

In the Supreme Court of the State of California

**THE PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff and Respondent,

v.

DONTE LAMONT McDANIEL,

Defendant and Appellant.

CAPITAL CASE

Case No. S171393

Los Angeles County Superior Court Case No. TA074274
The Honorable Robert J. Perry, Judge

SECOND SUPPLEMENTAL RESPONDENT'S BRIEF

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XIII. THIS COURT'S RECENT *GUTIERREZ* OPINION DOES NOT REQUIRE REVERSAL IN THIS CASE

Appellant argues that in light of this Court's recent decision in *People v. Gutierrez* (2017) 2 Cal.5th 1150, his case should be reversed. (Second Supp. AOB 6-15.) Contrary to appellant's argument, *Gutierrez* does not alter the ultimate determination that the trial court properly denied appellant's *Batson/Wheeler* motion.

As previously noted, discrimination in jury selection based on race, ethnicity, or similar grounds violates a defendant's right to a trial by jury under both state and federal Constitutions. (*Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.)

In *Gutierrez*, this Court found that the prosecutor's racially-neutral reason for excusing a juror was not genuine and did not pass the third step of *Batson/Wheeler*. The *Gutierrez* Court explained that "[t]his portion of the *Batson/Wheeler* inquiry focuses on the subjective genuineness of the reason, not the objective reasonableness" of the prosecutor's stated reasons. (*Gutierrez, supra*, 2 Cal.5th at p. 1158.)

This Court also noted that at this stage, the trial judge must make "'a sincere and reasoned attempt' to evaluate the prosecutor's justification, with consideration of the circumstances of the case known at that time, her knowledge of trial techniques, and her observations of the prosecutor's examination of panelists and exercise of for-cause and peremptory challenges." (*Id.* at p. 1159.) The credibility of the prosecutor's explanation for excusing a juror becomes "pertinent" at this stage. (*Id.* at p. 1158.) "To assess credibility, the court may consider, among other factors, the prosecutor's demeanor; how reasonable, or how improbable, the explanations are; and whether the proffered rationale has some basis in accepted trial strategy." (*Id.* at pp. 1158-1159, citations and internal quotation marks and punctuation omitted; see also *People v. Lenix* (2008)

44 Cal.4th 602, 613 [the trial court may rely on its “own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her”].) Finally, the *Gutierrez* Court highlighted that a trial court’s ruling must be reviewed for substantial evidence with “great restraint.” (*Gutierrez, supra*, at p. 1159.)

In *Gutierrez*, all three Hispanic defendants joined in a *Batson/Wheeler* motion on the grounds that of 16 peremptory strikes, 10 were against individuals identified as Hispanic, with four of the strikes being consecutive. (*Gutierrez, supra*, 2 Cal.5th at p. 1156.) The trial court individually reviewed eight out of the 10 proffered justifications, did not individually review the striking of two prospective jurors, and thereafter made a “global finding” that the prosecutor’s strikes were neutral and nonpretextual. (*Id.* at p. 1157.)

In its analysis, the *Gutierrez* Court described the circumstances surrounding three of the panelists who were the subject of the motion and ultimately addressed the claim of error as it pertained to one of those prospective jurors, Juror No. 2723471. (*Gutierrez, supra*, 2 Cal.5th at pp. 1159-1160.) The prosecutor’s reason for excusing Juror No. 2723471 was that “[s]he’s from Wasco and she said that she’s not aware of any gang activity going on in Wasco, and I was unsatisfied by some of her answers as to how she would respond when she hears that Gabriel Trevino is from a criminal street gang, a subset of the Surenos out of Wasco.” (*Id.* at p. 1160.) The trial court accepted the “Wasco issue” as justification for the prosecution’s peremptory challenge. (*Id.* at pp. 1161, 1168, 1171.)

This Court found that the prosecutor’s stated reason for the removal of Juror No. 2723471 was racially neutral but did not satisfy the credibility test of the third step of *Batson/Wheeler*. (*Gutierrez, supra*, 2 Cal.5th at pp. 1167-1172.) Although the trial court had acknowledged the “Wasco issue” and deemed it neutral, the *Gutierrez* Court faulted the trial judge for not

clarifying why the Wasco reason was accepted as honest. The Court focused on the fact that the prosecutor's explanation was not "self-evident," and as a result, "the question of whether a neutral explanation is genuine and made in good faith becomes more pressing." (*Id.* at p. 1171.) Thus, the trial court had to explain its ruling accepting the prosecutor's reason because it was not self-evident. Under this enhanced inquiry, the Court found the record did not support the trial court's ruling as to the "Wasco issue." (*Id.* at pp. 1171-1172.)

Further, the *Gutierrez* Court faulted the trial court for failing to reject or clarify the prosecutor's other reason for this strike (i.e., that the prospective juror had provided "other answers" which were ultimately not supported by the record). Finally, this Court noted that the trial court had erroneously cited a "lack of life experience" as a justification for removing this potential juror (the prosecutor never offered that reason). (*Id.* at pp. 1171-1172.) This Court found that "[o]n this record, we are unable to conclude that the trial court made 'a sincere and reasoned attempt to evaluate the prosecutor's explanation' regarding the strike of Juror 2723471." (*Id.* at p. 1172.) This Court explained:

The [trial] court may have made a *sincere* attempt to assess the Wasco rationale, but it never explained why it decided this justification was not a pretext for a discriminatory purpose. Because the prosecutor's reason for this strike was not self-evident and the record is void of any explication from the court, we cannot find under these circumstances that the court made a *reasoned* attempt to determine whether the justification was a credible one.

(*Ibid.*, original emphasis.)

Here, contrary to appellant's assertion, the trial court's handling of his *Batson/Wheeler* motion does not conflict with the holding in *Gutierrez*. As discussed in the respondent's brief, the prosecutor proffered race-neutral, valid reasons for the dismissal of Prospective Juror No. 28. (See RB 69-

70.) The prosecutor explained that he excused Prospective Juror No. 28 because the juror believed that life without the possibility of parole (“LWOP”) was a more severe punishment than death, he indicated that he did not want to serve on a lengthy trial, and he had only completed his education through twelfth grade (and the prosecutor sought jurors with the highest possible level of education). (5RT 1079.)

Notably, unlike in *Gutierrez*, where the prosecutor’s stated rationale was not self-evident and did not make sense, the prosecutor’s reasons here for striking Prospective Juror No. 28 were self-evident, plausible, and supported by the record of voir dire. (RB 68-70.) The *Gutierrez* Court recognized that “[s]ome neutral reasons for a challenge are sufficiently self-evident, if honestly held, such that they require little additional explication.” (*Gutierrez, supra*, 2 Cal.5th at p. 1171.) Here, the prosecutor’s reasons for excusing Prospective Juror No. 28 were sufficiently self-evident, especially because this was going to be a lengthy and complex case in which the prosecution was seeking the death penalty. As discussed in the respondent’s brief, all of the prosecutor’s explanations have been found to be race-neutral by this Court in other cases. (See AOB 69.) The fact that the reasons the prosecutor posited are widely-accepted shows that they are self-evident and plausible. In other words, the reasons were so obvious (and supported by the record (see AOB 67-70), that no further explanation by the prosecutor or the trial court was necessary.

Respondent acknowledges that similar to *Gutierrez*, the prosecutor here asked limited questions of Prospective Juror No. 28. But, as discussed in the respondent’s brief (RB 70-75), the instant case involved a capital trial, so the parties already had a considerable amount of information about the prospective jurors and their views on a number of topics from the questionnaires the jurors had completed prior to voir dire. In addition, the trial court extensively questioned the panelists regarding their views of the

death penalty. (See 4RT 864-903.) As a result, the need for extensive questioning was obviated by the plethora of information the prosecutor already had prior to excusing Prospective Juror No. 28. The voir dire record here is more developed than in *Gutierrez*, a non-capital case, and it provided substantial evidence that supported the prosecutor's reasons for striking Prospective Juror No. 28. (RB 67-94.)

Moreover, when assessing the prosecutor's credibility, the trial judge had an advantage based not only on his contemporaneous observations of the prosecutor, but also on his personal professional experience with him, in addition to the lengthy questionnaire and voir dire. The prosecutor proffered reasons for excusing Prospective Juror No. 28 from the information gleaned from the questionnaires and voir dire. The trial judge considered those reasons along with his subjective beliefs about the prosecutor's integrity, and found the reasons credible. The trial court issued its ruling, stating:

I have a great deal of respect for the [prosecutor] in this case, Mr. Dhanidina. And I hold him in high regard. He has tried many cases before me. [¶] I have always found him to be an utmost professional. I have never thought that he was trying to do anything underhanded. [¶] I believe peremptory challenges should have some flexibility in the way the judge looks at them. [¶] I am accepting of the articulated reasons that have been advanced here.

(5RT 1084-1085.)

Thus, unlike the circumstances in *Gutierrez*, the trial court here offered a reasoned explanation for why it accepted the prosecutor's reasons. This explanation was more than sufficient given that the prosecutor's reasons were self-evident and supported by the record. Also, unlike in *Gutierrez*, the trial court did not rely upon a justification that was not

offered by the prosecutor.¹ And, unlike in *Gutierrez*, the trial court had an established professional relationship with the prosecutor that informed its ruling. As a result, the record demonstrates that the trial court’s ruling was based on a consideration of the circumstances of the case and its observations of and familiarity with the prosecutor. Under these circumstances, *Gutierrez* does not dictate reversal of the present matter.

As noted above, the focus of the third step of a *Batson/Wheeler* analysis is on the subjective genuineness of the reasons given for the peremptory challenge, not on the objective reasonableness of those reasons. (*Gutierrez, supra*, 2 Cal.5th at p. 1158.) “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.” (*People v. Reynoso* (2003) 31 Cal.4th 903, 924.) The prosecutor here offered plausible, self-evident explanations, and the trial court made a sincere and reasoned effort to evaluate that explanation. Accordingly, *Gutierrez* does not impact the trial court’s ruling on the prosecutor’s dismissal of Prospective Juror No. 28, and appellant’s claim fails.

¹ As respondent acknowledged in the respondent’s brief, the trial court went on to find that the prosecutor’s race-neutral reasons for excusing Prospective Juror No. 46 were not credible. Nonetheless, the trial court appeared to have applied the stricter “for cause” standard in making its assessment. (See AOB 65-67.) Hence, that ruling is not germane to the trial court’s finding regarding the dismissal of Prospective Juror No. 28. Indeed, even after ruling on the dismissal of Prospective Juror No. 46, the trial judge continued to praise the prosecutor’s integrity and professionalism. (See 16RT 3057.)

CONCLUSION

For the foregoing reasons, and those previously discussed in the respondent's brief, respondent respectfully requests that this Court affirm the judgment and the sentence of death.

Dated: November 7, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **SECOND SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains **1,867** words.

Dated: November 7, 2017

XAVIER BECERRA
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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Donte Lamont McDaniel**
No.: **S171393**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On **November 7, 2017**, I electronically served the attached **SECOND SUPPLEMENTAL RESPONDENT'S BRIEF** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on **November 7, 2017**, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On **November 7, 2017**, I served the attached **SECOND SUPPLEMENTAL RESPONDENT'S BRIEF** by transmitting a true copy via electronic mail to:

David Barkhurst, Deputy District Attorney
Via Email: Courtesy Copy

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **November 7, 2017**, at Los Angeles, California.

Nora Fung

Declarant

Signature

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STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S171393**

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Date

/s/Kathy Pomerantz

Signature

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