IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. SHAWN OTIS HERNANDEZ, Defendant and Appellant.	Court of Appeal No. B333071 Superior Court No. 2023000637

APPEAL FROM THE SUPERIOR COURT OF VENTURA COUNTY

Hon. Catherine Voelker, Judge

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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ARGUMENT

I. TRIAL COUNSEL VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGE TO REMOVE PROSPECTIVE JURORS J.R.R. AND M.R. BASED ON THEIR RACE OR HISPANIC ETHNICITY AND J.R.R. AND M.R. BASED ON THEIR GENDER UNDER CODE OF CIVIL PROCEDURE SECTION 231.7.

A. Background.

Appellant was 31 years old at the time of the offenses

and has a Spanish surname. (Prob. Report at 1.) The victim, Janice Crosson, was 70 years old at the time of the offenses and does not have a Spanish surname. (Prob. Report at 2.)

Trial counsel made a motion to dismiss under *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). He argued the prosecutor used peremptory challenges to remove three prospective jurors (W.R., J.R.R., C.S.) and anticipated removing a fourth juror (M.R.) based on group bias because they were under 23 or 25. (Aug. 3RT 189-190.)

The trial court determined that age is a cognizable group under section 231.5 (Aug. 3RT 189) and stated: "[I]t's not really a Batson-Wheeler. . . It's really a [Code of Civil Procedure section] 231.7 process that we need to engage in at this juncture." (Aug. 3RT 191.) Counsel responded, "Right." (Aug. 3RT 191.) After the prosecutor stated his reasons, the court denied "the 231.7 objection" to the prosecutor's use of peremptory challenges against J.R.R. and W.R. (Aug. 3RT 208-209; AOB 50-52 [detailing findings].)

1. J.R.R.

Like appellant, J.R.R. was a male prospective juror with a Spanish surname. (AOB 54, citing Aug. 2RT 19, 23-24 [J.R.R.'s Spanish surname]; Code Civ. Proc.[1], § 231.7, subd. (a) [prohibiting peremptory challenge based on perceived race, ethnic membership, gender]; see *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1156, fn. 2 ["Spanish surnames may identify Hispanic individuals, who are members of a cognizable class for purposes of *Batson*/*Wheeler* motions"]; *People v. Uriostegui* (2024) 101 Cal.App.5th 271, 279.) He was young and unemployed, and submitted a hardship request because he was looking for a job. (Aug. 2RT 3, 63, 91; Aug. 3RT 23, 190, 193; Aug. 1CT 85-86.)

J.R.R. stated that if selected for the jury, he would give his full attention to the case. (Aug. 2RT 64.) He could put aside from his mind that he is missing out on money or potential job opportunities. (Aug. 2RT 91.) J.R.R. did not

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[1] Further statutory references are to the Code of Civil Procedure unless otherwise stated.

have any hesitation in his ability to follow the laws given on the presumption of innocence, proof beyond a reasonable doubt, defendant's right not to testify, and circumstantial and direct evidence. (Aug. 2RT 24.) He had previously served on a civil jury that had reached a verdict. (Aug. 2RT 3, 64.)

Trial counsel objected to the prosecutor's peremptory challenge of J.R.R. because he was 22 and unemployed, and the trial court did not excuse him based on his hardship request. (Aug. 3RT 189-190.) But counsel did not object based on J.R.R.'s race or Hispanic ethnicity and male gender.

The prosecutor acknowledged that he had exercised peremptory challenges against five male jurors, including J.R.R. and W.R., when the trial court overruled the objections. (Aug. 3RT 196; see also Aug. 3RT 118, 133, 157, 170; AOB 49-50.) He stated: "I know counsel has brought up an age-based 231.7. I would also like for the record to be noted that . . . Particularly for four of the five based on what I can perceive, they are white males." (Aug 3RT 196.) Given

the prosecutor's statements and J.R.R.'s Spanish surname, J.R.R. was likely the one non-white male juror among the five male jurors removed by the prosecutor. (*People v. Gutierrez, supra,* 2 Cal.5th at p. 1156, fn. 2 ["Spanish surnames may identify Hispanic individuals"].)

The prosecutor stated he exercised a peremptory challenge to J.R.R. because his hardship waiver stated that he would be "actively missing interviews potentially or coming up with a revenue stream." (Aug. 3RT 192.) His removal of J.R.R. was consistent with the strikes of two other prospective jurors (T.G. and J.K.) who had filled out hardship waivers based on employment and who were older than 25. (Aug. 3RT 191-192.) Additionally, the prosecutor "particularly paid attention to" J.R.R.'s tardiness because he arrived "four to five minutes after everyone else was here." (Aug. 3RT 209-210.)

The trial court found the prosecutor's stated reasons were "supported by the record, the hardship questionnaires" and also found that none of reasons were presumptively

invalid. (Aug. 3RT 206.) As for J.R.R.'s alleged tardiness, the trial court did not see it because he had not taken the bench. (Aug. 3RT 210.)

Appellant submitted in Argument II.C. to II.E. of the opening brief that: (1) the prosecutor's reason for striking J.R.R. was based in part on his lack of employment, a presumptively invalid reason under section 231.7, subdivision (e)(11) (AOB 52-55); (2) the prosecutor's contrary reasons and trial court's findings failed to overcome the presumption of invalidity under subdivisions (e) and (f) (AOB 55-58); and (3) the court's findings crediting the prosecutor's reasons were unsupported by substantial evidence (AOB 58-63).

2. W.R.

W.R. was a young, unemployed male college student who lived with his parents. (Aug. 2RT 42.) During childhood, he developed a friendship with a friend's father who was a sheriff. (Aug. 2RT 43.) The trial court asked whether his friendship with the friend's father "might influence [his]

ability to assess a police officer's testimony the same you would any other witness" and W.R. answered: "I don't think I'm biased towards that." (Aug. 2RT 43.) W.R. could set aside his experience with the friend's father and treat all witnesses equally. (Aug. 2RT 112.)

W.R. could follow the laws the trial court discussed. (Aug. 2RT 43-44, 112.) He could follow instructions and not discuss the case with anyone and listen to all testimony and decide the case after hearing all facts. (Aug. 2RT 82.) W.R. would not "change or make a vote simply because [he wanted] to go along with anybody else." (Aug. 2RT 82.)

Trial counsel objected to the prosecutor's removal of W.R. because he was 19 years old and unemployed. (Aug. 3RT 190.) But counsel did not object based on W.R.'s male gender. (See Aug 3RT 196 [prosecutor exercised peremptory challenges against five male jurors].)

The prosecutor stated that he "kicked" W.R. because he had "serious reservations" about the juror's attentiveness. W.R.'s head is "consistently down" and his eyes were closed

"throughout this process." (Aug. 3RT 196; see also Aug. 3RT 200-201 [W.R. was inattentive because he spent "a substantial part" of proceedings with his head down and "made basically no eye contact with anyone"].)

The trial court confirmed that W.R.'s head was down unless he spoken to by either the prosecutor or defense counsel, but the court did not confirm W.R.'s inattentiveness. (Aug. 3RT 201; Aug. 2RT 84 ["I don't know what his eyes are doing when his chin is down. He was making eye contact with Mr. Zaehringer, responsive to the question"].) The court nonetheless found the parties "agreed as to [W.R.'s] demeanor in the courtroom" and none of the prosecutor's stated reasons were presumptively invalid. (Aug. 3RT 206.) W.R.'s "behavior" was corroborated by the record. (Aug. 3RT 209.)

Appellant submitted in Argument I.D. and I.E. of the opening brief that: (1) the prosecutor cited W.R.'s inattentiveness, a presumptively invalid reason under section 231.7, subdivision (g), in both the confirmation and

explanation stages and the presumption remained unrebutted because the trial court failed to confirm W.R.'s inattentiveness at either stage (AOB 38-41) and (2) the prosecutor's cited reason of W.R.'s "behavior" was uncorroborated by the record or the court's observations (AOB 38-44).

3. M.R.

M.R. was a young college student, who like appellant and J.R.R., had a Spanish surname. (AOB 77, citing Aug. 3RT 189-190; § 231.7, subd. (a); *People v. Gutierrez, supra,* 2 Cal.5th at p. 1156, fn. 2; *People v. Uriostegui, supra,* 101 Cal.App.5th at p. 279; see Aug. 3RT 196 [prosecutor stating that he struck four "white males"].) Like J.R.R. and W.R., she was also unemployed. (AOB 77, citing Aug. 3RT 171, 190; § 231.7, subd. (e)(11); *Uriostegui,* at p. 280.)

M.R. studied criminal justice online at Colorado Mesa University. (Aug. 3RT 176-177.) She was considering becoming a probation officer and her coursework did not focus on criminal matters but focused on community policing

and corrections. (Aug. 3RT 184-185.) M.R. took a basic class on juvenile justice geared towards restorative justice and not necessarily punishment. (Aug. 3RT 182.) Her coursework involved "basic situations. Nothing too in depth." (Aug. 3RT 181.) She was "[j]ust learning what the law is in a particular state" in topics like landlord cases and capital punishment cases. (Aug. 3RT 181-182; see also AOB 64-68 [detailing voir dire responses].)

M.R. could follow the laws the trial court outlined for her and the other jurors regardless of what she may have learned in school and could be fair and impartial in the case. (Aug. 3RT 172, 177-179.) She understood that what she may have learned at school is not the law that applies in the case and would do no of her own research into the law. (Aug. 3RT 178.) M.R. also could set aside the coursework that deals with a particular point of view and focus on the evidence she heard in the case. (Aug. 3RT 182-183.) She would evaluate a police officer like any other witness and would not consider punishment at all. (Aug. 3RT 178-179, 185; AOB 75-76.)

Defense counsel objected to the prosecutor's anticipated removal of M.R. because she was under 23 or 25, was an unemployed student, and none of her statements showed bias against either party. (Aug. 3RT 189-191.) But counsel did not object to the possible excusal of M.R. based on her race or Hispanic ethnicity.

The trial court told the prosecutor to state his reasons for striking M.R. "[b]ecause we will inevitably be having that discussion." (Aug. 3RT 197.) The prosecutor stated his reason for removing M.R. was not age-based, but because "she's studying criminal justice" and "some of the coursework she's taken in terms of steering away from punishment." (Aug. 3RT 197.) He had also removed prospective juror T.G., a lawyer who researched criminal law and had knowledge of criminal justice, who was older than 25 years. (Aug. 3RT 197-198.)

The trial court did not overrule defense counsel's objection at the section 231.7 hearing. (Aug. 3RT 208-209; Aug. 3RT 208 [defense counsel stating, "I have nothing to

say at this point" because prosecutor has not yet exercised the challenge].) The court still stated: "Based on [M.R.'s] appearance, cannot say if she's over 25 or under 25. I don't feel comfortable making that gauge based upon her appearance. I just don't know." (Aug. 3RT 202.)

After the hearing, the prosecutor struck M.R. (Aug. 3RT 191, 219.) Defense counsel did not request a ruling from the court on his objection. (Aug. 3RT 219.)

In Argument III of the opening brief, appellant submitted that trial counsel's failure to obtain a ruling on his objection to the prosecutor's exercise of peremptory challenge to remove M.R. violated his Sixth Amendment right to effective assistance of counsel. (AOB 68-84.) The prosecutor's reasons for striking M.R. were unsupported by substantial evidence. (AOB 72-77 [Arg. III.C.].) At the same time, the trial court's inability to determine M.R.'s age was based on a presumptively invalid reason under section 231.7, subdivision (e)(9) (personal appearance), and the court made contrary findings related to two seated jurors in similar

circumstances. (AOB 78 [Arg. III.D.].)

B. Applicable standards.

1. Section 231.7

"In 2020, the Legislature responded to deficiencies in our *Batson* jurisprudence by overhauling the legal framework for peremptory strikes in order 'to put into place an effective procedure for eliminating the unfair exclusion of potential jurors based on race' or other categories." (*People v. Nadey* (2024) 16 Cal.5th 102, 193-194 (dis. opn. of Liu, J.), quoting Stats. 2020, ch. 318, § 1 subd. (a) and citing Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3070 (2019–2020 Reg. Sess.), as amended May 4, 2020, pp. 8-9; § 231.7.) It found, "peremptory challenges are frequently used in criminal cases to exclude potential jurors from serving" based on their perceived "race, ethnicity, gender, . . ." and "exclusion from jury service has disproportionately harmed African Americans, Latinos, and other people of color." (Stats. 2020, ch. 318, § 1 subd. (b).) Section 231.7, thus provides: "A party shall not use a peremptory challenge to

remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, . . . or the perceived membership of the prospective juror in any of those groups." (*Id.* at subd. (a).)

The Legislature also found that "requiring proof of intentional bias renders the procedure ineffective and that many of the reasons routinely advanced to justify the exclusion of jurors from protected groups are in fact associated with stereotypes about those groups or otherwise based on unlawful discrimination." (Stats. 2020, ch. 318, § 1 subd. (b).) Thus, section 231.7 "designates several justifications as presumptively invalid and provides a remedy for both conscious and unconscious bias in the use of peremptory challenges." (*Ibid.*)

To overcome the presumption of invalidity, the party exercising the peremptory challenge must show "by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to" the prospective juror's perceived "race, ethnicity, gender, . . . "

and the reasons "bear on the prospective juror's ability to be fair and impartial in the case." (§ 231.7, subd. (e).) The factfinder must then determine that "it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case." (§ 231.7, subd. (f).)

Our Legislature further declared that section 231.7 must "be broadly construed to further the purpose of eliminating the use of group stereotypes and discrimination, whether based on conscious or unconscious bias, in the exercise of peremptory challenges." (Stats. 2020, ch. 318, § 1(c) .)

2. Effective assistance of counsel.

The Sixth Amendment of the United States Constitution and article I, section 15 of the California Constitution guarantee a criminal defendant a right to effective assistance of counsel. (*Strickland v. Washington*

(1984) 466 U.S. 668, 686 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218; *People v. Pope* (1979) 23 Cal.3d 412, 422.) To establish ineffective assistance of counsel violating the Sixth Amendment, a defendant must show: (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) but for counsel's failings, it is reasonably probable the result would have been more favorable to defendant. (*Strickland,* at p. 687; *Ledesma,* at p. 216.)

Trial counsel's decisions are evaluated in the context of the available facts. (*Strickland, supra,* 466 U.S. at p. 690.) And when, as here, there could be no satisfactory explanation for counsel's conduct, the ineffective assistance claim may be made on direct appeal. (*Id.* at pp. 685-686; *People v. Pope, supra,* 23 Cal.3d at p. 426; *People v. Ledesma, supra,* 43 Cal.3d at p. 218; *People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

3. Standard of review.

A criminal defendant has the burden of proving ineffective assistance by a preponderance of the evidence. (*People v. Foster* (1992) 6 Cal.App.4th 1, 11.) The question is whether a reasonable lawyer could have acted as counsel did in the same circumstances. (*People v. Jones* (2010) 186 Cal.App.4th 216, 235.) Whether counsel's performance was deficient, and whether any deficiency prejudiced defendant, are mixed questions of law and fact subject to this Court's independent review. (*Id.* at pp. 235-236, quoting *Strickland*, *supra,* 466 U.S. at p. 698; *In re Gay* (2020) 8 Cal.5th 1059, 1073.)

C. Defense counsel was ineffective when he failed to assert section 231.7 objections to the prosecutor's use of peremptory challenges to remove J.R.R. and M.R. based on their race or Hispanic ethnicity, and to remove J.R.R. and W.R. based on their male gender.

When evaluating a claim of ineffective assistance, the reviewing court is required to "accord great deference to the

tactical decisions of trial counsel." (*People v. Mayfield* (1993) 5 Cal.4th 142, 199.) But "'deference is not abdication.'" (*People v. Ledesma, supra,* 43 Cal.3d at p. 217, citation omitted.) "[I]t must never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts or omissions." (*Ibid.*) And a reasonably competent attorney preserves arguably meritorious issues for appellate review. (*People v. Jackson* (1986) 187 Cal.App.3d 499, 506 ["Competent counsel, however, would have at least taken steps to preserve the point for appeal"]; see *People v. Pope, supra,* 23 Cal.3d at p. 426 [conviction "should be reversed" when counsel fails to research law or investigate facts "in the manner of a diligent and conscientious advocate"].)

Trial counsel objected to the prosecutor's use of peremptory challenges against J.R.R., W.R., and M.R. based on their youthful age. (Aug. 3RT 189-191.) But he failed to assert all meritorious objections under section 231.7 based on J.R.R. and M.R.'s race or Hispanic ethnicity and based on

J.R.R. and W.R.'s gender. (§ 231.7, subd. (a).) He failed to do so even though: (1) the prosecutor exercised peremptory challenges against five males, four of whom were "white" (Aug. 3RT 196; AOB 49-50); (2) the trial court found that appellant was not in the "same perceived cognizable group" as J.R.R. and W.R. based only on age (Aug. 3RT 202); (3) appellant, J.R.R., and W.R. share the male gender; and (4) appellant, J.R.R., and M.R. have Spanish surnames (I.A., *ante*).

Since counsel did object, there can be no conceivable tactical reason for counsel's failure to raise every meritorious objection and preserve the issues for appeal. (See *People v. Asbury* (1985) 173 Cal.App.3d 362, 366 ["If counsel objected on the grounds of insufficient evidence, there is no reason why he should not have done so on the grounds of collateral estoppel—except for failing to realize that such an objection was available"]; *People v. Jackson, supra,* 187 Cal.App.3d at p. 506 [competent counsel "would have at least taken steps to preserve the point for appeal"].) Appellant had nothing to

gain from counsel's failure to assert all meritorious objections under section 231.7 and preserve the issues for appeal.

Counsel failed to act in the manner of a diligent and conscientious advocate and appellant has been deprived of adequate assistance of counsel.

D. Counsel's failure was prejudicial.

Prejudice exists when there is a "a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (*People v. Centeno* (2014) 60 Cal.4th 659, 676, quoting *Strickland, supra,* 466 U.S. at pp. 691-694.) The test does not depend on outcome and appellant does not have to show that counsel's "deficient conduct more likely than not altered" the result. (*Strickland, supra,* at p. 693; *People v. Howard* (1987) 190 Cal.App.3d 41, 48 [prejudice exists when there is "a significant but something-less-than 50 percent likelihood of a more favorable" result absent the error].) Instead, reasonable probability is "'merely a *reasonable chance*, more

than an *abstract possibility*.' [Citation.]" (*People v. Wilkins* (2013) 56 Cal.4th 333, 351, citation omitted, emphasis in original.)

If the contentions raised in Arguments I.D. & I.E. (W.R.), II.C. to II.E. (J.R.R.), and III.C to III.E. (M.R.) of the opening brief are meritorious, appellant has met his burden to show that he was prejudiced by counsel's deficient performance. There can be no tactical reason for the deficiencies (I.C., *ante*) and section 231.7 precludes the finding of harmless error. (*People v. Uriostegui, supra,* 101 Cal.App.5th at p. 279.) An erroneous denial of a section 231.7 objection "shall be deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial." (§ 231.7, subd. (j); AOB 63, 84.)

The Legislature enacted section 231.7 with "the goal of *eliminating* the use of group stereotypes and discrimination *in any form or amount*." (*People v. Caparrotta* (2024) 103 Cal.App.5th 874, 897, citing Stats. 2020, ch. 318, § 1, subd. (c); Stats. 2020, ch. 317, § 2, subds. (h), (j)), italics in

original.) Accordingly, there is more than an abstract chance that the outcome of the trial would have been more favorable had counsel asserted all meritorious objections under section 231.7 based on race, ethnicity and gender. (*Strickland, supra,* 466 U.S. at p. 687.)

As for Hispanic male juror J.R.R., the prosecutor's reasons and the trial court's findings failed to overcome the presumption of invalidity based on J.R.R.'s lack of employment under section 231.7, subdivisions (e) and (f). (AOB 52-58 [Arg. II.C. & D.]; see *People v. Uriostegui, supra,* 101 Cal.App.5th at p. 280 [a "blanket claim" of facially neutral reason for excusing juror cannot be based in part on presumptively invalid reasons; permitting prosecution "to bury presumptively invalid reasons under an overarching facially neutral reason . . . . without the required findings under section 231.7, subdivision (f), would render section 231.7, subdivision (e) ineffective"].)

As for male juror W.R., the prosecutor's presumptively invalid reason of inattentiveness under section 231.7,

subdivision (g), remained unrebutted because the trial court did not confirm that W.R. was inattentive at either the confirmation or explanation stages. The prosecutor's reason of W.R.'s "behavior" was also uncorroborated by the record or the court's observations. (AOB 38-44 [Arg. I.D. & I.E.]; see *People v. Caparrotta, supra,* 103 Cal.App.5th at pp. 896-897 [objection must be sustained "whenever any reason identified for the challenge becomes conclusively invalid under section 231.7, subdivision (g)"].)

As for Hispanic juror M.R., the trial court relied on a presumptively invalid reason based on her personal appearance under section 231.7, subdivision (e)(9), when it stated that it could not determine the juror's age. (AOB at 78.) Had trial counsel asserted a section 231.7 objection based on M.R.'s race or Hispanic ethnicity and secured a ruling on the objection (AOB 79-84 [Arg. III.E & F.]), there is more than an abstract possibility that the court would have determined that M.R. was Hispanic based on her Spanish surname (and not her personal appearance) and granted the

objection because the prosecutor's reasons were unsupported by substantial evidence. (See *People v. Gutierrez, supra,* 2 Cal.5th at p. 1156, fn. 2 ["Spanish surnames may identify Hispanic individuals"]; AOB 72-77 [Arg. III.C.].)

But even if the trial court would not have granted the objections to the prosecutor's removal of J.R.R., W.R., and M.R., the erroneous denials present meritorious issues on appeal. When there is "at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result," the error is prejudicial. (*People v. Mower* (2002) 28 Cal.4th 457, 484.)

That said, the record discloses issues with the seated jurors and indications that deliberations were close. (AOB 82-83, citing 3RT 153; 4RT 219, 298-299, 337 [Juror 4 was inattentive, overslept, tardy by 45 minutes, and possibly dozing; Juror 7 appeared to struggle with staying awake]; AOB 83, citing 8RT 672-673 [report that two jurors were talking about the case in the hallway]; AOB 83, citing 8RT 668, 1CT 185 [Juror 9 stated that he was not voting guilty on

counts 1 and 2, and requested clarification on count 2].)

Trial counsel's failures constituted ineffective assistance, and the Court should remedy the issue here.

II. THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S OBJECTIONS TO THE REMOVAL OF W.R., J.R.R., AND M.R. ON THE BASIS OF THEIR AGE BY USING THE INCORRECT STANDARD AND VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHT TO EQUAL PROTECTION AND STATE CONSTITUTIONAL RIGHTS TO A JURY DRAWN FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY AND TO DUE PROCESS.

A. Background and introduction.

Appellant made a *Batson-Wheeler* motion for mistrial because the prosecutor exercised peremptory challenges to prospective jurors W.R., J.R.R., C.S., and anticipated challenge to M.R. based on their youthful age. (Aug. 3RT 189-190.) Out of the prosecutor's six peremptory challenges, these four prospective jurors were under the age of 23 or 25. (Aug. 3RT 189.)

The trial court found that age is a cognizable group

under section 231.5 (Aug. 3RT 189) but stated, "it's not really a Batson-Wheeler. . . It's really a 231.7 process that we need to engage in at this juncture." (Aug. 3RT 191.)

The trial court asked the prosecutor to state his reasons for removing the jurors. (Aug. 3RT 191.) And when stating his reasons, the prosecutor stated that he exercised peremptory challenges against five males, four of whom were "white males." (Aug. 3RT 196; AOB 49-50; I.A., *ante*.)

After the prosecutor stated his reasons, the trial court found that J.R.R. was under 25 (Aug. 3RT 201) and W.R. was 19 (Aug. 3RT 202). But it could not determine M.R.'s age based on her appearance. (Aug. 3RT 202.)

The trial court stated: "The standard for this hearing is whether there's a substantial likelihood an objective observer would view the cognizable group . . . as one factor in use of the challenge." (Aug. 3RT 202.) It then overruled "the 231.7 objection" as to W.R. and J.R.R. under section 231.7. (Aug. 3RT 208-209.)

Respondent argues forfeiture and claims section 231.7 does not apply to age discrimination (RB 30-32) and the "trial court and the parties erroneously applied a section 231.7 analysis." (RB 30). If this Court agrees with respondent, then the trial court erroneously denied the defense objections to the removal of the three prospective jurors by using an incorrect legal standard. The erroneous denials violated appellant's state constitutional rights to a jury drawn from a representative cross-section of the community and to due process of law, requiring reversal. (U.S. Const., amend. XIV; Cal. Const., art. I, §§ 7, 15, 16; § 231.5; Gov. Code, § 11135; *Batson, supra,* 476 U.S. 79; *Wheeler, supra,* 22 Cal.3d at pp. 276-277.)

B. Applicable standards.

1. *Batson-Wheeler*.

When a motion is made under *Batson-Wheeler,* the trial court and counsel engage in a three-step process. (*People v. Gutierrez, supra,* 2 Cal.5th at p. 1158.) "First, the party objecting to the strike must establish a prima facie

case by showing facts sufficient to support an inference of discriminatory purpose." (*People v. Reed* (2018) 4 Cal.5th 989, 999, citing *Johnson v. California* (2005) 545 U.S. 162, 168; accord *Unzueta v. Akopyan* (2022) 85 Cal.App.5th 67, 79.) "Second, if the objector succeeds in establishing a prima facie case, the burden shifts to the proponent of the strike to offer a permissible, nonbiased justification for the strike." (*Ibid.*) "Finally, if the proponent does offer a nonbiased justification, the trial court must decide whether that justification is genuine or instead whether impermissible discrimination in fact motivated the strike." (*Ibid.*)

But when a trial court "solicits an explanation of the strike without first declaring its views on the first stage," the reviewing court infers an "'implied prima facie finding' of discrimination and proceed[s] directly to review of the ultimate question of purposeful discrimination." (*People v. Scott* (2015) 61 Cal.4th 363, 387, fn. 1, citation omitted; see also *People v. Smith* (2018) 4 Cal.5th 1134, 1147 [court skips to third step when it finds prima facie showing but denies

motion based on evaluation of reasons for challenges].) The first step "issue becomes moot, and the only question remaining is whether the individual justifications were adequate." (*People v. Arias* (1996) 13 Cal.4th 92, 135.)

Applying *Batson-Wheeler* to the trial court's section 231.7 analysis, the court made an implied finding of a prima facie case when it invited the prosecutor to state his reasons without first declaring its views on the first step. (Aug. 3RT 191-193, 195-197, 197-198, 201-202, 208-209.) Thus, review of the *Batson-Wheeler* claim begins at the third step.

2. Standard of review.

A reviewing court normally reviews a trial court's determination that peremptory challenge was not based on impermissible group bias for substantial evidence. (*People v. Gutierrez, supra,* 2 Cal.5th at p. 1159.) But a trial court's conclusions are only entitled to deference when the court applied the correct legal standard; the prosecutor's stated reasons were valid, neutral, and nondiscriminatory; and the court made a sincere and reasoned inquiry into the

genuineness of the stated reasons. (*Id.* at pp. 1158-1159; *People v. Davis* (2009) 46 Cal.4th 539, 583; see *People v. Smith* (2019) 32 Cal.App.5th 860, 872, fn. 6 ["even were we to assume that this amounted to legal error sufficient to vitiate our otherwise deferential review of the trial court's *Batson*/*Wheeler* conclusions—we would reach the same result under a de novo standard of review"].) None of these requirements were met here and this Court should review the *Batson-Wheeler* claim independently.

First, respondent concedes the trial court applied an incorrect legal standard. (RB 30 ["the trial court and the parties erroneously applied a section 231.7 analysis"].) Second, the question of whether any of the challenged reasons were "were based on impermissible group bias under federal or California law" is reviewed independently as a question of law based on undisputed facts. (*Unzueta v. Akopyan, supra,* 85 Cal.App.5th at p. 80.) Third, the trial court did not question the reasons stated by the prosecutor that were unsupported by the record.

For example, the trial court found that none of the prosecutor's reasons were invalid under section 231.7, even though the prosecutor cited: (1) J.R.R.'s lack of employment, a presumptively invalid reason under section 231.7, subdivision (e)(11) (AOB 52-55) and (2) W.R.'s inattentiveness, a presumptively invalid reason under section 231.7, subdivision (g). (AOB 38-41.) It found W.R.'s "behavior" was corroborated even though the court never confirmed that he was inattentive. (Aug. 3RT 209; AOB 38-41.)

C. The *Batson-Wheeler* issue is cognizable.

Section 231.7, subdivision (d)(1), states: "A motion brought under this section shall also be deemed a sufficient presentation of claims asserting the discriminatory exclusion of jurors in violation of the United States and California Constitutions." That said, the purpose of the waiver doctrine is to encourage defendants to bring errors to the attention of the trial court so the matters can be developed and

considered fully at trial. (*People v. McClellan* (1993) 6 Cal.4th 367, 377.) Appellant's *Batson-Wheeler* motions informed the court "of the issue it is being called upon to decide" and "the record shows that the court understood the issue presented." (*People v. Scott* (1978) 21 Cal.3d 284, 290; accord *Unzueta v. Akopyan, supra,* 42 Cal.App.5th at p. 215; *People v. Jaime* (2023) 91 Cal.App.5th 941, 946.) This Court can decide the issue just as readily as the trial court based on the existing record. (II.B. *ante*.)

This Court may also consider "a claim raising a pure question of law on undisputed facts." (*People v. Yeoman* (2003) 31 Cal.4th 93, 118; accord *Ward v. Taggart* (1959) 51 Cal.2d 736, 742; *People v. Percelle* (2005) 126 Cal.App.4th 164, 179.) Such review should be undertaken when the issue involves important questions. (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 654.) *Batson-Wheeler* claims are intended to protect the integrity of courts by eliminating the taint of discriminatory bias in jury selection, while also ensuring that defendants receive the right to a fair trial to

which they are constitutionally entitled. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 238; *Wheeler, supra,* 22 Cal.3d at pp. 276-277.) Such fundamental rights are not subject to forfeiture by silence. (*People v. Vera* (1997) 15 Cal.4th 269, 276-277; *People v. Saunders* (1993) 5 Cal.4th 580, 592, 589 fn. 5; *People v. Menchaca* (1983) 146 Cal.App.3d 1019, 1025.)

Finally, this Court may address the claim to foreclose a claim of ineffective assistance of counsel. (*People v. Mattson* (1990) 50 Cal.3d 826, 854; *People v. Scaffidi* (1992) 11 Cal.App.4th 145, 151; *People v. Norwood* (1972) 26 Cal. App. 3d 148, 153.) This is particularly so when, as here, the prosecution was equally at fault. (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 644; RB 30 ["trial court and the parties erroneously applied a section 231.7 analysis"].)

D. Age is an invalid reason for a peremptory challenge under California law.

In *Wheeler,* the California Supreme Court held before *Batson* that discrimination in jury selection violates the state constitutional guarantees of trial by a jury drawn from

a representative cross section of the community. (*Wheeler*, *supra,* 22 Cal.3d at pp. 276-277.) Although our Supreme Court has since interpreted *Wheeler* in accord with *Batson* jurisprudence, our Legislature has expanded the list of protected categories to include age and other grounds.

Effective 2017, the Legislature expanded the list of cognizable groups subject to a *Batson/Wheeler* motion by amending section 231.5. (*Unzueta v. Akopyan, supra,* 85 Cal.App.5th at p. 81.) It now provides: "A party shall not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of a characteristic listed or defined in Section 11135 of the Government Code, or similar grounds." Government Code section 11135 in turn lists the following protected characteristics: "sex, race, color, religion, ancestry, national origin, ethnic group identification, *age*, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation[.]" (Gov. Code, § 11135, subd. (a), italics added.) "The protected bases

used in this section include a perception that a person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics." (*Id.* at subd. (d).)

In *Unzueta,* Division Seven of this District reversed a civil judgment based on section 231.5 and Government Code section 11135. (*Unzueta v. Akopyan, supra,* 85 Cal.App.5th at pp. 81-84.) It concluded that a prospective juror "is a member of a cognizable class for purposes of a *Batson/Wheeler* motion if the juror has or is perceived to have a listed characteristic in Government Code section 11135, subdivision (a), or if the juror is associated with a person who has or is perceived to have a listed characteristic under subdivision (d) of that section." (*Id.* at p. 83; see *id.* at p. 81 [discussing history of § 231.5]; but see, e.g., *People v. Trinh* (2014) 59 Cal.4th 216, 242 [approving marital and parental status as valid reasons for peremptory challenge before the 2017 amendment to § 231.5, adding age and other grounds as protected characteristics]; *People v. DeHoyos*

(2013) 57 Cal.4th 79, 107-108 [approving limited life experience as valid reason for a peremptory challenge before the 2017 amendment]; *People v. Lomax* (2010) 49 Cal.4th 530, 575 [approving youth as a legitimate race-neutral reason before the 2017 amendment].)

Unzueta clarified the exercise of a peremptory challenge based on a characteristic protected under sections 231.5 and 11135 violates the state constitutional guarantee of trial by a jury drawn from a representative cross-section of the community. (*Unzueta v. Akopyan, supra,* 85 Cal.App.5th at p. 82, citing *People v. Armstrong* (2019) 6 Cal.5th 735, 765 [citing § 231.5, as well as *Batson* and *Wheeler*, in concluding "[p]eremptory challenges may not be used to exclude prospective jurors based on group membership such as race or gender"]; *People v. Duff* (2014) 58 Cal.4th 527, 544-545 [citing to § 231.5 in explaining limits on use of peremptory challenges]; *Wheeler*, 22 Cal.3d at pp. 276-277.)

Additionally, California's due process clause "has independent–and greater–force than its federal analog: It

protects the dignity interest in obtaining an untainted adjudication." (*People v. Douglas* (2018) 22 Cal.App.5th 1162, 1175; *People v. Ramirez* (1979) 25 Cal.3d 260, 264 [due process analysis under the Cal. Const. begins "with an assessment of what procedural protections are constitutionally required in light of the government and private interests at stake"].)

Age is an invalid reason for a peremptory challenge under California and protected under *Wheeler*.

E. The prosecutor stated invalid and discriminatory reasons for striking J.R.R. and W.R.

When the prosecutor "offers multiple rationales for a peremptory strike, only some of which are permissible, the taint from the impermissible reason(s) mandates reversal." (*People v. Douglas, supra,* 22 Cal.App.5th at p. 1173; accord *People v. Silas* (2021) 68 Cal.App.5th 1057, 1101.) "Taints of discriminatory bias in jury selection—actual or perceived—erode confidence in the adjudicative process, undermining

the public's trust in courts." (*Douglas,* at p. 1176; see also *People v. Gutierrez, supra*, 2 Cal.5th at p. 1154; *Batson,* 476 U.S. at pp. 87-88.)

Section 231.7 informs the analysis at the third step. The Legislature stated that section 231.7 should be "broadly construed to further the purpose of eliminating the use of group stereotypes and discrimination. (Stats. 2020, ch. 318, § 1.) In *People v. Hicks* (2024) 103 Cal.App.5th 1229, 1240, the appellate court concluded that although section 231.7 did not apply in that case, the statute nonetheless informed the *Batson-Wheeler* analysis. The Court should do the same here, especially because the trial court denied appellant's objections under section 231.7.

1. J.R.R.

Out of the prosecutor's six peremptory challenges, four prospective jurors, including J.R.R., W.R., and M.R., were under 23 or 25. (Aug. 3RT 189.) And five were against "white males." (Aug. 3RT 196; see also Aug. 3RT 118, 133, 157, 170; AOB 49-50; I.A., I.C., *ante*.)

J.R.R., 22, unemployed, and with a Spanish surname, was the only youthful, non-white male juror removed by the prosecutor. (Aug. 3RT 189-190; *People v. Gutierrez, supra,* 2 Cal.5th at p. 1156, fn. 2 ["Spanish surnames may identify Hispanic individuals"]; I.A., *ante*.) The prosecutor's reason for striking J.R.R. was based in part on his lack of employment. Lack of employment has been historically associated with improper discrimination in jury selection and is a presumptively invalid reason to remove a juror. (§ 231.7, subd. (e)(11); AOB 52-55.) The prosecutor's contrary reasons and trial court's findings failed to overcome the presumption of invalidity under subdivisions (e) and (f). (AOB 55-58.) And the trial court's findings crediting the prosecutor's reasons were unsupported by substantial evidence. (AOB 58-63.)

The prosecutor also stated J.R.R. arrived "four to five minutes after everyone else was here" and "particularly paid attention to" his tardiness. (Aug. 3RT 209-210.) But this reason was not corroborated by the trial court or defense

counsel. (Aug 3RT 210 [trial court did not see it because it had not taken the bench and counsel did not recall it].) Even if it had, being tardy once by four to five minutes and before the court took the bench is of little consequence. The prosecutor failed to ask J.R.R. about his tardiness, showing that his "particular" concern about it was not genuine.

2. W.R.

W.R. was 19, male, and unemployed. (Aug. 3RT 190.) The prosecutor stated he removed W.R. based on inattentiveness because W.R. spent "a substantial part" of voir dire with his head down and "made basically no eye contact with anyone." (Aug. 3RT 200-201; see also Aug. 3RT 196 [W.R. would not be able to pay attention and follow evidence because his head is "consistently down" and his eyes were closed].) The trial court only corroborated the fact that W.R.'s head was down unless he was spoken to by counsel. (Aug. 3RT 201; Aug. 2RT 84.) But the trial court did not corroborate that W.R. was inattentive.

Inattentiveness has been historically associated with

improper discrimination in jury selection and is a presumptively invalid reason to remove a juror. (§ 231.7, subd. (g)(1)(A) & (B) [presumptively invalid reasons include inattentiveness, failure to make eye contact, problematic demeanor].) But the trial court accepted this stated reason without confirming that W.R. was inattentive. (Aug. 3RT 199, 201; Aug. 2RT 84; AOB 38-41 [presumptively invalid reason was unrebutted because court failed to confirm W.R.'s inattentiveness at either confirmation or explanation stages].) And the prosecutor's cited reason of W.R.'s "behavior" was uncorroborated by the record or the court's observations. (AOB 38-44). There is thus "no basis to evaluate whether" inattentiveness was "relevant" to the court's decision. (*People v. Hicks, supra,* 103 Cal.App.5th at p. 1241, citing *Snyder v. Louisiana* (2008) 552 U.S. 472, 479 [finding *Batson* error when "the record does not show that the trial judge actually made a determination concerning [the prospective juror's] demeanor" of "nervousness"].)

Moreover, W.R. had developed a friendship with a

friend's father who was a sheriff in childhood. (Aug. 2RT 43.) This suggests that W.R. "had experiences or contacts that normally would be considered favorable to the prosecution." (*People v. Allen* (2004) 115 Cal.App.4th 542, 550.)

In sum, the prosecutor offered impermissible reasons for removal of the J.R.R. and W.R. The taint from these reasons requires reversal. (*People v. Douglas, supra,* 22 Cal.App.5th at pp. 1173, 1176; *People v. Silas, supra,* 68 Cal.App.5th at p. 1101; *People v. Gutierrez, supra,* 2 Cal.5th at p. 1154.)

F. The prosecutor's reasons for removing M.R. were unsupported.

The focus in the third step is on the genuineness of the reasons stated. (*People v. Gutierrez, supra,* 2 Cal.5th at p. 1158.) To assess the prosecutor's credibility, the court should consider all the circumstances, including "how reasonable, or how improbable, the explanations are" and whether the stated reasons have "some basis in accepted trial strategy." (*Ibid.*, quoting *Miller-El v. Cockrell* (2003) 537 U.S. 322,

339.) "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." (*Gutierrez,* at p. 1159, quoting *Miller-El v. Dretke, supra,* 545 U.S. at p. 252.)

M.R., a college student with a Spanish surname, was young and unemployed like J.R.R. and W.R. (Aug. 3RT 189-190; AOB 77; I.A., *ante*.) The prosecutor stated that his reason for removing M.R. was not age-based but because "she's studying criminal justice" and "some of the coursework she's taken in terms of steering away from punishment." (Aug. 3RT 197.) She had "more intimate knowledge of the criminal justice system" and the prosecutor did not believe she "would put that experience aside, what she's learned in terms of criminal justice" (Aug. 3RT 197.) He had also removed prospective juror T.G., a lawyer who researched criminal law, had knowledge of criminal justice, and was over 25. (Aug. 3RT 197-198.)

But these reasons were unsupported. M.R. took one basic class on juvenile justice, and not the criminal justice system. (Aug. 3RT 182; AOB 73-74.) As M.R.'s answers confirmed, this basic class did not confer any "intimate knowledge of the criminal justice system." (AOB 74-75; Aug. 3RT 185 [coursework did not focus on "criminal matters" but focused on "community work" and "other general ed courses"], 181-182 [M.R. was "just learning" and did not form her own opinions].) The prosecutor also did not exercise a peremptory challenge against Juror 6 even though that juror had taken college coursework and stated, "Looking at a lot of the coursework, I feel like a lot of preventative therapy and behavior I think—I've learned therapy over punishment for sure." (Aug. 3RT 130.)

The prosecutor's comparative analysis between M.R. and T.G. also failed. (AOB 76-77.) T.G. was an experienced litigator and shareholder at a law firm. (Aug. 2RT 30.) His clients included criminal defense lawyers and judges, and he had relationships with prosecutors and defense lawyers.

(Aug. 2RT 32-33.) M.R., by contrast, was taking online college classes and considering becoming a probation officer. (Aug. 3RT 171, 176-177, 183-184.) She had never seen "how this system works in real life" before jury selection in this case. (Aug. 3RT 172.) And unlike T.G., whose jury service would result in "a huge loss of money," M.R. was unemployed. (Aug. 3RT 171; AOB 77, citing Aug. 3RT 190; § 231.7, subd. (e)(11).)

G. The error requires reversal.

In *Douglas,* the appellate court reversed under *Batson, Wheeler,* and the California Constitution's due process clause because one of the prosecutor's stated reasons for peremptory challenges was related to sexual orientation, a protected category. (*People v. Douglas, supra,* 22 Cal.App.5th at pp. 1169-1176.) It upheld the trial court's finding that the prosecutor had additional valid reasons for challenging the two jurors. (*Id.* at p. 1170.) The court nonetheless reversed because it would be "absurd" to "permit strikes based in part

on invalid reasons[,]" excusing prejudice and discrimination in jury selection. (*Id*. at pp. 1173-1174.) It would violate the due process guarantee of the California Constitution, as well as *Batson* and *Wheeler*, to permit invidious discrimination in jury selection to taint a trial. (*Id*. at pp. 1175-1176.)

The exclusion of a single prospective juror for impermissible reasons under *Batson-Wheeler* requires reversal. (*People v. Gutierrez, supra*, 2 Cal.5th at p. 1158, citing *People v. Silva* (2001) 25 Cal.4th 345, 386.) And here, the prosecutor removed J.R.R. and W.R. for invalid reasons (II.E., *ante*) and its reasons for removing M.R. was unsupported. (II.F., *ante*.) Appellant has thus shown that "it is more likely than not that the challenge was improperly motivated" (*Gutierrez,* at p. 1158) at least in part because of group bias against young people under *Batson-Wheeler*, and against Hispanic people and people of the male gender under section 231.7 (Arg. I, *ante*).

For these reasons, the judgment must be reversed.

CONCLUSION

For the above reasons and in appellant's opening brief, the judgment must be reversed, and the case remanded for a new trial.

Dated: March 23, 2025

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

I, Mi Kim, hereby certify under California Rules of Court, rule 8.360(b)(1), that this brief contains 7,489 words as calculated by Microsoft Word software in which it was written.

I declare under penalty of perjury under the laws of California that the above is true and correct.

Dated: March 23, 2025

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned, declare that I am over 18 years and not a party to the case. My business address is listed above. My electronic service address is mi@mikimlaw.com. I served the attached document as follows:

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Mi Kim