SUPREME COURT NO: S224724

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	) CASE NO. S224724
	)
Plaintiff and Respondent,	) (5DCA F065288/F065481
	) F065984)
	) Kern Co. Superior Court
	) No. LF9190C/LF9190A)
v.	)
	)
RAMIRO ENRIQUEZ,	)
	)
Defendant and Appellant	)
AND CONSOLIDATED CASES	)
	)

Appeal From The Judgment Of The Superior Court
County Of Kern

Honorable Michael E. Dellostritto, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

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TO: THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

ARGUMENTS

I

THE TRIAL COURT ERRONEOUSLY DENIED THE DEFENSE *BATSON/WHEELER* MOTION INASMUCH AS THE PROSECUTOR'S REASONS FOR EXCUSING THE HISPANIC JURORS WERE PRETEXTUAL

A. The Number of Hispanic Strikes Suggests That The Prosecutor's Reasons Are A Pretext For Racial Discrimination

Appellant contends that the large number of Hispanic strikes, 10 of 16, supports his claim that of the prosecutor's reasons for striking the ten Hispanic jurors are pretextual. (*People* v. *Jones* (2011) 51 Cal.4th 346, 362-363 [numbers of racial strikes relevant are relevant to the third stage of the *Wheeler/Batson*[1] inquiry, as well as to the question of whether a prima facie case has been made].) Respondent addresses this key issue briefly toward the end of its brief. (RB 112-113.)

Respondent does not contest the numbers used, 10 of 16 [2] peremptories, or the ultimate composition of the seated jury that tried

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

[2] Respondent contends that there were two Hispanic jurors seated on the panel at the time the *Batson/Wheeler* motion was made. (RB 5, fn. 3, citing 5ART 1048, 1052-1053.) Ramos' trial attorney identified two Hispanics left on the jury, when the motion was made, 246-8219 and 263-2943. (5RT 1048.) The court then noted that Ms. 247-8882, who it designated as a Hispanic, was still seated. (5ART 1053.) It appears that the court was correct in its statement that there were two Hispanic jurors at the time of the motion, contrary to appellant's statement in his opening brief. (Enriquez, AOB, p.

appellant's case. (RB 112-113.) Respondent notes that 60% of the prosecutor's strikes were Hispanics, or 10 of 16. (RB 112-113.)

Respondent conflates its response with Ramos' distinct argument that the Court of Appeal committed error for failing to reverse the judgment in regards to a violation of the right to a jury drawn from a cross-section of the community. (RB 112.) In doing so, respondent does not provide any case authority refuting the notion that striking 10 Hispanic jurors it self suggests that the reasons given for the strikes were largely pretextual. As explained by our United States Supreme Court in *Miller-El* v. *Dretke* (2005) 545 U.S. 231, 240-241:

> The numbers describing the prosecution's use of peremptories are remarkable. Out of 20 black members of the 108-person venire panel for *Miller's El's* trial, only 1 served. Although 9 were excused for cause or by agreement, 10 were peremptorily struck by the prosecution. (Citation omitted.) 'The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members. Happenstance is unlikely to produce this disparity.'

Here, only one Hispanic actually served on appellant's jury, though two remained at the time of the *Batson-Wheeler* motion. These numbers

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11.) Thus, the two Hispanic jurors seated at the time this motion was made are Ms. 247-8882 and. (5ART 1053.) Ultimately only one Hispanic juror was seated on the jury, with a juror designated Ms. 247-8882, being excused by Gutierrez after the motion. (5ART 1075.)

come close to those cited in *Snyder* v. *Louisiana* (2008) 552 U.S. 472, 476 [128 S.Ct. 1203, 170 L.Ed.2d 175], where the prosecutor challenged all five prospective African-American jurors, resulting in none on the actual jury, or in *Miller-El* v. *Dretke*, *supra*, 545 U.S. at pp. 240-241, where the prosecutor challenged nine of 10 prospective African-American jurors, resulting in only one on the actual jury.

The import of these indisputable facts goes well beyond this facet of appellant's argument. In several instances throughout its brief, respondent makes largely subjective and speculative inferences as to why white jurors similarly situated to the Hispanic venire persons remained on the jury. (See, e.g. RB 92-93.) The large number of strikes must also be considered in context with striking Ms. 251-0083, characterized by respondent in part as an "honest mistake of fact." (RB 76-77.) As will be discussed in further detail in this brief, the large number of Hispanics must be considered when assessing the validity of respondent's often-inconsequential differences between seated jurors and the stricken Hispanics, as a basis to uphold the appellate court's decision as the *Batson/Wheeler* motion.

B. The Record Does Not Support Many of the Reasons Given By The Prosecutor For the Strikes

This Court explained a reviewing court's duty at step three of the *Batson/Wheeler* process includes an obligation to "be suspicious when presented with reasons that are unsupported or otherwise implausible." (*People* v. *Silva* (2001) 25 Cal.4th 345, 385.) The lower court abandoned its duty to do so in the instant case.

Ms. 254-2776:

As to Ms. 254-7226, the prosecutor was initially unable to articulate any reason for excusing this potential juror. Respondent dismisses this fact, arguing without citation to the record that the prosecutor could not provide a reason because he had "misplaced his notes." (RB 48, 54.) Respondent's interpretation of the record is subject to dispute, inasmuch as it is apparent that the prosecutor was relying on his notes at the outset of his statement of reasons, as he told the court at that point, his "notes stack upper seat." (5RT 1057.) When he got to Ms. 254-2776, he stated that, " I don't have notes as to what my questioning was for Ms. 254-2776, 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 stay why I executed a peremptory on Ms. 254-7226." (5RT 1060.) He did recall that she had friends and relatives that

were correctional officers and that she was a service coordinator for the mentally disabled. (5RT 1060.) At the conclusion of his entire statement to the court he stated he had one note, that, "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....." (ART5, 1062.) Respondent repeats this suggestion that the prosecutor had misplaced his notes, again without citation, when dismissing appellant's argument that respondent's reason for dismissing reeks of afterthought. (RB 54.)

Respondent's argument also suggests that the State is relying on demeanor evidence, as evidenced by its citation of *People* v. *Lenix*, *infra*, in which it states, "[t]here is more to human communication than mere linguistic content." (RB 53, citing *People* v. *Lenix* (2008) 44 Cal.4th 602, 622.) However, inasmuch as neither the prosecutor nor the trial court commented on any such demeanor evidence, it is not susceptible to evaluation by this court. (*People* v. *Allen* (2004) 115 Cal.App.4th 542, 551; fn. omitted.)

Further, it the reasons given by the prosecutor that matter, not subsequent speculative arguments made by appellate counsel for the State. "*Batson's* step two requires evidence of the prosecutor's actual reasons for exercising her peremptory challenges..." (*Johnson* v. *California* (2005) 545 U.S. 162, 172, 125 S.Ct. 2410, 162 L.Ed.2d 129.)

Respondent also notes that no other seated juror displayed the hesitancy and timidity that Ms. 254-7226 displayed in the answers during voir dire. As discussed in appellant's opening brief, however, Ms. 254-2776, was the only juror questioned in this extensive fashion, in which she was tested on her knowledge of the deliberative process as to both procedure and specifics as to unanimity and other details of the process that is routinely explained to seated jurors in the form of jury instructions commonly given at the end of trial. (See, e.g. CALCRIM 3500, Unanimity, 3550, Pre-Deliberation Instructions.) The instructions also include the admonition that the foreperson see that "everyone has a fair chance to be heard." (CALCRIM 3550.)

In a separate discussion near the end of its brief, respondent simply dismisses this recognized principle of a "different script" as to Ms 254-7226, arguing that appellant did not specify which seated jurors were not questioned in this fashion. (RB 105-107.) Appellant described this

extensive questioning of this juror as an example of a "different script" (Enriquez AOB, pp. 50-53, citing *Miller-El* v. *Dretke*, *supra*, 54 US. at p. 244-245.)

Appellant stated a negative, that is, that *none* of the seated, white jurors were questioned in this fashion. Had any of these jurors been so questioned, respondent would be expected to cite to such an interchange in the record. Respondent's failure to locate and/or cite to any questioning of any seated juror, all of whom were listed by appellant in its statement of facts, demonstrates the lack of merit in its position. (See Enriquez AOB, p.21.) Notwithstanding the trial court's finding otherwise, the prosecutor did not question this juror in a similar fashion as the other jurors. (See RB 58, citing ART 1073-1074.)

Further, respondent argues that appellant's assertion that a "patronizing tone" was used is without merit, inasmuch as "tone" cannot come through a Reporter's Transcript, suggesting that tone, is descriptive of sound, and thus not capable of being ascertained from a cold record. (RB 107.) Tone does in fact, have a common usage meaning outside of simply sound or tonality. According to the dictionary, tone refers to " a quality, feeling, or attitude expressed by the words that someone uses in speaking or writing." (http://www.merriam-webster.com/dictionary/tone.)

Respondent's reliance on such a cavil point about the usage of the term to refute the argument, demonstrates the lack of merit in its effort to support this strike.

Many of the prosecutor's questions were in fact patronizing, suggesting by the language used that he was speaking to someone with limited knowledge of language or basic legal process, in a quasi, child-like manner. For example when Ms. 254-7226 is asked where deliberations take place, she states the jurors are taken to a room, or a separate section by themselves, which prompted the prosecutor to "correct" her, stating that it was actually called the "jury room." Query as to how describing the place where jurors deliberate as a room for the jurors is an incorrect designation for the jury room. (3ART 489-492.)

Respondent dismisses the import of *People* v. *Allen* (1979) 23 Cal.3d 286, as to the fact that Ms. 254-7226, absent her Hispanic group status had favorable juror qualities, in light of her favorable law enforcement connections. Respondent argues that that principle was used in *Allen* to establish a prima facie case, the first step, and this case involves the third step, thus concluding the principle is not applicable. (RB 54.) Respondent cites no reasoning as to why the factor would not weigh in on the third step analysis as to why this factor would not suggest a pretextual reason for

dismissing them. (See, e.g. *People* v. *Jones*, *supra*, 51 Cal.4th at pp. 362-363 [same factor used for first and third step].) This prospective juror "should have been an ideal juror in the eyes of a prosecutor … the prosecutors' explanations for the strike cannot reasonably be accepted." (*Miller-El* v. *Dretke*, *supra*, 545 U.S. at p. 247; see also *Ali* v. *Hickman* (9th Cir. 2009) 584 F.3d 1174, 1184 [holding stated reason for challenge not to be credible where any bias that would flow from the reason would favor the prosecution].); see also *Snyder* v. *Louisiana* (2008) 552 U.S. 472, 1208; ["In *Miller-El* v. *Dretke*, the Court made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted."])

Ms. 251-0083

Respondent does not address directly appellant Enriquez's argument that the record does not support the lower court's failure to find that the prosecutor's stated reasons for excusing Ms. 251-0083 were pretextual. Respondent discusses at length various arguments as to this venire member as to appellant Gutierrez, but only briefly references appellant's argument in two instances. (RB VI, 72-87, at pp. 81, 84.)

Ms. 251-0083 was stricken from the jury, for the stated reason that she had limited life experience as an instructional aid in elementary school, as well as a "lack of sophistication." She also had relatives in law enforcement, as well as a cousin who was a paralegal. (5ART 1057.)

Respondent argues that inasmuch as she was unmarried, had no children and no jury experience, and her job as a fourth grade classroom aide was soon about to end, that she indeed, lacked life experience. (RB 82, 84.) Respondent does not explain its apparent gender gaffe that a woman, to have life experience, must be both married and have given birth to children.

> For purposes of this opinion, we accept the definition of "gender bias" developed by the Judicial Council Advisory Committee on Gender Bias in the Courts, which provides that "gender bias includes behavior or decision making of participants in the justice system which is based on or reveals (1) stereotypical attitudes about the nature and roles of women and men; (2) cultural perceptions of their relative worth; and (3) myths and misconceptions about the social and economic realities encountered by both sexes." (Judicial Council of Cal. Achieving Equal Justice for Women and Men in the Courts: The Draft Rep. of the Judicial Council Advisory Committee on Gender Bias in the Courts (1990) at p. 2 [hereafter Draft Report of the Judicial Council].) This report was accepted on November 16, 1990, by the Judicial Council, which unanimously adopted its recommendation. (*Catchpole* v. *Brannon* (1995) 36

Cal.App.4th 237, 245 fn 2., disapproved on other grounds in *People* v. *Freeman* (2010) 47 Cal.4th 993, 1006, fn.4.)

Apparently these factors were not of import to the unemployed white, male, seated juror, Mr. 286-1675, who was also unmarried, and had no children. Recall that Mr. 286-1675, in addition to having no prior jury service, had a brother with a criminal history following his explosion of a Pepsi bottle, and was unsure about his future aspirations as either an emergency EMT, policeman or fire department, in some unknown capacity. (4RT 701.) "The fact that [a proffered] reason also applied to . . . other panel members, most of them white, none of them struck, is evidence of pretext." (*Ali* v. *Hickman*, *supra*, 571 F.3d at p. 916, citing *Miller-El* v. *Dretke*, *supra*, 545 U.S. at p. 248.) An effective comparison requires only that the challenged and unchallenged jurors are "similarly situated." (See *Miller-El* v. *Dretke*, *supra*, 545 U.S. at p. 247, fn 6.)

In this case, what respondent does not mention in its argument is telling—the State neglects to mention that Mr. 286-1675 was both unmarried, without children and had no jury experience demonstrates the lack of merit in the State's position that there were any dissimilarities between the two jurors. (RB 82-85.) These are precisely the reasons put forward as to why Ms. 251-0083 had no life experience, even though she

had current employment in a semi-professional capacity, had worked in customer service previously, was interviewing for another position and was otherwise responsive to questions about serving as a juror. (2ART 388; 4ART 818, 868-869.) And in any event, the Supreme Court has explicitly rejected the notion that comparative juror analysis requires the discharged and non- discharged juror to be "identical in all respects." (*Miller-El* v. *Dretke*, *supra*, 545 U.S. at p. 247, fn.6.)

Respondent then goes further, suggesting a possible thought process scenario for the prosecutor that was never articulated by him—that he may have "determined that Juror No. 286-1675 possessed more job experience, more extensive life experience and had a strong handle on the trial process, and that the juror therefore would be experienced and assertive in dealing with the attempted murder and gang charges involved in this case." (RB 83.) The record does not support this factual scenario as to the seated juror, Mr. 286-1675. Further, the principle that the State may suggest other reasons for accepting a juror not challenged, as opposed to challenged jurors was applied in the case cited by respondent on a comparative analysis that was undertaken for the first time on appeal. (*People* v. *Jones*, *supra*, 51 Cal.4th at pp., 365-366.) *Jones* is distinguishable because in the instant case, a comparative analysis was undertaken, in part, giving him both pause

and the opportunity to respond to concerns about seated jurors. In fact, the trial court mentioned that Mr. 286-1675 was young, and was similarly situated to Ms. 251-0083 and 272-3471, "in terms of perhaps having a lack of life experience..." (5RT 1072.)

Respondent goes to great effort to try to distinguish Ms. 251-0083's discussion with the trial court during its initial hardship portion of its questioning, this juror in fact did not request a hardship, even though she brought up the fact that she was going to have an interview, which the court ask her if she could try to reschedule. Respondent argues this issue in the context of the prosecutor's statement that he excused the juror because she had asked for release due to hardship. (5ART 1057.) Respondent suggests that the prosecutor's mistake that she had asked for a hardship should be treated as an "honest mistake of fact." (RB 76, citing *Purkett* v. *Elem* (1995) 514 U.S. 765, 768.) Relevant to this discussion is the principle that when a prosecutor mischaracterizes a juror's answer, that provides evidence of discrimination. (*Miller-El* v. *Dretke*, *supra*, 545 U.S. at 244. When a reason is unsupported by the record, it will be deemed pretextual. (*People* v. *Silva* (2001) 25 Cal.4th 345, 385; *McClain* v. *Prunty* (9th Cir. 2000) 217 F.3d 1209, 1212.) In light of other reasons that do not pass muster, as well as the extensive number of strikes, appellant suggests that this misstatement

of fact should not be written off as a simple error. Respondent attempts to minimize the misstatement by suggesting that the prosecutor had to deal with three *Batson/Wheeler* motions during the heat of trial. (RB 80.) This is a bit of an exaggeration; inasmuch there was one *Batson/Wheeler* motion, which was joined in by all three appellants that required one set of responses. (5ART 1048, 1049.)

Respondent apparently makes this distinction as to that Ms. 251-0083, in regards to the hardship issue, appears to be that, so as to distinguish her from two seated jurors who did in fact ask for hardships, Juror No 258-1907 and Juror No. 2719513. (EOB 40-41; 1ART 130-133.) Again, this is an inconsequential distinction that does invalidate the comparison of these factors to the other jurors. (RB 81.) As noted above, Ms. 251-0083 brought up her scheduling problem during the hardship portion of the jury procedure. Even though she did not specifically say, "I am requesting a hardship," it was clear that it was an economic situation that she was facing, and as such brought it to the court's attention. The fact that she was able to resolve her scheduling conflict, only speaks to her good faith efforts to comply with the court's request that she do so, as well as her willingness to serve as a juror. The seated jurors did in fact have requests for hardships, which were denied, suggesting they in fact would be less

favorable jurors than someone who had broached the subject of a hardship, but resolved it.

Mr. 229-1529

Finally as to Mr. 229-1529 [RB 87-88], the State argues that the prosecutor's statement that he appeared to be more affected by a recent law enforcement encounter than by his brother's death from a bar fight, that had occurred some 20 years earlier. (5ART 1059.) Respondent does not adequately explain how the prospective juror's lack of emotion regarding his brother's demise several years earlier, compared to being annoyed by being detained by police without apparent just cause a few years prior, had any legitimate basis to the issues in the case. (See, e.g. *Batson* v. *Kentucky supra*, 476 U.S. at p. 98 "[T]he reason must be "related to the particular case to be tried..."].)The State imagines that the prosecutor could have been concerned that this juror's reaction to the recent encounter with law enforcement demonstrated he in fact did not trust police officers and would be biased against him. The flaw with this argument is that it is not what the prosecutor articulated at the hearing. "*Batson's* step two requires evidence of the prosecutor's actual reasons for exercising her peremptory challenges..." (*Johnson* v. *California, supra*, 545 U.S. 162, 172, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005) (citing *Paulino I*, 371 F.3d at 1090("It does

not matter that the prosecutor might have had good reasons ... what matters is the real reason [the jurors] were stricken.") (Emphasis deleted) and *Holloway* v. *Horn* (3d Cir.2004) 355 F.3d 707, 725 ("[S]peculation ... 'does not aid our inquiry into the reasons the prosecutor actually harbored' for a peremptory strike")); see also *Turner* v. *Marshall* (9th Cir.1997) 121 F.3d 1248, 1253 ["The arguments that the State has made since the evidentiary hearing do not form part of the prosecutor's explanation."]; *Riley* v. *Taylor* (3d Cir.2001) 277 F.3d 261, 282 (en banc) ("Apparent or potential reasons do not shed any light on the prosecutor's intent....")

It is well-established that even a single racially-motivated peremptory challenge violates the Constitution. (*Snyder* v. *Louisiana, supra*, 552 U.S. at pp. 478-479 [170 L. Ed. 2d 175, 128 S. Ct. 1203]; *People* v. *Cleveland* (2004) 32 Cal.4th 704, 734; see *J.E.B.* v. *Alabama* (1994) 511 U.S. 127, 142, fn. 13 [128 L.Ed.2d 89, 114 S.Ct. 1419].) *Wheeler/Batson* error is structural error that requires automatic reversal. (*People* v. *Wheeler, supra,* 22 Cal.3d 258, 283; *People* v. *Silva, supra*, 25 Cal.4th 345, 386; *Windham* v. *Merkle* (9th Cir. 1998) 163 F.3d 1092, 1096.) Accordingly, the judgment must be reversed and the judgment of conviction must be set aside. (*People* v. *Wheeler, supra*, 22 Cal.3d at p. 283.

II

THE TRIAL COURT ERRONEOUSLY DENIED THE *BATSON/WHEELER* MOTION HAVING FAILED TO EXERCISE A VALID COMPARATIVE ANALYSIS OF THE JURORS THAT WERE STRICKEN TO THE SEATED JURORS

A. The Lower Court's Decision Is Not Entitled To Deference

Appellant contends that he trial court neglected its duty to make " 'a sincere and reasoned effort to evaluate' " the proffered justifications. (*People* v. *Lenix*, *supra*, 44 Cal.4th 602, 614; see also *People* v. *Silva* (2001) 25 Cal.4th 345, 385.) Accordingly, the trial court's decisions to accept the prosecutor's reasons and to deny defendant's motion are not entitled to deference on appeal. (*People* v. *Lenix*, *supra*, at p. 614; *People* v. *Silva*, at pp. 385-386.). The appellate court erred by not engaging in any comparative analysis. (Slip Opn., p. 14.)

Respondent disagrees, concluding that the trial court adequately made a sincere and reasoned attempt to evaluate the prosecutor's credibility, and as such is entitled to deferential review. (RB 27.) Respondent supports this wide-ranging conclusion with the fact that the court observed the entire voir dire, and took into consideration the prosecutor's reasons for excusing each potential juror and the appellant's contrary arguments. (RB 27.) Respondent's argument suggests that a

reviewing court should only retreat from this unlimited deference under limited circumstances, which it contends do not apply here. (RB 28.) Respondent claims that appellant has not offered any reason to deviate from established precedent. (RB 28.)

Respondent overlooks considerable precedent, as well as factual circumstances specific to this case, demonstrating why this court should not afford either the trial court or the appellate court deference when the prosecutor's strikes were upheld upon challenge with the *Batson/Wheeler* motion. Note that respondent agrees that the appellate court erred by not engaging in a comparative analysis. (RB 88, 90.)

The trial court has committed an error of law by failing to "evaluate meaningfully the persuasiveness of the prosecutor's [group]-neutral explanations," and to "make a deliberate decision whether purposeful discrimination occurred." (*United States* v. *Alanis* (9th Cir. 2003) 335 F.3d 965, 968-969 &fns. 2-3; *Barnes* v. *Anderson* (2d Cir. 1999) 202 F.3d 150, 157; *People* v. *Fuentes* (1991) 54 Cal.3d 701, 718-721.) This was the rationale this court used, in two of its three post- 1987 reversals based on *Batson* or *Wheeler* grounds. (*People* v. *Silva*, *supra*, 25 Cal.4th at p. 386; *People* v. *Fuentes*, *supra*, 54 Cal.3d at pp. 718-721.)

Further such deference is applied only when the trial court utilizes the correct legal standard. If the trial court utilizes an incorrect legal standard, its findings do not receive deference on appeal. Instead, an appellate court reviews the question de novo. (*Panetti* v. *Quarterman* (2007) 551 U.S. 930, 953; *Johnson* v. *California* (2005) 545 U.S. 162, 173.

The trial court's analysis in its ruling from the bench demonstrates that it appeared to be applying the wrong standard, when it undertook its comparison, stating, "And in this case, we're talking about Hispanics that seem to be similarly situated to the Hispanic jurors that were excused in this case." (ART 1070.) True, it continued to refer to other reasons suggesting that it was comparing seated jurors to stricken jurors, but the prefacing statement suggests a disconnect between the correct standard that it was required to apply. The court then summarized its findings, indicating that, " I do find that the reason that he has given are a group and neutral reasons, (sic) therefore, I'm going to deny the motion at this time." (5ART 1074.)

It appears from the trial court's use of the phrase "neutral reasons" that the judge is referring to the second step of the *Batson* process, where it is the prosecutor's duty to "offer a race-neutral basis for striking the juror in question." (*Snyder* v. *Louisiana*, *supra*, 552 U.S. at p. 476-477.) The correct standard in deciding the third step is to determine whether the

opponent of the strike has proven purposeful discrimination, or in the words of *Johnson* v. *California*, *supra*, 545 U.S. at 168, whether "the persuasiveness of the [prosecutor's] justification" has been proven. Denial of a *Batson/Wheeler* motion is not proper unless the prosecutor's totality of reasons, at the third step of *Batson* analysis, are found both persuasive and race-neutral, meaning, inter alia, that they were non-pretextual when compared with answers given by accepted white jurors. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 241.) In the instant case, the trial judge only found that the reasons given "are a group and neutral reasons," which is not only an imprecise statement that is not susceptible to easy comprehension, but more importantly, not within the parameters of recent case law from the United States Supreme court.

In *Snyder* v. *Louisiana*, *supra*, 552 U.S. at p. 484, the United States Supreme Court further explained this principle. It held that, if a prosecutor states both race-based reasons and race-neutral reasons for a challenge, then the challenge violates the equal protection clause if it was "motivated in substantial part" by race. That means that, if a prosecutor gives multiple reasons for a peremptory challenge, the trial court must examine and compare all the prosecutor's claimed reasons, to be sure that the challenge

was not motivated in substantial part by race. The trial court did not apply that principle here.

Further, the fact that the trial court merely referred to the prosecution's explanations without giving any indication that it considered the credibility of the explanation or engaged in the third-stage process required by *Batson*, is an error of law which warrants reversal. (See, e.g., *United States* v. *Hill* (6th Cir. 1998) 146 F.3d 337, 342; *Coulter* v. *Gilmore* (7th Cir. 1998) 155 F.3d 912, 920-922; *Montiel* v. *City of Los Angeles* (9th Cir. 1993) 2 F.3d 335, 340.) Respondent's failure to address these points, simply concluding that the trial court is entitled to deference under well-established standards is a conclusion unsupported by the record or pertinent case law.

B. The Evidence Does Not Support The Trial Court's Conclusions As To Its Partial Comparative Analysis

Additionally, as respondent concedes, the trial court did not undertake a complete comparative juror analysis, though requested by appellant Enriquez. (5ART 1067, 1068; RB 91.)

The trial judge focused on three of ten of the strikes with the most gang contact, finding that the prosecutor was "consistent in terms of people that have gang ties. (5ART 1071.)

Respondent rejects appellant's comparison of 246-8219 and 272-3471, who where not impacted by gang activity, yet let remain on the jury Jurors Nos. 264-8196, 240-8196, 273, 2073 and 263-2053, who were impacted by gang activity. Respondent suggests that Ms. 272-3471's lack of gang impact was not the actual reason, but the fact that she was from Wasco, and was not aware of any gang activity occurring in Wasco. (RB 39.)

The logic of the State's argument is faulty. Ms. 272-3471 did not say she did not believe that gang activity existed in Wasco, which would suggest she might not believe Trevino, but that she was unaware of any such gang activity. Being unaware of something does not suggest that one does not believe it exists. Again, there is no logical nexus between the reason given, and case specific reason for rejecting the juror. Respondent also argues that "the prosecutor was unsatisfied by some of her other answers as to how she would respond when she heard testimony that Trevino is a gang member," from a Sureño subset out of Wasco. (RB 39-40, citing ART 1058-1059.) However, Juror 272-3471's "other testimony" is not cited by respondent so it is pure speculation as to what other answers may have led the prosecutor to suspect that she would reject Trevino's testimony. The "other answers" reference appears to be completely

unsupported, which explains why respondent has failed to articulate such areas where the prosecutor might draw its conclusion. Ms. 272-3471 stated upon questioning that she was a divorced teacher with no children; her ex-husband was a correctional officer. (7ART 720.) She had a few relatives in corrections as well. (7ART 720.) She lived in Wasco itself, and was unaware of active gangs in the area. (7ART 731.) Gangs had not directly impacted her or anybody close to her. (ART 720.) She had never been the victim of a crime, her uncle was a California Highway Patrol officer, and she had no issues with any of the legal concepts discussed in court. (7ART 721.) A cursory review of this record suggests that the ambiguous and unspecific "other answers" is a pretextual answer to cover this juror being stricken on the basis of racial bias.

Appellant has joined in co-counsel Ramos' argument regarding using so-called neutral factors as a proxy for bias. In that vein of thought, Wasco is a proxy for bias, given that it has a high percentage of Hispanic residents, 76.7%, according to the 2010 Census Bureau. (Ramos AOB, pp. 54-59; http://www.census.gov/quickfacts/table/PST045215/0683542; See also *U.S.* v. *Bishop* (1973) 412 U.S. 346.)

Appellant has discussed at length Ms. 251-0083, in the previous argument and will not reiterate the argument here.

Respondent suggests that as to seated juror Ms. 271-9513, that her responses should not be considered, because although her hardship discussion came up prior to the *Batson/Wheeler* motion, she was not a seated juror and thus not properly subject to consideration in this analysis. (RB 91-92, citing *People* v. *Lenix*, *supra*, 44 Cal.4th at p. 624.) Given the trial court's failure to make a sincere and reasoned evaluation of the reasons given, appellant asserts that any further objection would have been futile. (*People* v. *Hill* (1998) 17 Cal.4th 800, 820) And in any event, the responses given by Ms. 271-9513 are informative as to the cumulative lack of consistency as to striking of similarly situated jurors.

Respondent's efforts at demonstrating how Ms. 271-9513, had more life experience, actually contains instances of comparable reasons for striking other Hispanic jurors. For example, respondent cites that Ms. 271-9513 knew a witness in the case, as well as the bailiff in the courtroom, as well as having three brothers in and out of jail for significant charges. (RB 93, citing ART 5ART 1077, 1078-1081.) Knowing witnesses in the case, court personnel and having substantial criminal conduct in her immediate family are actually negatives, and should have been the basis of a strike. Respondent also suggests the fact that Ms. 271-9513 was married with children, bespoke of life experience that Ms. 251-0083, had not yet

acquired. (RB 93, 94.) Respondent's insistence that an adult woman must be both married and has children to be considered to have life experience, smacks of yet another stereotype pertaining to gender bias. (See, e.g. *Catchpole* v. *Brannon*, *supra*, 36 Cal.App.4th at p.245, fn. 2.)

Much of the life experience that Ms. 271-9513 spoke of, including her own brush in with the law, her brothers' multiple convictions, and low expectations of officers who were only expected to take reports with multiple thefts of farm equipment on her property, was not the type of "life experience" that normally speaks well for a juror. (5ART 1079-1081.)

While the State assesses Ms. 271-9513's experience with multiple burglaries at her residence of farm equipment, she noted that the officers had only taken reports, and she in fact had no expectations that they would do anything else because of the area she lived in. (5ART 1079.) Respondent states that despite her low expectations of the police, doing the bare minimum to either locate the stolen property, the people responsible, or prevent the apparently ongoing thefts, she was fine with them simply taking a report, and thus did not have a negative expectation of police. This is an example of how a bias mindset comes into play—even though this seated juror clearly had a negative view of law enforcement when considering the import of her statement-that she expected the police to do

nothing or accomplish nothing as to multiple thefts from her ranch, her statement that she was "fine with that," suggested that she did not have a negative view of law enforcement. However, Mr. 285-2410, because he was improperly stopped and searched, and found that these particular officers were not trustworthy, similarly stated that he did not hold these experiences against all officers, and could be fair in the instant case. (2ART 316, 318; 3ART 493-494.) Respondent provides no explanation as to why this particular seated juror's assertion she had no hard feelings about negative experiences with the law, were more reassuring than the excused Hispanic juror.

Appellant notes at this juncture, that Mr. 285-2410, did not mention that he was mad about the situation until he was probed at length with very detailed questions that Ms. 271-9513 was not subjected to. (2ART 316.) Appellant incorrectly attributes that extensive questioning to the prosecutor, when in fact the trial court undertook that questioning. (Enriquez AOB 48-49.)

As to the comparison between Ms. 271-9513 to Ms. 264-7624, who had two nephews in gangs, respondent minimizes the seated jurors family criminality, stating that they appeared to be "minor in nature and much different than the gang violence experienced by Ms. 264-7624." (RB 100.)

However, one of the seated juror's brothers, described as being "in and out of jail," was serving time at Lerdo State Prison, which could hardly suggest a minor matter. (5ART 1080.)

Respondent makes the judgment call without disclosing its parameters for its conclusion that other seated jurors with criminal experiences did not have the amount and type of criminal exposure of experiences to he same degree when compared to Ms. 264-7624. (RB 101.)

Respondent's position should likewise be considered in a cumulative context. As explained by out Supreme Court, "It is true, of course, that at some points the significance of *Miller-El's* evidence is open to judgment calls, but when this evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination." (*Miller-El* v. *Dretke*, *supra*, 545 U.S. 231, 265.)

Respondent makes other distinctions for the various jurors who had similarities to seated jurors, finding minor differences in those seated jurors. (RB 40, 89-90.)

> "None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. . . . . A per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave Batson inoperable; potential jurors are

> not products of a set of cookie cutters." (*Miller-El* v. *Dretke*, *supra*, 545 U.S. at p. 247, n.6.)

The state does not address this aspect of *Miller-El*. Courts around the country, however, have recognized their obligation to follow *Miller-El*; the notion that jurors must be identical before an inference of pretext may be drawn had been consistently rejected. (See, e.g., *Reed* v. *Quarterman*, *(5th Cir. 2009)* 555 F.3d 364, 376; *United States* v. *Collins* (9th Cir. 2009) 551 F.3d 914, 927 fn.3; *United States* v. *Torres-Ramos* (6th Cir. 2008) 536 F.3d 542, 559.) It should be rejected here as well.

Respondent also draws a distinction between Jurors 246-8219 and 272-3471, excused because they were unaware of gang activity in Wasco, to seated juror Mr. 258-1907, who was likewise unaware of gang activity in his neighborhood. (4ART 900-901.) Appellant has discussed previously that respondent has not demonstrated any logical nexus between not being aware of gang activity in one's locale, as opposed being unwilling to believe that there was any gang activity in their area, which was the conclusion drawn by the prosecutor excusing these jurors. Additionally, Wasco, a highly- populated Hispanic town, was used as a proxy for bias by the prosecutor, as explained in the previous argument.

The trial court's conclusion that the prosecutor's striking most of the Hispanic jurors was unreasonable and erroneous, requiring reversal of the Court of Appeals decision upholding appellant's judgment.

III

THE TRIAL COURT ERRONEOUSLY DENIED THE *BATSON/WHEELER* MOTION INASMUCH AS SOME OF THE REASONS FOR STRIKING FOR TWO OF THE JURORS AMOUNTED TO IMPERMISSIBLE RACIAL PROFILING

Appellant contends here, that not only are the prosecutor's reasons for striking many of the Hispanic venire the result of bias under well-recognized principles discussed above, but also because it appears that reasons given as two of the jurors, Mr. 229-1529 and Mr. 285-2410, negative experiences with law enforcement appear to have been the result of racial profiling. Under well-established principles, the strikes are tainted as a result. Respondent disagrees, splitting its response in two separate parts of its brief, at Argument X, pages 107-109, and Argument XIII, pages 114-116.

Respondent initially argues that the record does not support the conclusion that these two Hispanic males were victims of racial profiling. (RB 107-108.) What respondent omits in its discussion is telling-- both men pulled over while driving by officers under circumstances suggesting less than probable cause. Mr. 229-1529 was stopped near his truck when two officers arrived to talk to him about his truck, then was subjected to the search of his truck by four more officers. (3ART 536-537.) He was never

told why his truck was searched. (3ART 537.) Mr. 285-2410 was told after being pulled over for driving a suspected stolen vehicle that he was stopped because "my description matched", and placed in the back of a patrol car. (2ART 481 3ART 493, 494.) What both these men have in common is that they were both Hispanic males, subjected to extensive detention, and in Mr. 229-1529, his car was subjected to an extensive search by a large number of officers. Mr. 285-2410, was apparently told that he looked like the car thief suspect, which may be safe to assume was a Hispanic male. (3ART 494.) For respondent to conclude that their race had nothing to do with these incidents ignores the actual facts and the reality of racial profiling. Respondent also overlooks appellant's citation to racial profiling data cited by Justice Brown, in her dissent and concurring opinion which concludes that there is there is an undeniable correlation between law enforcement stop-and-search practices and the racial characteristics of the driver. (*People* v. *McKay* (2002) 27 Cal.4th 601, 640.)

Respondent also misconstrues appellant's argument in some very material respects. Initially, appellant did not argue that the prosecutor excused these potential jurors because they had been the victims of racial profiling, as respondent asserts. (RB 108.) As stated in the opening brief, the prosecutor stated that he was excusing them because they had had

negative experiences with law enforcement, which fact is cited as the opening sentence of this issue. (Enriquez AOB, 55, citing 3ART 1059-1060.) The point here, is that these jurors negative experiences smack of racial profiling, which in turn resulted in them being denied their rights as citizens to serve as jurors.

Perhaps more importantly, appellant does not rely on "minority" court positions as the cornerstone of its argument, but instead cites to the majority opinion in *Miller El* v. *Dretke*, *supra*, 545 US. at pp. 237-238, as well as the decision in *Powers* v. *Ohio* (1991) 499, U.S. 400, 402, which confirms that racial bias in the selection of jurors "offends the dignity of persons and the integrity of the courts." Appellant will not reiterate the entirety of its argument, [Enriquez AOB 56-60] inasmuch as respondent has not discussed any of the citations or principles as they relate to this argument. The United States Supreme Court has made it clear that when the choice of jurors is tainted with racial bias, that the credibility of the process is put into question. (*Miller-El* v. *Dretke*, *supra*, 545 US. at p. 238.)

As such, when negative interaction with law enforcement suggests that it is the result of racial profiling, that such interaction with law enforcement becomes a proxy for racial bias, just as much as suggesting that people from certain areas of a town, such as Compton, do not make

good jurors. (see, e.g. *United States* v. *Bishop*, *supra*, 959 F.2d 820 [black juror excused because she lived in Compton, a poor, violent community where residents likely to be 'anesthetized to such violence' was a proxy for bias.) Here, the proxy is negative experiences with law enforcement, where it is apparent that interaction appears to have been triggered by racial bias itself. Racial bias in our courts has deep roots—ascertaining which factors operate as proxy's for bias and eliminating them as constitutionally sound reasons for striking a minority juror, seeks to accomplish the well-established goal of *Batson* and later cases explaining its depth.

Another material misconstruction of appellant's argument is respondent's assertion that the approach should be whether the prosecutor committed an act of discrimination in jury selection through subconscious discrimination. (RB 115.) Appellant has not suggested any such process, but provided an explanation as to how some of the proxies for bias, may seep into the everyday court process without a completely conscious process that it is in fact racial bias. The discussion [Enriquez AOB pp. 62-64] is not meant to be a blueprint for discerning *Batson* error, rather than an explanation of how some of these decisions occur. However, if a justification given by a prosecutor is clearly the result of bias (conscious or otherwise) then it fails as a race neutral justification required for him to

meet that burden under Step 2 of the *Batson* analysis. (*Shirley* v. *Yates* (2015) 807 F.3d 1090, 1110, fn. 26.) And as explained by this court, "When an advocate's peremptory strike is challenged, the trial court must determine whether the advocate allowed his or her calculus to be infected by racial bias and then lied to the court in an attempt to get away with it." (*People* v. *Lenix*, *supra*, 44 Cal.4th 602, 626.)

The resolution that appellant cited was the view that incorporates Justice Marshall's view which holds that "[r]egardless of how many other nondiscriminatory factors are considered, any consideration of a discriminatory factor directly conflicts with the purpose of *Batson* and taints the entire jury selection process." (*Wilkerson* v. *Texas* (1989) 423 US. 924 [dissent from denial of certiorari];*Arizona* v. *Lucas* (Ariz. Ct. App. 2001) 18 P.3d 160, 163 [additional citations in Enriquez AOB, pp.60-61.].)

Based on the foregoing, appellant requests that this court reverse the decision of the Court of Appeal.

CONCLUSION

The "Constitution forbids striking even a single prospective juror for a discriminatory purpose." (*United States* v. *Vasquez-Lopez* (9th Cir. 1994) 22 F.3d 900, 902.) The trial court's erroneous denial of appellant's *Wheeler/Batson* motion is reversible per se. *(People* v. *Wheeler*, *supra*, 22 Cal. 3d at p. 283 ["[N]o inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside."].) This Court need not determine whether the trial court erred in denying the *Batson/Wheeler* motion as to all ten of the challenged, Hispanic prospective jurors. The exclusion of a single juror by peremptory challenge on the basis of race is an error of constitutional magnitude requiring reversal. (*People* v. *Fuentes*, *supra*, 54 Cal. 3d 707, 716, fn. 4; *People* v. *Montiel* (1993) 5 Cal. 4th 877, 909.)

Dated: August 25, 2016,

Respectfully submitted,

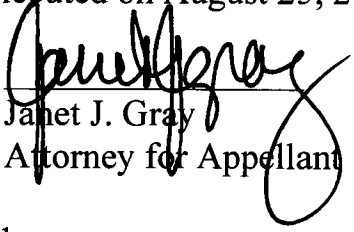
Janet J. Gray
Attorney for Appellant

PEOPLE OF THE STATE OF CALIFORNIA,	)	CASE NO. S224724
	)	
Plaintiff and Respondent,	)	(5DCA F065288/F065481
	)	F065984)
	)	Kern Co. Superior Court
	)	No. LF9190C/LF9190A)
v.	)	
	)	
RAMIRO ENRIQUEZ,	)	
	)	
Defendant and Appellant	)	
AND CONSOLIDATED CASES	)	
	)	

CERTIFICATE OF WORD COUNT

Pursuant to California rules of Court, rule 33, subdivision (b), appellant Ramiro Enriquez certifies, by his counsel of record, Janet J. Gray, that there are 7,559 words in his Reply Brief On The Merits, commencing with the title page of the brief, though excluding the tables, filed in the above-entitled matter. The word count was undertaken with the Mac version of Microsoft Word, version 14.5.5, the same program used to create the brief.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on August 25, 2016.



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PROOF OF SERVICE

People v. Enriquez, S224724
I, Janet J. Gray certify.

I am an active member of the State Bar of California and am not a party to this cause. My business address is P.O. Box 51962, Pacific Grove, California, 93950. On August 25, 2016, I served the foregoing document described as ***APPELLANT ENRIQUEZ'S REPLY BRIEF ON THE MERITS*** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Pacific Grove, California, addressed as follows:

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Janet J. Gray