

KAMALA D. HARRIS  
Attorney General

State of California  
DEPARTMENT OF JUSTICE



1300 I STREET, SUITE 125  
P.O. BOX 944255  
SACRAMENTO, CA 94244-2550

Public: (916) 445-9555  
Telephone: (916) 324-5474  
Facsimile: (916) 324-2960  
E-Mail: Jennifer.Poe@doj.ca.gov

March 7, 2016

Clerk of the Court  
Court Administrator  
California Supreme Court  
350 McAllister Street  
San Francisco, CA 94102-4797

SUPREME COURT  
FILED

MAR -7 2016

Frank A. McGuire Clerk

Deputy

RE: *People v. Enriquez*  
Case No. S224724

To the Clerk of the Supreme Court:

In response to your letter dated March 2, 2016, in the above-entitled matter, the Attorney General submits the following in response to the Court's request to address all issues raised by the request to augment the record recently filed by appellant Ramiro Enriquez.

#### A. Factual Background

Following jury convictions for attempted premeditated murder, assault with a firearm, and active participation in a criminal street gang, the Fifth District Court of Appeal affirmed the judgments of appellants Ramiro Enriquez, Gabriel Ramos, and Rene Gutierrez, Jr., on January 30, 2015. (*People v. Enriquez* (Jan. 30, 2015) 2015 WL 401784.) On June 10, 2015, this Court granted appellants' petitions for review, deferring briefing and further action in the matter pending consideration and disposition of related issues in *People v. Elizalde* (2015) 61 Cal.4th 523 (S215260), *People v. Prunty* (2015) 62 Cal.4th 59 (S210234), and/or further order of the court. On November 18, 2015, after those cases became final, this Court directed the parties to file briefs addressing the following issue: "Did the Court of Appeal err in upholding the trial court's denial of defendants' *Batson/Wheeler* motions?"

Rene Gutierrez, Jr., filed an opening brief on the merits on February 5, 2016. Opening briefs on the merits for both Enriquez and Ramos are due March 21, 2016. On February 26, 2016, Enriquez filed a request to augment the record. Enriquez seeks to

augment the record with the jury ladder filed in the trial court, which Enriquez argues identifies all of the seated jurors as well as panel members drawn but not seated. On March 2, 2016, this Court requested a letter brief from respondent in response to Enriquez's request to augment the record addressing all issues raised by the request.

**B. A Reviewing Court May Augment the Record under the California Rules of Court**

The first issue to be addressed is procedurally whether this Court may grant a request to augment the record following its grant of appellants' petitions for review and request for briefing. According to the California Rules of Court, this Court may order the record augmented as requested by Enriquez. California Rules of Court, rule 8.340(c), states in pertinent part that, "At any time, on motion of a party or on its own motion, the reviewing court may order the record augmented or corrected as provided in rule 8.155."<sup>1</sup> Rule 8.155, allows the reviewing court at any time to order the record augmented to include "[a]ny document filed or lodged in the case in superior court." (Cal. Rules of Court, rule 8.155(a)(1)(A).) Here, the Kern County Superior Court clerk placed under seal and filed the jury ladder in this case.<sup>2</sup> (2 CT 318-326.) As such, this Court has the discretion to augment the record to include the jury ladder.

**C. The Request to Augment the Record Should be Denied Because the Request is Untimely**

The next issue is whether this Court *should* grant Enriquez's motion to augment the record. A request to augment the record may be denied for delay in presenting the application. (See *People v. Simon* (1951) 107 Cal.App.2d 105, 124.) The court in *People v. Preslie* (1977) 70 Cal.App.3d 486, discussed a request to augment the record made after a reasonable time has passed:

We conclude that in view of the discretionary nature of granting or denying an augmentation request, the desirability of establishing and solidifying the record as early as possible and the supervisory responsibility of this court over appeals, informal requests for augmentation made after a reasonable time has expired from receiving the record on appeal, and particularly as late as those contained in briefs, will be denied

---

<sup>1</sup> A "reviewing court" is defined as "the Supreme Court or the Court of Appeal to which an appeal is taken, in which an original proceeding is begun, or to which an appeal or original proceeding is transferred." (Cal. Rules of Court, rule 8.10(6).)

<sup>2</sup> Sealed documents are governed by California Rules of Court, rule 8.46.

absent a strong showing of unusual or unavoidable circumstances giving rise to the delay.

(*Id.* at p. 492; see also *People v. Sahagun* (1979) 89 Cal.App.3d 1, 27.)

Here, Enriquez filed his notice of appeal on July 9, 2012.<sup>3</sup> Enriquez's appeal was briefed in late 2013 and early 2014, with the case fully briefed as of April 2, 2014. Following a request by Enriquez, supplemental briefing was permitted and was completed on April 30, 2014. The opinion of the Court of Appeal was filed January 30, 2015. This Court granted review on June 10, 2015, but deferred briefing. On November 18, 2015, this Court ordered briefing. It is only now, close to two years after briefing the issues on appeal, including the *Batson/Wheeler* issue, that Enriquez seeks to augment the record with a document that has been available in the trial court since the time of the trial. It has been over one year since the appellate court's decision affirming the judgment. Without a doubt, a reasonable time to request augmentation of the record has passed. Enriquez offers no explanation for the delay in seeking the jury ladder. Accordingly, Enriquez's request to augment the record with this material should be denied based on the undue and inexcusable delay in presenting the request to augment the record.

**D. The Request to Augment the Record Should Be Denied Because the Material Requested Would Be Irrelevant To The Issue on Review**

Augmentation is not a matter of right. (*People v. Gullick* (1961) 55 Cal.2d 540, 551; *People v. Simon* (1951) 107 Cal.App.2d 105, 124.) It is subject to the discretion of the reviewing court. (*People v. Gullick*, at p. 551.) To justify augmentation, a party seeking augmentation must show with "some certainty" the manner in which the augmenting material may be useful on appeal. (*People v. Gaston* (1978) 20 Cal.3d 476, 482; *People v. Hill* (1967) 67 Cal.2d 105, 124.) "The showing of 'some certainty' must be made as to the manner in which the materials may be useful, not as to the contents of the materials themselves." (*People v. Gatson*, at p. 482.) Thus, the moving party should show generally what he expects the omitted matter to contain and how he expects to make use of such matter in the presentation of his appeal. (*People v. Gullick*, at pp. 551-552.) Similarly, this Court may deny the request to augment where the identified material is not relevant to the issue on review. (See, e.g., *Chinn v. KMR Property Management* (2008) 166 Cal.App.4th 175, 180, fn. 3 [court of appeal would not augment the record with documents that were not relevant to the issues on appeal]; *Foothill Properties v. Lyon/Copley Corona Associates* (1996) 46 Cal.App.4th 1542, 1558, fn. 17 [motion to augment the record denied where requested document was not shown to be

---

<sup>3</sup> Appellate counsel filed a motion to augment which was granted on January 3, 2013, with the augmented materials filed later that year.

relevant to appeal].) While it is in the Court's discretion to grant Enriquez's request to augment the record upon a proper showing, the request should be denied in this case because the material requested would be of no use, i.e., irrelevant, in determining the issue identified for review by this Court.

Appellants argued on appeal that the trial court erred in denying their motions under *Batson/Wheeler* in the trial court. In the trial court, the court found a prima facie case was established but ultimately denied the motions after the prosecutor provided race-neutral reasons for the peremptory challenges. (*People v. Enriquez* (January 30, 2015), F065288, F065481, F065984 [nonpub. opn.] at p. 9.) The Fifth District Court of Appeal addressed the *Batson/Wheeler* issue by analyzing whether there were race-neutral reasons for the prosecutor's peremptory challenges. It examined the record and considered the prosecutor's articulated reasons for the challenges. (*Id.* at pp. 11-14.) The court specifically declined appellants' request to engage in a comparative juror analysis:

Defendants wish us to engage in a comparative analysis regarding the prosecution's use, or failure to use, peremptory challenges on specific jurors. We do not engage in a comparative analysis of various juror responses to evaluate the good faith of the prosecutor's stated reasons for excusing a particular juror 'because comparative analysis of jurors unrealistically ignores "the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar.'" [Citation.]

(*Id.* at p. 14.) Thus, without performing a comparative juror analysis, the Court of Appeal concluded that substantial evidence supported the trial court's rulings and refused to reverse the trial court's denial of the *Batson/Wheeler* motions. (*Id.* at p. 15.)

This Court has ordered the parties to brief the following issue: "Did the Court of Appeal err in upholding the trial court's denial of defendants' *Batson/Wheeler* motions?" In order to analyze this issue, the parties and this Court must examine how the appellate court analyzed the *Batson/Wheeler* issue on appeal and determine whether that analysis was proper. The issue is not whether the trial court erred in denying appellants' *Batson/Wheeler* motions but whether the Court of Appeal erred in upholding the trial court's denials. According to his request to augment the record, Enriquez is seeking the jury ladder in order to "completely and accurately undertake a comparative analysis of the seated jurors left on the panel . . ." (Request to Augment, p. 2.) However, the court of appeal did not engage in a comparative juror analysis on appeal. It specifically declined to conduct such an analysis in resolving the *Batson/Wheeler* claim. (*People v.*

*Enriquez* (January 30, 2015), F065288, F065481, F065984 [nonpub. opn.] at p. 14.) While examining whether the Court of Appeal properly refused to conduct a comparative juror analysis is responsive to the issue under review, conducting a comparative juror analysis anew is not. Where the Court of Appeal refused to conduct a comparative juror analysis, conducting such an analysis on review of the Court of Appeal decision would not be relevant to whether that court erred in its refusal. If error is found by this Court, the proper remedy would be to remand the case for such analysis, not to conduct it in the first instance. The jury ladder, therefore, is of no use and is irrelevant to the issue articulated by this Court as the issue under review.

**E. The Request to Augment the Record Should Be Denied Because Consideration by This Court of the Requested Materials is Improper**

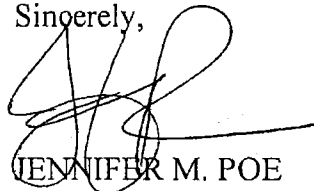
In this case, Enriquez's request to augment the record should not be granted because considering material not made part of the record on appeal for consideration by the Fifth District Court of Appeal would be improper. "A defendant cannot challenge a lower court's ruling and then 'augment the record' with information not presented to (or withheld from) the lower court." (*People v. Brown* (1993) 6 Cal.4th 322, 332, citing *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 711-712 (overruled on other grounds in *People v. Green* (1980) 27 Cal.3d 1) ["the appellate record is limited to those matters presented to the trial court."]); see also *Guardado v. Superior Court* (2008) 163 Cal.App.4th 91, 95, fn. 1 [motion to augment denied in writ proceeding where requested materials not considered by lower court in making the challenged ruling]; *BJG Associates, LLC v. Superior Court* (2000) 75 Cal.App.4th 952, 958 [ordinarily a reviewing court will not consider evidence arising after the lower court ruling, involving facts open to controversy which were not placed in issue or resolved by that court]; *Howard v. Howard* (1953) 119 Cal.App.2d 122, 123-124.) A motion to augment the record with documents not offered or used in the hearing below is improper. (*People v. Cantrell* (1962) 197 Cal.App.2d 40, 46.)

Here, the jury ladder sought in the request to augment was not part of the record on appeal and was not considered by the Fifth District Court of Appeal in upholding the trial court's denial of appellants' *Batson/Wheeler* motions. As noted above, the appellate court did not conduct a comparative juror analysis in resolving the *Batson/Wheeler* issue on appeal. It would be improper for this Court to consider the jury ladder where this same material was not considered by the Court of Appeal.

Clerk of the Court  
March 7, 2016  
Page 6

In sum, this Court should deny Enriquez's motion to augment the record with the jury ladder because Enriquez's request to augment the record is untimely, the jury ladder is irrelevant to the issue under review, and consideration of the jury ladder would be improper as it was not considered by the Fifth District Court of Appeal in affirming the judgments of appellants.

Sincerely,



JENNIFER M. POE  
Deputy Attorney General  
State Bar No. 192127

For Kamala D. Harris  
Attorney General

JMP:dc

SA2012307315  
12155575.docx

**DECLARATION OF SERVICE BY U.S. MAIL**

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

I declare:

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

On March 7, 2016, I served the attached

**LETTER BRIEF**

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

**Janet Jo Gray**  
**Attorney at Law**  
**P. O. Box 51962**  
**Pacific Grove, CA 93950**  
**2 Copies**

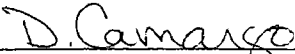
**Richard G. Terry**  
**Deputy Public Defender**  
**Kern County Public Defender's Office**  
**1315 Truxtun Avenue**  
**Bakersfield, CA 93301**  
**2 copies**

**Honorable Lisa Green**  
**Kern County District Attorney**  
**1215 Truxtun Avenue**  
**Bakersfield, CA 93301**

**Clerk of the Superior Court**  
**Kern County**  
**1415 Truxtun Avenue**  
**Bakersfield, CA 93301**

**CCAP**  
**Central California Appellate Program**  
**2150 River Plaza Dr., Ste. 300**  
**Sacramento, CA 95833**

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 March 7, 2016, at Sacramento, California.

  
\_\_\_\_\_  
Declarant