No. _____

In the

Supreme Court of the United States

October Term: _____

ANTHONY DAJUAN YATES,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Petition For a Writ of Certiorari
To The Court of Appeal Of The
State of California, Fifth Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Does a prosecutor's peremptory challenge of a prospective African-American juror based on the juror 's perception of racial profiling by law enforcement in his community, or on his efforts to reduce that racial profiling, constitute a "race-neutral" explanation for striking the juror, or does it violate the equal protection rights of the juror and of the African-American defendant?

II. Does a prosecutor's peremptory challenge based on negative encounters with law enforcement, particularly those involving racial profiling, violate the Equal Protection Clause because it will inevitably have a disparate impact on prospective minority jurors?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony Yates respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Fifth Appellate District Court of Appeal for the State of California, entered and filed in the above proceedings on October 22, 2018.

OPINIONS BELOW

The opinion of the Fifth Appellate District Court of Appeal for the State of California appears at Appendix A to the petition and is unpublished. The opinion of the Kern County Superior Court appear at Appendix B to the petition and is unpublished. The order of the California Supreme Court denying a petition for review appears at Appendix C to the petition and is unpublished.

JURISDICTION

The Fifth Appellate District Court of Appeal for the State of California decided this case on October 22, 2018. A copy of that decision appears at Appendix A. A timely petition for review to the California Supreme Court was thereafter denied on February 13, 2019. A copy of the order denying that petition appears at Appendix C.

This Court's jurisdiction is invoked under 28 U.S.C. section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Kern County District Attorney alleged that appellant Anthony D. Yates possessed marijuana within a state prison in violation of California Penal Code section 4573.6. Clerk's Transcript on Appeal ("CT") 47-48.

During jury selection, Yates objected that the prosecutor's use of peremptory challenges to strike all three African-American potential jurors violated his constitutional rights, but the trial court denied the motion after finding Yates had established a prima facie case of discrimination. CT 144; Volume 4, Augmented Reporter's Transcript on Appeal ("4-ART") 421-423; Appendix B. A jury subsequently found Yates guilty of possessing marijuana in prison, CT 222, 226; 4RT 635-637, and the court found he had suffered a prior strike conviction under California law. CT 227; 4 RT 641.

On April 18, 2016, the court sentenced Yates to the low term of four years, plus a consecutive one-year sentence in another case, for a total

sentence of five years to be served consecutively to sentences he was already serving. CT 256-258; 4 RT 645-646.

The Fifth Appellate District Court of Appeal affirmed the conviction in an unpublished decision, Appendix A, and the California Supreme Court denied review on February 13, 2019. Appendix C.

STATEMENT OF FACTS

A. Facts Underlying Offense

During a strip search following inmate Yates's return from the Kern Valley State Prison visiting area, correctional officers discovered he had a black bindle secreted on his person. 2-RT 160-162, 164, 174-175, 178, 198; 3-RT 370-372, 377-380. The loose, green leafy substance discovered inside the bindle turned out to be 63.62 grams of marijuana, a Schedule I controlled substance. 2-RT 255, 269-272.

B. Facts Pertaining to *Batson*

1. The Prosecutor Used Three of her Eight Peremptory Challenges to Strike All Three of the African-American Prospective Jurors

When the case against Yates came to trial, potential juror C.H. was one of the original group of 18 prospective jurors. 3-ART 107-110. C.H. is an instructional aide with special needs kids for the Kern County Superintendent of Schools, and his wife is a record keeper at the Wasco

State Prison. 3-ART 127. C.H. had a negative encounter with a deputy who mistook him for his brother "because we look similar." 4-ART 243-244. The incident had occurred 15-20 years ago and became a positive experience because C.H. subsequently became very good friends with the deputy, and "it opened up some doors" for dialogue regarding problems young African-American males were encountering in Wasco. 4-ART 243-247.

Deputies were stopping the young men for no reason, but C.H. was able to sit down with the deputies and get them "to really look at the way they were going about some things and, you know, to really get them to look at it differently." 4-ART 245. The sheriff's department changed and the deputies themselves changed "after we started having some dialogue" involving them and a coalition of church and community leaders that "opened up a real – a real conversation." 4-ART 245-246. The goal was to get the deputies to not be so hard on the young African-American males, and "some things really got taken care of" after deputies came to the churches and "talk[ed] to some of the kids .... They were more seen, they were more out in the public." 4-ART 247. This went on for approximately 5 years, and the deputies involved had all retired. 4-ART 246-247.

After the prosecutor challenged three jurors and the defense two, six new potential jurors were called, with K.F. among them. 3-ART 260-261. K.F. was upset about her son's drug conviction and believed officers could

lie, but answered "Oh, yes, most definitely" when asked if law enforcement could also tell the truth. 4-ART 273, 304. She answered repeated questions about what she considered her son's unfair treatment, but said nothing whatsoever about racial profiling. 4-ART 273, 278-279, 284, 327-328.

Following additional voir dire of the new potential jurors, the defense challenged another juror, and the prosecutor then struck C.H. with her fourth peremptory challenge. 3-ART 335. After each side struck one more juror, defense counsel indicated he was satisfied with the panel, but the prosecutor immediately used her sixth peremptory challenge to strike K.F. 3-ART 335-336, 409.

L.P. was among the group of six new potential jurors called up after the prosecutor struck K.F. 3-ART 336. When asked about contact with law enforcement that might affect her 4-ART 341, L.P. said police officers in two instances failed to help her even after she explained she was a recent rape victim. 4-ART 388-389. Her first negative encounter with law enforcement occurred at a checkpoint where her car was impounded due to her friend's licensing issues 4-ART 388, while her second occurred after she was pulled over because "someone in a vehicle like mine hit someone on a bike." 4-ART 389. But these contacts had occurred ten years ago, her more recent contacts with law enforcement had not been negative, and L.P. said she would be able to get over those earlier experiences. 4-ART 388-390.

After each side struck one more juror and defense counsel again indicated he was satisfied with the panel, the prosecutor immediately used her eighth peremptory challenge to strike L.P. 3-ART 335- 336, 409.

Defense counsel objected to the prosecutor's striking of C.H., K.F., and L.P. 4-ART 409-411, 418. Although the trial court made no specific finding as to whether the prosecutor had removed all prospective jurors who were African-American, it agreed with defense counsel that there did not appear to be any more African-Americans in the jury venire. 4-ART 411.

2. After the Trial Court Found that Petitioner had Made a Prima Facie Showing of Discriminatory Purpose, the Prosecutor Identified Purportedly "Race-Neutral" Explanations

Finding that Yates had made a prima facie showing of discriminatory purpose, the court asked the prosecutor to explain her use of peremptory challenges. 4-ART 411. The prosecutor explained that, while she liked C.H. "a great deal" and found him to be "friendly," she was concerned by his "five years of activism in the Wasco community specifically regarding the issue of, essentially, whether … police brutality, police misappropriate treatment of – and he specified 'young African-American males.'" 4-ART 414. She noted that C.H. had "negative incidents himself" regarding particular sheriff's deputies and, while he claimed that ended positively, "I actually even thought that he was trying to convince us a little bit too hard that it

ended up positively." 4-ART 415. The prosecutor thought "some of the problems still existed after this coalition no longer existed," and "that kind of activism ... against law enforcement" made C.H. an inappropriate juror. 4-ART 415.

The prosecutor rejected K.F., primarily because she told the court her son had been unfairly convicted of a drug crime, even though he did not use drugs. 4-ART 413-414. Regarding L.P., the prosecutor said she would hesitate to keep a juror who, like L.P., had been the victim of the violent, intimate and personal crime of rape, 4-ART 411, and that L.P. was further traumatized during the two encounters with police even though she explained to the officers that she was a rape victim. 4-ART 412-413.

Defense counsel argued that C.H.'s negative experience occurred when he was mistaken for his brother, that he later became good friends with the deputy, and the activism with the church had been 15 to 20 years ago. 4-ART 419. C.H.'s wife is a records clerk at Wasco State Prison with friends on the staff, so any negative feelings about law enforcement have nothing to do with prison authorities. 4-ART 419-420. K.F.'s son's wrongful conviction occurred in Los Angeles, which had nothing to do with prison or CDCR. 4-ART 419, 420-421. Defense counsel noted the prosecutor had not struck Juror No. 4067612, even though that juror had recently had a negative encounter with law enforcement. 4-ART 416.

3. The Trial Court Found No Discriminatory Purpose After Misstating Evidence Regarding Racial Profiling

In announcing its decision to deny the motion, the trial court stated that the "theme that runs with all three is profiling." 4-RT 421; Appendix B 421. Although the court agreed C.H. "was a really nice guy. He appeared to be open and honest and answered questions," C.H. also believed there was a problem with the Sheriff's Department in Wasco stopping young African-American males "for no basis at all. That sounds like profiling to me." Appendix B at 422. C.H.'s direct involvement in trying to get more communication between the Wasco community and those deputies was a legitimate basis to exclude him. Appendix B at 422-423.

According to the court, K.F. was unhappy about her son's drug conviction "and with kind of the inference that there was profiling as well and that the cops lied." Appendix B at 422. The court also believed L.P. intimated that in her second incident with police "there was profiling by police based on what she looked like." Appendix B at 421.

The court denied the motion. Appendix B at 423.

REASONS FOR GRANTING THE WRIT

Although many years have passed since this Court recognized that the "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community," *Batson v. Kentucky* (1986) 476 U.S. 79, 87, lower courts continue to allow prosecutors to abuse peremptory challenges in violation of the Equal Protection Clause of the Fourteenth Amendment. *Equal Justice Initiative, Illegal Racial Discrimination in Jury Selection, A Continuing Legacy* (Aug 2010) https://eji.org/sites/default/ files/illegal-racial-discrimination -in-jury-selection.pdf.

The prosecutor in this case used three of her first eight peremptory challenges to ensure that an African-American defendant's fate would be decided by a jury that did not include a single African-American juror. One of those three "should have been an ideal juror in the eyes of a prosecutor," *Miller-El v. Dretke*, 545 U.S. 231, 247 (2005), but the prosecutor struck him largely due to his work with community leaders and deputies to reduce the problem of racial profiling in his community. Although the case had nothing to do with racial profiling and none of the struck jurors had ever experienced it themselves, the Fifth Appellate District found that the juror's admittedly laudable attempts to better his community due to his perception that racial profiling was occurring disqualified him as a juror. The

appellate court also held that negative encounters with law enforcement experienced by all three African-American jurors were legitimate grounds for excusal, even though the prosecutor had not struck a white juror with a similar, more recent experience.

Although this Court has found *per curiam* that a juror's personal experience with racial profiling is a "race-neutral explanation[]" for a peremptory challenge, *Felkner v. Jackson,* 567 U.S. 594, 598 (2011), it should grant certiorari in this case to consider the role of racial profiiling during the second step in the *Batson* procedure. *Felkner* has received criticism for encouraging the exclusion of African-American jurors who have been the victims of racial profiling, but this case takes the issue a step further by encouraging the exclusion of minority jurors who simply acknowledge that racial profiling occurs. The Court should closely examine the second step in the *Batson* procedure to ensure that the promise of that case is fulfilled, and to counter the training received by prosecutors to undermine *Batson* by devising race-neutral explanations for strikes.

This case also provides the Court with a perfect vehicle to determine whether a negative encounter with law enforcement, and in particular one based on perceived racial profiling, can be considered a race-neutral explanation when it will inevitably result in the disproportionate removal of potential jurors from minority groups. *Hernandez v. New York*, 500 U.S.

352, 361 (1991), held that such a disproportionate effect did not constitute *per se* discrimination in jury selection, but by definition only minority potential jurors will have suffered racial profiling, making its continued use as a legitimate basis for striking a juror a violation of the Equal Protection Clause.

Racial tension has certainly not declined in this country is since this Court handed down its decision in *Batson*. While *Batson* finally established a reasonable procedure for preventing prosecutors from depriving minority defendants and prospective jurors of their right to equal protection under the Fourteenth Amendment, this case illustrates that, despite *Batson*, prosecutors will continue to find ways to keep members of minority groups from serving as jurors, and lower courts do too little to ensure that they are allowed to become jurors.

Allowing prosecutors to purposefully exclude minorities from juries will "undermine public confidence in the fairness of our system of justice.... Discrimination within the judicial system is most pernicious because it is a 'stimulant to ... race prejudice....'" *Batson*, 476 U.S. at 87-88, quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880). "The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders." *J.E.B. v.*

Alabama ex rel. T.B., 511 U.S. 127, 140 (1994).

ARGUMENT

I. This Court Should Grant Certiorari to Determine Whether a Perception that Racial Profiling by Law Enforcement Exists, or Attempts to Reduce Racial Profiling, Constitute a "Race-Neutral" Explanation for Striking a Prospective Minority Juror

A. The Burden of Establishing Purposeful Discrimination

Since 1880, this Court has consistently recognized "that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." *Batson*, 476 U.S. at 85, citing *Strauder*, 100 U.S. 303. "Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure," *Batson*, 476 U.S. at 85, and purposeful racial discrimination during jury selection therefore violates the constitutional rights of excluded jurors as well as those of the defendant. *Id.* at 87.

While the "principles announced in *Strauder* have never been questioned in any subsequent decision of this Court," *Batson*, 476 U.S. at 89, the question of how a defendant can establish purposeful discrimination has proven to be more elusive. In *Swain v. Alabama*, 380 U.S. 202 (1965),

the Court acknowledged that the State's intentional exclusion of all African-American jurors would violate the Equal Protection Clause, *id*. at 203-204, 223-224, but found no constitutional violation – despite the exclusion of all six prospective African-American jurors from the defendant's jury – because the defendant had not proven a systematic exclusion of such jurors in "case after case." *Id*. at 210, 222-228.

Batson rejected *Swain's* "crippling burden of proof," *Batson,* 476 U.S. at p. 92, establishing the now-familiar three-step test, requiring the defendant to take the first step by "producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California,* 545 U.S. 162, 170 (2005) Once the defendant has made out a prima facie case, the State has the burden on the second step of offering race-neutral justifications to explain the racial exclusion. (*Id*. at 168.)

In step three, the trial court considers the persuasiveness of the State's justification to determine whether the defendant has carried the burden of proving purposeful discrimination by establishing that it is "more likely than not that the challenge was improperly motivated." (*Id*. at 168-171. The court can measure the credibility of the State's purported reasons for striking the jurors by "how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in

accepted trial strategy." *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003). The prosecutor's "proffer of [a] pretextual explanation naturally gives rise to an inference of discriminatory intent." *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008).

B. Unquestioning Acceptance of "Race-Neutral" Explanations at Second *Batson* Step is Undermining the Equal Protection Clause

In *Felkner v. Jackson,* 567 U.S. 594, the Ninth Circuit had reversed the district court's denial of a federal habeas petition based on *Batson* in a brief decision this Court found "as inexplicable as it is unexplained." *Id.* at 598. One of the stricken minority jurors had complained in the California trial court of being the victim of racial profiling over an extended period of time, but this Court agreed with the lower courts that this was a "race-neutral" explanation for the prosecutor's challenge, and the trial court's acceptance of that explanation therefore had to "'be sustained unless it is clearly erroneous'" on direct appeal. *Id.* at 598, quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") added another layer of deference, imposing a "'highly deferential standard'" on federal courts, and the Ninth Circuit erred because the "state appellate court's decision was plainly not unreasonable." *Felkner,* 562 U.S. at 598, quoting *Renico v. Lett*, 559 U.S. 766, 773 (2010).

While recognizing that *Felkner* "was a summary decision issued within the constraints of the AEDPA," scholars have raised concerns that "it may nonetheless be read by some prosecutors and courts as a signal that the exclusion of black males who have been the victims of racial profiling is permissible." Elisabeth Semel, *Batson and the Discriminatory Use of Peremptory Challenges in the 21st Century*, Chapter 4 in Jurywork: Systematic Techniques § 4.35, p. 325 (NJP Consulting, Thompson Reuters 2018-2019 ed.) Given the widespread experience of racial profiling "a prosecutor today need merely ask about such experiences to trigger an answer that will justify a strike and insulate him from *Batson*." Sheri Lyyn Johnson, *Batson from the Very Bottom of the Well: Critical Race Theory and the Supreme Court's Peremptory Challenge Jurisprudence*, 12 Ohio St. J. Crim. Law 71, 88 (2014). The concern is not merely academic – after a potential juror mentioned she and her relatives had experience racial profiling, the District of Columbia Circuit found no good reason to believe the prosecutor's decision to strike her was discriminatory "merely because the Juror referenced race in expressing concerns about blacks' being pulled over by the police." *United States v. Gooch*, 665 F.3d 1318, 1330 (D.C. Cir. 2012).

The state courts in this case sanctioned an even more pernicious erosion of *Batson*, because C.H. was not himself the victim of racial

profiling – his "negative" experience with law enforcement occurred when a deputy mistook him for his brother. 4-ART 243-237. The trial court found C.H. "to be open and honest," but objected to his belief that deputies were stopping young African-American males "for no basis at all. That sounds like profiling to me," and also found C.H.'s voluntary efforts to ameliorate that problem to be a legitimate basis to exclude him. Appendix B at 422-423.

The Fifth Appellate District acknowledged that C.H.'s community service was "certainly laudable," but readily agreed it disqualified him from serving on the jury. Appendix A at 18. According to the appellate court, C.H.'s "concern with the targeting of young African-American men in the community, ran sufficiently deep and was sufficiently long-lasting to disqualify him as a juror." *Ibid*. While community activism in the abstract "is certainly laudable," C.H.'s activism "related directly to what he perceived as law enforcement's mistreatment of young African-American men vis-à-vis racial profiling," which the prosecutor could properly consider in striking him. *Ibid.*

Contrary to the unspoken assumption underlying the state courts' rationales, there is nothing in the record to suggest that C.H. was delusional, a lone Don Quixote-like crusader tilting at windmills. C.H. worked with church leaders, community leaders, and deputy sheriffs in promoting better

communication between those deputies and young African-American men in Wasco, all of whom presumably believed there was a problem. 4-ART 243-247.

While this Court has held that any reason, even a silly one, should be considered race neutral "'[u]nless a discriminatory intent is inherent in the prosecutor's explanation,'" *Purkett v. Elem*, 514 U.S. 765, 768 (1995), quoting *Hernandez*, 500 U.S. at 360, it should grant certiorari in this case to consider whether the mere perception that racial profiling exists can be considered a constitutionally reasonable basis for striking a prospective minority juror. Racial profiling has been a documented problem in this country for many years, as shown in the academic studies cited in *United States v. Leviner*, 31 F.Supp.2d 23, 34, fn. 26 (D. Mass. 1998), and it has continued to be a problem in California. *People v. Buza*, 4 Cal.5th 658, 698 (Liu, J., dissenting)(2018); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 Calif. L. Rev. 125 (2017).

Batson is not going to solve the problem of racial profiling in this country, but part of its legacy should at least include refusing to allow prosecutors to remove potential minority jurors who admit they believe it occurs. In criticizing what it characterized as "the charade that has become the *Batson* process," *People v. Randall*, 671 N.E.2d 60, 65-66 (Ill.App.

1996), a state court judge more than twenty years ago speculated that new prosecutors were given a manual to make it easy to "provide the trial court with a series of pat race-neutral reasons for exercise of peremptory challenges." *Ibid.* Since then, a prosecutor has posted a training video explaining how to strike African-American jurors through the use of purportedly race-neutral questioning because the prosecutor's "job is to win; it is not to be noble." Nancy S. Marder, *Batson v. Kentucky. Reflections Inspired by a Podcast*, 105 Ky. L.J. 621, 630 (2016-2017). And prosecutors almost always win *Batson* cases. See Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 Cornell L. Rev. 1075, 1102 (2011); *Equal Justice Initiative. Illegal Racial Discrimination in Jury Selection: A Continuing Legacy,* 14-22.

Reversal is required if a prosecutor strikes even one juror based on discriminatory intent. *Snyder v. Louisiana,* 552 U.S. 472, 478 (2008). This Court should grant certiorari to consider whether striking potential minority jurors based on their perception that racial profiling exists violates the constitutional right to equal protection of those jurors, and of the criminal defendants they are not considered qualified to judge.

Considering the overwhelming deference that even state appellate courts must afford the trial courts during the third *Batson* step, *Felkner*, 567

U.S. at 598, it will be nearly impossible for defendants to raise viable *Batson* challenges based on jurors' perception that racial profiling exists unless this Court grants certiorari to determine that it is not a race-neutral explanation for striking a prospective minority juror.

C. A Negative Experience with Law Enforcement, including Racial Profiling, Cannot Be Considered a Race Neutral Factor Given the Inevitably Disparate Impact It Has on Prospective Minority Jurors

The prosecutor in *Hernandez* excluded two bilingual jurors based on a concern that they would not be willing to follow the official translator's translation of Spanish-speaking witnesses, and this Court found no *per se* violation of the Equal Protection Clause even if "the prosecutor's criterion might well result in the disproportionate removal of prospective Latino jurors." *Hernandez*, 500 U.S. at 359-363. While "disparate impact should be given appropriate weight in determining whether the prosecutor acted with a forbidden intent, ... it will not be conclusive in the preliminary race-neutrality step of the *Batson* inquiry." *Id.* at 362. The prosecutor's explanation "raised a plausible, though not a necessary" inference of pretext, *id.* at 363, but the concept of federalism precluded this Court from overturning the state trial court's determination at the third *Batson* step in the absence of clear error. *Id.* at 369.

Even state appellate courts must give great deference to the trial courts' determination during the third *Batson* step, *Felkner*, 567 U.S. at 598, and both federal and state courts have repeatedly held that a negative encounter with law enforcement experienced by prospective minority jurors or their relatives was a race-neutral explanation for striking those jurors, regardless of whether that criterion would result in the disproportionate removal of minority jurors. See *United States v. Monell*, 801 F.3d 34, 44 (1st Cir. 2015); *United States v. Brooks*, 2 F.3d 838, 841 (8th Cir. 1993); *People v. Reed*, 4 Cal.5th 989, 1001 (2018).

This Court should grant certiorari in this case to consider whether negative encounters with law enforcement, and in particular experience with or even acknowledgment of racial profiling, can be considered a race-neutral explanation for striking prospective minority jurors. The purportedly "negative" encounter experienced by C.H. in this case involved a deputy who became the juror's good friend, 4-RT 243-247, completely undermining any reason to believe he still harbored bias against law enforcement many years later, yet the Fifth Appellate District found that the personal targeting by an officer disqualified C.H. from serving on a jury. Appendix A at 18.

Using negative encounters with law enforcement as a basis for disqualifying jurors will have a disparate impact on minority jurors,

particularly in the context of racial profiling which, by definition, will only be experienced by prospective minority jurors. Disparate impact arguments have had limited success, and a law review article published in 2012 found that, more than 20 years after *Hernandez*, only thirty-nine published federal decisions had addressed disparate impact arguments. Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the Misuse of Batson*, 45 U.C. Davis L. Rev. 1359, 1363 (2012.) The argument had failed in thirty-six cases involving people of color or women, but had succeeded in all three of the cases where stricken jurors were white. *Id*. at pp. 1363, 1373.

This Court should grant certiorari to consider whether an explanation for striking minority jurors that not only raises the prospect of the disproportionate removal of prospective minority jurors, *Hernandez*, 500 U.S. at 359-363, but will inevitably result in a disproportionate removal of those jurors because by definition it will only apply to them, can be considered a race-neutral explanation for a peremptory challenge.

CONCLUSION

For all the above reasons, this Court should grant certiorari.

Respectfully submitted,

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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY DAJUAN YATES, Defendant and Appellant.	F073663 (Super. Ct. No. DF011989A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Charles R. Brehmer, Judge.

Paul Kleven, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel Bernstein, Amanda D. Cary and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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Appendix A

INTRODUCTION

Defendant Anthony Dajuan Yates, a state prisoner, was caught by correctional staff with a bindle of marijuana. He was convicted by jury of unauthorized possession of a controlled substance in prison, in violation of Penal Code section 4573.6.[1] In a bifurcated proceeding, the trial court found true that defendant suffered a prior strike conviction within the meaning of the Three Strikes law. (§§ 667, subd. (c)–(j), 1170.12, subds. (a)–(e).) The trial court sentenced defendant to the lower term of two years, doubled to four years based on the prior strike conviction.[2]

On appeal, defendant claims that during jury selection, the prosecutor committed reversible error under *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) when she allegedly exercised peremptory challenges to excuse three African-American jurors based on race, in violation of the federal and state Constitutions. Defendant also claims the trial court abused its discretion when it excluded testimony relating to a correctional officer's alleged prior inconsistent statement, resulting in prejudice to him. (Evid. Code, § 1235.)

The People dispute defendant's entitlement to relief on either claim.

We agree with the People. We find no abuse of discretion in denying defendant's *Batson/Wheeler* motion or in excluding one of defendant's proposed witnesses from testifying on the ground there was no prior inconsistent statement. We therefore affirm the judgment.

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1 All further statutory references are to the Penal Code unless otherwise specified.

2 Although not relevant to the issues raised on appeal, the trial court designated the conviction in this case as the principal in-prison offense. In a separate Lassen County case, defendant was sentenced to one year for possession of a weapon in prison (§ 4502, subd. (a)), which the court designated as the subordinate in-prison offense. The court ordered the aggregate five-year prison term to run consecutive to the sentence on defendant's underlying conviction.

FACTUAL SUMMARY

On the afternoon of June 2, 2013, at Kern Valley State Prison, Rick Stinson, a correctional officer assigned to the yard, was preparing to assist Jason Gaddis, a correctional officer assigned to the visiting room. Visitation had just ended and the inmates, including defendant, needed to undergo strip searches prior to their release to the yard. Stinson testified that as he entered the visiting room, he noticed defendant had his hands down the back of his pants and the pants were moving as defendant tried to put something up his anus. Stinson explained that attempts by inmates to smuggle in contraband, usually narcotics or cell phones, is common and they usually do so by hiding the contraband in their anal cavity.

Stinson notified Gaddis he needed assistance and they took defendant from the visiting room to the adjacent inmate processing area, where the strip searches take place. As defendant, who was facing away from them, removed his boxer shorts, Stinson and Gaddis saw rubber material protruding from his anus. Stinson ordered defendant to remove the object, which was a black bindle inside a condom, and hand it to him. Defendant complied. The package, which was approximately seven inches long and two inches wide, was the largest Gaddis had ever seen.[3] No other contraband was found on defendant.

Stinson and Gaddis thereafter escorted defendant to a holding cell and Gaddis returned to the visiting room to process and release the remaining inmates. Stinson testified that defendant stated to him, "Stinson, this is for personal use because we're going on lockdown." When Stinson wrote his report later that day, he neither included defendant's statement nor authored a subsequent supplemental report including the statement.

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3 Gaddis testified most bindles are two to three inches in length.

At trial, Stinson testified that he was certain of defendant's statement and he denied forgetting about it. He explained he did not include the statement in his report because he did not consider it necessary given that inmates always cite personal usage and the bindle was large. Stinson explained that if inmates are caught with drugs for sale, they are locked up in the administrative segregation unit (ad-seg). If they are caught with drugs for personal use, they get written up but stay on the yard, a consequence preferable to placement in ad-seg. Stinson also testified that just prior to an earlier court proceeding in May 2015, he notified the then-assigned prosecutor of defendant's statement.[4] He testified that he told the prosecutor about the statement at that time because he thought the defense might bring it up and he did not want her to be caught off guard. He did not, however, think it was necessary to write a supplemental report to include the statement.

After defendant was placed in the holding cell, Stinson opened the bindle in the condom, which in turn contained four smaller bindles. In total, the four bindles contained what was later confirmed to be 63.62 grams of marijuana. Gaddis testified that a useable amount is defined as a single use and in prison, a typical useable amount is half of one gram. As such, the bindle defendant was caught with contained the equivalent of approximately 128 single usages, which Gaddis testified is inconsistent with personal use.

The circumstances surrounding defendant's receipt of the drug bindle in the visiting room were unknown. Inmates are strip searched prior to visitation and Gaddis did not see anyone hand anything to defendant. Although there are four cameras in the visiting room, one in each corner, there was no video recording of the visitation on June 2, 2013.[5] Lieutenant Chenelo described an outdated camera system plagued with

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4 The trial took place in March 2016.

5 There are no cameras in the inmate processing area because that is where strip searches occur.

problems. The system was not operable for long periods of time, including in 2013, and even when it was operable, its data was lost every time the generators were tested or there was otherwise a loss of power. Since the generators were tested once or twice a month, the data was saved for only 30 days at most.

In addition, the system was operated by the investigative services unit (ISU) and ISU officers did not work on weekends. If the camera system was going to run over the weekend, it had to be manually turned on and this did not occur unless ISU specifically planned to target someone. Chenelo, who was assigned to ISU, testified there was no plan to target anyone that weekend and it was his opinion that, based on the limitations surrounding the camera system, no recording was made of visitation on June 2, 2013. He also testified that even if a recording had been made, it would have been deleted within 30 days due to the generator testing and he explained that there was no way to download the data to compact disc for preservation.

DISCUSSION

I. *Batson/Wheeler* Claim

A. Applicable Legal Principles

Courts have long held that "'[b]oth the federal and state Constitutions prohibit any advocate's use of peremptory challenges to exclude prospective jurors based on race. [Citations.] Doing so violates both the equal protection clause of the United States Constitution and the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution.'" (*People v. Parker* (2017) 2 Cal.5th 1184, 1210–1211 (*Parker*), quoting *People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*).) The United States Supreme Court has recognized "[t]he Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system." (*Powers v. Ohio* (1991) 499 U.S. 400, 415.) This is so because "[i]t is not only litigants who are harmed when the right to trial by impartial jury is abridged. Taints of discriminatory bias

in jury selection—actual or perceived—erode confidence in the adjudicative process, undermining the public's trust in courts." (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1154 (*Gutierrez*), citing *Miller-El v. Dretke* (2005) 545 U.S. 231, 238 & *Powers v. Ohio*, *supra*, at p. 412.) For this reason, "race is irrelevant to a defendant's standing to object to the discriminatory use of peremptory challenges" and although here defendant and the excused jurors share the same racial identity, a *Batson/Wheeler* challenge may be raised even if the defendant does not share the same racial identity as the excused jurors. (*Powers v. Ohio*, *supra*, at pp. 415–416; accord, *Parker*, *supra*, at p. 1212; *People v. Burgener* (2003) 29 Cal.4th 833, 863.)

With respect to the selection of a jury, "'[t]here is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination.' [Citation.] 'A three-step procedure applies at trial when a defendant alleges discriminatory use of peremptory challenges. First, the defendant must make a prima facie showing that the prosecution exercised a challenge based on impermissible criteria. Second, if the trial court finds a prima facie case, then the prosecution must offer nondiscriminatory reasons for the challenge. Third, the trial court must determine whether the prosecution's offered justification is credible and whether, in light of all relevant circumstances, the defendant has shown purposeful race discrimination. [Citation.] "The ultimate burden of persuasion regarding [discriminatory] motivation rests with, and never shifts from, the [defendant]."'" (*Parker*, *supra*, 2 Cal.5th at p. 1211; accord, *Gutierrez*, *supra*, 2 Cal.5th at pp. 1158–1159.)

B. Procedural Background

1. Overview of Jury Selection Process

Trial courts have broad discretion over jury selection and the selection process varies. (*People v. Whalen* (2013) 56 Cal.4th 1, 29–30, disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 44, fn. 17; *Lenix*, *supra*, 44 Cal.4th at

p. 608.) In this case, the combined venire panel contained approximately 50 to 60 jurors. A group of 18 potential jurors was selected and examined through voir dire by the court and counsel. Following each voir dire session, jurors were selected from the venire panel to replace those jurors excused by stipulation, for cause or pursuant to the parties' peremptory challenges.

Although the trial court declined to make an express finding, the record suggests there were only three African-American jurors in the venire panel, all of whom were seated and subject to voir dire examination. C.H., an African-American man, was a member of the initial 18-member panel. After the first round of excusals, K.F., an African-American woman, was summoned from the venire panel and examined. In the next round of excusals, the prosecutor excused C.H. via peremptory challenge. After defense counsel and the prosecutor each exercised another peremptory challenge, the defense accepted the panel. The prosecutor then excused K.F. and six more potential jurors, including L.P., were seated. In the third and final round of excusals, the prosecutor excused L.P. via peremptory challenge, at which time defendant made his *Batson/Wheeler* motion.

The trial court found defendant had met his initial burden of demonstrating a prima facie case and the prosecutor made a record of her justifications for excusing C.H., K.F. and L.P. The court then made a finding the reasons were race neutral and denied the *Batson/Wheeler* motion.

2. Summary of Relevant Voir Dire

a. C.H.

C.H. was an instructional aid for special needs kids and his wife was a recordkeeper at Wasco State Prison. He had two adult children and had not previously served on a jury. During voir dire, C.H. stated that although his wife worked at a prison, he was not friends with any correctional officers. In response to defense counsel's inquiry, he agreed officers can make mistakes and said honesty was individual; some

officers could be telling the truth and some could be lying. In response to the prosecutor's questions, C.H. related a negative experience he had with law enforcement 15 years earlier when a sheriff's deputy mistook him for his brother and chased him down in a store. C.H. said the deputy kept calling him and following him. Another deputy told the pursuing deputy that C.H. was not his brother. C.H. said he finally turned around and asked, "[W]hat is your problem with my brother? You know, what is the problem?" C.H. described the negative experience as positive as well because he and the deputy later became friends.

C.H. also related that at the time, there was a "really big issue" in Wasco with the sheriff's department because African-American men were getting stopped for no reason and it was "a very terrible experience." He explained young African-American men walking down the street would find themselves stopped, placed against a wall and searched by law enforcement without reason. C.H. said his experience with the deputy he later became friends with helped open the door to a dialogue about the conduct of the sheriff's department toward young African-American men, and he was part of a coalition of churches and community leaders that met and talked with law enforcement. The coalition lasted approximately five years and was helpful in resolving some issues.

b. K.F.

After the first round of challenges, K.F. was selected to join the panel. She was a nurse with an adult son and a grandson. She previously served as a juror in one criminal case and the jury reached a verdict. She stated that law enforcement officers are capable of lying and they back each other up. When the panel was asked about arrests, charges or convictions, she related that her son pled guilty to possession of a controlled substance, but he did not do drugs and the case was not fairly resolved. When the panel was asked about experiences as a crime victim, she stated her home had been burglarized, but the crime was not investigated and when the trial court asked if she had an issue with that, she answered affirmatively.

When defense counsel questioned how she would assess a witness's testimony regarding a statement someone made to the witness, K.F. said that was hearsay and she could not assess it. She subsequently said if an individual took the stand and testified about someone else's statement, she would not consider it. When the prosecutor followed up on this line of questioning, K.F. reiterated she would not consider a hearsay statement because it is not factual, and after being informed by the prosecutor that the definition of hearsay was a legal judgment, she said, "Okay. I didn't know hearsay was a legal judgment. [¶] But if somebody else—if somebody comes to me and said such and such said something, I don't take—unless it's—I hear with my own ears, in that case—now, if—if later down the line there's supporting evidence that this was actually true, then of course it's—then it comes back into consideration. But until then." The prosecutor explained this was an important issue because K.F. would not have personally heard the evidence. K.F. responded, "Well, exactly. But I also don't have any other evidence supporting that statement—if it's the first witness."

At that point, the court intervened and explained such evidence is admissible under certain circumstances. K.F. said she would then consider it. The prosecutor followed up with K.F. and commented K.F. still seemed skeptical. K.F. said, "Well, you know, like you said, I'm not gonna—I'm not gonna hear it with my own two ears, but the person that said it, how come that person had said it unless you're talking about the defendant, of course. [¶] You know, if—how come they're not here to say it?"

c. L.P.

The prosecutor thereafter excused C.H. and K.F. L.P. then filled a seat on the panel. L.P. was a single social worker with no children. She had previously served as a juror on one criminal case, but the jury deadlocked ten to two and she was one of the two. She stated she was a crime victim but did not want to discuss it in open court. She also stated law enforcement officers were not more likely to tell the truth and, after a long pause that was noted in the record, stated they were not less likely to tell the truth, either.

L.P. related two negative experiences with law enforcement that occurred approximately 10 years earlier, in very close temporal proximity to the crime committed against her. Outside the presence of the other jurors, L.P. later explained she was the victim of rape. Prior to disclosing the nature of the crime against her, she stated in open court that due to the "incident" that had just occurred, she did not want to drive so her friend was driving her car. She was unaware there was an issue with her friend's driver's license and they were stopped at a checkpoint. L.P. had her driver's license and car insurance information with her and she explained what had just happened to her, but officers impounded her car anyway, which left a bad taste in her mouth.

A few days later, after she retrieved her car, she was pulled over and informed that someone in a car like hers had hit a bicyclist. She again explained everything she had gone through but the female officer "was real nasty." The prosecutor excused L.P. during the next and final challenge round, and defendant made his *Batson/Wheeler* motion as to C.H., K.F. and L.P.

3. Prosecutor's Justifications for Excusing C.H., K.F. and L.P.

With respect to C.H., the prosecutor stated that although C.H. was friendly and she "liked him a great deal," she excused him because of his negative experiences with law enforcement. The prosecutor explained that while C.H. said his own negative experience with law enforcement ended positively, she was not so sure and thought "he was trying to convince us a little bit too hard that it ended up positively." Additionally, she cited his extended community activism for five years, which was prompted by the perception that law enforcement was mistreating young African-American men based on race.

The prosecutor stated the main reason she excused K.F. was because K.F. believed her son, whom she said did not do drugs, was wrongfully convicted of a drug crime. Additionally, the prosecutor pointed out the legal conclusions drawn by K.F. with respect to hearsay evidence and stated she was concerned K.F. might draw such conclusions during trial.

Finally, the prosecutor stated she excused L.P. because she was the victim of a rape and obviously traumatized by the experience. As well, shortly after the rape, L.P. was stopped by police and treated rudely, and her car was impounded even though she told police what happened to her. A few days later, she had another negative experience with law enforcement when she was pulled over by a female officer, whom she also told about the crime against her and whom she described as "nasty." Finally, the prosecutor said L.P. hesitated multiple times when answering questions, including when the court asked her whether her experience was going to affect her. The prosecutor expressed doubt L.P. could put something so violent out of her mind, compounded by her mistreatment by law enforcement.

4. Defense Position

With respect to C.H., defense counsel argued that he would characterize C.H.'s experience with law enforcement as positive because he and the deputy who confused him with his brother became friends. He also argued that issue had nothing to do with prison and it occurred 15 to 20 years ago.

Regarding K.F., defense counsel expressed disbelief as to the prosecutor's stated concern regarding the exchange over hearsay evidence. Counsel argued K.F. was confused and the issue was cleared up. He also pointed out that while K.F. believed her son was wrongfully convicted, that incident occurred in Los Angeles.

With respect to L.P., counsel argued that the prosecutor's excusal of her because she was a rape victim did not make sense in a drug case or from a prosecutorial standpoint. He also argued L.P. was satisfied with the handling of her rape case and, as far as he could tell, the problem at the checkpoint was with her friend rather than Bakersfield Police Department (BPD) and she did not have any "lingering problems with BPD." Counsel disputed any interpretation of the record as indicating L.P. explained to the officers involved in the two incidents that she was a rape victim. Counsel conceded

that the record was clear the female officer in the second incident was rude to L.P., but he pointed out L.P. stated she could be fair and impartial.

As to all three jurors, defense counsel argued that they did not have any negative experiences with the California Department of Corrections and Rehabilitation. He also pointed out that Juror No. 4067612 reported a negative experience with law enforcement when he returned a wallet and was still upset about it but nevertheless remained on the jury.

5. Trial Court's Ruling

In denying defendant's *Batson/Wheeler* motion, the trial court ruled as follows:

> "Okay. Let's assume for purposes of this discussion that [L.P.], [C.H.], and [K.F.] are all Asian-Americans. Would there be a neutral, non protected class basis—or Caucasian Americans or, whatever. Would there be a basis, or is there a basis articulated by the prosecutor to excuse each of them? And, as [defense counsel] said, considering also, [Juror No. 4067612] still remains on the jury.
>
> "The theme that runs with all three is profiling. [L.P.] indicated, at least in the second run-in that she had with the Bakersfield Police Department, and intimated that there was profiling by police based on what she looked like.
>
> "Her body language here in court, her hesitation responding, the fact that she had two negative experiences with law enforcement, those are all non protected class reasons that she could be excused. So I don't find that there's a problem in regard to the People excusing [L.P.] In regard to whether she was a victim of rape or not, I don't quite understand that argument, but that doesn't really matter because there were other bases articulated.
>
> "In regard to [K.F.], she was combative, she didn't want to answer the questions directly, she talked over people questioning her including me. She clearly was unhappy about the fact that her son was arrested, charged and either pled or went to trial on a drug crime and with kind of the inference that there was profiling as well and that the cops lied.

"One of the areas of inquiry by both counsel, but particularly the defense, so far of the prospective jurors has to do with honesty and veracity of law enforcement officers or witnesses in general.

"[K.F.], the reason articulated by the People is a valid reason unrelated to her status as a member of a protected class.

"In regard to [C.H.], he was a really nice guy. He appeared to be open and honest and answered questions and also intimated that he believed that there was a problem with the Sheriff's Department in Wasco where he resides for a number of years and that that had to do with stopping young African-American males for no basis at all. That sounds like profiling to me.

"That he was involved directly in trying to combat that and to get more direct communication between certain members of the community in Wasco, and it sounds like through a church, with those Sheriff's deputies. That's also a basis to exclude him that would not be due to his ethnicity, race, or being a member of a protected class.

"The motion from the defense is denied."

C. *Batson/Wheeler's* Three Step Process

1. Prima Facie Case

At the first step of the *Batson/Wheeler* process, "the ... 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."'" (*Gutierrez*, *supra*, 2 Cal.5th at p. 1158; accord, *Parker*, *supra*, 2 Cal.5th at p. 1211.) Where, as here, the trial court found a prima facie showing and evaluated the prosecutor's justifications, "the adequacy of the prima facie showing becomes moot" and we focus on the third step. (*People v. Smith* (2018) 4 Cal.5th 1134, 1147 (*Smith*); accord, *People v. Melendez* (2016) 2 Cal.5th 1, 14–15; *People v. Silva* (2001) 25 Cal.4th 345, 384; *People v. Arellano* (2016) 245 Cal.App.4th 1139, 1157.)

2. Prosecutor's Explanation

At the second step of the process, the burden shifts to the prosecutor to "provide 'a "clear and reasonably specific" explanation of [her] "legitimate reasons" for exercising the challenges.' [Citation.] 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 '"[u]nless a discriminatory intent is inherent in the prosecutor's explanation,"' the reason will be deemed neutral." (*Gutierrez*, *supra*, 2 Cal.5th at p. 1158.) The standard imposed is not exacting and "does not demand an explanation that is persuasive, or even plausible. 'At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'" (*Purkett v. Elem* (1995) 514 U.S. 765, 767–768; accord, *Gutierrez*, *supra*, at p. 1168.) "'[E]ven a "trivial reason" if genuine and neutral, will suffice.'" (*Lenix*, *supra*, 44 Cal.4th at p. 613.)

In this case, the prosecutor's reasons for excusing C.H., K.F., and L.P. were facially neutral and defendant does not contend otherwise.

3. Trial Court's Evaluation

a. Standard of Review

At the third and final step, the trial court must "evaluate[] the credibility of the prosecutor's neutral explanation." (*Gutierrez*, *supra*, 2 Cal.5th at p. 1168; accord, *Lenix*, *supra*, 44 Cal.4th at p. 613; *People v. Silva*, *supra*, 25 Cal.4th at p. 385.) "In order to prevail, the movant must show it was '"more likely than not that the challenge was improperly motivated."' [Citation.] This portion of the *Batson/Wheeler* inquiry focuses on the subjective genuineness of the reason, not the objective reasonableness. [Citation.] 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.'" [Citations.] To satisfy [himself] 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, [his] knowledge of trial techniques, and [his] observations of the prosecutor's examination of panelists and exercise of for-cause and peremptory challenges. [Citation.] Justifications that are 'implausible or fantastic ... may (and probably will) be found to be pretexts for purposeful discrimination.' [Citation.] We recognize that 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." (*Gutierrez*, *supra*, at pp. 1158–1159; accord, *Lenix*, *supra*, at pp. 612–613.)

On appeal, "[w]e review a trial court's determination regarding the sufficiency of tendered justifications with '"great restraint."' [Citation.] We presume an advocate's use of peremptory challenges occurs in a constitutional manner. [Citation.] When a reviewing court addresses the trial court's ruling on a *Batson/Wheeler* motion, it ordinarily reviews the issue for substantial evidence. [Citation.] [However, 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.' [Citation.] 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.'" (*Gutierrez*, *supra*, 2 Cal.5th at p. 1159; accord, *Lenix*, *supra*, 44 Cal.4th at pp. 613–614; *People v. Silva*, *supra*, 25 Cal.4th at pp. 385–386.)

b. Analysis

1) Statistical Consideration

As we explain, *post*, we conclude the trial court's findings are supported by substantial evidence and it did not abuse its discretion in denying defendant's *Batson/Wheeler* motion. We begin with the recognition that the prosecutor dismissed all three—or 100 percent—of the African-American panel members and it appears no other African-American jurors remained in the venire panel. As well, defendant points out that the prosecutor used three out of eight peremptory challenges to excuse C.H., K.F. and L.P. However, where there are few jurors in the group subject to the *Batson/Wheeler* challenge, the ability to draw an inference of discrimination from the excusal of some or even all is impacted. (*Parker*, *supra*, 2 Cal.5th at p. 1212; accord, *People v. Arellano*, *supra*, 245 Cal.App.4th at p. 1159.) As the California Supreme Court explained in a case involving the excusal of two out of three African-America jurors, "'"[T]he small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible. '[E]ven the exclusion of a single prospective juror may be the product of an improper group bias. As a practical matter, however, the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion.'"'" (*Parker*, *supra*, at p. 1212, quoting *People v. Bonilla* (2007) 41 Cal.4th 313, 343; accord, *People v. Woodruff* (2018) 5 Cal.5th 697, 750 (*Woodruff*).) Such is the case here.

Further, "removing members of an identifiable group, where the defendant is a member of that group, is a fact that 'may prove particularly relevant' to the first-stage inquiry. [Citation.] But a prima facie case of discrimination can be established only if the *totality* of the relevant facts gives rise to an inference of discriminatory purpose. A court, in particular, may also consider nondiscriminatory reasons 'that are apparent from and "clearly established" in the record [citations] and that necessarily dispel any inference of bias.'" (*People v. Zaragoza* (2016) 1 Cal.5th 21, 43, quoting *People v. Scott* (2015) 61 Cal.4th 363, 384; accord, *Smith*, *supra*, 4 Cal.5th at p. 1147.) We conclude

that here, as discussed next, "[a]ny inference of bias is '"necessarily dispel[led]"' because nondiscriminatory reasons for the prosecutor's peremptory strikes of [C.H., K.F., and L.P.] 'are apparent from and clearly established in the record.'" (*Woodruff, supra*, 5 Cal.5th at p. 751, quoting *People v. Reed* (2018) 4 Cal.5th 989, 1000 (*Reed*).)

2) Record Expressly Supports Justifications Advanced by Prosecutor

The trial court identified experiences with racial profiling by law enforcement as the common thread linking the three excused jurors. While we agree with defendant that this characterization did not accurately summarize the prosecutor's concerns with K.F. and L.P., it remains that all three excused jurors related negative experiences with law enforcement or the criminal justice system, which the prosecutor cited as a basis for excusal. It is well settled that "[a] prospective juror's distrust of the criminal justice system is a race-neutral basis for his excusal" (*People v. Clark* (2011) 52 Cal.4th 856, 907; accord, *Reed, supra*, 4 Cal.5th at p. 1001), as is "'a prospective juror's negative experience with law enforcement'" (*Lenix, supra*, 44 Cal.4th at p. 628; accord, *Reed, supra*, at p. 1001). Moreover, the trial court's thematic summarization notwithstanding, the court did not overlook the reasons articulated by the prosecutor. (*Smith, supra*, 4 Cal.5th at pp. 1157–1158.)[6]

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6 In *Smith*, the California Supreme Court recently cautioned against such an approach, explaining, "This 'laundry list' approach [citation] carries a significant danger: that the trial court will take a shortcut in its determination of the prosecutor's credibility, picking one plausible item from the list and summarily accepting it without considering whether the prosecutor's explanation as a whole, including offered reasons that are implausible or unsupported by the prospective juror's questionnaire and voir dire, indicates a pretextual justification. A prosecutor's positing of multiple reasons, some of which, upon examination, prove implausible or unsupported by the facts, can in some circumstances fatally impair the prosecutor's credibility. [Citation.] In assessing credibility at the third stage of a *Batson/Wheeler* decision, trial courts should attempt to evaluate the attorney's statement of reasons as a whole rather than focus exclusively on one or two of the reasons offered." (*Smith, supra*, 4 Cal.5th at pp. 1157–1158.) However, the record does not suggest that in this case, the trial court "took any shortcut in evaluating the prosecutor's credibility." (*Id.* at p. 1158.)

Turning first to C.H., the prosecutor passed on him initially, using three peremptory challenges in the first round to excuse other jurors and then using her fourth peremptory challenge in the second round to excuse him. (See *Gutierrez, supra*, 2 Cal.5th at p. 1170 ["[P]asses while a specific panelist remains on the panel '"strongly suggest[] that race was not a motive"' in challenged strikes."].) Although he stated his initially negative experience with law enforcement ended positively when he later became friends with the deputy, the prosecutor perceived C.H. as trying too hard to convince them of this. Moreover, C.H.'s perception that law enforcement was profiling or otherwise mistreating young African-American males made a strong enough impression that it motivated him to engage in years-long community activism targeting that specific issue.

Given the circumstances underlying defendant's offenses, the prosecutor's case hinged on the testimony of law enforcement witnesses; there were no civilian witnesses to the crime. The prosecutor could have reasonably concluded that C.H.'s negative experiences with law enforcement, evidenced by his personal targeting by an officer and by his concern with the targeting of young African-American men in the community, ran sufficiently deep and was sufficiently longstanding to disqualify him as a juror.

Defendant casts C.H. as an "exemplary juror" and asserts that his "laudable, voluntary efforts over 5 years to reduce profiling in his community cannot be considered a justifiable explanation for striking him, or one based on any accepted trial strategy." The prosecutor and the trial court described C.H. in positive terms, and activism aimed at bettering a community is certainly laudable. However, this does not compel the conclusion that the prosecutor's concerns were unjustified and the excusal discriminatory. To the contrary, C.H.'s community activism related directly to what he perceived as law enforcement's mistreatment of young African-American men vis-à-vis racial profiling. The prosecutor was not required to ignore the context in which C.H.'s activism occurred and we reject defendant's contrary argument.

With respect to K.F., she stated her son did not do drugs and she believed he was wrongfully convicted of drug possession. An additional justification for excusing her was her response to questions regarding hearsay evidence. Although K.F. stated she could follow the law as instructed, her skepticism regarding hearsay evidence that was not corroborated by additional evidence is apparent from the record. As we have stated, a close family member's negative experience with the criminal justice system is a legitimate ground for excusal, as is concern that a potential juror cannot or will not follow the law.

Finally, the prosecutor could have reasonably concluded that L.P.'s back-to-back negative experiences with law enforcement, which is a sufficient ground to justify her excusal, took on a heightened dimension by virtue of the fact that they occurred shortly after she was the victim of a violent and particularly sensitive crime and that they occurred despite the fact she informed the involved officers of the crime against her.[7] During the course of the first incident, officers impounded L.P.'s car even though she had her license and registration with her and she explained the situation to them. The second incident involved an officer L.P. described as "real nasty." The prosecutor could have decided that this combination of events rendered L.P. unsuitable to serve as a juror because it left her with a strong negative impression of law enforcement.

The prosecutor also pointed out that L.P. hesitated multiple times in responding to questions and specifically hesitated before responding to the court's inquiry whether she could put the negative experiences with law enforcement out of her mind. The prosecutor's concern over this issue, too, finds express support in the record and we note the prosecutor specifically questioned L.P. regarding her hesitation during voir dire.

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[7] At trial, defense counsel argued the record did not suggest L.P. told officers she had been a crime victim. Defendant does not advance that argument on appeal, but we note the record supports the prosecutor's position that L.P told officers what had happened to her and they nevertheless impounded her car and treated her rudely.

In sum, the justifications advanced by the prosecutor to explain her excusal of C.H., K.F., and L.P. find express support in the record of voir dire. They also constitute legitimate, race-neutral bases for the exercise of peremptory challenges.

3) Claim Trial Court Substituted Reasoning

In advancing his *Batson/Wheeler* claim on appeal, defendant focuses on statements made by the trial court in evaluating the prosecutor's justifications and claims the trial court's evaluation was not sincere and reasoned. Defendant criticizes the trial court for describing racial profiling as the common denominator shared by C.H., K.F. and L.P., and for supplying its own reasons supporting the excusal of the jurors. We do not agree with these criticisms.

It is well established that "'[w]hen the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings.'" (*People v. Williams* (2013) 56 Cal.4th 630, 653; accord, *People v. Hardy* (2018) 5 Cal.5th 56, 76 (*Hardy*).) "'Some neutral reasons for a challenge are sufficiently self-evident, if honestly held, such that they require little additional explication.'" (*Hardy*, *supra*, at p. 77, quoting *Gutierrez*, *supra*, 2 Cal.5th at p. 1171.) Such is the situation here.

As well, as previously stated, neither the trial courts nor appellate courts may "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.'" (*Gutierrez*, *supra*, 2 Cal.5th at p. 1159, quoting *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 252.) Notwithstanding defendant's claim to the contrary, we are not persuaded this is what occurred here.

We have already addressed the court's comment that the excusals shared racial profiling in common. That this initial comment by the trial court did not accurately summarize the prosecutor's concerns with K.F. and L.P. does not compel a conclusion that the trial court substituted its own reasons for those given by the prosecutor; the record demonstrates this was not the case. The prosecutor's reasons were self-evident and supported by the record, as discussed, and those reasons were addressed by the court.

Regarding the trial court's comments about K.F.'s combative demeanor and L.P.'s unspecified body language, the court did not raise demeanor or body language as an independent reason justifying excusal of K.F. and L.P. and we reject defendant's contrary argument. In our view, the trial court's comments were made in the context of considering K.F.'s and L.P.'s negative experiences with law enforcement, K.F.'s skepticism toward hearsay evidence, and L.P.'s hesitation in responding. The same is true of the court's comment that K.F.'s statements suggested an inference that the police were lying. This comment did not identify an independent basis for excusal but instead related to K.F.'s statement that her son did not do drugs and was wrongfully convicted of a drug crime.

With respect to the prosecutor's reference to L.P.'s status as a crime victim, the trial court expressed a lack of understanding as to that basis but dismissed it in light of other bases articulated. However, "'[t]he inquiry is focused on whether the proffered neutral reasons are subjectively *genuine*, not on how objectively reasonable they are. The reasons need only be sincere and nondiscriminatory.'" (*Hardy, supra*, 5 Cal.5th at p. 76, quoting *People v. Melendez, supra*, 2 Cal.5th at p. 15.) The prosecutor expressed concern over the fact that L.P. experienced such an obviously traumatizing, violent and intimate crime. Whether it was objectively reasonable or not, nothing in the record suggests that the reason was either insincere or discriminatory, or that the trial court viewed it as such. Moreover, the prosecutor also stated L.P.'s traumatization was compounded by her

negative treatment by law enforcement. This suggests the prosecutor viewed these factors in combination rather than in isolation.

4) Comparative Juror Analysis

Finally, "'[e]vidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by the defendant and the record is adequate to permit the urged comparisons.'" (*Woodruff, supra*, 5 Cal.5th at p. 754, quoting *Lenix, supra*, 44 Cal.4th at p. 622; accord, *Gutierrez, supra*, 2 Cal.5th at p. 1174.) In this case, defendant argued in the trial court that in evaluating the prosecutor's justifications, the excusals of C.H., K.F. and L.P. need to be compared to the acceptance of Juror No. 4067612. On appeal, defendant argues L.P. and Juror No. 4067612 were comparable. In addition, defendant argues for the first time that the prosecutor's acceptance of Juror No. 4187970 shows the excusal of K.F. was also racially motivated.

Comparative juror analysis evidence "'is not necessarily dispositive, but it is one form of relevant circumstantial evidence.'" (*Hardy, supra*, 5 Cal.5th at p. 77, quoting *People v. Melendez, supra*, 2 Cal.5th at p. 15; accord, *Smith, supra*, 4 Cal.4th at pp. 1147–1148.) "'The rationale for comparative juror analysis is that a side-by-side comparison of a prospective juror struck by the prosecutor with a prospective juror accepted by the prosecutor may provide relevant circumstantial evidence of purposeful discrimination by the prosecutor. [Citations.]' [Citation.] 'If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step.' [Citation.] 'At the same time, "we are mindful that comparative juror analysis on a cold appellate record has inherent limitations." [Citation.] In addition to the difficulty of assessing tone, expression and gesture from the written transcript of voir dire, we attempt to keep in mind the fluid character of the jury selection process and the complexity of the balance involved. "Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by

other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding." [Citation.]'" (*People v. Winbush* (2017) 2 Cal.5th 402, 442; accord, *Woodruff, supra*, 5 Cal.5th at p. 754.)

"Pretext is established, however, when the compared jurors have expressed 'a substantially similar *combination* of responses,' in all material respects, to the jurors excused. [Citation.] Although jurors need not be completely identical for a comparison to be probative [citation], 'they must be materially similar in the respects significant to the prosecutor's stated basis for the challenge' [citation]." (*People v. Winbush, supra*, 2 Cal.5th at p. 443, quoting *People v. DeHoyos* (2013) 57 Cal. 4th 79, 107.)

a) Juror No. 4067612

Juror No. 4067612, a member of the initial panel, was married with two adult children. He worked at a hospital as a warehouse supervisor and his wife worked at a hospital as a secretary. He had previously served as a juror on two criminal cases, both of which resulted in a verdict. He reported being the victim of one crime many years before when someone broke into his house through the front door but was chased off by his wife.

Juror No. 4067612 also reported one negative experience with law enforcement six or seven years earlier when he and a friend found a wallet that contained no identification and they returned it to the police station. He explained that a gate had been open and he apparently should not have entered through it. He said the officer present "was being hard on me" and acting "like I was guilty of stealing a wallet because—that was the only bad experience I had. It did kind of—it did kind of upset me because I'm trying to be a good citizen." He stated, "That's the last time I do it. I'll just mail it in. That was a bad experience." He concluded, "I think there's a bad apple in every class of, you know, bad police officers, bad judge, bad employees. So I can put that aside."

Although he described his experience as "kind of upset[ting,]" it was nevertheless limited to an isolated incident.

Defendant argues L.P. was stricken despite her "milder and more distant experiences." The People disagree that L.P.'s two negative law enforcement experiences were milder than that of Juror No. 4067612 and contend that the prosecutor could have readily concluded that their experiences were sufficiently dissimilar to preclude L.P. but not Juror No. 4067612 from serving.

We are unconvinced that Juror No. 4067612 was materially similar to C.H., L.P. or K.F. The California Supreme Court has recognized that "parties with limited peremptory challenges generally cannot excuse every potential juror who has any trait that is at all problematic. They must instead excuse those they believe will be most problematic under all the circumstances. There will always be some similarities between excused jurors and nonexcused jurors." (*Hardy, supra*, 5 Cal.5th at p. 83.)

While L.P.'s negative experiences with law enforcement were more distant temporally than Juror No. 4067612's experience, neither of their experiences was recent and we do not find this point illuminative. More important were the experiences themselves and we agree with the People that L.P.'s negative experiences were not milder than Juror No. 4067612's experience. To the contrary, very shortly after L.P.'s rape, she was treated poorly by law enforcement on two occasions only days apart. Given that rape is a violent and intimate crime, the prosecutor could have reasonably concluded that L.P.'s mistreatment by police was more traumatizing and left a more deeply felt negative impression of law enforcement. Moreover, L.P.'s car was impounded during the first incident, which amounts to more than a minor inconvenience, even though she informed officers of her situation. We do not agree this is comparable to being treated suspiciously while turning in a wallet at a police station. Similarly, we do not find the wrongful conviction of one's child as reported by K.F. or the systemic racial

profiling described by C.H. comparable to being treated suspiciously on a single, brief occasion.

Although the prosecutor did not identify prior jury service as a ground for concern, Juror No. 4067612 served on two juries that reached verdicts. In contrast, L.P.'s jury service experience culminated in a hung jury with L.P. and one other person holding the minority position. This distinction sets Juror No. 4067612 and L.P. further apart when considering whether they were materially similar. (See *Reed*, *supra*, 4 Cal.5th at p. 1003 [potential juror's service resulting in hung jury a legitimate prosecutorial concern].)

We note C.H. had no prior jury service and while K.F. served on a jury that reached a verdict, the prosecutor's concern focused on the allegedly wrongful conviction of K.F.'s son. As we have stated, the prosecutor could have reasonably concluded that Juror No. 4067612's negative experience with law enforcement, vis-à-vis turning in the wallet, was not equivalent to either C.H.'s or K.F.'s experiences, both of which were more personal in nature and which were not limited to one brief contact. For these reasons, we do not find Juror No. 4067612 materially similar to C.H., K.F. or L.P.

b) Juror No. 4187970

Juror No. 4187970, who was selected to join the panel after the first round of challenges, was single and worked as an assistant to a financial advisor. She had served as a juror on two prior criminal cases, one of which resulted in a guilty verdict and the other of which resulted in acquittal.[8] She served as the foreperson for the latter case. The People do not address defendant's argument or otherwise touch on the issue of comparative analysis as to this juror.

Juror No. 4187970 served on a jury that acquitted the defendant. Outside the presence of the other jurors, she explained that during deliberation, the jurors, including

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8 Defendant refers to Juror No. 4187970 as "he," but the record reflects the juror is a woman.

two correctional officers, focused on questionable conduct by the Bakersfield Police Department. As we interpret her statements, jurors' concern lay, at least in part, with suspicious, possibly staged, crime scene photos.

Although defendant attempts to liken Juror No. 4187970's jury service experience involving untruthful law enforcement witnesses to the trial court's concern that K.F. was intimating the police lied with respect to her son's case, we are not persuaded. The prosecutor's overriding concern with C.H., K.F. and L.P. was their negative experience with law enforcement or the criminal justice system. Juror No. 4187970 did not have any similar negative experiences, nor is there any indication in the record that she was hesitant in responding like L.P. or had concerns about hearsay evidence like K.F. Therefore, defendant fails to demonstrate that she and C.H., K.F. or L.P. were materially similar jurors.

5) Conclusion

In this case, the facially neutral reasons articulated by the prosecutor for excusing C.H., K.F., and L.P. "'are apparent from and clearly established in the record.'" (*Woodruff, supra*, 5 Cal.5th at p. 751, quoting *Reed, supra*, 40 Cal.4th at p. 1000.) As a result, the trial court was not necessarily required to make a detailed record of its findings, but it nevertheless expressly evaluated the prosecutor's stated justifications. We conclude the trial court's findings are supported by substantial evidence and reject defendant's claim that the court abused its discretion in denying his *Batson/Wheeler* motion.

II. Exclusion of Testimony Regarding Alleged Prior Inconsistent Statement

A. Background

Turning to defendant's claim of evidentiary error, a witness's prior inconsistent statement is admissible pursuant to Evidence Code section 1235, which provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in

compliance with Section 770."[9] At trial, Stinson testified that after defendant was caught with the bindle of drugs, he stated, "Stinson, this is for personal use because we're going on lockdown." That statement was not documented in Stinson's incident report, and he testified he intentionally omitted it because he found it unnecessary given that inmates commonly make such statements to avoid being placed in ad-seg. He also testified that at an earlier court proceeding in 2015, he notified the then-assigned prosecutor, Jessica Hartnett, of the statement. He explained that he mentioned it to her at that time because he did not want her to be caught off guard if the defense brought up the statement. Hartnett thereafter notified the then-assigned defense counsel of defendant's statement via an email in which she represented that Stinson said he forgot to include the statement in his report.

During trial, Stinson did not testify what he told Hartnett, if anything, regarding why he did not include the statement in his report. The prosecutor decided not to call Hartnett as a witness and she made a motion to preclude the defense from calling Hartnett. Defendant argued that he wanted to call Hartnett as a witness so he could introduce impeachment evidence that Stinson made a prior inconsistent statement regarding his reason for omitting the statement from the report. The prosecutor contended the evidence was irrelevant because there was no inconsistent statement. After hearing their arguments, the trial court held a hearing pursuant to Evidence Code

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9 Section 770 of the Evidence Code provides: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

"(a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or

"(b) The witness has not been excused from giving further testimony in the action."

section 402 to clarify the circumstances underlying Hartnett's email and the exchange between Hartnett and Stinson.[10]

At the hearing, the trial court noted that Hartnett's representation to defense counsel that Stinson said he forgot to mention something in his report was not in quotations. In response to the court's inquiry, Hartnett testified that Stinson did not say he forgot to include the statement in his report and he never offered any explanation for the omission. Rather, he told her only of the statement and, in her haste to notify defense counsel, she assumed he forgot to include the statement in his report and communicated as much to defense counsel.

At the end of the hearing, the trial court ruled that Hartnett could testify at trial. After the prosecutor filed a motion for reconsideration, the trial court reversed its decision and excluded Hartnett as a witness, concluding that based on Hartnett's testimony, Stinson did not make the statement attributed to him in Hartnett's email and therefore, there was no prior inconsistent statement within the meaning of Evidence Code section 1235.[11]

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10 Section 402 of the Evidence Code provides:

"(a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.

"(b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests.

"(c) A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute."

11 In moving for reconsideration, the prosecutor argued in part that the evidence was irrelevant and should be excluded under Evidence Code section 352, which provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The trial court did not address Evidence Code section 352 in excluding the evidence nor is it necessary for us to consider that ground in light of our determination that there was no error. (See *People v. Zamudio* (2008) 43 Cal.4th 327, 351, fn. 11.)

On appeal, defendant contends the trial court erred in excluding the evidence of Stinson's prior inconsistent statement and the exclusion resulted in prejudice to him. The People maintain that, as a foundational matter, the trial court properly excluded Hartnett as a witness based on its determination that Stinson did not make any statement to Hartnett that was inconsistent with his trial testimony.

B. Standard of Review

"[A] trial court has broad discretion to determine whether a party has established the foundational requirements for a hearsay exception (*People v. Martinez* (2000) 22 Cal.4th 106, 120) and '[a] ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto[.]' (Evid. Code, § 402, subd. (c).) We review the trial court's conclusions regarding foundational facts for substantial evidence. (*People v. Phillips* (2000) 22 Cal.4th 226, 236.) We review the trial court's ultimate ruling for an abuse of discretion (*People v. Hovarter* (2008) 44 Cal.4th 983, 1007–1008; *People v. Martinez, supra*, at p. 120), reversing only if '"the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice."' (*People v. Brown* (2003) 31 Cal.4th 518, 534.)" (*People v. DeHoyos, supra*, 57 Cal.4th at p. 132; accord, *People v. Jackson* (2016) 1 Cal.5th 269, 320–321.)

C. Analysis

1. No Error

"A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770. The 'fundamental requirement' of section 1235 is that the statement in fact be *inconsistent* with the witness's trial testimony." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219, fn. omitted; accord, *People v. Homick* (2012) 55 Cal.4th 816, 859; *People v. Cowan* (2010) 50 Cal.4th 401, 462.) The rule is not mechanical. (*People v. Johnson, supra*, at p. 1219.) '"Inconsistency in effect, rather than contradiction in express terms, is the test for

admitting a witness' prior statement [citation], and the same principle governs the case of the forgetful witness.'" (*People v. Johnson*, *supra*, at p. 1219; *People v. Homick*, *supra*, at p. 859; *People v. Cowan*, *supra*, at p. 462.)

As previously set forth, the parties in this case disputed whether Hartnett's email evidenced a prior inconsistent statement by Stinson regarding why he omitted defendant's statement from his report, and the trial court held an Evidence Code section 402 hearing to clarify the circumstances underlying Hartnett's email. In precluding Hartnett from testifying, defendant claims the trial court "accept[ed] without question Hartnett's 'clarifying' testimony ...." and he asserts in his reply brief that he "met the foundational requirements for admission of the evidence ...."

Under Evidence Code section 403, subdivision (a)(4), "[t]he proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when [¶] ... [¶] [t]he proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself." The trial court determined, based on Hartnett's testimony, that Stinson never said he forgot to include defendant's statement in his report and instead, the language in Hartnett's email, which was not in quotation marks, merely reflected her impression based on his omission of the statement from his report. While a "*declarant's* denial of the prior inconsistent statement does not render that statement inadmissible" (*People v. Zapien* (1993) 4 Cal.4th 929, 954, italics added), the issue before the trial court was not a denial by Stinson that he made the statement but was, more fundamentally and notwithstanding defendant's contrary position, whether an inconsistent statement attributable to Stinson was ever made and it was within the discretion of the trial court to make this foundational finding (*People v. Brooks* (2017) 3 Cal.5th 1, 47). Based on Hartnett's clear and unequivocal testimony under oath and the absence of quotation

marks in her email, the trial court concluded that Stinson did not tell Harnett he forgot to include defendant's statement in his report. As this conclusion was supported by substantial evidence, we find no abuse of discretion in excluding Hartnett from testifying at trial.[12]

2. No Prejudice

Additionally, even if we assume error for the sake of argument, no prejudice resulted because "there is no reasonable probability defendant would have obtained a more favorable result had [he] been [permitted to call Hartnett to testify]." (*People v. Brooks*, *supra*, 3 Cal.5th at pp. 47–48; accord, *People v. Merriman*, *supra*, 60 Cal.4th at p. 69.) Defendant focuses on the importance of Stinson's testimony regarding defendant's statement and his inability "to effectively confront Stinson." Defendant argues, "Stinson's prior inconsistent statement, coupled with Hartnett's testimony that she gave a false reason for the late disclosure in her e-mail to defense counsel, might well have caused the jury to question Stinson's testimony that [defendant] ever made such a statement."

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12 Defendant takes issue in his reply brief with the People's failure to address his constitutional claims. However, his bare assertion that the exclusion of Hartnett as a witness violated his right to confront witnesses and to due process under the Sixth and Fourteenth Amendments lacks merit. Defendant cites no direct authority for the proposition that the trial court's evidentiary ruling violated his federal constitutional rights. The admission or exclusion of evidence under state law violates a defendant's right to due process only if it renders the trial fundamentally unfair. (*People v. Merriman* (2014) 60 Cal.4th 1, 70; *People v. Quartermain* (1997) 16 Cal.4th 600, 626.) No such unfairness resulted here. Moreover, "'[a] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness."' [Citations.] '"[U]nless the defendant can show that the prohibited cross-examination would have produced 'a significantly different impression of [the witness's] credibility' [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment." [Citation.]'" (*People v. Pearson* (2013) 56 Cal.4th 393, 455–456; see *People v. Hayes* (1999) 21 Cal.4th 1211, 1266, fn. 15 [restriction on presentation of impeachment evidence on collateral matter did not violate right to confrontation and cross-examination].) No such showing has been made.

Based on the testimony at the Evidence Code section 402 hearing, Hartnett would have informed the jury that Stinson told her about defendant's statement, but not that he forgot to include the statement in his report, and she would have explained that her contrary representation in her email to then-assigned defense counsel was based on an assumption on her part. We do not attach to this evidence the importance defendant urges.

This was a strong case for the prosecution; two correctional officers witnessed defendant with a seven-inch bindle of marijuana partially inserted into his rectum. Defendant's knowledge of the bindle's contents was an element the prosecutor was required to prove beyond a reasonable doubt and defendant's statement to Stinson was helpful to the prosecution in establishing knowledge, but defendant overstates the impact of Hartnett's proposed testimony given the circumstances underlying the crime here. Defendant's knowledge of the contents was reasonably inferable from his act of attempting to secret the bindle in his anal cavity. (See *People v. Tripp* (2007) 151 Cal.App.4th 951, 956 ["[K]nowledge of a substance's narcotic nature may be shown by evidence of the defendant's furtive acts and suspicious conduct indicating a consciousness of guilt, such as an attempt to flee or an attempt to hide or dispose of the contraband ...."].)

As we have stated, Hartnett's testimony would not have shown that Stinson made a prior inconsistent statement regarding the reason he omitted the statement from his report and while the jury might have concluded Hartnett was hasty or careless in her email communication, any such conclusion was collateral to the credibility of Stinson. We therefore find there is no reasonable probability of a more favorable outcome for defendant had Hartnett been permitted to testify regarding what Stinson told her and the contents of her email.

DISPOSITION

The judgment is affirmed.

MEEHAN, J.

WE CONCUR:

POOCHIGIAN, Acting P. J.

SNAUFFER, J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE FIFTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, vs. ANTHONY DAJUAN YATES, Defendant/Appellant.	AUGMENTED VOLUME No. 4 PAGES 148 - 426 COURT OF APPEAL No. F073663 KERN COUNTY No. DF011989A MARCH 15 & 16, 2016

AUGMENTED APPEAL TO THE COURT OF APPEAL

FROM THE SUPERIOR COURT OF KERN COUNTY

HON. CHARLES R. BREHMER, JUDGE, DEPARTMENT 10

REPORTER'S AUGMENTED TRANSCRIPT OF JURY VOIR DIRE

APPEARANCES:

For the Plaintiff/ Respondent:	Office of the Attorney General 1300 "I" Street Sacramento, Ca 95814-2919
For the Defendant/ Appellant:	PAUL KLEVEN Attorney at Law 1604 Solano Avenue Berkeley, Ca 94707
Reported By:	Donna S. McGarry, CSR 6764, CRC Certified Realtime Reporter Official Court Reporter

Appendix B

understandably, for something that happened in L.A. It has nothing to do with prison.

And then you have Mr. Harrison who didn't even have a negative experience with law enforcement.

I believe that all three of the jurors should be reseated on the case.

THE COURT: Okay. Let's assume for purposes of this discussion that Ms. Powell, Mr. Harrison, and Ms. Fitzgerald are all Asian-Americans. Would there be a neutral, non protected class basis -- or Caucasian Americans or, whatever. Would there be a basis, or is there a basis articulated by the prosecutor to excuse each of them? And, as Mr. Hinman said, considering also, [Juror No. 4067612] still remains on the jury.

The theme that runs with all three is profiling. Ms. Powell indicated, at least in the second run-in that she had with the Bakersfield Police Department, and intimated that there was profiling by police based on what she looked like.

Her body language here in court, her hesitation responding, the fact that she had two negative experiences with law enforcement, those are all non protected class reasons that she could be excused. So I don't find that there's a problem in regard to the People excusing Ms. Powell. In regard to whether she was a victim of rape or not, I don't quite understand that argument, but that doesn't really matter because there were other bases articulated.

In regard to Ms. Fitzgerald, she was combative, she didn't want to answer the questions directly, she talked over people questioning her including me. She clearly was unhappy about the fact that her son was arrested, charged and either pled or went to trial on a drug crime and with kind of the inference that there was profiling as well and that the cops lied.

One of the areas of inquiry by both counsel, but particularly the defense, so far of the prospective jurors has to do with honesty and veracity of law enforcement officers or witnesses in general.

Ms. Fitzgerald, the reason articulated by the People is a valid reason unrelated to her status as a member of a protected class.

In regard to Mr. Harrison, he was a really nice guy. He appeared to be open and honest and answered questions and also intimated that he believed that there was a problem with the Sheriff's Department in Wasco where he resides for a number of years and that that had to do with stopping young African-American males for no basis at all. That sounds like profiling to me.

That he was involved directly in trying to combat that and to get more direct communication between certain members of the community in Wasco, and it sounds like through a church, with those Sheriff's deputies. That's also a basis to exclude him that would not be due

to his ethnicity, race, or being a member of a protected class.

The motion from the defense is denied.

The record is protected for the defense as to each of the challenges and the bases of the challenge.

Let's bring the jurors back in and we'll excuse Ms. Powell after that.

(Whereupon the prospective jury panel entered the courtroom.)

THE COURT: Do you kind of feel like you're interviewing for a job you don't want?

JUROR NO. 4187970: Exactly.

THE COURT: I get that feeling sometimes too, but it's a really important job even though you may not be seeking that job. It may be seeking you.

Okay. Where we left off is the People had requested that Ms. Powell be excused.

Ms. Powell, thank you very much. You are excused. Have a wonderful day. You can leave your badge with the deputy.

(Prospective Juror Powell exited.)

THE COURT: And, [Juror No. 4096481], would you take that seat, please.

Mr. Hinman?

MR. HINMAN: Defense accepts the panel.

THE COURT: Okay. Ms. Avila?

MS. AVILA: The People accept the panel, your Honor.

Court of Appeal, Fifth Appellate District - No. F073663

S252886

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ANTHONY DAJUAN YATES, Defendant and Appellant.

The petition for review is denied.

Appendix C

CANTIL-SAKAUYE

Chief Justice