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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

FRANCIS MATA,

Defendant and Appellant.

Case No. S201413

Court of Appeal, Second Appellate District, Division One, No. B226256
Los Angeles County Superior Court, Case No. BA366071
The Honorable Norman J. Shapiro, Judge

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INTRODUCTION

In *People v. Willis* (2002) 27 Cal.4th 811, 821, 823-824 (*Willis*), this Court held that upon granting a motion under *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*), and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), a trial court has discretion to employ remedies other than declaring a mistrial and ordering a new venire, so long as the court has the moving party's consent. The *Willis* consent rule does not involve a fundamental right. Thus, where, as here, counsel does not object to the court's use of an alternative remedy, consent may be implied. Alternatively, counsel's consent to the alternative remedy used in this case may be implied from the totality of the circumstances. Moreover, because the consent rule involves only state law, any error in failing to obtain counsel's consent is subject to the harmless error analysis set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). Under this analysis, appellant cannot show it is reasonably probable his counsel would have withheld consent to the reseating remedy, had he been explicitly asked. Further, because appellant was tried by an impartial jury, any error in failing to obtain counsel's consent to an authorized alternative *Batson*/*Wheeler* remedy is harmless, even though it may have affected the composition of the jury.

Appellant nevertheless argues that consent to an alternative *Batson*/*Wheeler* remedy cannot be inferred from counsel's silence because such silence is ambiguous. Specifically, appellant speculates that counsel may have failed to object because he did not know he could insist on a new venire, or because he believed objecting would have been futile. Yet, recognizing that counsel may implicitly consent to an alternative remedy, appellant advocates a totality of the circumstances test, but argues the circumstances in this case do not demonstrate counsel's implied consent because specific circumstances present in other implied consent cases are

not present here. Lastly, appellant claims any error in failing to obtain counsel's consent to an alternative *Batson/Wheeler* remedy is reversible per se because the error results in the "wrong factfinder" trying the case, so the effect of the error cannot be assessed without impermissibly speculating about how another hypothetical jury would have resolved the particular case. Appellant then engages in such speculation as to his case, arguing that another hypothetical jury might have resolved the case in appellant's favor because one member of such jury *might* have had personal experiences with drugs that *might* have caused the juror to disregard the expert's testimony in this case that appellant possessed a "usable quantity" of cocaine base.

Appellant's arguments are unpersuasive. To presume counsel failed to object to an alternative *Batson/Wheeler* remedy because he did not know the law or believed an objection would have been futile when the circumstances did not involve a hostile court, would be to impermissibly assume ineffective assistance of counsel. Instead, the only inference from counsel's failure to object to the court's use of an alternative remedy is that counsel consented to that remedy. Moreover, inferring consent from the failure to object is in keeping with this Court's precedent and the concepts of finality and basic fairness to both parties in criminal proceedings. In any event, counsel's failure to object to the reseating remedy employed in this case despite several opportunities to do so, counsel's discussion about another prospective juror on the venire during the first sidebar discussion, counsel's adoption of the reseating remedy when making his second *Batson/Wheeler* motion, counsel's failure to use a peremptory challenge to excuse the reseated juror, and counsel's acceptance of the jury when he had remaining peremptory challenges, are all circumstances demonstrating counsel's implied consent to the reseating procedure.

Assuming error, appellant has failed to show that a violation of a state-court-created rule requires per se reversal. Initially, by arguing that the "wrong factfinder" decided the case, appellant incorrectly assesses the error. The court employed an authorized remedy to ameliorate the *Batson/Wheeler* violation. Thus, the use of the alternative remedy did not result in a "wrong" jury; it resulted in a different jury. However, appellant did not have a right to any particular juror. Thus, if any error occurred in this case, it was only the failure to obtain counsel's consent to an authorized alternative *Batson/Wheeler* remedy. Because this error involves a court-created state rule only, it should be analyzed under *Watson*. Contrary to appellant's contention, it is not too difficult to assess the error under this standard. Instead, the effect of the error can be easily determined by inquiring whether it is reasonably probable counsel would have withheld consent, had he been asked. Moreover, as in cases involving the erroneous failure to excuse a juror for cause, the harmlessness of the error can easily be determined by inquiring whether the jury that ultimately tried the case was impartial. This inquiry does not, as appellant contends, require speculating as to how a hypothetical jury might have resolved the case. Instead, it involves the presumption, on which our system of justice is based, that all impartial juries would uniformly resolve the exact same case, with the same evidence, same instructions, and same representation. For these reasons, the Court of Appeal's decision in this case should be reversed.

ARGUMENT

I. THE MOVING PARTY OF A SUCCESSFUL *BATSON/WHEELER* MOTION IMPLICITLY CONSENTS TO THE ALTERNATIVE REMEDY OF RESEATING AN IMPROPERLY EXCUSED JUROR BY FAILING TO OBJECT TO THAT REMEDY

A. Regardless of the Circumstances of a *Batson/Wheeler* Violation, with the Moving Party's Consent, a Trial Court Has Discretion to Remedy the Violation by Methods Other Than Ordering a New Venire, Including Reseating the Challenged Prospective Juror

With the consent of the moving party of a successful *Batson/Wheeler* motion, the trial court has discretion to select a remedy other than declaring a mistrial and ordering a new venire. Here, the Court of Appeal limited the availability of alternative *Batson/Wheeler* remedies to situations in which the "usual" remedy of mistrial and a new venire would reward the offending party, as it would have in *Willis*. (Opn. at pp. 6-7.) However, appellant does not contest that, with the moving party's consent, alternative remedies are available in *any* case, regardless of whether quashing the venire would reward the offending party. (See ABOM 9.) Indeed, as argued in the Opening Brief on the Merits (OBOM 11-12), alternative remedies must be available in all cases in which there is a *Batson/Wheeler* violation in order to serve the purposes of assisting courts with their "substantial and legitimate interest in the expeditious processing of cases for trial," and deterring "in future cases" the type of conduct in which the defense engaged in *Willis*. (*Willis, supra*, 27 Cal.4th at pp. 817-818, 820, 822.) Thus, the fact that ordering a new venire would not necessarily reward the offending party in this case did not preclude the trial court from employing an alternative *Batson/Wheeler* remedy. Accordingly, this portion of the Court of Appeal's reasoning fails.

B. Consent to an Alternative *Batson/Wheeler* Remedy, and Waiver of the Right to a Mistrial And a New Venire, Is Implied When the Moving Party Fails to Object to the Remedy And the Record Demonstrates the Party Had a Meaningful Opportunity to Object

Appellant concedes that explicit consent to an alternative *Batson/Wheeler* remedy is not required and that such consent may be implied. (ABOM 9.) However, relying extensively on *People v. Mitchell* (2011) 197 Cal.App.4th 1109, appellant contends that implied consent to an alternative remedy requires a showing that the party had knowledge of the right being relinquished (the right to a mistrial and a new venire) and that the party intentionally relinquished that right. (ABOM 9-10, 14-16.) Appellant's reliance on *Mitchell* is misplaced. *Mitchell* dealt with whether the defendant had knowingly, intelligently, and voluntarily waived his right to appeal when agreeing to a plea bargain. (*Mitchell, supra*, at p. 1015.) Thus, *Mitchell*'s language that waiver involves the intentional relinquishment of a known right is with regard to a defendant's personal and explicit waiver of a right. (*Mitchell, supra*, at p. 1015; see *People v. Panizzon* (1996) 13 Cal.4th 68, 80 [to be enforceable, a defendant's explicit and personal waiver of the statutory right to appeal, made pursuant to a plea agreement, must be knowing, intelligent, and voluntary], citing *People v. Vargas* (1993) 13 Cal.App.4th 1653, 1659; see also *People v. Haskett* (1982) 30 Cal.3d 841, 858 [a knowing and intelligent waiver of rights is required when a defendant pleads guilty because the plea involves relinquishing the fundamental rights of confrontation, jury trial, and protection from compelled self-incrimination; however, not all constitutional rights are fundamental or require an informed waiver].) This case does not deal with the validity of a defendant's personal and explicit waiver of fundamental rights. Indeed, appellant concedes that a defendant's personal consent to an alternative *Batson/Wheeler* remedy is

not required and that counsel may consent on behalf of his or her client. (ABOM 9.)

Moreover, as explained in the Opening Brief on the Merits (OBOM 15), any "right" to the remedy of a mistrial and ordering a new venire is not a fundamental or constitutional right. The language from *Mitchell* on which appellant relies is inapposite because *Willis*'s interchangeable use of the terms "waiver" and "consent" demonstrate that the waiver discussed in *Willis* is not the type of waiver that requires an analysis of whether the party intentionally relinquished a known right. Instead, consent and waiver may be inferred from counsel's failure to object to the court's chosen alternative remedy, so long as counsel had a meaningful opportunity to object. Indeed, in several contexts, this Court assumes consent and waiver from counsel's (and even defendant's) failure to object, without analyzing knowledge or intent, where such waiver does not involve a fundamental right. (E.g., *Barsamyan v. Appellate Division of Superior Court* (2008) 44 Cal.4th 960, 969-970 [consent to a delay in the proceedings, and thus a waiver of the defendant's statutory speedy trial rights, may be inferred from counsel's silence]; *People v. Mayfield* (1997) 14 Cal.4th 668, 811 [consent was implied where the defendant requested that a specific judge hear his disqualification motion, but he did not object when another judge heard the motion]; *In re Horton* (1991) 54 Cal.3d 82, 86, 90-91, 98-99 [counsel's failure to object constituted implied consent to defendant being tried by a commissioner, and waiver of defendant's constitutional right to be tried by a superior court judge];[1] *People v. Lessard* (1962) 58 Cal.2d 447, 452 [right

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[1] While the *Horton* Court considered the fact that counsel were aware that the person who proposed to try the case was a commissioner and not a judge (*Horton, supra*, 54 Cal.3d at p. 99), the Court did not consider or examine whether counsel knew that the defendant had a constitutional right to be tried by a superior court judge or whether counsel were
(continued...)

to have entire jury polled waived by counsel's failure to object when court clerk failed to poll one juror].) Thus, the waiver required by *Willis* is not the type of waiver discussed in *Mitchell*. Instead, it is the type of waiver that may be inferred from counsel's silence.

As explained in the Opening Brief (OBOM 16-17), several forfeiture cases demonstrate why implied consent and waiver should be construed from the failure to object to a trial court's selection of an alternative *Batson*/*Wheeler* remedy. For example, the failure to object to a venire on the ground that it does not represent a fair cross-section of the community forfeits any claim on appeal that the venire was not representative. (*People v. Lewis* (2001) 25 Cal.4th 610, 634.) Thus, to hold that a defendant consents to a nonrepresentative venire and abandons his right to a representative one by failing to object to the venire, but that a defendant does not consent to an authorized remedy for a violation of the right to a random draw from a representative venire by failing to object to the remedy, would be to provide more protection to a court-created state rule (i.e., an alternative remedy may not be used absent the moving party's consent) than to a constitutional right (i.e., the right to a venire that represents a fair cross-section of the community). Additionally, a defendant may forfeit various claims of error with regard to jury selection by failing to object because "important policies mandate that criminal convictions not be overturned on the basis of irregularities in jury selection to which the defendant did not object or in which he has acquiesced. [Citations.]" (*People v. Visciotti* (1992) 2 Cal.4th 1, 38; see also *People v. Benavides* (2005) 35 Cal.4th 69, 87-88 [challenge to the excusal of

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(...continued)
intentionally relinquishing such right. The court focused only on counsel's silence and continued participation in the proceedings. (*Id.* at pp. 99-100.)

prospective jurors based on questionnaires, without follow-up questioning]; *People v. Holt* (1997) 15 Cal.4th 619, 656-658 [challenge to a trial court's excusal of a juror for cause].) A rule allowing a defendant to complain about the technical defect of failing to obtain counsel's explicit consent to an alternative remedy for the first time on appeal, without having objected to the alternative remedy or moved to dismiss the venire, "would deprive the People [and the trial court] of the opportunity to cure the defect at trial and would 'permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal.' [Citation.]" (*People v. Rogers* (1978) 21 Cal.3d 542, 548.)

Appellant complains that respondent's reliance on forfeiture cases is misplaced because forfeiture is not equivalent to the waiver of a right. (ABOM 13-14.) Specifically, appellant makes much of this Court's recognition of the United States Supreme Court's distinction between the terms "forfeiture" and "waiver," i.e., that forfeiture is the failure to make a timely assertion of a right, whereas waiver is an intentional relinquishment of a known right. (ABOM 13-14, citing *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371, and *People v. Sanders* (1993) 5 Cal.4th 580, 590, fn. 6, both relying on *United States v. Olano* (1993) 507 U.S. 725, 733 [113 S.Ct. 1770, 123 L.Ed.2d 508].) However, even after recognizing this distinction, this Court has continued to use the terms interchangeably. (E.g., *People v. Villalobos* (2012) 54 Cal.4th 177, 182 ["A defendant *forfeits* a claim that his punishment exceeds the terms of a plea bargain when the trial court gives a section 1192.5 admonition and the defendant does not withdraw his plea at sentencing," but because the defendant was not given the admonition, his "failure to object at sentencing does not waive his claim on appeal"], italics added; *People v. Fuiava* (2012) 53 Cal.4th 622, 720 ["Assuming without deciding that defendant did not forfeit or waive his confrontation claim . . ."]; *People v. Burgener* (2003)

29 Cal.4th 833, 869 ["defendant waived his constitutional claims by failing to articulate them below"]; *People v. Holt, supra*, 15 Cal.4th at p. 658 [failure to object to excusal of juror for cause "will be deemed a waiver of the claim" on appeal].) Thus, the meaning ascribed to the *Willis* Court's use of the term "waiver" cannot be determined solely from the distinction this Court has intermittently recognized between the terms "forfeiture" and "waiver." Thus, the cited forfeiture cases are relevant and provide compelling reasons for finding implied consent and waiver from the failure to object to an alternative *Batson/Wheeler* remedy.

Appellant argues that the failure to object is too ambiguous to constitute consent or waiver, because counsel's failure to object in this case might have had any of the following three meanings: 1) counsel was unaware of the moving party's right to quash the venire; 2) counsel felt objecting to the court's chosen alternative remedy would have been futile; or 3) counsel was relinquishing appellant's right to a mistrial and a new venire, and consenting to the alternative remedy of reseating the challenged juror. (ABOM 10.) Only the third of appellant's suggestions withstands scrutiny.

First, it is impermissible to assume that counsel's silence meant he was unaware that he had the right to object to the alternative remedy. If counsel did not object because he did not know that declaring a mistrial and ordering a venire was the usual remedy for a *Batson/Wheeler* violation, counsel necessarily performed outside of the wide range of reasonable professional assistance by failing to be aware of well-established and applicable law. (See *In re Wilson* (1992) 3 Cal.4th 945, 955-956 [failure to object because of ignorance or an erroneous interpretation of applicable law constitutes deficient performance]; *People v. Haskett, supra,* 30 Cal.3d at pp. 854-855 [failure to move for mistrial may constitute ineffective assistance if "counsel's omission was shown to be grounded in ignorance or

misapplication of the law rather than tactical considerations"].) However, as appellant recognizes, it is reasonable to conclude that counsel failed to object because he consented to the alternative remedy. Where there is a reasonable tactical explanation for counsel's failure to object, a reviewing court must presume that counsel acted pursuant to such reason, instead of assuming deficient performance. (*People v. Ledesma* (2006) 39 Cal.4th 641, 746; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) More specifically, this Court will not presume that an attorney was ignorant of the applicable law; such ignorance must be affirmatively shown. (*People v. Cooper* (1991) 53 Cal.3d 771, 858, fn. 2; *People v. Najera* (1972) 8 Cal.3d 504, 517, disagreed with on another ground in *People v. Wiley* (1995) 9 Cal.4th 580, 588; *People v. Odom* (1969) 71 Cal.2d 709, 716, fn. 4 & 717; *People v. Provencio* (1989) 210 Cal.App.3d 290, 304-305; *People v. Anderson* (1979) 97 Cal.App.3d 419, 426.) Thus, counsel's failure to object cannot be attributed to his supposed ignorance of the law.

Moreover, the record in this case demonstrates that counsel was aware that declaring a mistrial and quashing the venire was the usual remedy. After the prosecutor challenged Prospective Juror 2473, counsel asked for a sidebar "after she leaves." (3RT 943.) By specifically asking that the sidebar *Batson*/*Wheeler* motion take place after the prospective juror left, counsel demonstrated that he understood reseating the prospective juror would be an alternative remedy. There is simply no reason to believe that counsel did not know that the usual remedy for a *Batson*/*Wheeler* violation was to declare a mistrial and order a new venire. Thus, appellant's first interpretation of counsel's failure to object necessarily fails.

Likewise, appellant's second interpretation of counsel's failure to object–that counsel may have believed an objection would be futile–cannot be credited. Objections are deemed futile only in extreme cases where objections were repeatedly made and overruled, and "the courtroom

atmosphere was so poisonous that further objections would have been futile." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 501-502; see *People v. Livingston* (2012) 53 Cal.4th 1145, 1160 ["The overruling of an objection to one item of evidence does not necessarily mean an objection to different evidence would have been futile"]); *People v. Riel* (2000) 22 Cal.4th 1153, 1212-1213 [objections to alleged prosecutorial error were not futile where the "trial atmosphere was not poisonous, defense counsel did not object at all, and the record fails to suggest that any objections would have been futile"]; see also *People v. Sturm* (2006) 37 Cal.4th 1218, 1237 [objection to alleged judicial misconduct would have been futile "[g]iven the evident hostility between the trial judge and defense counsel"].) There were no such extreme and hostile circumstances here. Even at the early stage of jury selection, the court had engaged in a lengthy discussion and allowed counsel to object and argue about for cause challenges (2RT 631-635), and, at the time in question, the court had just granted appellant's *Batson*/*Wheeler* motion. Moreover, the record demonstrates that the court and counsel had a longstanding and good relationship. (2RT 328, 631-621 [the court repeatedly referred to counsel by his first name]; 3RT 968 [during the second sidebar, the court indicated that it had known counsel "a long time," and told counsel, "I can't tell you how fond I am of you, and I enjoy every time you come in this courtroom"].) There simply is no reason to speculate that counsel believed that an objection to the court's chosen alternative remedy would have been futile.

In sum, the only interpretation of counsel's failure to object to the alternative *Batson*/*Wheeler* remedy was that he consented to that remedy. Appellant's speculation to the contrary ignores the longstanding rule that counsel's deficient performance will not be presumed where there is a tactical reason supporting counsel's failure to object. Here, it appears that counsel tactically declined to object to the reseating procedure because

leaving Prospective Juror 2473 on the jury left the People "with the unpleasant chore of trying a case to a jury containing at least one member who had been wronged by the prosecutor." (*People v. Smith* (1993) 21 Cal.App.4th 342, 346; see *Willis, supra*, 27 Cal.4th at p. 821.) Moreover, counsel's argument during the second sidebar discussion indicates that he was concerned with the prospective jurors' equal protection rights (3RT 968), which are best vindicated through the reseating procedure (*Willis, supra*, at p. 823; *People v. Overby* (2004) 124 Cal.App.4th 1237, 1245). Accordingly, counsel's failure to object to the chosen *Batson/Wheeler* remedy in this case constituted implied consent to the alternative remedy and an implied waiver of the right to a new venire.

C. Under the Totality of the Circumstances, Counsel Implicitly Waived a New Venire And Consented to the Alternative *Batson/Wheeler* Remedy Utilized in this Case

Even if this Court declines to hold that the failure to object to an alternative remedy constitutes implied consent to that remedy, reversal of appellant's convictions is not warranted because the totality of the circumstances demonstrates counsel's implied consent. Appellant agrees that a totality of the circumstances test may be applied to determine whether counsel implicitly consented to the alternative remedy. (ABOM 2.) Nevertheless, in arguing that consent cannot be found here even under a totality of the circumstances test, appellant again surmises that counsel may have failed to object to the alternative remedy because he did not know quashing the venire was the usual remedy. (ABOM 15-17.) However, as explained above, appellant's speculation requires an assumption that counsel rendered deficient performance, which is impermissible. Moreover, the record demonstrates that counsel knew reseating was not the usual remedy.

Appellant also argues that the totality of the circumstances does not demonstrate consent because, unlike in *Willis*, the parties did not explicitly discuss quashing the venire and the court did not explicitly solicit comments from the defense about the remedy. (ABOM 16-17.) This argument ignores the rule that, under a totality of the circumstances test, no specific factors are required or determinative. (See *People v. Lawrence* (2009) 46 Cal.4th 186, 196 [where standard of review is whether trial court abused its discretion under the totality of the circumstances in denying a defendant's motion to revoke his pro per status, no one factor is determinative]; *People v. Cruz* (2008) 44 Cal.4th 636, 668 [in determining whether the totality of the circumstances demonstrated a knowing and voluntary waiver of defendant's rights, no one response is determinative]; *People v. Morris* (1991) 53 Cal.3d 152, 197 [no one factor is dispositive in determining whether totality of circumstances demonstrated suspect was subjected to custodial interrogation], disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) Instead, the court looks to all of the circumstances involved, and decides each case on an individual basis. (*United States v. Arvizu* (2002) 534 U.S. 266, 274 [122 S.Ct. 744, 151 L.Ed.2d 740]; see *In re Raymond C.* (2008) 45 Cal.4th 303, 307.) Thus, whether the parties explicitly discussed quashing the venire, and whether the court explicitly solicited comments from the defense about the remedy, are not determinative of whether the totality of the circumstances demonstrates that consent to an alternative remedy was given. For the same reasons, the emphasis appellant places on the differences between the circumstances of this case and those in *People v. Overby, supra*, 124 Cal.App.4th 1237, and *Stanley v. Superior Court* (2012) 206 Cal.App.4th 265, is misplaced. (See ABOM 17-20.)

An examination of the totality of the circumstances of this particular case demonstrates that counsel waived appellant's right to a new venire and

consented to the reseating procedure. Once the trial court indicated it would reseat Prospective Juror 2473, appellant's trial counsel and the prosecutor discussed whether the prosecutor would exercise a peremptory challenge against Prospective Juror 0207, another African-American on the venire. By discussing Prospective Juror 0207, defense counsel implicitly demonstrated his consent to the reseating procedure, as the prospective juror would have been irrelevant if a new venire were to be called. In summarizing the circumstances of this case, appellant completely ignores this continued sidebar conversation. (ABOM 4, 16-20.)

Moreover, by not using a peremptory challenge on Prospective Juror 2473, even though he had such challenges remaining when he accepted the jury, counsel made clear he wanted Prospective Juror 2473 on the jury. In fact, by accepting the jury when he had peremptory challenges remaining, counsel demonstrated that he was content with this venire.

Further, when the prosecutor eventually did attempt to exercise a peremptory challenge against Prospective Juror 0207, defense counsel asked the juror to remain seated while he made a Batson/Wheeler motion at sidebar, thus demonstrating his continued consent to the reseating procedure. Counsel's failure to contest the court's characterization of his second Batson/Wheeler motion as a request to have the prospective juror reseated (3RT 972), negates the Court of Appeal's finding that counsel's request for Prospective Juror 0207 to remain seated simply demonstrated his "recognition of, and decision to comply with," the trial court's chosen alternative remedy (Opn. at 7). Additionally, the second sidebar discussion was quite lengthy, and at no time did counsel express dissatisfaction with the reseating procedure used after the first motion. (3RT 965-972; see *People v. Overby, supra*, 124 Cal.App.4th at pp. 1243, 1245 [consent was implied where counsel did not "indicate any dissatisfaction with the remedy chosen by the court," even during the prosecutor's motion for the court to

reconsider its finding of *Batson/Wheeler* error, and "after having time and opportunity to consider [the reseating remedy] further"].)

Thus, while the parties did not explicitly discuss the usual remedy, it was clear that appellant's trial counsel understood reseating the challenged juror was an alternative remedy, as he initially indicated his understanding that the juror would leave the courtroom while he made the Batson/Wheeler motion. Moreover, while the court did not explicitly invite counsel to comment on the alternative remedy, the court gave counsel several opportunities to do so at the initial sidebar before the remedy was actually imposed, and during another lengthy sidebar discussion about another *Batson/Wheeler* motion. Counsel never gave any indication that he was dissatisfied with the court's selected remedy. Further, while counsel did not propose the alternative remedy, his affirmative use of it in a later *Batson/Wheeler* motion demonstrated his consent to the remedy. Accordingly, under the totality of the circumstances, consent to the alternative remedy was implied.

II. UTILIZING AN ALTERNATIVE REMEDY AFTER A SUCCESSFUL *BATSON/WHEELER* MOTION WITHOUT THE MOVING PARTY'S CONSENT IS SUBJECT TO THE HARMLESS ERROR ANALYSIS FOR STATE-LAW ERROR, AND ANY SUCH ERROR HERE WAS HARMLESS

If there was error in this case, it was harmless. Appellant argues that the error in not ordering a new venire is reversible per se because the "wrong factfinder" tried the case. (ABOM 21, 30.) Appellant thus misreads the error. The error in this case, if any, was not in utilizing the alternative remedy of reseating an improperly challenged juror instead of ordering a new venire. Instead, the error was in failing to obtain counsel's consent to this authorized alternative remedy. To hold that the use of the alternative remedy itself was error would be to undermine *Willis*, which held that reseating an improperly challenged juror is an available and

appropriate remedy for a *Batson/Wheeler* violation. (*Willis, supra*, 27 Cal.4th at p. 821 [listing sanctions against counsel and reseating improperly excused jurors as appropriate alternative remedies]; see also *Batson, supra*, 476 U.S. at p. 99, fn. 24 [declining to express a view on whether it would be more appropriate in a particular case to remedy a party's exercise of group bias in jury selection by ordering a new venire or reseating the improperly challenged jurors].)

Significantly, in California, when a party makes a motion under *Batson* or *Wheeler*, the motion is considered to involve claims under both cases. (*People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.) In other words, a *Batson/Wheeler* violation is a violation of both the moving party's state constitutional right to a jury randomly drawn from a venire that is representative of a cross-section of the community, and the challenged juror's federal constitutional right to equal protection. Adhering to *Wheeler*, which was decided before *Batson*, this Court has declared quashing the venire to be the default remedy for a *Wheeler*–and therefore a *Batson*–violation in California. (*Willis, supra*, 27 Cal.4th at p. 823.) However, this Court has also noted that such a remedy does not actually ameliorate the equal rights violation that occurs when a party exercises a peremptory challenge due to group bias. (*Ibid.*) Thus, the fact that an authorized remedy might not completely vindicate each right involved does not make it any less of an appropriate remedy.[2] Indeed, appellant does not

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[2] In fact, the reseating remedy is, if anything, more capable of vindicating all of the rights involved than the usual remedy of ordering a new venire. For example, if each improperly challenged juror were reseated, both the moving party's rights and the jurors' rights would be vindicated. For this reason, the idea that declaring a mistrial and ordering a new venire is California's "default" remedy for a Batson/Wheeler violation should be reconsidered. While it is appropriate to require a trial court to obtain the moving party's consent to an alternative remedy such as (continued...)

contend that the remedy used here failed to vindicate his rights under *Batson* and *Wheeler*. And, if counsel had given explicit consent to the reseating remedy in this case, there would necessarily be no error because there was nothing "wrong" with the factfinders who tried this case. Accordingly, appellant is incorrect that the error here is that the "wrong factfinder" tried the case; the error was only in failing to obtain counsel's consent to an alternative *Wheeler* remedy.

Moreover, to find that the error in failing to obtain counsel's consent is reversible per se simply because it may have affected the composition of the jury "'defies literal application' because the remedy to correct such an error, dismissing the venire and starting jury selection anew, creates a scenario in which 'the composition of the jury would undoubtedly have been affected by the original error.'" (*People v. Riccardi* (2012) 54 Cal.4th 758, 843, quoting *Ross v. Oklahoma* (1988) 487 U.S. 81, 87, fn. 2 [108 S.Ct. 2273, 101 L.Ed.2d 80].) Thus, as argued in the Opening Brief on the Merits (OBOM 22-23), any error here was the violation only of the court-created prophylactic rule that the moving party must consent to an alternative remedy. As such, the error should be reviewed for whether there is a reasonable probability the defendant would have achieved a more favorable result had the error not occurred. (Cal. Const., art. VI, § 13; *Watson, supra*, 46 Cal.2d at p. 836.)

Implicitly conceding that any error here did not affect appellant's fundamental rights or render his trial fundamentally unfair, appellant argues

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(...continued)
sanctions, which does nothing to actually vindicate any of the rights involved, there is simply no reason that a trial court should not be granted the unqualified discretion to select among the two remedies of reseating the improperly challenged jurors who are available or declaring a mistrial and ordering a new venire.

that the error was nevertheless structural because it is difficult to assess the effect of the error. (ABOM 21, 24-25, 27-28, relying on *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140 [126 S.Ct. 2557, 165 L.Ed.2d 409].) The argument fails. *Gonzalez-Lopez* held that, regardless of the fundamental fairness of the proceedings, a constitutional error may be structural where the consequences of the error are unquantifiable, so that it is not possible to analyze prejudice under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (*Gonzalez-Lopez, supra*, at pp. 148-150.) Thus, *Gonzalez-Lopez*'s holding is with regard to constitutional errors only. (*Id.* at p. 149 ["structural defects" are a "class of constitutional error"]; *People v. Aranda* (2012) 55 Cal.4th 342, 364 [*Gonzalez-Lopez* "illustrates the view that the touchstone for determining the appropriateness of harmless error review is the ability to ascertain the effect of the *constitutional* violation"], italics added.) Here, the only possible error was the court's violation of a state, court-created procedural rule requiring the moving party's consent to an alternative, but authorized, *Batson*/*Wheeler* remedy. The error did not violate appellant's constitutional rights, so the type of structural error described in *Gonzalez-Lopez* could not have occurred here.

Further, error in failing to obtain counsel's consent to an alternative remedy may be easily evaluated and found harmless at the outset if it is not reasonably probable the moving party would have declined to consent to the alternative remedy had it been explicitly asked to give such consent. Appellant complains that this argument is circular because, if there was evidence that counsel would have consented to the remedy, there would be sufficient evidence under a totality of the circumstances test to demonstrate implied consent, and there would be no error. (ABOM 30-31.) Appellant is incorrect. Whether the People can show sufficient evidence under a totality of the circumstances test to affirmatively demonstrate implied

consent is a different question than whether the defendant can show it is reasonably probable counsel would have withheld consent had counsel been explicitly asked. Thus, where insufficient evidence establishes that the moving party implicitly consented to an alternative remedy, a separate harmless error analysis may be employed to determine whether it is reasonably probable the party would have withheld consent. Here, as described in the Opening Brief on the Merits (OBOM 25), even if there was insufficient evidence to establish that appellant's counsel implicitly consented to the reseating remedy, on this record, appellant cannot show it is reasonably probable counsel would have withheld consent.

Moreover, whether error in failing to obtain consent was prejudicial may also be evaluated by determining whether the defendant was tried by an impartial jury. *People v. Yeoman, supra*, 31 Cal.4th 93, is instructive. In *Yeoman*, the trial court denied several of the defendant's challenges for cause. The defendant then used peremptory challenges to remove those jurors from the panel. Once the defendant exhausted his peremptory challenges, he expressed dissatisfaction with the jury. (*Id.* at p. 114.) This Court found that any error in denying the challenges for cause was harmless unless the defendant could show an actual violation of his right to impartial jury. (*Ibid.*) Under *Yeoman*, where a defendant is forced to accept a jury with which he is dissatisfied, and which would have been constituted differently had the court not erred, the error is harmless unless the defendant can show the jury ultimately selected was biased and unfair. (*People v. Bonilla* (2007) 41 Cal.4th 313, 340; see also *Ross v. Oklahoma, supra*, 487 U.S. at p. 87 ["Although we agree that the [erroneous] failure to remove [a juror for cause] may have resulted in a jury panel different from that which would otherwise have decided the case, we do not accept the argument that this possibility mandates reversal."].) Likewise, any error in failing to obtain the moving party's consent before employing an

authorized remedy for a *Batson/Wheeler* violation is harmless unless it somehow caused the defendant to be tried by a biased jury. In terms of a harmless error analysis, there is simply no meaningful distinction between the situation in *Yeoman* and the situation here. (See *People v. Holt, supra*, 15 Cal.4th at p. 656 ["Defendant has a right to jurors who are qualified and competent, not to any particular juror."].)

Appellant unpersuasively argues that, as in *Gonzalez-Lopez*, any error here is too difficult to quantify and requires impermissibly assuming what might have occurred in an alternate universe where a different jury heard the case. (ABOM 24-25, 27-28.) In *Gonzalez-Lopez*, the United States Supreme Court held that the error in denying a non-indigent defendant his counsel of choice violates the Sixth Amendment regardless of whether the defendant received a fair trial because "the right at stake here is the right to counsel of choice, not the right to a fair trial," and "[t]he right to select counsel of one's choice . . . has never been derived from the Sixth Amendment's purpose of ensuring a fair trial." (*Gonzalez-Lopez, supra*, 548 U.S. at pp. 146-147.) Noting the many ways that representation might have proceeded had the trial court not erroneously denied the defendant his counsel of choice, the court found that conducting a harmless error analysis "would be a speculative inquiry into what might have occurred in an alternate universe," as the consequences of the error were "'necessarily unquantifiable and indeterminate.'" (*Id.* at p. 150.) Here, on the other hand, the right that was violated derives exclusively from the state right to an impartial jury. Specifically, the *Willis* consent rule is designed to protect the right to a new venire upon a *Batson/Wheeler* violation, which in turn is designed to protect the right to a jury drawn from a representative cross-section of the community, which is implicit in the California constitutional right to an impartial jury. (*Wheeler, supra*, 22 Cal.3d at pp. 266, 270, 276-277.) As appellant recognizes (ABOM 27), whether a particular defendant

was tried by an impartial jury can be easily determined. (See *Rivera v. Illinois* (2009) 556 U.S. 148, 158 [129 S.Ct. 1446, 173 L.Ed.2d 320] [jury is impartial if no member was removable for cause]; *People v. Yeoman, supra*, 31 Cal.4th at p. 114 ["defendant cannot show his right to an impartial jury was affected because he did not challenge for cause any sitting juror"].) Thus, as in *Yeoman,* any error here was harmless because appellant was tried by an impartial jury.

Attempting to overcome this hurdle, appellant engages in a misguided analysis of the evidence in this case, arguing that another impartial jury might have resolved the case differently because it might have included a juror who had personal experience with drugs and, because of this experience, would not have believed the detective's testimony in this case that the amount of cocaine appellant possessed was a usable quantity, in light of the testimony that the amount of drugs possessed for sale by appellant's codefendant would have been sold in larger amounts, and the lack of evidence as to the concentration of cocaine in the substance. (ABOM 31-33.) Appellant's argument is pure speculation, and, moreover, is based on a misunderstanding of the concept of a "usable quantity."

A "usable quantity" is any amount of drugs that is sufficient to be used or sold, and not a "blackened residue or useless trace." (*People v. Rubacalba* (1993) 6 Cal.4th 62, 66.) Indeed, the jury here was instructed that a usable quantity was "an amount sufficient to be used as a controlled substance," and that this element could be proven through expert testimony or "by evidence that the amount possessed, if any, was sufficient to be used in any manner customarily employed by users of the substance." (5RT 2145.) In other words, the purity or likely narcotic effect of the substance was irrelevant, so long as it contained contraband and was in a usable form. (*People v. Rubacalba, supra*, at pp. 65-67; CALCRIM No. 2304; see *People v. Karmelich* (1979) 92 Cal.App.3d 452, 456 [presence of "actual

narcotics, even though in minute quantities" is sufficient to show possession of a usable amount].) Thus, whether a juror's personal experience with drugs might cause that juror to believe that a drug user would not typically purchase the amount of drugs appellant possessed, or that the amount was insufficient to get one "high," is irrelevant; the issue of "usable quantity" is whether the substance was sufficient to be used in a manner customarily employed by drug users, not whether a drug user might customarily use, prefer, or purchase a larger amount.

In addition, to assume a juror would disregard the evidence of usable quantity in this case would be to assume juror misconduct. The prosecution presented evidence that scientific testing had revealed that the rock appellant possessed weighed .02 grams and contained cocaine. (4RT 1806, 1808.) Los Angeles Police Detective James Miller testified that, based on his training, experience, and personal observations of drug users, appellant possessed a usable quantity of drugs because the "rock" he possessed had a street sale value of $2 or $3, was sufficient to be ingested through smoking, and would cause a person to receive a "high." (3RT 1246-1247, 1253, 1277; 4RT 1534.) While the detective testified that a .02-gram rock of cocaine worth $2 or $3 was "not the most common amount" bought and sold on the street, it was "frequently sold," and he had seen people ingest even smaller amounts. (3RT 1278-1279; 4RT 1524, 1534.) Additionally, the jury was shown a photograph of the rock (3RT 1275), which demonstrated that the substance was more than mere residue or a useless trace. Further, appellant was caught possessing the .02-gram rock while crouched down on a street known for drug use, with another person who had just placed a different .0264-gram rock of cocaine into a pipe used for smoking rock cocaine. (3RT 1236, 1245-1246; 4RT 1544-1547, 1807-1808; see *People v. Camp* (1980) 104 Cal.App.3d 244, 247-249 ["usable quantity" inferred from the circumstances where defendant possessed hand-

rolled cigarette containing mint leaves "laced" with PCP; no evidence of amount of PCP in cigarette was required].)

The only reasonable inference from this evidence was that the amount appellant possessed was a usable quantity and not a useless trace or mere residue. To assume that a juror might disregard this evidence, as well as the instruction defining a usable quantity, and instead find insufficient proof of a usable quantity because, in the juror's personal experience with drugs, the amount appellant possessed was not the amount a drug user would customarily use or an amount that would likely produce a narcotic effect, would be to assume that a juror would engage in misconduct. (See *People v. Wilson* (2008) 44 Cal.4th 758, 829 [juror commits misconduct by considering facts outside the evidence]; *People v. Williams* (2001) 25 Cal.4th 441, 448-449, 451 [jurors are obligated to obey the court's instructions, and a juror who refuses to do so is unable to perform his duty and subject to excusal]; *People v. Nesler* (1997) 16 Cal.4th 561, 578 ["The requirement that a jury's verdict must be based on the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury"], internal quotation marks omitted.) Any juror that would engage in such misconduct is not an impartial juror. (*People v. Nesler, supra*, at p. 578; see *People v. Bennett* (2009) 45 Cal.4th 577, 626 [juror misconduct is prejudicial where there is a substantial likelihood of juror bias, i.e., where "the misconduct is inherently and substantially likely to have influenced the jury"]; see also *Wheeler, supra*, 22 Cal.3d at p. 282, fn. 29 [the People are also entitled to an impartial jury].) Accordingly, appellant has not shown that any impartial juror might decide the case differently based on his or her personal experience.

Aside from the inaccuracy of appellant's argument about the evidence in this case, the argument is irrelevant. As explained, once it is determined that a defendant received an impartial jury, any technical error in jury

selection is not prejudicial, even though the error might have caused the defendant to be tried by a different impartial jury than he would have received absent the error. (*People v. Bonilla, supra*, 41 Cal.4th at p. 340; *Yeoman, supra*, 31 Cal.4th at p. 114.) In other words, so long as a defendant is tried by an impartial jury, it is presumed that the defendant would not have achieved a more favorable result with a different impartial jury, and no "'appellate speculation about a hypothetical jury's action'" is required. (See ABOM 22, quoting *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280 [113 S.Ct. 2078, 124 L.Ed.2d 182].) To assume otherwise would be to assume a haphazard and unfair system of justice, as every criminal defendant's fate would depend entirely upon the personal experiences of particular jurors, not the evidence and applicable legal principles of a given case. Instead, while jurors are permitted to bring their common life experiences to bear, they are not permitted to claim an expertise and use specialized knowledge to affect the outcome. (*People v. Danks* (2004) 32 Cal.4th 269, 302; *In re Malone* (1996) 12 Cal.4th 935, 963.) Nor are they allowed to make a factual determination based on evidence not presented at trial, or to disobey the court's instructions. (*People v. Wilson, supra*, 44 Cal.4th at p. 829; *People v. Williams, supra*, 25 Cal.4th at pp. 448-449, 451; *People v. Nesler, supra*, 16 Cal.4th at p. 578.) Accordingly, there is never any reason to believe that the differing life experiences of one impartial jury would cause it to decide the exact same case, with the same representation, the same evidence, and the same instructions, differently than another impartial jury. The trial court's failure to obtain counsel's explicit consent to the alternative *Batson/Wheeler* remedy did not affect the fairness of the jury that tried the case. Accordingly, appellant was not prejudiced.

Appellant complains that if the impartiality of the jury is considered in determining whether prejudice resulted from the failure to obtain the

moving party's consent to an alternative *Batson/Wheeler* remedy, the error will be harmless even where the moving party objected to the alternative remedy. (ABOM 33-34.) However, this issue is not before the Court, as appellant's trial counsel did not object to the alternative remedy. In any event, this Court is not prevented from applying the *Watson* harmless error standard to the error of failing to obtain a party's consent to an alternative *Batson/Wheeler* remedy, even if doing so means such error will almost always be harmless. In other contexts, this Court has applied a harmless error analysis even where application of such analysis means the error will almost always be harmless. (E.g., *Yeoman, supra,* 31 Cal.4th at p. 114 [erroneous denial of for cause challenge where defendant used peremptory challenge to excuse jurors challenged for cause]; *People v. Williams, supra,* 26 Cal.4th at p. 791 [ambiguous instruction that could have allowed jury to convict defendant of assault even if he did not actually know the facts establishing that his act by its nature would probably and directly result in a battery "is largely technical and unlikely to affect the outcome of most assault cases"]; *People v. Webster* (1991) 54 Cal.3d 411, 447 [technical defects in jury verdict]; see also *People v. Pierce* (1995) 40 Cal.App.4th 1317, 1320 [trial court's failure to state reasons for its sentencing choice is "often, though not always, deemed harmless"].) The court's failure to obtain the moving party's consent is a mere technical defect. Where, as here, the court employed an authorized remedy to the *Batson/Wheeler* error, and the jury that ultimately tried the case was impartial, there is no reason to reverse a conviction based on the court's failure to obtain the moving party's consent to the remedy.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court reverse the Court of Appeal's decision and affirm appellant's judgment of conviction.

Dated: December 4, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S REPLY BRIEF ON THE MERITS, uses a 13-point Times New Roman font, and contains 7,733 words.

Dated: December 4, 2012

KAMALA D. HARRIS
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Francis Mata***
No.: **S201413**

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.

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On December 4, 2012, I served the attached **RESPONDENT'S REPLY 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 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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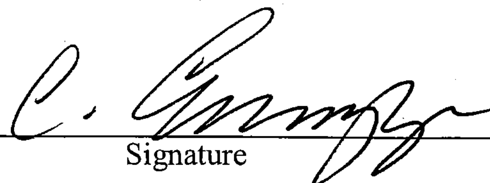
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 4, 2012, at Los Angeles, California.



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Declarant	Signature

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