

No. S171393

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DONTE LAMONT MCDANIEL,

Defendant and Appellant.

Los Angeles Superior Ct.
No. TA074274

APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles

HONORABLE ROBERT J. PERRY, JUDGE

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TABLE OF CONTENTS

	<u>Page</u>
XIII. THIS COURT’S DECISION IN <i>PEOPLE V. GUTIERREZ</i> MANDATES REVERSAL IN THIS CASE.	6
A. The <i>Gutierrez</i> Decision.	8
B. The Meaning Of <i>Gutierrez</i> : Trial Courts Must Undertake Meaningful Questioning And Provide Reasoned, Juror-By- Juror Analysis Under Sufficiently Suspicious Circumstances.	10
C. The <i>Gutierrez</i> Remedy..	14
CONCLUSION.	15

TABLE OF AUTHORITIES

Page(s)

CASES

<i>People v. Allen</i> (2004) 115 Cal.App.4th 542.....	12
<i>Batson v. Kentucky</i> (1986) 476 U.S. 79.....	6
<i>People v. Fuentes</i> (1991) 54 Cal.3d 707.....	12, 13, 14, 15
<i>People v. Gutierrez, Ramos, and Enriquez</i> (2017) 2 Cal.5th 1150.....	passim
<i>People v. Hall</i> (1983) 35 Cal.3d 161.....	passim
<i>People v. Jackson</i> (1992) 10 Cal.App.4th 13.....	15
<i>People v. Long</i> (2010) 189 Cal.App.4th 826.....	12
<i>People v. Reynoso</i> (2003) 31 Cal.4th 903.....	6, 8, 9, 11
<i>People v. Silva</i> (2001) 25 Cal.4th 345.....	12, 13, 14
<i>People v. Turner</i> (1986) 42 Cal.3d 711.....	15
<i>People v. Wheeler</i> (1978) 22 Cal.3d 258.....	6
<i>People v. Williams</i> (2013) 56 Cal.4th 630.....	11

TABLE OF AUTHORITIES

Page(s)

STATUTES

CAL. RULES OF COURT, RULE 8.630(b)(2)..... 17

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XIII.

THIS COURT’S DECISION IN *PEOPLE V. GUTIERREZ* MANDATES REVERSAL IN THIS CASE

In his opening and reply briefs, appellant explained why the prosecutor – who was caught red-handed discriminating against African-Americans in jury selection in both appellant’s case and the co-defendant’s case – had more likely than not discriminated against Prospective Juror No. 28 in striking him from the jury. (AOB at pp. 42-84; ARB at pp. 1-51.) Two weeks after appellant file his reply brief, this Court decided *People v. Gutierrez, Ramos, and Enriquez* (2017) 2 Cal.5th 1150 (*Gutierrez*). In that case, this Court “clarif[ied] the constitutionally required duties of California lawyers, trial judges, and appellate judges when a party has raised a claim of discriminatory bias in jury selection.” (*Id.* at p. 1154.) This supplemental brief discusses the impact of *Gutierrez* on appellant’s case.

The teaching of *Gutierrez* is simple: trial courts must play an active role in probing advocates’ explanations when suspicious circumstances arise. When trial courts fail to do so, reversal is required because a sufficient record for appellate review does not exist – and can never be created – that would be sufficient to dispel the strong presumption of discrimination already present.

Although not referencing it directly, *Gutierrez* underscored a tension in this Court’s past precedents. On the one hand, this Court has held repeatedly that it must defer to trial courts even when they provide only summary and unreasoned denials for *Batson/Wheeler* motions.¹ (See, e.g., *People v. Reynoso* (2003) 31 Cal.4th 903, 929.) On the other hand, as in

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

Gutierrez, this Court has held that when trial courts fail to probe obvious deficiencies in a party's justification(s) for a strike, appellate courts must correct the trial court's abdication from its vital role in eliminating discrimination from jury selection.

Although, as will be discussed, there is no fundamental inconsistency between these two lines, there is a clear potential for trial courts to be confused by the difference in approach. Knowing that they may be granted deference when they provide little or no reasoning, trial courts could mistakenly believe that it is better to say nothing rather than risk the possibility of having their analysis subject to the scrutiny of appellate review. This cannot be the law.

This case provides an opportunity to resolve the superficial tension that *Gutierrez* highlights between deference to unreasoned denials of *Batson/Wheeler* motions, and the heightened duty to create a record for appellate review that *Gutierrez* demands. The solution is simple, and already present in this Court's cases. Although trial courts need not conduct detailed, juror-by-juror analysis in every case, this form of more searching scrutiny *is* required when the record contains red flags that demand further inquiry.

The record in this case contains more than a red flag: it displays a flashing neon "danger" sign. The prosecutor was caught *actually discriminating* against other African-Americans and providing pretextual excuses for his actions, yet the trial court failed to ask a single question, or provide a single word of analysis, as to why it accepted the prosecutor's flimsy justifications for excusing Prospective Juror No. 28. Given the *Gutierrez* opinion's powerful emphasis on the importance of creating a

record for appellate review, and given the extremely suspect circumstances present in this case, reversal is now required.

A. The *Gutierrez* Decision

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

The majority opinion in *Gutierrez* rested its analysis on the dismissal of one Hispanic female juror. The prosecutor said that the basis for striking that juror was that “[s]he’s from Wasco and she said that she’s not aware of any gang activity going on in Wasco, and I was unsatisfied by some of her other answers as to how she would respond when she hears that Gabriel Trevino [a prosecution witness] is from a criminal street gang, a subset of the Surenos out of Wasco.” (*Gutierrez, supra*, 2 Cal.5th at p. 1160.) Notably, there were no “other answers” in the record to support the People’s position on this point. (*Ibid.*)

This Court emphasized the fact that the reason for the strike was suspicious because it did not really make sense. Although the Attorney General argued that the juror’s unawareness of gang activity in Wasco “would could cause that juror to be biased against Trevino,” the Court found the deduction “tenuous” because it “is not evident why a panelist’s unawareness of gang activity in Wasco would indicate a bias against a member of a gang based in Wasco.” (*Gutierrez, supra*, 2 Cal.5th at p. 1169.) This suspicion was compounded by the prosecutor’s failure to question on the topic. (*Id.* at p. 1170.) This Court noted that the “swift termination of individual voir dire of this panelist,” despite her seemingly benign answers to yes or no questions, “at least raises a question as to how

interested [the prosecutor] was in meaningfully examining whether her unawareness of gang activity in Wasco might cause her to be biased against the witness for the People’s case.” (*Ibid.*)²

The Court underscored that in such a suspicious situation (one in which the given explanation does not render “self-evident why an advocate would harbor a concern”) the trial court’s duty to probe whether an explanation is genuine and made in good faith becomes “more pressing.” (*Id.* at p. 1171.) This was “particularly so” where (as in appellant’s case) the advocate used a “considerable number of challenges” against the group at issue. (*Ibid.*) Applying these rules to the case, the Court found it “difficult to lend credence to the prosecutor’s concern” when his “brief questioning of this panelist failed to shed light on the nature of his apprehension or otherwise indicate his interest in meaningfully examining the topic, and the matter was far from self-evident.” (*Ibid.*)³

The Court ultimately tied its analysis to the rule requiring “sincere and reasoned” decisions in *Batson/Wheeler* challenges first delineated in *People v. Hall* (1983) 35 Cal.3d 161 (*Hall*): “Because the prosecutor’s reason for this strike was not self-evident and the record is void of any

² As discussed in the opening and reply briefs, the prosecutor below similarly did not ask Prospective Juror No. 28 a single question about the alleged “primary” cause for his excusal, despite asking other jurors detailed follow-up questions. (AOB at pp. 68-69; ARB at pp. 29-32.)

³ As discussed in appellant’s opening and reply briefs, at least one of the prosecutor’s justifications (his alleged concern for educational attainment) was not self-evident in terms of resultant bias, and the prosecutor asked no questions of *any* juror on this topic. (AOB at pp. 71-73; ARB at pp. 32-33.) This somewhat ambiguous criterion also not only failed comparative analysis, but also fell disproportionately against black prospective jurors. (ARB at pp. 47-49.)

explication from the court, we cannot find under these circumstances that the court made a *reasoned* attempt to determine whether the justification was a credible one.” (*Gutierrez, supra*, 2 Cal.5th at p. 1169, italics in original.)

Without explicitly stating that the prosecutor had provided pretextual justifications, the Court reversed, holding that “[f]or at least one excluded panelist in this case, the record does not permit us to find that the trial court met its obligations” and thus found that the trial court “erred in denying defendants’ *Batson/Wheeler* motion.” (*Gutierrez, supra*, 2 Cal.5th at p. 1175.) The Court later denied the Attorney General’s petition for rehearing, in which the Attorney General asserted that the Court had not made an explicit finding of discrimination and requested a remand for a more detailed third-stage analysis. (*Gutierrez, supra*, (No. S224724, reh. petn. filed June 19, 2017; reh. denied July 26, 2017).)

B. The Meaning Of *Gutierrez*: Trial Courts Must Undertake Meaningful Questioning And Provide Reasoned, Juror-By-Juror Analysis Under Sufficiently Suspicious Circumstances

Gutierrez, the Court pointed out, was intended to “clarify” the “constitutionally required duties” of trial courts analyzing *Batson/Wheeler* claims, as well as the duties of the lawyers justifying the strikes at issue. (*Gutierrez, supra*, 2 Cal.5th at p. 1154.) As the Court went on to explain “[a]dvocates and courts both have a role to play in building a record worthy of deference.” (*Id.* at 1171.) The role that trial courts are duty-bound to fulfill was made fairly explicit: create a record adequate for appellate review. In other words, because appellate courts can “only perform a meaningful review when the record contains evidence of solid value” it is

the “duty of courts and counsel to ensure the record is both accurate and adequately developed.” (*Gutierrez, supra*, 2 Cal.5th at p. 1172.)

At first blush, the rule of *Gutierrez* regarding the “duty” of the trial court to make an adequately developed record seems in tension with the rule recently reaffirmed in *People v. Williams* (2013) 56 Cal.4th 630 (*Williams*), namely that “a trial court is not required ‘to make explicit and detailed findings for the record in every instance. . . .’” (*Id.* at p. 653; see also *People v. Reynoso, supra*, 31 Cal.4th at p. 929.) After all, the trial court in *Gutierrez* did far more than provide the type of summary denial issued by the trial court in *Williams*. (Compare *Williams, supra*, 56 Cal.4th at p. 703 (dis. opn. of Liu, J.) [trial court ruling consisted of statement that “at this point I will accept [the prosecutor’s] explanation” along with an acknowledgment that trial court had stopped taking notes and a troubling aside regarding its experience with black female jurors]; with *Gutierrez, supra*, 2 Cal.5th at pp. 1157, 1173 [trial court “individually reviewed eight out of 10 proffered justifications” as well as “engaged in some comparative juror analysis”].)

But *Williams* and *Gutierrez* are in fact consistent, or at least reconcilable. Although a reasoned decision is not required in “every instance,” *Williams, supra*, 56 Cal.4th at 36, a reasoned analysis *is* required when the circumstances are so suspicious that follow-up and individualized analysis is the only way to create a record of “solid value.” (*Gutierrez, supra*, 2 Cal.5th at p. 1172.) *Gutierrez* provided one application of this general rule: where “the prosecutor’s reason for [the] strike was not self-evident and the record is void of any explication from the court, we cannot find under these circumstances that the court made a *reasoned* attempt to determine whether the justification was a credible one.” (*Ibid.*;

see also *People v. Allen* (2004) 115 Cal.App.4th 542, 553 [“In light of the vague and unsupported reasons offered by the prosecutor, additional inquiry was necessary”].)

However the underlying principle – that explicit follow-up questioning and analysis is required under suspicious circumstances – has been the rule in California as far back as this Court’s pre-*Batson* decision in *Hall*. (See *Hall, supra*, 35 Cal.3d at p. 169 [that prosecutor’s reasons failed comparative juror analysis is “strongly suggestive of bias” and “demanded further inquiry on the part of the trial court”].) And it is a rule that has been repeatedly enforced by this Court. (See, e.g., *People v. Silva* (2001) 25 Cal.4th 345, 375-376, 385 (*Silva*) [“suspicious” circumstances that demanded further inquiry included prosecutor’s stated belief that racial identity of defendant and jurors resulted in prior mistrial and fact that justifications in retrial were not supported by record]; see also *People v. Long* (2010) 189 Cal.App.4th 826, 847 [rule requiring deference to unreasoned *Batson/Wheeler* denials “is inapplicable by its terms when . . . one of the stated reasons deemed by the trial court to be a ‘legitimate’ basis for excusing a prospective juror is contradicted by the record”].)

Circumstances strikingly similar to those present in appellant’s case were present in another case in the same line of decisions: *People v. Fuentes* (1991) 54 Cal.3d 707 (*Fuentes*). In *Fuentes*, like in appellant’s case, the prosecutor provided some sham justifications, and the trial acknowledged this troubling circumstance. (See *id.* at p. 720 [trial court concluded that although there were some “good reasons,” other justifications were “totally unreasonable” and others “very spurious”].) This Court held that under such circumstances *Hall* “requires the [trial] court to address the challenged jurors individually to determine whether any

one of them has been improperly excluded.” (*Id.* at p. 720 [trial court erred by not conducted explicit, juror-by-juror analysis].)

Gutierrez clarifies how *Fuentes*, *Silva*, and *Hall* are meant to be applied. When sufficiently suspicious circumstances are present, it is simply not enough for the trial court to silently accept the prosecutor’s explanations without analysis. In this type of case, more – both in terms of questioning and reasoning – is required.

The circumstances present in appellant’s case surely mandated further inquiry by the trial court. In the very same hearing in which the trial court summarily denied appellant’s claim with respect to Prospective Juror No. 28, the trial court found that the prosecutor was engaged in discriminatory conduct when it struck another juror, Prospective Juror No. 46. (See AOB at pp. 57-61; ARB at pp. 8-17.) Short of an outright admission with respect to the juror in question, appellant can think of no more powerful evidence bearing on the question of discrimination. But instead of probing further, the trial court rested on its global finding that it was “accepting of the articulated reasons that have been advanced here” (5 RT 1084-1085). And this blanket absolution was made *before* the trial court ultimately concluded that the prosecutor discriminated against Prospective Juror No. 46 – a fact that strongly suggests that the trial court never took its own critical finding of discrimination into account. (See ARB at 20-22.) In addition, the trial court ignored defense counsel’s correct assertion that the prosecutor’s justifications failed comparative analysis. (ARB at 22-27; *Hall*, *supra*, 35 Cal.3d at p. 169 [failure of comparative juror analysis “demanded further inquiry on the part of the trial court”].) Nor did the trial court probe the fact that the prosecutor’s “primary” justification for excusing Prospective Juror No. 28 (his

questionnaire response regarding the relative severity of death and LWOP), was just used by the prosecutor as a sham pretext to excuse Prospective Juror No. 46. These troubling facts present precisely the type of case where “more is required of the trial court than a global finding that the reasons appear sufficient.” (*Gutierrez, supra*, 2 Cal.5th at p. 1171; *Silva, supra*, 25 Cal.4th at p. 386.)

C. The *Gutierrez* Remedy

The second important component of the *Gutierrez* decision is its determination of the appropriate remedy when the trial court fails in its “constitutionally required duties.” (*Gutierrez, supra*, 2 Cal.5th at p. 1154.) The *Gutierrez* court did not explicitly state that the prosecutor in *Gutierrez* had provided pretextual justifications. Instead, *Gutierrez* held that “the record does not permit us to find that the trial court met its obligations to make ‘a sincere and reasoned attempt to evaluate the prosecutor’s explanation’ and ‘clearly express its findings.’ [citations.]” (*Gutierrez, supra*, 2 Cal.5th at p. 1175.)

Similarly, in *Fuentes*, the Court also held that the trial court had failed to meet its obligation to “address the challenged jurors individually to determine whether any one of them has been improperly excluded.” (*Fuentes, supra*, 54 Cal.3d at p. 720.) But, as in *Gutierrez*, this Court did not itself explicitly find that any of the justifications were pretextual.⁴

⁴ In his concurring opinion, Justice Mosk underscored that the majority decision rested on the procedural failings of the trial court. He set forth his own view that, although the majority correctly articulated the “procedural deficiencies of the trial court,” he believed that “we must place the ultimate blame on its real source—the prosecutor.” (*People v. Fuentes, supra*, 54 Cal.3d at p. 800 (conc. opn. of Mosk, J.).)

Instead the Court reversed due to the failure of the trial court to adequately assess the prosecutor's justifications. (*Ibid*; see also *People v. Turner* (1986) 42 Cal.3d 711, 728 [describing the circumstances of *Hall* as one in which a trial court "failed to discharge its duty to inquire into and carefully evaluate the explanations offered by the prosecutor"]; *People v. Jackson* (1992) 10 Cal.App.4th 13, 23 ["If it appears that the trial court did not actually make [a sincere and reasoned] inquiry, the ruling cannot be upheld."].)

The same logic compelled the same result in *Hall*. Although the *Hall* decision rested on the procedural defects in the trial court's ruling, the Court nonetheless reversed for a new trial, refusing the Attorney General's request for a remand. "The People have suggested that if this court concludes that the trial court failed to comply with the mandate of *Wheeler*, the matter be remanded for a new hearing at which the court may again rule on defendant's claim that the prosecutor's use of peremptory challenges was based on group bias. The procedure is not appropriate here." (*Hall, supra*, 35 Cal.3d at p. 170.)

The same remedy should be applied in appellant's case. The trial court failed to make a sincere and reasoned analysis of the prosecutor's strike of Prospective Juror No. 28, and therefore the ruling cannot be upheld by this Court. (*Hall, supra*, 35 Cal.3d at p. 170.) It has already been nearly a decade since jury selection occurred in this case, far longer than the three years found inappropriate for a remand in *Hall*. Reversal is required and appellant afforded a new trial.

CONCLUSION

For the reasons set forth above, the judgment of conviction and the sentence of death must be reversed.

DATED: October 6, 2017

Respectfully submitted,

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**CERTIFICATE OF COUNSEL
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I, Elias Batchelder, am the attorney assigned to represent appellant in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is approximately 2985 words in length.

DATED: October 6, 2017

/s/ Elias Batchelder
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People v. Donte Lamont McDaniel

Supreme Court No. S171393
Superior Court No. TA074274

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Supreme Court of California

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