MI KIM A PROFESSIONAL LAW CORPORATION

March 11, 2024

Mr. Brandon L. Henson
Clerk/Executive Officer
Court of Appeal, Fourth Appellate District
Division Three
601 W. Santa Ana Blvd.
Santa Ana, California 92701

Re: Appellant's Supplemental Letter Brief
People v. Martin Ramirez Dominguez (G062521)

Dear Mr. Henson:

On February 26, 2024, this Court invited the parties to file supplemental letter briefs addressing the effect of *People v. Ortiz* (2023) 96 Cal.App.5th 768, 801-805 and *People v. Jaime* (2023) 91 Cal.App.5th 941, 947 on this appeal. Appellant Martin Ramirez Dominguez submits this supplemental letter brief pursuant to that order.

ARGUMENT

A. *Ortiz* supports the determination that the trial court's confirmation finding on the E.C.'s responses to the single witness hypothetical under section 231.7, subdivision (g)(2), is not supported by substantial evidence.

Code of Civil Procedure[1] section 231.7, subdivision (g), provides:

> (1) The following reasons for peremptory challenges have historically been associated with improper discrimination in jury selection:

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

2060-D E. Avenida de Los Arboles, #274 | Thousand Oaks, California 91362 | (805) 267-9113 | mi@mikimlaw.com

> (A) The prospective juror was inattentive, or staring or failing to make eye contact.
>
> (B) The prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor.
>
> (C) The prospective juror provided unintelligent or confused answers.
>
> (2) The reasons set forth in paragraph (1) are presumptively invalid unless the trial court is able to confirm that the asserted behavior occurred, based on the court's own observations or the observations of counsel for the objecting party. Even with that confirmation, the counsel offering the reason shall explain why the asserted demeanor, behavior, or manner in which the prospective juror answered questions matters to the case to be tried.

The *Ortiz* appellate court explained that section 231.7, subdivision (g)(2), "calls for a two-step inquiry concerning the presumptively invalid reasons listed in subdivision (g)(1)(A)-(C): that is, the confirmation requirement and the explanation requirement." (*People v. Ortiz, supra,* 96 Cal.App.5th at p. 801.) It confirmed that under section 231.7, subdivision (j), "only 'the trial court's express factual findings [are] reviewed for substantial evidence' and '[t]he appellate court shall not impute to the trial court any findings . . . that the trial court did not expressly state on the record.'" (*Id.* at pp. 803-804.)

As for the first step, "the substantial evidence standard applies where-as here-the trial court has made explicit findings in the confirmation stage." (*People v. Ortiz, supra,* 96 Cal.App.5th at p. 801.) In *Ortiz*, substantial evidence supported "the trial court's confirmation, pursuant to section 231.7, subdivision (g)(2), of the 'asserted behavior' described in the prosecutor's initial statement of reasons and the 'evasive questioning' reason." (*People v.*

Ortiz, supra, 96 Cal.App.5th at p. 803.) In relevant part, the appellate court pointed to: (1) "exchanges demonstrating S.H.'s inability to answer or understand questions, failure to answer questions, confusion, reluctance, timidity, and evasiveness"; (2) "S.H.'s failure to answer the questions on page two of his questionnaire" showed "he was confused when completing the questionnaire"; and, (3) S.H.'s responses to questions by prosecutor and the trial court about his questionnaire that "demonstrate an avoidance of some topics during the jury selection process." (*Id.* at pp. 801-803.)

As for the second step, the trial court in *Ortiz* made no factual finding on the prosecutor's explanation, under section 231.7, subdivision (g)(2), of "why the asserted demeanor, behavior, or manner in which the prospective juror answered questions matters to the case to be tried." (*People v. Ortiz, supra,* 96 Cal.App.5th at p. 803.) It nonetheless reviewed the record de novo to "only determine whether any explanation was in fact provided by the prosecutor." (*Id.* at p. 804.) "[I]n contrast to the confirmation requirement, neither the trial court nor the reviewing court must examine whether the prosecutor's explanation is supported by substantial evidence when deciding whether the explanation requirement has been fulfilled." (*Ibid.*)

Here, the prosecutor gave two reasons for exercising a peremptory challenge to remove E.C.: (1) his response to the single witness hypothetical and (2) his body language. (1RT 176-177.) As to the first reason, E.C. "indicated that he would want to know more, that he always overthinks things, that he believes that people can lie." (1RT 176.) Even with the one witness instruction, E.C. "would always require more, even if, let's say, he was not going to be forthcoming and indicate that explicitly in response to questioning." (1RT 176-177; see also Respondent's Brief at p. 23 [E.C. gave "an equivocal response that gave the prosecutor cause to worry that even if E.C. were instructed on the single witness rule, he 'would always require more'"].) As in *Ortiz,* the prosecutor's reason is presumably invalid under section 231.7, subdivision (g)(1). (§ 231.7, subd. (g)(1)(C) ["unintelligent or confused answers"].)

Also as in *Ortiz,* the trial court here made "explicit findings in the confirmation stage." (*People v. Ortiz, supra,* 96 Cal.App.5th at p. 801.) It found E.C. gave "somewhat equivocal answers" to the prosecutor's questions regarding the single witness instruction, although the questions

"does not address all possible factors to be considered in making the evaluation of a single witness' testimony, thereby making it more difficult for a prospective juror to give an appropriate response." (1RT 180, 182-183.) The court also stated that E.C. expressed his opinion that he would remain impartial and his "overall responses were that he would remain an impartial juror in this matter." (1RT 180, 183.)

The substantial evidence standard applies to the trial court's explicit findings in the confirmation stage under section 231.7, subdivision (g)(2). (*People v. Ortiz, supra,* 96 Cal.App.5th at p. 801.) And here, unlike in *Ortiz,* substantial evidence does not support the trial court's confirmation finding that E.C. gave "somewhat equivocal" answers to the questioning on the single witness hypothetical. (1RT 182; AOB at pp. 27-32; RB 6-10; *Ortiz, supra,* at pp. 801-803.)

In *Ortiz,* the prospective juror's failure to answer questions in his questionnaire supported the trial court's confirmation finding. (*People v. Ortiz, supra,* 96 Cal.App.5th at p. 802.) By contrast here, E.C.'s answer on his questionnaire rebuts the confirmation finding. E.C. marked "Yes" to the question that asked whether he could follow the rule of law and instruction that "the testimony of only one witness, if you believe them to be telling you the truth, can prove a fact." (2 Supp. CT 356; compare 1RT 82 [E.C. gave "somewhat equivocal answers" to questioning on single witness hypothetical].)

In *Ortiz*, the prospective juror's responses to questioning by the prosecutor and the trial court supported the trial court's confirmation finding. (*People v. Ortiz, supra,* 96 Cal.App.5th at pp. 802-803 [describing "exchanges" showing S.H.'s "inability to answer or understand questions, failure to answer questions, confusion, reluctance, timidity, and evasiveness" and "demonstrate an avoidance of some topics"].) By contrast here, the trial court found that even if E.C. gave "somewhat equivocal" answers to the single witness hypothetical, his "overall responses were that he would remain an impartial juror in this matter." (1RT 182-183, see 1RT 180 [E.C. expressed an opinion that he would remain impartial].)

Ortiz supports the determination that the trial court's confirmation finding is unsupported by substantial evidence.

As for why the asserted responses to the single witness hypothetical matters to the case under section 231.7, subdivision (g)(2), the prosecutor explained: "The indication between the responses and his body language in court presented a concern for his level of engagement during the trial or during the deliberations process." (1RT 177.) But this explanation cannot change the outcome. By failing to meet the confirmation requirement under section 231.7, subdivision (g)(2), the prosecution's exercise of a peremptory challenge to E.C. based on his response to the single witness hypothetical is presumptively invalid. (See *People v. Ortiz, supra,* 96 Cal.App.5th at p. 804 ["if the confirmation and explanation requirements have been fulfilled, then the proffered reason that falls under section 231.7, subdivision (g)(1) is no longer presumptively invalid"].)

But assuming that any explanation changes the outcome, the prosecutor's proffered explanation that E.C.'s responses presented "a concern for his level of engagement" also falls within the list of presumptively invalid reasons under 231.7, subdivision (g)(1). (§ 231.7, subd. (g)(1)(A) ["the prospective juror was inattentive"].) As explained below, one presumptively invalid reason cannot be used to overcome another presumptively invalid reason. Such use is contrary to, and frustrates, the express purpose of section 231.7.

B. The use of a different presumptively invalid reason under section 231.7, subdivision (g)(1)(A) (E.C.'s inattentiveness), to overcome the presumption of invalidity of the initially stated reason under subdivision (g)(1)(B) (E.C.'s body language), is contrary to, and frustrates, section 231.7's express purpose.

Here, the prosecutor stated that E.C. "had been slouched down" and had his chin on his hand, and perked up when he was asked a question. (1RT 177.) This is a presumptively invalid reason under section 231.7, subdivision (g)(1)(B). As for why the asserted body language matters to the case, under section 231.7, subdivision (g)(2), the prosecutor explained: "The indication between the responses and his body language in court presented a concern for his level of engagement during the trial or during the deliberations process." (1RT 177.) But "a concern for his level of engagement"—or inattentiveness—is a presumptively invalid reason under 231.7, subdivision (g)(1)(A).

The trial court confirmed that E.C. was slouched down, and stated this body language "suggest[ed] to me that he had a disinterest in being present for these proceedings." (1RT 183.) However, it was also difficult to say why E.C. was slouching down, "whether it was because of the desire that he could be somewhere else or that it was because of a disinterest in the proceedings that were [sic] engaged in, or because it may be that he's naturally a slacker," and E.C.'s body language was 'a thin reed' to base a finding adverse to the [objection]." (1RT 179.) While E.C.'s demeanor is "a legitimate consideration to take into account," it does not necessarily overcome "the factors that are enumerated by the legislature with respect to impermissible bases for an excuse of an individual juror." (1RT 179-180.)

The Legislature has unambiguously stated 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." (Assembly Bill No. 3070 (A.B. 3070), § 1, subd. (c).) To the extent the record suggests that the trial court permitted the use of a different presumptively invalid reason (section 231.7, subdivision (g)(1)(A) [inattentiveness]) to overcome the presumption of invalidity of the prosecutor's initially-stated reason (subdivision (g)(1)(B) [body language]), such use is contrary to, and frustrates, section 231.7's purpose.

Through A.B. 3070, the Legislature replaced the *Batson/Wheeler* inquiry with section 231.7. When doing so, it recognized that "peremptory challenges are frequently used in criminal cases to exclude potential jurors based on their race [or] ethnicity[,] and that exclusion from jury service has disproportionately harmed African Americans, Latinos, and other people of color." (A.B. 3070, § 1, subd. (b).) It also expressly found the *Batson/Wheeler* framework "for determining whether a peremptory challenge was exercised on the basis of a legally impermissible reason has failed to eliminate that discrimination." (*Ibid*.)

The Legislature highlighted several section 231.7 provisions that marked its rejection of the *Batson/Wheeler* framework: removing the requirement that the objecting party prove purposeful discrimination; designating as "presumptively invalid" justifications that are "in fact associated with stereotypes about "[African Americans, Latinos, and other

people of color] or otherwise based on unlawful discrimination"; and, "provid[ing] a remedy for both conscious and unconscious bias in the use of peremptory challenges." (A.B. 3070, § 1, subds. (b) & (c).)

Section 231.7's legislative history confirms the Legislature's primary goal was to address implicit bias in the exercise of peremptory challenges. First, the author of A.B. 3070, explained:

> Courts have acknowledged that it can be difficult and often impossible for the trial judge to determine whether the lawyer making the challenge actually intended to discriminate. . . . Perhaps more important, the existing procedure cannot address strikes exercised because of implicit bias, that is, unconscious or automatic attitudes and stereotypes[.]

(Assem. Floor Analysis, Assem. Bill 3070 (2019-2020 Reg. Sess.), 3d reading, as amended May 4, 2020, p. 3; see also Assem. Com. on Judiciary Analysis, Assem. Bill 3070 (2019-2020 Reg. Sess.), as amended May 4, 2020, p. 6 [stating "AB 3070 seeks to address deficiencies in the Batson-Wheeler procedure by address unlawful discrimination in jury selection, both unconscious and intentional[.]"].)

Second, the Legislature incorporated suggestions contained in the report of a workgroup convened by the Washington Supreme Court. (Assem. Floor Analysis, A.B. 3070 (2019-2020 Reg. Sess.), 3d reading, as amended May 4, 2020, p. 3 [noting A.B. 3070 incorporates suggestions from the report to address concerns with the Batson procedure]; Assem. Com. on Judiciary Analysis, A.B. 3070 (2019-2020 Reg. Sess.), as amended May 4, 2020, p. 10 [stating A.B. 3070 incorporates Washington workgroup's suggestions].) That report "emphasizes the importance of addressing implicit bias in the jury selection process." (Assem. Com. on Judiciary Analysis, A.B. 3070 (2019-2020 Reg. Sess.), as amended May 4, 2020, p. 9.)

Third, the Legislature incorporated the recommendations and findings of a report by Elisabeth Semel et al., Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors, Berkeley Law Death Penalty Clinic (2020) ("Whitewashing the Jury

Box”). This report analyzed about 700 *Batson/Wheeler* decisions over a 12-year period (2006 through 2018) and concluded: “[P]rosecutors across California use peremptory strikes to disproportionately remove African-American and Latinx citizens.” (Whitewashing the Jury Box, *supra,* at p. 13.) And California reviewing courts almost never reversed trial court decisions for *Batson* error. Instead, they routinely upheld the prosecutors’ reasons for striking Black and Latinx jurors as race-neutral and credible. (*Id.* at pp. 13 and 24.) These findings supported the Legislature’s determination that A.B. 3070 was necessary.

Indeed, legislative history confirms:

> [E]ven when judges require lawyers to provide reasons for a challenge, both the trial courts and the reviewing courts have been strongly inclined to accept whatever justifications are offered. Reasons given by the party making the strike will almost always suffice even if they are “trivial” or “arbitrary or idiosyncratic”—so long as they are not patently discriminatory or patently false… Additionally—even after a trial is already completed— California courts often invent their own reasons why an attorney may have challenged a juror to affirm the trial judge’s ruling that the peremptory challenge was not discriminatory.

(Sen. Com. on Public Safety, A.B. 3070 (2019-2020 Reg. Sess.), August 7, 2020, at p. 7.)

C. *Ortiz* should not be read to permit the use of a different presumptively invalid reason under section 231.7, subdivision (g)(1), to overcome the presumption of invalidity of the initially stated reason under subdivision (g)(1).

Ortiz did not specifically address the use of a different presumptively invalid reason identified in section 231.7, subdivision (g)(1), to overcome the presumption of invalidity of the initially stated reason that is also identified in subdivision (g)(1). It instead addressed "the standard of review applicable to our determination of whether the explanation requirement of section 231.7, subdivision (g)(2) has been fulfilled." (*People v. Ortiz, supra,* 96 Cal.App.5th at p. 803.)

Ortiz concluded that two different standards apply to "confirmation requirement" and the "explanation requirement" when analyzing the presumptively invalid reasons listed in subdivision (g)(1)(A)-(C). "[I]n contrast to the confirmation requirement, neither the trial court nor the reviewing court must examine whether the prosecutor's explanation is supported by substantial evidence when deciding whether the explanation requirement has been fulfilled." (*People v. Ortiz, supra,* 96 Cal.App.5th at p. 804.) It held, "counsel's proffer of any explanation regarding 'why the asserted demeanor, behavior, or manner ... matters to the case to be tried' fulfills the explanation requirement of section 231.7, subdivision (g)(2)." (*Ibid*.)

Ortiz found the prosecutor fulfilled the second-step explanation requirement by explaining the prospective juror's responses "did not allow her to determine his views and impartiality, and it was not for lack of her trying." (*People v. Ortiz, supra*, 96 Cal.App.5th at p. 805.) But in contrast to this case, the prosecutor arguably did not attempt to overcome the presumption of invalidity by stating a different presumptively invalid reason under subdivision (g)(1).

Ortiz should not be read to permit the use of different presumptively invalid reasons under section 231.7, subdivision (g)(1), to overcome the presumption of invalidity of the initially stated reason under section 231.7, subdivision (g)(1). As discussed in the above section, such an interpretation conflicts with, and frustrates, the Legislature's unambiguous statement of

intent that "this act 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." (A.B. 3070, § 1, subd. (c).)

D. Alternatively, the holding in *Ortiz* is contrary to the plain language of section 231.7, and the Legislature's mandate that a striking party must explain why a presumptively invalid reason matters to the case to be tried.

The *Ortiz* court engaged *de novo* review under subdivision (j), and explained that: (1) "[t]he trial court did not refer to the prosecutor's explanation itself"; (2) the trial court made no findings regarding the "evasiveness" explanation and "the appellate court shall not impute any findings . . . that the trial court did not expressly state on the record"; and, (3) unlike subdivision (e)(1), subdivision (g)(2), does not contain any state a standard of proof. (*People v. Ortiz, supra*, 96 Cal.App.5th at pp. 803-804.) It then held: "counsel's proffer of any explanation" fulfills the explanation requirement of section 231.7, subdivision (g)(2). (*Id.* at p. 804.) *Ortiz* is contrary to the plain language of section 231.7, and frustrates the Legislature's intent to require the striking party to explain why a presumptively invalid reason matters to the case to be tried.

First, section 231.7 provides: "The court shall explain the reasons for its ruling on the record." (§ 231.7, subd. (d)(1).) *Ortiz*'s conclusion that the "explanation requirement" requires no findings by the trial judge conflicts with this express statutory language.

Second, although section 231.7, subdivision (g)(2), does not specify a burden of proof for the explanation requirement, the Legislature has unambiguous stated the need for the striking party to satisfy its burden when it stated the statute 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." (A.B. 3070, § 1, subd. (c).) The Legislature also stated section 231.7 is necessary because "the existing procedure for determining whether a peremptory challenge was exercised on the basis of a legally impermissible reason has failed to eliminate that discrimination." (A.B. 3070, § 1, subd. (b).)

The statutory language also reflects the Legislature's intent to place the burden solely on the striking party to explain its peremptory challenge. (§ 231.7, subd. (c) ["[U]pon objection . . . the party exercising the peremptory challenge shall state the reasons the peremptory challenge has been exercised."]; subd. (j) ["The reviewing court shall consider only reasons actually given under subdivision (c) and shall not speculate as to or consider reasons that were not given…"].)

But if "any explanation. . . fulfills the explanation requirement of section 231.7, subdivision (g)(2)," (*People v. Ortiz, supra,* 96 Cal.App.5th at p. 804), the prosecutor may use, as here, a "presumptively invalid" reason that "have historically been associated with improper discrimination in jury selection" to satisfy its burden. (§ 231.7, subd. (g)(2).) Such a construction is contrary to the Legislature's overarching goal to eliminate both conscious and unconscious racial bias injury selection through section 231.7. It would also render subdivision (g)(2) meaningless.

Jaime is instructive. There, the prosecution did not dispute that it exercised a peremptory challenge against a prospective juror for a presumptively invalid reason under section 231.7, subdivision (e). (*People v. Jaime, supra,* 91 Cal.App.5th at p. 946.) Under that subdivision, a listed reason is presumptively invalid "unless rebutted by clear and convincing evidence that they are unrelated to the prospective juror's perceived membership in a protected group and that the reasons bear on the juror's ability to be fair and impartial." (*Id.* at p. 943, citing § 231.7, subd. (e).) The *Jaime* appellate court reversed the judgment and remanded the case for a new trial because, "[d]espite the lack of evidence to overcome the presumption, the trial court concluded the challenge was proper based on 'the district attorney's statements' and its 'view of everything.'" (*People v. Jaime, supra,* 91 Cal.App.5th at p. 947.) It expressly rejected the claim that the prosecutor's "reasons alone provide clear and convincing evidence" to overcome the presumption of invalidity. "Allowing a party to use the presumptively invalid reasons to overcome the presumption would render section 231.7, subdivision (e) meaningless." (*People v. Jaime, supra,* 91 Cal.App.5th at p. 946.)

Again, while section 231.7, subdivision (g)(2), does not specify a burden of proof for the explanation requirement, a prosecutor should not be

permitted to meet its burden by proffering "any explanation," (*People v. Ortiz, supra,* 96 Cal.App.5th at p. 804), much less one that is also presumptively invalid under subdivision (g)(1). Some standard of proof must apply to effectuate the Legislature's express intent to eliminate unconscious bias in jury selection. Even if the clear and convincing standard of subdivision (e) does not apply, at a minimum, the default standard of proof is by a preponderance of the evidence. (*People v. Jefferson* (2016) 1 Cal.App.5th 235, 241 [the "default standard of proof" is "by a preponderance of the evidence"]; Evid. Code, § 115 ["[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence"].)

Conclusion

For the reasons stated in appellant's opening brief, reply brief, and above, this Court should reverse Dominguez's judgment.

Respectfully submitted,

____

Mi Kim
State Bar No. 240413

PROOF OF SERVICE

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

TRUEFILING: By electronically serving the above-named document by transmitting a true copy via this Court's TrueFiling system to:

Office of the Attorney General	Appellate Defenders, Inc.

ELECTRONIC SERVICE: By sending from my electronic service address of mi@mikimlaw.com the above-named document to each of these persons at the following authorized email service addresses:

Riverside District Attorney (Appellate-unit@rivcoda.org)	Douglas Redden (daredden@rivco.org)
Riverside Superior Court For delivery to: Hon. Prevost (appealsteam@riverside.courts.ca.gov)	

USPS: By placing a copy of the above-named document in a sealed envelope, with the correct postage, and depositing them in the United States Postal Service, to each of these persons at these addresses:

Martin Ramirez Dominguez (via appellate counsel)	

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 11, 2024, at Thousand Oaks, California.

Mi Kim