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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

<p>PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,</p> <p>v.</p> <p>KENNETH LEONI ROBERTS, Defendant and Appellant.</p>
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H043738

(Santa Clara
County No.
C1511675)

PETITION FOR REHEARING

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA,
THE HONORABLE TERESA GUERRERO-DALEY, JUDGE

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
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**PETITION FOR REHEARING
INTRODUCTION**

California Rules of Court, rule 8.268 sets forth the authority for filing a petition for rehearing. As explained below, an error in this court's opinion requires that rehearing be granted. Reversal is required.

I. Rehearing Must Be Granted Because This Court Relied on *People v. Silva* (2001) 25 Cal.4th 345, When It Rejected Appellant's First Claim That the Record Is Inadequate to Permit Meaningful Appellate Review; This Court Misapplied *Silva*. (See AOB 24-34; Opn 6.)

Under California Rules of Court, rule 8.500(c)(2):

A party may petition for review without petitioning for rehearing in the Court of Appeal, but as a policy matter the Supreme Court normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing.

In its opinion, this court relied on *Silva, supra*, 25 Cal.4th at pages 385 to 386, to justify the conclusion that the appellate record was adequate for meaningful appellate review. (Opn. 6.) Citing to *Silva*, this court reasoned that because the “prosecutor’s explanation for the challenge is ‘both inherently plausible and supported by the record,’ the trial court need not make detailed findings.” (Opn. 6, citing to *Silva, supra*, 25 Cal.4th at pp. 385-386.) But on the facts of this case, the prosecutor’s justifications triggered a duty for the trial court to probe their basis because they were not sufficiently supported by the record. (See *Id.* at p. 385.) As such, rehearing is warranted so that this court may address the appropriate outcome under a proper application of *Silva*. As explained below, the trial court had a duty to probe the prosecutor’s justifications and then to provide a detailed statement of reasons. Because the record does not contain this information, reversal is required.

Appellant’s first claim of error was that “the record is inadequate to permit meaningful appellate review of whether the trial court properly denied the defense *Batson/Wheeler* motion.”¹ (AOB 24-34.) Appellant claimed in part that that the settled statement was inadequate as a matter of law because there were material conflicts retained in the statement and it did not include any information about the trial court’s reasoning. (AOB 28-32.) This court agreed that the trial court was required to resolve the

¹ See *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

material conflicts, but argued that the record was not inadequate for appellate review because appellant was not prejudiced. (Opn. 4-6.) This court concluded that even when the settled statement's conflicts were resolved in favor of the defense, and even though the record did not provide any information about the trial court's reasoning, appellant was not entitled to reversal because the prosecutor's justifications were "both inherently plausible and supported by the record." (Opn. 6, citing to *Silva, supra*, 25 Cal.4th at pp. 385-386.)

The prosecutor's justifications were insufficiently supported by the record because Juror No. 10 had made numerous other statements that undermined the prosecutor's conclusion, which triggered the trial court's duty under *Silva*, to further examine the prosecutor and to state its reasons on the record for denying the *Batson/Wheeler* challenge. (See *Silva, supra*, 25 Cal.4th at p. 385.)

In *Silva*, the defense made two *Batson/Wheeler* motions during jury selection after the prosecutor sought to exclude three jurors based on their Hispanic ancestry or surnames. (*Silva, supra*, 25 Cal.4th at pp. 382-383.) The trial court erroneously held *ex parte* hearings to allow the prosecutor a forum to describe his justifications. (*Ibid.*) After the *ex parte* transcripts were unsealed, a new trial motion was held on the grounds that the *Batson/Wheeler* motions were improperly denied. (*Id.* at pp. 384-385.) Although the trial court denied the new trial motion, the appellate court reversed the defendant's conviction due to the

trial court's failings during jury selection concerning the prosecutor's use of peremptory challenges. (*Id.* at pp. 385-386.)

The *Silva* court explained that the ex parte transcripts demonstrated the trial court's failure to "point out inconsistencies and ask probing questions." (*Silva, supra*, 25 Cal.4th at p. 385.) The *Silva* court explained, "the trial court has a duty to determine the credibility of the prosecutor's proffered explanations [citations], and it should be suspicious when presented with reasons that are unsupported or otherwise implausible." (*Ibid.*) There was inconsistencies between the prosecutor's stated grounds for removing one of the jurors, that could be demonstrated with reference to the voir dire transcripts as a whole. (*Id.* at pp. 385-386 [prosecutor's justifications were contrary to the juror's previous voir dire statements].) Accordingly, the *Silva* court found the trial court's "global" justification for denying the *Batson/Wheeler* claims improper. (*Id.* at p. 386.) "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. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient."

This is exactly the case at bar. The prosecutor's justifications as they appear in the settled statement are, "the fact that Juror No. 10's sister worked at the Santa Clara County Public Defender's Office, that defense counsel was an attorney at

the Santa Clara County Public Defender's Office who knew Juror No. 10's sister, and that the People had just accepted Juror No. 10 onto the panel." (CTS 2-4.) Although they are seemingly plausible on their face, the record also shows that the juror's closer relatives were law enforcement, the type of work that normally lends itself to being favorable to the prosecution. (See e.g. 4RT 445 [Juror No. 10's had a sister who was a corrections officer and another sister who was a retired Sheriff]; ARB 21-22.) Given these inherent inconsistencies, the juvenile court had the legal obligation to further inquire into the prosecutor's justifications. (*Silva, supra*, 25 Cal.4th at pp. 385-386.) The problem with the record in the instant case is that we do not know whether or not the trial court made such an inquiry nor whether or not the trial court explained its reasoning on the record. Under *Silva*, the record is inadequate to permit meaningful appellate review. (See also *People v. Jones* (2011) 51 Cal.4th 346, 385, dis. opn. Werdegarr, J. [following *Silva*, the prosecution's justifications were at least in part unsupported such that without the trial court's statement of reasons for the denial, the *Batson/Wheeler* challenge required reversal of the judgment].)

Because of the inconsistencies in the prosecutor's justifications, this court cannot rely on the rule that the trial court's statements of reasons is not required if the prosecutor's justifications are "both inherently plausible and supported by the record." (*Silva, supra*, 25 Cal.4th at pp. 385-386; Opn. 6.) Accordingly, the applicable remedy in this case was reversal of the judgment on the grounds that the record was inadequate.

In conclusion, rehearing should be granted so that this court can reconsider appellant's claim of the inadequacy of the record under *Silva, supra*, 25 Cal.4th at pp. 385-386. As explained above, reversal is warranted.

CONCLUSION

For the reasons expressed above, rehearing should be granted.

Dated: June 25, 2020

Respectfully submitted,



Anna L. Stuart
Attorney for Appellant,
Kenneth Roberts, Jr.

CERTIFICATE OF COUNSEL

I certify that this brief contains 1204 words.



Anna L. Stuart
Attorney for Appellant,
Kenneth Roberts, Jr.

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DECLARATION OF SERVICE BY E-MAIL AND U.S. MAIL

Case Name: *People v. Roberts*
Case No.: **H043738**

I declare that I am over the age of 18, not a party to this action and my business address is 95 S. Market Street, Suite 570, San Jose, California 95113. On the date shown below, I served the within **PETITION FOR REHEARING** to the following parties hereinafter named by:

 X **BY ELECTRONIC TRANSMISSION** - I transmitted a PDF version of this document by electronic mail to the party(s) identified on the attached service list using the e-mail address(es) indicated.

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 X **BY MAIL** - Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Jose, California, addressed as follows:

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I declare under penalty of perjury the foregoing is true and correct. Executed this 25th day of June, 2021, at San Jose, California.

/s/ Priscilla A. O'Harra
Priscilla A. O'Harra