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.	

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.

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STATEMENT OF THE CASE.

On February 28, 2012, an information filed in Kern County Superior Court charged appellant as follows:

Count 1: Attempted murder with premeditation and deliberation (Pen. Code, §§ 664 and 187, subd. (a)) with a gang allegation (Pen. Code § 186.22, subd. (b)(1)) and a personal firearm use and discharge allegations. (Pen. Code, § 12022.53, subds. (b) and (c).)

Count 2: Assault with a firearm (Pen. Code, § 245, subd. (a)(2)) with a gang allegation (Pen. Code § 186.22, subd. (b)(1)) and a personal firearm use allegation (Pen. Code, § 12022.53, subd. (b)).

Count 3: Active participation in a criminal street gang. (Pen. Code, § 186.22, subd. (a)).

It was alleged that appellant had one prior "strike" and two other felony convictions. (1CT 142-160.)

Appellant was convicted on all counts and all allegations were sustained. (2CT 361-369; 408-409.) Appellant was sentenced to a term of 30 years to life, consecutive to an addition determinate term of 27 years. The Court of Appeal affirmed the judgment.

SUMMARY STATEMENT OF FACTS.

On July 30, 2011, Clarence Langston was involved in an altercation with two men he met at the Knights Motel in Bakersfield. (1RT 110-112.) Langston road away from the motel on his bicycle. (1RT 116-119.) An SUV pulled up next to him a few blocks away and a gunman fired three shots at Langston, who was attempting to run away. (1RT 119-122.) Langston was hit with birdshot and suffered superficial injuries to his upper body. (2RT 286-289, 311.) A gang expert testified that the defendants were Sureno gang members (8RT 2394) and that the shooting was gang related. (8RT 2424-2426.) Gabriel Trevino, a veteran Sureno gang member of 20 years who originally came from Wasco (7RT 1753-1754, 1766-1767), testified for the prosecution that he was one of the four occupants of the SUV. He named appellant as the shooter and implicated other defendants in the crime. (6RT 1694, 1703-1705; 7RT 1916.)

Because this brief is limited to *Wheeler/Batson* issues involving jury selection, a more detailed statement of facts is not required.

ISSUE PRESENTED

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

ARGUMENT

I.

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

A. BACKGROUND.

Juror No. 2547226 is employed as a service coordinator for mentally disabled children and her significant other is a self-employed truck driver. They have two minor children and live in southwest Bakersfield. (4ART 586.) She has never been a crime victim. (4ART 525.) She was selected to serve on a jury once before, but the case settled before it went to trial. She believed that she could do the job of a juror in a fair and impartial manner. She has never had a bad experience with law enforcement. (4ART 563)

When the prosecutor questioned Ms. 2547226, he asked whether she knew "a little bit about the criminal justice system" from either school or television shows. She answered, "No, not from school." She said she was aware that 12 people serve on a jury and when asked to give her understanding of "deliberation," she explained it as "[t]he discussion of -- after everything is presented, and that the whole case to see if everything is found -- the case to be proven." This occurs, she explained, "[a]fter everything -- all the evidence and all the stuff has been presented to the case and take the jurors to a room or a section by themselves." She did not know, however, how many jurors had to agree. She nodded her head affirmatively when the prosecutor told her that the court would instruct jurors that there must be unanimous agreement. (5ART 614.)

Juror No. 2547226 answered affirmatively when asked if she understood that jurors must talk to each other about the evidence and to try to reach a verdict, and that she would have a vote that belonged to her alone, and that it was her responsibility to vote according to the law given by the judge and the facts and evidence found to be true. She indicated that she would be able to do that. (5ART 615.) She cited listening as her strong suit ("I think I do better at listening than speaking my mind out"), but if she does not agree with something, "the vote is mine." She did not think that she would have any problem letting others know if she did not agree with something and would have no problem in explaining her reasons. (5ART 616.)

After finding a *prima facie* case for group bias against Hispanics (7ART 1176-1177), the court asked the prosecutor for his explanation for excusing Ms. 2547226:

> [THE PROSECUTOR]: For Ms. 2547226, she had said she had friends and relatives who were COs, and she was a service coordinator for the mentally disabled, and I don't have notes as to what my questioning was for Ms. 2547226, so at this time I don't -- at this time, I'm reserving the right to look in my notes further, Your Honor. I can't specifically state why I executed a preemptory on Ms. 2547226. (7 ART 1184)

After reviewing his notes, the prosecutor returned to his explanation for removing this potential juror:

> I do have one note on Ms. 2547226. 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)

When the trial court gave its explanation for denying the motion, the court discussed the reasons given for challenging several other prospective jurors, but did not specifically discuss Ms. 2547226. (See 8ART 1194-1197.)

Appellant challenged the removal of this prospective juror on appeal on the grounds that: (1) the prosecutor's explanation was unsupported by the record and (2) the court accepted the prosecutor's explanation without a constitutionally sufficient inquiry. (AOB, at pp. 38-46.)

The Court of Appeal upheld the prosecutor's explanation as follows:

> "When asked about Prospective Juror No. 2547226 (hereafter Juror 2547226), the prosecutor indicated he felt she might have trouble fulfilling her role as a juror and in understanding the role of a juror. When questioned during voir dire, Juror 2547226 indicated she was better at "listening than speaking my mind" and expressed that she did not know how many jurors had to agree to a verdict in a criminal case.
>
> "Peremptory challenges properly may be based on the demeanor of the prospective juror. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1203.) Juror 2547226 gave equivocal answers to some questions and expressed a lack of understanding of the jury process in a criminal case. The prosecutor's stated reasons reflect that, based upon Juror 2547226's equivocal answers to voir dire questions, he had doubts about her being able to engage fully in the deliberative process and fulfill her role as a juror. A prosecutor may excuse a juror based upon 'hunches,' so long as the reason is not impermissible group bias. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1122 (*Gutierrez*).) " (Slip Opinion, at p. 11-12.)

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

Both the federal and California Constitutions prohibit counsel from using peremptory challenges to exclude prospective jurors based on race. (*Batson v. Kentucky* (1986) 476 U.S. 79, 97 ("*Batson*"); *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277 ("*Wheeler*") "Doing so violates both the equal protection clause of the United States Constitution and the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution." (*People v. Lenix* (2008) 44 Cal.4th 602, 612.) "'The Constitution forbids striking even a single prospective juror for

a discriminatory purpose ....'" (*Snyder v. Louisiana* (2008) 552 U.S. 472, 478 ("*Snyder*".)

Under both *Wheeler* and *Batson*, a three-step process is employed to adjudicate claims to determine whether peremptory challenges are based on impermissible group bias: (1) the court determines whether there is a *prima facie* case of group bias has been established, (2) the prosecutor comes forward with a clear and reasonably specific race-neutral explanation for the peremptory challenge which is reasonably related to the case, and (3) the court acts as trier of fact to determine, through inquiry and evaluation, whether the reason given by the prosecutor is genuine. (*Wheeler*, at p. 280-282; *Batson*, at pp. 96-98, & fn. 20.)

Here, the first step was satisfied when 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.) The issue, therefore, is whether the second and third steps were satisfied.

To explain why this potential juror was removed, the prosecutor referred to "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." (7 ART 1186.) The gist of this explanation was that the prosecutor was "concerned" about this potential juror's understanding of a juror's role and her ability to be heard in deliberations.

In step-two of the *Wheeler/Batson* process, "the prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." (*Batson,* at p. 98, fn. 20; *People v. Arias* (1996) 13 Cal.4th 92, 136 [reasons must be genuine, reasonably specific, and race or group neutral].) Specificity is required because "when illegitimate grounds like race are in issue, 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* (2005) 545 U.S. 231, 252, emphasis added.) Neither the trial judge nor the reviewing court may supplant the prosecutor's explanation by "thinking up" additional reasons why the prosecutor might want to remove the juror. (*Ibid.*) It is essential, therefore, that the prosecutor give a reasonably specific explanation for removing a potential juror so as to enable the court to evaluate it. (*People v. Allen* (2004) 115 Cal.App.4th 542, 553.) If the prosecutor gives an overly vague reason for excusing a juror, then the trial judge or reviewing court is tasked with breathing life into it, in which case it becomes the explanation of the court rather than the prosecutor.

In *People v. Turner* (1986) 42 Cal.3d 711, the prosecutor explained the exercise of a peremptory challenge by stating: "[I] think it was something in her work as to that she was doing that from our standpoint, that background was not — would not be good for the People's case. And I excused her, along with quite a few other people, too, for the same reason." (*Id.* at p. 725.) "[T]he assertion that 'something in her work' would 'not be good for the People's case' is so lacking in content as to amount to virtually no explanation. If such vague remarks were held to satisfy the prosecution's burden of rebutting a prima facie case of group discrimination, the defendant's constitutional right to trial by a jury drawn from a representative cross-section of the community could be violated with impunity." (*Ibid.*)

In *People v. Allen, supra*, 115 Cal.App.4th 542, the prosecutor explained the removal of a woman by claiming that something in her demeanor, the way she took her seat, and the way she dressed indicated that she might be the type of juror who would "disregard their duty as a juror and kind of have more of an independent thinking." (*Id.* at p. 546.) The appellate court found these explanations "incomprehensible, and there is nothing in the record to give them content." (*Id.* at p. 551.) Thus, the court found that the reasons given failed to provide the "clear and reasonably specific" explanation that *Batson* requires. (*Id.* at p. 552, citing *Batson*, at p. 98, fn. 20.) Nor were they "reasonably

relevant to the particular case on trial or its parties or witnesses," as *Wheeler* requires. (*Id.* at p. 551, citing *Wheeler*, at p. 282.)

The explanation given here -- that something about the prospective juror's articulation and understanding of the role of a juror in deliberations caused him concern -- was equally vague. He was concerned "if she felt strongly," whether she could "be heard." If such a vague assertions will suffice, a prosecutor can exclude minority jurors from the panel with impunity, and justify doing so by simply stating that something the prospective juror said caused "concern." The prosecutor failed to specify what it was that she said that caused him concern and failed to *clearly* and *specifically* explain why he was concerned about it.

The record does not show that Juror No. 2547226 lacked understanding of deliberations or the role of a juror in deliberations. On the contrary, she articulated an accurate understanding of jury deliberations, which she described as "[t]he discussion of -- after everything is presented, and that the whole case to see if everything is found -- the case to be proven," which occurs "[a]fter everything -- all the evidence and all the stuff has been presented to the case and take the jurors to a room or a section by themselves." (5ART 614.) Thus, she knew that deliberations occur after all the evidence is presented, and that jurors retire to a place where they can discuss the case amongst themselves to consider everything that was presented to determine if the case has been proven. That accurate description of deliberations does not support the prosecutor's concern that she did not understand the concept of jury deliberations and a juror's role in those deliberations.

The prosecutor asked Ms. 2547226 if she understood that "your vote is yours, you have a duty to listen to and talk to other jurors, but how you vote if you're impaneled on this jury is yours, it's your responsibility, and it's what you believe the law that the judge gives you and the facts and the evidence that you heard in court indicated as the truth," and when asked if she understood that, she answered: "Yes." He asked her whether she

"would be able to participate in deliberations and listen to everyone else in speaking your own mind?" Again, her answer was, "Yes." (5ART 613) When asked if she was the sort of person who would just "sit in the background and listen to other people," she said, "No, I don't think so." When she was asked whether she had a problem with speaking her mind and listening to other people at the same time, she explained that listening was her strong suit ("I think I do better at listening than speaking my mind out"), but when asked whether she would "have any problem letting other people on the panel know that you don't agree and here's why," she answered: "I don't think so." (5ART 616.) These answers do not show that Ms. 2547226 demonstrated any misunderstanding of the role of a juror, including the obligation of a juror to both speak her mind and listen to others.

In *People v. Silva* (2001) 25 Cal.4th 345, the prosecutor explained that a potential juror was removed because his answers revealed a reluctance to impose the death penalty and showed that he was the type of aggressive person who could hang a jury. (*Id.* at p. 376.) The court found that the record did not support these assertions. (*Id.* at p. 377.) "Nothing in the transcript of voir dire supports the prosecutor's assertions that M. would be reluctant to return a death verdict or that he was 'an extremely aggressive person.'" (*Id.* at p. 385.) The same is true here. Nothing in the record supports the prosecutor's concern that Ms. 2547226 lacked an "understanding" of a juror's role in deliberations, or that she was a timid person who would be unable to speak her mind.

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].) "'[I]f a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination.'" (*Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 360.) "Where the facts in the record are objectively contrary to the prosecutor's statements, serious questions about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised." (*McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209,

1221 [rejecting prosecutor's attempt to attribute to challenged juror "beliefs that she did not hold"]; *People v. Silva, supra,* 25 Cal.4th 345, 385 [citing *McClain* for same].

The prosecutor also expressed concern that she might lack the ability to stand her ground. But as the prosecutor admitted, the task of standing ground and listening to others is "obviously the difficult task of any juror." An inherent concern -- one that applies to all potential jurors -- cannot serve as a valid reason for excusing any one of them. A concern that applies to every juror "pertain[s] just as well to some white jurors who were not challenged." (*People v. Gray* (2005) 37 Cal.4th 168, 189, citing *Miller-El v. Dretke, supra,* 545 U.S. 231.) If a concern applies to all prospective jurors, it cannot be used to exclude minority jurors.

Although Juror No. 2547226 did say that she does better "at listening than speaking my mind out," she did not think that she would just "sit in the background" and listen to others, nor did she think that she would have a problem in speaking out on things that she disagreed with, and she assured the prosecutor that her vote was her own. (5ART 616.) It was not enough for the prosecutor to express "concern" whether she would have the ability to speak out and stand her ground. The prosecutor was required to *explain* why he did not believe her when she said that she could do that. A vague "concern" that a potential juror might not deliberate well does not satisfy *Batson's* requirement that the prosecutor give a "clear and reasonably specific" explanation. (*People v. Allen, supra,* 115 Cal.App.4th 542, 552.)

The Court of Appeal observed that Juror No. 2547226 "did not know how many jurors had to agree to a verdict in a criminal case." (Slip Opinion, at p. 11.) The prosecutor did not specifically cite that fact as the reason for excusing her.[1/] When Juror No. 2547226

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[1] The prosecutor said, "I believe I asked her about 12 votes, each independent of the others" and related that to the task of "standing their own ground" and listening to others. (7ART 1186) He did not express concern over the fact that she did not know that a verdict must be unanimous before receiving instruction on that concept.

said that she did not know how many jurors had to agree on a verdict, the prosecutor told her that the court would instruct jurors that unanimity was required. She nodded in the affirmative, which indicated that she understood. (5ART 612-613.) The prosecutor seemed satisfied with that. Because the prosecutor did not specifically cite that answer as a reason for excusing her, a reviewing court cannot rely on that factor to uphold the removal of a juror. (*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," and reviewing court may not supplant the prosecutor's explanation by "thinking up" additional reasons why the prosecutor might want to remove the juror].)

Had the prosecutor offered that as an explanation for removing this potential juror, it would probably not have been found credible. Jurors are expected set aside any preconceived understanding that they may have about rules of law and defer entirely to the instructions on the law given them by the trial judge. It was not important for a potential juror to know the law before the judge instructs on the law.

The Court of Appeal also observed that Juror No. 2547226 "gave equivocal answers to some questions and expressed a lack of understanding of the jury process in a criminal case." (Slip Opinion, at p. 11.) The prosecutor, however, did not specifically state that he found her answers "equivocal." Instead, he expressed a vague concern about the way she articulated her understanding of the jury deliberation process and a concern about her ability to stand her ground. The record does not show that her answers were equivocal.

Juror No. 2547226 answered a series of yes or no questions about the jury process by answering "yes" as appropriate. (5ART 615.) When the prosecutor asked her whether she would have a problem with speaking her mind and listening to others, she said "I think I do better at listening than speaking my mind out." (5ART 616.) Her answers were not equivocal.

The Court of Appeal also noted that "[p]eremptory challenges properly may be based on the demeanor of the prospective juror." (Slip Opinion, at p. 11.) The prosecutor's

explanation cannot be upheld based on demeanor because the prosecutor did not specifically cite the prospective juror's demeanor, nor did the trial court find that the prosecutor was relying on demeanor.

When a prosecution relies on "demeanor," the prosecutor must specifically state that he or she is relying on demeanor. Because reliance on demeanor is highly subjective and is often not supported by the cold record, the trial court will often have to take the prosecutor's word for it. That requires, at the very least, that the prosecutor give his or her word. Once that word is given, the trial court must determine the credibility of the prosecutor's assertion about the prospective juror's demeanor. (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339-340 [trial court evaluates the credibility of the prosecutor in stating reasons].) In *Rice v. Collins* (2006) 546 U.S. 333, for example, one reason given by the prosecutor for excusing a prospective juror was his observation that she "rolled her eyes in response to a question from the court." (*Id.* at p. 336.) Although the trial court did not see the eye-rolling incident, the judge credited the prosecutor's assertion nonetheless, and the Supreme Court upheld "the trial court's credibility determination." (*Id.* at p. 342.) A trial court obviously cannot evaluate the credibility of prosecutor's claim that the potential juror exhibited a certain demeanor unless the prosecutor actually makes that claim.

In *Snyder,* one reason given for excusing a panelist was that he looked nervous. Because the "nervous" factor was not supported by the cold transcript, the trial judge had to rely on the prosecutor's representation that the juror appeared nervous and determine whether that representation was credible. But because the trial court made no express finding in that regard, the Supreme Court could not presume that the "trial judge actually made a determination concerning Mr. Brooks' demeanor." (*Id.* at p. 479.) Thus, when a prosecutor intends to rely on demeanor, the prosecutor must specifically say so, so that the trial court can evaluate the believability of the prosecutor's explanation. (*Id.* 477.) "[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." (*Ibid.*) The trial court obviously cannot evaluate the credibility of the prosecutor's reliance on demeanor, and the prosecutor's own demeanor in making that assertion, unless the prosecutor specifically states that he or she is relying on demeanor as a factor.

Here, the record does not reveal the prospective juror's demeanor, the prosecutor did not specifically cite her demeanor, and the trial court made no express determination as to her demeanor. Because demeanor was not specifically cited, demeanor cannot be used to justify the prosecutor's action. (*Miller-El v. Dretke*, *supra,* 545 U.S. 231, 252 [explanation stands or falls on explanation actually given].)

For all of these reasons, the prosecutor's vague and vacuous expression of concern about Juror No. 2547226's articulation and understanding of the role of jurors standing their own ground and her ability to make herself heard during jury deliberations was without sufficient content to satisfy *Batson's* second-step requirement of a "clear and reasonably specific" explanation for removing this potential juror. (*Batson*, at p. 98, fn. 20; *People v. Turner, supra*, 42 Cal.3d 711, 725, *People v. Allen, supra*, 115 Cal.App.4th 542, 552.)

C. 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 court erred in accepting the prosecutor's explanation without a constitutionally sufficient *Wheeler/Batson* third-step inquiry. In denying the *Wheeler/Batson* motion, the court gave an analysis that discussed *other* potential jurors who were dismissed, but did not specifically discuss or mention the dismissal of Ms. 2547226. For her, the court made no individualized evaluation or findings at all. She was not even mentioned.[2/]

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[2] The Attorney General conceded below that the court did not specifically discuss or

"The trial court has a pivotal role in evaluating *Batson* claims. Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility." (*Snyder,* at p. 477.) At this stage, "the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Miller-El v. Cockrell, supra,* 537 U.S. 322, 339.)

"It is in the third step, ... that the court reaches the real meat of a *Batson* challenge. In the third step, the court has 'the duty to determine whether the defendant has established purposeful discrimination.'" (*Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 830. Thus, the trial court must evaluate the prosecutor's proffered reasons and make a credibility determination." (*Ibid.*) The third step in the *Wheeler/Batson* process requires the court to make 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; *People v. Williams* (1997) 16 Cal.4th 153, 189.)

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* (1991) 54 Cal.3d 707, 720, emphasis added.) "[E]very questioned peremptory challenge must be justified." (*Id.* at p. 715; see also *People v. Tapia* (1994) 25 Cal.App.4th 984, 1011, 1016

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mention the dismissal of Ms. 2547226. (RB, at p. 38.)

[trial court's evaluation inadequate where court gave reasons two of three peremptory challenges, but omitted any evaluation of the third].)

In *People v. Williams*, *supra,* 56 Cal.4th 630, the court upheld the denial of *Wheeler/Batson* challenges, even though the trial court accepted the prosecutor's explanations without engaging in an on-the-record evaluation or inquiry. *Williams* was a capital case, and the prosecutor explained that black panelists were removed based on their views on that specific issue, *i.e.*, whether they would be reluctant to impose the death penalty. The prosecutor explained his evaluation with specific reference to the oral and written answers given by those panelists on that topic, and by his assessment of their demeanor during *voir dire*. Because the explanations given were plausible and supported by the record, the denial of the *Wheeler/Batson* motion was upheld, despite the lack of further inquiry or detailed findings.

The *Williams* majority acknowledged the dissenting opinion (which argued that explicit findings or an on-the-record analysis should be required (*id.* at pp. 715-717)), but indicated that prior precedent would be followed. (*Id.* at p. 653, fn. 21, citing *People v. Silva, supra*, 25 Cal.4th 345, 385-386, and *People v. Reynoso* (2003) 31 Cal.4th 903, 929.) In *Silva*, the court stated 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. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (*Silva*, at p. 386.) In *Reynoso*, the court acknowledged that the trial court should make "an adequate record when dealing with a *Wheeler* motion" because deference can only be afforded if the trial court has "clearly expressed its findings and rulings and the bases therefor," but "explicit and detailed findings" are not always required when "the court determines to credit a prosecutor's demeanor-based reasons." (*Reynoso,* at p. 929.)

Thus, under existing precedent, when the prosecutor gives an inherently plausible and reasonably specific explanation that is obviously supported by the record, or is specifically based on demeanor, it can be accepted without further inquiry or evaluation. But questionable explanations should be questioned, and the more questionable the explanation, the greater the need for questioning.

Under this framework, the trial court's failure to provide any individualized evaluation or inquiry on the record for the removal of Juror No. 2547226 was error. Unlike *Williams* -- where the prosecutor cited specific reasons (the specific views expressed by prospective jurors and their demeanor in expressing those views) which were directed toward a specific issue that would arise at trial (willingness to impose the death penalty) -- the prosecutor here did not offer a reasonably specific explanation that was reasonably relevant to this particular case. Instead, he expressed a vague concern about Juror No. 2547226's "articulation" and "understanding" of the role of a juror during deliberations, together with a vague concern (despite her claims to the contrary) that she might not speak up and stand her ground. When the prosecutor offers an explanation that is "'too general' and 'too vague' for the court to possibly evaluate," requiring the judge to "guess what the prosecutor found troubling," the explanation is not "sufficient to demonstrate that the peremptory challenges were exercised 'on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses, -- *i.e.,* for reasons of specific bias as defined [in *Wheeler*].'" (*People v. Allen, supra*, 115 Cal.App.4th 542, 551.) When a vacuous or meaningless explanation is offered, it is error for the court conducting a third-step evaluation to accept it at face value without further probing. (*Id.* at p. 553.)

Not only was the prosecutor's explanation overly vague, it was not supported by the record. The court should not accept at face value an explanation that is unsupported by the record. (*People v. Silva, supra*, 25 Cal.4th 345, 386; *People v. Reynoso, supra*, 31 Cal.4th 903, 923.) An explanation that is unsupported by the record "cannot reasonably be accepted." (*Miller-El v. Dretke, supra*, 545 U.S. 231, 244-247.)

The prosecutor suggested that Juror No. 2547226 lacked a proper understanding of deliberations, which was an assertion unsupported by the record. (See 5ART 614 [expressing accurate understanding of jury deliberations].) He suggested that she did not understand that a juror must listen to others and stand her ground, which is also unsupported by the record. (See 5ART 615-616 [stating that listening is her strong suit, while acknowledging that "the vote is mine"].) He questioned her ability "to be heard" about matters that she felt strongly about. That too unsupported by the record. (See 5ART 616 [she did not foresee a problem in expressing and explaining areas of disagreement].) Because she did not articulate the concerns that the prosecutor attributed to her, the trial court had an obligation to inquire further, to seek from the prosecutor a more specific explanation to explain why he had these concerns. The trial court should not "guess what the prosecutor found troubling." (*People v. Allen*, *supra*, 115 Cal.App.4th 542, 551.) When the trial court does that, there is the danger that court will supplant its own view on whether the panelist would make a good juror or not. The constitution requires that the 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.)

There is 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.) "Because gender and race are overlapping categories, gender can be used as a pretext for racial discrimination. [fn.] Allowing parties to remove racial minorities from the jury not because of their race, but because of their gender, contravenes well-established equal protection principles and could insulate effectively racial discrimination from judicial scrutiny." (*Id.* at p. 705.) As the court observed, "the majority of the lower court decisions extending *Batson* to gender involve the use of peremptory challenges to remove minority women." (*Id.* at p. 705, fn. 18.)

Here, when the prosecutor questioned Juror No. 2547226, he asked her whether she would be "deferential,"[3] *i.e.,* whether she would "want to sit in the background and listen to other people?" (5ART 616.) His concern that she might be "deferential" could well have been based on gender bias, or a combination of racial and gender bias. The notion that women can be deferential to others is a gender-based stereotype. When applied to an Hispanic woman, such a concern could be based on a stereotypical view that Hispanic women are quiet, timid or meek, and might prefer to sit in the background during deliberations rather than participate, and might defer to the judgment of others. Thus, the prosecutor's explanation -- which was based on a concern that Juror No. 2547226 might lack the ability to speak her mind and stand her ground -- was not necessarily group-neutral in terms of both race and gender, but was suggestive of bias.

When the prosecutor offers an explanation that is suggestive of bias, further inquiry is required. (*People v. Turner*, *supra*, 42 Cal.3d 711, 728.) Given that the prosecutor offered a vague concern about this Hispanic woman's assertiveness which was not necessarily group neutral and was suggestive of bias, the trial court should have required the prosecutor to give a more specific explanation for his concerns, to ensure that those concerns were not based on gender or racially based stereotypes about Hispanic women. The prosecutor should have been required to give a specific and individualized, group-neutral explanation for his concern that this Hispanic woman might be deferential, unable to speak her mind and stand her ground. The trial court would then be required to evaluate that claim on the record, to determine whether the prosecutor's group-neutral explanation was genuine and worthy of belief.

In sum, given that the prosecutor expressed only vague concerns, unsupported by the record, about this potential juror's understanding of deliberations and her ability to speak

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[3] The court reported wrote "differential," but in context, it appears that the word used by the prosecutor was "deferential."

her mind and stand her ground, and because those concerns were not necessarily group neutral, but could have been based on racial and gender stereotypes, the prosecutor's explanation was suggestive of bias, which imposed upon the trial court the duty to engage in further inquiry and evaluation. The court's failure to do so -- to even mention Juror No. 2547226 -- represents a failure of *Batson's* third step.

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. BACKGROUND.

Juror No. 2723471 revealed that she was a divorced teacher living in Wasco, that her ex-husband and a few other relatives were correctional officers and that her uncle was with the California Highway Patrol. She has never served on a jury. She knew nobody in the legal profession. Neither she nor anyone close to her has been accused of a crime, has been the victim of a crime, or has been affected, directly or indirectly, by gangs. She believed that she could judge witnesses fairly. (5ART 844-846)

When the prosecutor questioned her on *voir dire*, he asked:

> Q. And starting with Ms. 2723471, are you gangs that are active in the Wasco area?
>
> A. No.
>
> Q. Do you live in the Wasco area?
>
> A. Yes.
>
> Q. In Wasco itself?
>
> A. Yes, I live in Wasco. (5 ART 855)

The prosecutor exercised a peremptory challenge to excuse Ms. 2723471. (6ART 926.) She was identified as Hispanic in counsel's motion. (7ART 1172.) After finding a *prima facie* case for group bias against Hispanics, the court asked the prosecutor for his explanation for excusing Ms. 2723471.

> [THE PROSECUTOR]: Your Honor, Ms. 2723471 is similar to, I believe, it was -- I may get it wrong. It was either Ms. 2510083 or Ms. 2408196. Ms. 2723471 was a tough one for me, Your Honor, not only did I pass for --

> pass for the entire panel, and passed for challenges while she was on the panel, I think I did that two or three times. I kicked it over the entire week. And to tell you the truth, I feel bad about -- about having her come back on Monday, but it's the same thing for Ms. 2723471 as it was for that other juror.
>
> She's from Wasco and she said that she's not aware of any gang activity going on in Wasco, and I was unsatisfied by some of her other answers as to how she would respond when she hears that Gabriel Trevino is from a criminal street gang, a subset of the Surenos out of Wasco. That was what informed my decision on Ms. 2723471. (7ART 1183.)

The trial court denied the *Wheeler/Batson* motion globally, finding all of the reasons given were group neutral. (7ART 1194-1198.) As for the reasons for excusing this prospective juror, the court stated: "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.)[4/]

On appeal, appellant challenged the removal of Juror No. 2723471 based on (1) the prosecutor's explanation was not race-neutral, (2) other factors cited were inadequate or not supported by the record, and (3) the court accepted the prosecutor's explanation without a constitutionally sufficient inquiry.

The Court of Appeal found:

> As to Prospective Juror No. 2723471 (hereafter Juror 2723471), the prosecutor indicated he exercised a peremptory challenge against her because she professed to being unaware of any gang activity occurring in Wasco, where she lived. This troubled the prosecutor because a principal witness, Trevino, was a member of a criminal street gang in Wasco and the prosecutor was concerned how Juror 2723471 would react to testimony from a Wasco gang member. This is a race-neutral reason that need not rise to the level of a challenge for cause. Moreover, it constitutes a valid reason, even if in a defendant's view the reason is trivial. (*People v. Arias* (1996) 13 Cal.4th 92, 136.) (Slip Opinion, at p. 12.)

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[4] The Attorney General conceded below that the trial court misspoke in citing the "life experience" factor, which is something that the prosecutor did not mention with regard to this juror. (See RB, at p. 43.)

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

Because Wasco is a predominately Hispanic community, 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.

In *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820, 825-826, overruled on another ground in *United States v. Nevils* (9th Cir. 2010) 598 F.3d 1158, 1167, the prosecutor explained that he excused an African-American woman from the jury because she lived in Compton. As the Ninth Circuit observed, Compton had an African-American population of 74.6 percent at the time. (*Id.* at p. 822, fn. 2.) "[W]here residence is utilized as a surrogate for racial stereotypes -- as, for instance, a short hand for insensitivity to violence -- its invocation runs afoul of the guarantees of equal protection." (*Id.* at p. 826.)

The California Court of Appeal followed *Bishop* in *People v. Turner* (2001) 90 Cal.App.4th 413, where the prosecutor exercised a peremptory challenge against an African-American woman from Inglewood. (*Id.* at p. 418.) Because Inglewood, according to census data, was 49.9 percent African-American, the prosecutor's explanation was not considered race neutral. (*Id.* at p. 420.)

According to recent census data, 76.7% of the people who live in Wasco identify as Hispanic or Latino.[5/] That makes Wasco more predominately Hispanic, in a greater percentage, than African-Americans in Inglewood and Compton. Because the great majority of the residents in Wasco identify as Hispanic or Latino, to say that a potential juror is a Wasco resident is another way of saying that the person is probably Hispanic. As such, the fact that Ms. 2723471 lives in Wasco is not a race-neutral factor.

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[5] <http://quickfacts.census.gov/qfd/states/06/0683542.html>

Bishop was distinguished in *People v. Williams*, *supra,* 16 Cal.4th 153, where a potential juror was excused, not because he lived in a city that was predominantly African-American, but because he went to high school where the student body was loyal to the Bloods gang, and the defendant in the case was a Bloods gang member. Thus, the prosecutor had good reason, aside from mere race or residence, to believe that the potential juror might be sympathetic to the defendant out of high school gang loyalty. "Where residence is utilized as a link connecting a specific juror to the facts of the case, a prosecutor's explanation based on residence could rebut the prima facie showing." (*Id*, at p. 191, citing *United States v. Bishop*, *supra,* 959 F.2d 820, 826.)

Here, the prosecutor attempted to link the fact that this potential juror lived in Wasco to the case by noting that a prosecution witness (Gabriel Trevino) originated as a Wasco gang member. He noted her answer that "she's not aware of any gang activity going on in Wasco" and wondered aloud "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.) This does not *explain* why he removed her.

"[T]he prosecutor must give a '*clear* and *reasonably specific*' *explanation* of his 'legitimate reasons' for exercising the challenges." (*Batson,* at p. 98, fn. 20, emphasis added.) And a proffered explanation must be "reasonably relevant to the particular case on trial or its parties or witnesses..." (*Wheeler,* at pp. 281-282.) The prosecutor did not clearly and specifically explain how these factors (living in Wasco and being unaware of gang activity there) made Ms. 2723471 an undesirable juror. The fact that she was unaware of active gangs in Wasco was not reasonably relevant to the particular case on trial or its parties or witnesses. She was either aware of gang activity in Wasco or unaware of it. Either way, the prosecutor could cite her answer as the reason for excusing her. To serve as a plausible *explanation*, the prosecutor should have to explain *why* her unawareness of gang activity in her town made her a bad or undesirable juror. There

must be a conceivable reason why the cited factor "should give rise to a specific bias against the prosecution." (*People v. Turner, supra*, 42 Cal.3d 711, 727.)

If the prosecutor could connect Juror No. 2723471 to gang activity in Wasco in a way that might suggest that she had some potential gang loyalties, that could serve as a plausible explanation for why he removed her. (*People v. Williams, supra,* 16 Cal.4th 153, 191.) But Juror No. 2723471 indicated that she was unaware of gangs who were active in Wasco. If the prosecutor feared that Hispanics who live in a predominantly Hispanic community (such as Wasco) might be loyal to a local Hispanic gang simply because they are Hispanic, even though they are unaware of the gang's existence, that explanation would not be race neutral.

As the Court of Appeal noted, several other challenged jurors were removed because of gang ties.[6/] Thus, it appears that the prosecutor was systematically removing Hispanics who were shown to have gang ties personally or through relatives, which the Court of Appeal deemed appropriate. (Slip Opinion, at pp. 12-13, citing *People v. Williams, supra*, 16 Cal.4th at p. 191.) Juror No. 2723471, however, had no known gang ties, and was not even aware of gangs that are active in her community. (5ART 855.) If the prosecutor is able to remove Hispanics from the jury because they either have gang ties or

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6 "Prospective Juror No. 2632053 had participated in gang activity and had been around gangs in Idaho. She had a child fathered by a Sureños gang member, who had been found guilty of being an accessory to murder. This prospective juror's brother was a member of the Eastside Locos gang." (Slip Opinion, at p. 12.) "Prospective Juror No. 2732073's husband had always been affiliated with a gang and had been convicted and incarcerated for offenses. The prosecutor exercised a peremptory challenge against this prospective juror because of the gang connections." (Id., at pp. 12-13.) "Prospective Juror No. 2408196 ... had an uncle who had been a gang member ... [and] the gang connection constitutes a race-neutral reason for exercising a peremptory challenge." (Slip Opinion, at p. 13.) "Prospective Juror No. 2647624 had two nephews who were serving prison sentences for gang-related crimes. She also had nieces who had sons that currently were involved in gang activity." (*Ibid.*)

do not have gang ties, then the prosecutor is justified in removing all Hispanics from the jury.[7/]

The Court of Appeal explained that Juror No. 2723471 was removed because her "being unaware of any gang activity occurring in Wasco" was something that "troubled the prosecutor because a principal witness, Trevino, was a member of a criminal street gang in Wasco and the prosecutor was concerned how Juror 2723471 would react to testimony from a Wasco gang member." (Slip Opinion, at p.12.)

Wondering how she might react upon hearing that Gabriel Trevino was a gang member from her home town (a community of 25,000) was not reasonably relevant to the particular case on trial or its parties or witnesses (*Wheeler*, at pp. 281-282), nor did it *explain* why she was removed. The idea that she might have some unknown reaction to hearing that Trevino was a gang member who originally came from Wasco, and that her reaction would in some way interfere with her ability to serve as a juror or would make her biased against the prosecution is far too speculative. It is "clear error" for the court to uphold a *Batson* challenge when the explanation given is speculative or implausible. (*Snyder,* at p. 482; *Johnson v. California* (2005) 545 U.S. 162, 175.)

The prosecutor also advanced the vague assertion that he "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, emphasis added.) But the prosecutor never identified what "other answers" left him unsatisfied in that regard. There were no "other answers" that she gave that had anything to do with "how she would respond when she hears that Gabriel Trevino is from a

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[7] The prosecutor removed another potential juror (Juror No. 2468219) because she once lived with her mother in "an area with a lot of gang activity, but that she had not specifically seen." (7ART 1185.) Thus, for her, simply being *aware* of gang activity in her community was cited as the reason to remove her. For Juror No. 2723471, on the other hand, being *unaware* of gang activity in her community was cited as a reason to remove her.

criminal street gang, a subset of the Surenos out of Wasco." An explanation that is unsupported by the record "cannot reasonably be accepted." (*Miller-El v. Dretke, supra*, 545 U.S. 231, 244-247.)

Nor was she ever specifically asked how she would react if she heard that a gang member from Wasco would testify in this case. If the prosecutor was genuinely troubled about how she might react upon learning that a prosecution witness was a gang member who originally came from Wasco, he would have asked her about it. "'[T]he 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.'" (*Id.* at p. 246.)

Although Trevino's gang affiliation began in Wasco when was a thirteen year old boy, he later graduated to full Sureño and operated as a Sureño gangster throughout Kern County, including Bakersfield. (7RT 1753-1758; 1763-1764.) This was presumably known to the prosecutor during *voir dire*. Yet the prosecutor was not troubled about how other non-Hispanic Kern County or Bakersfield jurors might react upon hearing that Trevino operates as a Sureño gang member in their county (Kern County) or their city (Bakersfield). The prosecutor was only concerned how Hispanic jurors from Wasco (a predominately Hispanic community) might react upon hearing that Trevino joined a Wasco gang when he was a boy. That is not a race-neutral explanation.

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.

In denying the *Wheeler/Batson* motion, 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.) As the Attorney General

conceded below, the trial court misspoke in stating that she was removed for a lack of life experience. (See RB, at p. 43.) A lack of life experience was not cited by the prosecutor, nor was such a claim supported by the record.

The trial court's observation that Juror No. 2723471 was removed because of the "Wasco issue" did not satisfy the court's obligation to conduct a an individualized evaluation. (*People v. Fuentes, supra,* 54 Cal.3d 707, 720.) "[E]very questioned peremptory challenge must be justified." (*Id.* at p. 715.) Nor was it a "sincere and reasoned attempt to evaluate the prosecutor's explanation," through "inquiry and evaluation." (*People v. Hall, supra,* 35 Cal.3d 161, 167-168.) There is no indication that the court engaged in "an evaluation of the prosecutor's credibility" in providing his explanation for Juror No. 2723471. (*Snyder,* at p. 477.) The trial court gave no indication that the prosecutor's explanation was evaluated in terms of "the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Miller-El v. Cockrell, supra,* 537 U.S. 322, 339.) When "the prosecutor's explanations were either implausible or suggestive of bias," they "'demanded *further inquiry* on the part of the trial court' ...followed by a 'sincere and reasoned' effort by the court to evaluate their genuineness and sufficiency in light of all the circumstances of the trial." (*People v. Turner, supra,* 42 Cal.3d 711, 728, emphasis added.) Given that Wasco is a predominately Hispanic community, the fact that this juror lived in Wasco is not a race-neutral factor. Thus, it was at least "suggestive of bias," which imposed upon the trial court an obligation of further inquiry.

The additional factor cited, *i.e.*, that the prosecutor wondered how a Wasco juror who was unaware of gang activity in Wasco would react upon learning that a prosecution wittiness was a gang member who came from Wasco, was overly vague and suggestive of bias. Because vague explanations that make little sense can be a mask for racial

discrimination, the trial court has an obligation to conduct further inquiry to make sure that is not the case.

The prosecutor's vague concern about how Juror No. 2723471 might react upon learning that Trevino came from Wasco was so vague that it defied evaluation, leaving the court to "guess what the prosecutor found troubling." (*People v. Allen, supra,* 115 Cal.App.4th 542, 551.) The prosecutor failed to explain what kind of a reaction she might have and how such a reaction might make her an undesirable jurors from the prosecutor's point of view. Her reaction upon learning that Trevino came from Wasco could have been anything from good to bad to indifferent. An unspecified concern as to how she might respond was so lacking in content as to amount to virtually no explanation." (*People v. Turner, supra,* 42 Cal.3d 711, 725 ["the assertion that 'something in her work' would 'not be good for the People's case' is so lacking in content as to amount to virtually no explanation"].) A vague explanation that is lacking in content demands further inquiry. (*Id.* at p. 728.) The trial court should have asked the prosecutor to explain what kind of adverse reaction that Juror No. 2723471 might have, and why he thought such a reaction would make her an undesirable juror. Had the prosecutor been forced to speculate, any such explanation would have probably have been rejected as too speculative. (*Snyder,* at p. 479 [highly speculative explanations cannot be accepted].) The court should not allow the prosecutor to avoid a *Batson* third-step inquiry by simply offering an explanation that is so vacuous that it defies evaluation. It is error for the court conducting a third-step evaluation to accept such a meaningless explanation at face value without further probing. (*People v. Allen, supra,* 115 Cal.App.4th 542, 553.) Such error occurred here.

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. BACKGROUND.

Ms. 2510083 identified herself as an elementary school (fourth grade) instructional aid, unmarried and without children, living in the southwest portion of Bakersfield, with no prior jury service. Before working as an instructional aide, she worked full time as a customer service representative for the telephone company. She has a cousin with the California Highway Patrol and another cousin with the Arizona Highway Patrol. Another cousin is a worker's compensation paralegal at a local law office. (6ART 942-943, 992-993.) When questioned by defense counsel, she agreed that nobody is perfect and that everyone is capable of making mistakes, even police officers. (6 ART 974.)

At the inception of the jury selection process, Ms. 2510083 asserted a hardship: "I work at an elementary school and there's only two more weeks of school left, and so when that's over, I will be out of work. And I was actually applying at a few places, and I did have an interview on Monday, but missed it, and I also have another on Friday ... [a]t 10:30 AM." (4ART 512.) The court asked her and she confirmed that she would be paid for the last two weeks of the school year and that her only claim of hardship was "perhaps missing an opportunity to get another job." (4ART 513.) The court also asked her if she could reschedule the up-coming job interview. She said that she would call and ask, and would report back the next day to advise the court whether she was successful. (4ART 512-513.) The next day, the court inquired whether she was able to reschedule her job interview. She advised the court: "I was able to talk to the manager, and he said that it was okay if I go tomorrow at 4:00." (5ART 728.) The court agreed to adjourn early on that day to accommodate her. (4RT 728.)

The prosecutor exercised a peremptory challenge to excuse Ms. 2510083. She was identified as Hispanic in counsel's *Wheeler/Batson* motion. (7 ART 1172.) After finding a *prima facie* case for group bias against Hispanics, the court asked the prosecutor for his explanation for excusing Ms. 2510083.

> [PROSECUTOR]: Your Honor, Ms. 2510083, like I was asking to Mr. 2868617 and Ms. 2478882, I was concerned about her life experience. She's an instructional 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.
>
> And I do note that this was a tough call. She had relatives in law enforcement. And, I believe, a cousin who is a paralegal, so she had some idea of the nature and the purpose of these proceedings, but it just didn't seem to me that she had -- again, she had the life experience necessary to consider some of the charges and -- and, again, the -- well, I will just leave it there. That was my reasoning. (7ART 1181.)

In denying the *Wheeler/Batson* motion, the court said of Ms. 2510083:

> Another juror indicated he excused for the purposes of -- or excused as a result of primarily life experience, and I think it was Ms. 2510083, and both of those jurors are young. The only juror similarly situated that -- obviously, we still have -- we haven't finished the challenges, but Mr. 2861675 -- he has passed with Mr. 2861675 on the panel, and Mr. 2861675 is young. He's the only one that I find similarly situated perhaps to Ms. 2723471 and Ms. 2510083 in terms of perhaps having a lack of life experience, but there were other reasons as he gave to those jurors as well, not just the lack of life experience. (7ART 1196.)

It would thus appear that the trial court employed comparative analysis to negate the lack-of-life-experience and lack-of-sophistication factors (because a similarly situated young white male was kept on the jury), but denied the *Wheeler/Batson* motion based on "other reasons." The only other factor was her claim of hardship.[8/]

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8 The prosecutor also cited the fact that she had relatives in law enforcement and a

On appeal, appellant challenged the removal of Juror No. 2510083 based on (1) the prosecutor's explanation was unsupported by the record and (2) the court accepted the prosecutor's explanation without a constitutionally sufficient inquiry. (AOB, at pp. 55-59.)

The Court of Appeal upheld the prosecutor's explanation based only on the claim-of-hardship factor:

> Prospective Juror No. 2510083 (hereafter Juror 2510083) was excused by the prosecutor because she had claimed a hardship in serving, even though the trial court did not excuse her based on hardship. This constitutes a valid race-neutral reason for excusing the juror on a peremptory challenge. (See *People v. Barber* (1988) 200 Cal.App.3d 378, 398; *People v. Landry* (1996) 49 Cal.App.4th 785, 789.) (Slip Opinion, at p. 12.)

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

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.) This was the sole reason for her removal credited by the Court of Appeal. (Slip Opinion, at p. 12.)

This prospective juror's only claim of hardship was that she might miss a job interview. She did not seek release from jury duty for that reason, as the prosecutor asserted. Instead, she agreed to try to reschedule her job interview so that she could remain on the panel, which she was able to do. The court agreed to release jurors early on the day of her rescheduled interview as an accommodation. The prosecutor's explanation

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cousin who was a paralegal, but these facts were not cited as reasons for excluding her. On the contrary, in context, it appears that these were factors that the prosecutor scored in her favor (because she had "some idea of the nature and the purpose of these proceedings") and were cited to support his claim that her exclusion was a "tough call." (7ART 1181.)

for removing this potential juror based on a *resolved* claim of hardship -- a job interview that she was able to reschedule -- was implausible.

Snyder is directly on point. There, a student teacher claimed hardship, expressing concern that jury duty would interfere with his 300-hour classroom observation requirements. The trial judge resolved that concern by having a law clerk phone the dean of the university, who advised that the prospective juror could make up the time lost during the semester, as long as the trial did not go beyond a week. The dean promised to work with the student-teacher to help him make up the lost time. The prospective juror accepted that assurance, which effectively resolved the claim of hardship. The prosecutor cited the claim of hardship nonetheless as a reason to excuse the student teacher. He explained that the potential juror was removed because he might feel rushed and opt for a lesser included offense to avoid a penalty phase of the trial. The Supreme Court regarded this explanation as overly speculative and implausible, given that the trial was not expected to be lengthy and the assurance from the dean that the prospective juror could make up the time. (*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 is true here, but to a much greater extent. Like the student teacher in *Snyder*, Juror No. 2510083 claimed a hardship based on her belief that jury duty would conflict with a prior commitment. But her claim of hardship was far less pressing. Her job interview could be and was easily rescheduled. The resolution of the hardship claimed in *Snyder*, on the other hand, still left the student-teacher with some concerns. The dean saw no problem with the student-teacher making up the time "as long as it's just this week" (*id.*, at p. 481), and he would still have to expend an extra "hour or two per

week in order to compensate for the time that he would have lost due to jury service." (*Id.* at p. 483.) Thus, there was still some lingering basis for concern that the student teacher might feel troubled by having to serve on the jury, even though he expressed none. That provided the prosecutor with at least a speculative basis to assert that the student-teacher might feel rushed during deliberations. Here, in contrast, Ms. 2510083's claim of hardship was completely resolved by simply rescheduling her job interview. She assured the court that her job interview was her only claim of hardship. (4RT 513.) Given the complete resolution of the hardship claim, the prosecutor in this case did not even have a speculative basis to claim that her initial assertion of a hardship could in any way affect her performance as a juror. Because her claim of hardship was more effectively resolved than the claim of hardship in *Snyder*, given the holding in *Snyder*, the prosecutor's reliance on her resolved claim of hardship was perforce implausible.

The prosecutor asserted that she "asked for release" due to her hardship, as if she would be a reluctant juror. (7ART 1181.) On the contrary, the fact that she went to the trouble to reschedule her job interview displayed a willingness rather than a reluctance to serve on the jury. The fact that the prosecutor would cite her rescheduled job interview -- an issue that was fully resolved -- as a reason to excuse her, suggests that the prosecutor's explanation was contrived. "The prosecution's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent." (*Snyder,* at p. 485.)

The easy resolution of her hardship distinguishes this case from the two cases cited by the Court of Appeal. (See Slip Opinion, at p. 12, citing *People v. Barber* (1988) 200 Cal.App.3d 378, 398 [farmer claimed financial hardship]; *People v. Landry* (1996) 49 Cal.App.4th 785, 789 [juror would have to forego a planned business trip].) Both of those cases involved *unresolved* claims of hardship which could make the juror reluctant to serve. Ms. 2510083 was not a reluctant juror being forced to serve on the jury despite her hardship. Her claim of hardship was resolved, and she was the one who resolved it.

The Supreme Court conducted a comparative analysis in *Snyder* to reinforce its conclusion that the prosecutor's proffered explanation was implausible: "The implausibility of this explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks'." (*Synder,* at p. 483.) The Supreme Court compared the hardship claimed by Brooks with a white juror that the prosecutor accepted. The white juror "offered strong reasons" and "substantially more pressing" hardships than did Brooks. (*Id.* at pp. 483-484.) But rather than excuse the white juror, the prosecutor "attempted to elicit assurances that he would be able to serve despite his work and family obligations." (*Id.* at p. 484.)

The same is true here. The prosecutor allowed Juror No. 2581907 to remain on the panel. (See 7ART 1193 [acknowledging that this juror was kept].)[9/] Juror No. 2581907 was identified by counsel (Mr. Terry) as white. (7ART 1192.) Juror No. 2581907 complained in a private *voir dire* session (May 14, 2012) that he was "a little piqued" by the slowness of the jury selection process and "[t]he biggest thing I may be concerned about is how long the jury process is taking and if it goes into June, I'm going to start to have some conflict problems .... I have a medical appointment and I have one and only grandson who is graduating from high school, and I have an art show that I'm supposed to participate in, and just a number of obligations." (7ART 1039-1040.) "[M]y grandson graduates on a Thursday afternoon in early June, so it is my only grandchild, and I sure want to be there for him." (7ART 1040.) "My only point is I might get a little nervous if we start to approach June and this thing was halfway through as the Judge may have remembered, I started out Monday with him and he told us that he thought this trial would go to the 25th of May. And, well, I didn't have any problems whatsoever. The 25th of May to me -- my month of May is open, so I felt pretty confident, but as I've seen the jury

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[9] Juror No. 2581907 went on to serve as jury foreman. (10RT 2613.)

process drag, you know, on beyond what even the Judge estimated. I began to get a little nervous especially for June, so that's my concern." (7ART 1040-1041.) The prosecutor assured Juror No. 2581907 that an alternate could take his place if need be, and asked him if knowing that would assuage his nervousness. (7ART 1041.) Juror No. 2581907 replied that his other obligations "wouldn't affect my focus. It would my fact of being piqued." (7ART 1041-1042.) "I might get a little irritated, but I would do my duty. That's all I can say. I would do my duty." (7ART 1042.) The People declined to exercise a challenge to Juror No. 2581907. (7ART 1053.)

This exchange shows that Juror No. 2581907 was far more concerned that jury service could disrupt his personal life than was Juror No. 2510083. He expressed actual frustration and irritation at the slow pace of jury selection, and was nervous that a lengthy trial would interfere with important personal obligations. If the prosecutor was genuinely concerned that Juror No. 2510083 would be a reluctant juror because she had to (and did) reschedule her job interview, he should have been doubly concerned about Juror No. 2581907, who resented having to serve as a juror in what he feared could be a slowly-paced and lengthy trial.

As was the case in *Snyder*, not only was the prosecutor unconcerned by the fact that this white juror complained that a lengthy trial would interfere with personal obligations, he went to great lengths to keep him on the jury, going so far as to suggest that he could be replaced with an alternate if the trial were to drag on too long. The prosecutor also asked him whether he thought "that jitteriness would affect [his] ability to focus on the trial if [he] were impaneled," and Juror No. 2581907 answered that it would not affect his focus. (7ART 1041.) Thus, as in *Snyder*, the prosecutor "attempted to elicit assurances that he would be able to serve despite his [other] obligations." (*Snyder,* at p. 484.)

The Court of Appeal expressed the view that comparative analysis should not be considered by a reviewing court. (Slip Opinion, at p. 14.) The Court of Appeal erred by relying on out-moded authority on that issue. The United States Supreme Court has held

more recently that comparative analysis is appropriate. (*Miller-El v. Dretke*, *supra,* 545 U.S. 231.) "*Miller-El* holds that at this third stage, after the prosecutor has proffered his or her reasons, an appellate court should compare those reasons with the prosecutor's actions with respect to other jurors to determine whether the reasons given were pretextual." (*People v. Gray*, *supra,* 37 Cal.4th 168, 189.) "Comparative juror analysis is evidence that, while subject to inherent limitations, must be considered when reviewing claims of error at *Wheeler/Batson's* third stage when the defendant relies on such evidence and the record is adequate to permit the comparisons. In those circumstances, comparative juror analysis must be performed on appeal even when such an analysis was not conducted below." (*People v. Lenix*, *supra,* 44 Cal.4th 602, 607.) Here, appellant was entitled to the same sort of comparative analysis as the Supreme Court conducted in *Snyder*. As is shown above, that comparative analysis reinforces the implausibility of the prosecutor's reliance on the resolved claim of hardship.

In sum, adherence to *Snyder* compels the conclusion that the prosecutor's reliance on Juror No. 2510083's fully-resolved claim of hardship was both disingenuous and implausible. Not only was her claim of hardship more easily resolved than the claim of hardship in *Snyder*, the prosecutor's reliance on this factor failed comparative analysis. As in *Snyder*, the prosecutor accepted a white male juror who had potential hardships that were more pressing, so much so that they caused him actual frustration and irritation.

In *Snyder*, the court concluded that "the trial court committed clear error in its ruling on a *Batson* objection, and we therefore reverse." (*Snyder*, at p. 474.) The same result is compelled here.

C. 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 (one not discussed by the Court of Appeal) for excusing this prospective juror was a supposed lack of life experience and sophistication. The Court of

Appeal was correct in ignoring this factor, for it appears that the trial court did not credit it. Instead, it appears that the it was negated by the trial court's comparative analysis.[10/] The peremptory challenge was upheld based on "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, which would explain why the Court of Appeal focused only on that factor.

When it does not appear that the trial court credited a certain factor cited by the prosecutor, the reviewing court cannot uphold the prosecutor's exercise of peremptory challenge based on that factor. (*Snyder*, at pp. 478-479.) Here, because the trial court appears to have rejected the life-experience factor based on comparative analysis, the trial court's ruling cannot be upheld based on that factor.

In any event, even if the trial court had credited the life-experience factor, it was still implausible, for it was not supported by the record. The prosecutor cited the fact that Juror No. 2510083 appeared to be "quite young," but he specifically asserted that "her youth is not a reason for exclusion." Instead, he made a vague reference to a "lack of sophistication in some of her answers" and stated that he did not think that she "had the life experience necessary to consider some of the charges." (7ART 1181.) But aside from what he thought was her youthful appearance (which he disclaimed as a factor), there was nothing in the record to suggest that she was unsophisticated or lacked significant life experience.

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10 The young white male (Juror No. 2861675) who remained on the panel displayed no more life experience or sophistication than did Ms. 2510083. He stated: "I'm not currently employed, though, I will be starting school in July. I am not married, no children. I reside in Bakersfield Southwest and I don't have any prior jury experience." He has not yet decided on a career goal, but was considering EMT, police or fire. (5ART 825.) Thus, he had a near identical life-experience profile as Juror No. 2510083 in terms of being unmarried, childless, and without prior jury experience.

When the prosecutor questioned her on *voir dire* (6 ART 992-993), he did not ask her to state her age. He did ask her where she worked before becoming an instructional aid, and he learned that she worked full-time as a customer service representative for the phone company. That did not establish a lack of life experience in terms of employment.

The prosecutor made no further attempt to question her about what life experience she possessed and what life experience she might lack. "'[T]he 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.)

Moreover, the prosecutor failed to explain how a perceived lack of life experience was related to this case. A reason for removing a juror must be specific and must be "related to the particular case being tried." (*Batson,* at p. 98.) The proffered explanation must be "reasonably relevant to the particular case on trial or its parties or witnesses..." (*Wheeler,* at pp. 281-282.) When a prosecutor relies on youth or lack of life experience as a factor, the explanation should connect that factor to the particular case being tried. (See *e.g.*, *Rice v. Collins*, *supra,* 546 U.S. 333, 341 [in drug possession case, prosecutor believed young jurors would be more tolerant of drugs]; *People v. DeHoyos* (2013) 57 Cal.4th 79, 107-108, [prosecutor believed that young person lacked the education and intellectual skills necessary to understand scientific evidence that would be presented]; *People v. Hamilton* (2009) 45 Cal.4th 863, 905-907 [prosecutor believed that young, unwed mother did not share the same traditional family values as murder victim and would be less sympathetic toward the victim for that reason]; *People v. Sims* (1993) 5 Cal.4th 405, 430-431 [prosecutor believed young juror lacked sufficient maturity to make death penalty determination].) Here, the prosecutor cited a lack of life experience without explaining how that was reasonably relevant to the issues of this particular case or its parties or witnesses.

As for the prosecutor's claim that "there was a lack of sophistication in some of her answers," such a vague assertion does not amount to a "clear and reasonably specific" explanation for his decision to remove her. (*Batson,* at p. 98, fn. 20 [" prosecutor must give a 'clear and reasonably specific' explanation"].)

There was nothing unsophisticated in the way that Ms. 2510083 gave her personal information. (6ART 942-943.) When she was questioned by defense counsel on whether people can be trained not to make any mistakes, she was asked yes-or-no questions and answered appropriately, without displaying any lack of sophistication. (6ART 974.) Nor was a lack of sophistication demonstrated when she addressed the court about her hardship. (4ART 512-513; 5ART 728.) 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*, at p. 479.)

Moreover, 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 ["State's claim that several African-Americans were of 'low intelligence' is a particularly suspicious explanation given the role that the claim of 'low intelligence' has played in the history of racial discrimination from juries"].) When it is claimed that a minority panelist appears less "sophisticated" than other jurors, that assessment can just as easily be based on racial prejudice as it can be based on legitimate grounds. Thus, the claim that a minority panelist lacks "sophistication" is not necessarily race neutral.

D. 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 trial court conducted a proper third-step inquiry to evaluate the youth factor (lack of life-experience and sophistication), and it appears that the court rejected that factor based on comparative analysis. After finding that a young white male was "similarly situated," the court cited "other reasons" to uphold the peremptory challenge. If the court upheld the peremptory challenge based solely on "other reasons," it did so without a constitutionally sufficient *Batson* third-step inquiry and evaluation of those other reasons.

Aside from the youth factor, the only other reason given for removing Juror No. 2510083 was her resolved claim of hardship. 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), a prosecutor's reliance on a *resolved* claim of hardship is inherently implausible. (*Snyder,* at p. 485.) And the fact that the prosecutor accepted a white male (the foreman) who was worried that a prolonged trial court interfere with more pressing personal obligations, and who expressed actual irritation at the slow pace of the trial, reinforced the implausibility of the prosecutor's explanation. (*Id.* at pp. 483-484.) 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.) The court cannot accept an implausible explanation at face value. (*Snyder,* at pp. 479, 485; *Miller-El v. Dretke*, *supra*, 545 U.S. 231, 247.)

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 that was considered important. In evaluating the claim, the court should have noted the fact that her claim of hardship was resolved by having her job interview rescheduled, and should have asked the prosecutor to explain how her rescheduled job interview could have had any impact on

her performance as a juror. In other words, when the prosecutor cited her resolved claim of hardship, the court should have asked, "so what?" Had that been done, the prosecutor would have been stumped to explain, for there is no conceivable reason why a fully-resolved claim of hardship could have any affect on this woman's performance as a juror. (*People v. Turner*, *supra*, 42 Cal.3d 711, 726 "[Absent such inquiry, we can conceive of no reason why [factor cited] should give rise to a specific bias against the prosecution"].)

If the trial court gave any additional weight to the youth factor, which was seemingly rejected by comparative analysis, that too called for further inquiry and evaluation. A failure of comparative analysis "casts the prosecution's reasons for striking [the prospective juror] in an implausible light." (*Miller-El v. Dretke*, *supra*, 545 U.S. 231, 247.) When the prosecutor's explanations are "either implausible or suggestive of bias," they "demanded further inquiry on the part of the trial court." (*People v. Turner*, *supra*, 42 Cal.3d 711, 728.) And the implausibility and suggestion of bias was reinforced by the adverse inference that arises from the prosecutor's reliance on an alternative explanation that was found to be implausible (*i.e.*, reliance on the resolved claim of hardship), which casts suspicion on all of he factors cited. (*Snyder,* at p. 485.) Thus, if the trial court believed that the life-experience factor was deserving of any weight, the court had an obligation of inquiry and evaluation (*People v. Hall*, *supra,* 35 Cal.3d 161, 167-168), to force the prosecutor to explain why he removed this juror for a perceived lack of life experience, but accepted the similarly situated young white male.

In sum, the trial court upheld the peremptory challenge to Juror No. 2510083 without a constitutionally sufficient *Batson* third step evaluation. Although the court cited reasons to reject one facet of the prosecutor's explanation (a failure of comparative analysis on the life-experience factor), the court accepted the prosecutor's alternative explanation (resolved claim of hardship) without any inquiry or evaluation. Because reliance on a resolved claim of hardship is inherently implausible which gives rise to an inference of

discriminatory intent (*Snyder*, at p. 485), further inquiry was required. Without further inquiry or evaluation of the explanations that were accepted, there was a failure of *Batson*'s third step.

IV.

JOINDER IN CLAIMS MADE BY CO-DEFENDANTS CONCERNING THE REMOVAL OF POTENTIAL JURORS

Although appellant's *Wheeter/Batson* challenged the removal of ten Hispanic panelists, his challenge on appeal focused on three that were removed for reasons that were least justifiable. "'The Constitution forbids striking even a single prospective juror for a discriminatory purpose ....'" (*Snyder,* at p. 478.)

By focusing on the three peremptory challenges that were least defensible, appellant does not concede that the removal of the other Hispanic panelists was justifiable. As noted by the Court of Appeal, co-defendants raised appellate challenges to all ten Hispanic panelists who were removed. Appellant joins in any argument made by co-defendants that challenge the removal of all ten Hispanic panelists, and any one of them.

CONCLUSION

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

Respectfully Submitted,

Dated: 1/19/2015

Scott Concklin
Attorney for Appellant

WORD COUNT CERTIFICATION

This is to certify that this Petition for Review does not exceed 14,000 words, including footnotes. The computer word processing program that produced this document returned a word count of 13,994 words (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: 1/19/2015

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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: 1/22/2016

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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

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