JOHNNY LOPEZ
NAME
P-57181
PRISON NUMBER
P.V.S.P. D-2-134L
P.O.BOX 8500
CURRENT ADDRESS OR PLACE OF CONFINEMENT
COALINGA, CAL. 93210
CITY, STATE, ZIP CODE

2254 ___ 1983 ___
FILING FEE PAID
Yes ___ No ___
IFP MOTION FILED
Yes ___ No ___
COPIES SENT TO
Court ___ ProSe ___

FILED
MAY 13 2011
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOHNNY LOPEZ,
(FULL NAME OF PETITIONER)

PETITIONER

v.

JAMES A. YATES (WARDEN),
(NAME OF WARDEN, SUPERINTENDENT, JAILOR, OR AUTHORIZED PERSON HAVING CUSTODY OF PETITIONER [E.G., DIRECTOR OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS])

RESPONDENT

and

C. HARRIS,
The Attorney General of the State of California, Additional Respondent.

'11 CV 1064 DMS BLM

Civil No. ______________
(TO BE FILLED IN BY CLERK OF U.S. DISTRICT COURT)

PETITION FOR WRIT OF HABEAS CORPUS

UNDER 28 U.S.C. § 2254
BY A PERSON IN STATE CUSTODY

1. Name and location of the court that entered the judgment of conviction under attack: SAN BERNARDINO COUNTY SUPERIOR COURT
2. Date of judgment of conviction: FEBRUARY 23, 2007
3. Trial court case number of the judgment of conviction being challenged: FSB052571
4. Length of sentence: 25 - LIFE PLUS 7 YEARS

5. Sentence start date and projected release date: START: 10-13-2005
E.P.R.D: 10-13-~~2031~~ 2037

6. Offense(s) for which you were convicted or pleaded guilty (all counts):
STRONG ARM ROBBERY
ESCAPE

7. What was your plea? (CHECK ONE)
   (a) Not guilty ☒
   (b) Guilty ☐
   (c) Nolo contendere ☐

8. If you pleaded not guilty, what kind of trial did you have? (CHECK ONE)
   (a) Jury ☒
   (b) Judge only ☐

9. Did you testify at the trial?
☐ Yes ☒ No

DIRECT APPEAL

10. Did you appeal from the judgment of conviction in the **California Court of Appeal**?
☒ Yes ☐ No

11. If you appealed in the **California Court of Appeal**, answer the following:
   (a) Result: AFFIRMED IN PART/REVERSED IN PART W/ DIRECTIONS
   (b) Date of result, case number and citation, if known: JUNE 11, 2009
   (c) Grounds raised on direct appeal:
   1.) PROSECUTIONS USE OF PREMPTORY CHALLENGES TO EXCLUDE FOUR MINORITY JURORS
   2.) CAL.CRIM. NUMBER 223 SHIFTS BURDEN OF PROOF AND UNDERMINES THE PRESUMPTION OF INNOCENCE
   3.) TRIAL COURT AWARDED AN IMPROPER AMOUNT OF PRE-SENTENCE CUSTODY CREDITS

12. If you sought further direct review of the decision on appeal by the **California Supreme Court** (e.g., a Petition for Review), please answer the following:
   (a) Result: DENIED
   (b) Date of result, case number and citation, if known: AUGUST 19, 2009
   CASE NO: S174729
   (c) Grounds raised: SAME AS ABOVE IN #11(c).

13. If you filed a petition for certiorari in the **United States Supreme Court**, please answer the following with respect to that petition:

(a) Result: ______

(b) Date of result, case number and citation, if known: ______

(c) Grounds raised: ______

COLLATERAL REVIEW IN STATE COURT

14. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the **California Superior Court**?
☒ Yes ☐ No

15. If your answer to #15 was "Yes," give the following information:

(a) **California Superior Court** Case Number: WHCSS1000194

(b) Nature of proceeding: WRIT OF HABEAS CORPUS

(c) Grounds raised:
1.) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL
2.) SAN BERNARDINO COUNTY SUPERIOR COURT'S DELIBERATE BREACH OF PETITIONER'S PRIOR PLEA AGREEMENT FROM PRIOR CASE

(d) Did you receive an evidentiary hearing on your petition, application or motion?
☐ Yes ☒ No

(e) Result: DENIED

(f) Date of result: JUNE 11, 2010

16. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the **California Court of Appeal**?
☒ Yes ☐ No

17. If your answer to #17 was "Yes," give the following information:

(a) **California Court of Appeal** Case Number: FSB052571

(b) Nature of proceeding: WRIT OF HABEAS CORPUS

(c) Grounds raised: SAME AS ABOVE IN #15 (c).

(d) Did you receive an evidentiary hearing on your petition, application or motion?
☐ Yes ☒ No

(e) Result: DENIED

(f) Date of result: AUGUST 6, 2010

18. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the **California Supreme Court**?
☒ Yes ☐ No

19. If your answer to #19 was "Yes," give the following information:

(a) **California Supreme Court** Case Number: S187169

(b) Nature of proceeding: WRIT OF HABEAS CORPUS

(c) Grounds raised: SAME AS ABOVE IN #15 (c).

(d) Did you receive an evidentiary hearing on your petition, application or motion?

☐ Yes ☒ No

(e) Result: DENIED

(f) Date of result: APRIL 13, 2011

20. If you did ***not*** file a petition, application or motion (e.g., a Petition for Review or a Petition for Writ of Habeas Corpus) with the **California Supreme Court**, containing the grounds raised in this federal Petition, explain briefly why you did not:

COLLATERAL REVIEW IN FEDERAL COURT

21. Is this your **first** federal petition for writ of habeas corpus challenging this conviction?

☒ Yes ☐ No (IF "YES" SKIP TO #11)

(a) If no, in what federal court was the prior action filed? ____________

(i) What was the prior case number? ____________

(ii) Was the prior action (CHECK ONE):

☐ Denied on the merits?

☐ Dismissed for procedural reasons?

(iii) Date of decision: ____________

(b) Were any of the issues in this current petition also raised in the prior federal petition?

☐ Yes ☐ No

(c) If the prior case was denied on the merits, has the Ninth Circuit Court of Appeals given you permission to file this second or successive petition?

☐ Yes ☐ No

CAUTION:

- **Exhaustion of State Court Remedies:** In order to proceed in federal court you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. This means that even if you have exhausted some grounds by raising them before the California Supreme Court, you must first present ***all*** other grounds to the California Supreme Court before raising them in your federal Petition.

- **Single Petition:** If you fail to set forth all grounds in this Petition challenging a specific judgment, you may be barred from presenting additional grounds challenging the same judgment at a later date.

- **Factual Specificity:** You must state facts, not conclusions, in support of your grounds. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do. A rule of thumb to follow is — state who did exactly what to violate your federal constitutional rights at what time or place.

5/10/2011

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STATEMENT OF THE CASE

On April 3, 2006, a first amended information filed in the San Bernardino Superior Court charged appellant, Johnny Lopez, with second degree robbery (count 1, § 211), assault by means likely to produce great bodily injury (count 2, § 245, subd. (a)(1)), and misdemeanor escape from custody (count 3, § 836.6, subd. (a)). (C.T. pp. 71-73.) The information further alleged that appellant had eight strike prior convictions (§§ 667, subds. (b) - (i), 1170.12, subds. (a) - (d)), five serious felony prior convictions arising out of two separate cases (§ 667, subd. (a)), and two prison priors (§ 667.5, subd. (b)). (C.T. p. 73-77.)

On February 15, 2007, the trial court denied the defense *Batson/Wheeler*[2] motion. (C.T. p. 113; R.T. pp. 118-121.) On February 20, 2007, the court granted the government's motion to amend count 3 of the information to allege misdemeanor escape from custody under a different subdivision (§ 836.6, subd. (b)). (C.T. p. 118; R.T. pp. 234-235.) The following day, the jury found appellant guilty as to counts 1, 2, and 3. (C.T. pp. 121-122, 234-236; 2 R.T. pp. 313-314.)

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[2] *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69]; *People v. Wheeler* (1978) 22 Cal.3d 258.

On February 22, 2007, the government filed a second amended information which corrected the first amended information to allege two serious felony priors (§ 667, subd. (a)). (C.T. p. 127-134.) The court found that appellant was the same person who committed the alleged strike, serious, and prison priors. (C.T. pp. 123-124; 2 R.T. p. 236.) The jury found all the priors true. (C.T. pp. 136-137, 224-233; 2 R.T. pp. 397-401.)

After denying a defense motion to strike appellant's strike priors[3] on April 13, 2007, the court sentenced appellant to a determinate term of seven years, plus 25 years to life. (C.T. pp. 276-277; 2 R.T. pp. 415-416.)

Appellant filed a notice of appeal on April 16, 2007. (C.T. p. 278.)

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[3] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

STATEMENT OF FACTS

On October 13, 2005 at about 6:00 p.m., Louise Bessler was inside the Wash and Dry Laundromat when a man approached her and asked her for some change. (1 R.T. pp. 70, 72, 75.) Bessler felt uncomfortable and told the man she did not have any change. (1 R.T. p. 73.) She tried to avoid talking to him and walked outside the laundromat when he approached her a second time. (1 R.T. p. 73.))

About 10 minutes later, Bessler was inside the restroom when she heard someone knock on the door. (1 R.T. pp. 74, 76, 82-83.) Bessler told the person she would be right out. (1 R.T. pp. 82-83.) A few minutes later, she opened the door to leave when the same man grabbed her by the throat and pushed her back inside the restroom. (1 R.T. pp. 83-84.) The door closed behind the man. (1 R.T. p. 85.) Bessler screamed, but the man told her to shut up. (1 R.T. p. 85.) He told her to bend over and pushed the back of her head toward the sink. (1 R.T. pp. 86-89.) Bessler's head struck the edge of the sink, causing a slight bump. (1 R.T. p. 89.) As she leaned over the sink, Bessler heard the man say, "Nevermind." (1 R.T. p. 90.) She heard the door open, noticed her purse was missing, and ran out to see the man leaving with her purse. (1 R.T. pp. 90-91.) Bessler screamed and yelled while she chased after the man. (1 R.T. p. 91.)

Heather Schoonover was walking towards the laundromat when she saw Bessler running out. (1 R.T. pp. 123, 125-126.) Bessler pointed to the man who told Schoonover that Bessler owed him money. (1 R.T. p. 127.) When Schoonover asked the man why he didn't call the police, he admitted that he took five dollars when Bessler refused to give him any money. (1 R.T. p. 127.) Schoonover lectured the man briefly, and he returned the purse and left. (1 R.T. p. 127.)

Corporal Newport stopped appellant about half a mile from the laundromat. (1 R.T. pp. 187, 212.) He was wearing a dark colored flannel shirt over a white T-shirt and dark colored blue jeans. (1 R.T. p. 187.) A pat down search revealed two knives. (1 R.T. p. 188.)

Deputy Benge drove Bessler and Schoonover to the in-field show up where they saw appellant handcuffed, standing next to several law enforcement officers. (1 R.T. pp. 109, 142, 159, 167-168, 176.) Bessler blurted out that appellant was the man who had robbed her, and Benge told her not to say anything. (1 R.T. p. 145.) When Benge returned to the laundromat parking lot, he interviewed the women separately. (1 R.T. p. 145.) Both women promptly identified appellant as the man who had robbed Bessler. (1 R.T. pp. 107-108, 145, 167-168.)

At about 8:00 p.m. that evening, Deputy Smith transported appellant to the station. (1 R.T. pp. 214-215.) He ran inside the station briefly to grab some booking forms and returned to find the back window kicked out and appellant missing. (1 R.T. p. 217.) Appellant was re-arrested in a nearby shopping center. (1 R.T. p. 220.)

At trial, Bessler described the man as Hispanic, older, short and stocky with short, gray hair and a beard. (1 R.T. pp. 70-71.) He was wearing a sweatshirt, jeans, and tennis shoes. (1 R.T. pp. 98, 103.) Schoonover described the man as Hispanic, late 40's, just a few inches taller than herself (5 feet, 4 inches) with dark hair. (1 R.T. p. 126.) She recalled him wearing a white shirt (T-shirt or tank top.) (1 R.T. p. 128.) Neither of the women remembered seeing any tattoos on the man's arms. (1 R.T. pp. 99, 120-121, 128, 178.)

At trial, Bessler testified that she was pretty sure that appellant was the same man, but admitted that she had some doubts even on the night she made her initial identification. (1 R.T. p. 116.) She remembered the man being smaller than her. (1 R.T. p. 117.) Bessler was not 100 percent positive that appellant was the same man who robbed her. (1 R.T. pp. 71-72, 83, 100.)

Initially, Schoonover was unable to identify appellant at trial, saying that it had been too long since the incident. (1 R.T. p. 126.) The following day, she identified appellant as the man who returned the purse outside the laundromat. (1 R.T. p. 165.) She said she was too nervous to look at him the day before, but by the end of her testimony, she was certain appellant was the man. (1 R.T. pp. 165, 167.) She remembered having a clear view of the man's arms and said she never saw any tattoos. (1 R.T. p. 178.)

Appellant is taller than Bessler and has two tattoos on his right arm. (1 R.T. pp. 117, 120-121.) The first tattoo covers about 65 percent of his arm; the second tattoo is a peacock on his right hand which extends toward his bicep, covering about one third of his arm. (1 R.T. pp. 120-121.)

GROUNDS FOR RELIEF

22. **State *concisely* every ground on which you claim that you are being held in violation of the constitution, law or treaties of the United States. Summarize *briefly* the facts supporting each ground.** If necessary, you may attach pages stating additional grounds and/or facts supporting each ground.

(a) **GROUND ONE**: PROSECUTOR'S USE OF PEREMPTORY CHALLENGES TO EXCLUDE FOUR MINORITY JURORS

Supporting FACTS (state *briefly* without citing cases or law) SEE FOLLOWING ATTACHED PAGES AS FACTS ARE NUMEROUS

Did you raise GROUND ONE in the California Supreme Court?
☒ Yes ☐ No.

ARGUMENT

I.

THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES TO EXCLUDE FOUR MINORITY JURORS VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION AND A JURY DRAWN FROM A CROSS SECTION OF THE COMMUNITY.

A. Introduction

During jury selection, the prosecutor exercised a total of seven peremptory challenges, five of which were used to strike minority jurors from the panel. (Aug.R.T. pp. 76, 83-84, 97, 103, 116, 118-120.) After the prosecutor's fifth peremptory challenge against a minority juror, defense counsel made a *Wheeler* motion.[4] The trial court found a prima facie case had been established and asked the prosecutor to explain her reasons for excusing the minority jurors. (C.T. p. 113; Aug.R.T. p. 118.) The prosecutor provided reasons for excusing prospective jurors Mario S., Suzanne G., Linda M., Andy R., and Rita G.[5] (Aug.R.T. pp. 118-120.) Thereafter, the trial court denied the *Wheeler* motion, stating:

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[4] *People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69].

[5] The court found, and the parties agreed, that Mario S., Suzanne G., Rita G. were Hispanic. Linda M. and Andy R. were African American. (Aug.R.T. pp. 118-120.) On appeal, appellant does not contest the trial court's ruling with regard to Rita G.

> As to each of the stated articulated reasons, I find they were specifically discernible from the Court's own observations. I find each of them legitimate and nonrace based and nonethnically based and nonminority based.

(C.T. p. 113; Aug.R.T. pp. 120-121.)

The trial court failed to make a sincere and reasoned effort to evaluate the prosecutor's stated reasons for excusing each of the minority jurors and determine whether appellant had established purposeful discrimination. The trial court erred in denying the *Wheeler* motion because the prosecutor's reasons were not supported by the record. As a result, the court violated appellant's rights to equal protection and a jury drawn from a representative cross-section of the community under the federal and state constitutions. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16; *Batson v. Kentucky, supra*, 476 U.S. 79; *Powers v. Ohio* (1991) 499 U.S. 400 [111 S.Ct. 1364, 113 L.Ed.2d 411]; *People v. Wheeler, supra,* 22 Cal.3d 258.)

B. The Erroneous Denial of a *Batson/Wheeler* Motion Violates an Accused's State and Federal Constitutional Rights to Equal Protection and a Jury Drawn From a Cross Section of the Community.

"Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. 'The very idea of a jury is a body

. . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.' [Citations omitted.] . . . Those on the venire must be 'indifferently chosen,' to secure the defendant's right under the Fourteenth Amendment to 'protection of life and liberty against race or color prejudice.' [Citation omitted.]" (*Batson v. Kentucky*, *supra*, 476 U.S. at pp. 86-87.) "A defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race." (*Powers v. Ohio, supra*, 499 U.S. at p. 415.)

Further, the federal and state constitutions guarantee a defendant's "right to trial by a jury drawn from a representative cross-section of the community." (*People v. Wheeler, supra*, 22 Cal.3d at p. 272; *People v. Williams* (1997) 16 Cal.4th 635, 663.) The "use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to a trial by a jury drawn from a representative cross-section of the community." (*People v. Wheeler, supra,* 22 Cal.3d at pp. 276-277.)

The United States Supreme Court has set forth a three part test to be followed when a party claims that an opponent has exercised peremptory challenges in a discriminatory manner. (*Snyder v. Louisiana* (March 19,

2008, No. 06-10119) __ U.S. ___ [2008 WL 723750]; *Johnson v. California* (2005) 545 U.S. 162, 170 [125 S.Ct. 2410, 162 L.Ed.2d 129]; *People v. Jurado* (2006) 38 Cal.4th 72, 104.)

> First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. [Citations omitted.]" Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations omitted.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful discrimination." [Citation omitted.]

(*Johnson v. California, supra*, 545 U.S. at p. 168.)

In the present case, the defense objected immediately after five minority jurors were excused by the prosecutor. (C.T. p. 113; Aug.R.T. 117.) The trial court found that the defense had made a prima facie case and asked the prosecutor to explain her reasons for excusing the jurors. (C.T. p. 113; Aug.R.T. p. 118.)

"Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging [minority] jurors." (*Batson v. Kentucky, supra*, 476 U.S. at p. 97.) A prosecutor cannot rebut the presumption by relying upon reasons which arise solely from the juror's race. (*Id.* at pp. 97-98.) "Nor may the prosecutor rebut the defendant's case merely by denying that he had a

discriminatory motive or '[affirming] [his] good faith in making individual selections.'" (*Id.* at p. 98 quoting *Alexander v. Louisiana* (1972) 405 U.S. 625, 632 [92 S.Ct. 1221, 31 L.Ed.2d 536].) "The prosecutor . . . must articulate a neutral explanation related to the particular case to be tried." (*Batson v. Kentucky, supra*, 476 U.S. at p. 98.) "[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 768 [115 S.Ct. 1769, 131 L.Ed.2d 834].) Here, the prosecutor offered race-neutral reasons for excusing each of the minority jurors. (Aug.R.T. pp. 118-120.)

After the prosecutor provides racially-neutral reasons for excusing the minority jurors, the trial court's duty in evaluating the reasons is two-fold. First, it must distinguish between bona fide reasons for exercising the peremptory challenges and "sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*People v. Wheeler, supra*, 22 Cal.3d at p. 282; *People v. Fuentes* (1991) 54 Cal.3d 707, 720.) The trial court must "satisfy itself that the explanation is genuine." (*People v. Hall* (1983) 35 Cal.3d 161, 167.) It must make a "sincere and reasoned attempt to evaluate the . . . explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the [counsel asserting the peremptory challenges] has

examined members of the venire and has exercised challenges for cause or peremptorily." (*People v. Snow* (1987) 44 Cal.3d 216, 222 quoting *People v. Hall, supra,* 35 Cal.3d at pp.167-168, internal quotations omitted.)

Second, as to each juror, "the trial court must determine not only that a valid reason existed but also that the reason actually prompted the prosecutor's exercise of the particular peremptory challenge." (*People v. Fuentes*, *supra*, 54 Cal.3d at p. 720.) "Every questioned peremptory challenge must be justified: 'If the court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted' and the court must dismiss the venire and begin jury selection anew.'" (*Id.* at p. 715 quoting *People v. Wheeler, supra*, 22 Cal.3d at p. 282.) In the present case, the trial court failed in the third step of the *Batson* analysis where it needed to determine whether purposeful discrimination occurred. (*Batson v. Kentucky, supra*, 476 U.S. at p. 98; *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 832.)

C. Standard of Review

The trial court's ruling is reviewed for substantial evidence. (*People v. McDermott* (2002) 28 Cal.4th 946, 970-971.) But, this deferential standard is only applied where the trial court has made a "sincere and

reasoned attempt to evaluate each stated reason as applied to each challenged juror." (*Ibid.*; *People v. Lewis* (2006) 39 Cal.4th 970, 1009; *People v. Jurado* (2006) 38 Cal.4th 105, 105-106; *People v. Ward* (2005) 36 Cal.4th 186, 200.)

> When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. However, where the prosecutor's reasons are either unsupported by the record or inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient.

(*People v. Silva* (2001) 25 Cal.4th 345, 386.)

D. The prosecutor's "race-neutral" reasons were inherently implausible and not supported by the record; the trial court erred in denying the *Wheeler* motion.

The trial court failed in its duty under state and federal law to determine not only whether the prosecutor's reasons were race-neutral, but also whether they were the actual reason for the prosecutor's exercise of the peremptory challenge or a "pretext for purposeful discrimination." The trial court's findings were not supported by substantial evidence.

1. *Linda M.*

During voir dire, Linda M. explained that her brother had been previously arrested in San Bernardino county. (Aug.R.T. p. 95.) The court inquired further, and the following exchange occurred:

[Court]: From talking to him about it, do you think he was treated fairly?

[Linda M.]: Yes.

[Court]: If it was in this county it was prosecuted in this county by the district attorney, probably not Ms. Fragoso but somebody she worked with. Would that affect how you would perceive Ms. Fragoso or her job here?

[Linda M.]: No.

[Court]: Was the case investigated by the sheriff's department or some other?

[Linda M.]: Sheriff's department.

[Court]: The people that investigated this case that are going to be testifying here are deputy sheriffs. Would you be able to set aside that experience and judge the witnesses here fairly?

[Linda M.]: Yes.

(Aug.R.T. pp. 95-96.)

Rather than questioning Linda M. about her brother's case, the prosecutor decided not to ask Linda M. any questions. (Aug. R.T. pp. 96.) After both parties passed for cause, the prosecutor used her next peremptory challenge to strike Linda M. from the panel. (Aug.R.T. pp. 96-97.) When asked why she excused Linda M., the prosecutor gave the following reason: "Her brother was arrested in San Bernardino *and she did not think he was*

treated fairly." (Aug.R.T. p. 119, italics added.) The prosecutor's stated reason is *contradicted* by the record.

In *People v. Silva* (2001) 25 Cal.4th 345, 376, the California Supreme Court reversed the judgment, finding that the trial court erred in denying the defense *Wheeler* motion. The present case is strikingly similar to *Silva*. In *Silva*, the trial court found a prima facie case of purposeful discrimination had been established after the prosecutor excused three minority jurors from the venire. The prosecutor provided facially neutral reasons for excusing each of the minority jurors, and, similar to the present case, the trial court in *Silva* denied the *Wheeler* motion, stating generally, "I think that there was a good excuse with regard to all of these people." (*Id.* at pp. 382, 385.)

The California Supreme Court disagreed. (*People v. Silva, supra,* 25 Cal.4th at p. 385.) In *Silva*, the prosecutor cited three reasons for excusing a particular minority juror: (1) the juror said the death penalty was the toughest punishment, (2) the juror said he would look for other options before imposing it, and (3) the juror was "an extremely aggressive person" and might hang the jury. (*Id.* at pp. 376-377.) During voir dire, the juror said that the death penalty was the hardest punishment, and when asked to clarify whether he was for or against it, he stated that he was mixed and

would consider arguments on both sides. (*Id.* at p. 377.) On several occasions thereafter, the juror said he would listen to arguments for and against the death penalty, he would listen to all the evidence presented, and if the jury was hung he would "back off[,]" listen to the other jurors and consider whether he was wrong. (*Id.* at p. 377.) At one point, the juror said he might lean slightly for the death penalty. (*Ibid.*)

Reversing the judgment, the California Supreme Court found that the trial court failed to make a "sincere and reasoned attempt to evaluate the prosecutor's explanation." (*People v. Silva, supra*, 25 Cal.4th at p. 385.) The court clarified its holding, stating, "[w]e find nothing in the trial court's remarks indicating it was aware of, or attached any significance to, the obvious gap between the prosecutor's claimed reasons for exercising a peremptory challenge against M. and the facts as disclosed by the transcripts of M.'s voir dire responses." (*Ibid.*) The court concluded: "Nothing in the transcript of voir dire proceedings supports the prosecutor's assertions that M. would be reluctant to return a death verdict or that he "was an extremely aggressive person." (*Ibid.*)

The error in the present case is even more clear than that of *Silva*. The prosecutor provided only one reason for excusing Linda M.: "Her brother was arrested in San Bernardino and she did not think he was treated

fairly." (Aug.R.T. pp. 119-120.) This reason is contradicted by the record which establishes that Linda M. believed her brother *was* treated fairly. (Aug.R.T. pp. 95-96.) Yet, nothing in the trial court's comments indicates its awareness of the "obvious gap" between the prosecutor's claimed reason and the transcripts of voir dire. Where "a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination." (*Lewis v. Lewis, supra*, 321 F.3d at p. 830.) Here, the appellate record contradicts the prosecutor's only stated reason for excusing Linda M. Therefore, it should be deemed a pretext for racial discrimination.

Even more compelling evidence is the prosecutor's failure to question Linda M. Rather than ask Linda M. about her brother's arrest, the prosecutor declined the opportunity and immediately struck her from the jury. (Aug.R.T. p. 96.) "A prosecutor's failure to engage Black prospective jurors 'in more that desultory voir dire, or indeed to ask them any questions at all,' before striking them peremptorily, is one factor supporting an inference that the challenge is in fact based on group bias." (*People v. Turner* (1986) 42 Cal.3d 711, 727 quoting *People v. Wheeler, supra*, 22 Cal.3d at p. 281.)

In *Miller-El v. Dreke* (2005) 545 U.S. 231, 242 [125 S.Ct. 2317, 162 L.Ed.2d 196], the prosecution used its second peremptory strike to dismiss a black juror who had expressed "unwavering support for the death penalty." When asked to provide a race-neutral reason for excusing the juror, the prosecutor misstated the juror's statements about the death penalty. (*Id.* at p. 243-244.) Noting the discrepancy between the juror's comments and the prosecutor's characterization, the high court stated:

> Thus, Nelson simply mischaracterized Fields's testimony. He represented that Fields said he would not vote for death if rehabilitation was possible, whereas Fields unequivocally stated that he could impose the death penalty regardless of the possibility of rehabilitation. Perhaps Nelson misunderstood, but unless he had an ulterior reason for keeping Fields off the jury we think he would have proceeded differently. In light of Fields's outspoken support for the death penalty, we expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike.

(*Miller-El v. Dretke, supra*, 545 U.S. at pp. 243-244.)

Similarly, had the prosecutor in the present case not had an "ulterior reason" for striking Linda M. from the jury, she would have cleared up any misunderstanding by asking Linda M. about her brother's arrest. As in *Miller-El*, the prosecutor's "failure to ask undermines the persuasiveness of the claimed concern." (*Miller-El v. Dretke* (2005) 545 U.S. at p. 250.)

The trial court failed to make a sincere and reasoned attempt to evaluate the prosecutor's reasons for excusing Linda M. Had the trial court done so, it would have realized that the prosecutor's reasons were contradicted by the record and asked more probing questions, or granted the *Wheeler* motion. The trial court's finding is therefore, not entitled to deference on appeal. The judgment must be reversed because the prosecutor's reason was simply a pretext for racial discrimination.

2. *Andy R.*

The prosecutor excused Andy R., stating, "Very young, inexperienced, seemed very hesitant to answer a question. I did not think he would stand up to the jury." (Aug.R.T. p. 120.) Similar to Linda M., the prosecutor never asked Andy R. any questions. (Aug.R.T. p. 103.) Further, when defense counsel questioned Andy R. about his ability to withstand peer pressure, Andy R. affirmed that he would not change his vote simply because others are pressuring him to do so. (Aug.R.T. pp. 102-103.) The record does not substantiate the prosecutor's allegations that Andy R. would not stand up to the jury.

In *Snyder v. Louisiana*, *supra*, 2008 WL 723750, *3, the prosecutor used five peremptory challenges to strike the only black jurors from the panel. The defense *Batson* motion was denied in the trial court, the court

stating simply, "All right. I'm going to allow the challenge. I'm going to allow the challenge." (*Id.* at pp. *3, *5.) On appeal, the state court affirmed the *Batson* ruling. (*Ibid.*) The United States Supreme Court reversed, finding the trial court committed clear error when it overruled the defense *Batson* motion with respect to Mr. Brooks. (*Id.* at p. *4.) The prosecutor in *Snyder* cited two reasons for excusing Juror Brooks, one being the juror's nervousness. (*Id.* at p. *5.) The prosecutor stated, "[T]he main reason is that he looked very nervous to me throughout the questioning. (*Id.* at p. *5, italics original.)

The high court rejected this reason. (*Snyder v. Louisiana, supra*, at p. *5.) It acknowledged that normally a trial court's determination must be given deference since nervousness is not something which can be gleaned from the cold record. (*Ibid.*) However, because the trial court made no express findings regarding Mr. Brooks's demeanor, no deference could be given. (*Ibid.*) The high court explained:

> The trial judge was given two explanations for the strike. *Rather than making a specific finding on the record concerning Mr. Brooks' demeanor, the trial judge simply allowed the challenge without explanation.* It is possible that the judge did not have any impression one way or the other concerning Mr. Brooks' demeanor. Mr. Brooks was not challenged until the day after he was questioned, and by that time dozens of other jurors had been questioned. Thus, the trial judge may not have recalled Mr. Brooks' demeanor. Or, the trial judge may have found it unnecessary to consider Mr.

> Brooks' demeanor, instead basing his ruling completely on the second proffered justification for the strike. For these reasons, we cannot presume that the trial judge credited the prosecutor's assertion that Mr. Brooks was nervous.

(*Snyder v. Louisiana, supra*, at p. *5, italics added.)

Similarly, in the present case, the trial court made no express findings with regard to Andy R.'s demeanor. To the extent that respondent may rely upon the trial court's general statement, "As to each of the stated articulated reasons, I find they were specifically discernible from the Court's own observations[,]" this argument must be rejected. As previously discussed with regard to Linda M., the prosecutor's "stated articulated reason[]" for excusing Linda M. could not have been discernible from the court's own observations because it was contradicted by the record. Thus, this general statement cannot suffice as an express declaration that the trial court specifically evaluated Andy R.'s demeanor and concurred with the prosecutor's observation. Absent more evidence, such an as express finding and reasons for believing the prosecutor, it cannot be assumed that the trial court found the prosecutor's reasons to be credible.

In *People v. Trevino* (1985) 39 Cal.3d 667, 691 overruled on another point in *People v. Johnson* (1989) 47 Cal.3d 1194, 1221, the prosecutor relied on age as a primary factor for excusing several minority jurors. "He voiced his concern that these particular jurors lacked maturity and that they

might be close to the same age as the defendants." (*Ibid.*) Finding these reasons unsatisfactory, the California Supreme Court commented on the prosecutor's failure to determine the jurors' ages on voir dire or inquire as to whether they harbored any age-related biases. (*Ibid.*)

The present case is similar to *Trevino*, as the prosecutor made no effort to find out Andy R.'s age, or determine what, if any, age-related biases he may have had. Instead, as with Linda M., the prosecutor declined the opportunity to question Andy R., passed for cause, and struck him immediately from the panel. (Aug.R.T. p. 103.) The prosecutor's stated reason was merely a sham for purposeful discrimination. The trial court erred in denying the *Wheeler* motion.

3. *Mario S.*

When asked to explain her reasons for excusing Mario S., the prosecutor explained, "He seemed to be disinterested when we talked to him. I noted kind of in response a little attitude. Specifically with regard to police officers, he indicated on several occasions when I asked him he thought that police officers should be held to a higher standard." (Aug.R.T. p. 118.) The court offered that Mario S. had been a reserve police officer, and the prosecutor stated, "Yes. Even after I said would he follow the law, he said yes, and then I again asked him, do you still hold them to a higher

standard, and I believe his answer was yes." (Aug.R.T. pp. 118-119.) As in the cases of prospective jurors Linda M. and Andy R., the prosecutor's reasons were not supported by the record.

During voir dire, Mario S. revealed that he was previously a reserve police officer for the City of South Pasadena. (Aug.R.T. p. 45.) During his training, he went through the police academy. (Aug.R.T. p. 45.) Defense counsel asked Mario S. whether he thought officers should be held to a lower standard because they help people out in the community, and Mario S. responded, "No." (Aug.R.T. p. 41.) Defense counsel then asked whether he thought they should be held to a higher standard, and Mario S. said, "Yes, I do." (Aug.R.T. p. 41.) When asked whether he would follow the law given by the judge, Mario S. said that he would. (Aug.R.T. p. 41.) The prosecutor questioned Mario S. further:

> [Prosecutor]: I think you had mentioned in your opinion officers should be held to a higher standard. Is that correct?
>
> [Mario S.]: That's right.
>
> [Prosecutor]: And if the law told you that all witnesses are to be treated equally, would you be able to follow the law? Is that a yes?
>
> [Mario S.]: Yes.

[Prosecutor]: Which means you would have to treat them equally, which is contrary to what you earlier said; is that correct?

[Mario S.]: That's correct.

[Prosecutor]: Keeping that in mind, would that be difficult for you not to look at a police officer and expect more from a police officer than any other witness, law witness?

[Mario S.]: I would expect, knowing that he has that background that *he knows what he's talking about when you compare him to just any other witness* as far as, you know, his job. . .

[Prosecutor]: Okay.

[Mario S.]: Not any other job, you know. If you go to the doctor, you're not going to expect any other to do the same kind of service.

[Prosecutor]: So they're kind of starting behind other witnesses, so to speak, do you think?

[Mario S.]: I don't know what you're saying, behind.

[Prosecutor]: They have to show more to you or professionalism, more believability than any other witnesses because they're police officers.

[Mario S.]: Sure. I look at, for example, if I'm stranded and a person drives up behind you to help you, you get an officer driving up behind you, of course there's going to be a difference. Who am I going to trust?

(Aug.R.T. pp. 55-56, italics added.)

The record does not support the prosecutor's reasons for excusing Mario S. Mario S. did not mean he would hold police officers to a higher standard. Rather, Mario S. thought police officers were more credible, more trustworthy, and more knowledgeable in certain areas because of their training and experience. On several occasions, he stated that he would follow the law and treat the witnesses to the same standard. (Aug.R.T. pp. 41, 55.)

Further, there was no evidence that Mario S. was "disinterested" or did he displayed "a little attitude." He responded to all of the prosecutor's questions, his responses were appropriate, and he asked a clarifying question when necessary. In *People v. Ward, supra*, 36 Cal.4th at p. 202, the prosecutor excused minority jurors based on intangible factors such as "demeanor" and "antagonism" toward the prosecutor during questioning. The trial court denied the *Wheeler* motion, and the defendant appealed, arguing, amongst other things, that the trial court erred in denying the *Wheeler* motion. (*Ibid.*) But, in *Ward*, unlike the present case, the trial court expressly confirmed that the juror's manner or demeanor during questioning demonstrated a reluctance to impose the death penalty, and that another juror displayed hostility toward the prosecutor during the voir dire examination. (*Ibid.*) Thus, the California Supreme Court affirmed, stating,

"Because we give '"great deference" on appeal' to the trial court's observations regarding 'a prospective juror's demeanor' and nothing in the record contradicts these observations, we see no grounds for reversing the trial court's decision to deny the defendant's *Wheeler* motion . . . ." (*Ibid.*, quoting *People v. Reynoso* (2003) 31 Cal.4th 903, 926, internal quotation marks omitted.) No such findings were made in the present case. Further, the record contradicts the prosecutor's statements regarding Mario S.'s "disinterest" since Mario S. engaged in lengthy questioning and asked clarifying questions. The prosecutor's stated reason was merely a sham for purposeful discrimination.

4. *Suzanne G.*

When asked why she excused Suzanne G., the prosecutor stated, "She had been arrested for forgery. *At one point*, she also seemed to be the kind of juror who wouldn't stand up to the jury." (Aug.R.T. p. 119, italics.) During the court's voir dire, Suzanne G. said she had been arrested for misdemeanor forgery when she was "younger." (Aug.R.T. p. 25.) Although the prosecutor questioned Suzanne G. about other issues, she never asked her about the prior arrest or inquired whether the experience would cause her to be biased against the prosecution. (Aug.R.T. pp. 51, 59, 63.)

People v. Turner, supra, 42 Cal.3d at p. 725 is illustrative. In *Turner*, the prosecutor couldn't recall the exact reason why he excused a minority juror, but thought "it was something in her work as to that she was doing that from our standpoint, that background was not-would not be good for the People's case." (*Ibid.*) Finding the prosecutor's reason unsatisfactory, the California Supreme Court noted, "although the prosecutor took her on voir dire, he asked no questions about her job. Absent such inquiry, we can conceive of no reason why Ms. Buchanan's position in hospital administration should give rise to a specific bias against the prosecution." (*Id.* at p. 726.) Similarly, there is no reason why Suzanne G.'s prior arrest for misdemeanor forgery "when [she] was younger" would necessarily give rise to a bias against the prosecution.

Further, the prosecutor's other stated reason, that Suzanne G. would not stand up to the other jurors, was equally unsupported by the record. During voir dire, the prosecutor questioned Suzanne G. about whether she would be able to stand up for their views:

> [Prosecutor]: You're going to be with 11 other people if you get selected for the jury and you're going to talk about the facts of the case. And you might find that you disagree with those 11 other people. And it might be difficult for you to tell the other people you disagree for some of you. [¶] As difficult as that may be, No. 3 [Suzanne G.],

could you speak up and tell the rest of the other 11, I think you're wrong because A, B, and C?

[Suzanne G.]:Yes.

[Prosecutor]: Can you do that?

[Suzanne G.]:Yes.

[Prosecutor]: What if there's some chatterbox in the jury room and that person is talking, talking, talking, and talking over you. Are you going to say, I give up, I'll just go with the rest of you?

[Suzanne G.]:No.

(Aug.R.T. p. 63.)

Nothing in this exchange between the prosecutor and Suzanne G. supports the prosecutor's claim that Suzanne G. would not stand up to the jurors. The prosecutor never explained why she believed Suzanne G. would not stand up to the other jurors. Nor did the prosecutor clarify what she meant by "at one point" Suzanne G. seemed like the kind of juror that would not stand up to the other jurors. The prosecutor's stated reason is simply unsupported by the record.

D. **Because the trial court erred in denying the *Batson/Wheeler* motion, the judgment must be reversed.**

"When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm.

[Citation omitted.] Such discrimination undermines the structural integrity of the criminal tribunal itself . . . ." (*People v. Turner, supra*, 42 Cal.3d at p. 728 quoting *Vasquez v. Hillery* (1986) 474 U.S. 254, 263-264 [106 S.Ct. 617, 88 L.Ed.2d 598].) The erroneous denial of the *Wheeler* motion constitutes structural error; the error is prejudicial per se. (*People v. Wheeler, supra*, 22 Cal.3d at p. 283.) If the offending party does not meet its burden of justification, the presumption of their validity is rebutted. (*Id.* at p. 282.) The remaining jurors must be dismissed, and the remaining venire must be quashed. (*Ibid.*) A different venire shall be drawn, and the jury selection process begins anew.[6] (*Ibid.*)

Here, the prosecutor's stated reasons were not supported by substantial evidence. As to Linda M., the prosecutor's reason was contradicted by the record. The trial court failed to determine whether the prosecutor was exercising her peremptory challenges in a discriminatory manner. The judgment must be reversed.

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[6] Alternative remedies may be fashioned with the consent of the complaining party. (*People v. Willis* (2002) 27 Cal.4th 811, 823-824.)

(b) **GROUND TWO**: CALCRIM NO. 223 SHIFTS THE BURDEN OF PROOF AND UNDERMINES THE PRESUMPTION OF INNOCENCE.

Supporting FACTS (state *briefly* without citing cases or law): SEE FOLLOWING ATTACHED PAGES AS FACTS ARE NUMEROUS

Did you raise GROUND TWO in the California Supreme Court?
☒ Yes ☐ No.

II.

CALCRIM NO. 223 SHIFTS THE BURDEN OF PROOF AND UNDERMINES THE PRESUMPTION OF INNOCENCE BY INSTRUCTING THE JURY THAT "DIRECT AND CIRCUMSTANTIAL EVIDENCE ARE ACCEPTABLE TYPES OF EVIDENCE TO PROVE OR DISPROVE ELEMENTS OF A CHARGE"; THIS LANGUAGE IMPLIES THAT THE DEFENSE MUST DISPROVE THE CHARGE IN ORDER TO ATTAIN AN ACQUITTAL.

"For a defendant to be found not guilty, it is not necessary that the evidence as a whole prove his innocence, only that the evidence as a whole fails to prove his guilt beyond a reasonable doubt. In other words, a not guilty verdict is based on the insufficiency of the evidence of guilt." (*People v. Anderson* (2007) 152 Cal.App.4th 919, 932.) CALCRIM No. 223 ignores this distinction by instructing the jury: "Both direct and circumstantial evidence are acceptable types of evidence to prove *or disprove the elements of a charge, including intent and acts necessary to a conviction*, and neither is necessarily more reliable than the other." (CALCRIM No. 223, italics added.) Reference to "disprov[ing] the elements of a charge" circumvents the fundamental rule of due process that the prosecution, not the defense, carries the burden of proof and the accused is presumed innocent. Further, by limiting the use of evidence to

"prove or disprove" the charges, it implies the respective roles of the prosecution and defense are to prove or disprove the charges.

In the present case, the trial court instructed the jury pursuant to CALCRIM No. 223. (1 C.T. p. 149; 2 R.T. pp. 260-261.) Because the jury instruction relieves the prosecution of its burden of proof and undermines the presumption of innocence in contravention of appellant's state and federal rights to due process of law, the judgment must be reversed. (U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., Art. I, §§ 7 & 16; *United States v. Gaudin* (1995) 515 U.S. 506, 509-510 [115 S.Ct. 2310, 132 L.Ed.2d 444]; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278 [113 S.Ct. 2078, 124 L.Ed.2d 182]; *In re Winship* (1970) 397 U.S. 358, 362 [90 S.Ct. 1068, 25 L.Ed.2d 368]; *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524 [99 S.Ct. 2450, 61 L.Ed.2d 39]; *Patterson v. New York* (1977) 432 U.S. 197, 215 [97 S.Ct. 2319, 53 L.Ed.2d 281]; *People v. Dillon* (1983) 34 Cal.3d 441, 473.)

A. The issue has not been waived by trial counsel's failure to object.

An appellate court may review an instruction given, even in the absence of an objection, if the substantial rights of the defendant are thereby

affected. (§ 1259;[7] *People v. Hernandez* (1991) 231 Cal.App.3d 1376, 1383.) "'Substantial rights' are equated by reversible error under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243." (*People v. Martinez* (1984) 157 Cal.App.3d 660, 670.) As discussed more fully below, appellant's substantial rights were impinged upon by the erroneous instruction because there is a reasonable probability that but for the error the outcome of the case would have been more favorable to appellant. Thus, under the circumstances of the present case, the error is reviewable on appeal, even absent an objection at the trial level.

Further, to the extent trial counsel acceded to the giving of this instruction, the error was not invited because trial counsel's actions did not evidence a considered, tactical purpose in agreeing to the instruction or reflect an agreement to give any erroneous, irrelevant or confusing portion of the instruction. (*People v. Coffman* (2004) 34 Cal.4th 1, 49; *People v. Wickersham* (1982) 32 Cal.3d 307, 332 [if defense counsel accedes to the

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[7] Section 1259 provides: "Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

erroneous instruction because of neglect or mistake there is no 'invited error'; only if counsel expresses a deliberate tactical purpose in acceding to an instruction, does it nullify the trial court's obligation to instruct in the cause]; see also *People v. De Leon* (1992) 10 Cal.App.4th 815, 824 [invited error may be found were a tactical purpose may be inferred from record].) Indeed, where the effect of counsel's actions is to lessen the prosecution's burden, there would appear to be no conceivable tactical purpose. (See *People v. Beardslee* (1991) 53 Cal.3d 68, 88.) Because the jury instruction impinged upon the substantial rights of appellant, and the error was not invited, the issue is cognizable on appeal.

B. Standard of Review

An appellate court reviews instructional claims de novo. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1089.)

C. By instructing the jury that "direct and circumstantial evidence are acceptable . . . to prove *or disprove the elements of a charge*[,]" the trial court implied that the defense had a duty to disprove the charges, thereby shifting the burden of proof and undermining the presumption of innocence.

The due process clause requires the State to prove all elements of the offense beyond a reasonable doubt. (*In re Winship*, *supra*, 397 U.S. at p. 364; *Patterson v. New York, supra,* 432 U.S. at p. 204.) "Reasonable doubt may arise from the evidence presented at trial or the 'lack of evidence.'"

(*People v. Westbrook* (2007) 151 Cal.App.4th 1500, 1508 quoting *Johnson v. Louisiana* (1972) 406 U.S. 356, 360 [92 S.Ct. 1620, 32 L.Ed.2d 152].) "Jury instructions relieving States of this burden violate a defendant's due process rights. [Citations omitted.] Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases." (*Carella v. California* (1989) 491 U.S. 263, 265 [109 S.Ct. 2419, 105 L.Ed.2d 218]; *Patterson v. New York, supra*, 432 U.S. at p. 215; *Sandstrom v. Montana, supra*, 442 U.S. at p. 520-524.)

CALCRIM No. 223, in defining direct and circumstantial evidence, refers to its use "to prove or disprove the elements of a charge, including intent and acts necessary to a conviction . . . ." (C.T. p. 149; 2 R.T. pp. 260-261.) Reference to "disprov[ing] the elements of a charge" can only refer to the defense evidence, whether presented through cross examination of prosecution witnesses or an affirmative defense case, for only the defense would seek to "disprove" the elements of the offense. By mentioning the defense's role in disproving a fact, an element, or a charge, the instruction erroneously implies that the defendant must "disprove" the elements of the offense.

The type of error presented in this instruction is analogous to *Griffin* error where courts and prosecutors are prohibited from commenting or referring to the accused's failure to testify. (*Griffin v. California* (1965) 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106].) Courts have reasoned that *comment* on the failure to testify necessarily imposes a punishment on the accused's exercise of his constitutional right against self-incrimination. (*Id.* at p. 614.) "It is a penalty imposed by the courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." (*Ibid.*)

In *People v. Medina* (1974) 41 Cal.App.3d 438, 458, the appellate court found *Griffin* error where the prosecutor argued in closing, "there is no evidence whatsoever to contradict the fact that Mrs. Rubio (Campos) saw Mr. Vargas and Mr. Medina [defendant] over Mr. Olness. *And there is no denial at all that they were there.*" (Italics added.) The court acknowledged that *Griffin* error did not extend to comment on the defense's failure to present material evidence or call logical witnesses, and noted that another case had found a similar comment permissible where the prosecutor argued the "state of the record is that There [sic] has been no explanation given for this (People's evidence of guilt) . . . ." (*Ibid.* quoting *People v. Bethea* (1971) 18 Cal.App.3d 930, 936, internal quotation marks omitted.)

Finding the prosecutor's argument in *Medina* impermissible, the *Medina* court distinguished *Bethea* stating, "In the present case, the word 'denial' connotes a personal response by the accused himself. Any witness could 'explain' the facts, but only defendant could himself 'deny' his presence at the crime scene." (*People v. Medina, supra*, 41 Cal.App.3d at p. 459.)

Similarly, use of the phrase "to disprove the elements of a charge" to define permissible uses of direct and circumstantial evidence could only refer to the defense's role in presenting evidence to refute the charges. *Griffin* prohibits a prosecutor from commenting, directly or indirectly, on an accused's failure to testify because it violates an accused's constitutional right against self incrimination. (*Griffin v. California, supra,* 380 U.S. at p. 614; *People v. Cornwell* (2005) 37 Cal.4th 50, 91.) By analogy, instructions which comment or reference the defense's role in "disprov[ing]" the charges should be prohibited because it assigns to the defense a duty to disprove the charges and relieves the State of its burden of proof. By highlighting the defense's ability to call witnesses and otherwise disprove the truth of the charges, the instruction emphasizes the defense's failure to call such witnesses.

Contrast the CALCRIM wording to CALJIC No. 2.00 which states, in relevant part, "Both direct and circumstantial evidence are acceptable *as*

a means of proof." CALJIC No. 2.00 correctly does not refer to "disproving" an element of the offense. Rather, it states in neutral terms that both types of evidence are acceptable. It does not present a criminal trial as a dichotomy where each side is required to prove or disprove a fact.

D. The government cannot prove that the instructional error was harmless beyond a reasonable doubt.

Where a reasonable juror might understand the instruction to be conclusive or as shifting the burden of persuasion, the instruction results in constitutional error. (*Carella v. California, supra*, 491 U.S. at p. 266; *Francis v. Franklin* (1984) 471 U.S. 307, 316 [105 S.Ct. 1965, 85 L.Ed.2d 344].) As previously discussed, the instruction presents the trial as a debate, where each party is assigned to prove or disprove the elements of the charges. It implies that evidence, both direct and circumstantial, is utilized by parties to support their case. In doing so, the instruction shifts the burden of proof and undermines the presumption of innocence. The government cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

This was a close case, and the evidence of identity was weak because the eyewitness identifications were highly suspect and there was no corroborating evidence. The initial identifications occurred during a field

show up shortly after the robbery occurred. (1 R.T. p. 142.) Both women were transported to a nearby location where they saw appellant standing next to a uniformed police officer while handcuffed and surrounded by patrol cars. (1 R.T. pp. 109, 159, 176.) Schoonover's identification was further tainted when Bessler failed to heed Sergeant Benge's warning and blurted out, in front of Schoonover, that appellant was the man who robbed her. (1 R.T. p. 145.) Schoonover's later identification of appellant was necessarily tainted by Bessler's previous identification.

Yet, even on the night she identified appellant, Bessler had doubts about her identification. (1 R.T. p. 116.) Then, at the preliminary hearing, she testified that she was not sure appellant was the man who attacked her. (1 R.T. p. 99.) At trial, she testified that appellant looked like the man who attacked her, but admitted she was not 100 percent sure. (1 R.T. pp. 71-72, 100.) Bessler was unsure because she thought the suspect was smaller than her. (1 R.T. pp. 116-117.) At trial, when Bessler was asked to stand next to appellant, she admitted appellant was at least as tall, if not taller, than her. (1 R.T. p. 117.)

Even Schoonover initially expressed some doubts at trial. When asked whether she saw the man in the courtroom, Schoonover said, "It's been over a year, so I can't say for sure." (1 R.T. p. 126.) Ultimately, she

changed her mind, and the following day testified that she was sure appellant was the person. (1 R.T. p. 167.) But, there can be no question that her identifications were tainted by Bessler's initial statements.

Finally, appellant's physical description did not match Bessler's description in one very important way: the man who attacked Bessler did not have any tattoos. (1 R.T. pp. 98, 120-121.) The parties stipulated that appellant had a tattoo on his right arm, covering about 65 percent of the arm, and a tattoo on his right hand covering about three to four inches. (1 R.T. pp. 120-121.) Bessler testified on several occasions that she saw the man's bare arms and never saw any tattoos. (1 R.T. pp. 99, 120-121.) Although Schoonover initially testified she could not recall whether the man's arms were covered, the following day she testified she had a clear view of the man's arms and never saw any tattoos. (1 R.T. pp. 128, 178.)

Given the witnesses' inconsistent identifications and the discrepancy between the suspect's physical description and appellant's, the instructional error was prejudicial.

(c) **GROUND THREE**: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Supporting FACTS (state *briefly* without citing cases or law):

SEE FOLLOWING ATTACHED PAGES AS FACTS ARE NUMEROUS

Did you raise GROUND THREE in the California Supreme Court?

☒ Yes ☐ No.

6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "The trial court imposed an illegal enhancement." *(If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page 4. For additional grounds, make copies of page 4 and number the additional grounds in order.)*

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts on which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel, you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is, *who* did exactly *what* to violate your rights at what time *(when)* or place *(where)*. *(If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)*

MR. LAFIANZA WAS APPOINTED BY SAN BERNARDINO TO REPRESENT PETITIONER MR. LOPEZ DURING HIS TRIAL WITH RESPECT TO THE SIXTH (6TH) AND FOURTEENTH (14TH) AMENDMENTS OF THE UNITED STATES CONSTITUTION. MR. LAFIANZA CLEARLY AND BLATANTLY VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS BY PLAINLY REFUSING TO PRESENT ANY TYPE OF DEFENSE FOR MR. LOPEZ. HAD MR. LAFIANZA PRESENTED A DEFENSE FOR PETITIONER IT IS PETITIONERS POSITION THAT THE OUTCOME OF HIS TRIAL WOULD HAVE BEEN SIGNIFICANTLY DIFFERENT. IT IS POSSIBLE THAT PETITIONER WOULD HAVE EITHER RECEIVED A "HUNG JURY" OR AN ACQUITTAL. SOME OF THE EXAMPLES OF MR. LAFIANZA'S INEFFECTIVENESS ARE AS FOLLOWS:

SEE ATTACHED PAGE(S) →

b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

CASES & AUTHORITY & RULES CITED & DISCUSSED WITHIN — SEE HI-LIGHTED CASE LAW & RULES

GROUND 1 CONTINUED:

I.) COUNSEL FAILED TO LOOK INTO OR INVESTIGATE POSSIBLE AVENUES FOR DEFENSE THAT MR. LOPEZ RELAYED TO MR. LAFIANZA VIA LETTERS (INCLUDING THE LACK OF A "MIRANDA" ADVISEMENT,

II.) COUNSEL FAILED TO OBJECT TO AND/OR ATTACK THE CREDIBILTY OF PROSECUTION'S WITNESSES (THROUGH DISCREPANCIES IN TESTIMONY) ON CROSS-EXAMINATION,

III.) COUNSEL REFUSED TO PRESENT ANY DEFENSE ON BEHALF OF MR. LOPEZ

THE PERFORMANCE OF PETITIONER'S TRIAL COUNSEL WAS OVERLY DEFICIENT IN HIS DILIGENCE BECAUSE, FIRST AND FOREMOST, MR. LAFIANZA REFUSED TO PRESENT, (OR EVEN ATTEMPT TO PRESENT) ANY FORM OF DEFENSE ON BEHALF OF PETITIONER, MR. LOPEZ. THERE WERE SEVERAL AVENUES OF DEFENSE READILY AVAILABLE TO MR. LAFIANZA, (I.E. NO "MIRANDA" RIGHTS WERE GIVEN; INSUFFICIENT "IN-FIELD LINE-UP; FAULTY "IN-FIELD SHOW-UP PROTOCOL WERE ENACTED BY POLICE; NO PURSE, NO FINGERPRINTS ETC....). YET, MR. LAFIANZA OPTED TO NOT PRESENT ANY TYPE OF DEFENSE. (THIS IS FURTHER ESTABLISHED IN EXHIBITS "A" THRU "D"). THIS VIOLATES PETITIONER'S FIFTH (5TH) AMENDMENT RIGHT TO EQUAL PROTECTION AND DUE PROCESS OF THE LAW. FURTHERMORE, PETITIONER'S SIXTH (6TH) AMENDMENT RIGHT TO A FAIR AND IMPARTIAL TRIAL AND THE RIGHT TO EFFECTIVE COUNSEL. THIS ALSO INFRINGES UPON PETITIONER'S FOURTEENTH (14TH) AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT ALL STAGES OF TRIAL AND OTHER RELATED PROCEEDINGS. THIS DEMONSTRATES A CLEAR VIOLATION OF THE FIRST PRONG OF <u>STRICKLAND V. WASHINGTON</u> (1984) 466 U.S. 668.

THE SECOND PRONG OF <u>STRICKLAND V. WASHINGTON</u> (1984), <u>SUPRA</u>, WAS VIOLATED AS FOLLOWS: MR. LAFIANZA PREJUDICED PETITIONER'S TRIAL BY REFUSING TO INVESTIGATE MATTERS RELATED TO HIM BY PETITIONER, MR. LOPEZ. ALSO BY REFUSING NOT ONCE, BUT TWICE TO PUT ON ANY TYPE OF DEFENSE FOR MR. LOPEZ, THEREBY IMPLYING THAT MR. LAFIANZA BELIEVED MR. LOPEZ WAS GUILTY BEFORE THE TRIAL EVEN BEGAN. HAD MR. LAFIANZA PUT ON SOME KIND OF DEFENSE FOR PETITIONER, IT IS REASONABLE TO BELIEVE THAT PETITIONER WOULD HAVE RECEIVED A FAIR TRIAL. DUE TO MR. LAFIANZA'S REFUSAL TO PRESENT A DEFENSE, IT IS REASONABLE TO BELIEVE THAT A REVERSIBLE ERROR HAS BEEN COMMITTED. THE FACT THAT THE JUDGE ALLOWED THIS ERROR TO BE MADE CONSTITUTES A PLAIN ERROR THAT IS BLATANTLY OBVIOUS. THIS WILL BE PROVEN HEREIN.

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I.) MR. LAFIANZA COULD HAVE CHALLENGED THE FACT THAT PETITIONER WAS NOT GIVEN A "MIRANDA" ADVISEMENT AT ANY TIME. MR. LAFIANZA COULD HAVE ALSO CHALLENGED THE FAULTY IN-FIELD LINE-UP PROTOCOL, AS PETITIONER WAS ALREADY HANDCUFFED & WAS THE ONLY "PERSON-OF-INTEREST" AT THE SCENE OF SAID FAULTY IN-FIELD LINE-UP. FURTHERMORE, PETITIONER WAS SURROUNDED BY 4 (FOUR) SQUAD CARS AND 8 (EIGHT) OFFICERS (2 OFFICERS PER CAR), AND ONE (1) HELICOPTER.

PETITIONER SPECIFICALLY REQUESTED THAT MR. LAFIANZA PRESENT THESE FACTS TO THE COURT. (SEE EXHIBIT A) BASED ON THIS, MR. LAFIANZA COULD HAVE FILED FOR A "DISMISSAL OF THE CHARGES" BECAUSE PETITIONER'S "MIRANDA" RIGHTS WERE NEVER GIVEN. THIS CASE WAS DISMISSED ONCE BEFORE DUE TO THE FACT THAT PETITIONER WAS NEVER GIVEN HIS "MIRANDA" RIGHTS EVEN THOUGH HE HAD BEEN CLEARLY DETAINED BY POLICE. THE PRESENT CASE CLEARLY MEETS THE CRITERIA SET FORTH IN PEOPLE V. AGUILERA (1996) 51 CAL. APP. 4th 1151, 1162 (SEE EXHIBIT B RT. PP 17-18

II.) MR. LAFIANZA FAILED TO OBJECT TO AND/OR ATTACK THE CLEAR AND CONCISE DISCREPANCIES IN THE PROSECUTION'S WITNESSES TESTIMONIES OF THE SUPPOSED DESCRIPTION OF PETITIONER. HAD MR. LAFIANZA USED THIS OPTION AS A LINE OF DEFENSE, HE COULD HAVE SHOWN BOTH, THE JURORS, AND THE COURT THAT NEITHER THE VICTIM, MS. BESSLER, NOR THE WITNESS MS. SCHOONOVER COULD EFFECTIVELY DESCRIBE WHAT THE PETITIONER WAS WEARING AT THE TIME OF THE CRIME, (I.E. T-SHIRT, OR A TANK-TOP, A HOODED SWEATSHIRT OR A FLANNEL SHIRT, LONG-SLEEVE SHIRT OR A SHORT-SLEEVED SHIRT). NEITHER COULD DESCRIBE WHAT PETITIONER LOOKED LIKE, (I.E. TALL OR SHORT, FACIAL HAIR OR NO FACIAL HAIR, TATTOOS OR NO TATTOOS). (SEE EXHIBIT C RT PP 99-100; 120, 121-128; 128)

HAD MR. LAFIANZA PUT ON THIS LINE OF DEFENSE, IT IS CLEAR THAT A REASONABLE DOUBT COULD HAVE BEEN PRODUCED, WHICH, IN TURN COULD HAVE POSSIBLY RENDERED A "HUNG JURY" OR EVEN AN ACQUITTAL. THE FACT THAT MR. LAFIANZA CHOSE NOT TO DO THIS CLEARLY DEMONSTRATES THE DEFICIENCY OF MR. LAFIANZA'S PERFORMANCE. IT ALSO SHOWS MR. LAFIANZA'S BIAS TOWARD PETITIONER.

III.) MR. LAFIANZA PLAINLY REFUSED TO PUT FORTH ANY TYPE OF DEFENSE FOR PETITIONER, EVEN AFTER THE JUDGE ASKED MR. LAFIANZA, NOT ONCE, BUT TWICE, IF HE WISHED TO PRESENT A DEFENSE. (SEE EXHIBIT D RT. PP 233, 234

THE UNITED STATES CONSTITUTION GUARANTEES AN ACCUSED THE RIGHT TO EFFECTIVE COUNSEL UNDER THE 6th (SIXTH) AND THE 14th AMENDMENTS; THE UNITED STATES CONSTITUTION GUARANTEES AN ACCUSED THE RIGHT TO EQUAL PROTECTION AND DUE PROCESS OF THE LAW, FURTHERMORE THE RIGHT TO A FAIR AND IMPARTIAL TRIAL UNDER THE FIFTH (5th) AMENDMENT. THE CONSTITUTION ALSO GUARANTEES THE RIGHT TO COUNSEL THAT WILL ENSURE THAT THE RIGHTS OF THE ACCUSED WILL NOT BE VIOLATED IN ANY WAY.

PETITIONER DID NOT RECEIVE ANY OF THESE RIGHTS IN ANY SHAPE, FORM, OR FASHION. THESE VIOLATIONS CLEARLY POINT TO (AND DEMONSTRATE) THE FACT THAT MR. LAFIANZA WAS PREJUDICED AND BIASED TOWARD PETITIONER AND BELIEVED PETITIONER WAS GUILTY.

1 COUNSEL NEED NOT VERBALIZE THEIR BELIEF THAT THEIR CLIENT MAY BE GUILTY, COUNSEL NEED ONLY TO IMPLY SAID
2 BELIEF THROUGH THEIR (ACTIONS, OR) LACK OF ACTIONS AS
3 SHOWN IN THIS PRESENT CASE.

THE EXAMPLES IN THIS PETITION SHOW THAT THE
4 EFFECTIVENESS OF COUNSEL IN PETITIONER'S CASE HAS BEEN
5 SO GREATLY DIMINISHED TO THE POINT THAT THE INTEGRITY OF PETITIONER'S TRIAL WAS JEOPARDIZED, THEREBY MAKING THE
6 OUTCOME TOTALLY UNRELIABLE. THE JUDGE, IN FACT, WAS FULLY AWARE OF MR. LAFIANZA'S INEFFECTIVENESS WHEN HE
7 ASKED MR. LAFIANZA, TWICE, IF HE WISHED TO PRESENT A DEFENSE AND MR. LAFIANZA DECLINED BOTH OPPORTUNITIES. FURTHERMORE,
8 PETITIONER ASKED MR. LAFIANZA TO INVESTIGATE WHAT HAPPENED TO THE PURSE THAT MS. BESSLER HAD WHEN THIS CRIME WAS
9 SUPPOSEDLY COMMITTED; WHY THE POLICE NEVER CHECKED THE PURSE FOR PETITIONER'S PRINTS; WHY THE PURSE WAS NOT
10 TAKEN INTO EVIDENCE, OR WHY MS. BESSLER WAS NOT TOLD TO NOT LOSE, SELL, OR GET RID OF SAID PURSE.
11

(d) **GROUND FOUR**: SAN BERNARDINO COUNTY SUPERIOR COURTS DELIBERATE BREACH OF PETITIONER'S PRIOR PLEA AGREEMENT FROM PRIOR CASE.

Supporting FACTS (state *briefly* without citing cases or law): SEE FOLLOWING ATTACHED PAGES FACTS ARE NUMEROUS.

Did you raise GROUND FOUR in the California Supreme Court?

☒ Yes ☐ No.

12 GROUND 2: SAN BERNARDINO COUNTY SUPERIOR
13 COURT'S DELIBERATE BREACH OF
14 PETITIONER'S PRIOR PLEA AGREEMENT
15 FROM PRIOR CASE.
16
17 SUPPORTING FACTS: THE STATE OF CALIFORNIA CANNOT USE THE CASE FROM DECEMBER 16, 1970 AS
18 A STRIKE. THERE IS NOTHING IN THE ABSTRACT OF JUDGMENT THAT STATES THAT CASE NUMBER CR-8465 WAS TO BE USED AS A
19 STRIKE AT ANY TIME IN THE FUTURE. THIS PLEA AGREEMENT ABSTRACT OF JUDGMENT IS A CONTRACT THAT CANNOT BE CHANGED NOR
20 ALTERED TO BENEFIT THE PROSECUTION IN POST 1970 CASES AGAINST PETITIONER.
21 PLEASE REFER TO BUCKLEY V. TERHUNE CASE NO. 03-55045 - CITED AS 441 F.3d 688, FOR THE FOLLOWING QUOTES FROM THIS CASE:
22 "[4] CONSTITUTIONAL LAW 92K4590 SAYS: A CRIMINAL DEFENDANT HAS A DUE PROCESS RIGHT TO ENFORCE THE TERMS OF HIS PLEA AGREEMENT
23 U.S.C.A CONST. AMEND. 14".
"[5] CRIMINAL LAW 110K 273.1(2) SAYS: IN CALIFORNIA, A NEGOTIATED PLEA AGREEMENT IS A FORM OF CONTRACT, AND IT IS INTERPRETED
24 ACCORDING TO GENERAL CONTRACT PRINCIPLES, AND ACCORDING TO THE SAME RULES AS OTHER CONTRACTS.".
25 "[6] CRIMINAL LAW 110 K 273.1(2) SAYS: CALIFORNIA COURTS ARE
REQUIRED TO CONSTRUE AND INTERPRET PLEA AGREEMENTS IN
26 ACCORDANCE WITH STATE CONTRACT LAW,";
27
28

1 "[14] HABEAS CORPUS 197K447 K. DEPRIVATION OF FUNDAMENTAL OR CONSTITUTIONAL RIGHTS; MISCARRIAGE OF JUSTICE STATES: THE RELEVANT INQUIRY IN A HABEAS PROCEEDING TO DETERMINE THE EXISTENCE OF PREJUDICE DUE TO A CONSTITUTIONAL ERROR IS WHETHER THE STATE COURT'S ERROR HAD A SUBSTANTIAL AND INJURIOUS EFFECT ON PETITIONER. 28 U.S.C.A. § 2254(d).";

"[18] CRIMINAL LAW 110K274(3.1) STATES: A CRIMINAL DEFENDANT HAS TWO AVAILABLE REMEDIES UNDER CALIFORNIA LAW FOR THE BREACH OF HIS PLEA AGREEMENT: WITHDRAWAL OF HIS PLEA THAT IS RECISSION OF THE CONTRACT, AND SPECIFIC PERFORMANCE.";

"[19] CRIMINAL LAW 110K273.1(2) STATES: UNDER CALIFORNIA LAW, WHERE A PLEA AGREEMENT IS BREACHED, THE PURPOSE OF THE REMEDY IS, TO THE EXTENT POSSIBLE, TO REPAIR THE HARM CAUSED BY THE BREACH.";

"CAL. CIV. CODE § 1654, SEE ALSO TOSCANO, 124 CAL. APP. 4TH at 345, 20 CAL. RPTR. 3d 923 ("AMBIGUITIES [IN A PLEA AGREEMENT] ARE CONSTRUED IN FAVOR OF THE DEFENDANT").;

BANK OF THE WEST 2 CAL. 4th 1265, 10 CAL. RPTR. 2d 538, 833 P. 2d 545 STATES: "THIS IS BECAUSE LANGUAGE IN A CONTRACT MUST BE CONSTRUED IN CONTEXT OF THAT INSTRUMENT AS A WHOLE, AND IN THE CIRCUMSTANCES OF THAT CASE, AND CANNOT BE FOUND TO BE AMBIGUOUS IN ABSTRACT.";

CAL. CIV. CODE § 1654 STATES: "IN CASES OF UNCERTAINTY NOT REMOVED BY THE PRECEDING RULES, THE LANGUAGE OF A CONTRACT SHOULD BE INTERPRETED MOST STRONGLY AGAINST THE PARTY WHO CAUSED THE UNCERTAINTY TO EXIST."

PETITIONER, JOHNNY LOPEZ, ENTERED INTO A PLEA AGREEMENT WITH RIVERSIDE COUNTY ON OR ABOUT DECEMBER 16th 1970 FOR TWO COUNTS OF FIRST DEGREE BURGLARY AND TWO COUNTS OF SECOND DEGREE ROBBERY. ACCORDING TO THE ABSTRACT OF JUDGMENT FROM DEC. 16, 1970, (SEE EXHIBIT "E"), THERE IS NO LANGUAGE WHICH STATES THAT SAID DOCUMENT COULD NOR WOULD BE USED AS A STRIKE(S) AT ANY TIME DURING POSSIBLE CASES AGAINST PETITIONER.

TO THIS DATE, THIS HAS BEEN PETITIONER LOPEZ'S UNDERSTANDING. IT IS CERTAIN THAT THE STATE PURPOSELY LEFT PETITIONER LOPEZ WITH THIS UNCERTAINTY BY REFUSING TO CLARIFY THIS POINT.

PETITIONER LOPEZ, ENTERED INTO THIS AGREEMENT WITH THE UNDERSTANDING THAT THIS AGREEMENT WOULD NOT BE USED AS A STRIKE(S) IN POSSIBLE FUTURE CASES. IN CALIFORNIA, PLEA AGREEMENTS ARE CONSTRUED IN THE SAME MANNER AS ALL OTHER CONTRACTS. IN PETITIONER'S CASE, THE STATE COURT FAILED TO DO SO. IT IS THE DUTY OF THE COURTS, TO ENSURE THAT AN ACCUSED'S CONSTITUTIONAL RIGHTS ARE NOT VIOLATED, AND THAT THE BARGAIN IS HONORED.

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PEOPLE V. TOSCANO (2004) 124 CAL. APP. 4th 340, 344, 20 CAL. RPTR. 3d 923 (CITED WITH APPROVAL IN SHELTON ALONG WITH OTHER CALIFORNIA CASES TO SAME EFFECT DATING BACK TO 1982) THUS, UNDER ADAMSON, CALIFORNIA COURTS ARE REQUIRED TO CONSTRUE AND INTERPRET PLEA AGREEMENTS IN ACCORDANCE WITH STATE CONTRACT LAW.

IT IS EVIDENT ON THE FACE OF IT'S DECISION THAT THE STATE COURT CLEARLY FAILED TO CONSTRUE PETITIONER'S PRIOR PLEA AGREEMENT IN ACCORDANCE WITH CALIFORNIA STATE CONTRACT LAW. THERE IS NO LANGUAGE IN PETITIONER'S 1970 PLEA AGREEMENT WHICH STATES THAT IT MAY BE USED AS A STRIKE IN THE FUTURE. IT WAS PETITIONER'S UNDERSTANDING AND BELIEF DURING THE SENTENCING PHASE OF HIS PRESENT CASE FROM 2005 (APPROX.) THAT THE PLEA AGREEMENT FROM 1970 WOULD NOT BE USED AS A STRIKE FOR THAT VERY REASON.

FURTHERMORE IT IS PETITIONER'S BELIEF AND CONTENTION THAT HIS SENTENCE SHOULD BE RECALCULATED TO REFLECT THAT OF A NORMAL SENTENCE IN ACCORDANCE WITH PENAL CODE §§ VIOLATIONS CHARGED WITHOUT A STRIKE ENHANCEMENT.

CONCLUSION

THE ERRORS COMMITTED IN THIS PRESENT CASE, BOTH, SINGULARLY, AND COLLECTIVELY, AMOUNT TO A CLEAR AND CONCISE VIOLATION OF THE "PLAIN ERROR" RULE. THIS IS CLEARLY A PLAIN ERROR OF SUCH GRANDIOSE EFFECT THAT NO OBJECTION IS NECESSARY TO PRESERVE THIS ISSUE FOR APPEAL AT ANY LEVEL. IT IS FURTHER CLEAR THAT PETITIONER'S CASE SATISFIES THE CRITERIA SET FORTH IN U.S. V DAVIS (D.C. CIR. 1992) 974 F. 2d 182, WHICH STATES: "FOR AN APPELLATE COURT TO OVERTURN A CONVICTION UNDER (PLAIN ERROR STANDARD), THE ERROR COMPLAINED OF MUST MEET AT LEAST THREE (3) REQUIREMENTS:

1. IT MUST BE A PLAIN ONE (I.E. SO OBVIOUS THAT THE JUDGE SHOULD HAVE RECOGNIZED IT ON HIS OWN);

2. IT MUST AFFECT THE SUBSTANTIAL RIGHTS OF PARTIES (I.E. IT CANNOT BE MERELY HARMLESS), AND FINALLY,

3. IT MUST BE ONE THAT "SERIOUSLY AFFECTS THE FAIRNESS INTEGRITY, OR PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS"

SEE U.S. V. YOUNG (1985) 470 U.S. 1; 105 S. Ct. 1038; 84 L. Ed. 2d 1"

PETITIONER'S CASE ALSO MEETS THE CRITERIA OF U.S. V. NICHOLS (7th CIR. 1991) 937 F. 2d. 1257 "THERE IS PLAIN ERROR WHEN A CONVICTION RESULTS, BUT FOR THE ERROR, THE DEFENDANT WOULD HAVE BEEN ACQUITTED."

FURTHERMORE, THERE IS NO PROOF THAT PETITIONER WAS NOT

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1 PREJUDICED OR THAT PETITIONER'S DUE PROCESS AND EQUAL PROTECTION RIGHTS AS GUARANTEED BY THE FIFTH AND FOURTEENTH
2 AMENDMENTS OF THE U.S. CONSTITUTION WERE NOT VIOLATED, UNDER THE STANDARD SET FORTH IN BRECHT V. ABRAHAMSON (1993)
3 507 U.S. 619, IT IS CLEARLY OBVIOUS THAT THE ERRORS IN PETITIONER'S CASE ARE NOT "HARMLESS" ERRORS. ANY OF THE ERRORS
4 EITHER COLLECTIVELY OR SINGULARLY MUST NOT BE CONSTRUED AS "HARMLESS" AND NOT PREJUDICIAL AS THE OUTCOME OF PETITIONER'S
5 TRIAL WOULD HAVE, IN FACT, BEEN DIFFERENT HAD THE ERRORS NOT BEEN ALLOWED.
6 FURTHER, IN 28 U.S.C.A. § 2254 - JUDICIARY PROCEDURE - NOTE 954 - EFFECTIVE ASSISTANCE OF COUNSEL - PARAGRAPH 14
7 PAGE 111 IT SAYS - "ATTORNEY ERROR CAN ONLY SERVE AS CAUSE TO EXCUSE PROCEDURAL DEFAULT OF POTENTIAL HABEAS CLAIMS IF
8 ATTORNEY'S PERFORMANCE IS SO POOR AS TO CONSTITUTE CONSTITUTIONALLY INEFFECTIVE ASSISTANCE." ORBE V. TRUE (E.D. VA. 2002)
9 233 F. SUPP 2d 749.
10 ALSO, 28 U.S.C.A. § 2254 - JUDICIARY PROCEDURE - NOTE 954 - EFFECTIVE ASSISTANCE OF COUNSEL - PARAGRAPH 16 - PAGE 112,
11 IT SAYS: "WHILE CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL CAN CONSTITUTE FOR PROCEDURAL DEFAULT FOR PURPOSES
12 OF DETERMINING WHETHER FEDERAL HABEAS COURT IS PRECLUDED FROM REVIEW, IT CAN ONLY BE CAUSE IF IT IS AN INDEPENDENT
13 CONSTITUTIONAL VIOLATION." TUCKER V. MOORE (D.S.C. 1999) 36 F. SUPP 2d 611.
14 FURTHERMORE, "AN INDIGENT APPELLANT (OR DEFENDANT AT TRIAL) IS ENTITLED TO COUNSEL WHO ACTS AS AN ACTIVE ADVOCATE"
15 U.S. V. GRIFFY (9TH CIR 1990) 895 F. 2d 561, 562.
16
17 DATED: 2/28/10 RESPECTFULLY SUBMITTED,
18 X Johnny Lopez
JOHNNY LOPEZ
PETITIONER
19
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23. Do you have any petition or appeal **now pending** in any court, either state or federal, pertaining to the judgment under attack?
☐ Yes ☒ No

24. If your answer to #23 is "Yes," give the following information:

(a) Name of Court: __________

(b) Case Number: __________

(c) Date action filed: __________

(d) Nature of proceeding: __________

(e) Grounds raised: __________

(f) Did you receive an evidentiary hearing on your petition, application or motion?
☐ Yes ☐ No

25. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: RICHARD LAFIANZA – 364 N. MOUNTAINVIEW AVE. SAN BERNARDINO, CA. 92415

(b) At arraignment and plea: __________

(c) At trial: __________

(d) At sentencing: __________

(e) On appeal: LYNELLE HEE – 555 W. BEECH ST. STE. 300, SAN DIEGO, CA. 92101

(f) In any post-conviction proceeding: PRO-PER

(g) On appeal from any adverse ruling in a post-conviction proceeding: PRO-PER

26. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
☐ Yes ☒ No

26. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
☐ Yes ☒ No

27. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
☐ Yes ☒ No

(a) If so, give name and location of court that imposed sentence to be served in the future:

(b) Give date and length of the future sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
☐ Yes ☐ No

28. Consent to Magistrate Judge Jurisdiction

In order to insure the just, speedy and inexpensive determination of Section 2254 habeas cases filed in this district, the parties may waive their right to procced before a district judge and consent to magistrate judge jurisdiction. Upon consent of all the parties under 28 U.S.C. § 636(c) to such jurisdiction, the magistrate judge will conduct all proceedings including the entry of final judgment. The parties are free to withhold consent without adverse substantive consequences.

The Court encourages parties to consent to a magistrate judge as it will likely result in an earlier resolution of this matter. If you request that a district judge be designated to decide dispositive matters, a magistrate judge will nevertheless hear and decide all non-dispositive matters and will hear and issue a recommendation to the district judge as to all dispositive matters.

You may consent to have a magistrate judge conduct any and all further proceedings in this case, including the entry of final judgment, by indicating your consent below.

Choose only one of the following:

☐ Plaintiff consents to magistrate judge jurisdiction as set forth above.

OR

☒ Plaintiff requests that a district judge be designated to decide dispositive matters and trial in this case.

29. Date you are mailing (or handing to a correctional officer) this Petition to this court:

5/10/2011

Wherefore, Petitioner prays that the Court grant Petitioner relief to which he may be entitled in this proceeding.

SIGNATURE OF ATTORNEY (IF ANY)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

5/10/2011
(DATE)

Johnny Lopez
SIGNATURE OF PETITIONER

PROOF OF SERVICE BY MAIL

I, JOHNNY LOPEZ, declare;

I am at least 18 years of age, ~~and a party /~~ and not a party to the attached herein cause of action. My mailing address is;

PLEASANT VALLEY STATE PRISON
FACILITY D, BUILDING 2, CELL 134L
POST OFFICE BOX 8500
COALINGA CALIFORNIA
93210-8504

On 5/10/2011, 2011, I delivered to prison officials at Pleasant Valley State Prison at the above address the following documents for mailing via the U.S. Postal Service:

1. FEDERAL WRIT OF HABEAS CORPUS
2. AFFIDAVIT & MOTION TO PROCEED IN FORMA PAUPERIS
3.
4.

In a sealed envelope(s) with postage fully prepaid, addressed to:

1.

2.

3.

4.

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

Executed this ____ day of 5/10/2011, 20___, at Coalinga, California.

Johnny Lopez
Petitioner / Declarant IN PRO PER

JS44

(Rev. 07/89)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

I (a) PLAINTIFFS

Johnny Lopez

DEFENDANTS

Yates et al

1:11 CV 1064 DMS BLM

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Fresno
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Johnny Lopez
PO Box 8500
Coalinga, CA 93210
P-57181

ATTORNEYS (IF KNOWN)

2254 ___ 1983 ___
FILING FEE PAID
Yes ___ No ___
IFP MOTION FILED
Yes ___ No ___
COPIES SENT TO
Court ___ ProSe ___

FILED
MAY 13 2011
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
DEPUTY

II. BASIS OF JURISDICTION (PLACE AN x IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)
(For Diversity Cases Only)

	PT	DEF		PT	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business in This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business in Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY).

28 U.S.C. 2254

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

CONTRACT
- ☐ 110 Insurance
- ☐ Marine
- ☐ Miller Act
- ☐ Negotiable Instrument
- ☐ 150 Recovery of Overpayment &Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153Recovery of Overpayment of Veterans Benefits
- ☐ 160 Stockholders Suits
- ☐ Other Contract
- ☐ 195 Contract Product Liability

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Eiectmant
- ☐ 240 Tort to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury- Medical Malpractice
- ☐ 365 Personal Injury - Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/Accommodations
- ☐ 444 Welfare
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence Habeas Corpus
- ☒ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC881
- ☐ 630 Liquor Laws
- ☐ 640 RR & Truck
- ☐ 650 Airline Regs
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710Fair Labor Standards Act
- 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt. Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc.
- ☐ Security Act

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (13958)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS - Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reappointment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce/ICC Rates/etc.
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities Exchange
- ☐ 875 Customer Challenge 12 USC
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900 Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State
- ☐ 890 Other Statutory Actions

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

☒ 1 Original Proceeding ☐ 2 Removal from State Court ☐ 3 Remanded from Appelate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23 **DEMAND $**

Check YES only if demanded in complaint:
JURY DEMAND: ☐ YES ☐ NO

VIII. RELATED CASE(S) IF ANY (See Instructions): JUDGE Docket Number

DATE 5/13/11

SIGNATURE OF ATTORNEY OF RECORD