate for racial stereotypes. There was a direct link between Ms. 2468219's exposure to gang activity and concerns about this case, an attempted murder case with gang enhancements. The trial court mentioned the applicability of gang exposure and experiences in the beginning of voir dire after explaining that the charges involved attempted murder with a firearm and allegations that the crimes were committed for the benefit of a criminal

street gang. (2 ART 292.) The trial court explained that voir dire would cover the issue of gang exposure of the potential jurors:

> I'm going to talk to you about there's allegations of - - that the crimes were committed for the benefit of a criminal street gang. I'm going to talk to [you] about that first. I'm going to see how this might bear on any of you being a fair juror to all sides in this particular case, so what I'm going to do is ask some questions, and then I will go row by row, and ask you to raise your hand if any of these questions apply to you. And then depending on what the question is, I might ask some follow-up questions. Perhaps I might ask to talk to you about certain things in private, does everybody understand that?

(2 ART 299.)

In *People v. Turner* (1986) 42 Cal.3d 711 (*Turner*), cited by Ramos (ROB 60-62), this Court rejected the prosecutor's explanation that "'something in [the juror's] work' would 'not be good for the People's case' [as] so lacking in content as to amount to virtually no explanation." (*Turner*, *supra*, 42 Cal.3d at p. 725.) The *Turner* court stated,

> If such vague remarks were held to satisfy the prosecution's burden of rebutting a prima facie case of group discrimination, the defendant's constitutional right to trial by a jury drawn from a representative cross-section of the community could be violated with impunity.

(*Id.* at p. 725.)

In contrast, the prosecutor's reasons do not suggest group bias or racial motivation. Rather, the prosecutor excused Ms. 2468219 in part because she had lived in an area where there is a lot of gang activity. (5 ART 1061.) This was a relevant, race-neutral reason for the prosecutor to exercise a peremptory challenge against her. In cases such as this one, where gang crimes are involved, a prospective juror with personal gang experiences or knowledge may make that juror have a predisposition against the prosecution or for the defense. (See *People v. Watson* (2008) 43 Cal.4th 652, 674 [neighborhood exposure to gangs may have biased

prospective juror and is sufficient race-neutral reason]; *Williams I, supra*, 16 Cal.4th 153, 191 [exposure to defendant's gang in high school indicated prospective juror might be unsympathetic to prosecution, despite statement defendant's gang membership "'wouldn't mean a thing'"]; *People v. Cox* (2010) 187 Cal.App.4th 337, 347-348.) The prosecutor reasonably could be concerned that Ms. 2468219's exposure to gang activity would make her empathetic to gang activity and retaliation. The prosecutor reasonably could be concerned about whether, in light of her experience and knowledge of gang activity, Ms. 2468219 could be fair in this gang-related attempted murder prosecution.

Ramos further contends that the prosecutor failed to ask Ms. 2468219 whether her experience would actually cause her to be biased. (ROB 60.) A failure to engage in meaningful voir dire on a subject of purported concern can, in some circumstances, be circumstantial evidence suggesting the stated concern is pretextual. (See *Miller-El, supra*, 545 U.S. at pp. 244-245.) However, it was not necessary for the prosecutor to delve into detailed questioning of this juror. The trial court asked questions of this juror regarding her exposure and knowledge of gang activity. (2 ART 300-302.) Ms. 2468219 had heard on the news that there were a lot of gang-related shootings in the area. (2 ART 300-301.) The court's questions were sufficient to obtain information from this juror regarding her exposure to gang activity in an area where she had lived for several years and where she returned to visit. (*Ibid.*) Even if the prosecutor had gone farther and asked Ms. 2468219 if she harbored a bias based on this gang activity, the juror's answers would not necessarily alter the analysis. A prospective juror's statement that the juror could be fair despite legitimate reasons for excusing the juror does not invalidate the otherwise legitimate reasons. (See *People v. Watson, supra*, 43 Cal.4th at pp. 679-680; *Williams I, supra*, 16 Cal.4th at p. 191.) Assuming the juror said that she could be a fair juror,

the prosecutor was still justified in excusing the juror based upon her responses and his belief that she may not be able to fairly judge the case.

Ramos also argues that asking this juror about living in a neighborhood was discriminatory. (ROB 60.) Here, it was the trial court that asked all of the jurors about their residence. Specifically the court wanted to know in which part of Bakersfield or Kern County the jurors resided. (2 ART 450.) The court asked Ms. 2468219 these same questions, and she reported that she lived in southwest Bakersfield. (2 ART 460.) The prosecutor did not ask this juror about her residence. Nor was this juror's residence a reason for excusing her. Rather, the prosecutor excused this juror because she had been exposed to gang activity. (5 ART 1061.) This juror never specified where she had lived with her mother but instead explained that the area was a rough neighborhood where there is criminal street gang activity and news of shootings. (2 ART 300-301.) She had lived with her mother there for several years. (2 ART 300.) Thus, it was the juror's exposure to gang activity rather than her place of residence that was one of the reasons the prosecutor challenged her.

Ramos faults the prosecutor for failing to explain, when providing his reasons for exercising the peremptory challenges, how knowledge of gang activity may render Ms. 2468219 biased. (ROB 61.) However, there is no requirement that the prosecutor elaborate on his explanation for excusing a prospective juror. "A peremptory challenge is not a challenge for cause but may be exercised whenever a legitimate reason appears for a party to worry whether that juror will be impartial." (*People v. Jones* (2011) 51 Cal.4th 346, 367.) A prosecutor asked to explain his conduct must provide a "'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." (*Batson, supra*, 476 U.S. at p. 98, fn. 20.) The prosecutor in this case complied with this requirement. In assessing whether a prosecutor is sufficiently specific and clear in providing an

explanation, it is critical that the trial court understand the prosecutor's stated reasons so that it may determine whether the prosecutor's reasons are race-neutral and credible. The trial court in this case had discussed with counsel and jurors the issue of gang exposure as it related to the facts of this gang case. (2 ART 291-292.) The trial court asked each of the jurors if they had any experience or exposure to gang activity. Further, the court determined that the prosecutor was specific in providing his justifications for challenging the jurors. (5 ART 1070.) The court recognized that the prosecutor exercised peremptory challenges to jurors who had exposure or experience with gang activity. (5 ART 1070-1071.) This demonstrates that the explanation provided by the prosecutor was clear and reasonably specific, permitting the trial court to rule on the legitimacy of the reasons:

> I think it does go beyond what [Enriquez's counsel] is saying. It's not just a question whether they came into contact with a gang member. He's essentially excused jurors that have been [*sic*] themselves grown up in gang areas or certainly relatives that have been involved in criminal gang activities, so I think he's certainly consistent in terms of excusing those jurors for those reasons. . . .

(5 ART 1071.)

In addition, this is only one of three reasons offered by the prosecutor for excusing this juror. The prosecutor explained,

> Ms. 2468219 also testified about living in an area where there is a lot of gang activity and she testified about - - excuse me, I'm using the wrong word, Your Honor. She spoke to us living in an area with a lot of gang activity, but that she had not specifically seen. She mentioned that her brother had been accused. And, again, this was a close one because she had relatives in law enforcement. She was also a member of a hung jury in a criminal case that she participated in earlier on, Your Honor, and those were the facts that led me to execute a peremptory challenge against that juror.

(5 ART 1061.) Thus, the prosecutor challenged this juror not only for her gang exposure but also because she had been on a jury which could not come to agreement as to the verdict and because she had a brother who had been charged with criminal activity. (*Ibid.*) Both of these reasons are persuasive race-neutral reasons for excusing a juror. Prior service on a jury that hung or acquitted is a legitimate concern because the prosecution needs jurors who can reach a unanimous guilty verdict. (See *People v. Farnam* (2002) 28 Cal.4th 107, 138; *People v. Turner* (1994) 8 Cal.4th 137, 170, overruled on different grounds in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.) Prior criminal history of a prospective juror or his or her relatives is a valid, race-neutral reason for exercising a peremptory challenge. (See *Jones*, *supra*, 51 Cal.4th at p. 366.)

Ramos argues that Ms. 2647624 was similarly situated to Ms. 2468219 because they both had gang ties which were very attenuated and there was no reason to excuse this juror absent suspected sympathy for gang members. (ROB 62-63.) Ramos argues that gang exposure could have just as easily made this prospective juror believe gangs were a scourge and be biased in favor of the prosecutor. Ramos in essence is arguing that it is necessary that a prospective juror actually display bias before a peremptory challenge is justified. However, a showing that a peremptory challenge was not predicated on group bias alone need not rise to the level of a challenge for cause but must persuade the court that the challenge was exercised on grounds that were reasonably relevant to the particular case. (*Wheeler*, *supra*, 22 Cal.3d at pp. 281-282.)

D. The Prosecutor's Challenge to Ms. 2408196 Was Plausible

Ramos argues that the reason for excusing Ms. 2408196, that she was unaware of gang activity despite living in Wasco, was implausible.[11] (ROB 66-67.) The same argument was addressed as to a different juror in Argument V.B, *post*, but the analysis applies equally. Ramos further argues that Ms. 2408196 "admitted to seeing possibly gang-related graffiti in Wasco." (ROB 63, fn. 27.) This explanation of the facts distorts the record. After stating that there was nothing to cause her to believe that there is gang activity in Wasco, Ms. 2408196 stated, "I think back when I was younger, I would see more of the graffiti and the tagging than I do now. I guess you randomly see stuff - - graffiti, but I can't say that I know that's gang related." (4 ART 864.)

Ramos argues as to Ms. 2408196 that one of the prosecutor's stated reasons for excusing her, that she had an uncle who was in a criminal street gang, was discriminatory because she was not close to this uncle. (ROB 66.) In voir dire, Ms. 2408196 explained that she had an uncle who was a gang member. (4 ART 813, 864.) He had been in and out of prison and was eventually deported. (8 ART 816.) She had not talked to him about his crimes or about his experiences and was not close with him because he had always been in prison. (8 ART 865.) The fact that this prospective juror was not close with her gang member uncle does not negate the significance of this reason for excusing her. Rather, the reason this juror was not close to her uncle, because he had been constantly incarcerated for his crimes, bolsters the prosecutor's reason for excusing her. The prosecutor reasonably could be concerned that this potential juror would be

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[11] Wasco had a population of 26,303 in 2014. (http://www.city-data.com/city/Wasco-California.html.)

sympathetic to the defendants or to gang activity in general because it was gang activity which had prevented her from being in close contact with her uncle. Nevertheless, the prosecutor relied not only on the fact that Ms. 2408196 had an uncle who was a gang member but also because she was unaware of any gang activity in Wasco, and the prosecutor thought that Trevino's testimony would cause a moment of pause for her. (5 ART 1056.) Additionally, Ms. 2408196 had a cousin who had been murdered in 2004. (*Ibid.*) Thus, the prosecutor excused this juror based on three valid, non-discriminatory reasons which were determined by the trial court to be credible.

Ramos further claims the other reason cited by the prosecutor, that this juror was from Wasco but was unaware of gang activity there, would not cure the racial stereotyping present in the first reason. (ROB 66-67.) Ramos's citation to federal law for the proposition that the existence of non-discriminatory reasons does not cure a reason based on racial stereotyping is not controlling. "Decisions of lower federal courts interpreting federal law are not binding on state courts." (*Williams*, *supra*, 16 Cal.4th at p. 190.) Furthermore, even under the mixed motives analysis or the motivated in substantial part test, the trial court's holding would be upheld. (See Argument XI, *post.*)

IV. THE COURT OF APPEAL PROPERLY DENIED APPELLANTS' *BATSON/WHEELER* CHALLENGE AS TO MS. 2547226

Gutierrez makes several arguments concerning Ms. 2547226, including that the prosecutor failed to clearly and specifically explain why he had challenged Ms. 2547226 and that the record does not support the reasons provided by the prosecutor. (GOB 13-18.) He further contends that the trial court erred by accepting the prosecutor's reasons without conducting an individualized third-step *Batson* inquiry. (GOB 18-24.) Finally, in assessing the validity of exercising a peremptory challenge as to

Ms. 2547226, the Court of Appeal relied upon factors not cited by the prosecutor. (GOB 15-16.) Respondent addresses each of these arguments below.

A. Factual and Procedural Background

The trial court made a finding that appellants had established a prima facie case under *Batson/Wheeler* and asked the prosecutor to justify his peremptory challenges. (5 ART 1052-1053.) After initially passing on providing an explanation for excusing Ms. 2547226 because he had misplaced his notes, the prosecutor addressed his reasons for excusing her:

> I believe I asked her about 12 votes, each independent of the others and her being able to, you know, take on the task which is obviously the difficult task of any juror of both standing their own ground where they believe they are right, and also listening to other people. And I was concerned about her articulation about that role. I was concerned about her understanding of that and her ability to - - quite frankly if she felt strongly to be heard in the course of jury deliberations.

(*Ibid.*)

On appeal, the court found that the prosecutor articulated race-neutral reasons for excusing this juror:

> When asked about Prospective Juror No. 2547226 (hereafter Juror 2547226), the prosecutor indicated he felt she might have trouble fulfilling her role as a juror and in understanding the role of a juror. When questioned during voir dire, Juror 2547226 indicated she was better at "listening than speaking my mind" and expressed that she did not know how many jurors had to agree to a verdict in a criminal case.
>
> Peremptory challenges properly may be based on the demeanor of the prospective juror. [Citation.] Juror 2547226 gave equivocal answers to some questions and expressed a lack of understanding of the jury process in a criminal case. The prosecutor's stated reasons reflect that, based upon Juror 2547226's equivocal answers to voir dire questions, he had doubts about her being able to engage fully in the deliberative process and fulfill her role as a juror. A prosecutor may excuse

a juror based upon "hunches," so long as the reason is not impermissible group bias. [Citation.]

(Slip Opinion at pp. 11-12.)

B. The Prosecutor Provided a Clear and Reasonably Specific Explanation of His Legitimate Reasons for Exercising a Peremptory Challenge against Ms. 2547226, and These Reasons Were Supported by the Record

Gutierrez argues that the prosecutor failed to clearly and specifically explain why he challenged Ms. 2547226 and that the record does not support the reasons provided by the prosecutor. (GOB 13-18.) However, a review of the record reveals valid and nondiscriminatory reasons for excusing this juror that were properly and sufficiently articulated by the prosecutor in the trial court.

Here the prosecutor provided a clear and reasonably specific explanation of his reasons for exercising a challenge against Ms. 2547226 as required by *Batson*. The prosecutor explained that he excused this prospective juror because he believed she may not fully understand her role as a juror and may be unable to state her opinion and thoughts to other jurors during deliberations. In other words, she may not be able to properly participate as a juror in the process of deliberation. The reasons provided by the prosecutor were reasonably specific so as to enable the trial court to evaluate the reasons under the *Batson* framework. The explanation by the prosecutor was neither vague nor unintelligent. The trial court and counsel could easily understand the prosecutor's proffered reasoning, and there is no suggestion in the record that the prosecutor's explanation was anything other than clear and specific. Gutierrez's focus on the prosecutor's wording, in particular his use of the word "concern," is misplaced. (GOB 13, 15.) The prosecutor was merely describing his belief that the juror may not be the best juror for this case based on the answers she provided,

answers which led him to believe she may not understand her role as a juror or be able to participate fully as a juror. There is no requirement that the prosecutor use specific words or specifically pinpoint in precise terms his reasoning. *Batson* requires a "clear and reasonably specific" explanation, and the prosecutor complied with this requirement.

Gutierrez and Enriquez argue that the record does not support the prosecutor's stated reason that Ms. 2547226 may not fully understand her role as a juror and may be unable to deliberate. (GOB 13-15; EOB 31-32.) On the contrary, the record contains answers given by this juror which support this stated reason. Here, Ms. 2547226 answered questions from the prosecutor in a way that suggested she may have difficulty discussing the case with fellow jurors:

> Q. You don't think that there's anything about you that's differential[12] 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.

(3 ART 492.)

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[12] It appears from the context of this discussion that the prosecutor said "deferential." (3 ART 492.)

Furthermore, the fact that this prospective juror answered some questions in a way that indicated she understood the jury trial process does not detract from the prosecutor's reasoning. (See GOB 13-14.) As Gutierrez points out, there were several questions the prosecutor asked concerning the trial to which Ms. 2547226 responded affirmatively that she understood. The questions by the prosecutor, oftentimes leading, were as follows:

> Q. So you're understanding that there are 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.
>
> Q. 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. Okay. 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 yours, you have a duty to listen to and talk to other jurors, but how you vote if you're impaneled on this jury is yours, it's your responsibility, and it's what you believe the 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.

(3 ART 490-491.)

To the leading questions the juror answered yes, but when pushed by the prosecutor, this prospective juror revealed that she "[may] do better at listening than speaking [her] mind out." (3 ART 491.) Following the affirmative answers to the questions, the juror responded "I don't think so,"

when asked if she may want to sit in the background and listen to other people. (3 ART 492.) The phrasing – "I don't think so" – chosen by this prospective juror reasonably could make the prosecutor question her ability to deliberate and state her opinion to others when necessary. (*Ibid.*) As pointed out by this Court in *Lenix*, "[t]here is more to human communication than mere linguistic content." (*Lenix*, *supra*, 44 Cal.4th at p. 622.) In this case, the prosecutor properly determined based on the totality of the answers provided by Ms. 2547226 that she may not be able to properly participate as a juror in the process of deliberation. "[N]othing in *Wheeler* disallows reliance on the prospective jurors' body language or manner of answering questions as a basis for rebutting a prima facie case. . . ." (*People v. Fuentes* (1991) 54 Cal.3d 707, 715.) Her answers support the prosecutor's stated reasons that he was concerned Ms. 2547226 may not have the ability to fulfill her role as a juror and "if she felt strongly to be heard in the course of jury deliberations." (5 ART 1062.) Thus, the prosecutor's stated reasons are supported by the record.

Gutierrez analogizes this case to *People v. Silva* (2001) 25 Cal.4th 345 (*Silva*), arguing that just as in that case, nothing in the record of voir dire supports the prosecutor's stated reasons that the juror may not understand her role as a juror or be able to participate in deliberations. (GOB 14.) In *Silva*, the Court found *Batson* error when the prosecutor struck a juror on the grounds that he was "extremely aggressive" and would be reluctant to impose the death penalty, when the record lacked any support for the conclusion. (*Silva*, *supra*, 25 Cal.4th at pp. 375-376, 385.) Here, by contrast, the record supports the prosecutor's conclusion that the juror may not understand her role as a juror. (See Background at 2.h, *ante*.)

Enriquez's contention that the prosecutor's stated reasons for excluding Ms. 2547226 "reeks of afterthought," as in *Miller-El,* is not well taken. [13] (EOB 32.) Here, the prosecutor initially could not find his notes, an unremarkable situation, especially given the length and complexity of the voir dire. Once his notes were found, he explained he was concerned about her understanding of a juror's role and whether she could voice her opinion during deliberations.

Enriquez argues that Ms. 2547226 (as well as Ms. 2510083) would have been a desirable juror for the prosecution based on her law enforcement connections. (EOB 32-33.) However, the presence of factors which would normally be favorable concerning a prospective juror does not negate the genuineness of the prosecutor's proffered reasons for why the juror may not be the best juror for this case. Furthermore, the case relied upon by Enriquez to support this argument is easily distinguishable. (*Ibid.*) In *People v. Allen* (2004) 115 Cal.App.4th 542, the only two African-American jurors in the jury box had been excused. (*Id.* at p. 550.) Both had experiences or contacts that normally would be considered favorable to the prosecution. (*Ibid.*) This was used by the trial court to find a prima facie case in the first step of a *Batson/Wheeler* motion. (*Ibid.*) A prima facie finding is the first step in a *Batson/Wheeler* claim, and in the present case, the issue involves the third step.

Gutierrez argues that whether a prospective juror may lack the ability to stand his or her ground and voice an opinion is an inherent concern applicable to every single juror. (GOB 15.) Respondent disagrees. Many people exhibit and possess the ability to state their opinion while listening

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[13] Ramos makes a similar argument that the prosecutor's justification for excusing Ms. 2547226 was "weak" based on the fact that the prosecutor initially could not recall his reasons for exercising a peremptory challenge for this juror. (ROB 74; 5 ART 1060.)

to others in the deliberation process. In fact, no other seated juror demonstrated the hesitancy and timidity that Ms. 2547226 displayed in the answers she gave during voir dire. The "I don't think so" answers show a lack of confidence and assuredness regarding the juror's ability to speak out when necessary. The prosecutor's concern about Ms. 2547226's ability to deliberate was supported by her responses in voir dire, and no other juror expressed a similar inability to state their opinions and participate in deliberations.

C. The Court of Appeal Properly Relied on the Prosecutor's Clear and Reasonably Specific Explanations in Denying the *Batson/Wheeler* Claim

Gutierrez argues that the Court of Appeal, in assessing the validity of exercising a peremptory challenge as to Ms. 2547226, relied upon factors not cited by the prosecutor. (GOB 15-16.) These include the fact that Ms. 2547226 "'did not know how many jurors had to agree to a verdict in a criminal case,'" and "'gave equivocal answers to some questions and expressed a lack of understanding of the jury process in a criminal case.'" (GOB 15-16, quoting Slip Opinion at p. 11.) A careful reading of the opinion reveals that the appellate court did not rely on these facts as reasons to excuse the juror. Nor did the Court of Appeal attempt to add to the explanation given by the prosecutor. Rather, the Court of Appeal explained the prosecutor's stated reasons for exercising the challenge, that is, the prosecutor "indicated he felt she might have trouble fulfilling her role as a juror and in understanding the role of a juror." (Slip Opinion at p. 11.) The Court of Appeal then pointed to the portion of the record which supported the prosecutor's stated reasons, namely, Ms. 2547226's equivocal answers, including the answer in which she indicated she did not know how many jurors had to agree to reach a verdict in a criminal case. (*Ibid.*) The Court of Appeal at no time cited to the juror's answers as a substitute for the

explanation provided by the prosecutor concerning the exercise of the peremptory challenge. In other words, the Court of Appeal properly allowed the prosecutor to "stand or fall on the plausibility of the reasons he gives." (*Miller-El, supra*, 545 U.S. at p. 252.) Because the record supported the prosecutor's stated reasons and because those reasons were race-neutral and genuine, the Court of Appeal properly upheld the trial court's denial of appellants' motions.

Gutierrez argues that the prosecutor's explanation cannot be upheld based on Ms. 2547226's demeanor as suggested by the Court of Appeal because the prosecutor never used the word "demeanor." (GOB 16-17.) However, the Court of Appeal did not rely on the demeanor of the juror in upholding the trial court's denial of the *Batson/Wheeler* motion. While the court did cite to *People v. Davenport* (1995) 11 Cal.4th 1171, 1203, for the proposition that "[p]eremptory challenges properly may be based on the demeanor of the prospective juror," it did not rely on this characteristic for Ms. 2547226 nor did it suggest that the prosecutor relied upon this juror's demeanor in excusing her. (Slip Opinion at pp. 11-12.)

As Gutierrez points out, the trial court did not make a specific finding as to Ms. 2547226, or mention her demeanor. He argues however that, as in *Snyder v. Louisana* (2008) 552 U.S. 472 (*Snyder*), because the trial court made no specific finding on demeanor, the reviewing court could not presume that the lower court made a determination on that ground. In *Snyder*, the prosecution offered two race-neutral reasons for striking the juror at issue, one of which was that the prospective juror looked very nervous throughout the questioning. (*Id.* at p 478.) On review, the Court noted that, rather than making a specific finding on the record concerning the juror's demeanor, the trial judge simply allowed the challenge without explanation. (*Id.* at p. 479.) Thus, the Court could not presume that the

trial judge credited the prosecutor's stated reason that the juror appeared nervous. (*Ibid.*)

Here, on the other hand, the prospective juror's answers to the questions during voir dire were articulated in such a fashion so as to provide evidence that the juror may not understand the role of a juror and may be timid about speaking her mind when necessary during deliberations. The prosecutor did not cite her demeanor as a reason for excusing this juror. The trial court made no finding as to this juror's demeanor. And the Court of Appeal did not rely upon this juror's demeanor or ascribe this reason as one the prosecutor relied on in excusing the juror. Thus, the Court of Appeal did not presume that the trial court made a determination based on Ms. 2547226's demeanor.

D. The Trial Court Was Not Required to Make Specific or Detailed Findings as to Ms. 2547226 Because the Prosecutor's Stated Reasons Were Both Inherently Plausible and Supported by the Record

Gutierrez and Ramos contend that the trial court erred by accepting the prosecutor's reasons without conducting an individualized third-step *Batson* inquiry. (GOB 18-24; ROB 75.) Ramos specifically points out that the trial court did not make any individual findings as to Ms. 2468219 and 2547226. (ROB 53.) However, in light of the facts pertaining to Ms. 2547226 and Ms. 2468219, the trial court was not required to question the prosecutor or make detailed findings.

This Court has recently explained that, in some instances, the trial court is not required to explain on the record its ruling on a *Batson/Wheeler* motion:

> [T]he trial court must make a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has

> exercised challenges for cause or peremptorily. . . . [T]he trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine.

(*People v. Hung Thanh Mai*, *supra*, 57 Cal.4th at pp. 1048, 1054, internal citations and quotations omitted.) "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings." (*Reynoso*, *supra*, 31 Cal.4th at p. 923.)

Here, the trial court made a "sincere and reasoned attempt" to evaluate the explanations given for the prosecutor's peremptory challenges. This is evident from the methodical and careful means by which the trial court examined almost every single excused juror. The ruling of the trial judge was comprehensive and was the result of the trial court having the benefit of being able to "place jurors' answers in context and draw meaning from all circumstances, including matters not discernible from the cold record." (*Lenix*, *supra*, 44 Cal.4th at p. 626.) As set forth in detail in the preceding arguments, the prosecutor's stated reasons concerning Ms. 2547226 were factually supported by the record and were inherently plausible. Ms. 2547226 answered questions from the prosecutor in a way that suggested she may have difficulty discussing the case with fellow jurors and understanding her role as a juror. Furthermore, the court pointed out that the prosecutor questioned all of the potential jurors in a similar fashion and asked appropriate questions designed to elicit useful information regarding potential bias and suitability to serve on the jury. (5 ART 1073-1074.) The prosecutor's questions during voir dire are a proper consideration under a *Batson/Wheeler* analysis. (See *Batson*, *supra*, 476 U.S. at p. 97.)

As to Ms. 2468219, the prosecutor explained that she had lived in an area where there is a lot of gang activity although she had not specifically seen any. (5 ART 1061.) Her brother had been accused of wrongdoing and she had been a member of a hung jury on a criminal case. (*Ibid.*) All of these facts led to the prosecutor exercising a peremptory challenge against Ms. 2468219. (*Ibid.*) The reasons stated by the prosecutor were inherently plausible and supported by the record.

In addition, the trial court conducted its own comparative juror analysis and found that the jurors that were passed on did not fall into the same category as those the prosecutor had excused in terms of life experiences, gang experience, and bad experiences with law enforcement. (5 ART 1073.) Under these circumstances, the trial court was under no duty to further question the prosecutor about his stated reasons for exercising the peremptory challenges or to make any detailed findings as to this juror.

Ramos argues that the Court of Appeal committed error under *Turner* by accepting the prosecutor's justifications for striking Ms. 2547226 without conducting further inquiry. (ROB 73-75.) In *Turner*, this Court reversed a death penalty judgment where the prosecutor used his peremptory challenges to strike three Black prospective jurors in a racially discriminatory manner. (*Turner*, *supra*, 42 Cal.3d at p. 714.) It further determined that the inadequacy of the prosecutor's reasons was compounded by the trial court's acceptance of those reasons at face value and without any inquiry prior to denying the motion without comment. (*Ibid*, citing *People v. Hall* (1983) 35 Cal.3d 161, 169.) The explanations of the prosecutor "'demanded further inquiry on the part of the trial court' [citation], followed by a 'sincere and reasoned' effort by the court to evaluate their genuineness and sufficiency in light of all the circumstances of the trial [citation]." (*Id.* at p. 728.) Thus, the trial court failed to

discharge its duty to inquire into and carefully evaluate the explanations offered by the prosecutor. (*Ibid.*)

This case is factually nothing like *Turner* because the stated reasons of the prosecutor for excusing this juror were reasonable. Moreover, the trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine. (*Reynoso*, *supra*, 31 Cal.4th at p. 919.)

Ramos argues that one of the prosecutor's reasons for excusing the juror, that he was concerned about her understanding of the role of a juror, was not genuine because her lack of prior jury experience made her answers in voir dire unremarkable. But that is precisely the point. This juror did not have any juror experience. Her lack of experience was evident from some of her answers in voir dire. The prosecutor reasonably may be concerned about this potential juror's lack of knowledge about the deliberation process and the role of each juror. The prosecutor reasonably could conclude in sincerity that this prospective juror with no prior jury experience, who would be a juror on a very serious criminal case involving three co-defendants charged with attempted murder and gang enhancements, would not be the best type of juror for the case. (See *Reynoso*, *supra*, 31 Cal.4th at pp. 924-925.)

Ramos also argues that Ms. 2547226 was the only juror questioned in this fashion. (ROB 74.) However, the court pointed out that the prosecutor questioned all of the potential jurors in a similar fashion and asked appropriate questions designed to elicit useful information regarding potential bias and suitability to serve on the jury. (5 ART 1073-1074.) Furthermore, the prosecutor questioned other potential jurors regarding the role of a juror. For example, prospective juror no. 2386215 was questioned about the presumption of innocence, the standard of proof applicable in a

criminal trial, and how the jurors can view all the evidence as overcoming the presumption. (3 ART 562-565 ["M.s 2386215, I have a sense that you get all the hard questions this afternoon."]; see also 3 ART 504-505, 506-508, 509-512, 512-514, 568-569.)

Ramos further contends that the prosecutor's stated reason – that this juror may not be able to be heard during deliberations if she felt strongly about something – was also suspect. (ROB 75.) However, this was a reasonable, sincere basis for striking this juror. As evidenced by the questions and answers during voir dire, this juror answered in a hesitant fashion to some of the questions and explained that she thought she was better at listening than at speaking her mind. (3 ART 492.) The prosecutor was entitled to rely upon her answers in forming his opinion that she may not be well-suited to be a juror in this multiple co-defendant gang case. Furthermore, the juror's equivocal and wavering answer – that she did not think she would have any problem letting other people on the panel know that she did not agree with them (*ibid.*) – only provides further support for the prosecutor's reasoning. Under these circumstances, the prosecutor's stated reason was valid and non-discriminatory as he reasonably could believe that this juror may not be well-suited to sit on this jury. Moreover, a prospective juror's statement that the juror could be fair despite legitimate reasons for excusing the juror does not invalidate the otherwise legitimate factor. (See *Williams*, *supra*, 16 Cal.4th at p. 191.)

In the alternative, the case should be remanded to allow the trial court to make an explicit finding regarding whether appellants established the existence of discrimination as to Juror Nos. 2547226 and 2468219. Although *Wheeler* error has been deemed reversible per se in light of the fundamental right involved (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 283), remand for a further hearing on the issue may be ordered in appropriate cases. (*People v. Williams* (2000) 78 Cal.App.4th 1118, 1125; *People v.*

Gore (1993) 18 Cal.App.4th 692, 706.) "Ordinarily, factors to be considered in determining whether remand is appropriate are the length of time since voir dire, the likelihood that the court and counsel will recall the circumstances of the case, the likelihood that the prosecution will remember the reasons for the peremptory challenges, as well as the ability of the trial judge to recall and assess the manner in which the prosecutor examined the venire and exercised other peremptory challenges." (*People v. Williams*, *supra*, 78 Cal.App.4th at p. 1125.) Here, the trial court would be able to make findings based on the fact the record is inclusive and the prosecutor was able to state his reasons for excusing the prospective jurors. The trial court would not be asked to recall unspoken information as to these jurors, such as their demeanor, because the prosecutor's stated reasons can be found in the record of voir dire. Further, this was a serious gang case involving multiple defendants and involved the unusual testimony of Trevino, making it more likely the court would be able to recall specifics about the case.

Finally, Gutierrez argues that the challenged juror was also a woman which provided yet another reason why the trial court was required to conduct further inquiry into the prosecutor's explanation. (GOB 22-24.) However, the prosecutor's stated reasons for excusing Ms. 2547226 were both race-neutral and gender-neutral. The prosecutor clearly and reasonably specifically explained why he had challenged Ms. 2547226, and the record supports the reasons provided by the prosecutor. The reasons were credible and non-discriminatory. Thus, the trial court did not err when it did not make a specific and detailed finding as to this particular juror.

V. THE COURT OF APPEAL PROPERLY DENIED APPELLANTS' *BATSON/WHEELER* CHALLENGE AS TO MS. 2723471

Ms. 2723471 was a prospective juror who was excused by the prosecutor because she lived in Wasco but was not aware of any gang activity occurring there. Gutierrez makes several arguments as to Ms. 2723471, including that because Wasco is a predominantly Hispanic community, the prosecutor's stated reason for excusing Ms. 2723471 – that she was a resident of Wasco – was not a race-neutral factor. (GOB 27-31.) He further contends that the trial court's evaluation of the prosecutor's stated reasons for excusing this prospective juror was insufficient. (GOB 31-33.) Respondent addresses each of these arguments below.

A. Factual and Procedural Background

When asked to provide his reasons for exercising a peremptory challenge against Ms. 2723471, the prosecutor explained as follows:

> Your Honor, Ms. 2723471 is similar to, I believe, it was - - I may get it wrong. It was either Ms. 2510083 or Ms. 2408196. Ms. 2723471 was a tough one for me, Your Honor, not only did I pass for - - pass for the entire panel, and passed for challenges while she was on the panel, I think I did that two or three times. I kicked it over the entire week. And to tell you the truth, I feel bad about - - about having her come back on Monday, but it's the same thing for Ms. 2723471 as it was for that other juror.
>
> She's from Wasco and she said that she's not aware of any gang activity going on in Wasco, and I was unsatisfied by some of her other answers as to how she would respond when she hears that Gabriel Trevino is from a criminal street gang, a subset of the Surenos out of Wasco. That was what informed my decision on Ms. 2723471.

(5 ART 1058-1059.)

The trial court acknowledged that the prosecutor did pass several times with Ms. 2723471 still on the panel. (5 ART 1071-1072.) It then stated,

> And Ms. 2723471, I believe, according to [the prosecutor] was excused as a result of the Wasco issue and also lack of life experience. Another juror indicated he excused for the purposes of - - or excused as a result of primarily life experience, and I think it was Ms. 2510083, and both of those jurors are young. The only juror similarly situated that - - obviously, we still have - - we haven't finished the challenges, but Mr. 2861675 - - he has passed with Mr. 2861675 on the panel, and Mr. 2861675 is young. He's the only one that I find similarly situated perhaps to Ms. 2723471 and Ms. 2510083 in terms of perhaps having a lack of life experience, but there were other reasons as he gave to those jurors as well, not just the lack of life experience.

(5 ART 1072.)

On review, the Court of Appeal determined that,

> As to Prospective Juror No. 2723471 (hereafter Juror 2723471), the prosecutor indicated he exercised a peremptory challenge against her because she professed to being unaware of any gang activity occurring in Wasco, where she lived. This troubled the prosecutor because a principal witness, Trevino, was a member of a criminal street gang in Wasco and the prosecutor was concerned how Juror 2723471 would react to testimony from a Wasco gang member. This is a race-neutral reason that need not rise to the level of a challenge for cause. Moreover, it constitutes a valid reason, even if in a defendant's view the reason is trivial. (*People v. Arias* (1996) 13 Cal.4th 92, 136.)

(Slip Opinion at p. 12.)

B. The Prosecutor Provided a Legitimate Reason for Exercising a Peremptory Challenge against Ms. 2723471

Gutierrez argues that because Wasco is a predominantly Hispanic community, the prosecutor's stated reason for excusing Ms. 2723471 – that she was a resident of Wasco – was not a race-neutral factor. (GOB 27-31.) However, the prosecutor did not excuse this juror based on her residence alone. The prosecutor excused Ms. 2723471 because she lived in Wasco and was unaware of any gang activity in Wasco despite living there. Gutierrez later acknowledges that the prosecutor's stated reason for

excusing this juror is not simply a matter of residence. (GOB 28-29.) His argument becomes that the prosecutor did not explain clearly and reasonably the link between the jurors living in Wasco and the facts of the case. (*Ibid.*) Similarly, Ramos contends that one of the prosecutor's reasons for excusing Ms. 2723471 and Ms. 2408196 – that they were unaware of any gang activity in Wasco despite living there – was implausible. (ROB 63-67.) These arguments lack merit, for the prosecutor's stated reason was clear and reasonably specific and was relevant to the particular issues at trial.

The prosecutor challenged these jurors because their lack of knowledge of gang activity in an area where gang activity was present may affect their ability to believe Trevino, himself an active gang member in Wasco. (5 ART 1056, 1059.) Trevino was an important witness for the prosecution in that he provided testimony concerning not only the crimes at issue but testimony regarding the Sureño criminal street gang and its activities. Trevino was part of a Sureño subset that was based in Wasco. The prosecutor reasonably could be concerned that Ms. 2723471 and Ms. 2408196 may not find Trevino credible. The prosecutor's reason for excusing these jurors was clear and reasonably specific, and the trial court understood the prosecutor's reason. (5 ART 1071-1072.) It was also a valid and non-discriminatory reason for excusing these prospective juror, and the trial court properly determined the reason was genuine.

Moreover, the stated reason was relevant to the issues at trial. Trevino, a gang member active in Wasco, turned state's evidence, testifying extensively about the Sureño gang under an immunity agreement. The fact that a potential juror is unaware of the activity of gangs in Wasco could cause that juror to be biased against Trevino who would testify to the contrary. Peremptory challenges may properly be used to remove prospective jurors believed to entertain specific bias, i.e., bias regarding a

particular witness. (*Wheeler*, *supra*, 22 Cal.3d at p. 274.) The "law recognizes that a peremptory challenge may be based on a broad spectrum of evidence suggestive of juror partiality," ranging "from the virtually certain to the highly speculative." (*Williams I*, *supra*, 16 Cal.4th at p. 190.)

Ramos argues that anticipated testimony of Trevino had no material bearing on the issues in the case and was of a passing nature. (ROB 64.) This is incorrect. The prosecutor could have anticipated Trevino testifying under an immunity agreement. Trevino was not only a participant in the crimes at issue, he was a member of the Sureños, specifically the Varrio Wasco Rifa, which is a subset of the Sureño criminal street gang. (1 ERT 33.) The prosecutor reasonably could have anticipated that Trevino would testify as to his own gang affiliation and criminal activity in Wasco. Trevino was a key prosecution witness, and the prosecutor's reason for excusing these jurors who could potentially find Trevino to be incredible was genuine and nondiscriminatory. To describe the testimony of Trevino as "of the most passing nature" is misleading.

This Court's decision in *Williams I* provides useful guidance on this issue. In that case, the defendant presented a similar argument that the prosecutor's explanation for excusing a prospective juror, while facially neutral, functioned as a proxy for race. (*Williams I*, *supra*, 16 Cal.4th at p. 190.) At trial, the prosecutor used residence as a link connecting a prospective juror to the facts of defendant's case. (*Id.* at p. 191.) Referring to evidence that the defendant in the case was a member of the Blood gang, the prosecutor stated he suspected the juror in question would be sympathetic toward Blood gang members because the juror had attended Morningside High in "a Blood gang area." (*Ibid.*) The prospective juror confirmed on voir dire that he had gone to school with gang members, that the Blood gang was prevalent at Morningside High School, and that "'the whole school would get together and run [the Crips] out' if they came to

Morningside High." (*Ibid.*) According to the *Williams I* Court, the prosecutor's conclusion that the likelihood the juror would evince sympathy for the defendant based on his high school familiarity with Blood gang members was sufficient to warrant use of a peremptory challenge. (*Ibid.*) Thus, the trial court did not err in accepting the prosecutor's race-neutral reason. (*Ibid.*)

Similarly, the prosecutor in the instant case linked the residence of Ms. 2723471 with the juror's ability to fairly judge the credibility of Trevino when he testified that he had been a member of a gang based in Wasco and detailed the gang activity in that area. Thus, there was a nexus between Ms. 2723471's unfamiliarity with gang activity in Wasco and this juror's potential bias against the prosecution's witness who was involved in gang activity occurring there.

Bishop is also inapposite. There the prosecutor explained his peremptory challenge was based in part on the fact that the black juror lived in a predominantly low-income, black neighborhood (Compton) and was therefore likely to believe the police "'pick on black people.'" (*Id.* at p. 821.) The *Bishop* Court found that the proffered reasons (that people from Compton are likely to be hostile to the police because they have witnessed police activity and are inured to violence) are generic reasons, group-based presuppositions applicable in all criminal trials to residents of poor, predominantly black neighborhoods. (*Id.* at p. 825.)

Contrary to the facts in *Bishop*, here the prosecutor articulated the link between Ms. 2723471 living in Wasco and her being unaware of gang activity to the potential inability of the juror to fairly judge the credibility of an important prosecution witness. The stated reason was not a generalization applicable to racial groups and their environment as in *Bishop*. Thus, the trial court properly found the proferred reason for excusing the prospective juror was race-neutral and permissible.

People v. Turner (2001) 90 Cal.App.4th 413, is similarly distinguishable. There, the prosecutor excluded an African-American juror because she lived in Inglewood, and "people in [Inglewood] . . . may or may not consider drugs the problem that people in other locations do." (*Id.* at p. 418.) The reviewing court held that this was not a race-neutral reason, but was based on a stereotypical view of people who lived in Inglewood, a predominantly African-American neighborhood. (*Id.* at p. 420.) The prosecutor in this case, on the other hand, articulated the nexus between the juror living in Wasco and being unaware of any gang activity occurring in that region and the evidence that would be presented at trial via Trevino's testimony. The prosecutor reasonably concluded that Ms. 2723471 may find such testimony unbelievable in light of her experience in living in the community. Unlike *Turner*, the prosecutor's reason in this case was race-neutral and not based on a view of all people living in Wasco.

Gutierrez contends that the reason provided by the prosecutor is too speculative and that "wondering how [the juror] might react upon hearing that Gabriel Trevino was a gang member from her home town" does not adequately explain why the juror was removed. (GOB 30-31.) Gutierrez is overly critical of the prosecutor's choice of words. There is no requirement that the prosecutor state with precision his explanation for excusing a prospective juror. Nevertheless, the prosecutor gave a clear and reasonably specific explanation of his reason as explained above.

Gutierrez argues that Ms. 2723471 was never asked any questions about Trevino or how she would respond when she learned that a prosecution witness was a gang member from Wasco. (GOB 31.) A failure to engage in meaningful voir dire on a subject of purported concern can, in some circumstances, be circumstantial evidence suggesting the stated concern is pretextual. (See *Miller–El*, *supra*, 545 U.S. at pp. 244-245.) However, it was not necessary for the prosecutor to delve into detailed

questioning of this juror during the voir dire process. The questions asked by the prosecutor were sufficient to flush out the prospective juror's lack of awareness of gang activity in Wasco. (3 ART 731.) Even if the prosecutor had gone farther and asked Ms. 2723471 how she might react upon learning the Trevino was part of a criminal street gang based in Wasco, the juror's answers would not alter the analysis. Assuming the juror said that she could fairly judge the credibility of Trevino, the prosecutor is still justified in excusing the juror based upon her responses and his belief that she may not find the witness credible. A prospective juror's statement that the juror could be fair despite legitimate reasons for excusing the juror does not invalidate the otherwise legitimate factor. (See *People v. Watson*, *supra*, 43 Cal.4th at pp. 679-680; *Williams I*, *supra*, 16 Cal.4th at p. 191.)

Gutierrez argues that the prosecutor was not troubled about how other non-Hispanic Kern County or Bakersfield jurors might react upon hearing from Trevino that gang activity occurs there. (GOB 31.) However, he points to no juror who indicated that he or she was unaware of any gang activity in that county or the City of Bakersfield. This argument lacks merit.

Ramos contends the prosecutor's justification was exaggerated in that the prosecutor stated some of this prospective juror's other answers made him dissatisfied about how she would respond to Trevino's testimony. (ROB 65.) Ramos counters that the prosecutor only asked Ms. 2723471 one question. (*Ibid.*) This also misstates the record. First, the prosecutor asked Ms. 2723471 several questions. (3 ART 731.) Second, he did not state in his explanation that he was relying on Ms. 2723471's answers to only his questions. He referred to some of her "other answers." (5 ART 1060.) Ms. 2723471 provided many answers to questions posed by the trial court and by defense counsel. (3 ART 720-722, 731.) As such, the prosecutor's stated reason was supported by the record. Moreover, this

prospective juror's answers to other questions gave the prosecutor the opportunity to learn that this juror was unaware of gang activity in Wasco despite living there. Thus the prosecutor's decision to limit questioning of this juror does not undermine the trial court's finding that the reason was not pretextual. (See, e.g., *People v. Lewis* (2008) 43 Cal.4th 415, 476[14] [prosecutor had opportunity to observe juror's demeanor during questioning by court and defense counsel and failure to question did not undermine trial court's decision that reasons for challenge were not pretextual]; *People v. Edwards* (2013) 57 Cal.4th 658, 698.)

Finally, Ramos attempts to show discriminatory intent on the part of the prosecutor by pointing out that these two jurors had strong law enforcement connections. (ROB 63.) However, the existence of positive reasons for retaining a prospective juror does not transform the prosecutor's stated reasons into reasons based on racial bias. A party legitimately may challenge one prospective juror but not another to whom the same particular concern applies. (*People v. Chism* (2014) 58 Cal.4th 1266, 1319.)

C. The Trial Court Properly Conducted a Sincere and Reasoned Inquiry Regarding Ms. 2723471

Gutierrez argues that the trial court's evaluation of the prosecutor's stated reasons for excusing Ms. 2723471 was insufficient. (GOB 31-33.) Gutierrez points to the trial court's analysis that this juror was excused "as a result of the Wasco issue and also lack of life experience" and argues that because the explanation was suggestive of bias, the trial court was required to undertake further inquiry to evaluate the genuineness of the explanation. (*Ibid.*) In the same vein, Ramos points out that the trial court relied on lack

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[14] Abrogated on others grounds in *People v. Black* (2014) 58 Cal.4th 912, 919-920.

of life experience as a reason for excluding Ms. 2723471 while the prosecutor did not cite this as a reason for exercising a peremptory challenge against her. (ROB 65.)

Here, the trial court's inquiry in the matter was individualized. As the record reflects, the trial court examined the reasons for excusing Ms. 2723471 individually to determine whether she had been excused improperly. Despite the court's misstatement about Ms. 2723471's life experience, the trial court correctly pointed out that this juror was excused by the prosecutor because she had no awareness of gang activity in Wasco even though she lived in that community, and that reason, as set forth above, was a genuine, nondiscriminatory basis for the challenge. There is nothing vague or suggestive of bias in the stated reason provided. Thus, the record demonstrates that the trial court made a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered by the prosecution, and its conclusions are entitled to deference on appeal. (*Lenix*, *supra*, 44 Cal.4th at pp. 613-614.) No further inquiry was necessary.

Finally, Ramos argues that the court incorrectly noted that the prosecutor twice passed his peremptory challenges with Ms. 2723471 on the panel. (ROB 66, citing 5 ART 1058, 1071.) Ramos correctly points out that the prosecutor passed on his challenges with this juror on the panel only one time. (*Ibid.*) The trial court's mistake is likely a function of the note-taking at this early stage in the proceeding. At the time the parties were exercising their peremptory challenges, including passing on Ms. 2723471, the prosecutor passed on the jury panel five times. (4 ART 742-744.) Regardless, the significance of the prosecutor passing on the jury with this prospective juror on the panel remains, regardless of whether it was once or twice. This factor demonstrates the prosecutor's good faith in exercising peremptory challenges against the jurors at issue. Although not a conclusive factor, "the passing of certain jurors may be an indication of

the prosecutor's good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection. . . ." (*People v. Snow* (1987) 44 Cal.3d 216, 225.)

VI. THE COURT OF APPEAL PROPERLY DENIED APPELLANTS' *BATSON/WHEELER* CHALLENGE AS TO MS. 2510083

Gutierrez argues that the prosecutor's explanation for removing Ms. 2510083 – which he terms as a resolved claim of hardship – was implausible. (GOB 36-40.) He further argues that the trial court rejected the proffered reason given by the prosecutor that Ms. 2510083 had limited life experience (GOB 41-42), and that the trial court erred by accepting the prosecutor's reasons at face value without an individualized third-step *Batson* inquiry (GOB 45-47). Respondent addresses each of these contentions below.

A. Factual Background

During voir dire on May 9, 2012, Ms. 2510083 brought a hardship issue to the attention of the court. The following colloquy took place:

BY THE COURT:

Q. Let me get your name.

A. It's 2510083.

Q. Ms. 2510083, you have some sort of hardship, ma'am; is that correct?

Ma'am, go ahead.

A. I work at an elementary school and there's only two more weeks of school left, and so when that's over, I will be out of work. And I was actually applying at a few places, and I did have an interview on Monday, but missed it, and I also have another one on Friday.

Q. This Friday?

A. Yeah.

Q. What time is the interview?

A. At 10:30.

Q. So can they reschedule that interview for you?

A. I can call and ask.

Q. If you can, let them know, you're on jury duty and you -- the judge asked if it was possible to reschedule the interview, and then let us know what you find out tomorrow, would that be all right?

A. I can do that.

Q. So, I mean, ultimately, you're going to get paid for the two weeks, remaining in the school year for jury services; is that correct?

A. Yeah.

Q. So it's just a matter of perhaps missing an opportunity to get another job?

A. Yes.

Q. Why don't you check and see if they can reschedule that interview for you. You know, even at some other time or maybe they can schedule it at 12:30 Friday or something like that, and we will try to work around it, or maybe at the end of the day, they can do at four o'clock for you, and we will try to get you out of here for that interview or something to that effect or earlier in the morning, just see what they say, and let them know what your situation is, and see what they tell you and then let me know tomorrow.

A. Before --

Q. Remind Deputy Perez that you need to talk to us tomorrow.

A. Okay.

THE COURT: Any questions, Mr. Revelo?

MR. REVELO: No.

THE COURT: Ms. Kim?

MS. KIM: No, Your Honor.

THE COURT: Mr. Terry?

MR. TERRY: None.

THE COURT: Mr. Schlaerth?

MR. SCHLAERTH: None.

THE COURT: We will see you tomorrow at 9:00. Maybe you can find out by 9:00, and if not, we'll give you a chance to make a phone call tomorrow and find out.

THE JUROR: Okay.

THE COURT: Thank you very much, ma'am.

THE JUROR: Thank you.

(5 ART 388-390.)

On the following day, May 10, 2012, Ms. 2510083 discussed the issue with the trial court again.

BY THE COURT:

Q. So you were going to change a job interview tomorrow?

A. Yeah. I was going to tell you after. I was able to talk to the manager, and he said that it was okay if I go tomorrow at 4:00.

Q. Oh, okay. So we will definitely -- I need you to remind me. So what time would you have to leave here to make it by four o'clock.

A. Probably like 3:30.

Q. All right. We will certainly make arrangements for you to keep that appointment.

A. Okay.

Q. All right. Then you're free to go. We will see you back tomorrow at nine o'clock.

A. Okay. Thank you.

(5 ART 603-604.)

Following the trial court's finding of a prima facie case, the prosecutor pointed out that Ms. 2510083 did not appear to be Hispanic although she did have a Hispanic surname. (5 ART 1058.) The prosecutor then provided the following explanation for exercising a peremptory challenge as to Ms. 2510083:

> Your Honor, Ms. 2510083, like I was asking to Mr. 2868617 and Ms. 2478882, I was concerned about her life experience. She's an instructional aide at an elementary school and she has no jury experience and she came across as being quite young. And, although, her youth is not a reason for exclusion, I thought there was a lack of sophistication in some of her answers. And, I believe, she had also asked for release due to a hardship because of her situation.
>
> And I do note that this was a tough call. She had relatives in law enforcement. And, I believe, a cousin who is a paralegal, so she had some idea of the nature and the purpose of these proceedings, but it just didn't seem to me that she had - - again, she had the life experience necessary to consider some of the charges and - - and, again, the - - well, I will just leave it there. That was my reasoning. . . .

(5 ART 1057.)

After hearing argument from all parties, the trial court found as follows concerning Ms. 2510083:

> And Ms. 2723471, I believe, according to [the prosecutor] was excused as a result of the Wasco issue and also lack of life experience. Another juror indicated he excused for the purposes of - - or excused as a result of primarily life experience, and I think it was Ms. 2510083, and both of those jurors are young. The only juror similarly situated that - - obviously, we still have - - we haven't finished the challenges, but Mr. 2861675 - - he has passed with Mr. 2861675 on the panel, and Mr. 2861675 is

young. He's the only one that I find similarly situated perhaps to Ms. 2723471 and Ms. 2510083 in terms of perhaps having a lack of life experience, but there were other reasons as he gave to those jurors as well, not just the lack of life experience.

(5 ART 1072.)

In turn, the appellate court found as to Ms. 2510083:

> Prospective Juror No. 2510083 [] was excused by the prosecutor because she had claimed a hardship in serving, even though the trial court did not excuse her based on hardship. This constitutes a valid race-neutral reason for excusing the juror on a peremptory challenge. [Citations.]

(Slip Opinion at p. 12.)

B. The Prosecutor's Stated Reason That Ms. 2510083 Asked to be Released for Hardship Was a Genuine Mistake and Thus a Race-Neutral Reason

In the third stage of a *Batson/Wheeler* analysis, the trial court must decide whether the opponent of the peremptory strike has proved purposeful discrimination. (*Purkett, supra*, 514 U.S. at p. 767.) The persuasiveness of the proffered justification is relevant, and implausible or fantastic justifications will be found to be pretexts for purposeful discrimination. (*Purkett*, at p. 768.) However, an "honest mistake of fact" will not necessarily demonstrate impermissible group bias. (*Jones, supra*, 51 Cal.4th at p. 366; see also *People v. Elliott* (2012) 53 Cal.4th 535, 565.) As recognized by this Court, "factual mistakes of this sort are usually the result of faulty memory and 'are not necessarily associated with impermissible reliance on presumed group bias.'" (*People v. Elliott, supra*, 53 Cal.4th 535, 565, quoting *Williams I*, supra, 16 Cal.4th at p. 189; accord, *Jones, supra*, 51 Cal.4th at p. 366.) This "isolated mistake or misstatement" (*People v. Silva, supra*, 25 Cal.4th at p. 385) by itself does not compel the conclusion that this reason was not sincere. For instance, in *Williams I, supra*, 16 Cal.4th 153, 188, the prosecutor stated he excused a

juror "in error," and the defense brought a *Batson/Wheeler* motion challenging the juror's excusal. This Court found no violation of *Batson/Wheeler*, holding that "a genuine 'mistake' is a race-neutral reason." (*Id.* at p. 189.) In *Williams II, supra*, 56 Cal.4th 630, the Court similarly found the prosecutor's mistaken reason for excusing a juror was a race-neutral reason, even where the court and parties were never made aware of the prosecutor's possible error. (*Id.* at p. 661.)

Here, the mistaken recollection of the prosecutor does not demonstrate pretext. When asked to provide his reason for exercising a peremptory challenge as to Ms. 2510083, the prosecutor stated that he believed the answers provided by Ms. 2510083 demonstrated a lack of sophistication. (5 ART 1057.) The prosecutor also stated, "And, I believe, she had also asked for release due to a hardship because of her situation." (*Ibid.*) He then went on to explain that "it just didn't seem to me that she had - - again, she had the life experience necessary to consider some of the charges." (*Ibid.*) Thus, the prosecutor indicated as a reason for excluding the juror – his belief that she had asked to released from jury duty. None of the three defense attorneys or the court corrected the prosecutor's statement that Ms. 2510083 asked to be released from the jury. However, an examination of the record reveals that this particular juror did not ask to be released from jury service as a result of a hardship. She did bring a possible conflict, a pending work interview, to the attention of the court. The court suggested that she attempt to reschedule the interview which the juror was ultimately able to do. At no time did Ms. 2510083 seek to be excused from the jury for hardship.[15]

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[15] It should be noted that the court referred to the issue raised by Ms. 2510083 as "some sort of hardship," and that "[t]here's a couple of people

(continued...)

This mistake was understandable given the length of voir dire and the number of parties involved in the process. Voir dire took place from Monday, May 7, 2012 to Wednesday, May 16, 2012. (2 ECT 301-326.) The particular juror at issue, Ms. 2510083, brought her interview to the court's attention on Wednesday, May 9. (2 ART 389.) Although the record is not clear, it appears the prosecutor exercised a peremptory challenge as to this juror on Monday, May 14. (4 ART 893-897.) The court and prosecutor were involved in the voir dire process along with three attorneys representing each of the appellants. There was an intervening weekend prior to appellants' *Batson/Wheeler* motions, which were made on Tuesday, May 15. (5 ART 1048.) Under these circumstances, it is understandable that the prosecutor's memory was not perfect. "The purpose of a hearing on a *Wheeler/Batson* motion is not to test the prosecutor's memory but to determine whether the reasons given are genuine and race neutral." (*Jones*, *supra*, 51 Cal.4th at p. 366.) In light of the lengthy voir dire process and the number of parties involved in selecting the jury, the prosecutor's mistaken reference to Ms. 2510083 seeking to be released from jury service does not establish that the stated reason was a pretext for discrimination.

Furthermore, the prosecutor's stated reason for excusing the juror was also that she lacked life experience and that there was a lack of sophistication in her answers. (5 ART 1057.) These reasons were also race-neutral and valid. The prosecutor's mistake regarding Ms. 2510083 asking to be excused is not unreasonable under the circumstances, and the juror was excused for the additional reasons which were race-neutral.

(...continued)
that have hardships," which may have contributed to the prosecutor's confusion. (2 ART 387-388.)

"Faulty memory, clerical errors, and similar conditions that might engender a 'mistake' of the type the prosecutor proffered to explain his peremptory challenge are not necessarily associated with impermissible reliance on presumed group bias." (*Williams I, supra*, 16 Cal.4th at p. 189.)

Jones is instructive. In *Jones*, a prospective juror, N.C., wrote on the juror questionnaire that his son had been accused of a crime but the prospective juror did not disclose the crime. (*Jones, supra*, at pp. 358, 366.) The defendant later made a *Batson/Wheeler* motion to the peremptory challenges in excusing three African-American prospective jurors. With regard to N.C., the prosecutor mistakenly said in explaining the peremptory challenge "'I think it was attempt[ed] murder or murder.'" (*Id.* at p. 358.) The prosecutor also explained that he was concerned with N.C.'s body language in response to several questions. When asked by the trial court whether the prosecutor's primary concern was that N.C. had a family member charged with a serious crime, the prosecutor responded that the "'conjunction'" of these factors "'pushed [N.C.] over on the scale.'" (*Ibid.*) The trial court found the prosecutor's peremptory challenge to N.C. and two other prospective jurors to be for nonracial and racially neutral purposes. (*Id.* at p. 359.) The *Jones* court upheld the denial of the defendant's *Wheeler/Batson* motion, noting that there was no reason to assume the prosecutor intentionally misstated the matter, and an honest mistake by a prosecutor does not compel the conclusion that the prosecutor's reason for exclusion was insincere. (*Id.* at p. 366.) The court stated:

> Although relevant, this circumstance is not dispositive. No reason appears to assume the prosecutor intentionally misstated the matter. He might have based what he thought on information he obtained outside the record. Or he may simply have misremembered the record. The prosecutor had to keep track of dozens of prospective jurors, thousands of pages of jury questionnaires, and several days of jury voir dire, and then he

> had to make his challenges in the heat of trial. He did not have the luxury of being able to doublecheck all the facts that appellate attorneys and reviewing courts have. Under the circumstances, it is quite plausible that he simply made an honest mistake of fact. Such a mistake would not show racial bias, especially given that an accurate statement (that N.C. wrote that his son had been accused of, and tried for, a crime but left the rest of the answer blank) would also have provided a race-neutral reason for the challenge.

(*Ibid.*)

Here, as in *Jones*, the prosecutor made an isolated misstatement concerning Ms. 2510083. Just as the prosecutor in *Jones* seemed to qualify the reason by stating "I think it was attempt[ed] murder or murder," (*id.* at p. 358), the prosecutor here stated, "I believe, she had also asked for release due to a hardship because of her situation." (5 ART 1057.) Had the prosecutor's stated reason been accurate, i.e., had the juror asked to be excused from the jury based on a hardship, this would have been deemed a race-neutral reason to exercise a peremptory challenge. The record does not support the conclusion that the prosecutor intentionally misstated the record concerning Ms. 2510083. Also like the prosecutor in *Jones*, the prosecutor in this case had to keep track of dozens of jurors over a week of voir dire and then respond to three oral *Batson/Wheeler* motions in the heat of trial. Under these circumstances, the prosecutor's mistake, as in *Jones*, fails to show racial bias.

Gutierrez argues that the prosecutor's explanation for removing Ms. 2510083 based on a resolved claim of hardship was implausible. (GOB 36-40.) Gutierrez's argument, however, is premised on the mistaken notion that the prosecutor excused the juror based on her bringing her work interview to the trial court's attention. The prosecutor at no time stated his reason was based on a resolved claim of hardship. The prosecutor did not mention that the juror raised a hardship that she had a job interview which

she was ultimately able to reschedule. Instead, the prosecutor mistakenly stated that the juror asked to be released. This stated reason, an asserted hardship, has been found to be a race-neutral reason for exercising a peremptory challenge. (*People v. Barber* (1998) 200 Cal.App.3d 378, 398; *People v. Landry* (1996) 49 Cal.App.4th 785, 789.) As such, *Snyder*, supra, 552 U.S. at pp. 484-486 [prosecutor's reason pretextual where based on hardship that was determined to be not pressing], is inapposite. Gutierrez's argument, "The fact that the prosecutor would cite her rescheduled job interview – an issue that was fully resolved – as a reason to excuse her, suggests that the prosecutor's explanation was contrived" (GOB 38), is based on a faulty premise. The prosecutor's reason, although mistaken, was valid and did not give rise to an inference of discriminatory intent.

The comparative juror analysis utilized by Gutierrez is also based on the same faulty premise. A comparison of Ms. 2510083 with Juror No. 2581907 would be of use if the prosecutor had in fact offered Ms. 2510083's rescheduled interview as a reason to excuse her. The same holds true for Enriquez's attempt to compare Ms. 2510083 with Juror No. 2719513, who asked to be excused because the tennis team he coached was in playoffs. (EOB 40-41; 1 ART 130-133.) However, the prosecutor mistakenly believed that Ms. 2510083 sought to be released based on hardship.

C. The Prosecutor's Stated Reason That Ms. 2510083 Lacked Life Experience Was Supported by the Record and Was a Valid, Nondiscriminatory Reason for Excusing Her

Gutierrez argues that the trial court rejected the proffered reason given by the prosecutor that Ms. 2510083 had limited life experience. (GOB 41-42.) In support of this assertion he cited to the comparative juror analysis performed by the trial court pitching Ms. 2510083 against Juror No. 2861675. (*Ibid.*) In conducting this analysis, the trial court stated,

> And Ms. 2723471, I believe, according to [the prosecutor] was excused as a result of the Wasco issue and also lack of life experience. Another juror indicated he excused for the purposes of - - or excused as a result of primarily life experience, and I think it was Ms. 2510083, and both of those jurors are young. The only juror similarly situated that - - obviously, we still have - - we haven't finished the challenges, but Mr. 2861675 - - he has passed with Mr. 2861675 on the panel, and Mr. 2861675 is young. He's the only one that I find similarly situated perhaps to Ms. 2723471 and Ms. 2510083 in terms of perhaps having a lack of life experience, but there were other reasons as he gave to those jurors as well, not just the lack of life experience.

(5 ART 1072.)

The trial court did not reject the prosecutor's reasons for excusing Ms. 2510083. While the trial court acknowledged that Mr. 2861675 was "young," and "perhaps having a lack of life experience," the trial court found that there were other reasons given by the prosecutor to distinguish the two excused jurors, including that Ms. 2510083 was viewed as having a lack of sophistication in her voir dire responses. The trial court also explained its ruling as follows:

> As I indicated earlier, he's paid the same attention to all the jurors in terms of questioning whether they are Hispanic or not Hispanic, and he's asked appropriate questions to all the jurors, all in these particular areas trying to see if he could give some information, obviously, that he's interested in.
>
> I do find that the reason that he has given are a group and neutral reasons [*sic*], therefore, I'm going to deny the motion at this time.

(5 ART 1073-1074.) With this ruling, the trial court specifically accepted the prosecutor's reasons as genuine and nondiscriminatory.

The trial court's determination is supported by a comparative juror analysis. Ms. 2510083 was not married and had no children. (4 ART 818.) She had no jury experience. (*Ibid.*) At the time of jury selection, she was an instructional aide for fourth graders. (4 ART 868.) Her prior work was

in customer service for a phone company. (4 ART 869.) She informed the court that she had only two more weeks of school and then she would be unemployed. (2 ART 388-389.)

Juror No. 2861675, who was ultimately seated on the jury, was unemployed at the time of the trial but was starting school in two months to pursue a career as an emergency service technician, a police officer, or a fireman. (3 ART 701.) Importantly, Juror No. 2861675 had worked as a security guard for two different apartment complexes. (3 ART 702, 731.) When asked about the general legal principles applicable to the criminal trial, including the burden of proof, presumption of innocence, and whether he had any issue with those principles, Juror No. 2861675 responded assuredly, "Not at all." (3 ART 706.) When asked if he had any issue with having to be a fair juror, the juror responded, "No problem at all." (*Ibid.*) The prosecutor asked questions of Juror No. 2861675 indicating, "it's pretty clear that you are both intelligent and you have a sense of humor." (3 ART 730.) The juror indicated he would have no problem deliberating with the jury. (*Ibid.*) The prosecutor likely determined that Mr. 2861675 would make a positive and intelligent contribution to the jury in light of his career goals and security guard experience despite the fact that he was young. A reviewing court may consider on appeal reasons in the record supporting a prosecutor's decision not to challenge a particular juror even if the prosecutor did not cite those reasons. (*Jones*, *supra*, 51 Cal.4th at pp. 365-366.) Compared to Ms. 2510083, the prosecutor may have determined that Juror No. 2861675 possessed more job experience, more extensive life experience, and had a strong handle on the trial process, and that the juror therefore would be experienced and assertive in dealing with the attempted murder and gang charges involved in this case.

Appellants contend that the record does not support the prosecutor's stated reasons for excusing Ms. 2510083 that there was a lack of

sophistication in some of her answers and that she lacked life experience.[16] (GOB 42-43; EOB 32-33; ROB 70-73.) However, as explained by this juror, she was a soon-to-be unemployed aide in a fourth grade classroom who was unmarried, had no children, and had no jury experience. (4 ART 818-819.) Further, Ms. 2510083's answers to the attorneys' questions were predominately short and often given in a yes or no fashion. (4 ART 850, 868-869.) The record adequately supports the prosecutor's stated reasons for excusing this juror.

Gutierrez also argues that the prosecutor failed to further question Ms. 2510083 about her life experience. (GOB 43.) He contends that the prosecutor failed to ask the prospective juror what life experience she possessed and what life experience she might lack. (*Ibid.*) A failure to engage in meaningful voir dire on a subject of purported concern can, in some circumstances, be circumstantial evidence suggesting the stated concern is pretextual. (See *Miller-El*, *supra*, 545 U.S. at pp. 244-245.) However, the prosecutor's voir dire was adequate in this case. The prosecutor asked the juror similar questions to those posed to the other venire members. It was unnecessary for the prosecutor to ask further questions because the juror provided information showing a lack of life experience. In responding to the trial court's general questions to each of the jurors, this prospective juror explained that she was not married and had no children. (4 ART 818.) She also had no jury experience. (*Ibid.*) Her employment history was limited to customer service and a teaching assistant position. (*Ibid.*) This information is sufficient for the prosecutor

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[16] Ramos contends the only voir dire answers given by Ms. 2510083 pertained to the hardship issue. (ROB 72.) On the contrary, the prosecutor asked many questions of this juror which revealed her lack of life experience and lack of sophistication in some of her voir dire answers. (4 ART 818-819, 850, 868-869.)

to determine that she lacked life experience in areas of significant importance such that she may not be the best suited candidate to serve on the jury. As this Court has recognized, "A party is not required to examine a prospective juror about every aspect that might cause concern before it may exercise a peremptory challenge." (*Jones*, *supra*, 51 Cal.4th at p. 363.) The prosecutor's belief that this potential juror lacked life experience is a race-neutral reason for exclusion for which the prosecutor asked relevant and sufficient questions. Under these circumstances, the prosecutor engaged in meaningful and sufficient voir dire of Ms. 2510083.

Gutierrez argues that the prosecutor failed to explain how Ms. 2510083's lack of life experience was relevant to the issues of the case. (GOB 43.) The prosecutor must demonstrate that the peremptory challenges were exercised on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses. (*Wheeler*, *supra*, 22 Cal.3d at p. 282.) Here, the juror's lack of life experience may have been a detriment to this complex, attempted murder case involving three co-defendants and gang allegations. Additionally, a high-ranking ex-gang member, Trevino, would be testifying for the prosecution and providing information as to the workings of the Sureño criminal street gang. The prosecutor reasonably could have determined that Ms. 2510083's lack of life experience would make her not well suited to sit on such a complex and serious case.

Gutierrez argues that the prosecutor's stated reason that there was a lack of sophistication in the answers given by Ms. 2510083 was not clear and reasonably specific and can be a proxy for discrimination. (GOB 44.) However, Ms. 2510083's answers reveal that she had never served on a jury, was not married, and had no children. (4 ART 818-819.) Her job as an instructional aid was about to conclude, and she had no further work. (2 ART 388-389.) This information supports the conclusion of the prosecutor

that this prospective juror may not be experienced or knowledgeable about various aspects of life. The record adequately supports the prosecutor's opinion of this juror. Limited life experience and immaturity are neutral reasons supporting a peremptory challenge. (See *People v. Sims* (1993) 5 Cal.4th 405, 431; *People v. Neuman* (2009) 176 Cal.App.4th 571, 581; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328.)

Gutierrez cites to *McGahee v. Alabama Dept of Corrections* (11th Cir 2009) 560 F.3d 1252, 1265, but the case does not assist him. (GOB 44.) In that case, the State of Alabama had proffered as an explanation that it removed multiple African-American jurors because of their "low intelligence" when the intelligence of the jurors was unsupported by any evidence in the record. (*Ibid.*) The prosecutor in this case at no time challenged Ms. 2510083's intelligence. The case does not further Gutierrez's argument.

D. The Trial Court Conducted a Proper Third-Step Inquiry of the Prosecutor's Stated Reasons

Gutierrez argues that, because the reasons provided by the prosecutor were implausible and failed comparative analysis, the trial court erred by accepting them at face value without an individualized third-step *Batson* inquiry. (GOB 45-47.) However, Gutierrez's argument depends on two faulty premises: (1) that the trial court rejected the prosecutor's stated reasoning that Ms. 2510083 lacked life experience; and (2) that the trial court denied the *Batson* motion based on "other reasons" which were not stated by the prosecutor. As explained in the preceding arguments, the trial court did not reject the prosecutor's reasons for excusing Ms. 2510083. While the trial court acknowledged that Ms. 2861675 was "young," and "perhaps having a lack of life experience," in comparing Ms. 2510083 with seated juror No. 2861675, the trial court found that there were other reasons given by the prosecutor to be valid, such as a lack of sophistication in her

voir dire responses. Limited life experience and immaturity are neutral reasons supporting a peremptory challenge. (*People v. Sims*, *supra*, 5 Cal.4th at pp. 429-430; *People v. Perez*, *supra*, 29 Cal.App.4th at p. 1328.) "A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons." (*Lenix*, *supra*, 44 Cal.4th at p. 613.) Certainly a lack of life experience and lack of sophistication are stronger, more valid reasons for excusing a juror than a hunch. Thus, the trial court analyzed the prosecutor's reasons of lack of life experience and lack of sophistication in this prospective juror's voir dire answers and determined that the explanations provided by the prosecutor were genuine. Neither of the prosecutor's stated reasons were implausible or suggestive of bias. Lack of experience and youth are accepted reasons based on sound trial strategy for excusing a prospective juror. A potential juror's youth and apparent immaturity are race-neutral reasons that can support a peremptory challenge. As the Supreme Court observed in *Rice v. Collins* (2006) 546 U.S. 333, 341, it is not unreasonable for a prosecutor to believe a young person with few ties to the community might be less willing than an older, more permanent resident to impose a substantial penalty." (*People v. Lomax* (2010) 49 Cal.4th 530, 575.) The trial court's analysis and ruling on the *Batson/Wheeler* motion indicate that it accepted as reasonable and genuine the prosecutor's stated reasons for excusing this juror after making a sincere and reasoned attempt to evaluate the proffered reasons.

VII. THE COURT OF APPEAL PROPERLY DENIED APPELLANTS' *BATSON/WHEELER* MOTION AS TO MR. 2291529

Enriquez argues that the prosecutor's stated reasons for excusing Mr. 2291529 were pretextual because this juror stated in voir dire that he harbored no ill will toward the Sheriff's Office and because the fact relied on by the prosecutor – that this juror's brother had died – had occurred over

twenty years earlier. (EOB 33-34.) The prosecutor exercised a peremptory challenge against this juror because the juror appeared to be more affected by a recent law enforcement encounter than by his brother's death from a bar fight which had occurred years earlier and which the potential juror could not say had been adequately investigated. (5 ART 1059.) The disproportionate nature of his answers caused the prosecutor concern. As pointed out above, a negative experience with the criminal justice system is a valid nondiscriminatory reason for excusing a juror. (*People v. Calvin* (2008) 159 Cal.App.4th 1377, 1386-1387.) Moreover, a prospective juror's statement that the juror could be fair despite legitimate reasons for excusing the juror does not invalidate the otherwise legitimate factor. (See *People v. Watson*, *supra*, 43 Cal.4th at pp. 679-680; *People v. Williams*, *supra*, 16 Cal.4th at p. 191.) The prosecutor reasonably could have concluded that this juror may view law enforcement with distrust based on their failure to adequately investigate his brother's case. Enriquez points out that this potential juror's brother had been killed twenty years earlier while the most recent interaction with law enforcement was two years prior, inferring that the juror's emotional reactions were not cause for concern and not a valid, race-neutral reason for excusing the juror. (EOB 33-34.) On the contrary, the prosecutor reasonably could have been concerned that this juror's reaction to the recent encounter with law enforcement demonstrated he in fact did not trust police officers and would be biased against them.

VIII. ALTHOUGH THE COURT OF APPEAL SHOULD HAVE CONDUCTED COMPARATIVE JUROR ANALYSIS, SUCH ANALYSIS DOES NOT DEMONSTRATE THAT THE PROSECUTOR ENGAGED IN PURPOSEFUL DISCRIMINATION

Enriquez and Ramos argue that the Court of Appeal erred in refusing to undertake comparative analysis as directed by this Court in *Lenix*, *supra*, 44 Cal.4th at p. 622. (EOB 37-39; ROB 49-50.) Respondent agrees.

A. Factual Background

At trial, counsel for Gutierrez challenged the prosecutor's reasoning and attempted to engage in some comparative juror analysis.[17] (5 ART 1062-1066.) Counsel pointed out that while Ms. 2510083 had family members who were serving time in prison, the prosecutor passed on another prospective juror, Ms. 2589394, who also had family members serving time.[18] (5 ART 1064-1065.) Counsel for Enriquez also encouraged the trial court to examine the challenged jurors with those sitting on the jury currently. (5 ART 1067.) He compared the challenged jurors with those left on the panel who had contact with gangs. (*Ibid.*) For instance, Mr. 2861675, who is white, had prior exposure to gangs but remained on the jury. (*Ibid.*) Similarly, Mr. 2546044 and Mr. 2581097 had exposure to gangs which put them in the same category as those Hispanics who had been exposed to gang activity. (5 ART 1068.) Furthermore, Ms. 2674226 had no prior jury service but was retained on the jury while some Hispanic jurors were challenged on the grounds that they lacked experience. (*Ibid.*)

The prosecutor responded by distinguishing the extent and nature of the exposure to gang activity experienced by some sitting jurors, such as Mr. 2581907, who volunteered in the state prison and taught gang members. (5 ART 1069.) This was different from the exposure of Ms. 2632053, who was immersed in gangs from age 13 to 19. (*Ibid.*) Likewise, seated juror Mr. 2861675 had exposure to gang activity which was limited to his quitting his job after observing 30 people get into a fight at an apartment complex where he was a watchman. (*Ibid.*) The prosecutor argued that he exercised peremptory challenges to each of the jurors at

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[17] Counsel for Gutierrez discussed Mr. 2608698, a juror not among those either challenged or seated. (5 ART 1063.)

[18] Ms. 2589394 had been excused by the defense the day before and therefore was not a sitting juror. (4 ART 929.)

issue for nonracial reasons and that the facts in the record supported his challenges. (5 ART 1069-1070.) The trial court in turn responded to the comparative analysis arguments both generally and by specifically comparing some of the challenged jurors to sitting juror No. 2861675. (5 ART 1072-1073.)

On appeal, the Court of Appeal declined to conduct a comparative juror analysis. (Slip Opinion at p. 14.)

B. The Court of Appeal, Unlike the Trial Court, Failed to Engage in Comparative Juror Analysis

On a claim of race-based peremptory challenges, comparative juror analysis compares the voir dire responses of the challenged prospective jurors with those of similar jurors who were not members of the challenged jurors' racial group, whom the prosecutor did not challenge. (*Miller-El*, *supra*, 545 U.S. at p. 241 ["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."].) "Comparative juror analysis is evidence that, while subject to inherent limitations, must be considered when reviewing claims of error at [*Batson/Wheeler*]'s third stage when the defendant relies on such evidence and the record is adequate to permit the comparisons." (*Lenix*, *supra*, 44 Cal.4th at p. 607.) "In those circumstances, comparative juror analysis must be performed on appeal even when such an analysis was not conducted below." (*Ibid.*) The analysis involves comparing jurors excused by the prosecutor to other seated jurors rather than to prospective jurors. (*Miller-El*, *supra*, 545 U.S. at p. 241.)

When a defendant asks for comparative juror analysis for the first time on appeal, this Court has held that "such evidence will be considered in view of the deference accorded the trial court's ultimate finding of no

discriminatory intent." (*Lenix, supra*, 44 Cal.4th at p. 624.) "[A]n appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable." (*Snyder, supra*, 552 U.S. at p. 483.) "[C]omparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." (*Lenix, supra*, 44 Cal.4th at p. 622.) This is true because

> [o]n appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact. 'Even an inflection in the voice can make a difference in the meaning.'

(*Ibid.*)

Although the trial court engaged in some comparative juror analysis in denying appellants' motion, the Court of Appeal declined to undertake such a comparison when it should have.

C. Comparative Juror Analysis Does Not Demonstrate the Prosecutor Engaged In Purposeful Discrimination

Even taking into consideration the comparative evidence and analyzing such evidence in light of the totality of the circumstances in this case, appellants cannot meet their burden to establish purposeful discrimination as set forth more fully herein. A comparative juror analysis in this case does not demonstrate the prosecutor engaged in purposeful discrimination.

1. Ms. 2510083

Enriquez compares Ms. 2510083, who the prosecutor excused based in part on his belief that she asked to be removed based on a hardship, with seated Juror No. 2719513, who requested a hardship based on the fact that

she was a tennis coach and her team made the playoffs but remained on the jury. (EOB 40-41.) The problem with this comparison is that the prosecutor mistakenly believed that Ms. 2510083 had asked to be excused from jury service. (See Argument VI.B., *ante*.) However, an examination of the record reveals that this particular juror did not ask to be released from jury service as a result of a hardship. She did bring a possible conflict, a pending work interview, to the attention of the court. The court suggested that she attempt to reschedule the interview which the juror was ultimately able to do. As such, Ms. 2510083 is not similarly situated to Juror No. 2719513, who did seek to be excused from the jury for hardship.

The question then becomes whether a comparative juror analysis involving Ms. 2719513 is appropriate, considering that this juror was not even called into the jury box for questioning until after the trial court heard and denied appellants' motion. (5 ART 1076.) As this Court stated in *Lenix*, "appellate review is necessarily circumscribed. . . . [T]he trial court's finding is reviewed on the record as it stands at the time the [*Batson/Wheeler*] ruling is made." (*Lenix*, *supra*, 44 Cal.4th at p. 624.) "If the defendant believes that subsequent events should be considered by the trial court, a renewed objection is required to permit appellate consideration of these subsequent developments." (*Ibid.*) Therefore, if appellants believed that the voir dire of this juror (excepting her hardship request which occurred prior to the *Batson/Wheeler* motion) should be considered by the trial court, they could have, and should have, renewed their *Batson/Wheeler* motion. Appellants did not do this. As a result, any reliance on this juror's voir dire responses occurring after the *Batson/Wheeler* motion was denied is forfeited. (*Chism*, *supra*, 58 Cal.4th at p. 1319.)

Nevertheless, even if the responses of Ms. 2719513 are taken into consideration, they demonstrate that the prosecutor's stated reasons for

excusing the Hispanic jurors were not a pretext for discrimination. Ms. 2510083 was young and inexperienced in life, a far cry from Ms. 2719513 who was a married teacher with two minor children and two adult stepsons and evidenced much life experience in her responses on voir dire. (5 ART 1076-1077.) Ms. 2719513 stated that she knew one of the witnesses in the case. (5 ART 1077.) She stated this person was Timothy Diaz, a police officer. (*Ibid.*) She saw him now and then because their daughters ran cross-country together and Diaz's brother was her daughter's track coach. (5 ART 1077-1078.) Ms. 2719513 also revealed that she knew several people in law enforcement. (5 ART 1078.) She knew one of the bailiffs outside the courtroom. (*Ibid.*) She had a family friend who was a police officer in the Delano area. (*Ibid.*) She had another family friend who was a public defender in Fresno. (5 ART 1078, 1111-1112.) Ms. 2719513 also stated that her garage and backyard had been broken into several times, and her husband's farm equipment had been stolen. (5 ART 1079.) No one had been apprehended in any of those cases. (*Ibid.*) However, law enforcement officers came out and took reports, mainly for insurance purposes. (*Ibid.*) Ms. 2719513 stated, "That's pretty much what we expect from them, because of the area. Nothing - - I don't have any hard feelings what they have done there." (*Ibid.*)

Ms. 2719513 had three brothers who had been in and out of jail for drunk and disorderly conduct, drugs, and an assault charge. (5 ART 1079.) She did not feel that they had been treated unfairly by the system. (5 ART 1079-1080.) She had also been accused of something that "went nowhere" by her husband's ex-wife and the officer had handled it appropriately. (5 ART 1080.) She had been involved in a civil case once as a witness for the plaintiff. (5 ART 1080-1081.) Finally, Ms. 2719513 was aware of gangs in the McFarland area, and she had seen tagging in the area. (5 ART 1081.)

This juror had also had students who were jumped into gangs and who told her that is why they were beat up. (*Ibid.*)

Ms. 2719513 possessed much more life experience and sophistication than Ms. 2510083. Ms. 2510083 was not married and had no children. (4 ART 818.) She had no jury experience. (*Ibid.*) At the time of jury selection, she was an instructional aide for fourth graders. (4 ART 868.) Her prior work was in customer service for a phone company. (4 ART 869.) She informed the court that she had only two more weeks of school and then she would be unemployed. (2 ART 388-389.) Furthermore, Ms. 2719513 knew several people in law enforcement positions, including one officer who was a listed witness in the case. (5 ART 1078-1080.) This association with law enforcement was more extensive than Ms. 2510083, who has two cousins in law enforcement, one of whom worked out of state, and another cousin who was an attorney. (4 ART 818-819.) Thus, Ms. 2719513 was not similarly situated to Ms. 2510083, and there were reasons for which the prosecutor would have wanted to retain Ms. 2719513 on the jury, including her life experience, law enforcement contacts and responses, and her view of gangs and criminal activity.

2. Mr. 2852410

Enriquez then compares the criminal experiences of this seated juror, Ms. 2719513, with Mr. 2852410 who was an excused Hispanic.[19] (EOB 41.) Ms. 2719513 explained that her husband's farm equipment had been stolen several times from the backyard and garage. (5 ART 1079.) While no one had been apprehended for the thefts, law enforcement officers had come out and taken reports. (*Ibid.*) Ms. 2719513 stated, "That's pretty

[19] In the first full paragraph of Enriquez's Opening Brief on the Merits at page 41, Enriquez appears to refer to Ms. 2719513, who "mentioned that her home had been burglarized," although he wrote Ms. 2510083. (EOB 41.)

much what we expect from them, because of the area. Nothing - - I don't have any hard feelings what [law enforcement officers] have done there." (*Ibid.*) Ms. 2719513 expressed a positive view of law enforcement which likely would have been viewed as a helpful quality for the prosecutor. Mr. 2852410, on the other hand, did not share a positive view of law enforcement. In fact, it is fair to say that the record reflects this excused juror had a negative view of law enforcement. (2 ART 433, 481; 3 ART 494.) The prosecutor excused this juror based on his belief that this juror harbored resentment toward law enforcement. This is the juror who was pulled over by BPD because his truck matched the description of a stolen vehicle. (*Ibid.*) Mr. 2852410 was removed from his truck and placed in the back of the patrol car while officers searched his truck. (*Ibid.*) This prospective juror agreed that this was an unpleasant experience. (*Ibid.*) He was mad at the officers for this incident. (3 ART 494.) He could not believe the two police officers who pulled him over "for no reason." (3 ART 494.) These officers were not trustworthy. (*Ibid.*) In another incident, Mr. 2852410 had his truck broken into, and the investigating officer did not take a report until about six days after the incident. (2 ART 316; 3 ART 493.) Mr. 2852410 was "pretty mad" about that. (2 ART 317-318; 3 ART 493.) No one was ever apprehended. (2 ART 316.) Mr. 2852410 lost about $3,000 worth of goods from his truck, including computers and stereo equipment. (2 ART 318.) About four years earlier, his father's office had been burglarized. (2 ART 316.) No one was apprehended in that case either. (2 ART 316-317.)

Clearly Mr. 2852410 had significant negative experiences with law enforcement, unlike Ms. 2719513, who had no problem with the manner in which law enforcement officers responded to thefts of farm equipment from her yard and garage.

Ramos compares the law enforcement experiences of excused Hispanic potential juror Mr. 2852410 with Juror Nos. 2546044 and 2861675, summarily concluding that these latter jurors were similarly situated to Mr. 2852410 and without providing any citation to the record.[20] (ROB 79.) However, an examination of the record concerning these two seated jurors shows that Mr. 2852410's experiences with law enforcement were vastly different.

About four years prior, BPD had pulled over Mr. 2852410, saying that his truck matched the description of a stolen vehicle. (2 ART 433, 481; 3 ART 494.) He was removed from his truck and placed in the back of the patrol car while officers searched his truck. (*Ibid.*) This was an unpleasant experience and Mr. 2852410 was mad about it. (*Ibid.*) The two police officers had pulled him over "for no reason" and were not trustworthy. (3 ART 494.) Mr. 2852410 stated that he would not believe the testimony of the police officers who pulled him over. (3 ART 494.) Ramos contends this experience was similar to that of Mr. 2861675 who remained on the jury. (ROB 79.) However, as detailed above, Mr. 2861675's negative experience with law enforcement did not rise to the level of that experienced by Mr. 2852410. Mr. 2861675 thought officers acted

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[20] Ramos characterizes one of the prosecutor's reasons in excusing Mr. 2852410 – that this juror was mad about officers taking so long to take a report following the break in of his truck – as the prosecutor's "principal justification" for excusing this prospective juror. (ROB 79.) There is nothing in the record to support this characterization. The prosecutor cited two reasons for exercising a peremptory challenge against Mr. 2852410 but did not emphasize that one reason had any more significance than the other. (5 ART 1061-1062.) Ramos further argues the trial court failed to state whether Mr. 2852410 was "clearly upset" about the first incident involving the break in or the second incident involving officers searching the prospective juror's truck. (ROB 79.) The trial court did not need to assign Mr. 2852410's emotion to one or the other of the incidents because Mr. 2852410 stated he was mad about both of them. (3 ART 493-494.)

unprofessionally in arresting his brother and holding him on $500,000 bail for blowing up a Pepsi bottle with dry ice. (3 ART 703-706.) The personal experience of Mr. 2852410 in having his truck searched as he sat in the back of a patrol car would be viewed as much more invasive and distressing than the effect on Mr. 2861675 of his brother's arrest.

About two years earlier, Mr. 2852410 had his truck broken into, and the investigating officer did not take a report until about six days after the incident. (2 ART 316; 3 ART 493.) Ramos compares this incident with that experienced by Juror No. 2546044. (ROB 79.) In 1987, his car and later his truck had been broken into, and no one was ever apprehended. (2 ART 322.) He felt that law enforcement could have done more. (2 ART 322; 3 ART 505.) But the description provided by Mr. 2852410 demonstrates that a more serious and disturbing set of circumstances existed when he was victimized. Mr. 2852410 had been eating lunch in the same building with a couple of BPD officers. (2 ART 317.) Afterwards, Mr. 2852410 went outside and discovered his truck had been broken into. (*Ibid.*) He told the police officers who had been eating next to him, and they told him to call and make a report. (*Ibid.*) The officers just drove away. (*Ibid.*) Mr. 2852410 called to report the incident. (*Ibid.*) However, an officer did not respond until six days later. (2 ART 317; 3 ART 493.) Mr. 2852410 was mad about the incident. (2 ART 317-318; 3 ART 493.) No one had ever been apprehended. (2 ART 316.) Mr. 2852410 lost about $3,000 worth of goods from his truck, including computers and stereo equipment. (2 ART 318.) In light of these facts, Mr. 2852410 was not similarly situated to Mr. 2546044.

Ramos also claims, again without any citation to the record, that Juror Nos. 2546044 and 2861675, who were seated, did not have strong ties to law enforcement like Mr. 2852410 did. (ROB 79.) However, the fact that an excused juror revealed a positive reason for acceptance by the prosecutor

has no bearing on the fact that non-discriminatory and genuine reasons for excusing the juror exists.

Ramos further argues that in light of comparative juror analysis, the exclusion of prospective Hispanic juror Mr. 2852410 was discriminatory. (ROB 76-78.) However, the trial court properly found the prosecutor's justifications to be credible. The court conducted an adequate analysis and ruled,

> Mr. 2852410 had a bad experience with law enforcement and he was clearly upset about his contact with law enforcement as well, so I think [the prosecutor] has been consistent in terms of excusing jurors that have the same issues in terms of the information we received about that juror or members of their family.

(5 ART 1072-1073.)

Substantial evidence supports the trial court's finding that the prosecutor's peremptory excusal of Mr. 2852410 was not motivated by discriminatory intent, and the trial court conducted a sufficient inquiry under the *Batson/Wheeler* ruberic. Ramos's reliance on comparative juror analysis does not undermine this conclusion.

3. Ms. 2647624

Enriquez next compares seated juror, Ms. 2719513, who stated, "I have had students jumped into gangs, and they've told me that's why they were beat up" (5 ART 1081), with Ms. 2647624, who had two nephews who were in gangs.[21] (EOB 42.) Despite knowing some students who were jumped into gangs, Ms. 2719513 denied being impacted by gangs or that

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[21] As pointed out earlier, reliance on the voir dire of Ms. 2719513 is forfeited because her responses occurred after the *Batson/Wheeler* motion was denied. Nonetheless, even considering her responses, a comparison does not aid Enriquez's argument that the prosecutor's reasons for excusing Ms. 2647624 were pretextual.

anyone close to her had been impacted by gangs. (5 ART 1081.) She stated that she avoided the gang areas. (*Ibid.*) Ms. 2647624, on the other hand, had nieces who had sons who were currently involved in gang activity in Kern County. (4 ART 773-774, 798-799.) Additionally, she had a nephew serving a life sentence for an attempted gang murder. (4 ART 771.) Another nephew was convicted and sentenced to seven years in prison for a gang-related murder. (*Ibid.*) Ms. 2647624 was close to these nephews at one time. (4 ART 772-773.) This prospective juror made it known to the parties and the court that it bothered her that this was a gang case. (4 ART 800.) It made her feel uncomfortable. (4 ART 801.) When asked how the case bothered her, she stated, "Knowing that I have family that is also involved in gangs and all that, and I see it here. I really don't associate with the family that's involved, but to not have to see it here, it's something else. Its' different." (4 ART 800.) As evidenced by the record, Ms. 2647624 had extensive and ongoing gang exposure from close family members and admitted that serving on a gang case made her uncomfortable. Ms. 2719513, on the other hand, merely had some students who talked about being jumped into gangs. These two jurors are not similarly situated in their view of and exposure to gang activity, and the prosecutor could reasonably have assessed Ms. 2647624 as someone who may not be a good fit for this jury.

Enriquez next compares Ms. 2719513, who had three brothers with criminal issues, with Ms. 2647624, who had "criminality in the family" and nephews with gang ties. (EOB 42-43.) He argues the former had more criminal issues and gang experience than the latter juror who had infrequent contact with her nephews who were involved in gangs. (*Ibid.*) However, the record shows that just the opposite is true. The excused juror had significantly greater experience with members of her family being involved in criminal activity. Further, the criminal activity experienced by the

excused juror was the same as the criminal charges pending against the three co-defendants. Ms. 2647624 had a nephew serving a life sentence for a gang-related attempted murder and another nephew who had been sentenced to seven years for a gang-related murder. (4 ART 771.) The juror commented about the difference in sentence between the two cases, stating that the one nephew who committed murder received seven years and the other got 25 to life for attempted murder. (4 ART 772.) This juror also had nieces who had sons who were currently involved in gang activity in Kern County. (4 ART 773-774, 798-799.) Her voir dire answers revealed that she did not feel like this was the jury trial for her because the case involved guns. (4 ART 799-800.) She stated that she does not like guns and does not even like seeing guns. (*Ibid.*) It also bothered this juror that this was a gang case. (4 ART 800.) She explained, "Knowing that I have family that is also involved in gangs and all that, and I see it here. I really don't associate with the family that's involved, but to not have to see it here, it's something else. It's different." (*Ibid.*) This shows that the excused juror was greatly affected by the significant amount and type of criminality she had been exposed to within her own family.

On the other hand, Ms. 2719513 had three brothers who had been in and out of jail for drunk and disorderly conduct, drugs, and an assault charge. (5 ART 1079.) She had also been accused of something that "went nowhere" by her husband's ex-wife and the officer handled it appropriately. (5 ART 1080.) The criminal charges appeared to be minor in nature and much different than the gang violence experienced by Ms. 2647624. Even though Ms. 2719513 knew some students who had been jumped into gangs, her experience with the gangs and the non-gang criminality within her family was far less in quantity and quality than that experienced by Ms. 2647624. Thus, the prosecutor reasonably could have determined that Ms. 2647624 would not be a proper juror for the instant case. Furthermore, "[a]

party concerned about one factor need not challenge every prospective juror to whom that concern applies in order to legitimately challenge any of them." (*Jones*, *supra*, 51 Cal.4th at p. 365.)

Enriquez also adds that like seated juror Ms. 2719513, seated juror Ms. 2689647 had children arrested for drug use. (EOB 43.) However, Ms. 2689647 did not have the same gang exposure and family members with violent gang crime convictions as Ms. 2647624. Other seated jury members cited by Enriquez, Juror Nos. 2546044, 2861675, and 2674226, did not have the amount and type of criminal exposure or experiences to the same degree when compared to Ms. 2647624.

4. Ms. 2468219 and Ms. 2723471

Enriquez also contrasts Juror Nos. 2468219 and 2723471, who were excused because they were unaware of gang activity in Wasco, with Mr. 2581907 who was also not aware of gang activity in his neighborhood but was left on the jury. (EOB 44.) However, Juror No. 2581907 was not from Wasco, but rather lived in Tehachapi and was not aware of gang problems "in our neighborhood." (4 ART 900-901.) The prosecutor excused two jurors who lived in Wasco and were unaware of any gang activity there because Trevino was in an active Wasco gang and would testify extensively about gangs. (5 ART 1034.) The prosecutor was concerned about these potential juror's judgment of Trevino's credibility as a witness. Thus, Juror No. 2581907 was not similarly situated to Juror Nos. 2468219 and 2723471.

5. Ms. 2291529

Ramos compares excused potential juror Mr. 2291529 with Juror Nos. 2861675 and 2546044, non-Hispanic, seated jurors who he claims had comparable experiences with law enforcement but were not excused by the

prosecutor.[22] (ROB 76-77.) A look at the record shows that these two jurors had encounters with law enforcement that were qualitatively different than that experienced by Mr. 2291529. Mr. 229129 described being stopped two years prior by multiple officers for his vehicle registration, and "it just got out of hand." (3 ART 536.) At first there were two officers, and they called for backup which resulted in six officers on scene. (3 ART 536-537.) The officers searched his vehicle but ended up giving him a ticket for having no registration. (*Ibid.*) The officers never explained why they searched the vehicle. (*Ibid.*) He was not happy about the officers keeping him there and searching his vehicle. (*Ibid.*) If the officers had explained why they had searched the truck, Mr. 2291529 may have felt differently. (3 ART 537.) However, the experience did not cause him to have any ill will towards law enforcement. (3 ART 567.) He would not discredit law enforcement based on his experience or treat their testimony differently than the testimony of a civilian. (*Ibid.*)

Mr. 2861675's negative experience with law enforcement pales in comparison. First, Mr. 2861675's experience did not actually happen to him. About three or four years prior, the brother of Mr. 2861675 was accused of blowing up a Pepsi bottle with dry ice. (3 ART 703-704.) Mr. 2861675 stated that it was kind of a convoluted case in which his brother pled not guilty and was released on some sort of probationary period. He never went back to court. (*Ibid.*) Mr. 2861675 thought that the amount of bail on which his brother was held, $500,000, was excessive in light of the act of blowing up dry ice in a Pepsi bottle. (3 ART 704.) He also thought

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[22] Ramos also points to Mr. 2291529's statement that he nonetheless bore no ill will toward law enforcement as a result of the incident. (ROB 76.) However, a prospective juror's statement that the juror could be fair despite legitimate reasons for excusing the juror does not invalidate the otherwise legitimate factor. (See *Williams*, *supra*, 16 Cal.4th at p. 191.)

from the police officers' accounts that they acted very unprofessionally towards his brother. (*Ibid.*) The court then asked, "Other than the bail and the initial contact or the arrest procedures that took place in that case, do you have any reason that he was treated unfairly?" (*Ibid.*) Mr. 2861675 responded, "No. After that point – in fact, I believe, it was handled in court very appropriately and very well." (*Ibid.*) He further explained that, "Well, my brother's experience was a little bit ridiculous. He is also not the brightest person I have ever known and it knocked some sense into him anyways." (3 ART 706.) When asked later by the prosecutor if he was "okay with law enforcement," Mr. 2861675 responded, "Yes. As a matter of fact, while I mentioned my brother, I had my own personal experience with law enforcement as been very positive [*sic*]. I have had enough interaction, but I respect the officers very well." (3 ART 730-731.) Thus, while Mr. 2291529 had a personal encounter with six officers who, without explanation, detained him and searched his vehicle, and with whom he still harbored resentment, with Mr. 2861675 thought officers acted unprofessionally in arresting his brother and holding him on $500,000 bail for blowing up a Pepsi bottle. The personal experience of Mr. 2291529 would be viewed as much more invasive and distressing than the effect that Mr. 2861675 described due to his brother's arrest.

The experience of Mr. 2546044 is also easily distinguishable from the experiences of Mr. 2291529.[23] Mr. 2546044 felt that law enforcement had

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[23] Ramos also relies on facts pertaining to Juror No. 2801041, who he acknowledges was excused for cause, to support his comparative juror analysis. (ROB 78-79, fn. 32; 2 ART 383.) Comparative juror analysis involving a juror excused for cause is of no assistance in a *Batson/Wheeler* claim. The law is clear that in conducting comparative juror analysis, this Court is required to compare jurors excused by the prosecutor to other seated jurors rather than to other prospective jurors. (*Miller-El*, *supra*, 545 U.S. at p. 241.)

(continued...)

not done enough when he had been the *victim* of a crime. (3 ART 505.) In 1987, his car and later his truck had been broken into and no one had even been apprehended. (2 ART 322.) He felt that in at least one of these incidents, law enforcement could have done more. (2 ART 322; 3 ART 505.) This is to be distinguished from the experience Mr. 2546044 had when he was arrested and convicted of a DUI ten years earlier. (2 ART 328.) There was nothing about that experience with law enforcement that led him to feel that he was treated improperly. (*Ibid.*) Clearly, Mr. 2546044's dissatisfaction with officers who could have done more in a case where he was a victim of a crime is nothing like Mr. 2291529's experience where he was detained by six officers and his vehicle searched as if he had committed a crime.

Furthermore, comparative juror analysis is but one form of circumstantial evidence relevant to a determination of discriminatory purpose. Where, as here, it demonstrates that the excused juror and the seated jurors were very dissimilar in their experiences with law enforcement, it is not probative of discriminatory purpose. Under these circumstances, the prosecutor was justified in excusing Mr. 2291529.

Ramos further argues that, in light of comparative juror analysis, the exclusion of prospective Mr. 2291529 was discriminatory.[24] (ROB 76-78.) However, comparative juror analysis fails to show purposeful

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(...continued)

[24] Mr. 2859437, who Ramos also argues was the subject of discrimination (ROB 46-48), was excused by for cause by the trial court after this prospective juror revealed that he had been putting in work (graffiti) for the Colonia criminal street gang and did not think he could be a fair juror in this case. (4 ART 885-888.) But, comparative juror analysis involving a juror excused for cause is of no assistance in a *Batson/Wheeler* claim. (See fn.22, *ante*.)

discrimination in the peremptory strike of these jurors. Moreover, the trial court's analysis of appellants' claim of discriminatory purpose was sincere and reasoned. It compared Mr. 2291529 to the seated jurors who had encounters with law enforcement and found none to have had a similar experience. It stated, "Mr. 2291529 indicated he had a bad experience with law enforcement, and I'm not sure - - any of the jurors that passed on have indicated law enforcement at least to the extent that Mr. 2291529 indicated he did." (5 ART 1072.)

> Comparative juror evidence is most effectively considered in the trial court where the defendant can make an inclusive record, where the prosecutor can respond to the alleged similarities, and where the trial court can evaluate those arguments based on what it has seen and heard.

(*Lenix*, *supra*, at p. 624.) Thus, the trial court in this instance conducted a sincere and reasoned analysis of the prosecutor's proffered justifications.

Ramos contends that the prosecutor should have "more carefully inquire[d] with [Mr. 2291529], instead of *reflexively dismissing* him." (ROB 78, emphasis added.) The record belies this contention. The prosecutor asked appropriately detailed questions of this juror following the trial court's voir dire as well as questions posed by the defense. (3 ART 534-538, 558, 565-567.) In light of this sufficiently inclusive voir dire, it can hardly be said that the prosecutor "reflexively dismiss[ed]" this juror.

IX. THERE IS NO EVIDENCE THE PROSECUTOR USED A DIFFERENT SCRIPT WHEN QUESTIONING HISPANIC JURORS

Enriquez argues that there is some indication in the record that the prosecutor used a different script of questions in order to disqualify minority jurors, citing *Miller-El*, *supra*, 545 U.S. at pp. 244-245. (EOB 47-54.) He points to the prosecutor's questioning of Mr. 2852410, who was excused, arguing the questioning was extensive concerning an incident in which his truck had been broken into and officers in the immediate area did

not assist him. (*Ibid.*) He contrasts this with the prosecutor's questioning of seated juror Nos. 2674226 and 2546044 in which the prosecutor only asked one follow up question for each. (*Ibid.*) However, Enriquez cites to voir dire questions asked *by the trial court*, not the prosecutor. (See EOB 48-50, citing 2 ART 316-318; 4 ART 943.) Furthermore, the difference between Mr. 2852410 and Ms. 2674226 is that the former prospective juror told the court and the parties that he was unhappy with the way law enforcement handled the crimes he experienced. (2 ART 316-318.) Ms. 2674226 indicated law enforcement had handled the crime she experienced appropriately. (4 ART 943.) The court was obtaining personal baseline information from the jurors and as part of this process had asked jurors if they had been the victim of a crime and if so, whether anyone had been arrested and whether they felt that law enforcement had handled the case appropriately. (2 ART 311-312.) Ms. 2674226 anticipated these questions and summed up her answers to the court, stating, "My house was broken into approximately 20, 25 years ago, and nobody was ever apprehended on it. The police handled it fine. They did all they could do. . . ." (4 ART 943.) The prosecutor did not ask further questions about this incident likely because the juror indicated it had occurred 20 to 25 years before and that she did not feel as if law enforcement had handled the situation poorly. Many other jurors answered similar introductory questions in a summary fashion, and the prosecutor did not ask follow up questions if there appeared to be no concern as to this issue.

With regard to Mr. 2546044, Enriquez again cites to questions posed *by the trial court* in arguing that the prosecutor questioned the jurors using a different script. (EOB 50, citing 2 ART 328.) Furthermore, for comparison, Enriquez cites to an area of questioning where the trial court asked whether any juror or anyone close to the juror had been accused of a crime rather than whether the juror had been the victim of a crime. (2 ART

324, 328.) The court had previously asked whether the jurors had been the victim of a crime. (2 ART 322.) In comparing the questioning on the topic of whether the juror had been the victim of a crime, Mr. 2546044 reported that he had a car and a truck that had been broken into. (*Ibid.*) The trial court asked several follow-up questions. (2 ART 322-323.) Additionally, the prosecutor asked several questions of this juror concerning his prior victimization. (3 ART 505-506.) Thus, Enriquez fails to establish that the prosecutor used a different pattern of questioning the excused Hispanic jurors versus the non-Hispanic jurors who sat on the jury.

Enriquez then quotes extensively from the prosecutor's questioning of Ms. 2547226 claiming that he spoke to this prospective juror in a patronizing tone. (EOB 50-53.) Tone does not come through on the Reporter's Transcript. Enriquez concludes by arguing that "other seated jurors" were not similarly questioned about the deliberation process. (EOB 54.) However, without specifying which seated jurors he thinks were not so questioned, respondent cannot sufficiently respond to this argument.

X. INSUFFICIENT EVIDENCE SUPPORTS THE ASSESSMENT THAT JUROR NOS. 2852410 AND 2291529 WERE VICTIMS OF RACIAL PROFILING; REGARDLESS THE PROSECUTOR'S REASONS FOR EXCUSING THESE JURORS WERE NOT DISCRIMINATORY

Enriquez and Ramos argue that the prosecutor exercised peremptory challenges against two of the Hispanic jurors because they previously had been the subjects of racial profiling by law enforcement officers. (EOB 56-64; ROB 77-78.) Enriquez contends that the descriptions by these prospective jurors of their encounters with law enforcement "suggest racial profiling as to the incidents described." (EOB 57.) These arguments fail on several fronts.

As to one of the jurors, Mr. 2852410, his truck matched a description of a stolen vehicle, and he was pulled over by BPD about four years prior.

(2 ART 481.) As to the other, Mr. 2291529, he was stopped two years prior by multiple officers for his vehicle registration, and "it just got out of hand." (3 ART 536-537.) Officers searched his vehicle but ended up giving him a ticket for having no registration. (*Ibid.*) The officers never explained why they searched the vehicle. (*Ibid.*) He was not happy about the officers keeping him there and searching his vehicle. (*Ibid.*) If the officers had explained why they had searched the truck, Mr. 2291529 may have felt differently. (3 ART 537.)

Here, there is insufficient evidence to establish that racial profiling occurred from two incidents described only by the alleged victims. As Enriquez points out, the definition of racial profiling according to Penal Code section 13519.4, subdivision (e), is

> the consideration of, or reliance on, to any degree, actual or perceived race, color, ethnicity, national origin, age, religion, gender identity or expression, sexual orientation, or mental or physical disability in deciding which persons to subject to a stop or in deciding upon the scope or substance of law enforcement activities following a stop, except that an officer may consider or rely on characteristics listed in a specific suspect description.

Based on the descriptions of these jurors alone, it cannot be determined that the law enforcement officers took into consideration or relied on the jurors' race in deciding to subject them to a traffic stop. Without more evidence, one cannot conclude that the officers in these incidents pulled over the prospective jurors based on their race. Enriquez's argument fails for lack of evidence.

Further, there is no showing whatsoever that the prosecutor excused either juror on the grounds that the jurors believed they had been victims of racial profiling or that the prosecutor believed they had been the victims of racial profiling. The record is simply void of any such notion, and Enriquez's argument is based purely on speculation. Finally, even assuming arguendo the prosecutor stated that his reason for excusing the

jurors was that they had been the victims of racial profiling, this would arguably constitute a genuine race-neutral reason. The prosecutor reasonably could have believed that these jurors would not find law enforcement credible or trustworthy after having been the victim of racial profiling. Enriquez's argument regarding racial profiling lacks merit.

Ramos contends that exclusion of the two jurors highlighted the fact that these jurors experienced racial profiling that the court and prosecutor had never experienced themselves. (ROB 80.) First, there is no evidence other than the jurors' own descriptions of their encounters with law enforcement to indicate they were racially profiled. Second, the record contains no evidence of the race of the trial judge or the prosecutor much less that they never experienced racial profiling. Third, whether or not the judge or prosecutor had ever been the victim of racial profiling is irrelevant to a *Batson/Wheeler* claim.

XI. THE COURT OF APPEAL PROPERLY CONSIDERED ALL RELEVANT CIRCUMSTANCES ACCORDING TO *MILLER-EL*

Ramos argues that the Court of Appeal erred in failing to consider other circumstances which were relevant to the prosecutor's credibility. (ROB 80-83.) Ramos contends these circumstances include that the prosecutor made a material misstatement of fact concerning the extent of his trial experience, that the prosecutor wasted no time excluding Hispanics, and that the lone deaf Hispanic remaining on the jury would not be vociferous in expressing her opinion and was the least likely to hold out for an acquittal. (*Ibid.*) However, the Court of Appeal properly considered all relevant factors bearing on the prosecutor's credibility.

In determining whether the defendant ultimately has carried his burden of proving purposeful racial discrimination, 'the trial court "must make 'a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his

knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily. . . .' [Citation.]" (*People v. Reynoso* (2003) 31 Cal.4th 903, 919.)

In this case, after the appellants made the *Batson/Wheeler* motion, the trial court invited the prosecutor to respond to the contention whether a prima facie case had been established. (5 ART 1049-1050.) The prosecutor responded as follows:

> Your Honor, it's my understanding is that it's for the Court to determine whether or not a prima facie case has been determined. And that until then, there's no requirement that I do respond. I say that's my understanding. Your Honor, I'm approaching 50,000 trials, and this is the first time I've had a Batts and Wheeler [*sic*]. So - - and I believe that's the procedure, and I have no response at this time unless and until the Court does make a prima facie showing.

(5 ART 1050.)

The trial in this case took place in May of 2012. The prosecutor was admitted to the California bar in June 2002.[25] (ROB 81.) Thus, at the time of trial, the prosecutor had been practicing for 10 years.[26] (*Ibid.*) Trying 50,000 cases in the span of 10 years would likely be an impossible task, as Ramos correctly points out. (ROB 82, [to be true, "the prosecutor would have had to conduct approximately 416 trials per month"].) Under these facts, it is most probable that this was an error in the reporter's transcript. It is far more likely that the prosecutor indicated he was approaching 50 criminal trials and had not yet faced a *Batson/Wheeler* motion. To find this apparent error in the record to be relevant as to the prosecutor's veracity, particularly where there is absolutely no evidence that the prosecutor had

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[25] http://members.calbar.ca.gov/fal/Member/Detail/219856.

[26] Ramos mistakenly states the prosecutor's career was 20 years. (ROB 81.)

purposely misrepresented anything to the court and counsel, would be extremely unfair. As such, it is not a valid factor for consideration in reviewing a *Batson/Wheeler* motion. Nor does the record give any indication whatsoever that the prosecutor stated he had done 50,000 trials in a sarcastic manner as Ramos speculates. Further, the prosecutor did not offer the statement as a defense to the *Batson/Wheeler* motion or as having any relevancy to his reasons for challenging any of the potential jurors. This Court should decline to take the prosecutor's statement, as written in the Reporter's Transcript, into consideration.

Ramos next argues that evidence tending to show that the prosecutor exercised peremptory challenges in a discriminatory manner was the "sequence of exclusion of Hispanics." (ROB 82.) He argues the prosecutor wasted no time in challenging the jurors and that Ms. 2723471 only survived one panel before being removed. (*Ibid.*) There is no evidence in the record that the prosecutor rapidly challenged Hispanics jurors. The prosecutor is free to use the statutorily provided peremptory challenges in any manner he or she chooses, so long as that use does not obstruct the defendant's constitutional rights. (See *Wheeler*, *supra*, 22 Cal.3d 258.) Moreover, this Court has stated that "'the passing of certain jurors may be an indication of the prosecutor's good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection.'" (*Williams*, *supra*, 56 Cal.4th at p. 659, quoting *People v. Snow* (1987) 44 Cal.3d 216, 225.) Here, there were at least three instances in which the prosecutor accepted the panel containing a juror who was Hispanic but was later excused. (4 ART 744, 806, 928-929.) The trial court recognized this in its ruling, stating, "and I checked again, and [the prosecutor] did pass several times with Ms. 2723471 still on the panel and has passed several times with Ms. 2478882 on the panel." (5 ART 1071.) The trial court further stated that there may be more possibly Hispanic

jurors as well who were accepted by the prosecutor. (*Ibid.*) This factor demonstrates the prosecutor's good faith in exercising peremptory challenges against the jurors at issue.

Ramos's final argument is that the prosecutor allowed to remain on the jury a lone Hispanic woman who he speculates was mute and not likely to express her opinion or stand her ground if she alone thought defendants were not guilty. (ROB 82-83.) Of course this is nothing but sheer, rank speculation. There is absolutely nothing other than Ramos's own speculation to believe that this juror was "not likely to be vociferous in expressing her opinion" or that she "harbored sympathy for the appellants" or that she was "the least likely to hold out for acquittal." (RB 82-83.) Ramos fails to point to anything in the record to support these ideas. In addition to the fact that nothing in the record supports Ramos's descriptions of this juror, she was not the lone Hispanic remaining on the jury. Another juror sitting at the time of the *Batson/Wheeler* motion was also Hispanic, No. 2632943. (5 ART 1048, 1052-1053.) Thus, there were at least two Hispanic persons on the jury at the time of the *Batson/Wheeler* motion. Ms. 2478882 was ultimately excused by Gutierrez after the *Batson/Wheeler* motion was denied. (5 ART 1075-1076.)

XII. THE COURT OF APPEAL DID NOT COMMIT ERROR UNDER *WHEELER*

Ramos argues that the Court of Appeal committed error under *Wheeler* by failing to reverse the judgment for the violation of his right to a jury drawn from a cross-section of the community. (ROB 83-86.) Enriquez similarly argues that the number of Hispanic strikes suggests that the prosecutor's reasons for excusing the Hispanic jurors are a pretext for racial discrimination. (EOB 29-31.) These arguments lack merit.

Under the federal and state Constitutions, a criminal defendant is entitled to a jury drawn from a representative cross-section of the

community. (U.S. Const., Amend. VI; Cal. Const., art. I, § 16.) The federal and state guarantees are coextensive, and the analyses are identical. (*People v. Bell* (1989) 49 Cal.3d 502, 525, fn. 10.) In *Wheeler,* the Court held that "the use of peremptory challenges to remove prospective jurors on the sole ground of group bias" violates a defendant's right under the California Constitution to a trial by jury drawn from a representative cross-section of the community. (*Wheeler, supra,* 22 Cal.3d at pp. 276-277.)

Here, the prosecution used approximately 60 percent of its challenges on Hispanics (10 of 16), and the jury panel at the time of the *Batson/Wheeler* motion was roughly 16 percent Hispanic (2 of 12). (5 ART 1048, 1051-1054.) This compares to between 49.2 and 51.5 percent of Hispanics total in the Kern County population at the time of trial. (http://www.census.gov/quickfacts/table/PST045215/06029.) Respondent does not dispute that this information shows that the prosecution used a disproportionate number of his peremptory challenges against Hispanics, a cognizable group under *Wheeler.* However, the record of voir dire demonstrates that the prosecutor did not use his peremptory challenges as a means of removing prospective jurors on the sole ground of group bias. The prosecutor's explanations for removing each of the challenged jurors shows that for each juror the prosecutor had valid, non-discriminatory reasons for excusing each. He excused each of the potential jurors at issue on grounds that were reasonably relevant to this gang case and the parties and witnesses involved in the case. For example, the prosecutor's peremptories demonstrate that he challenged similarly situated jurors who had significant exposure to gang activities. The prosecutor engaged all prospective jurors in the same type of questioning following the trial court's extensive voir dire involving all prospective jurors. The prosecutor at no time engaged Hispanic jurors in different questioning or desultory voir dire. Under the totality of the circumstances, the trial court properly

denied appellants' *Wheeler* challenge. This Court should "rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*Reynoso*, *supra*, 31 Cal.4th at p. 915.) Ramos's *Wheeler*-error argument should be rejected.

XIII. THIS COURT HAS NO OCCASION TO ADOPT THE "TAINTED APPROACH" UTILIZED BY A FEW STATE COURTS

Enriquez advocates that this Court adopt the approach of a small number of other state courts, as opposed to that of the federal courts, which hold that a racially discriminatory peremptory challenge cannot be saved because the proponent of the strike puts forth a non-discriminatory reason. (EOB 59-62.) The state courts which Enriquez advocates follow the "tainted" approach, where a racially motivated explanation will vitiate the entire selection process regardless of the genuineness of other explanations for the strike. (See, e.g. *Moore v. State* (Tex.App.1991) 811 S.W.2d 197; *Rector v. State* (1994) 213 Ga.App.450; *Strozier v. Clark* (1992) 206 Ga.App. 85.) Only a handful of state courts have adopted this reasoning, and California is not among them. Enriquez's argument is not ripe since the issue does not present itself in this case. The prosecutor offered no pretextual explanations for excusing the prospective jurors. Thus, this Court should not adopt the minority approach that a pretextual explanation for a peremptory strike necessarily constitutes a *Batson* violation when a valid, race neutral explanation for striking the juror is also offered.

Some of the federal courts use a mixed-motives analysis where an action partially motivated by an improper purpose is nonetheless valid if the alleged offender would have taken the same action in the absence of an improper motive. (See *Rico v. Leftridge-Byrd* (3d Cir. 2003) 340 F.3d 178, 186.) However, the approach of the United States Supreme Court and Ninth Circuit is to determine whether the prosecutor was "motivated in

substantial part by discriminatory intent." (*Snyder*, *supra*, 552 U.S. at p. 472; *Cook v. LaMarque* (9th Cir. 2010) 593 F.3d 810, 815.) This is set forth in *Snyder*, which declined to decide whether mixed motives applied in the *Batson* context:

> In other circumstances, we have held that, once it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative. [Citation.] We have not previously applied this rule in a *Batson* case, and we need not decide here whether that standard governs in this context. For present purposes, it is enough to recognize that a peremptory strike shown to have been *motivated in substantial part by discriminatory intent* could not be sustained based on any lesser showing by the prosecution.

(*Id.* at p. 472, emphasis added; see also *Cook v. LaMarque* (9th Cir. 2010) 593 F.3d 810, 815.) Under either of these tests, the prosecutor's stated reasons for excusing the challenged jurors would be upheld.

Enriquez argues that the approach of this Court should be to determine not whether the prosecutor's explanation is pretext but whether the prosecutor has committed an act of discrimination in jury selection through subconscious discrimination. (EOB 62-64.) He does not suggest, however, the means by which this Court should undertake to determine and eradicate this subconscious discrimination. Nor is there any evidence in this case that the prosecutor exercised any of his peremptory challenges on the basis of "attitudinal or subconscious discrimination." (EOB 63.) Rather, the evidence shows that the prosecutor's peremptory challenges were exercised in a constitutional manner, and that the trial court properly made a sincere and reasoned evaluation of the prosecutor's reasons for exercising his peremptory challenges, finding the prosecutor to be credible. Under these circumstances, substantial evidence supports trial court's finding that prosecutor's proffered explanations for excusing the potential

jurors at issue was not a pretext for racial discrimination, either subconscious or conscious.

XIV. *FOSTER* DOES NOT ALTER OR EXPAND *BATSON* JURISPRUDENCE

The United States Supreme Court recently issued an opinion in *Foster v. Chapman* (May 23, 2016) 578 U.S. __, 136 S.Ct. 1737 (*Foster*). Ramos submitted this new authority to the Court in a letter brief dated May 26, 2016. (Letter Brief.) In doing so, he also asked the Court to consider his arguments related to *Foster* to which Respondent now responds.

In *Foster*, the High Court reversed the Georgia Supreme Court's denial of the defendant's habeas petition based on *Batson* error. Defendant's habeas petition was supported by newly discovered evidence recovered through the Georgia Open Records Act while his renewed habeas petition was pending in state court. This evidence consisted of copies of the file used by the prosecution during Foster's trial and contained lists, documents, and notes pertaining to voir dire and the prosecutor's exercise of peremptory challenges against all four black jurors. Among other documents, the newly obtained evidence included: (1) a jury venire list on which the names of each black prospective juror were highlighted in bright green; (2) a draft affidavit from an investigator comparing black prospective jurors and concluding, "If it comes down to having to pick one of the black jurors, [this one] might be okay"; (3) notes identifying black prospective jurors as "B# 1," "B# 2," and "B# 3"; (4) notes with "N" (for "no") appearing next to the names of all black prospective jurors; (5) a list titled "[D]efinite NO's" containing six names, including the names of all of the qualified black prospective jurors; (6) a document with notes on the Church of Christ that was annotated "NO. No Black Church"; and (7) the questionnaires filled out by five prospective black jurors, on which each juror's response indicating his or her race had been circled. (*Foster, supra,*

136 S.Ct. at p. 1740.) Thus, the decision in *Foster* was based on substantial, case-specific evidence which ultimately demonstrated pretext in the striking of black jurors. Factually, the present case is nothing like *Foster*, and Ramos does not argue otherwise, with the exception that close to all Hispanic jurors were struck from the jury.[27] (Letter Brief at p. 1.)

Ramos argues that *Foster* clarified that the standard of review for *Batson* claims "must be calibrated to the actual record being reviewed," with greater scrutiny placed on cases with greater circumstantial evidence of discriminatory intent, and that *Foster* invites this Court to similarly clarify its substantial evidence standard. (Letter Brief at pp. 1-2.) Not so. The *Foster* court implemented a long-established standard of review, deferring to state court factual findings, unless they concluded that such findings were clearly erroneous, and considered all circumstances that bear upon the *Batson* issue, as set forth in *Snyder*, *supra*, 552 U.S. at pp. 477-478. (*Foster*, *supra*, 136 S.Ct. at pp. 1747-1750.) *Foster* did not expand upon or encourage an extension or calibration of the standard of review for *Batson* claims.

Ramos argues that the *Foster* case demonstrates that analysis in the third step in a *Batson* claim is similar to the independent judgment test in other criminal contexts. (Letter Brief at p. 2.) He points to the High Court's careful examination of the newly obtained evidence from the prosecutor's file. (*Ibid.*) However, nothing in the Court's opinion indicates that it advocated a de novo review of *Batson* challenges. Rather, in reviewing the lower court's factual findings, the *Foster* Court did not defer to the state court factual findings because it determined that the decision

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[27] Ramos asserts that, "the prosecutor in *Foster* struck all qualified potential jurors, 10 in total." (Letter Brief at p. 1.) That misstates the facts of *Foster*, where the prosecutor actually struck all *four* African-American jurors. (Slip Opinion at p. 3.)

that Foster failed to show purposeful discrimination was clearly erroneous. (*Foster*, supra, 136 S.Ct. at pp. 1740, 1750.)

Ramos argues that *Foster* extends *Batson* jurisprudence by finding that the strikes were motivated by discriminatory intent based on items in the prosecutor's file. (Letter Brief at p. 3.) However, as stated in *Foster*, "We have 'made it 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.' *Snyder*, 552 U.S., at 478, 128 S.Ct. 1203." (*Foster*, *supra*, 136 S.Ct. at p. 1748.) The examination of the prosecutor's file as circumstantial evidence of intent is sanctioned under *Batson* authority.

Finally, Ramos argues that this Court should direct trial courts in this state to include on jury questionnaires a question requesting that the prospective juror identify his or her race. (Letter Brief at pp. 4-5.) However, jury questionnaires are not at issue in this case, and the determination regarding such a directive is best left for a *Batson* case involving such questionnaires.

CONCLUSION

Although the Court of Appeal erred in declining to conduct comparative juror analysis on appeal, the prosecutor's stated reasons for exercising peremptories against the Hispanic challenged jurors were persuasive and plausible, and substantial evidence supports the trial court's denial of appellants' *Batson/Wheeler* motions. This Court should affirm the holding of the Court of Appeal.

Dated: June 28, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **People's Answering Brief On The Merits** uses a 13 point Times New Roman font and contains 36,514 words.

Dated: June 28, 2016

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Enriquez, et al.** No.: **F065288 / S224724**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 29, 2016, I served the attached

PEOPLE'S ANSWERING BRIEF ON THE MERITS

by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 29, 2016, at Sacramento, California.

_____
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