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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT GENEL, Defendant and Appellant.	B269297 (Los Angeles County Super. Ct. No. BA435549)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa B. Lench, Judge. Affirmed.

Richard M. Doctoroff, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Miyoshi and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Robert Genel appeals his convictions for misdemeanor obstructing a peace officer and two counts of carrying a concealed dirk or dagger. Genel contends the trial court erred by denying his *Batson/Wheeler* motion,[1] and Penal Code section 21310,[2] as applied to him, infringes his federal Second Amendment right to arm himself in his home.[3] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

In 2007, Genel was convicted of being a felon in possession of a firearm and active participation in a criminal street gang. On October 12, 2011, he was released on parole, with a three-year parole term.

a. *People's evidence*

Beginning in 2014, Andrea Denegal was Genel's parole agent. Denegal knew that Genel sometimes lived in a detached garage at his mother's residence on West Simmons Avenue in Los Angeles. Because Genel was a parolee at large, that is, he had stopped reporting to Denegal, she had a warrant issued for his arrest.

On April 1, 2015, Genel's mother telephoned Denegal and told her that she no longer wanted Genel at her home. She said

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

[2] All further undesignated statutory references are to the Penal Code.

[3] In his opening brief, Genel raised an additional claim that the trial court erred by denying his suppression motion. However, in his reply brief, he withdraws this contention.

Genel was hallucinating, that is, "saying that he sees things that don't exist." Denegal assembled a team of parole agents and arranged for the sheriff's department to provide backup. Along with parole agents Eric Borba, Tina Rivero, and Cesar Melendez, Denegal travelled to the West Simmons Avenue address to arrest Genel. The agents were clad in jackets saying "parole agent" on the garments' front and back. Upon arrival at the house at approximately 5:00 p.m., Denegal spoke with Genel's mother and learned Genel was in the garage.

Borba entered the garage first, with his firearm drawn. He announced he was "state parole police." Genel was standing in the garage, holding a rake and a wrench. The rake handle was towards the ground, and it appeared Genel was using the wrench to manipulate the rake. Borba ordered Genel to drop the items, and Genel complied. The other three agents entered the garage immediately after Borba.

After dropping the rake and wrench, Genel placed his hands into his pants pockets. Concerned that Genel might have a weapon, Borba told Genel to remove his hands from his pockets "[a]t least a couple" times. Genel did not comply. According to Borba, Genel appeared confused and worried; according to Denegal, he appeared frustrated. Borba pulled Genel's left hand from his pocket, revealing that Genel had a potato peeler in his hand. Borba moved behind Genel, while Melendez grabbed his left arm and Rivero grabbed his right. The agents continued to command Genel to remove his right hand from his pocket, but he failed to comply and struggled. When Rivero pulled Genel's hand from his right pocket, Genel was holding a small knife. He failed to heed her order to drop it. Instead, he swung his arm back and forth in a horizontal motion, making the knife come within five

inches of Rivero's face. Borba placed Genel in a "bear hug," causing Genel and all four parole agents to fall to the ground. When the agents attempted to handcuff Genel, he clenched his fists and locked his arms and elbows.

After Genel was handcuffed, Melendez searched Genel's person. Genel was wearing two pairs of pants. In the pocket of the first pants layer was another small knife.

During the incident, Genel stated that he was not on parole. He asked, "What's going on?" and "What's the problem?" He also stated, "I'm not doing anything wrong" and "I didn't do anything."

As a result of the struggle, Borba's right knee was sore and his pants were ripped. Rivero's knees and elbows were scraped and her foot was twisted, necessitating a hospital visit. Melendez cut his finger on the knife in Genel's inner pocket.

b. *Defense evidence*

Genel testified in his own behalf. Denegal became his parole officer in October 2014. Genel lived at the West Simmons Avenue address, in the garage, in 2014 and 2015, and Denegal had visited him there. At some point Denegal told Genel that a neighbor was complaining about the condition of the yard. Denegal told Genel he needed to maintain the yard, and Genel signed a paper agreeing to do so. Thereafter, he cleaned the yard and pruned the trees. Genel was told by a parole agent that his parole would terminate in March of 2015. Therefore, he ceased reporting.

When the parole agents arrived on April 1, 2015, he was fixing the rake so he could clean the yard. He was using the potato peeler and the small knife to strip splinters from the rake's wooden handle. There was also a loose screw, making the

rake wobble, and he was using the wrench to tighten it. The other knife was a pumpkin cutter. When the agents entered the garage he was surprised. He complied with their orders by emptying his pockets onto the floor, including the knives and the potato peeler, and dropping the wrench and the rake. He did not wave the knife around. However, the agents forced him to the floor. Denegal placed a knee on his neck and pushed his head into the floor, causing him to bleed. He struggled only because he was in pain when his head was pressed against the floor and the agent's knee was on his back. He was wearing shorts over a pair of sweatpants in order to protect the sweatpants, in which he slept.

2. *Procedure*

A jury convicted Genel of two counts of carrying a concealed dirk or dagger (§ 21310) and misdemeanor obstructing a peace officer, Officer Borba (§ 148, subd. (a)(1)), a lesser included offense of the charged crime of resisting an executive officer (§ 69). It acquitted Genel of assault with a deadly weapon upon a peace officer (§ 245, subd. (c), Officer Rivero). Genel admitted serving two prior prison terms within the meaning of section 667.5, subdivision (b). The trial court sentenced Genel to two years in jail, with credit for 502 days in custody. Eight months of his sentence was suspended and deemed a period of mandatory supervision (§ 1170, subd. (h)(5)(B)). The trial court imposed a restitution fine, a suspended probation revocation restitution fine, a criminal conviction assessment, and a court operations assessment. Genel appeals.

DISCUSSION

1. *Batson/Wheeler motion*

Genel, who is apparently Hispanic, contends the prosecutor exercised peremptory challenges against three Hispanic prospective jurors based on their ethnicity in violation of *Batson* and *Wheeler,* and the trial court erred in denying his objections to these challenges.[4] We disagree.

a. *Background*

At the start of jury selection, a panel of 35 jurors was sworn. Prospective Juror No. 9 (4287) was a sterile processing technician who prepared instrumentation for surgery. She lived with her husband, a telecommunications contractor. She had no jury experience. Prospective Juror No. 9 confirmed, in response to defense counsel's question, that she had no issue with the defendant not testifying. The prosecutor did not question her individually.

Prospective Juror No. 17 (4447) was a former payroll clerk who was on permanent disability. He lived by himself, and had no jury experience. Neither the prosecutor nor defense counsel questioned him individually.

Prospective Juror No. 20 (8055) was employed as a line technician for a telecommunications company. He lived with his three children aged 24, 21, and 18. One of his children also worked in the telecommunications field. He had no jury experience. When asked by defense counsel, Prospective Juror

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[4] Genel argues that the prosecutor's "misconduct violated appellant's right to have a jury drawn from a cross-section of Sacramento County residents." Counsel advised at oral argument that the reference to Sacramento County was a typographical error.

No. 20 indicated he did not have a "problem" with a defendant's choice not to testify. When defense counsel asked, "What do you think about the fact that these are parole officers?" Prospective Juror No. 20 replied, "we have to hear what happened on April 15th [*sic*]." The prosecutor asked whether Prospective Juror No. 20 would "feel comfortable in giving a guilty vote if you find that the defendant is guilty?" and he replied that he would have "[n]o problem."

The prosecutor exercised her first and second peremptory challenges[5] against two prospective jurors who, as far as the record shows, were not Hispanic. She exercised her third, fourth, and fifth peremptory challenges against Prospective Juror Nos. 17, 9, and 20, respectively. After the prosecutor's exercise of her fifth peremptory challenge, defense counsel brought a *Batson*/*Wheeler* motion, contending the prosecutor's third through fifth peremptories were exercised against Hispanic prospective jurors. It appeared to defense counsel that no Hispanics remained among the 12 seated in the jury box. Counsel pointed out that neither he nor the prosecutor had questioned Prospective Juror No. 9.

The trial court stated it could not determine the ethnicity of the three prospective jurors in question, although they had Hispanic surnames. Prospective Juror No. 17 appeared to the court to be Hispanic, but Prospective Juror No. 20 did not. The court noted, "We all know certain people who have surnames who

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[5] Another Hispanic prospective juror, No. 15, was removed for cause, without objection from the defense, after she explained at a sidebar conference that she was unsure she could be "fair to the State" given her own experiences of discriminatory treatment by law enforcement officers.

are not the race that their surname might suggest[ ]." The court observed, "based upon some of the impressions I have of the people who were excused, I don't think there is a prima facie case made yet." It acknowledged, "I understand that it can be made with one, and even accepting as true that the last three have been Hispanic, I don't think that I can – I can think of some reasons in my own mind for why at least two of them have been excused."

The court then stated it would give the prosecutor a chance to address the issue. The prosecutor averred, "I don't kick people out based on their race. And actually I think the juror in seat number 2 looks Hispanic to me. I don't check their names on the list. I haven't checked any of their names. [¶] The reasons why I kicked out those people were, I had bad nonverbal vibes from them or I didn't like their answers. Nothing to do with their race. And honestly, I couldn't even remember some of their races."

The trial court stated that Prospective Juror No. 17 "appeared to have a little bit of a language difficulty. Although I'm not sure that it was determinative. But I think he did have a little bit of a language difficulty." The court then denied the motion.

Subsequently, the prosecutor exercised peremptory challenges to an additional three prospective jurors, without objection.

b. *Analysis*

Our California Supreme court recently reiterated the parameters governing *Batson*/*Wheeler* motions. Any advocate's use of peremptory challenges to exclude prospective jurors based on race or ethnicity violates both the equal protection clause of the United States Constitution and the right to trial by a jury

drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. (*People v. Parker* (2017) 2 Cal.5th 1184, 1210-1211; *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1157-1158.) Exclusion of even a single prospective juror for such impermissible reasons is structural error requiring reversal. (*Gutierrez*, at p. 1158.)

A prima facie case of discrimination based on race or ethnicity in the use of peremptory challenges is established if the totality of the relevant facts gives rise to an inference of discriminatory purpose. (*People v. Thomas* (2012) 53 Cal.4th 771, 793; *People v. Gutierrez*, *supra*, 2 Cal.5th at p. 1158; *People v. Jones* (2017) 7 Cal.App.5th 787, 802.) " 'There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination.' [Citation.] 'A three-step procedure applies at trial when a defendant alleges discriminatory use of peremptory challenges. First, the defendant must make a prima facie showing that the prosecution exercised a challenge based on impermissible criteria. Second, if the trial court finds a prima facie case, then the prosecution must offer nondiscriminatory reasons for the challenge. Third, the trial court must determine whether the prosecution's offered justification is credible and whether, in light of all relevant circumstances, the defendant has shown purposeful race discrimination. [Citation.] "The ultimate burden of persuasion regarding [discriminatory] motivation rests with, and never shifts from, the [defendant]." ' [Citation.]" (*People v. Parker*, *supra*, 2 Cal.5th at p. 1211.)

Unless a trial court applies the wrong standard, a "trial court's ruling on a *Wheeler* motion is reviewed for substantial

evidence. [Citation.] 'The determination of whether a defendant has established a prima facie case "is largely within the province of the trial court whose decision is subject only to limited review. [Citations.]" [Citation.] On appeal, we examine the entire record of voir dire for evidence to support the trial court's ruling. [Citation.] Because of the trial judge's knowledge of local conditions and local prosecutors, powers of observation, understanding of trial techniques, and judicial experience, we must give "considerable deference" to the determination that appellant failed to establish a prima facie case of improper exclusion. [Citation.]' " (*People v. Rushing* (2011) 197 Cal.App.4th 801, 809; *People v. Sattiewhite* (2014) 59 Cal.4th 446, 470; *People v. Bonilla* (2007) 41 Cal.4th 313, 341 [ordinarily, an appellate court reviews a trial court's denial of a *Wheeler/Batson* motion "deferentially, considering only whether substantial evidence supports its conclusions"].)

Where, as here, a trial court determines that no prima facie case exists, then allows or invites the prosecutor to state his or her reasons for excusing the jurors, but refrains from ruling on the validity of those reasons, an appellate court "properly reviews the first-stage ruling." (*People v. Scott* (2015) 61 Cal.4th 363, 386, 391; *People v. Sattiewhite*, *supra*, 59 Cal.4th at pp. 469-470.) When reviewing such a first-stage ruling, we do not rely on the prosecutor's statement of reasons to support a trial court's finding that defendant failed to make out a prima facie case. "Although a court reviewing a first-stage ruling that no inference of discrimination exists 'may consider apparent reasons for the challenges discernible on the record' as part of its 'consideration of "all relevant circumstances" ' [citation], the fact that the prosecutor volunteered one or more nondiscriminatory reasons

for excusing the juror is of no relevance at the first stage." (*Scott*, at p. 390.) If an appellate court disagrees with the trial court's first-stage ruling, "it can proceed directly to review of the third-stage ruling, aided by a full record of reasons and the trial court's evaluation of their plausibility." (*Id.* at p. 391.)

In determining whether a party established a prima facie case, "certain types of evidence may prove particularly relevant. [Citation.] Among these are that a party has struck most or all of the members of the identified group from the venire, that a party has used a disproportionate number of strikes against the group, that the party has failed to engage these jurors in more than desultory voir dire, that the defendant is a member of the identified group, and that the victim is a member of the group to which the majority of the remaining jurors belong. [Citation.] A court may also consider nondiscriminatory reasons for a peremptory challenge that are apparent from and 'clearly established' in the record [citations] and that necessarily dispel any inference of bias. [Citations.]" (*People v. Scott*, *supra*, 61 Cal.4th at p. 384; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 342; *People v. Jones*, *supra*, 7 Cal.App.5th at p. 802.)

Here, the trial court did not explicitly or implicitly rule upon the validity of the prosecutor's stated reasons for her use of peremptory challenges; therefore, we review the court's first-stage ruling, that is, whether Genel established a prima facie case, without regard to the prosecutor's stated justifications. (See *People v. Sattiewhite*, *supra*, 59 Cal.4th at pp. 469-470.)

Substantial evidence supports the trial court's conclusion that Genel failed to establish a prima facie showing. "While it is true that '[t]he exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional

magnitude requiring reversal' [citation], the prima facie showing is not made merely by establishing that an excluded juror was a member of a cognizable group. [Citations.] Rather, ' "in drawing an inference of discrimination from the fact one party has excused 'most or all' members of a cognizable group" . . . "a court finding a prima facie case is necessarily relying on an apparent pattern in the party's challenges." [Citation.] Such a pattern will be difficult to discern when the number of challenges is extremely small.' [Citations.]" (*People v. Jones*, *supra*, 7 Cal.App.5th at p. 803; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 343, fn. 12.) Our Supreme Court has noted, "[w]hile no prospective juror may be struck on improper grounds, we have found it ' "impossible," ' as a practical matter, to draw the requisite inference where only a few members of a cognizable group have been excused and no indelible pattern of discrimination appears.' " (*People v. Garcia* (2011) 52 Cal.4th 706, 747.)

Thus, courts have repeatedly found no prima facie case based solely upon the prosecutor's exercise of peremptories against a few jurors. In *People v. Farnam* (2002) 28 Cal.4th 107, for example, the prosecutor exercised four of his first five peremptory challenges against African-American prospective jurors, and a small minority of jurors on the panel were African-American. (*Id.* at p 136.) Nonetheless, these circumstances fell "short of a prima facie showing." (*Id.* at p. 137.) In *People v. Hoyos* (2007) 41 Cal.4th 872, disapproved on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 919-920, no prima facie case was found although the prosecutor used peremptory challenges to strike three of the only four Hispanics on the panel, and the defendant was also Hispanic. The court reasoned, "although a prosecutor's excusal of all members of a particular

group may establish a prima facie discrimination case, especially if the defendant belongs to the same group, this fact alone is not conclusive." (*Hoyos*, at p. 901.) In *People v. Bell*, the prosecutor's excusal of two out of three African-American jurors did not establish a prima facie case; "the small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible." (*People v. Bell* (2007) 40 Cal.4th 582, 598, disapproved on other grounds by *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.) In *People v. Parker*, *supra*, 2 Cal.5th at pages 1212-1213, the excusal of the only two African-Americans in the jury pool was insufficient to support an inference that the two were challenged because of their race. Echoing the reasoning of earlier cases, the court reasoned that the " ' "small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible" ' " because " ' " '[a]s a practical matter . . . the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion.' " ' " (*Id.* at p. 1212.) In *People v. Bonilla*, *supra*, 41 Cal.4th 313, the defendant "made no prima facie showing" based on the prosecutor's use of peremptory challenges against the only two African-Americans in the jury pool. (*Id.* at pp. 342-343.) In *Jones,* the prosecutor exercised three out of nine peremptory challenges to excuse African–American prospective jurors, and the defendant argued there was no apparent reason for excluding them. (*People v. Jones*, *supra*, 7 Cal.App.5th at p. 803.) *Jones* concluded the prosecutor's use of the peremptory challenges "was insufficient, standing alone, to establish a prima facie case of race discrimination." (*Id.* at p. 804; see generally *People v. Clark* (2016) 63 Cal.4th 522, 567.)

Likewise, here, the fact the prosecutor used three of eight peremptory challenges to excuse Hispanic prospective jurors was insufficient to give rise to an inference of discrimination based on

ethnicity, given the small number of prospective jurors in question. Indeed, Genel conceded at oral argument that the fact three Hispanic jurors were excused did not, in and of itself, give rise to a prima facie case.[6] Furthermore, the prosecutor opined that Prospective Juror No. 2 appeared to be Hispanic, and this juror remained on the panel. "[U]ltimate inclusion on the jury of members of the group allegedly targeted by discrimination indicates ' "good faith" ' in the use of peremptory challenges, and may show under all the circumstances that no *Wheeler/Batson* violation occurred." (*People v. Garcia*, *supra*, 52 Cal.4th at pp. 747-748; *People v. Cunningham* (2015) 61 Cal.4th 609, 664; *People v. Jones*, *supra*, 7 Cal.App.5th at p. 806 [fact two African-Americans were ultimately seated on the jury was a circumstance supporting the trial court's conclusion that defendant failed to make a prima facie showing].) While the record does not conclusively reveal the ethnicity of the parole officers (the alleged

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[6] The People argue no prima facie showing was made because Genel failed to show the prosecutor exercised peremptory challenges against "members of a cognizable group." They argue that the trial court found only one of the challenged jurors was actually Hispanic, despite the fact all three had Hispanic surnames. This argument is meritless. Our Supreme Court has explained: "We have held that Spanish surnames may identify Hispanic individuals, who are members of a cognizable class for purposes of *Batson*/*Wheeler* motions. [Citations.] 'Where . . . no one knows at the time of challenge whether a particular individual who has a Spanish surname is Hispanic, a showing that jurors are being excluded on the basis of surname alone' may nonetheless constitute a prima facie case of impermissible strikes based on association with a cognizable group. [Citation.] 'Although the correlation between surname and group membership is not exact, such precision is unnecessary.' " (*People v. Gutierrez*, *supra*, 2 Cal.5th at p. 1156, fn. 2.)

victims), at least two – Melendez and Rivero – had Hispanic surnames. Thus it cannot be said that the victims were members of the group to which the majority of the remaining jurors belonged, a factor supporting the trial court's ruling. It is true the prosecutor did not individually question two of the jurors at issue, but this is not a weighty consideration because the prosecutor did not extensively question the vast majority of prospective jurors. And, contrary to Genel's argument, the prosecutor's comments were not discriminatory on their face.

Genel argues that the prosecutor's stated reasons were pretextual and insufficient. But, because we are examining the first-stage inquiry – that is, whether a prima facie case was established – the prosecutor's reasons are not at issue. (See *People v. Scott*, *supra*, 61 Cal.4th at p. 390; *People v. Jones*, *supra*, 7 Cal.App.5th at p. 804.) To the extent Genel suggests comparative juror analysis was required, we disagree; comparative juror analysis is unnecessary when no prima facie case is established. (*People v. Clark*, *supra*, 63 Cal.4th at p. 568 ["Our obligation to consider comparative juror analysis for the first time on appeal only applies to stage three *Batson/Wheeler* claims, not stage one claims"]; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 350.)

2. *Constitutionality of section 21310 as applied to Genel*

At the conclusion of the People's case, defense counsel moved to dismiss the concealed dirk or dagger counts, arguing that section 21310 was unconstitutional as applied to Genel's possession of concealed knives in his own home. The trial court denied the motion.

Genel here renews his argument that, as applied to him, the statute is unconstitutional in light of *District of Columbia v. Heller* (2008) 554 U.S. 570 (*Heller*). Under *Heller*, he avers, he

had the constitutional right to carry concealed knives to defend himself in his home.

a. *Section 21310*

Section 21310 provides: "Except as provided in Chapter 1 (commencing with Section 17700)[7] of Division 2 of Title 2, any person in this state who carries concealed upon the person any dirk or dagger is punishable by imprisonment in a county jail not exceeding one year or imprisonment pursuant to subdivision (h) of Section 1170."

Section 16470 defines dirk or dagger. It provides: "As used in this part, 'dirk' or 'dagger' means a knife or other instrument with or without a handguard that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death. A nonlocking folding knife, a folding knife that is not prohibited by Section 21510, or a pocketknife is capable of ready use as a stabbing weapon that may inflict great bodily injury or death only if the blade of the knife is exposed and locked into position."[8] Section 20200 provides: "A knife carried in a sheath that is worn openly suspended from the waist of the wearer is not concealed

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[7] Section 16590 defines generally prohibited weapons. Chapter 1 of division 2 of title 2, that is, sections 17700 through 17745, exempt from section 16590's definition items such as, for example, antique firearms and items possessed during the course of filming motion pictures. None of these exemptions are relevant here.

[8] Effective in 2012, the relevant statutory sections were renumbered without substantive change. Section 21310 was formerly section 12020, subdivision (a)(4). Section 16470 was formerly section 12020, subdivision (c)(24). (*People v. Mitchell* (2012) 209 Cal.App.4th 1364, 1369, fn. 1 (*Mitchell*).)

within the meaning of" section 21310. Thus, section 21310 proscribes carrying a concealed knife, but provides exceptions for a knife in a sheath that is visibly suspended from the waist, and for a non-switchblade folding or pocketknife, if the blade is not exposed and locked. (*Mitchell*, *supra*, 209 Cal.App.4th at p. 1371; see generally *People v. Castillolopez* (2016) 63 Cal.4th 322, 329-331.)

A defendant's specific intent is not an element of the offense. Thus, to be guilty of violating section 21310, a defendant need not have intended to use the concealed dirk or dagger as a stabbing instrument. (*People v. Rubalcava* (2000) 23 Cal.4th 322, 325, 331-332 (*Rubalcava*); *Mitchell*, *supra*, 209 Cal.App.4th at p. 1372.) However, the defendant "must knowingly and intentionally carry concealed upon his or her person an instrument 'that is capable of ready use as a stabbing weapon.' [Citation.] A defendant who does not know that he is carrying the weapon or that the concealed instrument may be used as a stabbing weapon is therefore not guilty of violating section 12020." (*Rubalcava*, at p. 332.) The legislative purpose in enacting the law was "to combat the dangers arising from the *concealment* of weapons," and give third parties the opportunity to protect themselves from surprise attacks. (*Mitchell*, at p. 1371; *In re George W.* (1998) 68 Cal.App.4th 1208, 1213.)

In *Rubalcava,* our Supreme Court upheld section 12020, subdivision (a) (the predecessor statute to section 21310), against vagueness and overbreadth challenges. (*Rubalcava*, *supra*, 23 Cal.4th at pp. 332-334.) There, while arresting the defendant, officers discovered a knife, with a dull, three-inch blade, concealed on the defendant's person. (*Id.* at p. 325.) Rubalcava testified that he worked in an automotive repair shop, was

transporting tools to a friend, and brought the knife only because he kept it with his tools. (*Id.* at p. 326.) Convicted of unlawfully carrying a concealed dirk or dagger, Rubalcava appealed on the ground the jury should have been instructed that the intent to use the knife as a stabbing weapon was an element of the offense. (*Id.* at pp. 327-328.) Our Supreme Court rejected this argument, reasoning that the plain statutory language did not require such an intent, and the legislative history indicated the Legislature did not intend to require it. (*Id.* at pp. 328-331.)

The court likewise rejected Rubalcava's contention that, without such an intent-to-use element, the statute was unconstitutionally vague and overbroad. (*Rubalcava*, *supra*, 23 Cal.4th at p. 331.) Pointing to earlier case law, Rubalcava argued that without an intent-to-use requirement, the statute would sweep too broadly: it would, for example, make a felon out of a tailor who places a pair of scissors in his jacket, an auto mechanic who absentmindedly slips a utility knife in a pocket, a shopper who leaves a kitchen supply store with a newly-purchased steak knife in a pocket, or a parent who puts a knife in his or her coat to carry into a PTA potluck. (*Ibid.*) Although the court found "the potentially broad reach of section 12020 . . . troubling, these concerns do not render the statute unconstitutional." (*Ibid.*) The statute contained no vague terms that were open to multiple interpretations. As to Rubalcava's contention that the statute might criminalize " 'wholly innocent conduct,' " the court explained: "The mere fact that a statute may criminalize previously legal conduct does not . . . make a statute unconstitutionally vague especially where, as here, the statutory language and legislative history indicate the Legislature intended such a result." (*Id.* at p. 332.) As to the overbreadth

challenge, the court reasoned that a statute is overbroad only if it prohibits a substantial amount of constitutionally protected conduct. Rubalcava cited "general examples of the statute's overbreadth" but "desecribe[d] *no* instances where the statute actually infringes on constitutionally protected conduct," and the court could "think of none. Even though section 12020 may seem overbroad as a matter of common sense, we will not find it *unconstitutionally* overbroad without some concrete impairment of constitutionally protected conduct." (*Id.* at p. 333.)

The court reiterated: "Although we conclude that section 12020 is not unconstitutionally vague or overbroad, we echo the concerns over the breadth of the statute raised by Rubalcava. As written, section 12020, subdivisions (a) and (c)(24) may criminalize seemingly innocent conduct. Consequently, the statute may invite arbitrary and discriminatory enforcement *not* due to any vagueness in the statutory language but due to the wide range of otherwise innocent conduct it proscribes." (*Rubalcava*, *supra*, 23 Cal.4th at p. 333.) The court left it "to the Legislature to reconsider the wisdom of its statutory enactments." (*Ibid.*; see also pp. 337-338 (conc. opn. of Werdegar, J.).)

b. *The Second Amendment, Heller, and Mitchell*

The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." (U.S. Const., 2d Amend.)

In *Heller*, the high court concluded that the Second Amendment protects the individual right to keep and bear arms, that is, "the individual right to possess and carry weapons in case of confrontation," unconnected with service in a militia. (*Heller*,

supra, 554 U.S. at pp. 592-593, 595.) There, a District of Columbia statute imposed a complete ban on handgun possession in the home, and required that any firearm lawfully in the home be disassembled or bound by a trigger lock, rendering it inoperable. (*Id.* at p. 628.) A police officer who wished to keep a handgun in his home challenged the constitutionality of the law. After an in-depth analysis of the history of the Second Amendment, Justice Scalia, writing for the majority, concluded that the Second Amendment codified the pre-existing right of individuals to possess and carry weapons for self-defense. (*Id.* at pp. 592, 599.) The District of Columbia statute at issue was constitutionally flawed because it prohibited an entire class of arms, overwhelmingly chosen by society for self-defense, in a location – the home – where the need for self-defense was most acute. (*Heller*, at pp. 628-629, 635.) The inoperability requirement made it impossible for a person to use the weapon "for the core lawful purpose of self-defense." (*Id.* at p. 630.)

However, the court was careful to note that the right to bear arms in self-defense was not unlimited. (*Heller*, *supra*, 554 U.S. at pp. 595, 626.) The right is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," and some measures regulating handguns are permissible. (*Id.* at pp. 626-627, 636.) *Heller* observed that prohibitions on carrying concealed weapons had generally been held lawful (*id.* at p. 626), and cautioned that its ruling did not cast doubt on presumptively lawful, "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." (*Id.* at

pp. 626-627 & fn. 26.) Accordingly, the court held, "[a]ssuming that Heller is not disqualified from the exercise of Second Amendment rights," the District was required to permit him to register his handgun and issue him a license to carry it in the home. (*Id.* at p. 635.)

Two years after *Heller,* the high court held that the right to keep and bear arms is "among those fundamental rights necessary to our system of ordered liberty." (*McDonald v. Chicago* (2010) 561 U.S. 742, 750, 778.) The Second Amendment right to possess a handgun in the home for self-defense is incorporated into the Fourteenth Amendment's Due Process Clause, and is thereby fully applicable to the States. (*Id.* at p. 750; see *People v. Delacy* (2011) 192 Cal.App.4th 1481, 1487; *Peruta v. County of San Diego* (9th Cir. 2016) 824 F.3d 919, 928-929 (en banc).)

Subsequently, California courts have rejected a number of *Heller*-based challenges to state laws prohibiting carrying concealed weapons. (*People v. Ellison* (2011) 196 Cal.App.4th 1342, 1346-1351 [former section 12025, prohibiting carrying a concealed weapon in a vehicle, did not violate the Second Amendment]; *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 314 ["the *Heller* opinion specifically expressed constitutional approval of the accepted statutory proscriptions against carrying concealed weapons"]; *People v. Flores* (2008) 169 Cal.App.4th 568, 575-576 [carrying a concealed firearm].) Cases also upheld challenges to California laws prohibiting certain misdemeanants and others from possessing firearms. (*Flores*, at pp. 574-575; *People v. Delacy*, *supra*, 192 Cal.App.4th at pp. 1488-1493; *City of San Diego v. Boggess* (2013) 216 Cal.App.4th 1494, 1503 [Welfare and Institutions Code section 8102, authorizing the seizure and

forfeiture of weapons belonging to persons detained due to their mental condition, did not violate Second Amendment].)

Most significantly here, *Mitchell* concluded that section 21310 is neither facially unconstitutional nor unconstitutional as applied in that case. There, the defendant, Mitchell, was removed from a San Francisco trolley because he did not have a ticket, and trolley security officers found an 11-inch knife with a five-inch blade concealed in Mitchell's pants. (*Mitchell*, *supra*, 209 Cal.App.4th at p. 1369.) Mitchell told the officers he carried the knife for self-defense. (*Ibid.*) At trial, Mitchell testified he was carrying the knife because he was going fishing, and used it as a fishing tool. (*Id.* at pp. 1369-1370.) He appealed his conviction for violating former section 12020, subdivision (a)(4), arguing the statute was unconstitutional, both facially and as applied to him. (*Id.* at p. 1370.)

Mitchell disagreed on both points. First, the statute was not facially unconstitutional: "Consistent with the historical interpretation permitting prohibitions on the carrying of concealed weapons, we find no facial unconstitutionality in the statute proscribing the carrying of a concealed dirk or dagger." (*Mitchell*, *supra*, 209 Cal.App.4th at p. 1373.) Because section 21310 limits, but does not completely ban, carrying a dirk or dagger for self-defense, the court applied the intermediate scrutiny test, which requires that the law serve an important governmental interest and be narrowly tailored to effectuate that interest. (*Id.* at p. 1374.) "The ban on carrying a concealed dirk or dagger serves the important governmental interest of allowing third parties to protect themselves from exposure to the risk of a surprise attack from a bearer of a weapon. The risk of a surprise attack exists even if the weapon bearer originally intends to use

the weapon only for legitimate self-defense." (*Id.* at p. 1375.) One who carries a knife or pistol intending to use it only in lawful self-defense may overreact or make poor judgments and use the weapon in an unjustified fashion. (*Ibid.*) The statute was narrowly tailored, *Mitchell* reasoned, because an instrument qualifies as a dirk or dagger only if it is a knife or other instrument capable of ready use as a stabbing weapon that may inflict great bodily injury or death. Further, the statute does not prohibit carrying a nonconcealed knife, a knife in a sheath, or certain folding knives, thereby providing "other means of carrying a dirk or dagger for self-defense." (*Id.* at p. 1375.) Thus, the statute did "not run afoul of the Second Amendment because it is narrowly tailored to serve the important governmental interest of preventing exposure to the risk of surprise attacks and does not burden the right to bear arms in self-defense beyond what is reasonably necessary to serve that interest." (*Id.* at pp. 1375-1376.) In distinguishing *Heller, Mitchell* explained that unlike the District of Columbia statute, "the dirk/dagger statute restricts the concealment of weapons on a person *to protect the rights of third parties not to be exposed to surprise attacks.* The statute does not contain any express restriction on concealment of weapons on the person at home, and to the extent it is capable of being applied improperly in the home context . . . , any overbreadth can be cured on a case-by-case basis." (*Mitchell*, at p. 1376.)

The statute was also constitutional as applied, *Mitchell* reasoned, for essentially the same reasons: it served an important governmental interest of diminishing the risk of surprise attacks. (*Mitchell*, *supra*, 209 Cal.App.4th at p. 1378.) *Mitchell* reasoned that the jury must have rejected defendant's

testimony that he was using the knife for innocuous purposes because it had been instructed to consider all surrounding circumstances when deciding whether defendant knew the object could be used as a stabbing weapon. Thus, the court reasoned, the case was not one "involving a conviction based on an innocuous possession of a knife." (*Id.* at p. 1379.)

c. *Application here*

Genel argues that, as applied to him, section 21310 unconstitutionally infringes upon his right to bear arms in his home, and therefore his convictions must be reversed. Inexplicably, the People's responsive argument was initially limited to the contention that section 21310 is not facially unconstitutional. But Genel never argued the statute was facially unconstitutional; instead, his contention is the statute is unconstitutional as applied *in this case*. Accordingly, we sought and have received supplemental briefing from the parties. In their supplemental brief, the People contend that (1) according to Agent Denegal's testimony, as a parolee-at-large, Genel was not allowed to have knives concealed on his person; (2) the knives "became an issue here only when the agents attempted to place appellant in custody and he put his hands in his pockets, apparently reaching for [one of] the kni[ves]"; (3) Genel was not using the knives against an illegal intruder; and (4) Genel, as a parolee-at-large, is disqualified from possessing concealed arms for self-defense. In response, Genel argues: (1) *Heller's* conclusion that a felon may be prohibited from possessing firearms in his or her own home does not extend to the possession of other weapons; (2) the People fail to point to evidence that any parole condition actually prohibited him from possessing a small knife in his pocket at home; (3) unlike section 29800's statutory

prohibition on a felon's firearm possession, no analogous statute specifically prohibits felons from possessing concealed knives in the home; and (4) the People's argument that the knife possession "only came into play" when he resisted arrest is irrelevant, especially in light of the fact he was acquitted of felony resisting an executive officer and of assault on a peace officer.

"When considering a claim that a facially valid statute has been applied in a constitutionally impermissible manner, 'the court evaluates the propriety of the application on a case-by-case basis to determine whether to relieve the defendant of the sanction.' [Citation.] An as-applied challenge 'contemplates analysis of the facts of a particular case . . . to determine the circumstances in which the statute . . . has been applied and to consider whether in those particular circumstances the application deprived the [defendant] of a protected right.' [Citation.] When reviewing an as-applied constitutional challenge on appeal, we defer to the trial court's findings on historical facts that are supported by substantial evidence, and then independently review the constitutionality of the statute under those facts. [Citation.]" (*Mitchell*, *supra*, 209 Cal.App.4th at p. 1378.)

Application of section 21310 in this instance is, in our view, troubling. It was undisputed Genel was alone in his residence, holding the small, commonplace knives in his pants for an innocent purpose – to repair a rake – so that he might comply with his parole agent's directive to maintain the residence's yard. Although the People focus on Genel's purported use of one of the knives against the parole agents, the jury acquitted him of assault with a deadly weapon upon a peace officer, and of resisting an executive officer and convicted him instead of the

lesser offense of unlawfully obstructing a peace officer, indicating it rejected the People's theory that Genel used the knives against the officers. Nonetheless, we are bound by *Rubalcava*'s conclusion that the concealed dirk or dagger statute, despite its "common sense" overbreadth, is not *unconstitutionally* overbroad unless defendant shows some concrete impairment of constitutionally protected conduct. (*Rubalcava*, *supra*, 23 Cal.4th at p. 333; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Here, the only right Genel contends was infringed is the Second Amendment right to bear arms. Thus, unless application of section 21310 to Genel's concealed possession of the knives in his home offends the Second Amendment, we must affirm his convictions.

We assume, without deciding, that knives are "arms" within the meaning of the Second Amendment. (See *State v. Deciccio* (Conn. 2014) 105 A.3d 165, 171, 197 [defendant's possession of a dirk knife and a police baton in his home was protected by the Second Amendment; dirk knives constitute "arms" for Second Amendment purposes]; Kopel et al., *Knives and the Second Amendment* (2013) 47 U.Mich. J.L. Reform 167, 191-194 [knives can be used for self-defense and are arms within the meaning of the Second Amendment]; see generally *Heller*, *supra*, 554 U.S. at pp. 624-625.) We also assume arguendo that Genel was in his home, even though he did not own or rent the space and the owner of the garage, apparently, no longer wanted him to stay there. And we attach no significance to the fact Genel was using the knives, at the moment the parole agents arrived, for yard work rather than for self-defense; logically, the fact an item is used sometimes as a tool, or for recreational purposes, should not impact a Second Amendment analysis.

As explained, section 21310's prohibition on carrying a concealed dirk or dagger is constitutional when applied to a defendant's conduct in public. (*Mitchell*, *supra*, 209 Cal.App.4th at pp. 1373-1379.) It is also clear that a statute may, consistent with the Second Amendment, prohibit a *felon's* possession of arms – firearms in particular – even in the home and even if used for self-defense. (See *People v. Flores*, *supra*, 169 Cal.App.4th at p. 575 [under *Heller*, the Second Amendment permits the government to proscribe the possession of a firearm by any felon, including nonviolent offenders]; *U.S. v. Rozier* (11th Cir. 2010) 598 F.3d 768, 771 [*Heller*'s language "suggests that statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment"]; *U.S. v. Barton* (3d Cir. 2011) 633 F.3d 168, 169-170, 174-175, disapproved on another ground by *Binderup v. Atty. Gen. of U.S. of America* (3d Cir. 2016) 836 F.3d 336, 349;[9] *U.S. v. Vongxay* (9th Cir. 2010) 594 F.3d 1111, 1117 ["[d]enying felons the right to bear arms is . . . consistent with the explicit purpose of the Second Amendment to maintain 'the security of a free State' "]; *U.S. v. Darrington* (5th Cir. 2003) 351 F.3d 632, 635 [pre-*Heller* case holding that felons are excluded "as a class from the Second Amendment's protection of 'the right of Americans generally to keep and bear their private arms as historically understood in this country' "].) "At its core, the Second Amendment protects the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home," and does not protect a felon's

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[9] *Binderup* disapproved *Barton* to the extent *Barton* held the passage of time or evidence of rehabilitation could restore the Second Amendment rights of persons who have committed serious crimes. (*Binderup*, *supra*, 836 F.3d at pp. 349-350.)

weapon possession. (*U.S. v. Marzzarella* (3d Cir. 2010) 614 F.3d 85, 92, fn. omitted.) Thus, the question here is whether section 21310's prohibition on carrying a concealed dirk or dagger violates the Second Amendment when applied to criminalize possession in one's own home.

Whether or not a non-felon could prevail on a such a Second Amendment claim[10] – a question we do not reach – Genel cannot, because he is a convicted felon and may be prohibited from having concealed arms in his home. *Heller* considered certain longstanding prohibitions on the possession of firearms, including those prohibiting felons from carrying firearms, as presumptively lawful. (*Heller*, *supra*, 554 U.S. at pp. 626-627.) *Heller's* instruction to the District of Columbia to permit Heller to register his gun and to issue him a license was made expressly contingent upon a determination that Heller was not "disqualified from the exercise of Second Amendment rights." (*Id.* at p. 635; *U.S. v. Barton*, *supra*, 633 F.3d at p. 171.) Courts

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10 (See, e.g., *State v. Herrmann* (Wis.App. 2015) 873 N.W.2d 257, 261-262 [statute entirely prohibiting possession of a switchblade knife, as applied to defendant's in-home possession, violated Second Amendment where defendant had no prior convictions and was not using the knife for any offensive purpose; threat to public of a surprise attack from a person possessing a switchblade in his own residence for self-defense purposes was negligible, and the complete ban burdened defendant's right to bear arms]; *State v. Deciccio*, *supra*, 105 A.3d at pp. 171-172, 197, 203-204 [possession of a dirk knife in one's home is protected by the Second Amendment; as applied, statute categorically barring transport of dirk knives violated Second Amendment because it prohibited defendant from transporting knives in his weapons collection when moving from one residence to another, burdening his right and effectively banning his in-home possession].)

have repeatedly held that the Second Amendment "affords no protection" for the possession of weapons by a felon. (*U.S. v. Marzzarella*, *supra*, 614 F.3d at p. 92, citing *Heller* at p. 626.) "[A]lthough the Second Amendment protects the individual right to possess firearms for defense of hearth and home, *Heller* suggests, and many [federal courts] have held, a felony conviction disqualifies an individual from asserting that interest. [Citations.] This is so, even if a felon arguably possesses just as strong an interest in defending himself and his home as any law-abiding individual." (*U.S. v. Marzzarella*, *supra*, 614 F.3d at p. 92; *U.S. v. Barton*, *supra*, 633 F.3d at pp. 174-175 [" 'a felony conviction disqualifies an individual from asserting' his fundamental right to 'defense of hearth and home' "]; *U.S. v. Vongxay*, *supra*, 594 F.3d at pp. 1115, 1118 ["felons are categorically different from the individuals who have a fundamental right to bear arms"; because he was a felon, defendant was "explicitly excluded from *Heller*'s holding"]; *People v. Kim* (2011) 193 Cal.App.4th 836, 847 ["a convicted felon has no constitutional right to bear arms"].)

As explained in *U.S. v. Rozier*, *supra*, 598 F.3d 768: "When issuing its ruling and settling the actual case and controversy at issue, *Heller* stated, '[a]ssuming that Heller *is not disqualified* from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.' [Citation.] This indicates that the first question to be asked is not whether the handgun is possessed for self-defense or whether it is contained within one's home, rather the initial question is whether one is *qualified* to possess a firearm. In Rozier's case, the most relevant modifier, as to the question of qualification, is 'felon.' [¶] . . . Rozier's Second

Amendment right to bear arms is not weighed in the same manner as that of a law-abiding citizen, such as the appellant in *Heller*. While felons do not forfeit their constitutional rights upon being convicted, their status as felons substantially affects the level of protection those rights are accorded." (*Id*. at pp. 770-771.) Because of his status as a felon, the fact Rozier may have possessed a handgun in his home for purposes of self-defense was "irrelevant." (*Id.* at p. 771.)

The same is true here. Because the prohibition on Genel, a felon, possessing a concealed dirk or dagger falls within *Heller's* " 'presumptively lawful' " category, it is "immune from means-end scrutiny." (*People v. Delacy*, *supra*, 192 Cal.App.4th at pp. 1491-1492 [*Heller* did not intend to "open felon-in-possession prohibitions and similar categorical weapons possession bans to constitutional means-end scrutiny"].) Put differently, his as-applied challenge fails because application of the law has not deprived him of a protected right; as a felon, he has no protected Second Amendment right to bear concealed arms, even in his residence. (See *Mitchell*, *supra*, 209 Cal.App.4th at p. 1378 [setting forth standard for evaluation of as-applied claim].)

Genel contends, cursorily and without analysis, that *Heller*'s conclusion a felon can constitutionally be prohibited from possessing a weapon applies "only to firearms," because the court "said nothing about other weapons." We are not convinced. The Second Amendment refers to arms, not just firearms, and nothing in *Heller* suggests the court's analysis is as constricted as Genel proposes. (See Kopel et al., *supra, Knives and the Second Amendment*, 47 U.Mich. J.L. Reform at p. 191 ["the Second Amendment is for 'arms,' not just for 'firearms' "].) *Heller* explained that the right secured by the Second Amendment "was

not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. [Citations.] For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." (*Heller*, *supra*, 554 U.S. at p. 626.) The court's language was not limited to guns, but encompassed "weapons"; thus, if the knives here were "arms," *Heller*'s analysis applies. (Of course, if the knives were not "arms" within the meaning of the Second Amendment, the Second Amendment would not apply in the first instance, defeating Genel's claim.)

Even assuming for the sake of argument that Genel is not disqualified from raising his Second Amendment claim by his status as a felon, section 21310 is constitutional as applied to him. Because section 21310 does not entirely prohibit possession of a dirk or dagger, we apply intermediate scrutiny. (*Mitchell*, *supra*, 209 Cal.App.4th at pp. 1374, 1378.) Under that test, the statute must serve an important governmental interest, and there must be a "reasonable fit" between it and the governmental objective. (*Id.* at p. 1374.) As noted, section 21310's purpose is to prevent surprise knife attacks. (*Id.* at p. 1371.) It is undisputed that Genel was a parolee. Parolees are generally subject to unannounced searches at any time. If a parolee has a concealed weapon on his or her person when such an unannounced visit occurs, there is a danger that just such a surprise attack could transpire. As *Mitchell* explained, one who carries a knife may intend to use it only for lawful purposes, but if an unsettling event occurs without warning, persons who " 'are startled or upset may overreact, lose their tempers, or make poor judgments under stress. Even when they start out with good intentions,

persons who carry items capable of inflicting death or great bodily injury may use them in ways and in situations that are not justified—with grave results.' " (*Mitchell*, at p. 1375.) Section 21310 protects against this danger by ensuring parolees are not armed with concealed knives. Moreover, the statute does not prohibit a parolee from possessing a knife in his or her own home as long as it is not concealed on his or her person. Thus, there is a reasonable fit between the statute and the governmental objective of protecting parole authorities who monitor parolees' behavior. The statute therefore "survive s constitutional scrutiny because it is reasonably necessary to serve the important governmental interest of diminishing the risk of a surprise attack that accompanies concealed carrying of a dirk or dagger." (*Mitchell*, at p. 1378.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DHANIDINA, J.

WE CONCUR:

EDMON, P. J.

LAVIN, J.