SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	**CASE NO. S224724**
Plaintiff and Respondent,	**DCA CASE NO. F065288 [Enriquez] F065984 [Gutierrez] F065481 [Ramos]**
vs.	
RAMIRO ENRIQUEZ, *et al.*	**Kern County Case No. BF137853C**
Defendants and Appellants.	

REPLY BRIEF ON THE MERITS

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
COUNTY OF KERN
THE HONORABLE MICHAEL DELLOSTRITTO, JUDGE

Submitted on behalf of appellant,
RENE GUTIERREZ, Jr.

SCOTT CONCKLIN [105090]
Attorney at Law
2205 Hilltop Drive, No. PMB-116
Redding, California 96002
(530) 243-8510
Attorney for RENE GUTIERREZ, Jr.
Appointed by the Supreme Court

TABLE OF CONTENTS

ARGUMENT 5

I. JUROR NO. 2547226 WAS REMOVED FOR SPECULATIVE AND IMPLAUSIBLE REASONS, AND THE COURT FAILED TO CONDUCT A SUFFICIENT STEP-THREE INQUIRY. 5

A. THE PROSECUTOR'S EXPLANATION WAS VAGUE AND WITHOUT SPECIFIC CONTENT, AND WAS OTHERWISE UNSUPPORTED BY THE RECORD. 5

B. BECAUSE THE PROSECUTOR'S EXPLANATION WAS VAGUE AND WITHOUT SPECIFIC CONTENT, AND WAS OTHERWISE UNSUPPORTED BY THE RECORD, THE TRIAL COURT ERRED BY ACCEPTING IT AT FACE VALUE WITHOUT AN INDIVIDUALIZED THIRD-STEP *BATSON* INQUIRY. 1

C. REMEDY 13

II. JUROR NO. 2547226 WAS REMOVED FOR A REASON THAT WAS NOT RACE NEUTRAL AND WAS OTHERWISE VAGUE AND IMPLAUSIBLE, AND THE TRIAL COURT FAILED TO CONDUCT A SUFFICIENT STEP-THREE EVALUATION. 16

A. THE "WASCO ISSUE" WAS NOT RACE NEUTRAL. 16

C. BECAUSE THE PROSECUTOR'S EXPLANATION WAS VAGUE, IMPLAUSIBLE, AND SUGGESTIVE OF BIAS, THE TRIAL COURT ERRED BY ACCEPTING IT AT FACE VALUE WITHOUT AN INDIVIDUALIZED THIRD-STEP *BATSON* INQUIRY. 19

III. JUROR NO. 2510083 WAS REMOVED FOR AN IMPLAUSIBLE REASON (RESOLVED CLAIM OF HARDSHIP), AND THE IMPLAUSIBILITY OF THAT EXPLANATION WAS REINFORCED BY COMPARATIVE ANALYSIS.. 22

A. THE PROSECUTOR'S RELIANCE ON A RESOLVED CLAIM OF HARDSHIP WAS IMPLAUSIBLE. 22

B. THE LIFE-EXPERIENCE FACTOR WAS NEGATED BY COMPARATIVE ANALYSIS AND WAS OTHERWISE UNSUPPORTED BY THE RECORD AND IMPLAUSIBLE. 25

C. BECAUSE THE EXPLANATIONS GIVEN WERE IMPLAUSIBLE AND FAILING COMPARATIVE ANALYSIS, THE TRIAL COURT ERRED BY ACCEPTING THEM AT FACE VALUE WITHOUT AN INDIVIDUALIZED THIRD-STEP *BATSON* INQUIRY. 28

CONCLUSION 31

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

Batson v. Kentucky (1986) 476 U.S. 79 — 5-6, 18
J.E.B. v. Alabama ex rel. T.B. (1994) 511 U.S. 127 — 13
Miller-El v. Cockrell (2003) 537 U.S. 322 — 14
Miller-El v. Dretke (2005) 545 U.S. 231 — 5, 10-11, 14, 18, 21, 28
Rice v. Collins (2006) 546 U.S. 333 — 14
Snyder v. Louisiana (2008) 552 U.S. 472 — 9, 11, 14, 21-22, 24-30

CALIFORNIA SUPREME COURT

People v. Fuentes (1991) 54 Cal.3d 707 — 9, 11, 20
People v. Reynoso (2003) 31 Cal.4th 903 — 11
People v. Silva (2001) 25 Cal.4th 345 — 7
People v. Turner (1986) 42 Cal.3d 711 — 13, 28
People v. Wheeler (1978) 22 Cal.3d 258 — 5
People v. Williams (1997) 16 Cal.4th 153 — 18, 22
People v. Williams (2013) 56 Cal.4th 630 — 24, 30

CALIFORNIA COURT OF APPEAL

People v. Allen (2004) 115 Cal.App.4th 542 — 12, 28
People v. Barber (1988) 200 Cal.App.3d 378 — 25
People v. Gore (1993) 18 Cal.App.4th 692 — 13
People v. Landry (1996) 49 Cal.App.4th 785 — 25
People v. Turner (2001) 90 Cal.App.4th 413 — 16, 20

FEDERAL CASES

McGahee v. Alabama Dep't of Corrections (11th Cir.2009) 560 F.3d 1252 — 28
United States v. Bishop (9th Cir.1992) 959 F.2d 820 — 16, 20

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	**CASE NO. S224724**
Plaintiff and Respondent,	**DCA CASE NO. F065288 [Enriquez] F065984 [Gutierrez] F065481 [Ramos]**
vs.	
RAMIRO ENRIQUEZ, *et al.*	**Kern County Case No. BF137853C**
Defendant and Appellant.	

REPLY BRIEF ON THE MERITS

I.

JUROR NO. 2547226 WAS REMOVED FOR SPECULATIVE AND IMPLAUSIBLE REASONS, AND THE COURT FAILED TO CONDUCT A SUFFICIENT STEP-THREE INQUIRY

A. THE PROSECUTOR'S EXPLANATION WAS VAGUE AND WITHOUT SPECIFIC CONTENT, AND WAS OTHERWISE UNSUPPORTED BY THE RECORD.

Given that the trial court declared a *prima facie* case of group bias based on the prosecutor's use of peremptory challenges to remove ten Hispanic panelists from the jury (7RT 1176-1177), for each challenge, the prosecutor had an obligation to come forward with a clear and reasonably specific race-neutral explanation which is reasonably related to the case. (*People v. Wheeler* (1978) 22 Cal.3d 258, 280-282; *Batson v. Kentucky* (1986) 476 U.S. 79, 96-98, & fn. 20.) An explanation that is unsupported by the record "cannot reasonably be accepted." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 244-247.)

Here, the prosecutor explained the removal of this prospective juror by stating: "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." (7ART 1186) Because the prospective juror indicated that she would be able to listen to other jurors (which she cited as her strong suit), that she did not think that she would be deferential to others, and did not think that she would have trouble voicing disagreement with others or in explaining her reasons (3ART 492), the prosecutor's vague "concern" was unsupported by the record, and failed to provide a "'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenge[]." (*Batson v. Kentucky, supra,* 476 U.S. 79, 98, fn. 20.)

Respondent argues that "[t]he 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." (PBM, at p. 58.)

The prosecutor did not clearly and specifically explain why he believed that Ms. 2547226 lacked an understanding of her role as a juror. When asked, she expressed a correct understanding of deliberations and the role of jurors during deliberations. She knew that jury deliberations occur "[a]fter everything -- all the evidence and all the stuff has been presented," and that jurors would retire to a room where they would discuss by themselves "the whole case to see if everything is found -- the case to be proven." (5ART 614.) She knew that jurors should participate in deliberations by both listening to others and in speaking their own mind, and she knew that her own vote belonged to her. (5ART 613, 616.)

The only thing that she did not know was that both a guilty verdict and a not guilty verdict require juror unanimity. But the prosecutor did not specifically cite that as the basis for the claim that she did not understand the role of a juror and respondent does not cite that as the basis for the prosecutor's concern. The jury would be instructed on unanimity and it was never suggested that a good juror should know about that point of law in advance.

Respondent argues that Ms. 2547226's correct understanding of jury deliberations was the product of leading questioning by the prosecutor. (RB, at pp. 51-52.) The fact that she expressed her understanding of the jury deliberation process with affirmative answers to leading questions propounded by the prosecutor does not demonstrate that she lacked an understanding of a juror's role in the deliberation process. Moreover, the fact that the prosecutor elected to ask her leading questions demonstrates that the prosecutor was engaged in *voir dire* to educate the panel about the process rather than to test the understanding of individual jurors. That shows that the prosecutor was not genuinely concerned that Ms. 2547226 might have an insufficient understanding of the jury deliberation process.

In any event, her responses to open-ended questions demonstrated a correct understanding of the deliberation process. She gave correct responses when asked non-leading questions such as "[w]hat is your understanding of what a jury deliberation is?" and "where do you - - is your understanding of where that happens?" (5ART 614.) Those correct answers, together with her correct answers to so-called leading question, provided the prosecutor no basis to claim that Ms. 2547226 lacked an understanding of the deliberation process. Nothing in the record supports the prosecutor's concern that Ms. 2547226 lacked an "understanding" of a juror's role in deliberations. (*People v. Silva* (2001) 25 Cal.4th 345, 376-377.)

The other reason cited by respondent was the prosecutor's concern that she "may be unable to state her opinion and thoughts to other jurors during deliberations." (PBM, at p.

49.) Although the prosecutor did not specifically explain the basis for this concern, respondent attributes it to her use of the phrase "I don't think so" when asked whether she would be deferential to others or would have trouble speaking her mind.

As respondent acknowledges, Ms. 2547226 denied that she would be "deferential" to others or just "sit in the background and listen to other people." She said that she does better at listening than speaking her mind, but if she does not agree, "[t]hen the vote is mine." If there are things that "I'm not in agreement with," she will "decide what I want to say." (PBM, at p. 50.) Respondent argues nonetheless that "[t]he 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." (PBM, at p. 53.)

The phraseology ("I don't think so") was not chosen by the prospective juror, it was introduced by the prosecutor who prefaced his questioning on this topic by asking her what she *thinks*: "You don't *think* that there's anything about you that's [deferential] or, you know, what to sit in he background and listen to other people?" (5ART 601, emphasis added.) Because she was asked what she thinks, her answer -- "No, I don't think so" -- was responsive to the question. She used the phrases "I think" or "I don't think" in three of her four answers on the topic. Because the prosecutor began this series of questions by asking her what she thinks, her answers -- which were couched in terms of what she thinks -- were responsive to what the prosecutor was asking her.

Respondent argues that her answers demonstrated "hesitancy and timidity" because her "'I don't think so' answers show a lack of confidence and assuredness regarding the juror's ability to speak out when necessary." (RB, at p. 55.) Saying "I don't think so" is just another way of saying "no." The fact that she said "I don't think so" instead of "no" is of no consequence, especially given that the prosecutor prefaced his questioning on this topic by asking her what she thought.

The words "I don't think so," standing alone, do not suggest hesitancy and timidity, nor do they display a lack of confidence. Instead, the phrase is a common expression that is used to give a negative response to a question or request. Taken literally, the phrase simply means that the speaker does not believe that an assertion is true. Use of the phrase may suggest timidity only if it is delivered with a timid demeanor.

Respondent imagines that Juror No. 2547226 may have uttered the phrase with "timidity." Depending on tone of voice and demeanor, one can also imagine that she may have barked out that phrase with absolute self-confidence. The cold record does not illuminate either way. It only shows that the prospective juror gave a negative answer. If there was something about her demeanor that gave the prosecutor reason to discredit her answer, it was the prosecutor's duty to make a record of her demeanor when called upon to explain that as a reason for challenging her.

Respondent's argument contradicts itself on this point. Respondent argues that the prosecutor was entitled to rely on "body language or manner of answering questions." (PBM, at p. 53 citing *People v. Fuentes* (1991) 54 Cal.3d 707, 715.) True, but respondent also insists that "[t]he 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 on this juror's demeanor or ascribe this reason as one the prosecutor relied on in excusing the juror." (PBM, at p. 57.) Because the prosecutor did not cite her demeanor (*i.e.*, "body language or manner of answering questions") as the reason for his concern, and because the trial court did not credit an explanation that relied on demeanor as a factor, the prosecutor's explanation cannot be upheld based on a theory that the prospective juror may have displayed a timid demeanor when she answered the questions. (*Snyder v. Louisiana* (2008) 552 U.S. 472, 477, 479.)

Respondent also asserts that "this juror answered in a hesitant fashion." (PBM, at p. 61, citing 3ACT 492.) The transcript does not show that there was any hesitation in answering questions.

Respondent also cites her answer where she said that "she was better at listening than at speaking her mind." (PBM, at p. 61, citing 3ACT 492.) The fact that she considered herself a better listener than a speaker does not mean that she would be unable to speak her mind. Both qualities are important for a good juror. That fact that she is better at one does not mean that she is unable to do the other. She told the prosecutor that she did not think that she would have any problem speaking her mind. (3ACT 492.) She was willing and able to do both.

Because the prosecutor did not state that he was relying on the prospective juror's demeanor, and because there was nothing in the record to support the prosecutor's assertion that she lacked a proper understanding of the role of a juror or lacked the ability to be heard in deliberations, the prosecutor's explanation failed to provide a "'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenge[]." (*Batson,* at p. 98, fn. 20.) An explanation that is unsupported by the record "cannot reasonably be accepted." (*Miller-El v. Dretke, supra*, 545 U.S. 231, 244-247 [prosecutor mischaracterized potential juror's views on the death penalty].)

B. BECAUSE THE PROSECUTOR'S EXPLANATION WAS VAGUE AND WITHOUT SPECIFIC CONTENT, AND WAS OTHERWISE UNSUPPORTED BY THE RECORD, THE TRIAL COURT ERRED BY ACCEPTING IT AT FACE VALUE WITHOUT AN INDIVIDUALIZED THIRD-STEP *BATSON* INQUIRY.

The trial court erred in accepting the prosecutor's implausible explanation without a constitutionally sufficient *Wheeler/Batson* third-step inquiry. (*Miller-El v. Dretke*, *supra,* 545 U.S. 231, 252 [court must assess plausibility of prosecutor's explanation].) For Juror No. 2547226, the court made no specific evaluation or finding at all. The trial court chose to evaluate, or at least mention, the reasons for excusing each challenged juror individually, but failed to give Juror No. 2547226 any individual attention. "[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." (*People v. Fuentes, supra,* 54 Cal.3d 707, 720, emphasis added.) "[E]very questioned peremptory challenge must be justified." (*Id.* at p. 715.)

Respondent relies on the rule that "'[w]hen 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." (PBM, at p. 58, citing *People v. Reynoso* (2003) 31 Cal.4th 903, 923.) Here, the prosecutor's statement of "concern" about the potential juror's understanding of the role of a juror and her ability to be heard in the course of jury deliberations was not so obviously supported by the record that trial court was excused from conducting a *Batson* third-step inquiry. Rather than accept the prosecutor's explanation at face value, without specific analysis or questioning, the trial court should have required the prosecutor to articulate the basis for his concern. "[A] prosecutor simply has got to state his reasons as best he can and *stand or fall* on the plausibility of the reasons *he gives*." (*Miller-El v. Dretke*, *supra*, 545 U.S. 231, 252, emphasis added.) That cannot occur if the trial court does not require the prosecutor to adequately explain his reasons in the first place.

As previously set forth, Ms. 2547226 articulated a correct understanding of the deliberation process and told the prosecutor that she did not think that she would be deferential to others or have a problem speaking her mind. If the prosecutor had some reason to doubt her answers in that regard, he should have explained the reasons for his doubt. Because the prosecutor failed to do so, the trial court should have questioned him to ascertain the basis for his doubt. The court should have asked him which answers caused him concern and why they caused him concern. If the prosecutor was relying on her demeanor, body language, or the way that she answered the questions, the court

should have required him to state those things for the record. (*Snyder v. Louisiana*, *supra*, 552 U.S. 472, 477, 479.)

Because the prosecutor did not articulate the basis for those concerns, and because the trial court did not inquire, there is no way to determine what led the prosecutor to have those concerns. The court should not have to "guess what the prosecutor found troubling." (*People v. Allen* (2004) 115 Cal.App.4th 542, 551.)

Respondent argues that the prosecutor's concern was based on the prospective juror's use of the phrase "I don't think so" in answering certain questions. (PBM, at p. 53.) The record does not show that this was the actual basis for the prosecutor's concern as opposed to something that has been thought up after the fact. A prosecutor's explanation will "stand or fall on the plausibility of the reasons he gives," and cannot be justified by "thinking up" an explanation after the fact. (*Miller-El v. Dretke*, *supra,* 545 U.S. 231, 252.)

Respondent argues that the prosecutor was actually concerned about the fact that Ms. 2547226 had no prior jury experience. (RB, at p. 60.) But the prosecutor never articulated her lack of jury experience as a basis for his concern.

Respondent also argues that "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." (RB, at p. 61.) The record shows no hesitation in her answers and her assertion that she was a better listener than a speaker does not mean that she would be unable to speak her mind in deliberations. If this was the answer that caused the prosecutor concern, the prosecutor should have been called upon to say so.

Respondent asserts that Juror No. 2547226 gave an "equivocal and wavering answer" when she said that "she did not think she would have any problem letting other people on the panel know that she did not agree with them." (RB, at p. 61.) When she was asked whether she would "be able to participate in deliberations and listen to everyone else in speaking your own mind," she answered "Yes" without equivocation. (3ACT 491.) She

said that if she does not agree with other jurors, "[t]hen the vote is mine," and she did not think that she would have any problem letting others on the panel know when she disagrees with them. (3ACT 492.) There was nothing equivocal or wavering about those answers.

Appellant cited an additional reason why further inquiry was required in this instance. Juror No. 2547226 was not only Hispanic, she was an Hispanic woman. A peremptory challenged cannot be based on gender. (*J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 129.) The prosecutor's concern that Juror No. 2547226 might be "deferential," to others was suggestive of bias, for it could be based on a stereotypical view that Hispanic women are quiet, timid or meek. Respondent dismisses the claim by simply asserting that the prosecutor's concern was gender-neutral. (PBM, at p. 62.) The notion that women are less assertive than men is a well-known stereotype. The prosecutor's expressed concern that a Hispanic woman would be deferential or less assertive in deliberations plays upon that stereotype, which makes it suggestive of bias. When the prosecutor offers an explanation that is suggestive of bias, further inquiry is required. (*People v. Turner* (1986) 42 Cal.3d 711, 728.) Rather than accept the prosecutor's explanation at face value, the trial court should have conducted further inquiry to determine whether the prosecutor's concern was based on a combination of race and gender bias.

Because the record does not supply obvious support for the prosecutor's explanation, the trial court had an obligation to conduct a proper third-step Batson analysis. The trial court's failure to address or mention the prosecutor's explanation for removing this juror represents a complete failure of the court's duty to conduct an adequate third-step *Batson* analysis.

C. REMEDY.

Respondent suggests that "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." (RB, at pp. 61, citing *People v.*

Williams (2000) 78 Cal.App.4th 1118, 1125; *People v. Gore* (1993) 18 Cal.App.4th 692, 706.) In the cases cited, the trial court erred by failing to consider a *Wheeler/Batson* motion in the first instance. Because the motions were denied without a hearing, there was no finding of a *prima facie* of group bias, nor was the prosecution called upon to justify peremptory challenges. It was in that context that a remand was considered appropriate. Here, in contrast, *Wheeler/Batson* motions were made, the court found a *prima facie* case of group bias, the prosecutor was called upon to explain peremptory challenges and gave explanations for each challenge. Respondent cites no authority that says that a trial court's failure to conduct an adequate third-step *Batson* inquiry can be remedied by remand.

Again, a prosecutor's explanation must "*stand or fall* on the plausibility of the reasons *he gives*." (*Miller-El v. Dretke, supra,* 545 U.S. 231, 252, emphasis added.) The trial court was required to conduct an adequate inquiry at the time those explanations were given, which necessarily involved an evaluation of the prosecutor's credibility at the time the explanation is offered. (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339-340 [trial court evaluates the credibility of the prosecutor in stating reasons]; *Rice v. Collins* (2006) 546 U.S. 333, 342.)

Respondent argues that remand would be appropriate because "[t]he 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." (PBM, at p. 62.) On the contrary, if there were to be a remand, the trial court would be asked to recall both the prosecutor's demeanor at the time the explanation was given and the prospective juror's demeanor. "[T]he trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. (*Snyder v. Louisiana, supra,* 552 U.S. 472, 477.)

Although respondent insists that the prospective juror's demeanor is not at issue, her demeanor is the gist of respondent's claim. She told the prosecutor that she did not think that she would be deferential to other jurors and that she did not think she would have a problem speaking her mind. Respondent claims that she was hesitant, equivocal, wavering, and timid in her answers. Because those things are not apparent from the cold record, respondent's claim depends upon whether she displayed a hesitant and timid demeanor when she gave those answers. It is not likely that such issues can be adequately resolved long after the fact.

When he was first asked to explain his reason for excusing Juror No. 2547226, the prosecutor had insufficient recollection to give an explanation without his notes. (7 ART 1184.) Respondent terms that "an unremarkable situation, especially given the length and complexity of the voir dire." (RB, at p. 54.) When the trial court evaluated the prosecutor's explanations, Juror No. 2547226 was skipped. That shows that the voir dire of this potential juror was not deemed particularly memorable at the time. There is no reason to believe that memories would be improved four years later.

II.

JUROR NO. 2547226 WAS REMOVED FOR A REASON THAT WAS NOT RACE NEUTRAL AND WAS OTHERWISE VAGUE AND IMPLAUSIBLE, AND THE TRIAL COURT FAILED TO CONDUCT A SUFFICIENT STEP-THREE EVALUATION.

A. THE "WASCO ISSUE" WAS NOT RACE NEUTRAL.

Juror No. 2723471 revealed that she lived in Wasco and was not aware of gangs that are active in the Wasco area. (5ART 855) She was excused by the prosecutor because "[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 is from a criminal street gang, a subset of the Surenos out of Wasco." (7ART 1183.)

Respondent does not contest the assertion that Wasco is a predominately Hispanic community. Because Wasco is predominately Hispanic, the "Wasco issue" is not race neutral. When a certain ethnic or racial group is associated with a particular community, the fact that a prospective juror hails from that community is not a race- or ethnic-neutral reason for a peremptory challenge. (*United States v. Bishop* (9th Cir. 1992) 959 F.2d 820, 825-826; *People v. Turner* (2001) 90 Cal.App.4th 413, 420.) Saying that she is from Wasco is another way of saying that she is Hispanic.

Respondent argues that "the prosecutor did not excuse this juror based on her residence alone. The prosecutor excused [her] because she lived in Wasco and was unaware of any gang activity in Wasco despite living there." (RB, at p. 64.)

The additional fact that she claimed to be unaware of gangs active in her community does not make the prosecutor's explanation race neutral. Unless we are to assume that Hispanics who live in a Hispanic community are expected to be aware of gangs or gang activity in their community, there is nothing remarkable about her answer. To assume that Ms. 2723471 should be aware of gang activity in her community because she is

Hispanic and because her community is predominately Hispanic is to engage in the sort of stereotyping that *Wheeler/Batson* forbids.

To be precise, this prospective juror was not asked whether she was aware of *gang activity* in Wasco. She was asked "are you *gangs that are active* in the Wasco area." (5 ART 855, emphasis added.) Because the question lacked a verb, it is unclear what the prosecutor was asking. Assuming that the prosecutor meant to ask her whether she was *aware* of "gangs that are active in the Wasco area," that is different from being aware of "gang activity" in the area. One can have a general awareness of gang activity in an area without being aware of the gangs that are active in the area.

In any event, like the prosecutor below, respondent fails to explain how her *lack* of awareness of gangs that are active in the area made her an undesirable jurors. The prosecutor did not specifically explain why he excused her, he simply wondered "how she would respond when she hears that Gabriel Trevino is from a criminal street gang, a subset of the Surenos out of Wasco." (7ART 1183.)

Respondent asserts that a "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." (RB, at p. 65.) Respondent fails to adequately explain how her *lack* of knowledge of gangs or gang activity in her home town could have an effect on how she assesses Trevino's credibility.

Respondent argues that "[t]he 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." (RB, at p. 65.) The prosecutor did not specifically state that Ms. 2723471 would be biased against Trevino because she lacked an awareness of gangs or gang activity in Wasco. He merely expressed concern over how she would "respond when she hears that Gabriel Trevino is from a criminal street gang, a subset of the Surenos out of Wasco." (7ART 1183.) Wondering how she might respond, given her lack of awareness, did not provide a '*clear* and *reasonably specific*' *explanation* of his 'legitimate reasons'

for exercising the challenges." (*Batson v. Kentucky*, *supra,* 476 U.S. 79, 98, fn. 20, emphasis added.)

Respondent relies on *People v. Williams* (1997) 16 Cal.4th 153, where a potential juror was excused because he attended a high school where the student body was loyal to the Bloods gang. Because the defendant was a Bloods gang member, the prosecutor was concerned that the potential juror might have gang-related sympathy for the defendant. (PBM, at pp. 66-67.) The same cannot be said about a potential juror who is *unaware* of gangs or gang activity in her area. Because she was unaware of gangs or gang activity in her area, it cannot be said that she had any loyalty to any particular gang.

Respondent argues that "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." The fact that she was *unfamiliar* with gangs or gang activity in Wasco does not suggest that she would be biased against Trevino merely because he was a Wasco gang member. If she said that she was unfamiliar with golf, that would not give her a rational reason to be biased against Lee Trevino. The fact that she was unfamiliar with gangs in her town did not give her a rational reason to be biased against Gabriel Trevino.

If the prosecutor was genuinely concerned that this juror's lack of awareness of gangs in her community, he would have asked her about it. As respondent acknowledges, "'the State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.'" (*Miller-El v. Dretke*, *supra,* 545 U.S. 231, 246.) Respondent argues that "[t]he questions asked by the prosecutor were sufficient to flush out the prospective juror's lack of awareness of gang activity in Wasco." (PBM, at p. 69, citing 3RT 731 [Gonzales 3ART 855].) The only question that she was asked on point was "are you gangs that are active in the Wasco area?" She answered "no." (5 ART 855.) If the prosecutor was genuinely concerned that this juror could be biased against the

prosecution because she was unaware of gang activity in her community, he would have explored that topic with her. The fact that he excused her based on her answer to one ambiguous question shows that this was not a genuine concern.

As noted in appellant's opening brief, other Hispanic jurors were removed because they had some connection to gangs. (*E.g.*, Juror No. 2632053, Juror No. 2732073, Juror No. 2647624.) Juror No. 2468219 was removed because she once lived in "an area with a lot of gang activity, but that she had not specifically seen." (7ART 1185.) For her, simply being *aware* of gang activity in her community was cited as the reason to remove her. Ms. 2723471 was removed because she was said to be unaware of gang activity in her community. This is having it both ways. If a Hispanic panelist can be removed for being either aware or unaware of gang activity in the community, all Hispanic panelist can be removed.

B. BECAUSE THE PROSECUTOR'S EXPLANATION WAS VAGUE, IMPLAUSIBLE, AND SUGGESTIVE OF BIAS, THE TRIAL COURT ERRED BY ACCEPTING IT AT FACE VALUE WITHOUT AN INDIVIDUALIZED THIRD-STEP *BATSON* INQUIRY.

The court erred in accepting the prosecutor's implausible explanation without a constitutionally sufficient *Wheeler/Batson* third-step inquiry. (*Miller-El v. Dretke*, *supra,* 545 U.S. 231, 252 [court must assess plausibility of prosecutor's explanation].) The only individual evaluation of the prosecutor's explanation for removing this juror occurred when the trial judge said this: "And Ms. 2723471, I believe, according to Mr. Schlaerth was excused as a result of the Wasco issue and also lack of life experience. (7ART 1196.) Respondent concedes that the trial court was mistaken in stating that she was removed for a lack of life experience. (PBM, at p. 71.) Thus, the court's statement that the juror was removed because of the "Wasco issue" was the only observation that the court made concerning the removal of this juror. That did not satisfy the court's obligation to conduct and individualized evaluation (*People v. Fuentes, supra,* 54 Cal.3d

707, 715, 720), nor did it reflect a "sincere and reasoned attempt to evaluate the prosecutor's explanation," through "inquiry and evaluation." (*People v. Hall* (1983) 35 Cal.3d 161, 167-168.)

Because Wasco is a predominately Hispanic community, the prosecutor's reliance on the fact that this juror lived in Wasco was suggestive of bias. When the prosecutor's explanation is suggestive of bias, further inquiry is required. (*People v. Turner*, *supra*, 42 Cal.3d 711, 728.) The court's observation that this juror was removed because of the "Wasco issue" does not show that the court engaged in the inquiry that was required.

Respondent argues that "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." (RB, at p. 71.) The court did not state that at all. The court simply stated that she was removed because of the "Wasco issue." (7ART 1196.) Terming it a "Wasco issue" suggests that she was removed because she lives in Wasco. That is not a race-neutral explanation. (*United States v. Bishop*, *supra,* 959 F.2d 820, 825-826; *People v. Turner*, *supra,* 90 Cal.App.4th 413, 420.) Other than refer to the prosecutor's explanation as the "Wasco issue," the court made no analysis to explain what that might mean.

Respondent argues that "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." (PMB, at p. 71.) The court's statement that the juror was removed because of the "Wasco issue" does not reflect a sincere and reasoned effort to evaluate the prosecutor's explanation.

Respondent argues that a third-step *Batson* inquiry was not required because "[t]here is nothing vague or suggestive of bias in the stated reason provided." (PMB, at p. 71.) The fact that the respondent relied on the fact that Juror No. 2723471 lives in a Hispanic community is suggestive of bias. The prosecutor's additional concern that he did not

know "how she would respond when she hears that Gabriel Trevino is from a criminal street gang, a subset of the Surenos out of Wasco" was vague. Respondent claims that the prosecutor was concerned that Ms. 2723471's unfamiliarity with gang activity in her community would be make her biased against Trevino as a witness, but the prosecutor did not specifically articulate that concern. (*Miller-El v. Dretke*, *supra,* 545 U.S. 231, 252 [prosecutor's explanation must stand or fall on the plausibility of the reasons he gives].) If that was the prosecutor's concern, it was too speculative to be accepted at face value. (*Snyder v. Louisiana*, *supra,* 552 U.S. 472, 479 [highly speculative explanations cannot be accepted].)

III.

JUROR NO. 2510083 WAS REMOVED FOR AN IMPLAUSIBLE REASON (RESOLVED CLAIM OF HARDSHIP), AND THE IMPLAUSIBILITY OF THAT EXPLANATION WAS REINFORCED BY COMPARATIVE ANALYSIS.

A. THE PROSECUTOR'S RELIANCE ON A RESOLVED CLAIM OF HARDSHIP WAS IMPLAUSIBLE.

In *Snyder v. Louisiana, supra,* 552 U.S. 472, the prosecutor removed a prospective juror based on a resolved claim of hardship. There, the prospective juror claimed that jury service would interfere with his obligations as a student teacher. The trial judge resolved that concern by having a law clerk phone the dean of the university. Despite resolution of the hardship claim, the prosecutor cited the assertion of hardship as a reason to excuse the juror. The Supreme Court found the explanation implausible, given that the hardship was effectively resolved. (*Id.* at pp. 482-483.) "The prosecution's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent." (*Id.* at p. 485.) That, in turn, gives rise to an adverse inference concerning the legitimacy of any other explanation given by the prosecutor for the removal of the juror. (*Ibid.*) "We hold that the trial court committed clear error in its ruling on a *Batson* objection, and we therefore reverse." (*Id.* at p. 474.)

The same occurred here. When the trial court took claims of hardship, Juror No. 2510083 asserted that jury service could conflict with an upcoming job interview. The court suggested that she try to reschedule her appointment. (4ART 512-513.) She informed the court the next day that she was able to reschedule the appointment for the following afternoon and the court indicated that the court would be adjourned early that afternoon as an accommodation. (5ART 728.) One of the reasons given by the prosecutor for excusing Juror No. 2510083 was that she "asked for release due to a hardship because of her situation." (7ART 1181.)

On appeal from the denial of appellant's *Wheeler/Batson* motion, appellant argued in the Court of Appeal that the prosecutor misstated the record in asserting that Ms. 2510083 asked for release due to hardship, and that her rescheduled job interview did not supply a plausible reason for excusing her. Respondent argued in the Court of Appeal that "despite the prosecutor's misstatement that this juror asked to be released due to hardship, the fact remains that Ms. 2510083's statements to the court that she would be out of work and needed to attend a job interview gave the prosecutor concern that this juror could be preoccupied with work issues and reluctant to serve on the jury. This is a reasonable, race-neutral reason and a proper basis to exercise a challenge as to this juror." (RB, at p. 45.) The Court of Appeal accepted the People's argument by finding that the prospective juror "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." (Slip Opinion, at p. 12.)

Respondent now adopts a new approach. Respondent abandons the claim that the prosecutor expressed "concern that this juror could be preoccupied with work issues" and asserts instead that the prosecutor was simply mistaken when he cited the juror's claim of hardship as a reason for excusing her. (PBM, at pp. 76-78.) Respondent invokes the rule that "a genuine 'mistake' is a race-neutral reason." (*People v. Williams*, *supra,* 16 Cal.4th 153, 189.)

In *Williams*, when called upon to explain why a prospective juror was removed, the prosecutor stated that he actually wanted the juror to serve (she was a police officer) and that he excused her by mistake. The trial court questioned the prosecutor on his claim of mistake, and the prosecutor offered to display his notes showing that the prospective juror was highly rated. He even offered a stipulation that would return the prospective juror to the panel. The trial court accepted the explanation. On appeal, the court found that the prosecutor's assertion of mistake was adequate. "We realize the possibility always exists

that counsel called upon to explain a questionable peremptory challenge will take refuge in a disingenuous claim the challenge was mistakenly made. In such a case, 'we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptoriness from sham excuses belatedly contrived to avoid admitting acts of group discrimination. [Citations.] We and the United States Supreme Court give great deference to the trial court's determination that the use of peremptory challenges was not for an improper or class bias purpose." (*Ibid.*)

Here, the prosecutor did not assert his own mistake when called upon to explain his reason for excusing Ms. 2510083. Because he did not assert that she was excused by mistake, or for a mistaken reason, the trial court had no occasion to evaluate the *bona fides* of that explanation. Because the claim of mistake is raised by the People for the first time on appeal (in response to an appellate record that does not support the prosecutor's explanation), it was never evaluated by the trial court, which means that there is no trial court ruling that is entitled to deference.

Respondent relies on *People v. Williams* (2013) 56 Cal.4th 630, where the court discovered a probable mistake by the prosecutor for the first time on appeal. There, two African-American women on the panel shared the same last name, and it was apparent from the record that the prosecutor mistakenly excused one because he thought she was the other. The court did not find a genuine mistake based merely upon the fact that the prosecutor's explanation was wrong. Instead, the record supplied an independent basis to conclude that the prosecutor's misstatements were due to an honest mistake.

Here, the only basis in the record which would support respondent's claim of mistake is that the record does not support the prosecutor's explanation that the juror was excused because she "asked for release due to a hardship because of her situation." (7ART 1181.) A prosecutor's explanation that misstates the record is normally seen as pretextual. "The prosecution's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent." (*Snyder v. Louisiana, supra,* 552 U.S. 472, 485.)

A pretextual explanation is one where the prosecutor cites a seemingly legitimate reason for excusing a minority panelist as a pretext to mask discriminatory intent. A claim of hardship has been found to be a race-neutral reason for exercising a peremptory challenge against a potential juror. (*People v. Barber* (1998) 200 Cal.App.3d 378, 398; *People v. Landry* (1996) 49 Cal.App.4th 785, 789 .) With that rule in mind, prosecutors can take note whenever a minority panelist claims a hardship, so that the claim of hardship can be cited as a reason for removing those jurors. The prosecutor attempted to play that card in this case. The only mistake made by the prosecutor was that the asserted claim of hardship did not serve as a plausible explanation to excuse the juror because the hardship had been resolved. Citing a resolved hardship as a reason to excuse a potential juror is considered pretextual. (*Snyder v. Louisiana, supra,* 552 U.S. 472, 485.)

B. THE LIFE-EXPERIENCE FACTOR WAS NEGATED BY COMPARATIVE ANALYSIS, WAS NOT CREDITED BY THE TRIAL COURT, AND WAS OTHERWISE UNSUPPORTED BY THE RECORD AND IMPLAUSIBLE.

The other reason given for excusing this prospective juror was a supposed lack of life experience and sophistication.[1/] The trial court did not credit this factor. Instead, the court employed comparative analysis to find that a "similarly situated" young white male was allowed to remain on the panel. The trial court upheld the prosecutor's explanation nonetheless because of "other reasons as he gave ..., not just the lack of life experience." (7 ART 1196.) The only other reason given was the resolved claim of hardship. When it does not appear that the trial court credited a certain factor cited by the

---

[1] I was concerned about her life experience. She's an instructional aid at an elementary school and she has no jury experience and she came across of 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 ... [I]t 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." (7ART 1181.)

prosecutor, the reviewing court cannot uphold the prosecutor's exercise of peremptory challenge based on that factor. (*Snyder v. Louisiana*, *supra,* 552 U.S. 472, 478-479.)

Respondent argues that the trial court's comparative analysis (comparing Ms. 2510083 to the "similarly situated" young white male) did not result in a rejection of the life experience factor. Instead, respondent asserts that the "other reasons" cited by the trial court referred to her lack of sophistication. (PBM, at p. 82.)

The prosecutor's reference to a lack of sophistication was included in the "life experience" factor and was not a separate reason for excusing her. When the trial court found that the young white male panelist was "similarly situated" in terms of youth and lack of life experience, that effectively negated the prosecutor's reliance on youth, inexperience and lack of sophistication as a factor.

Nor is the lack-of-sophistication factor supported by the record. There was nothing unsophisticated in the way that Ms. 2510083 asserted her claim of hardship (4ART 512-513; 5ART 728), or in the way n she gave her personal information (6ART 942-943), or in the way she answered voir dire questions from counsel. (6ART 974.) The prosecutor did not specifically state that he was relying on her demeanor to assert a lack of sophistication. And because the trial court made no express finding that Juror No. 2510083 displayed an unsophisticated demeanor, it cannot be presumed that the prosecutor's representation was credited. (*Snyder v. Louisiana*, *supra,* 552 U.S. 472, 479.)

Respondent argues that she displayed a lack of sophistication because "her answers to the attorneys' questions were predominately short and often given in a yes or no fashion." (PBM, at p. 84.) The record shows that she gave yes-or-no answers to yes-or-no questions, and that she answered other questions appropriately, without any apparent lack of sophistication.

As respondent acknowledges, "'the State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.'" (*Miller-El v. Dretke*, *supra,* 545 U.S. 231, 246.) Respondent argues that further questioning was unnecessary because the juror's lack of life experience was apparent from the answers that she gave. (PBM, at pp. 84-85.) But because the life experience factor was negated by comparative analysis, respondent relies on the juror's asserted lack of "sophistication" as an additional reason that distinguishes this juror from the young, white male panelist. If the prosecutor was genuinely concerned about this woman's lack of sophistication, he would have asked her questions designed to probe her level of sophistication.

Nor did the prosecutor explain how a perceived lack of life experience and sophistication was related to this particular case. The record does not show that Ms. 2510083 lacked employment. She was a teacher's aide and she previously worked as a customer service representative for a phone company. And she was interviewing for summer employment.

Respondent notes that she was unmarried and had no children. (PBM, at p. 84.) That would indicate that she had no experience dealing with married life and no experience in raising children. Respondent concedes that "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." (*Ibid.*) Respondent describes this case as a "complex, attempted murder case involving three codefendants and gang allegations" where a 'a high-ranking ex-gang member, Trevino, would be testifying for the prosecution and providing information as to the workings of the Sureno criminal street gang." (*Ibid.*) Respondent does not explain how experience at married life or child rearing would be helpful to a juror in this particular case.

Moreover, as appellant asserted in his opening brief, a claim that a minority panelist lacks "sophistication" is suspect, for such a claim can be a proxy from racial discrimination. (See *e.g., McGahee v. Alabama Dep't of Corrections* (11th Cir. 2009) 560 F.3d 1252, 1265.) Respondent counters that "[t]he prosecutor in this case at no time challenged Ms. 2510083's intelligence." (RB, at p. 86.) But an assertion that a minority panelist lacks "sophistication" is equally suspect, if not more suspect, especially when there is nothing in the record to support the claim. A claim that a panelist lacks intelligence can be supported by the record by pointing to unintelligible answers that the panelist may have given. A claim that a panelist lacks sophistication is merely a subjective derogatory that is more difficult to verify. Such a claim is consistent with a stereotypical view that racial and ethnic minorities are less sophisticated than those in the majority. As such, the claim is not necessarily race neutral.

C. BECAUSE THE EXPLANATIONS GIVEN WERE IMPLAUSIBLE AND FAILED COMPARATIVE ANALYSIS, THE TRIAL COURT ERRED BY ACCEPTING THEM AT FACE VALUE WITHOUT AN INDIVIDUALIZED THIRD-STEP *BATSON* INQUIRY.

The court erred in accepting the prosecutor's implausible explanation without a constitutionally sufficient *Wheeler/Batson* third-step inquiry. (*Miller-El v. Dretke*, *supra,* 545 U.S. 231, 252 [court must assess plausibility of prosecutor's explanation].) To the extent that the trial court relied on the resolved claim of hardship to uphold the prosecutor's peremptory challenge, the court's determination was not supported by an adequate third-step *Batson* inquiry. A prosecutor's reliance on a resolved claim of hardship is inherently implausible. (*Snyder v. Louisiana*, *supra,* 552 U.S. 472, 485.) The court cannot accept an implausible explanation at face value. (*Id.,* at pp. 479, 485; *Miller-El v. Dretke*, *supra*, 545 U.S. 231, 247.) When the prosecutor offers an implausible explanation, further inquiry is required before it can be accepted. (*People v. Turner*, *supra*, 42 Cal.3d 711, 728; *People v. Allen*, *supra,* 115 Cal.App.4th 542, 553.)

Rather than accept the prosecutor's reliance on a resolved claim of hardship at face value, the trial court should have asked the prosecutor why this factor was cited. Respondent acknowledges that the prosecutor misstated the record but asserts that the prosecutor was simply mistaken. Citing a resolved hardship as a reason to excuse a potential juror is considered pretextual. (*Snyder v. Louisiana, supra,* 552 U.S. 472, 485.) Given that the prosecutor misstated the record and was relying on a pretextual reason for excusing the juror, the court had a third-step *Batson* obligation to inquire. The trial court failed in that obligation.

Respondent argues that the court conducted a proper third-step inquiry to evaluate the life-experience and lack-of sophistication factors. Respondent disagrees with appellant's claim that these factors were negated by the trial court's comparative analysis. As respondent explains, the trial court's comparative analysis went only to youth and life-experience, and that lack of sophistication was the basis for excusing Ms. 2510083. (PBM, at pp. 86-87.) Respondent argues that because a mere "hunch" can be support a prosecutor's decision to exercise a peremptory challenge, the prosecutor's claim that Ms. 2510083 lacked life experience and sophistication was adequate, and the trial court's analysis in accepting that reason was adequate. (PBM, at p. 87.)

The fact that the prosecutor cited a resolved hardship called into question the prosecutor's decision to exercise the peremptory challenge. "The prosecution's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent." (*Snyder v. Louisiana, supra,* 552 U.S. 472, 485.) An inference of discriminatory intent infects all of the reasons given. Once an inference of discriminatory intent arises, the trial court should conduct an adequate inquiry to ensure that other reasons given by the prosecutor are not pretextual.

Here, the trial court engaged in an a comparative analysis that seemingly negated the prosecutor's reliance on youth and lack of life experience. Respondent notes that the trial court acknowledged the existence of "other reason" which would support the prosecutor's

decision. (PBM, at p. 86.) The trial court did not identify what those other reasons were, and did not express an analysis of those other reasons, and did not conduct any inquiry into those other reasons.

As noted above, the "other reasons" cited by the trial court were probably in reference to the prosecutor's reliance on the resolved claim of hardship. If so, reliance on the resolved claim of hardship was pretextual (*Snyder v. Louisiana, supra,* 552 U.S. 472, 485), which raised an adverse inference of discriminatory intent. Accordingly, a further step-three *Batson* inquiry was required.

If "other reasons" referred to the juror's asserted lack of sophistication, that too called for further inquiry. Although a trial court need not make further inquiry when the prosecutor gives a reasonably specific and inherently plausible explanation that is supported by the record (*People v. Williams, supra*, 56 Cal.4th 630, 653, fn. 21), there is nothing in this record that shows that Ms. 2510083 lacked sophistication in her answers. If the prosecutor was relying on her demeanor as a basis for claiming that she was unsophisticated, it was incumbent upon the prosecutor to say so, and the trial court must then determine that the prosecutor's reliance on demeanor is credible. (*Snyder v. Louisiana, supra,* 552 U.S. 472, 477, 479.) Because the prosecutor did not specifically state that Ms. 2510083 was deemed unsophisticated because of her demeanor, and because the trial court did not expressly find that the prosecutor was relying on demeanor to support his claim that she was unsophisticated, the lack-of-sophistication explanation (like the nervousness explanation in *Snyder*) cannot be credited. (*Ibid.*)

CONCLUSION

For the reasons set forth above, appellant requests that the decision of the Court of Appeal be reversed.

Respectfully Submitted,

Dated: 8/24/2106

Scott Concklin
Attorney for Appellant

WORD COUNT CERTIFICATION

The computer word processing program that produced this document returned a word count of 9244 (excluding tables required under rule 8.204(a)(1), the cover information required under rule 8.204(b)(10), this certificate, signature blocks, and quotation of issues required by rule 8.520(b)(2).)
Dated: 8/24/2106

Scott Concklin
Attorney for Appellant

PROOF OF SERVICE BY MAIL
[CCP 1013a, 2015.5]

I declare that I am a resident of the County of Shasta, State of California. I am over the age of eighteen (18) years and I am not a party to the within entitled cause. My business address is: 2205 Hilltop Drive, No. 116, Redding, California, 96002.

On the date of: 8/25/2016

I served the within copies, the exact title of which, are as follows:

REPLY BRIEF ON THE MERITS

The name and address of the person(s) served, as shown on the sealed envelope with postage prepaid, and which was deposited in the United States mail at Redding, California, is a follows:

FOR RESPONDENT
STATE ATTORNEY GENERAL
PO Box 944255
Sacramento, California 94244

CCAP
2407 J Street, Suite 301
Sacramento, California 95816

District Attorney
Kern County
1215 Truxton Avenue, 4th Floor
Bakersfield, California 93301

Superior Court
Kern County
1415 Truxton Avenue
Bakersfield, California 93301

APPELLANT:
RENE GUTIERREZ
AM5679
Pelican Bay SP
PO BOX 7500,
Crescent City, CA 95532

Clerk of the Court of Appeal
Fifth Appellate District
2424 Ventura Street
Fresno, California, 93721
[X] served electronically

For: RAMIRO ENRIQUEZ
Janet Grey
PO Box 51962
Pacific Grove, CA 93950

For: GABRIAL RAMOS
Don Ginoza
660 4th Street, #279
San Francisco, CA 94107

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct, and that this declaration was executed in Redding, California

Date: 8/25/2016

_____
Scott Concklin