IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

NO._____

JESUS MAYA ZAPATA, Petitioner

vs.

STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO
THE CALIFORNIA COURT OF APPEAL
First Appellate District

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QUESTION PRESENTED FOR REVIEW

Review is requested to clarify whether there is a single deferential standard of appellate review for Sixth Amendment claims arising under *Batson v. Kentucky* (1986) 476 U.S. 79 or whether appellate courts should apply review *de novo* as to those issues involving the reasonableness of stated justifications for the peremptory excusal of a juror.

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PETITION FOR CERTIORARI

Petitioner, JESUS MAYA ZAPATA, respectfully petitions for a writ of certiorari to review the judgement of the California Court of Appeal, First Appellate District, Division Five affirming his conviction & sentence in the Superior Court of Los Angeles County, California.

OPINIONS BELOW

The reported opinion of the California Court of Appeal, First Appellate District appears as Appendix A.

The order of the California Supreme Court dismissing the petition for review appears as Appendix B.

JURISDICTIONAL STATEMENT

The judgement of the California Court of Appeal, Second Appellate District was entered on 15 December 2021. A timely petition for review was filed on 13 January 2022. The petition was denied on 23 February 2022 . On request, this Court granted an extension to file the petition until 23 July 2022. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257, subd. (a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

United States Constitution, Fourteenth Amendment, Section One:

"... No State ... shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive a 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. "

FEDERAL STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257, sub. (a):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

RELATED CALIFORNIA STATUTES

(Please see Appendix C)

STATEMENT OF CASE

Petitioner, JESUS MAYA ZAPATA, was tried before a jury and convicted of 17 sexual offenses involving his stepdaughter over a period of several years beginning when she was under ten years of age. He was sentenced to an indeterminate prison term of 75 years to life plus a determinate term of 40 years.

On appeal, petitioner raised multiple claims of state and federal constitutional error, including *inter alia,* that racio-ethnically motivated peremptory challenges had violated his Sixth and Fourteenth Amendments to a jury trial. On 15 December 2021, the Court of Appeal affirmed the judgement and sentence. Petitioner's petition for review on all alleged errors was denied on 23 February 2022. On 31 May 2022, upon request, this Court granted Petitioner an extension to file his petition for certiorari until 23 July 2022.

STATEMENT OF FACTS

Petitioner's step-daughter, Jane Doe, testified that, starting when she was nine years old, petitioner began to touch her inappropriately. (RT 68-69, 72-73.) Although she could not remember any specific instances (RT 77), Doe testified that petitioner then began to engage in vaginal intercourse on a routine basis. (RT 75-77.) According to her, he also engaged in acts of oral copulation and sodomy. (RT 79-81.) Doe did not tell her mother because her mother always took partitioner's side in things. (RT 74.) Doe stated that, in accomplishing these things petitioner would resort to bribes or punishments. He would offer her "money and stuff." (RT 78) "He would say that he would give me money or let me go out with my friends, or convince my mom to let me go out." (RT 82.) He

would punish her by telling her mother that she was bad. "He would just either take my phone away or my iPod at the time and tell her that I wasn't listening to him, and I was just talking back to him and just being bad." (RT 78, 83) Once when he found her texting her boyfriend, petitioner got angry and pulled her ear. (RT 83.) When she was 17, she left home and went to live with her boyfriend. (RT 86.) Prior to petitioner's arrest, the police arranged a pretext call during which petitioner obliquely acknowledged having had sex with Doe. (RT 116-117; People's Exhibit 1.) After petitioner's arrest Doe identified text messages she sent to appellant in August of 2016, declining his offer of $100.00 for a "quickie." (RT 87.) She also identified People's Exhibit No. 5, a picture of appellant's penis which he "groomed" in a specifically identifiable way. (RT 88-89.)

At trial the prosecution argued that appellant's sexual acts had been accomplished by force, violence, fear or duress because Doe had complied under "parental duress." (RT 185.) [1]

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1 The prosecution's theory of "parental duress," meaning any psychological pressure, derived from a judicial gloss on the applicable statutes which added "hardship" to the statutory language referencing force or threats of force. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 49-50; *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010.) Accordingly, at trial, the prosecution argued that while appellant had never employed force or threats of force, he had resorted to "*emotional manipulation* [which] is exactly what *parental duress* is about." (RT 186, 213 [italics added].) The prosecutor explained that, "[w]e all use a form of duress to get our children to comply and do what we want them to do ... So it's a really an effective tool ... The defendant understood this technique and used it to regularly get Jane Doe to submit to him." (RT 183-184.)

On appeal, in addition to the issue raised herein, petitioner asserted claims of insufficient evidence of aggravated conduct (*Jackson v. Virginia* (1979) 443 U.S. 307) and constitutional ambiguity ("hardship") under *Sessions v. Dimaya*, (2018) 584 U.S. ___ [138 S. Ct. 1204], both of which claims were denied.

REASONS FOR GRANTING WRIT

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REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER, IN REVIEWING A CLAIM ARISING UNDER *BATSON V. KENTUCKY,* ON DIRECT APPEAL, THE COURT SHOULD EMPLOY A SINGLE AND DEFERENTIAL STANDARD OF REVIEW APPLICABLE TO ALL ASPECTS OF THE "CREDIBILITY DETERMINATION" IN PHASE THREE OF THE *BATSON* PROCEDURE OR WHETHER IT SHOULD EMPLOY A *DE NOVO* STANDARD OF REVIEW TO THOSE ASPECTS OF THE CASE THAT INVOLVE THE "REASONABLENESS" OF THE JUSTIFICATIONS PROFERRED FOR THE JUROR'S EXCUSAL

A. Relevant Facts.

During voir dire, defense counsel objected to the prosecution's peremptory excusal of Ms. Hernandez, a Latina woman and the last Hispanic on the panel. (ART 357-358.)[2] On being asked for her justifications, the prosecutor stated that she had "multiple reasons" for excusing Ms. Hernandez. According to the prosecutor, "in a long explanation at the end of her questionnaire," Ms. Hernandez had recounted how she had been arrested for an assault against her mother but had all charges dropped when it was discovered that she been the victim of child abuse." (Augmented RT 358.) The prosecutor continued, "She goes on to discuss that police officers and law enforcement were kind to her during that situation. However, for me, having a previous arrest is a red flag as a juror." (Ibid.)

In addition, Ms. Hernandez had been on a civil jury and sided with a person on welfare who was being evicted. According to the prosecutor, "this

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2 Four other Hispanics had been challenged by the defense.

show[ed] a tendency to side with the underdog." (1 Augmented RT 359.)

Lastly, Ms. Hernandez, at 23, was "very young" and came across "as less mature than the other jurors, not having a lot of broad life experience that I think would be necessary to be a fair juror in this case." (Ibid.)

The trial judge denied appellant's motion stating, "I will say, my observations of her were also that she was very immature. She was giggling. She took up a lot of time with her answers and did seem somewhat enthusiastic and anxious to serve as a juror. But, at any rate, the motion is denied." (Ibid.)

B. Contentions on Appeal.

The use of peremptory challenges by a prosecutor to strike prospective jurors on the basis of specified group memberships violates (1) a defendant's right to equal protection of the laws under the Fourteenth Amendment (*Batson v. Kentucky, supra* 476 U.S. 79 [African-Americans] and (2) a juror's equal protection and due process right to participate in jury service (*Edmonson v. Leesville Concrete Co*. (1991) 500 U.S 614) which a defendant has standing to vindicate (*Powers v. Ohio* (1991) 499 U.S. 400, 414). *Batson's* rule was subsequently extended to hispanics, women and other minorities (*Hernandez v. New York* (1991) 500 U.S. 352 [Hispanics]; *J.E.B. v. Alabama ex rel. T.B*. (1994) 511 U.S. 127 [gender].) The procedure *Batson* established for evaluating objections at trial to the use of a peremptory challenge is well known and need not be instructed to this Court. (see *Batson v. Kentucky*, *supra,* 476 U.S., at pp. 94-98; *Johnson v. California* (2005) 545 U.S. 162, 168.) This case concerns the so-called Third Stage and appellate review thereof.

When, upon challenge, the trial court has *found* a *prima facie* case of discrimination, and when the prosecution has provided a so-called "race-neutral"[3] reason for the excusal, it then becomes the trial court's task "to assess the *plausibility of that reason* in light of all evidence with a bearing on it." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 252 [italics added].) In making this determination this Court has instructed that:

> "the court must weigh 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." (*Miller–El v. Cockrell* (2003) 537 U.S. 322, 338-339 [italics added]; see *People v. Lenix* (2008) 44 Cal.4th 602, 613 [quoting].)

On appeal, petitioner herein argued that the reasons the prosecutor gave were demonstrably unreasonable and made no sense given the facts established at voir dire or given well accepted trial strategy. In particular,

While Hernandez's arrest without more might be a signal ("red light") of hostility to the prosecution, Hernandez had been cleared of the charges and, as the prosecutor acknowledged, she had explained on her questionnaire that her experience with the police had been "positive" and that they "have been very patient [?] and helpful to me in the past. Was taken in handcuffs for my own protection from abuse." (2 Augmented CT 475.) To ignore half of Hernandez's response was utterly arbitrary and implied a pretextual motive.

Likewise, the proffered excuse that Hernandez "show[ed] a tendency to

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3 The term "race-neutral" is understood to mean a justification that does not resort to racial, ethnic, or sexual stereotypes. (See e.g. *J.E.B. v. Alabama ex rel. T.B, supra,* 511 U.S. 127.

side with the underdog" was a double absurdity. In the first place, the entirety of the prosecution's case was based on the alleged use of "parental duress" against a minor for sexual purposes. (See footnote 2, *supra.*) In terms of equities and trial dynamics, the prosecution was not representing the police or the "state" but the archetypical underdog -- a dependent child under fourteen years. By any reasonable trial strategy, Hernandez's "tendency to side with the underdog" was an asset to the prosecution. Secondly, the incident which had led to Hernandez's initial arrest showed that she herself had been a victim of parental abuse, albeit non-sexual. Lastly, the notion that someone who had returned a verdict in favor of a tenant would be hostile to the prosecution of a case of child abuse was a *non-sequitur*. Even more so, when Hernandez's account of the trial is taken into consideration. According to Hernandez, "There was miscommunication with the landlord about -- the tenant was Section 8 -- and the landlord was increasing the rent. ... But the tenant was, like, You never gave me any notification. It turns out that her paperwork was very disorganized and she was a very passive landlord. So at the end of the day --" (Augmented RT 337.) This account reflected no partiality to tenants or hostility to landlords. In fact, it betrayed a degree of sympathy for the latter. However, the prosecution's *non-sequitur* was infused with precisely those generic stereotypes, explicitly condemned in *Batson,* that because a juror is black or brown he or she therefore harbors group biases or acts in a predictable fashion. (*Batson, supra,* at p. 97.)

Lastly, the excuse that Hernandez was "young" and did not have a lot of "broad life experience" that "would be necessary to be a fair juror in this case"

does not withstand scrutiny. Where it mattered -- child abuse -- Hernandez had plenty of life experience; more so in fact than older jurors who had never suffered abuse or who had never had personal experience in the criminal justice system. In fact, Hernandez had experience not only as the vindicated victim in a criminal case but also as a juror in a civil case, where she had been elected foreperson by fellow jurors who evidently did not think she was too inexperienced. During voir dire the following colloquy with the prosecutor took place,

> Q. You have had some positive experiences with law enforcement?
> A. Yes.
> Q. Are you comfortable still judging a law enforcement officer as one testifies just the same as any other witness?
> A. Yes. They're all human. Everyone makes mistakes.
> (1 Aug. RT 337.)

When subsequently asked how she would handle a jury split, Hernandez replied

> "Well, it definitely is that you would try to reevaluate the situation. So definitely I would try to evaluate the situation, okay, what do I have? Maybe I'm wrong. So I would try to reevaluate the evidence in front of me. And, I don't know, I guess it depends on the evidence if I would change it or not." (1 Aug. RT 343.)

At this point, Hernandez unmistakably sounded like the instruction given upon a jury deadlock. (See Calcrim No. 3551 ["...Do not hesitate to reexamine your own views. Fair and effective jury deliberations require frank and forthright exchange of views. ..."].)

Asked about the civil case she had participated in, Hernandez related the

facts previously noted. Asked how she felt about that jury experience, Hernandez replied,

> "I loved it. I've never been a juror before then. That was 2 or 3 years ago and I was excited. This is great, I get to be part of the process. I learned so much about it, especially for rights for tenants, things like that. I had a good experience with that." (1 Aug. RT 337-338.)

To which the prosecutor replied, "That's so nice to hear. Again, we don't hear that very often." (Ibid.) It was plain that Hernandez did not lack sufficient broad based experience to be a juror on the instant case.

"The prosecution's proffer of th[ese] pretextual explanation[s] naturally gives rise to an inference of discriminatory intent." (*Snyder v. Lousiana* (2008) 552 U.S. 472, 487, fn.1; citing *Miller–El v. Dretke, supra,* 545 U.S., at p., 277.)

In addition, a comparative juror analysis[4] showed that the prosecution had excused jurors who had negative experiences with law enforcement (juror nos. 47, 33, 8 at 1 Aug CT 162-163, 280, 310, 523; 2 Aug CT 369) and had accepted non-Hispanics who either had had positive experiences with law enforcement or had expressed interest in or partiality towards children's rights organizations (juror nos. 57, 79 and 90 at 1 Aug. CT 78, 81, 87, 90, 104).

The trial judge never actually made a finding on the subjective issue of the prosecutor's intent. Instead, it offered *its own* reasons why it felt Hernandez was unsuited to be a juror. The first of these was the claim that Hernandez was "immature" in that she giggled. (1ART 359) The second court-offered

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4 See *Flowers v. Mississippi* (2019) 588 U.S. ___, [139 S. Ct. 2228] at pp. 2235; *Foster v. Chatman* (2016) 578 U. S. ___, slip 11 [136 S.Ct. 1737]; *Snyder, supra,* 552 U.S. 472, at pp. 483–484; *Dretke, supra,* 545 U.S. at p.241.)

justification was that Hernandez took up a lot of time with her answers and seemed " enthusiastic and anxious to serve as a juror." (Ibid.) The prosecution never proffered these justifications. It did not state that Hernandez was *emotionally* immature, but rather that she was immature in the sense of lacking "broad life experience." In ruling on the motion before it, the trial judge's abused its discretion. While a trial judge can certainly *confirm* observations and arguments relied upon by the prosecutor, it was not proper for the judge to *supply* reasons that the prosecutor herself had not advanced. Because the trial court offered reasons of its own that were separate and additional to those advanced by the prosecutor, it cannot be deemed to have actually ruled on the issue before it; namely, the prosecutor's own discriminatory intent. At best, the court simply rubber stamped the prosecution's denial. Nevertheless, assuming *arguendo* that the judge's remarks were merely "confirmatory" in nature, they made no more sense than the prosecutor's pretexts.

The Court of Appeal affirmed, stating it reviewed the trial court's ruling for substantial evidence and that "[w]e are required to defer to the trial court so long as it undertook a ' sincere and reasoned effort' to evaluate the prosecutor's explanations." (Opn. p. 18, citing *People v. Huggins* (2006) 38 Cal4th 175, 227 [multiple quote marks omitted].) In coming to this conclusion the Court of Appeal relied on *People v. Lenix*, *supra,* 44 Cal.4th 602, in which the California Supreme Court has instructed,

> "Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. (*People v. Bonilla* [(2007)] 41 Cal.4th [313], 341-342.) We review a trial court's

> determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges 'with great restraint.' [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.] (*People v. Burgener* (2003) 29 Cal.4th 833, 864.)" (*Lenix, supra,* at pp. 613-614.)

Lenix, in turn relied on its own prior decision in *People v. Reynoso* (2003) 31 Cal.4th 903,

> "All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory. '[A] "'legitimate reason is not a reason that makes sense, but a reason that does not deny equal protection. [Citations.]."' ... "The proper focus of a *Batson/Wheeler* inquiry, of course, is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, *not* on the objective *reasonableness* of those reasons." (*Ibid*. 924 [italics original].)

C. Question Presented.

As reflected in the Court of Appeal opinion, California has adopted what can most charitably be described as an extremely deferential standard of review for Third Stage *Batson* determinations by the trial court. The point of departure for California's standard is this Court's statement in *Hernandez v. New York, supra,* 500 U.S. 352, that "[d]eference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding will 'largely turn on *evaluation of credibility*'. ... There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. ...[E]valuation of the prosecutor's state of mind based on demeanor and credibility lies

'peculiarly within a trial judge's province.' [Citation].” (*Id.*, at p. 365 [italics added].) However, whether there is “seldom” any additional evidence other than the doe-eyed look of the prosecutor does not mean that there is “never” any additional evidence; and this Court has walked back the sweep of this dictum. As previously noted, in *Miller–El v. Cockrell*, *supra*, this Court instructed that, in evaluating the credibility of the prosecutor's proffered justifications, “the [trial] court must weigh 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.” (*Id.*, at pp. 338-339.) The question thus presented in this petition is whether the Third Stage analysis-factors set out in *Miller–El v. Cockrell*, require a singular or multiple standards of review depending on the factor under consideration.

Although *Hernandez's* reference to “*evaluation of credibility*” was cast in a unitary mold, there are two basic components to the *Cockrell* standard: a subjective one (see *Snyder v. Louisiana, supra,* 552 U.S. 472, 477 [“whether the prosecutor's *demeanor* belies a discriminatory intent”] and an objective one (*Miller-El, supra,* [*how reasonable or improbable*]). In other words, the word “*credibility*” covers two different things: *demeanor* credibility, and *substance* credibility. In addition, the term “credibility” covers those kinds of credibility that relate to reputation or to a common practice in the trade, both of which are also subject to objective corroboration.

In short, “credibility” is not cut from a single cloth and, given the different types of “credibility” involved in the Third Stage *Batson* inquiry it is erroneous to

subject *Batson* claims to a singular standard of review. Demeanor-based determinations are always reviewed deferentially under a clearly erroneous or substantial evidence standard. (*Snyder v. Lousiana supra* 552 U.S., at p. 479 ["nervousness cannot be shown from a cold transcript, which is why ... the [trial] judge's evaluation must be given much deference."].) In practice, this standard is a virtual rubber stamp because there is very likely no evidence before the appellate court to review, unless the trial court specifies that it was persuaded by the presence or absence of sweat on the brow, shifty looks, shuffling feet and so on; and, should it do so, there is would still be no basis for a reviewing court to think otherwise. However, *substance credibility* -- the reasonableness, probability and/or lawfulness of a reason, is quintessentially a legal question and should therefore be subject to *de novo* review on appeal. (*Ornelas v. United States* (1996) 517 U.S. 690, 699 [reasonableness and probable cause reviewed *de novo* on appeal]; *United States v. McConney* (9th Cir. 1984) 728 F.2d 1195, 1200-01 [mixed deferential/de novo standard of review] ; *People v. Leyba* (1981) 29 Cal.3d 591, 598 [constitutional standard of reasonableness a legal question]; *People v. Ault* (2004) 33 Cal.4th 1250, 1264 and footnote 8 [listing cases].) As always, the primary facts may be as found by the trial court provided they are supported by substantial evidence; but, in the present context, the "primary facts" are actually the *reasons* volunteered by the prosecutor, and it is unlikely that there will be some reason to doubt the *existence* of those stated reasons. A trial court ruling that stated reasons were reasonable is not a finding of "fact" but a legal judgement which can and ought to be reviewed *de novo* on appeal.

In contrast, operating from the premise that the issue is one of "credibility" and that there is no little or no basis for an appellate court to second guess the trial court's determination, the California Supreme Court ended up fashioning what is, in effect a two-tiered, rule of good faith, *viz.*,^

> "We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a *sincere and reasoned* effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]" (*People v. Burgener, supra,* 29 Cal.4th 833, at p. 864; *People v. Williams* (2013) 56 Cal.4th 630, 650 [italics added])

Of course, a "non-discriminatory" reason is only one that, on its face, does not openly admit to a racially biased motive.[5] Anything will do so long as it is not: "I excused her because she was Hispanic." [6] "The justification need not support a challenge for *cause,* and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Lenix, supra,* 44 Cal.4th at p. 613, "The proper focus ... is on the subjective *genuineness* of the race-neutral reasons given. (*Reynoso, supra,*) 31 Cal.4th at p. 924, . italics in *Reynoso*.)

Thus, the issue on appeal becomes whether the trial judge made a "*sincere*

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5 "All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory. '[A] legitimate reason is not a reason that makes sense, but a reason that does not deny equal protection. [Citations.].'" (*People v. Reynoso, supra,* 31 Cal.4th, at p. 924, quoting *Purkett v. Elam* (1995) 514 U.S. 765, 769.)

6 At the Second Stage, the prosecutor has only to "proffer" a reason. The inquiry ends at that point if it concedes that its challenge was racially motivated. Only if it comes up with a non discriminatory motive does the inquiry proceed to the Third Stage. (See *Johnson v. California, supra,* 545 U.S. at p. 168.)

and reasoned" effort to detect whether the prosecutor was being "*genuine*" when he came up with a facially non-discriminatory reason (howsoever absurd) to justify an excusal that was presumably properly made in any event. [7] The result is two-layered good-faith inquiry in which the issue of the prosecutor's discriminatory intent gets displaced by an inquiry into the trial judge's sincerity in handling the issue. The Court of Appeal can hardly be faulted for saying that it was "required" to defer to the trial court so long as it did anything other than express a racial animus itself or fall asleep at the bench. Such a standard, however, reduces *Batson* to a *fulmen brutum*.

California's exceedingly deferential interpretation of this Court's *Batson* jurisprudence has been strongly criticized by members of the California high court and by the state's Legislature itself.

In *People v. Reynoso, supra,* Justice Kennard dissented, arguing that, by "indulg[ing] a presumption that both the prosecutor and the trial court acted properly" the majority had "adopt[ed] a standard of appellate review that effectively insulates discriminatory strikes from meaningful scrutiny at both the trial and appellate stages." (*Id*., 31 Cal.4th, at p. 930.) *Reynoso* is particularly apt here given that the prosecutor's reason for striking an Hispanic juror was that, as a "customer service representative" she was insufficiently educated for jury duty,

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7 The use of the word *genuine* induces a subtle shift from the question of discriminatory intent. Biases and stereotypes may be unconsciously held. They also manifest themselves through different configurations of thought, even if sincerely believed. Similarly, a 'trivial' reason is not the same as an 'improbable' one. Objective analysis of intent provides the best balast for the inquiry.

an excuse which the majority itself conceded was "a dubious notion" (*id.* at p. 925).

The California high court's jurisprudence has also been serially criticized by Justice Liu who wrote that the majority's interpretation of *Batson* law amounted to a " 'don't ask, don't tell' approach to appellate review" (*People v. Mai* (2013) 57 Cal.4th 986, 1075) Justice Liu, went on to state that "As demonstrated by our repeated quotation and application of *Reynoso*'s rule in case after case, it has been easy for the court to find a prosecutor's stated reasons to be inherently plausible and either supported or not contradicted by the record, and then to defer to the trial court's ruling on that basis. (See, e.g., maj. opn., *ante,* 161 Cal.Rptr.3d at pp. 55, 59, 305 P.3d at pp. 1220, 1223; *Williams, supra,*56 Cal.4th at pp. 653–659, 156 Cal.Rptr.3d 214, 299 P.3d 1185; *People v. Vines* (2011) 51 Cal.4th 830, 849–850, 124 Cal.Rptr.3d 830, 251 P.3d 943; *People v. Watson* (2008) 43 Cal.4th 652, 670–673, 76 Cal.Rptr.3d 208, 182 P.3d 543;*People v. Guerra* (2006) 37 Cal.4th 1067, 1103, 40 Cal.Rptr.3d 118, 129 P.3d 321.)" (*People v. Mai, supra,* 57 Cal.4th, at p. 1073.)

Justice Liu also noted that "In adjudicating *Batson* claims in more than 100 cases over the past two decades, this court has found unlawful discrimination in jury selection only once—and that was a case more than 12 years ago in which the prosecutor struck all five Hispanic members of the venire and through his own words "revealed an acute sensitivity to the presence of Hispanics on the jury panel and an evident belief that Hispanics would not be favorable jurors for the prosecution.(*People v. Silva* (2001) 25 Cal.4th 345, 375)" (*People v. Harris* (2013) 57

Cal.4th 804, 865.) [8]

On 30 September 2020 the California Racial Justice Act was signed into law. (Assembly Bill 2542, § 2, subd. (c), Ch. 317, Statutes of 2020, amending Penal code §§ 1473 and 1473.7 of, and adding § 745.) In that act, the Legislature *found* that racism had permeated this State's criminal justice system. (AB 2542, § 2, subd. (a).) It further *found*, with specified reference to jury selection, that the the law, "as interpreted by the high courts," was woefully inadequate to address the problem of mostly prosecutorial abuse of the privilege of peremptory challenge. (*Id*., subd.(c), citing *People v. Bryant*, (2019) 40 Cal.App.5th 525, 543 (Humes, J., concurring)). In so finding the Legislature echoed the above-summarized criticisms by Justices Liu and Kennard.

In petitioner's view, California's evisceration of *Batson* arises primarily from a single minded focus on demeanor credibility. The demeanor-based credibility standard, while not entirely irrelevant, is over-blown, given the fact that prosecutors, counsel and police are all professionals who are adept at stating the most far-fetched propositions with a straight face. They are at ease and adept in court and before judges with whom they have worked almost daily. Both at trial and on appeal, the analysis should focus on the reasons given. If *reasons* are

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8 Petitioner's research has not disclosed any *Batson* reversals by the California high court since Justice Liu's tabulation, except for a reversal in *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1175 based on the dual ground that the trial judge upheld an excusal on a justification not offered by the prosecutor and the appellate court had refused to conduct a comparative juror analysis. (*Id*., at p. 1175.) In any event the affirmance rate is so high that a visiting alien might be excused for concluding that California jury selection is near impeccable.

of no importance, then why ask for them to be proffered in the first place? It would be sufficient simply to pull out the Judicial Ouija board and *detect* whether counsel is being **g-e-n-u-i-n-e** or not.

The Court of Appeal opinion dismissed petitioner's arguments as "try[ing] to *pick apart* the prosecutor's reasons." (Opn. 18 [italics added].) Absolutely, appellant did so. That is the very essence of "*analysis*," derived from the Greek "αναλυω. ... to unloose, undo, of Penelope's web. Od. 2. to unloose, to set free, release .. II ...2. to analyse, Arist. ...." (*Greek-English, Lexicon*, Lidell & Scott, Oxford, Clarendon Press, 7th Ed. 1961, pg. 58.) If an appellate court does not pick things apart, what then does it do? As instructed by California's high court, evidently not much. (*Mai, supra,* 57 Cal.4th, at p. 1075, J. Liu, concurring.)

In closing, petitioner would take the liberty of observing that the Sixth Amendment's guarantee of trial by a popular and irresponsible jury is one of three main bulwarks of democratic freedom. (See *Bushell's Case* (1670) 124 Eng.Rep**.** 1006 [6 Howell's State Trials 999]; *Sparf Hansen v. United States*, (1895) 156 U.S. 51, 105; *Carpenters v. United States* (1947) 330 U.S. 395, 408l; *The American Jury System*, (2015) 9 Chicago Kent L. Rev 825, 826.) The hackneyed saw that the jury is a "fact-finder" overlooks the fact that the jury is "the circuit-breaker in the State's machinery of justice." (*Blakely v. Washington* (2004) 542 U. S. 296, 307.) If jury trials were just a question of investigative *functions*, a more ludicrous functionality could not have been devised. On the contrary, the jury is a political institution that *represents* the community's "collective judgement" on the specific matter presented. (See *United States v. Powell* (1984) 469 U.S. 57, 67.) It is not a

"random sampling" but the adversarially elected representation of the community, in which both parties can repose confidence. How that election is made, as with any election, can never be entirely rationalised. As all trial lawyers understand, there must be room for intuition, hunch, feeling. Peremptory challenges are critical to the election process and to the jury as we know it. Their abolition would sap the jury's political vitality. But neither can peremptory challenges be used for a constitutionally illicit purpose and something more than deferential vigilance is required to insure that such is not the case.

CONCLUSION

For the foregoing reasons, petitioner therefore respectfully requests that his petition for certiorari be granted.

Word Count Certification

The undersigned counsel certifies under penalty of perjury that the word count for this brief is: 5, 875 words, excluding cover, tables and appendices.

Dated: 21 July 2021

Respectfully submitted

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Attorney for Petitioner

APPENDIX A

Filed: 12/15/21

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JESUS MAYA-ZAPATA, Defendant and Appellant.	A156982 (Contra Costa County Super. Ct. No. 51715069)

Appellant Jesus Maya-Zapata was tried before a jury and convicted of 17 sexual offenses arising from his abuse of his stepdaughter over a period of several years that began when she was less than ten years old. He appeals from a judgment sentencing him to prison for 75 years to life plus 40 years, arguing: (1) the court should have granted his motion to suppress statements made and evidence seized during his police interrogation; (2) the prosecutor's peremptory challenge of a Latinx woman during voir dire violated *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*); (3) several of the counts were committed without force, violence, fear or duress, a necessary element of the crimes charged; (4) the court should have instructed on additional lesser included offenses as to some of the counts; (5) the court's

instructions lessened the prosecution's burden to prove certain elements of certain crimes; (6) appellant's sentence constitutes cruel and unusual punishment; and (7) the cumulative effect of the trial errors requires reversal. We affirm.

I. BACKGROUND

Jane Doe was born in 1999 and her parents divorced when she was four. Appellant (who was born in 1981) began living with her mother shortly thereafter. Doe did not like appellant at first, but they gradually became closer and she came to view him as a father figure. Appellant was in charge of discipling Doe when she was younger, which he did by yelling at her or pulling on her ears.

When she was about nine years old, appellant began to touch Doe in a sexual way. She remembered her age because she was still in elementary school and the family lived on Sheryl Drive, and also because the touching coincided with her menstrual period, which she began having when she was nine years old.

Appellant began by touching Doe's legs, thighs, and vagina over her clothes. Doe was afraid but did not tell her mother what was happening because she did not think her mother would believe her. Appellant always told Doe's mother that Doe was a bad person and Doe's mother would react by hitting her or yelling at her. The touching progressed and appellant would grab her hand and put it on his penis. He started putting his fingers inside her vagina.

When Doe was 10 years old, appellant began having sexual intercourse with her once or twice a week. Doe did not tell her mother because she believed she would take appellant's side. The family moved to Linda Street and appellant continued to have sexual intercourse with Doe, using a condom for protection. He initiated the sex by bribing Doe, offering her "money and stuff," and "[i]t was either cooperate or get punished for it." He told Doe he would tell her mother she was talking back and being bad to get her in trouble, and he threated to take away her phone and iPod. When she gave in, appellant would lay her on the bed and remove her clothes.

Doe began giving appellant oral sex about once a week. She did not want to but appellant would offer her things and "it was either that way or no way." The intercourse and oral sex continued, with appellant "bribing" Doe by giving her money or letting her go out with her friends or convincing her mother to let her go out with her friends.

The family moved to a house on Frances Road, and appellant began having anal sex with Doe once or twice a month. It was very painful for Doe and she bled from it; appellant told her he would use more lubrication.

The sexual contact continued, as did appellant's efforts to persuade Doe to participate by taking away her phone and by threatening to tell Doe's mother she was acting badly. Appellant would offer her money in exchange for sexual acts, with the amount offered dependent on the act, and she came to see that behavior as "normal." Doe remembered an incident in which

appellant caught her texting a boy and pulled her ears, similar to how he had done when she was a young child.

Appellant stopped touching Doe when she was 16 or 17. Her grandmother had come to live with the family, and because Doe felt her grandmother supported her, she started to refuse appellant's demands for sex. On one occasion appellant texted Doe and offered her $100 for sex, and she refused and threatened to call the police. Appellant told her she was missing out.

Doe had a boyfriend whom appellant did not like, and in the summer of 2016 (when Doe was 17), she told him what appellant had done to her. Doe's boyfriend gave her the courage to speak out and she told her grandmother, who told her mother. Doe ran away to live with her boyfriend's family and then went to the police.

Doe first met with a deputy sheriff in a Walgreen's parking lot accompanied by her mother because she did not want to meet appellant at the residence. She told the deputy that appellant had begun molesting her when she was nine years old and that they began having sexual intercourse when she was 10 years old. The deputy passed the information to a detective in the special victims' unit, who interviewed her regarding the molestations. Doe told the detective that appellant had started having intercourse with her when she was 10, and oral and anal sex when she was 11. The detective arranged for Doe to participate in a recorded pretext call, which was played for the jury.

In the call, Doe told appellant she was confused about her feelings. Appellant told her "You like for me to do it to you,

actually." Appellant offered to help Doe with money and when Doe asked him if he would want sex, responded "Well, yes, I would indeed like it. Of course, if—like we say, I beg for it." He also told her that if they started having contact again they wouldn't have to have anal sex, but later in the call told her "that's also part of a couple" when she stated that she would not want to have sex that way. Appellant acknowledged having offered and given Doe money for sex and explained that he did it because he liked her. He estimated they had been having sex since she was 12 or 13 years old. He stated that Doe had wanted sex, and denied that she had been only 10 years old when they started. When Doe mentioned that she had been "little," appellant told her, "No, not little, well, you were the one who wanted it."

Doe identified a photograph of appellant's penis that had been taken from appellant's phone.

Appellant was charged with sexual intercourse with a child 10 years of age or younger (Pen Code,[1] § 288.7, subd. (a); count 1); oral copulation or sexual penetration of a child 10 years of age or younger (§ 288.7, subd. (b); count 2); lewd act on a child under 14 (§ 288, subd. (a); count 3); sodomy of a child under 14 with a ten-year age difference (§ 286, subd. (c)(1); count 4); aggravated sexual assault (rape) on a child under 14 with a ten-year age

[1] Further statutory references are to the Penal Code unless otherwise indicated.

difference[2] (§ 269, subd. (a)(1)/269, subd. (a)(2) and (a)(6)); counts 5 and 6); two counts of aggravated sexual assault (sodomy) on a child under 14 (§ 269, subd. (a)(3)/261, subds. (a)(2) and (a)(6); counts 7 and 8); aggravated sexual assault (oral copulation) on a child under 14 (§§ 269, subd (a)(4)/former 288a,[3] subds. (c)(2), (c)(3) and (d); count 9); four counts of forcible lewd acts on a child (§ 288, subd. (b), counts 10 through 13); forcible oral copulation of a minor 14 years of age or older (§ 288a, subd. (c)(2)(C); count 14); sodomy of a person under 16 years of age (§ 286, subd. (b)(2)); count 15); and two counts of lewd act on a minor with a ten-year age difference (§ 288, subd. (c)(1); counts 16 and 17). He was convicted of all counts following a jury trial.

II. DISCUSSION

A. *Motion to Suppress*

Appellant argues he was prejudiced because the court should have granted his in limine motion seeking to suppress certain evidence on the grounds that it was obtained without a valid waiver of the right to counsel, in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). We reject the claim.

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[2] Section 269 was amended in 2006 to reduce the 10-year age difference required for a violation of the statute to seven years. (Stats. 2006, ch. 337, § 6; Initiative Measure (Prop. 83), § 5.) Appellant was more than 10 years older than Doe so the amendment is immaterial for our purposes.

[3] Renumbered as § 287 effective January 1, 2019. (Stats. 2018, ch. 423 (SB 1494).)

1. Procedural Background.

Appellant was interrogated by two sheriff's detectives after the pretext call. He was advised of his *Miranda* rights, including the right to speak to an attorney during questioning, and he indicated that he understood these rights.

The lead interrogating detective then asked appellant some general questions and stated: "Okay. I'm going to be . . . honest with you, okay? I'm going to be honest and I'm going to tell you why we're here, but I want you to. . . look me in the face, please. I also want you to be very honest with us. We're going to ask you some things but I would like you to be honest; okay? We could have—" Defendant interjected, "Didn't you say you were going to bring a lawyer or something?" The detective replied, "No, it's just going to be us right now; okay? There are two sides to everything. . . ." Appellant proceeded to make incriminating statements to the detectives and wrote a letter of apology to Doe at their behest. He also gave the detectives permission to search his cell phone, which yielded a picture of his penis and text messages to Doe in which he offered her $100 for sex.

Appellant moved to suppress his incriminating statements as involuntary, arguing that his question "[d]idn't you say you were going to bring a lawyer or something" was an invocation of the right to counsel and the detectives should have immediately ceased their questioning at that point or should have at least clarified what was meant by the statement. He alternatively argued that notwithstanding his earlier indication that he understood each of his *Miranda* rights, his question indicates he

had not really understood he had the right to have counsel present during questioning. Appellant also moved to suppress the evidence found on his cell phone during the interrogation as the fruit of the poisonous tree. (See *Wong Sun v. United States* (1963) 371 U.S. 471, 485.)

The court denied the motion. Appellant's statements and the apology letter were never introduced at trial. The prosecution did introduce the text message in which appellant asked Doe for sex in exchange for money and the photograph of appellant's penis (which Doe identified at trial).

Appellant now argues that the court should have suppressed the evidence. He acknowledges that the statements and apology letter were not introduced at trial, but contends he was nonetheless prejudiced because they could have been introduced as impeachment evidence had he testified, and the knowledge of this possibility discouraged him from testifying and explaining the circumstances regarding the charges. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 813 [defendant did not forfeit challenge to voluntariness of statement where he failed to testify and statement was never introduced].) Appellant argues that the photograph of his penis and text messages to Doe were the product of the unlawful interrogation and were prejudicial because they corroborated Doe's testimony.

2. Validity of Initial Waiver of *Miranda* Rights.

Appellant claims his initial waiver of *Miranda* was not knowing and voluntary. We disagree.

"*Miranda* makes clear that in order for defendant's statements to be admissible against him, he must have knowingly and intelligently waived his rights to remain silent, and to the presence and assistance of counsel." (*People v. Cruz* (2008) 44 Cal.4th 636, 667 (*Cruz*).) The prosecution has the burden of proving that an accused understood a *Miranda* advisement. (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 384.) A suspect's " 'expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights.' " (*People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, 221.) After a knowing and voluntary waiver, interrogation may proceed " ' "until and unless the suspect clearly requests an attorney." ' " (*People v. Dykes* (2009) 46 Cal.4th 731, 751.)

Although we must independently review the ultimate legal question of whether a statement was obtained in violation of *Miranda*, we accept the trial court's factual findings if they are supported by substantial evidence. (*People v. Scott* (2011) 52 Cal.4th 452, 480.) "[W]hether a particular defendant understood and knowingly waived his rights is essentially a factual question, which we review only for substantial evidence." (*People v. Jenkins* (2004) 122 Cal.App.4th 1160, 1173, fn. 2.)

Here, appellant was advised of his *Miranda* rights, including the right to have an attorney present during questioning, and answered without qualification that he understood his rights. Although appellant did not specifically indicate that he waived his *Miranda* rights, his express and

unambiguous acknowledgment that he understood them was sufficient to show a knowing and voluntary waiver. (*Cruz*, *supra*, 44 Cal.4th at pp. 667–668.) Substantial evidence supports the trial court's determination that appellant initially waived his rights.

3. Invocation of Right to Counsel

Appellant alternatively argues that after his initial waiver, he invoked his right to counsel. Again, we disagree.

Upon the assertion of the right to counsel, all questioning must cease until an attorney is present. (*Edwards v. Arizona* (1981) 451 U.S. 477, 484–485; *People v. Cunningham* (2015) 61 Cal.4th 609, 646 (*Cunningham*).) However, "[f]or a statement to qualify as an invocation of the right to an attorney. . . the defendant 'must unambiguously request counsel.' " (*Cunningham* at p. 646.) If a reasonable police officer would not understand a defendant's statement to be an unambiguous and unequivocal request for counsel, officers have no duty to ask clarifying questions. (*Davis v. United States* (1994) 512 U.S. 452, 461–462 (*Davis*).)

"[A] reviewing court—like the trial court in the first instance—must ask whether, in light of the circumstances, a reasonable officer would have understood a defendant's reference to an attorney to be an unequivocal and unambiguous request for counsel, without regard to the defendant's subjective ability or capacity to articulate his or her desire for counsel, and with no further requirement imposed upon the officers to ask clarifying

questions of the defendant." (*People v. Gonzalez* (2005) 34 Cal.4th 1111, 1125.)

Appellant's question as to whether the detective would be bringing an attorney was not an unambiguous request for counsel. (See *Davis, supra*, 512 U.S. at pp. 459, 462 [" 'Maybe I should talk to a lawyer' " was not an unambiguous or unequivocal request for counsel]; *People v. Molano* (2019) 7 Cal.5th 620, 659 [statement by defendant that he would " 'feel more comfortable' " if he spoke to a public defender first was not a " 'clear assertion' " of the right to counsel]; *Cunningham, supra*, 61 Cal.4th at p. 645 [suspect did not unequivocally request counsel by stating, " 'Should I have somebody here talking for me, is this the way it's supposed to be?"]; *People v. Shamblin* (2015) 236 Cal.App.4th 1, 20 [" 'I think I probably should change my mind about the lawyer now. . . I think I need some advice here' " did not show clear intention to invoke right to counsel].) The detectives were not obligated to stop their interrogation and clarify what appellant meant by his question.

4. Effect of Question on Initial Waiver/Harmless Error

Appellant argues that his question about whether the detectives would be bringing an attorney indicates that he did not subjectively understand in the first place the *Miranda* advisement that he was entitled to have an attorney present. He also argues that the lead detective's response to his question about whether they were going to bring a lawyer—"No, it's just going to be us right now"—was misleading in that it suggested appellant did not have a right to have counsel present.

Even if we construed appellant's statement in this way and assume a *Miranda* violation, reversal is not required. We review a *Miranda* violation under the harmless-beyond-a-reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Elizalde* (2015) 61 Cal.4th 523, 542.) The People must show, beyond a reasonable doubt, that the error did not contribute to the jury's verdict. (*Ibid.*)

As noted, the incriminating statements to the detectives and the apology letter to Doe that they elicited during the interrogation were not introduced into evidence and could not have directly affected the verdict. Appellant posits that he was prevented from testifying by the possible use of the statements and letter as impeachment evidence, but that evidence would have been admissible for impeachment purposes even if the detectives had been found to have violated *Miranda*, so we cannot attribute his failure to testify to any assumed *Miranda* violation. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1075–1076 [incriminating statement to police, even if taken in violation of *Miranda*, is admissible as impeachment if defendant elects to testify].) The other evidence was strong: in addition to Doe's testimony, appellant acknowledged sexual contact with her during the recorded pretext call, whose admissibility is not challenged, and he further acknowledged that the contact occurred when Doe was 12 or 13 years old. To the extent he would have denied that Doe was even younger had he testified, he had claimed as much during the pretext call, telling Doe she had not been as young as she remembered.

Turning to the photograph of appellant's penis and the text messages to Doe which were found on his phone, those items were physical evidence that appellant seeks to suppress as the fruits of the alleged *Miranda* violation. "The fruit of the poisonous tree doctrine does not apply to physical evidence seized as the result of a noncoercive *Miranda* violation." (*People v. Davis* (2009) 46 Cal.4th 539, 598; *People v. Brewer* (2000) 81 Cal.App.4th 442, 454–455; *People v. Whitfield* (1996) 46 Cal.App.4th 947, 955–957.) Appellant argues that a *Miranda* violation renders an interrogation inherently coercive, but courts have repeatedly held that a violation of the prophylactic rules of *Miranda* does not mean a statement was coerced. (E.g., *Davis* at p. 598; *People v. Bradford* (1997) 14 Cal.4th 1005, 1039–1040.)

Even if we assume the photograph and text message should have been excluded, their admission was patently harmless. The photograph was relevant only because Doe identified it as depicting appellant's penis, but from the other evidence in the case (including the pretext call, in which appellant admitted sexual contact with Doe), it was clear Doe was familiar with that part of appellant's anatomy. The text message to Doe confirmed the sexual nature of her relationship with appellant and his practice of offering her money for sex, but he acknowledged the same thing in the pretext call.

B. Batson/Wheeler *Motion*

Appellant contends the court should have granted his *Batson/Wheeler* motion because the prosecution's reasons for

excusing a Latinx woman were a pretext for ethnic bias. We disagree.

1. Background

Prospective Juror Hernandez was a single 23-year-old server with an Associates of Arts degree who had received training as an aviation mechanic. She indicated on her questionnaire that she had had a positive experience with law enforcement, and she had been "taken in handcuffs for my own protection from abuse." This abuse was not sexual in nature, and she wrote that neither she nor a close family member had ever been a victim of sexual abuse. She revealed she had been arrested for assaulting her mother, but that the charges against her were dropped because of the history of child abuse. She also indicated that she believed sexual abuse was wrong, but would not judge another person without having all the facts. She had sat on another jury in an eviction case.

When Hernandez was questioned during voir dire, she indicated that despite her positive experiences with law enforcement, she believed she could judge the credibility of a law enforcement witness fairly because "[t]hey're all human. Everyone makes mistakes." She explained that she had sat on the jury in a landlord-tenant case about a rent increase where the Section 8 tenant claimed insufficient notification of the increase and the landlord had not kept adequate records. Hernandez had enjoyed that experience and had learned a lot about tenants' rights. She stated she did not have an emotional reaction to the charges in this case and would be able to listen to the evidence

and the witnesses. She did not have a husband, boyfriend or kids, and tended to stay away from jobs involving kids because she didn't know how to "communicate with them properly." In the event Hernandez saw the evidence differently than the other jurors, she stated she would reexamine the evidence but could vote her conscience.

The prosecutor exercised a peremptory challenge against Hernandez, and defense counsel made a *Batson/Wheeler* motion. An unreported sidebar conference was held. In a reported conference outside the presence of the jury panel, defense counsel put her reasons for the motion on the record, indicating that Hernandez was "Latina" and observing that appellant was "Latino," and while one of the other prospective jurors (who ultimately sat on the jury) might be Latina, nothing Hernandez had said had indicated a bias. The court indicated that it had asked the prosecutor to respond even though it did not appear that the challenge to Hernandez had been racially motivated, and it further stated that the defense had used peremptory challenges against three Latino jurors.

The prosecutor gave three reasons for excusing prospective juror Hernandez: (1) Hernandez had been arrested for assaulting her mother, and even though she had not been charged and believed the police were kind to her, "for me, having a previous arrest is a red flag as a juror;" (2) Hernandez had been on a civil jury and seemed to side with a person who had been on welfare, indicating a tendency to favor the "underdog;" and (3) Hernandez was young and came across as less mature than the other jurors

The court denied the *Batson/Wheeler* motion, observing: "I will say, my observations of her were also that she was very immature. She was giggling. She took up a lot of time with her answers and did seem somewhat enthusiastic and anxious to serve as a juror."

2. Legal Framework

The state and federal constitutions forbid prosecutors from using peremptory challenges to remove jurors on account of race, ethnicity, gender or membership in a similar cognizable class.[4] (*Batson*, *supra*, 476 U.S. at p. 89; *Wheeler*, *supra*, 22 Cal.3d at pp. 276–277; *People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*).) A defendant who suspects a juror has been challenged for a discriminatory reason must bring a motion under *Batson/Wheeler*, at which point the trial court will analyze the claim using a familiar three-prong test. First, it must determine whether the defendant has made a prima facie showing the prosecutor exercised a peremptory challenge based on race, ethnicity or some other impermissible ground. Second, if the showing is made, the burden then shifts to the prosecutor to

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[4] Appellant was tried in 2019. In 2020, the Legislature passed Assembly Bill 3070, which enacts Code of Civil Procedure section 231.7 and codifies the principle that peremptory challenges may not be based on membership in a racial, ethnic or similar group. (Stats. 2020, ch. 318, §§ 1–3.) Among other things, the changes affect the standard of appellate review and make certain reasons for peremptory challenges presumptively invalid. (Code Civ. Proc., § 231.7, subds. (e)–(g), (j).) The changes are effective for criminal trials in which jury selection begins on or after January 1, 2022, and the new law does not apply to appellant's trial. (See Code Civ. Proc., § 231.7, subd. (i).)

demonstrate the challenge was exercised for a neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination by evaluating the proffered reasons and determining whether they are legitimate or pretextual. (*Lenix*, at p. 612; see *People v. Manibusan* (2013) 58 Cal.4th 40, 77.)

In this case, the trial court made no express finding regarding a prima facie case of discrimination, but asked the prosecutor to explain her reasons for excusing Hernandez. We therefore review this as a third-prong case, and review for substantial evidence the trial court's determination that the challenge was not discriminatory. (*People v. McDermott* (2002) 28 Cal.4th 946, 971 [whether opponent of a peremptory challenge has proved purposeful discrimination is reviewed for substantial evidence]; *People v. Williams* (2013) 58 Cal.4th 197, 280–281 [when court ruled on ultimate question of intentional discrimination, question of whether defendant established a prima facie case of discrimination is moot].) This standard requires us to give "great deference to the trial court's ability to distinguish bona fide reasons from sham excuses," at least so long as the court made "a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered." (*People v. Burgener* (2003) 29 Cal.4th 833, 864.)

A prosecutor's reason for excusing a juror does not need to be well-founded so long as it is not discriminatory. (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) " '[E]valuation of the prosecutor's state of mind based on demeanor and credibility lies

"peculiarly within a trial judge's province." ' " (*People v. Stevens* (2007) 41 Cal.4th 182, 198.) It is presumed an advocate's use of peremptory challenges was constitutional. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1009.) The ultimate issue is "whether it was more likely than not that the challenge was improperly motivated." (*Johnson v. California* (2005) 545 U.S. 162, 170.)

Appellant tries to pick apart the prosecutor's stated reasons for excusing prospective juror Hernandez—her criminal arrest, her apparent sympathy toward the "underdog," and her maturity relative to that of the other jurors—but none of these reasons were " 'implausible or fantastic' " and they were all unrelated to race. (*People v. Huggins* (2006) 38 Cal.4th 175, 227.) We are required to defer to the trial court so long as it undertook a " " " 'sincere and reasoned effort' to evaluate the prosecutor's explanations." ' " (*Ibid.*) It did so.

Appellant's attempt to use comparative juror analysis for the first time on appeal also fails. Appellant focuses on three seated jurors, noting that Juror No. 57 had friends in law enforcement and had positive experiences with law enforcement officers as people; that Juror No. 79 had a former girlfriend who had been raped as a teenager and followed the "MeToo" movement in the news; and that Juror No. 90 had sat on a jury in a manslaughter case that reached a verdict and followed childhood sex cases because he had an 11-year-old daughter. He contrasts these responses with prospective jurors whom the prosecution excused, who had negative feelings about law

enforcement or were critical about the prosecution of child sex abuse cases, and argues that Hernandez's responses were closer to those of the seated jurors.

The three seated jurors cited by appellant were mature men with significant educational and life experience, all of whom had children, and they had little in common with Hernandez. Juror 57's positive experiences with law enforcement were based on his friendships with officers whereas Hernandez's arose from their kind treatment of her during an arrest. And while Juror Nos. 79 and 90 can be broadly said to have expressed an interest in or knowledge of childhood sex abuse, Hernandez's abuse as a child was not sexual in nature.

Though comparative juror analysis can be done on appeal even if a comparative review was not conducted below (*Lenix*, *supra*, 44 Cal.4th at p. 622), we agree with appellant's acknowledgement that in this case, there was "very little to compare." Certainly, there is not enough to infer that the only reason for excluding Hernandez was her ethnicity.

C. *Evidence of Duress*

Counts 5 through 14 (two counts of aggravated sexual assault on a child by means of rape, two counts of aggravated sexual assault on a child by means of sodomy, one count of aggravated sexual assault on a child by means of oral copulation, four counts of forcible lewd conduct, and one count of forcible oral copulation) each required proof that the sexual act at issue was accomplished by force, violence, fear or duress. (§§ 269, subd. (a)/261, subds. (a)(2) & (a)(6)/286, subds. (c)(2), (c)(3)/288a, subds.

(c)(2), (c)(3), 288, subd. (b)(1).) Appellant challenges the sufficiency of the evidence to prove this element. We reject the claim.

We apply the well-established and "highly deferential" substantial evidence standard. (*People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 538.) "The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

Appellant argues that despite the prosecutor's suggestion that force could be proved because of the size disparity between him and Doe, there was no evidence the acts were committed by force or violence because he did not use more force than was necessary to commit the sexual acts. It is not necessary to decide this issue, because the prosecutor relied on duress and the evidence was sufficient to support the convictions based on this theory. (See *People v. Perez* (2005) 35 Cal.4th 1219, 1232–1233 [court must affirm if jury was instructed on factually valid theory supported by the evidence, unless it can be demonstrated jury convicted based on factually invalid ground].)

The jury was instructed that "duress" in the context of sodomy, oral copulation and lewd conduct is "a direct or implied threat of force, violence, danger, hardship, or retribution that

causes a reasonable person to do or submit to something that he or she would not otherwise do or submit to. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the other person and her relationship to the defendant." Duress in the context of rape was similarly defined, but, as the jury was properly instructed, it did not include a threat of "hardship." (*People v. Leal* (2004) 33 Cal.4th 999, 1007–1008.)

To determine whether duress was used, the finder of fact should consider "various circumstances, including the relationship between the defendant and the victim, and their relative ages and sizes (*People v. Senior* (1992) 3 Cal.App.4th 765, 775.) " 'Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim' is relevant to the existence of duress." (*Ibid.*, quoting *People v. Superior Court (Kneip)* (1990) 219 Cal.App.3d 235, 239; see *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 (*Cochran*), disapproved on other grounds in *People v. Soto* (2011) 51 Cal.4th 229, 248, fn. 12;[5] *People v. Schulz* (1992) 2 Cal.App.4th 999, 1005.) The victim's testimony must be considered in light of her age and her relationship to the defendant. (*Cochran*, *supra*, at pp. 13–14.)

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[5] In *Soto*, *supra*, 51 Cal.4th at p. 248, footnote 12, the court disapproved language in *Cochran* and other cases suggesting the consent of the victim is a defense to the crime of forcible lewd acts under section 288, subdivision (b)(1).

In this case, the evidence shows that appellant began molesting Doe when she was only nine years old and he was a father figure to her. There was a significant disparity in their age, size and power dynamic. Appellant disciplined Doe by yelling at her and pulling on her ears, and he threatened to tell her mother she was bad and used threats and bribery to get her to comply with his demands for sex. Though the acts underlying the counts in question occurred when Doe was a little older than when the sexual abuse first began (12 to 14 years old instead of 9 to 10 years old), the continuing nature of the sexual contact, fostered by appellant's bribery, threats and manipulation, were sufficient to constitute duress when considering the totality of the circumstances. (*Cochran*, *supra*, 103 Cal.App.4th at p. 13–14.)

Appellant argues that psychological coercion is not enough to establish duress and there must be some kind of direct or implied threat, citing *People v. Hecker* (1990) 219 Cal.App.3d 1238 (*Hecker*) and *People v. Espinoza* (2002) 95 Cal.App.4th 1287. The reasoning of those cases has been undermined by *Cochran*, *supra*, 103 Cal.App.4th at page 15 (decided by the same court that decided *Hecker*), in which the court found duress where the evidence supported a finding that the victim's compliance in the sexual acts was derived from the "psychological control [her father] exercised over her and was not the result of freely given consent."

Appellant suggests his actions in threatening to take Doe's phone away from her or to not allow her to see her friends was not a threat of hardship, but was simply an exercise of parental

authority. Taking a phone from a preteen is an act of parental authority; threatening to do so in order to have sex is not.

C. *Lesser Included Offenses*

The court instructed the jury on lesser included offenses as to several of the counts, most of which contained the element of force and were distinguishable from the charged crimes due to the age element of the offense. Appellant contends the court committed prejudicial error in additionally failing to instruct on sexual intercourse with a minor (§ 261.5), nonforcible sodomy with a minor (§ 286, subds. (b) or (c)) and nonforcible oral copulation with a minor (former § 288a, subds. (b)(1) and (c)(1); see § 287) as lesser included offenses of counts 5, 6, 7, 8 and 9, which alleged aggravated sexual assault on a child under 14 under section 261, subdivision (a)(2) & (6), and count 14, which alleged forcible oral copulation with a minor 14 or older under section 288, subdivision (a). We reject the claim.

"Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 117–118.) "California decisions have held for decades that even absent a request, and even over the parties' objections, the trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser." (*Id.* at p. 118.) We review the failure to

instruct on a lesser included offense by asking whether it is reasonably probable appellant would have obtained a more favorable outcome had the jury been so instructed. (*People v. Breverman* (1998) 19 Cal.4th 142, 177–178 (*Breverman*).)

We assume for the sake of argument that the nonforcible offenses were lesser included offenses of the charged crimes under either the elements or accusatory pleadings test. But assuming that notwithstanding the lack of a request the court should have instructed on the nonforcible offenses, the failure to do so was not prejudicial because it is not reasonably probable the jury would have reached a result more favorable to appellant if so instructed. (*Breverman*, *supra*, 19 Cal.4th at pp. 177–178.)

The rape underlying counts 5 and 6 was alleged to have been committed between March 31, 2009 and March 30, 2013; the sodomy underlying counts 7 and 8 was alleged to have been committed on March 30, 2011 to March 31, 2013, and from March 31, 2009 to March 31, 2013, respectively; the oral copulation underlying count 9 was alleged to have been committed between March 31, 2009 and March 30, 2013; and the oral copulation underlying count 14 was alleged to have been committed between March 31, 2013 and March 31, 2016. The jury was instructed on nonforcible lewd conduct as a lesser included offense for forcible lewd conduct in counts 10 to 13 (§ 288, subd. (a) and (b)(1)), alleged to have occurred between March 31, 2008, and March 30, 2013, yet it convicted appellant of the greater crime of forcible lewd conduct.

The duress in this case was overarching, born of the parental relationship between appellant and Doe and the history of the sexual abuse. It is inconceivable that a jury which, when faced with the option of nonforcible lewd conduct, nonetheless convicted appellant of forcible lewd conduct, would have concluded that the sexual intercourse, sodomy and oral copulation committed during the same time frame was committed without duress.

We recognize that count 14 was alleged to have occurred later than the forcible lewd conduct in counts 10, 11, 12 and 13 (March 31, 2013 to March 31, 2016 versus March 31, 2008 to March 30, 2013), but given the nature of the duress in this case, which was based primarily on the parental relationship, it is not reasonably probable that a jury would have determined it somehow evaporated during the later years. Remand is not required.

D. *Instructional Error*

Although he did not object in the trial court, appellant argues the trial court's use of pattern legal instructions were legally erroneous in several respects. Assuming the error has not been forfeited, we conclude there was no prejudicial error.

1. Failure to Define "Menace", "Retaliation" or "Retribution"

In CALCRIM Nos. 1000, which defined the elements of forcible rape, "duress" was defined to include a threat of "retribution." In CALCRIM Nos. 1015, 1030 and 1111, which defined the elements of forcible oral copulation, forcible sodomy,

and forcible lewd acts, the court defined "duress" to include a threat of "hardship" or "retribution." Appellant contends these terms had a specific legal meaning and should have been defined. We disagree.

The terms used in the jury instructions were the same as those used in the statutes at issue. "If the jury would have no difficulty in understanding the statute without guidance, the court need do no more than instruct in [the] statutory language." (*People v. Estrada* (1995) 11 Cal.4th 568, 574.) Appellant seems to argue that because the statutes defining the crimes allow for a conviction if the crimes were committed by "menace," the instruction should have defined that term as well. But the instructions did not include that term and, as the People note, the prosecution did not argue it as a theory of the case.

2. Specific Intent to Threaten

Appellant next argues that the jury should have been instructed that "duress" requires a specific intent to threaten. The requirement that a sexual offense be committed "by 'force, violence, duress, menace, or fear of immediate and unlawful bodily injury' " does not require a specific intent. (*Senior*, *supra*, 3 Cal.App.4th at p. 776.) "It describes types of intimidating conduct by the defendant and not any particular state of mind of the defendant." (*Ibid.*) The trial court was not required to instruct on an element that was not required.

3. Parental Prerogatives

Appellant argues that the court should have instructed the jurors that they should consider "the legitimate objectives of

parenting" in assessing whether appellant used duress to accomplish his sex crimes. He acknowledges that no case so holds, and we will not be the first court to say that duress is somehow *less* culpable if it is based on the dynamics of a parental relationship.

We agree with appellant that "*all* parenting entails a compulsive environment." When the goals of that "compulsive" environment serve the legitimate objectives of parenting—compelling a child to do her homework or go to bed at a reasonable hour, for example—that is obviously not duress in the criminal sense. When, however, the parental relationship is perverted so that the parent uses the same authority to coerce the child into performing sexual acts with the parent, that is another matter entirely, and the defendant is not entitled to hide behind the veil of "parental prerogatives."

4. Hardship

With the exception of the charges based on rape, the jury was instructed on "hardship" as a basis for duress. This was appropriate. (See *Leal*, *supra*, 33 Cal.4th at pp. 1004–1010.)

E. *"Hardship" as Component of Duress*

Appellant argues that "hardship," as used to define a basis of duress in the instructions, was unconstitutionally vague. We disagree. (*Leal*, *supra*, 33 Cal.3d at pp. 1004–1010.)

F. *Cruel and Unusual Punishment*

Appellant argues that his sentence—which is the practical equivalent of life without the possibility of parole—constituted cruel and unusual punishment because it was disproportionate to

the offenses in violation of the United States and California Constitutions. (See U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.) We disagree. (*People v. Baker* (2018) 20 Cal.App.5th 711, 719–734 [life sentence for single count under § 288.7 where defendant molested niece was not cruel and unusual punishment]; *People v. Retanan* (2007) 154 Cal.App.4th 1219, 1231 [sentence of 135 years to life for offender who molested several children was not disproportionate]; *People v. Alvarado* (2001) 87 Cal.App.4th 178, 199–201 [life sentence for single count of rape during robbery did not violate cruel and unusual punishment clauses]; *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520 [sentence of 129 years to life not unconstitutional per se when defendant was convicted of 25 sex crimes against single child victim].)

G. *Cumulative Error*

Appellant argues the cumulative effect of the errors in this case require reversal even if individually they do not. There is essentially nothing to cumulate, and we reject the claim. (*People v. Lewis* (2001) 25 Cal.4th 610, 635.)

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BURNS, J.

APPENDIX B

Court of Appeal, First Appellate District, Division Five - No. A156982

S272689

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JESUS MAYA-ZAPATA, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

APPENDIX C

AB-2542 Criminal procedure: discrimination. (2019-2020)

Date Published: 10/02/2020 02:00 PM

Assembly Bill No. 2542

CHAPTER 317

An act to amend Sections 1473 and 1473.7 of, and to add Section 745 to, the Penal Code, relating to criminal procedure.

[Approved by Governor September 30, 2020. Filed with Secretary of State September 30, 2020.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2542, Kalra. Criminal procedure: discrimination.

Existing law generally prescribes the procedure for the prosecution of persons arrested for committing a crime, including pleadings, bail, pretrial proceedings, trial, judgment, sentencing, and appeals. Existing law allows a person who is unlawfully imprisoned or restrained of their liberty to prosecute a writ of habeas corpus to inquire

into the cause of their imprisonment or restraint. Existing law allows a writ of habeas corpus to be prosecuted for, among other things, relief based on the use of false evidence that is substantially material or probative to the issue of guilt or punishment that was introduced at trial.

This bill would prohibit the state from seeking a criminal conviction or sentence on the basis of race, ethnicity, or national origin, as specified. The bill would allow a writ of habeas corpus to be prosecuted on the basis of that prohibition, and would require the defendant to appear at the evidentiary hearing by video unless their presence in court is needed. The bill would permit a defendant to file a motion requesting disclosure of all evidence relevant to a potential violation of that prohibition that is in the possession or control of the prosecutor and would require a court, upon a showing of good cause, to order those records to be released. The bill would authorize a court that finds a violation of that prohibition to impose a remedy specified in the bill. The bill would apply its provisions to adjudications and dispositions in the juvenile delinquency system. The bill would apply its provisions only prospectively to cases in which judgment has not been entered prior to January 1, 2021.

Existing law creates an explicit right for a person no longer imprisoned or restrained to file a motion to vacate a conviction or sentence based on a prejudicial error damaging to the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere, or based on newly discovered evidence of actual innocence, as specified.

This bill would additionally allow for a person no longer imprisoned or restrained to file a motion to vacate a conviction or sentence based on a conviction or sentence that was sought, obtained, or imposed on the basis of race, ethnicity, or national origin in violation of the bill's provisions.

This bill would state that its provisions are severable.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. This act shall be known and may be cited as the California Racial Justice Act of 2020.

SEC. 2. The Legislature finds and declares all of the following:

(a) Discrimination in our criminal justice system based on race, ethnicity, or national origin (hereafter "race" or "racial bias") has a deleterious effect not only on individual criminal defendants but on our system of justice as a whole. The United States Supreme Court has said: "Discrimination on the basis of race, odious in all respects, is

especially pernicious in the administration of justice." (Rose v. Mitchell, 443 U.S. 545, 556 (1979) (quoting Ballard v. United States, 329 U.S. 187, 195 (1946))). The United States Supreme Court has also recognized "the impact of … evidence [of racial bias] cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses." (Buck v. Davis, 137 S. Ct. 759, 777 (2017)). Discrimination undermines public confidence in the fairness of the state's system of justice and deprives Californians of equal justice under law.

(b) A United States Supreme Court Justice has observed, "[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination." (Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary, 572 U.S. 291, 380-81 (2014) (Sotomayor, J., dissenting)). We cannot simply accept the stark reality that race pervades our system of justice. Rather, we must acknowledge and seek to remedy that reality and create a fair system of justice that upholds our democratic ideals.

(c) Even though racial bias is widely acknowledged as intolerable in our criminal justice system, it nevertheless persists because courts generally only address racial bias in its most extreme and blatant forms. More and more judges in California and across the country are recognizing that current law, as interpreted by the high courts, is insufficient to address discrimination in our justice system. (State v. Saintcalle, 178 Wash. 2d 34, 35 (2013); Ellis v. Harrison, 891 F.3rd 1160, 1166-67 (9th Cir. 2018) (Nguyen, J., concurring), reh'g en banc granted Jan. 30, 2019; Turner v. Murray, 476 U.S. 28, 35 (1986); People v. Bryant, 40 Cal.App.5th 525 (2019) (Humes, J., concurring)). Even when racism clearly infects a criminal proceeding, under current legal precedent, proof of purposeful discrimination is often required, but nearly impossible to establish. For example, one justice on the California Court of Appeals recently observed the legal standards for preventing racial bias in jury selection are ineffective, observing that "requiring a showing of purposeful discrimination sets a high standard that is difficult to prove in any context." (Bryant, 40 Cal.App.5th 525 (Humes, J., concurring)).

(d) Current legal precedent often results in courts sanctioning racism in criminal trials. Existing precedent countenances racially biased testimony, including expert testimony, and arguments in criminal trials. A court upheld a conviction based in part on an expert's racist testimony that people of Indian descent are predisposed to commit bribery. (United States v. Shah, 768 Fed. Appx. 637, 640 (9th Cir. 2019)). Existing precedent has provided no recourse for a defendant whose own attorney harbors racial animus towards the defendant's racial group, or toward the defendant, even where the attorney routinely used racist language and "harbor[ed] deep and utter contempt" for the defendant's racial group (Mayfield v. Woodford, 270 F.3d 915, 924-25 (9th Cir. 2001) (en banc); id. at 939-40 (Graber, J., dissenting)). Existing precedent holds that appellate courts must defer to

the rulings of judges who make racially biased comments during jury selection. (People v. Williams, 56 Cal. 4th 630, 652 (2013); see also id. at 700 (Liu, J., concurring)).

(e) Existing precedent tolerates the use of racially incendiary or racially coded language, images, and racial stereotypes in criminal trials. For example, courts have upheld convictions in cases where prosecutors have compared defendants who are people of color to Bengal tigers and other animals, even while acknowledging that such statements are "highly offensive and inappropriate" (Duncan v. Ornoski, 286 Fed. Appx. 361, 363 (9th Cir. 2008); see also People v. Powell, 6 Cal.5th 136, 182-83 (2018)). Because use of animal imagery is historically associated with racism, use of animal imagery in reference to a defendant is racially discriminatory and should not be permitted in our court system (Phillip Atiba Goff, Jennifer L. Eberhardt, Melissa J. Williams, and Matthew Christian Jackson, Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences, Journal of Personality and Social Psychology (2008) Vol. 94, No. 2, 292-293; Praatika Prasad, Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response, 86 Fordham Law Review, Volume 86, Issue 6, Article 24 3091, 3105-06 (2018)).

(f) Existing precedent also accepts racial disparities in our criminal justice system as inevitable. Most famously, in 1987, the United States Supreme Court found that there was "a discrepancy that appears to correlate with race" in death penalty cases in Georgia, but the court would not intervene without proof of a discriminatory purpose, concluding that we must simply accept these disparities as "an inevitable part of our criminal justice system" (McCleskey v. Kemp, 481 U.S. 279, 295-99, 312 (1987)). In dissent, one Justice described this as "a fear of too much justice" (Id. at p. 339 (Brennan, J., dissenting)).

(g) Current law, as interpreted by the courts, stands in sharp contrast to this Legislature's commitment to "ameliorate bias-based injustice in the courtroom" subdivision (b) of Section 1 of Chapter 418 of the Statutes of 2019 (Assembly Bill 242). The Legislature has acknowledged that all persons possess implicit biases (Id. at Section 1(a)(1)), that these biases impact the criminal justice system (Id. at Section (1)(a)(5)), and that negative implicit biases tend to disfavor people of color (Id. at Section (1)(a)(3)-(4)). In California in 2020, we can no longer accept racial discrimination and racial disparities as inevitable in our criminal justice system and we must act to make clear that this discrimination and these disparities are illegal and will not be tolerated in California, both prospectively and retroactively.

(h) There is growing awareness that no degree or amount of racial bias is tolerable in a fair and just criminal justice system, that racial bias is often insidious, and that purposeful discrimination is often masked and racial animus disguised. The examples described here are but a few select instances of intolerable racism infecting decisionmaking in the criminal justice system. Examples of the racism that pervades the criminal justice system

are too numerous to list.

(i) It is the intent of the Legislature to eliminate racial bias from California's criminal justice system because racism in any form or amount, at any stage of a criminal trial, is intolerable, inimical to a fair criminal justice system, is a miscarriage of justice under Article VI of the California Constitution, and violates the laws and Constitution of the State of California. Implicit bias, although often unintentional and unconscious, may inject racism and unfairness into proceedings similar to intentional bias. The intent of the Legislature is not to punish this type of bias, but rather to remedy the harm to the defendant's case and to the integrity of the judicial system. It is the intent of the Legislature to ensure that race plays no role at all in seeking or obtaining convictions or in sentencing. It is the intent of the Legislature to reject the conclusion that racial disparities within our criminal justice are inevitable, and to actively work to eradicate them.

(j) It is the further intent of the Legislature to provide remedies that will eliminate racially discriminatory practices in the criminal justice system, in addition to intentional discrimination. It is the further intent of the Legislature to ensure that individuals have access to all relevant evidence, including statistical evidence, regarding potential discrimination in seeking or obtaining convictions or imposing sentences.

SEC. 3. Section 745 is added to the Penal Code, immediately following Section 740, to read:

745. (a) The state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin. A violation is established if the defendant proves, by a preponderance of the evidence, any of the following:

(1) The judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin.

(2) During the defendant's trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful. This paragraph does not apply if the person speaking is describing language used by another that is relevant to the case or if the person speaking is giving a racially neutral and unbiased physical description of the suspect.

(3) Race, ethnicity, or national origin was a factor in the exercise of peremptory challenges. The defendant need not show that purposeful discrimination occurred in the exercise of peremptory challenges to demonstrate a violation of subdivision (a).

(4) The defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who commit similar offenses and are similarly situated, and the evidence establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin in the county where the convictions were sought or obtained.

(5) (A) A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for that offense on people that share the defendant's race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county where the sentence was imposed.

(B) A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for the same offense on defendants in cases with victims of one race, ethnicity, or national origin than in cases with victims of other races, ethnicities, or national origins, in the county where the sentence was imposed.

(b) A defendant may file a motion in the trial court or, if judgment has been imposed, may file a petition for writ of habeas corpus or a motion under Section 1473.7 in a court of competent jurisdiction, alleging a violation of subdivision (a).

(c) If a motion is filed in the trial court and the defendant makes a prima facie showing of a violation of subdivision (a), the trial court shall hold a hearing.

(1) At the hearing, evidence may be presented by either party, including, but not limited to, statistical evidence, aggregate data, expert testimony, and the sworn testimony of witnesses. The court may also appoint an independent expert.

(2) The defendant shall have the burden of proving a violation of subdivision (a) by a preponderance of the evidence.

(3) At the conclusion of the hearing, the court shall make findings on the record.

(d) A defendant may file a motion requesting disclosure to the defense of all evidence relevant to a potential violation of subdivision (a) in the possession or control of the state. A motion filed under this subdivision shall describe the type of records or information the defendant seeks. Upon a showing of good cause, and if the records are not privileged, the court shall order the records to be released. Upon a showing of good cause, the court may permit the prosecution to redact information prior to disclosure.

(e) Notwithstanding any other law, except for an initiative approved by the voters, if the court finds, by a preponderance of evidence, a violation of subdivision (a), the court shall impose a remedy specific to the violation found from the following list of remedies:

(1) Before a judgment has been entered, the court may impose any of the following remedies:

(A) Reseat a juror removed by use of a peremptory challenge.

(B) Declare a mistrial, if requested by the defendant.

(C) Discharge the jury panel and empanel a new jury.

(D) If the court determines that it would be in the interest of justice, dismiss enhancements, special circumstances, or special allegations, or reduce one or more charges.

(2) (A) When a judgment has been entered, if the court finds that a conviction was sought or obtained in violation of subdivision (a), the court shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings consistent with subdivision (a). If the court finds that the only violation of subdivision (a) that occurred is based on paragraph (4) of subdivision (a) and the court has the ability to rectify the violation by modifying the judgment, the court shall vacate the conviction and sentence, find that the conviction is legally invalid, and modify the judgment to impose an appropriate remedy for the violation that occurred. On resentencing, the court shall not impose a new sentence greater than that previously imposed.

(B) When a judgment has been entered, if the court finds that only the sentence was sought, obtained, or imposed in violation of subdivision (a), the court shall vacate the sentence, find that it is legally invalid, and impose a new sentence. On resentencing, the court shall not impose a new sentence greater than that previously imposed.

(3) When the court finds there has been a violation of subdivision (a), the defendant shall not be eligible for the death penalty.

(4) The remedies available under this section do not foreclose any other remedies available under the United States Constitution, the California Constitution, or any other law.

(f) This section also applies to adjudications and dispositions in the juvenile delinquency system.

(g) This section shall not prevent the prosecution of hate crimes pursuant to Sections 422.6 to 422.865,

inclusive.

(h) As used in this section, the following definitions apply:

(1) "More frequently sought or obtained" or "more frequently imposed" means that statistical evidence or aggregate data demonstrate a significant difference in seeking or obtaining convictions or in imposing sentences comparing individuals who have committed similar offenses and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity.

(2) "Prima facie showing" means that the defendant produces facts that, if true, establish that there is a substantial likelihood that a violation of subdivision (a) occurred. For purposes of this section, a "substantial likelihood" requires more than a mere possibility, but less than a standard of more likely than not.

(3) "Racially discriminatory language" means language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded language, language that compares the defendant to an animal, or language that references the defendant's physical appearance, culture, ethnicity, or national origin. Evidence that particular words or images are used exclusively or disproportionately in cases where the defendant is of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory.

(4) "State" includes the Attorney General, a district attorney, or a city prosecutor.

(i) A defendant may share a race, ethnicity, or national origin with more than one group. A defendant may aggregate data among groups to demonstrate a violation of subdivision (a).

(j) This section applies only prospectively in cases in which judgment has not been entered prior to January 1, 2021.

SEC. 3.5. Section 745 is added to the Penal Code, immediately following Section 740, to read:

745. (a) The state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin. A violation is established if the defendant proves, by a preponderance of the evidence, any of the following:

(1) The judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin.

(2) During the defendant's trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful. This paragraph does not apply if the person speaking is describing language used by another that is relevant to the case or if the person speaking is giving a racially neutral and unbiased physical description of the suspect.

(3) The defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who commit similar offenses and are similarly situated, and the evidence establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin in the county where the convictions were sought or obtained.

(4) (A) A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for that offense on people that share the defendant's race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county where the sentence was imposed.

(B) A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for the same offense on defendants in cases with victims of one race, ethnicity, or national origin than in cases with victims of other races, ethnicities, or national origins, in the county where the sentence was imposed.

(b) A defendant may file a motion in the trial court or, if judgment has been imposed, may file a petition for writ of habeas corpus or a motion under Section 1473.7 in a court of competent jurisdiction, alleging a violation of subdivision (a).

(c) If a motion is filed in the trial court and the defendant makes a prima facie showing of a violation of subdivision (a), the trial court shall hold a hearing.

(1) At the hearing, evidence may be presented by either party, including, but not limited to, statistical evidence, aggregate data, expert testimony, and the sworn testimony of witnesses. The court may also appoint an independent expert.

(2) The defendant shall have the burden of proving a violation of subdivision (a) by a preponderance of the evidence.

(3) At the conclusion of the hearing, the court shall make findings on the record.

(d) A defendant may file a motion requesting disclosure to the defense of all evidence relevant to a potential violation of subdivision (a) in the possession or control of the state. A motion filed under this section shall describe the type of records or information the defendant seeks. Upon a showing of good cause, the court shall order the records to be released. Upon a showing of good cause, and if the records are not privileged, the court may permit the prosecution to redact information prior to disclosure.

(e) Notwithstanding any other law, except for an initiative approved by the voters, if the court finds, by a preponderance of evidence, a violation of subdivision (a), the court shall impose a remedy specific to the violation found from the following list:

(1) Before a judgment has been entered, the court may impose any of the following remedies:

(A) Declare a mistrial, if requested the by defendant.

(B) Discharge the jury panel and empanel a new jury.

(C) If the court determines that it would be in the interest of justice, dismiss enhancements, special circumstances, or special allegations, or reduce one or more charges.

(2) (A) When a judgment has been entered, if the court finds that a conviction was sought or obtained in violation of subdivision (a), the court shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings consistent with subdivision (a). If the court finds that the only violation of subdivision (a) that occurred is based on paragraph (3) of subdivision (a) and the court has the ability to rectify the violation by modifying the judgment, the court shall vacate the conviction and sentence, find that the conviction is legally invalid, and modify the judgment to impose an appropriate remedy for the violation that occurred. On resentencing, the court shall not impose a new sentence greater than that previously imposed.

(B) When a judgment has been entered, if the court finds that only the sentence was sought, obtained, or imposed in violation of subdivision (a), the court shall vacate the sentence, find that it is legally invalid, and impose a new sentence. On resentencing, the court shall not impose a new sentence greater than that previously imposed.

(3) When the court finds there has been a violation of subdivision (a), the defendant shall not be eligible for the death penalty.

(4) The remedies available under this section do not foreclose any other remedies available under the United States Constitution, the California Constitution, or any other law.

(f) This section also applies to adjudications and dispositions in the juvenile delinquency system.

(g) This section shall not prevent the prosecution of hate crimes pursuant to Sections 422.6 to 422.865, inclusive.

(h) As used in this section, the following definitions apply:

(1) "More frequently sought or obtained" or "more frequently imposed" means that statistical evidence or aggregate data demonstrate a significant difference in seeking or obtaining convictions or in imposing sentences comparing individuals who have committed similar offenses and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity.

(2) "Prima facie showing" means that the defendant produces facts that, if true, establish that there is a substantial likelihood that a violation of subdivision (a) occurred. For purposes of this section, a "substantial likelihood" requires more than a mere possibility, but less than a standard of more likely than not.

(3) "Racially discriminatory language" means language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded language, language that compares the defendant to an animal, or language that references the defendant's physical appearance, culture, ethnicity, or national origin. Evidence that particular words or images are used exclusively or disproportionately in cases where the defendant is of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory.

(4) "State" includes the Attorney General, a district attorney, or a city prosecutor.

(i) A defendant may share a race, ethnicity, or national origin with more than one group. A defendant may aggregate data among groups to demonstrate a violation of subdivision (a).

(j) This section applies only prospectively in cases in which judgment has not been entered prior to January 1, 2021.

SEC. 4. Section 1473 of the Penal Code is amended to read:

1473. (a) A person unlawfully imprisoned or restrained of their liberty, under any pretense, may prosecute a writ

of habeas corpus to inquire into the cause of the imprisonment or restraint.

(b) A writ of habeas corpus may be prosecuted for, but not limited to, the following reasons:

(1) False evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at a hearing or trial relating to the person's incarceration.

(2) False physical evidence, believed by a person to be factual, probative, or material on the issue of guilt, which was known by the person at the time of entering a plea of guilty, which was a material factor directly related to the plea of guilty by the person.

(3) (A) New evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial.

(B) For purposes of this section, "new evidence" means evidence that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral, or impeaching.

(c) Any allegation that the prosecution knew or should have known of the false nature of the evidence referred to in paragraphs (1) and (2) of subdivision (b) is immaterial to the prosecution of a writ of habeas corpus brought pursuant to paragraph (1) or (2) of subdivision (b).

(d) This section does not limit the grounds for which a writ of habeas corpus may be prosecuted or preclude the use of any other remedies.

(e) (1) For purposes of this section, "false evidence" includes opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or that have been undermined by later scientific research or technological advances.

(2) This section does not create additional liabilities, beyond those already recognized, for an expert who repudiates the original opinion provided at a hearing or trial or whose opinion has been undermined by later scientific research or technological advancements.

(f) Notwithstanding any other law, a writ of habeas corpus may also be prosecuted after judgment has been entered based on evidence that a criminal conviction or sentence was sought, obtained, or imposed in violation of subdivision (a) of Section 745 if judgment was entered on or after January 1, 2021. A petition raising a claim of this nature for the first time, or on the basis of new discovery provided by the state or other new evidence that

could not have been previously known by the petitioner with due diligence, shall not be deemed a successive or abusive petition. If the petitioner has a habeas corpus petition pending in state court, but it has not yet been decided, the petitioner may amend the existing petition with a claim that the petitioner's conviction or sentence was sought, obtained, or imposed in violation of subdivision (a) of Section 745. The petition shall state if the petitioner requests appointment of counsel and the court shall appoint counsel if the petitioner cannot afford counsel and either the petition alleges facts that would establish a violation of subdivision (a) of Section 745 or the State Public Defender requests counsel be appointed. Newly appointed counsel may amend a petition filed before their appointment. The court shall review a petition raising a claim pursuant to Section 745 and shall determine if the petitioner has made a prima facie showing of entitlement to relief. If the petitioner makes a prima facie showing that the petitioner is entitled to relief, the court shall issue an order to show cause why relief shall not be granted and hold an evidentiary hearing, unless the state declines to show cause. The defendant shall appear at the hearing by video unless counsel indicates that their presence in court is needed. If the court determines that the petitioner has not established a prima facie showing of entitlement to relief, the court shall state the factual and legal basis for its conclusion on the record or issue a written order detailing the factual and legal basis for its conclusion.

SEC. 5. Section 1473.7 of the Penal Code is amended to read:

1473.7. (a) A person who is no longer in criminal custody may file a motion to vacate a conviction or sentence for any of the following reasons:

(1) The conviction or sentence is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere. A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel.

(2) Newly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice.

(3) A conviction or sentence was sought, obtained, or imposed on the basis of race, ethnicity, or national origin in violation of subdivision (a) of Section 745.

(b) (1) Except as provided in paragraph (2), a motion pursuant to paragraph (1) of subdivision (a) shall be deemed timely filed at any time in which the individual filing the motion is no longer in criminal custody.

(2) A motion pursuant to paragraph (1) of subdivision (a) may be deemed untimely filed if it was not filed with reasonable diligence after the later of the following:

(A) The moving party receives a notice to appear in immigration court or other notice from immigration authorities that asserts the conviction or sentence as a basis for removal or the denial of an application for an immigration benefit, lawful status, or naturalization.

(B) Notice that a final removal order has been issued against the moving party, based on the existence of the conviction or sentence that the moving party seeks to vacate.

(c) A motion pursuant to paragraph (2) or (3) of subdivision (a) shall be filed without undue delay from the date the moving party discovered, or could have discovered with the exercise of due diligence, the evidence that provides a basis for relief under this section or Section 745.

(d) All motions shall be entitled to a hearing. Upon the request of the moving party, the court may hold the hearing without the personal presence of the moving party provided that it finds good cause as to why the moving party cannot be present. If the prosecution has no objection to the motion, the court may grant the motion to vacate the conviction or sentence without a hearing.

(e) When ruling on the motion:

(1) The court shall grant the motion to vacate the conviction or sentence if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief specified in subdivision (a). For a motion made pursuant to paragraph (1) of subdivision (a), the moving party shall also establish that the conviction or sentence being challenged is currently causing or has the potential to cause removal or the denial of an application for an immigration benefit, lawful status, or naturalization.

(2) There is a presumption of legal invalidity for the purposes of paragraph (1) of subdivision (a) if the moving party pleaded guilty or nolo contendere pursuant to a statute that provided that, upon completion of specific requirements, the arrest and conviction shall be deemed never to have occurred, where the moving party complied with these requirements, and where the disposition under the statute has been, or potentially could be, used as a basis for adverse immigration consequences.

(3) If the court grants the motion to vacate a conviction or sentence obtained through a plea of guilty or nolo contendere, the court shall allow the moving party to withdraw the plea.

(4) When ruling on a motion under paragraph (1) of subdivision (a), the only finding that the court is required to

make is whether the conviction is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere. When ruling on a motion under paragraph (2) of subdivision (a), the court shall specify the basis for its conclusion.

(f) An order granting or denying the motion is appealable under subdivision (b) of Section 1237 as an order after judgment affecting the substantial rights of a party.

(g) A court may only issue a specific finding of ineffective assistance of counsel as a result of a motion brought under paragraph (1) of subdivision (a) if the attorney found to be ineffective was given timely advance notice of the motion hearing by the moving party or the prosecutor, pursuant to Section 416.90 of the Code of Civil Procedure.

SEC. 6. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 7. Section 3.5 of this bill shall only become operative if Assembly Bill 3070 is enacted and becomes effective on or before January 1, 2021, in which case Section 3 of this bill shall not become operative.

PROOF OF SERVICE

Title: JESUS MAYA ZAPATA v. CALIFORNIA **Court of Appeal Case No.:** **A156982**

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The undersigned declares:

I am a citizen of the United States of America, over the age of eighteen years and counsel for petitioner herein. My business address is 1535 Farmers Lane 133, Santa Rosa, CA 95405.

On 22 July 2022 I served the attached, **PETITION FOR CERTIORARI & MOTION TO PROCEED IN FORMA PAUPERIS** on the parties in this action by placing a true copy thereof, in a sealed envelope with first class postage fully prepaid, in the United States Mail, addressed as follows:

[x] Second District Court of Appeal
300 South Spring St., N.Tower,
L.A., CA 90013

[x] Attorney General of California
300 South Spring Street, Suite 1702
Los Angeles, CA 90013

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

Sworn this 22 July 2021, at Santa Rosa, California

/s/ Manjarrez

Kieran D. C. Manjarrez