CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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People v Gutierrez 6/1/17

Jury selection; Batson/Wheeler Motion; Improper Motive for Prospective Juror Exclusion

"This case offers the opportunity to clarify the constitutionally required duties of California lawyers, trial judges, and appellate judges when a party has raised a claim of discriminatory bias in jury selection in a civil or criminal proceeding." (Justice Corrigan, writing for a unanimous Supreme Court)

The underlying facts show that around midnight on July 30, 2011, defendant Ramos became involved in an altercation with Clarence Langston in the parking lot of the Western Nights Motel in Bakersfield. Ramos asked defendants Gutierrez and Enriquez, who had been observing from a balcony, to come down. Ramos said he was going to retrieve a gun to defend himself, and he left the motel on foot. Langston rode away on his bicycle.

Gabriel Trevino testified that after Ramos and Langston left the motel premises, he, along with Enriquez and Gutierrez, got into an SUV driven by Kyle Fuller. At a stop sign, Enriquez said, "Look, there he is, there he is," identifying Langston. Gutierrez exited the vehicle, brandished his firearm, and fired three rounds. Langston was hit with multiple shotgun pellets and suffered nonfatal wounds to his upper body.

The prosecution's gang expert testified that defendants were Sureño gang members, and that the shooting was gang-related. According to the expert, Ramos was a member of the Varrio Bakers, a Sureño gang subset based in Bakersfield. Gutierrez and Enriquez, according to the expert, were members of Varrio West Side Shafter, a different Sureño gang subset based in Shafter. And Trevino testified that he himself was member of Varrio Wasco Rifas, a Sureño gang subset based in Wasco.

On June 6, 2012, a jury convicted Gutierrez and Enriquez of attempted premeditated murder (Pen. Code, §§ 664 & 187, subd. (a)); assault with a firearm (§ 245, subd. (a)(2)); and active participation in a criminal street gang (§ 186.22, subd. (a)). As to those two defendants, the jury found applicable a firearm enhancement (§ 12022.53, subds. (d) & (e)(1)) as to attempted premeditated murder, and a gang enhancement (§ 186.22, subd. (b)(1)) as to attempted premeditated murder and assault with a firearm. The jury deadlocked in deciding whether Ramos committed attempted premeditated murder and assault with a firearm, so the court declared a mistrial as to those counts. Ramos was found guilty of active participation in a criminal street gang, and he thereafter pleaded no contest to making criminal threats and admitted prior convictions. Following a bifurcated court trial, the court found true the prior strike conviction allegations as to Enriquez and Gutierrez.

Gutierrez was sentenced to prison for 30 years to life, plus 27 years. Enriquez was sentenced to prison for 14 years to life, plus 25 years. Ramos was sentenced to prison for 5 years. The Court of Appeal consolidated the appeals for Gutierrez, Ramos, and Enriquez. It unanimously affirmed the judgments in all respects.

All three defendants are Hispanic, and they joined in a ***Batson/Wheeler* motion** toward the end of voir dire proceedings. (*People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79) The motion was brought on the basis of **asserted discriminatory exclusion of Hispanic individuals**. By the time the motion was made, the People had exercised 16 peremptory strikes — 10 of them against individuals identified as Hispanic, either based on appearance or surname. The court observed that four of the prosecutor's challenges against Hispanics were consecutive. There were two Hispanic prospective jurors seated on the panel at the time of the motion.

The People do not dispute that the prosecutor's pattern of challenges showed "a disproportionate number of . . . peremptory challenges against Hispanics." After finding that defendants had established a prima facie case under the *Batson/Wheeler* framework, the court asked the prosecutor to explain the reasons for his challenges. The prosecutor did so for each removed Hispanic panelist. The court individually reviewed eight out of 10 proffered justifications. The court did not individually review the strikes of Prospective Jurors Nos. 2468219 and 2547226. Thereafter, the court made a global finding that the prosecutor's strikes were neutral and nonpretextual. It also found that the prosecutor "paid the same attention to all the jurors in terms of questioning" and "asked appropriate questions" of all prospective jurors. The court denied defendants' motion.

Thereafter, the People struck three more panelists. Defendants individually exercised further peremptory challenges, with counsel for Gutierrez removing one prospective juror previously identified as Hispanic. The final jury included one Hispanic individual. After additional voir dire, two alternate jurors

were selected. Defendants did not renew their *Batson/Wheeler* motion. The Supreme Court granted review on the limited issue of whether the Court of Appeal erred in upholding the trial court's denial of defendants' joint *Batson/Wheeler* motion.

Justice Corrigan began her opinion by noting that peremptory challenges are a longstanding feature of civil and criminal adjudication. But the exercise of even a single peremptory challenge solely on the basis of race or ethnicity offends the guarantee of equal protection of the laws under the Fourteenth Amendment to the federal Constitution. (*Batson v. Kentucky* (1986) 476 U.S. 79; *United States v. Martinez-Salazar* (2000) 528 U.S. 304, 315.) Such conduct also violates a defendant's right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the state Constitution. (*People v. Wheeler* (1978) 22 Cal.3d 258)

At issue in a *Batson/Wheeler* motion is whether any specific prospective juror is challenged on account of bias against an identifiable group distinguished on racial, religious, ethnic, or similar grounds. (*People v. Avila* (2006) 38 Cal.4th 491, 549) Exclusion of even one prospective juror for reasons impermissible under *Batson* and *Wheeler* constitutes structural error, requiring reversal. (*People v. Silva* (2001) 25 Cal.4th 345, 386)

When a party raises a claim that an opponent has improperly discriminated in the exercise of peremptory challenges, the court and counsel must follow a **three-step process**. **First**, the *Batson/Wheeler* movant **must demonstrate a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. The moving party**

satisfies this first step by producing " 'evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.' " (*Avila*, p. 553, quoting *Johnson v. California* (2005) 545 U.S. 162, 170.)

Second, if the court finds the movant meets the threshold for demonstrating a prima facie case, **the burden shifts to the opponent of the motion to give an adequate nondiscriminatory explanation for the challenges**. To meet the second step's requirement, **the opponent of the motion must provide "a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges."** (*Batson*, at p. 98), In evaluating a trial court's finding that a party has offered a neutral basis — one not based on race, ethnicity, or similar grounds — for subjecting particular prospective jurors to peremptory challenge, we are mindful that " 'unless a discriminatory intent is inherent in the prosecutor's explanation,' " the reason will be deemed neutral. (*Purkett v. Elem* (1995) 514 U.S. 765, 768)

Third, if the opponent indeed tenders a neutral explanation, **the trial court must decide whether the movant has proven purposeful discrimination**. (See *Johnson v. California* (2005) 545 U.S. 162, 168.) In order to prevail, **the movant must show it was " 'more likely than not that the challenge was improperly motivated.' "** (*People v. Mai* (2013) 57 Cal.4th 986, 1059.) This portion of the *Batson/Wheeler* inquiry **focuses on the subjective genuineness of the reason**, not the objective reasonableness. (*People v. Reynoso* (2003) 31 Cal.4th 903, 924.) At this third step, **the credibility of the explanation becomes pertinent**. To assess credibility, the court may consider, " 'among other factors, the prosecutor's demeanor; . . . how reasonable, or how improbable, the explanations are; and . . . whether the proffered rationale has some basis in accepted trial strategy.' " (*People v. Lenix* (2008) 44 Cal.4th 602, 613, quoting *Miller-El v. Cockrell* (2003) 537

U.S. 322, 339 (*Miller-El I*).) To satisfy herself that an explanation is genuine, the presiding judge must make "a sincere and reasoned attempt" to evaluate the prosecutor's justification, with consideration of the circumstances of the case known at that time, her knowledge of trial techniques, and her observations of the prosecutor's examination of panelists and exercise of for-cause and peremptory challenges. (*People v. Hall* (1983) 35 Cal.3d 161, 167–168) Justifications that are "implausible or fantastic . . . may (and probably will) be found to be pretexts for purposeful discrimination." The trial court enjoys a relative advantage vis-à-vis reviewing courts, for it draws on its contemporaneous observations when assessing a prosecutor's credibility.

An appellate court will review a trial court's determination regarding the sufficiency of tendered justifications with " 'great restraint.' " (See *People v. Ervin* (2000) 22 Cal.4th 48.) The Justices presume an advocate's use of peremptory challenges occurs in a constitutional manner. (See *People v. Fuentes* (1991) 54 Cal.3d 707, 721) When a reviewing court addresses the trial court's ruling on a *Batson/Wheeler* motion, it ordinarily reviews the issue for substantial evidence. (*People v. McDermott* (2002) 28 Cal.4th 946, 970.) A trial court's conclusions are entitled to deference only when the court made a "sincere and reasoned effort to evaluate the nondiscriminatory justifications offered." (*People v. Burgener* (2003) 29 Cal.4th 833, 864.) What courts should not do is substitute their own reasoning for the rationale given by the prosecutor, even if they can imagine a valid reason that would not be shown to be pretextual. "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. . . . If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." (See *Miller-El v. Dretke* (2005) 545 U.S. 231, 252)

Here, the prosecutor provided justifications for strikes of 10 Hispanic individuals. As to four of these prospective jurors — Prospective Jurors Nos. 2647624, 2408196, 2732073, and 2632053 — the prosecutor cited as at least one reason the fact that they were each either previously affiliated with gangs or had family members who were at some point involved in gang activity. The prosecutor struck Prospective Jurors Nos. 2852410 and 2291529 because they recounted negative experiences with law enforcement. Prospective Juror No. 2468219 was removed because she testified about "living in an area with a lot of gang activity, but that she had not specifically seen," her brother had been accused of a crime, and she previously served as a juror in a criminal case that resulted in a hung jury. What follows in more depth are the circumstances surrounding the strikes of the remaining three Hispanic panelists who were the subject of defendants' *Batson/Wheeler* motion.

The First Prospective Juror

The first was a teacher from the City of Wasco, Prospective Juror No. 2723471 was divorced and without children. Her former husband was a correctional officer. She had other relatives in law enforcement positions, including an uncle who worked for California Highway Patrol. Neither she nor anyone close to her had any connections to gangs. The prosecutor's colloquy with Juror 2723471, in its entirety, was as follows:

"[The prosecutor]: And starting with Ms. 2723471, are there gangs that are active in the Wasco area?

"[Juror 2723471]: No.

"[The prosecutor]: Do you live in the Wasco area?

"[Juror 2723471]: Yes.

"[The prosecutor]: In Wasco itself?
"[Juror 2723471]: Yes, I live in Wasco."

The prosecutor indicated that his decision to challenge Juror 2723471 was "a tough one." The reason for the strike, he said, was that "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." The prosecutor did not specify which of her "other answers" caused him dissatisfaction, nor do the People identify any such responses bearing on her possible reaction to Trevino's testimony. The Justices found no other answers in the record to support the People's position on this point.

The prosecutor had broached the Wasco-related justification a few minutes earlier, during his explanation of his strike of a different Hispanic female, Prospective Juror No. 2408196 (Juror 2408196). He said that that panelist's unawareness of Wasco gang activity "causes a moment of pause when she's going to hear . . . Mr. Trevino freely admits that he's a member of the Varrio Wasco." But the prosecutor struck Juror 2408196 because she also had an uncle who was in a gang and had a cousin who had been murdered.

Regarding Juror 2723471, the court stated: "I checked again, and the prosecutor did pass several times with Ms. 2723471 still on the panel." The court noted that "Ms. 2723471 was excused as a result of the Wasco issue and also lack of life experience." Defendants argue, and the People concede, that the court was partially mistaken: the prosecutor had not enumerated lack of life experience as

a reason for striking Juror 2723471. Accordingly, the sole basis relied upon by the prosecutor for striking this particular panelist was the "Wasco issue."

The Second Prospective Juror

The second prospective Juror No. 2547226 lived in southwest Bakersfield and worked as a service coordinator for mentally disabled individuals. She had two children, and her significant other was a self-employed truck driver. She had been selected to serve on a jury a couple years earlier, but parties reached a plea agreement. She had no gang experience, nor any close relations with gang members.

The prosecutor asked this prospective juror several questions about the jury deliberation process and her understanding of a juror's role. Their exchange included the following excerpt:

"[The prosecutor]: And that's sort of the function of these deliberations. You talk to each other, and you hear what people hear about the evidence, and you see where everyone is, and then ultimately you try to reach a verdict as best you can, do you understand that?

"[Juror 2547226]: Yes.

"[The prosecutor]: As one of 12 jurors, you would have a vote, do you understand that?

"[Juror 2547226]: Yes.

"[The prosecutor]: Okay. You also understand 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, do you understand that?

"[Juror 2547226]: Yes.

"[The prosecutor]: Would you be able to do that? Would you be able to participate in deliberations and listen to everyone else in speaking your mind?

"[Juror 2547226]: Yes.

"[The prosecutor]: You don't think that there's anything about you that's deferential or, you know, want to sit in the background or listen to other people?

"[Juror 2547226]: No, I don't think so.

"[The prosecutor]: Okay. You have no problem with speaking your mind and listening to other people at the same time?

"[Juror 2547226]: I think I do better at listening than speaking my mind out.

"[The prosecutor]: What happens if you don't agree?

"[Juror 2547226]: Then the vote is mine. So I just -- what I'm not in agreement with and decide what I want to say.

"[The prosecutor]: Would you have any problem letting other people on the panel know that you don't agree and here's why?

"[Juror 2547226]: I don't think so."

At first, the prosecutor could not recall why he struck this panelist. Later, consulting a single note, he stated, "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."

The trial court did not make any individualized finding with respect to the removal of this prospective juror. In upholding this strike on direct appeal, the Court of Appeal explained, "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. 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." We note that the prosecutor did not cite as a reason for striking Juror 2547226 her unawareness of the necessary unanimity of a verdict.

When the prosecutor asked Juror 2547226, "Would you be able to participate in deliberations and listen to everyone else in speaking your mind?" she answered, unequivocally, "Yes." Yet the prosecutor continued to probe her on this point, asking whether she considered herself deferential or prone to "sit in the background."

The prosecutor did not cite Juror 2547226's demeanor as a reason for exercising a strike against her. The People argue that the precise phrasing of "I don't think so" in response to a question asking whether this panelist may wish to sit in the background and listen to other people "reasonably could make the prosecutor question her ability to deliberate and state her opinion to others when necessary." During the same panel round in which the prosecutor individually questioned Juror 2547226, the prosecutor engaged Prospective Juror No. 2570137, a non-Hispanic female. The following colloquy transpired between the prosecutor and Juror 2570137:

"[The prosecutor]: And, Ms. 2570137, I asked the other potential jurors if you are impaneled on this jury you're going to be in deliberation with 11 other people, they are going to want and need your input, and you are very soft spoken, would you be able to speak your mind?

"[Juror 2570137]: I hope so.

"[The prosecutor]: Would you be able to listen to other people as well?

"[Juror 2570137]: Yes, definitely that if I can hear them.

"[The prosecutor]: Thank you, Ms. 2570137."

As the record demonstrates, the prosecutor perceived Juror 2570137 to be soft-spoken. Despite her arguably noncommittal answer of "I hope so" in response to the prosecutor's inquiry as to whether she could speak her mind during jury deliberations, the prosecutor did not further press this panelist on her ability to voice her opinions, as he had done with Juror 2547226. Instead, he shortly thereafter thanked Juror 2570137 and moved on to question another prospective juror.

The Third Prospective Juror

The third prospective juror was an elementary school instructional aide, Prospective Juror No. 2510083 lived in southwest Bakersfield. She was unmarried and had no children. She had no prior jury experience. One of her cousins was in the California Highway Patrol and another cousin worked for the highway patrol in Arizona. A third cousin was a workers' compensation paralegal at a local law office.

During the first week of voir dire proceedings, Juror 2510083 informed the court of a potential hardship due to a job interview scheduled the morning of the upcoming Friday. The court advised her to request that the interview be

rescheduled to another time. The next day, Juror 2510083 reported that her interview had been rescheduled for 4:00 p.m. on Friday. In the presence of counsel, the court agreed to make arrangements so that she could attend her interview. She returned the following week for the continuation of voir dire.

When questioned by defense counsel, Juror 2510083 agreed that although people can be trained to make fewer mistakes, nobody is perfect and everyone is capable of making mistakes, even police officers. The prosecutor's individual voir dire of this panelist proceeded as follows:

"[The prosecutor]: You're an instructional aide at an elementary school; is that correct?

"[Juror 2510083]: Hmm-hmm.

"[The prosecutor]: Where generally is the elementary school?

"[Juror 2510083]: It's over close to where I live on the Southwest part of town.

"[The prosecutor]: Okay. And what age students do you usually deal with?

"[Juror 2510083]: They are fourth graders.

"[The prosecutor]: About 10 years old?

"[Juror 2510083]: Yeah, about nine, 10.

"[The prosecutor]: Have you held any work prior to that or is this full-time work?

"[Juror 2510083]: Before I started working there?

"[The prosecutor]: Yes.

"[Juror 2510083]: Yeah, I worked somewhere else full-time.

"[The prosecutor]: What was the name of that place?

"[Juror 2510083]: It was customer service.

"[The prosecutor]: Any type of business in particular or just --

"[Juror 2510083]: For that job?

"[The prosecutor]: Yes.

"[Juror 2510083]: It was a phone company.

"[The prosecutor]: Okay."

In explaining why he struck Juror 2510083, the prosecutor stated, "Ms. 2510083, like I was asking to Mr. 2868617 and Ms. 2478882, I was concerned about her life experience. She's an instructional aide 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. It just didn't seem to me that she had -- again, she had the life experience necessary to consider some of the charges." The prosecutor acknowledged that this strike was a "tough call" because this panelist had relatives in law enforcement. In addition, the prosecutor regarded with favor the fact that she had a cousin working as a paralegal "so she had some idea of the nature and the purpose of these proceedings."

The prosecutor incorrectly stated that this panelist "had also asked for release due to a hardship because of her situation." Juror 2510083's potential job interview conflict was resolved, in the prosecutor's presence, during the first week of voir dire proceedings: she successfully rescheduled her interview and the court agreed to make accommodations so that she could attend. At no time did Juror 2510083 ask to be excused.

In this respect, the Court of Appeal erroneously affirmed the trial court's ruling as to Juror 2510083 on the hardship ground alone. On review, the People

contend — for the first time — that the prosecutor's proffered hardship reason was based on a mistake of fact. Voir dire lasted from Monday, May 7 through part of Wednesday, May 16. Along with the court, four attorneys — the prosecutor and the three defense attorneys — engaged in separate lines of questioning during the jury selection process. Several days, including an intervening weekend, elapsed between the resolution of the panelist's potential interview conflict (on Thursday, May 10, the day before her interview) and the defendants' *Batson/Wheeler* motion (on Tuesday, May 15). The People argue that the prosecutor made a genuine mistake regarding this point of hardship.

In individually reviewing the tendered rationale for striking Juror 2510083, the court remarked, "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 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."

The prosecutor commented that this panelist's "youth was not a reason for exclusion." It appears that the trial court found Juror 2510083 and Prospective Juror No. 2861675 (Juror 2861675) to be comparable in terms of relative youth and lack of life experience, such that the decision to strike one but not the other might require further examination — if those had been the only reasons proffered. But the court apparently found credible the prosecutor's "other reasons" for striking Juror 2510083, i.e., a request for release due to hardship and

a lack of sophistication. The court did not correct the prosecutor's erroneous assertion that this panelist asked to be excused due to a hardship.

The Supreme Court, in Justice Corrigan's written opinion, began by noting that when they assess the viability of **neutral reasons** advanced to justify a peremptory challenge by a prosecutor, both a trial court and reviewing court must examine only those reasons actually expressed. (*People v. Jones* (2011) 51 Cal.4th 346, 365) Defendants argue that the prosecutor's explanation regarding his removal of Juror 2723471 was inadequate because it did not explain why her unawareness of gang activity where she lived made her a bad or undesirable juror. But *Batson* and *Wheeler* do not prescribe such an exacting standard at the second step. The Justices find the reason here to be "clear and reasonably specific," particularly considering that the prosecutor had previously, with respect to another prospective juror, introduced the notion of this Wasco-related rationale and provided somewhat more insight into the logic underlying it.

Defendants also contend that the prosecutor's reasoning was not neutral, because he was effectively using an individual's residence in Wasco as a proxy for Hispanic ethnicity. According to 2010 census data, Wasco is a city of approximately 25,000 residents, 76.7% of whom identify as Hispanic or Latino. Defendants cite *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820 for the proposition that equal protection principles prohibit the utilization of residence as a surrogate for racial stereotypes during jury selection. In *Bishop*, the prosecutor explained that he felt an eligibility worker who lived in Compton was likely to be hostile to law enforcement and desensitized to violence. The court found discriminatory intent to be inherent in these generic "group-based presuppositions" that "one who lives in an area heavily populated by poor black people could not fairly try a black defendant."

The prosecutor's justification here is distinguishable from the justification at issue in *Bishop*. True: in some ways, the purported basis of unawareness of gang activity in one's neighborhood was particular to Wasco, a city whose population is mostly Hispanic or Latino. After all, the prosecutor did not exercise a strike, for example, against non-Hispanic Prospective Juror No. 2581907, a longtime resident of Tehachapi who was unaware of gang problems in his neighborhood. But such a discrepancy is not altogether inconsistent, given the prosecutor's articulated basis referencing Trevino's Wasco gang affiliation. The reason was thus **not inherently based on stereotypical views** of Wasco residents.

The Court finds the Wasco reason to be **facially neutral**. The conclusion is compelled by the high court's decision in *Purkett*, which held that **the second stage of the *Batson/Wheeler* framework "does not demand an explanation that is persuasive, or even plausible.** ' . . . The issue is the facial validity of the prosecutor's explanation.' " (*Purkett*, at p. 768.) Accordingly, the Justices proceed to the third step of the *Batson/Wheeler* inquiry, in order to **assess the credibility of the explanations provided.**

At the third step of the *Batson/Wheeler* analysis, **the trial court evaluates the credibility of the attorney's neutral explanation.** Credibility may be gauged by examining factors including but not limited to "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."

In evaluating the prosecutor's reasons, the court expressly acknowledged the justification for striking (*the First Prospective Juror*) Juror 2723471, noting that

she "was excused as a result of the Wasco issue." It also observed that the prosecutor "did pass several times with Ms. 2723471 still on the panel." Moments later, in denying defendants' *Batson/Wheeler* motion as to all Hispanic panelists, the court made a global finding that "in looking at the totality of the circumstances and judging the reasons given by the prosecutor, I don't find his reasons to be a pretext in this particular case, and he does appear consistent." The prosecutor cited the "Wasco reason" for challenging both Jurors 2723471 and 2408196, the only two panelists who were Wasco residents. **This rationale nonetheless applied only to Hispanic panelists — so the notion that the prosecutor "consistently" cited this reason appears minimally probative on the issue of whether the reason offered by the prosecutor was credible.** The court also made a general finding that the prosecutor had "paid the same attention to all the jurors in terms of questioning whether they are Hispanic or not Hispanic, and he's asked appropriate questions to all the jurors . . . ." Yet the prosecutor questioned only Hispanic panelists about gang activity in Wasco, because only Hispanic panelists stated that they lived in Wasco. No adequate comparison exists between Hispanic and non-Hispanic panelists regarding the prosecutor's questioning specifically about Wasco.

The prosecutor's articulated basis for striking Juror 2723471 was derived solely from three responses to yes/no questions, which established that this panelist lived in Wasco and was not aware of gangs active in the Wasco area. The prosecutor may have conveyed the gist of his concern — that he was uncertain how a prospective juror's unawareness of Wasco gang activity might bear on her response to Trevino — but his explanation left some lucidity to be desired. What the People argue on review is that Trevino was an "important witness" for the prosecution, and "the prosecutor could have reasonably anticipated that Trevino would testify as to his own gang affiliation and criminal

activity in Wasco." They assert, "The fact that a potential juror is unaware of the activity of gangs in Wasco could cause that juror to be biased against Trevino who would testify to the contrary." In consideration of the record of voir dire, such a deduction is tenuous. It is not evident why a panelist's *unawareness* of gang activity in Wasco would indicate a bias against a member of a gang based in Wasco. Although it is possible that a juror unaware of gang activity in Wasco would be discomfited by, and skeptical of, a witness who claimed to be member of a gang based in her neighborhood, **such a conclusion does not strike the Justices as an obvious or natural inference drawn from this panelist's responses**.

It is conceivable — even though the People do not present this argument — that the prosecutor genuinely believed gang activity to be so rampant in Wasco that this panelist must have been either untruthful or uninformed in denying her awareness of Wasco gang activity. If this had been the case, such reasoning should have been articulated by the prosecutor. "**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. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis.**" (See *Miller-El II,* at p. 252.)

The questioning of Juror 2723471 provides little aid in elucidating the reasoning for this strike. The prosecutor asked no follow-up questions to this prospective juror, certainly none about how she would react if she heard that a member of a Wasco gang would testify in this case. No further support for the People's argument is found in this panelist's dialogue with either the court or any of the defense attorneys. The prosecutor's swift termination of individual voir dire of this panelist — even though her responses did not evince a manifest predisposition to disbelieve or dislike Trevino — at least **raises a question as to**

how interested he was in meaningfully examining whether her unawareness of gang activity in Wasco might cause her to be biased against the witness for the People's case.

In the course of responding to voir dire questioning by the court, Juror 2723471 disclosed that she had relatives in corrections and law enforcement positions. Her former husband was a correctional officer, and she had other relatives in law enforcement positions, including an uncle who worked for the California Highway Patrol. The record demonstrates that this prosecutor viewed familial relationships with law enforcement members as a generally desirable characteristic. The prosecutor explained that he considered his strikes of Jurors 2510083 and 2468219 to be a "tough call" because of their relatives in law enforcement. The prosecutor's statements, considered in context, reveal that he viewed familial ties to law enforcement as an offsetting force against characteristics he perceived as negative. The fact that the prosecutor struck Juror 2723471 despite her law enforcement ties — though he expressed his tendency to favor this characteristic with regard to other panelists — is a relevant circumstance in assessing the credibility of the prosecutor's reasoning.

Weighing against a finding of **discriminatory intent**, however, is the fact that the prosecutor passed on challenges five times while Juror 2723471 remained on the panel. She lasted through one full panel round and was the first person struck during the next panel round. These passes may tend to indicate the prosecutor's good faith. (See *People v. Snow* (1987) 44 Cal.3d 216, 225.) Indeed, **the Supreme Court has found that passes while a specific panelist remains on the panel " 'strongly suggest that race was not a motive' " in challenged strikes.** (*People v. Lomax* (2010) 49 Cal.4th 530, 576) But neither that acknowledgement nor the prosecutor's passes themselves wholly preclude a

finding that a panelist is struck on account of bias against an identifiable group, when such a strike occurs eventually instead of immediately

Some **neutral reasons for a challenge** are sufficiently self-evident, if honestly held, such that they require little additional explication. One example: excusing a panelist because she has previously been victim to the same crime at issue in the case to be tried. Moreover, a peremptory challenge may be based on a broad range of factors indicative of juror partiality, even those which are "apparently trivial" or "highly speculative." (*People v. Williams* (1997) 16 Cal.4th 153, 191) Yet when it is not self-evident why an advocate would harbor a concern, the question of whether a neutral explanation is genuine and made in good faith becomes more pressing. That is particularly so when, as here, an advocate uses a considerable number of challenges to exclude a large proportion of members of a cognizable group. **Out of 16 strikes exercised by the prosecution up to that point, 10 were used to remove jurors who shared the same ethnicity as defendants.** Four of these challenges against Hispanics were consecutive. And when the motion was made, 10 out of 12 Hispanic panelists (83 percent) who had entered the jury box were peremptorily struck by the prosecution.

Advocates and courts both have a role to play in building a record worthy of deference. **Advocates should bear in mind the record created by their own questioning** — where the court and opposing counsel have failed to elicit panelist responses in a certain area of interest — as well as their explanations for peremptory challenges. In this instance, it is difficult to lend credence to the prosecutor's concern about "how Juror 2723471 would respond when she hears that Gabriel Trevino is from a criminal street gang" when his brief questioning of this panelist failed to shed light on the nature of his apprehension or otherwise

indicate his interest in meaningfully examining the topic, and the matter was far from self-evident.

The court, too, has its own obligations under the progeny of *Batson* and *Wheeler*. "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.) The court here acknowledged the "Wasco issue" justification and deemed it neutral and nonpretextual by blanket statements. It never clarified why it accepted the Wasco reason as an honest one. Another tendered basis for this strike, the reference to the prospective juror's "other answers" as they related to an expectation of her reaction to Trevino, was not borne out by the record — but the court did not reject this reason or ask the prosecutor to explain further. In addition, the court improperly cited a justification not offered by the prosecutor: a lack of life experience. On this record, the Justices are unable to conclude that the trial court made "a sincere and reasoned attempt to evaluate the prosecutor's explanation" regarding the strike of Juror 2723471. The court may have made a *sincere* attempt to assess the Wasco rationale, but it never explained why it decided this justification was not a pretext for a discriminatory purpose. Because the prosecutor's reason for this strike was not self-evident and the record is void of any explication from the court, **the record does not show under these circumstances that the court made a *reasoned* attempt to determine whether the justification was a credible one.**

Though an appellate court will exercise great restraint in reviewing a prosecutor's explanations and typically afford deference to a trial court's *Batson/Wheeler* rulings, the Justices can only perform a meaningful review when the record contains evidence of solid value. Providing an adequate record may

prove onerous, particularly when jury selection extends over several days and involves a significant number of potential jurors. It can be difficult to keep all the panelists and their responses straight. Nevertheless**, the obligation to avoid discrimination in jury selection is a pivotal one.** It is the duty of courts and counsel to ensure the record is both accurate and adequately developed.

Excluding by peremptory challenge even "a single juror on the basis of race or ethnicity is an error of constitutional magnitude." (*Silva*, at p. 386.) The trial court's ruling — its finding that defendants had not met their burden of proving intentional discrimination with respect to the prosecutor's exclusion of Juror 2723471 — was unreasonable in light of the record of voir dire proceedings. The unanimous Justices' conclusion renders it unnecessary to determine whether the trial court erred in denying the *Batson/Wheeler* motion as to other Hispanic panelists. Because the court's denial of defendants' motion is unsupported, at least regarding Juror 2723471, the Supreme Court concludes that defendants were denied their right to a fair trial in violation of the equal protection clause of the federal Constitution and their right to a trial by a jury drawn from a representative cross-section of the community under the state Constitution. (*Batson*, at pp. 84–89; *Wheeler*, at pp. 276–277.)

When a court undertakes **comparative juror analysis**, it engages in a comparison between, on the one hand, a challenged panelist, and on the other hand, similarly situated but unchallenged panelists who are not members of the challenged panelist's protected group. (See *Miller-El II*, at p. 241.) In this case, **a comparative analysis would ask whether the prosecutor's justification for striking one Hispanic individual applies just as well to an otherwise similarly situated non-Hispanic individual who is permitted to serve on the jury.** The high court has held that comparative analysis may be probative of purposeful

discrimination at *Batson*'s third stage. (See *Miller-El II*, at p. 241.) The individuals compared need not be identical in every respect aside from ethnicity: "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 II*, at p. 247, fn. 6.)

In its review of the prosecutor's justifications, the trial court engaged in some comparative juror analysis. Regarding removed Hispanic female Juror 2510083, the court pointed out a similarly situated non-Hispanic male who was still on the panel (and who would sit on the jury), Juror 2861675. The court commented, "Mr. 2861675 is young. He's the only one that I find similarly situated perhaps to . . . 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."

The court endeavored to identify nonchallenged jurors who were similarly situated to challenged jurors in other respects. For the most part, it found no adequate comparisons. The court noted that the prosecutor had been consistent in excusing jurors who had "grown up in gang areas" or whose relatives "have been involved in criminal gang activities." The court also found that the prosecutor had been consistent in excusing prospective jurors who mentioned being upset about negative experiences with law enforcement. In other words, the court did not identify any panelists similarly situated as to those gang-related life experiences or as to negative encounters with law enforcement who had avoided a peremptory challenge by the prosecutor.

On direct appeal, defendants urged the Court of Appeal to engage in comparative juror analysis. The court declined, stating that "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." ' "

Defendants argue that the Court of Appeal erred in refusing to undertake comparative juror analysis. By avoiding comparative juror analysis in this context, the Court of Appeal went against the grain of established holdings from both our Supreme Court and the high court, which recognize comparisons between panelists who are challenged and those who are not to be valuable tools in determining the credibility of explanations. (*Foster v. Chatman* (2016) ___ U.S. ___, ___ [136 S.Ct. 1737, 1750]; *Snyder v. Louisiana* (2008) 552 U.S. 472, 483)

The appellate court reached its erroneous conclusion by relying on an excerpt from *People v. Johnson* (1989) 47 Cal.3d 1194, 1220, which suggested that comparative analysis performed by a reviewing court is disfavored as impractical and insufficiently deferential to the trial court. But subsequent decisions have superseded *Johnson* in this respect. What the California Supreme Court held in *Lenix* is that "**evidence of comparative juror analysis *must* be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons.**" (*Lenix*, at p. 622) The Justices remain mindful that comparative analysis is subject to inherent limitations, especially when performed for the first time on appeal. But it was error for the Court of Appeal to categorically conclude that a court should not undertake a comparative analysis for the first time on appeal — regardless of the adequacy of the record. The Court of Appeal also erred in declining to review the panelist comparison that *had* been made by the trial court,

the comparison between Jurors 2510083 and 2861675. The Supreme Court will overrule *People v. Johnson* (1989) 47 Cal.3d 1194 to the extent it is inconsistent with this opinion.

Counsel have a role to play in ensuring that the record of proceedings sufficiently supports neutral, credible justifications for strikes of prospective jurors. But the ultimate responsibility of safeguarding the integrity of jury selection and our justice system rests with courts. (*Wheeler*, at p. 272.) For at least one excluded panelist in this case, the record does not permit a finding that the trial court met its obligations to make " 'a sincere and reasoned attempt to evaluate the prosecutor's explanation' " and "clearly express its findings." (*Silva*, at p. 385.) In light of the voir dire record, the Justices conclude that the trial court erred in denying defendants' *Batson/Wheeler* motion. In addition, the Court of Appeal erred in refusing to conduct comparative juror analysis. The Supreme Court will reverse the judgment of the Court of Appeal and remand for further proceedings consistent with this opinion.

Justice Liu authored a separate concurring opinion, further discussing the *Batson/Wheeler* rationale and the basis for the Supreme Court's ruling.

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