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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, *Petitioner,* v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, *Respondent.* BRYAN MAURICE JONES, *Real Party in Interest.*	Case No. S255826 Appeal from the Court of Appeal, Fourth District, Division One No. D074028 San Diego County Superior Court, Case No. CR136371, Honorable Joan P. Weber (Related to Habeas Corpus Case No. S217284 and Automatic Appeal Case No. S042346 [closed])

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF REAL PARTY IN INTEREST

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INTERESTS OF AMICUS CURIAE

Amicus curiae the NAACP Legal Defense & Educational Fund, Inc. (hereinafter "LDF") respectfully submits this brief in support of Real Party in Interest Bryan Maurice Jones. Founded in 1940 under the leadership of Thurgood Marshall, LDF is a non-profit law organization that focuses on advancing civil rights in education, economic justice, political participation, and criminal justice. LDF has longstanding interests in ensuring that any death sentence meets constitutional requirements and that criminal defendants are tried before a jury selected free from racial discrimination.

LDF has litigated or filed amicus briefs in numerous cases advancing and protecting these rights, including *Furman v. Georgia*, 408 U.S. 238 (1972); *Coker v. Georgia*, 433 U.S. 584 (1977); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Banks v. Dretke*, 540 U.S. 668 (2004); *Roper v. Simmons*, 543 U.S. 551 (2005); and *Buck v. Davis*, 580 U.S. __, 137 S. Ct. 759 (2017). LDF has served as counsel of record in cases challenging racial bias in the jury system, including *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972), and *Ham v. South Carolina*, 409 U.S. 524 (1973), as well as amicus in *Peña-Rodriguez v. Colorado*, 580 U.S. __, 137 S. Ct. 855 (2017). LDF has also appeared as amicus curiae in cases involving the use of race in peremptory challenges, including *Johnson v. California*, 543 U.S. 499 (2005), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Georgia v. McCollum*, 505 U.S. 42 (1992), *Edmonson v. Leesville Concrete Co., Inc.*,

500 U.S. 614 (1991), and *Batson v. Kentucky*, 476 U.S. 79 (1986) (overruling *Swain*).

The circumstances of Bryan Maurice Jones' capital trial directly implicate racial discrimination in jury selection. LDF is committed to eradicating such discrimination from our criminal justice system.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

"More than a century ago, the [United States Supreme] Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." *Batson v. Kentucky*, 476 U.S. 79, 85 (1986) (citing *Strauder v. West Virginia*, 100 U.S. 303 (1879)). Since then, the U.S. Supreme Court has made "unceasing efforts to eradicate racial discrimination" from jury selection. *Id.*; *see also Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 871 (2017) (reaffirming that our country needs to "continue to make strides to overcome race-based discrimination").

However, the United States Supreme Court has also long recognized that peremptory challenges "permit[] those to discriminate who are of a mind to discriminate." *Batson*, 476 U.S. at 96 (citations and internal quotation

[1] Pursuant to California Rule of Court 8.200(c)(3), amicus LDF states that no party's counsel authored this brief either in whole or in part, and further, that no party or party's counsel, or person or entity other than amicus, amicus's members, and their counsel, contributed money intended to fund preparing or submitting this brief.

marks omitted). Courts must be especially vigilant in eradicating such discrimination because "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Id.* at 87. It denies excluded veniremembers equal opportunity to participate in jury service, relegating them to second-class citizenship. The U.S. Supreme Court has stressed this point: When "prosecutors draw[] racial lines in picking juries," they establish "'state-sponsored group stereotypes rooted in, and reflective of, historical prejudice[.]'" *Miller El v. Dretke*, 545 U.S. 231, 237–38 (2005) (citation omitted).

"Nor is the harm confined to [citizens of color]." *Id.* at 238. Discrimination in jury selection "casts doubt on the integrity of the judicial process . . . and places the fairness of a criminal proceeding in doubt." *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (citation and internal quotation marks omitted). Excluding jurors because of their race "not only violates our Constitution . . . but is at war with our basic concepts of a democratic society and a representative government." *Smith v. Texas*, 311 U.S. 128, 130 (1940).

This Court has made equally clear that the California Constitution does not tolerate discrimination in jury selection. *See, e.g., People v. Harris*, 57 Cal. 4th 804, 833 (2013); *People v. Wheeler*, 22 Cal. 3d 258, 276–77 (1978).

Nevertheless, for as long as the U.S. Supreme Court and this Court have denounced racial discrimination in jury selection, it has persisted. *See Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 268–69 (2005) (Breyer, J., concurring) (citing eight studies and anecdotal reports detailing widespread race discrimination in jury selection). *Batson* invited courts to scrutinize discrimination more closely by requiring prosecutors to provide race-neutral reasons for striking prospective jurors when the circumstances of the particular case establish a prima facie case of discrimination. But "*Batson*'s individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give." *Miller-El II*, 545 U.S. at 240. Capitalizing on this weakness, some prosecutors are trained on purported race-neutral reasons that may allow them to overcome a *Batson* challenge.

Resolving questions of racial discrimination in jury selection is a difficult task. *Batson* presents the rare occasion where the prosecutor's state of mind is the question before the court. How do courts discern the prosecutor's state of mind and intent? The U.S. Supreme Court has answered this question: by considering all relevant circumstances that may have bearing on the actual reasons for the prosecutor's strikes. *See Batson*, 476 U.S. at 96 (instructing trial courts to "consider all relevant circumstances" in assessing whether there has been a *Batson* violation); *see also Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016) ("[I]n considering a *Batson*

objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.") (citation and internal quotation marks omitted).

Thus, at the third and final step of the *Batson* inquiry, a court must critically examine the prosecution's race-neutral proffered reasons in light of all evidence bearing on it to discern the actual reasons for the peremptory strikes. Here, the prosecutor proffered race-neutral reasons for his strikes. His jury notes are needed to shed light on the genuineness of his proffered reasons and whether the prosecutor was motivated by racial discrimination in striking Black veniremembers from Mr. Jones' trial. For these reasons, the respondent court properly exercised its discretion to grant Mr. Jones discovery of the prosecutor's jury selection notes.

FACTS AND PROCEDURAL HISTORY

After this Court affirmed Mr. Jones' conviction in 2013, the instant habeas proceedings ensued. As relevant here, Mr. Jones asserts a claim of ineffective assistance of trial counsel as a result of trial counsel's failure to raise a *Batson-Wheeler* objection notwithstanding the prosecutor's use of peremptory strikes in a manner indicating race bias.

Habeas counsel requested post-conviction discovery of the prosecutor's jury selection notes in aid of Mr. Jones' habeas petition. The Superior Court of San Diego County granted the motion in April 2018, following a hearing and over the State's objection. The court found the

prosecutor's jury selection notes "can be very enlightening as to whether there was racial basis for exclusion of certain jurors from the venire" *See* Jones Answer Br. on the Merits, at 16, 34 [hereinafter Jones Answer Br.].

The State's petition for writ of mandate was twice denied by the Court of Appeal. This Court ultimately granted the State's petition for review regarding the discoverability of jury selection notes when sought in post-conviction proceedings.

ARGUMENT

I. The Breadth and Severity of the Harms Caused by Discrimination in Jury Selection Should Be Considered When Deciding the Scope of *Batson-Wheeler* Discovery.

For 140 years, the U.S. Supreme Court has held that the Fourteenth Amendment "prohibit[s] the exclusion of jurors on the basis of race." *Peña-Rodriguez*, 137 S. Ct. at 867 (citing *Strauder*, 100 U.S. at 305–309). Discriminatory peremptory strikes cause harms with wide-ranging impact, including to the defendant, the struck veniremember, citizens of color more generally, and the integrity of the criminal justice system itself. *See, e.g., Miller-El II*, 545 U.S. at 237–8 (noting harm to "racial minorities" and "' . . . the parties, the jury'" and " . . . the very integrity of the courts . . .") (citation omitted).

The nature of these harms is important here because the Court must decide how to balance the prosecutor's stated interest in work product protection against the defendant's interest in a fair trial, the juror's interest in

a fair opportunity to participate in jury service, citizens of color's interest in freedom from "state-sponsored group stereotypes[,]" and society's confidence in the integrity of our courts. *Id.* at 238.

A. Racially Discriminatory Peremptory Strikes Harm Criminal Defendants.

The U.S. Supreme Court has held that a "State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." *Batson*, 476 U.S. at 85 (citing *Strauder*, 100 U.S. 303); *see also Flowers v. Mississippi*, 139 S. Ct. 2228, 2251 (2019).

Specifically, the jury system was designed to "safeguard[] a person accused of crime against the arbitrary exercise of power by prosecutor or judge." *Batson*, 476 U.S. at 86. In order to protect a criminal defendant from State oppression a jury must be "indifferently chosen[.]" *Id.* (quoting 4 W. Blackstone, *Commentaries* 350 (Cooley ed. 1899)). While a defendant is not entitled to a jury with a specific racial makeup, under the Fourteenth Amendment he is entitled to a jury drawn in a nondiscriminatory manner. *Batson*, 476 U.S. at 85–86. By denying to the defendant a representative jury, discriminatory peremptory strikes deprive him of the protection that a trial by jury is intended to secure.

This Court has similarly recognized that a representative and impartial jury is "a vital and effective safeguard of the liberties of California citizens."

People v. Wheeler, 22 Cal. 3d 258, 272 (1978). For this reason, this Court has held that discriminatory peremptory strikes violate a defendant's right to a trial by a jury drawn from a representative cross section of the community. *Id.* at 276–77. This Court has continued to uphold this principle. *See People v. Gutierrez*, 2 Cal. 5th 1150, 1172 (2017) (holding exclusion of Hispanic jurors was a fair cross-section violation pursuant to *Wheeler*); *People v. Silva*, 25 Cal. 4th 345, 386 (2001) (same).

Studies confirm that diverse juries are more effective safeguards from arbitrary deprivations of life and liberty by the State than homogeneous juries. Racial heterogeneity among jurors correlates with greater factual accuracy of information shared during deliberation, and an increased willingness among jurors to correct inaccuracies when presented with relevant information.[2] Diverse juries also correlate with an increase in "concerns about avoiding prejudice" among white jurors.[3]

As the jury is the primary safeguard for defendants, courts must vigilantly ensure that jury selection is free of discrimination or risk the right to an impartial jury being "reduced to a hollow form of words[.]" *Wheeler,* 22 Cal. 3d at 758.

[2] *See* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psychol. 597, 608 (2006).
[3] *Id.* at 607–08.

B. Racially Discriminatory Peremptory Strikes Harm Prospective Jurors and Citizens of Color More Generally.

The U.S. Supreme Court has recognized that the harm of a prosecutor's racially discriminatory strike is not only to the defendant but also to the excluded veniremember. *Powers*, 499 U.S. at 409. While an individual juror does not have the right to be seated on any particular jury, he does have the constitutional right to not be discriminated against. *Id.*

The racially discriminatory exclusion of qualified prospective jurors denies veniremembers the equal opportunity to participate in the civic duty of jury service. *See id.* (holding that the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude jurors based on their race, "a practice that forecloses a significant opportunity to participate in civic life"). Aside from voting, for most citizens "jury duty is their most significant opportunity to participate in the democratic process." *Powers*, 499 U.S. at 407. Just as the State cannot invidiously discriminate in withholding equal access to the franchise, the State cannot extend the opportunity of jury service to some of its citizens but deny it to others based on their race. *Id.* at 408. Excluding Black citizens from jury service because of their race relegates them to second-class citizenship. It "is practically a brand upon them, . . . an assertion of their inferiority . . . ." *Id.* at 408 (quoting *Strauder*, 100 U.S. at 308). The exclusion of Black veniremembers from jury service is therefore a "primary example of the evil the Fourteenth

Amendment was designed to cure." *Batson,* 476 U.S. at 85; *see also Peña-Rodriguez*, 137 S. Ct. at 867 (holding central purpose of Fourteenth Amendment was to eliminate racial discrimination by state officials).

Racially discriminatory strikes of Black jurors also harm Black citizens and other citizens of color generally. *See Miller-El II*, 545 U.S. at 237–38. Excluding jurors on the basis of race perpetuates invidious stereotypes, including that Black people are less likely to weigh evidence fairly, be open-minded to the state's case, or that they "lack the 'intelligence, experience, or moral integrity'" to do so. *Batson,* 476 U.S. at 104–05 (quoting *Neal v. Delaware*, 103 U.S. 370, 394 (1881)). This form of discrimination is particularly malevolent because a "person's race simply is unrelated to his fitness as a juror." *Batson*, 476 U.S. at 87 (citation and internal quotation marks omitted); *see also Powers,* 499 U.S. at 410 ("We may not accept as a defense to racial discrimination the very stereotype the law condemns."). By lending the State's imprimatur to "group stereotypes rooted in, and reflective of, historical prejudice," discriminatory strikes legitimize baseless racial stereotypes. *Miller-El II*, 545 U.S. at 237–38, (quoting *J.E.B. v. Alabama ex rel T.B.,* 511 U.S. 127, 128).

If the actual reasons for a prosecutor's strikes are not fully investigated, jury selection runs the risk of enabling stereotypes and racial prejudice to the detriment of jurors and citizens of color alike.

C. Racially Discriminatory Peremptory Strikes Undermine Public Confidence in the Criminal Justice System.

Racial discrimination in jury selection also "places the fairness of a criminal proceeding in doubt." *Powers*, 499 U.S. at 411. It not only casts doubt on the outcome of the trial in which jurors were discriminatorily excluded, but also undermines public confidence in the fairness of the criminal justice system as a whole. *Batson*, 476 U.S. at 87; *accord People v. Johnson*, 8 Cal. 5th 475, 528, (2019) (Liu, J., dissenting).

When courts allow racial discrimination to infect a trial, the integrity of the legal system and the "democratic ideal reflected in the processes of our courts" is corroded. *Ballard v. U.S.*, 329 U.S 187, 195 (1946). An unconstitutionally empaneled jury is no longer seen as a check on the exercise of a State's power. *See Peña-Rodriguez*, 137 S. Ct. at 868 ("Permitting racial prejudice in the jury system damages 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'") (quoting *Powers*, 499 U.S. at 411). In sum, "the very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality,' and 'undermines public confidence in adjudication.'" *Miller-El II*, 545 U.S. at 238 (citation omitted).

* * *

Despite the aforementioned harms, this Court has not found a *Batson* error regarding the removal of a Black veniremember in over 30 years.

People v. Johnson, (2019) 8 Cal. 5th 475, 528 (Liu, J., dissent); *cf. People v. Snow*, 44 Cal. 3d 216, 219 (1987) (last finding of *Wheeler* error involving a Black venireperson). However, this is not because racial discrimination in jury selection has been eradicated.

Rather, as discussed further below, the inability to find that any Black veniremembers are unconstitutionally excluded is likely attributable to the inherent difficulties of discerning a prosecutor's state of mind. Defendants are faced with limited information, while prosecutors are positioned as the sole witness for the reasons underlying a strike. For this reason, "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons." *Batson*, 476 U.S. at 105–06 (Marshall, J., concurring). This informational asymmetry enables prosecutors to continue to conceal their actual reasons with impunity.

To prevent the continuing harm discussed above, courts must search out discrimination using all relevant information and by considering "all relevant circumstances," *see Miller-El II*, 545 U.S. at 232, including a prosecutor's contemporaneous jury notes. . By contrast, declining to consider all evidence necessary to determine whether race discrimination infected jury selection would send the message that the justice system "condones violations of the United States Constitution within the very institution entrusted with its enforcement[.]" *Powers*, 499 U.S. at 412; *see also Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 628 (1991) ("[T]he

injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself.").

II. *Batson* is Circumvented When Prosecutors Are Permitted to Use Prong Two of the Framework to Mask Discriminatory Strikes with Impunity.

By modifying the burden-of-proof calculus, the *Batson* Court sought to hold prosecutors to account when a defendant made a charge of discrimination in jury selection. Under the previous framework set forth in *Swain v. Alabama*, a Defendant was required to "show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time." 380 U.S. 202, 227 (1965). Recognizing the near-impossibility of this burden, the *Batson* Court overruled *Swain*, setting forth the now-familiar three-prong framework. No sooner than the Court announced the framework, however, was *Batson*'s underlying premise challenged.

In his *Batson* concurrence, Justice Thurgood Marshall foreshadowed that the "decision today will not end the racial discrimination that peremptories inject into the jury-selection process." *Batson*, 479 U.S. at 102. Just last Term, the U.S. Supreme Court recognized that, despite *Batson*, "critical problems persisted" in jury selection. *Flowers*, 139 S. Ct. at 2239. Prosecutors continue to successfully exclude Black veniremembers from juries, often by masking racially discriminatory peremptory strikes with facially race-neutral justifications.

Empirical studies and scholarly articles have outlined the ongoing, pervasive, discriminatory uses of peremptory strikes post-*Batson*, and the widespread (and often successful) use of facially race-neutral justifications for racially discriminatory peremptory strikes. For example, one study noted that "startlingly common" justifications provided by prosecutors for excluding Black jurors included that the jurors supposedly had "low intelligence," "lack of education" or "affiliation with an historically black university."[4] Another study noted that prosecutors routinely proffer justifications for striking prospective Black jurors rooted in socioeconomic indicators that are " . . . still intertwined with structural racism . . . ."[5]

Some prosecutors have even been trained on how to conceal discriminatory peremptory strikes. For example, just a few years ago, John Zimmermann, then a prosecutor in Tennessee, "openly advocated to his peers that...jury selection could (and apparently should) be conducted based on

[4] Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* 4, 17 (2010).

[5] Whitney DeCamp & Elise DeCamp, *It's Still about Race: Peremptory Challenge Use on Black Prospective Jurors,* 57 J. Res. Crime & Delinq. 3, 4 (2019) ("prosecutors possess a facility for offering race-neutral justifications tied to socioeconomic indicators (e.g., occupation, education) —which are still intertwined with structural racism—that judges feel compelled to accept"); see also Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U. Mich. J. L. Reform 229, 238–265 (1993) (listing various facially neutral peremptory justifications—including age, occupation, relationship status, and others—that courts have found to be pretexts for discrimination).

racial motivations/stereotyping" during a CLE presentation.[6] As another example, Pennsylvania Assistant District Attorney Jack McMahon prepared a training video for new prosecutors instructing them to remove Black prospective jurors from the venire.[7] McMahon acknowledged that such race-based strikes ran afoul of *Batson* but offered ways to conceal discriminatory strikes, encouraging prosecutors to "question [Black jurors] at length" and to "mark something down that you can articulate later if something happens . . . ." *Id.*

More recently, a group of North Carolina district attorneys presented statewide training that provided a laundry list of justifications for prosecutors to rely on when striking Black jurors. *See State v. Golphin*, No. 97 CRS 47314–15, slip op. (N.C. Super. Ct. Dec. 13, 2012). Conference training materials included a one-page handout titled "*Batson* Justifications: Articulating Juror Negatives." *Id.* at 73. The document included a laundry

[6] Abu Ali Abdur'Rahman Response in Opposition to State's Motion for Expedited Execution Dates and Reasons Why No Execution Date Should Be Set at 19–20, *Tennessee v. Abu Ali Abdur'Rahman*, No. M1988-00026-SC-DDT-DD (Tenn. Mar. 1, 2018), https://www.courthousenews.com/wp-content/uploads/2018/03/InjectionsTN.pdf (last accessed March 5, 2020 at 12:00p); *see also id.* at 20 ("If in today's race-conscious world, when prosecutors are under public scrutiny, Mr. Zimmermann was willing to describe and advocate for racist practices in a CLE presentation to fellow prosecutors, then it is fair to infer that Mr. Zimmermann was willing to use race in jury selection at the time of Mr. Abdur'Rahman's trial.").

[7] Jeffrey Bellin and Junichi P. Semitsu, *Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative*, 96 Cornell Law Rev. 1075, 1079 (2011).

list of race neutral justifications a prosecutor might offer in response to a *Batson* challenge. *Id.* The list is representative of a widespread practice among prosecutors: offer a series of race-neutral justifications in response to a *Batson* challenge to pad up a *Batson* defense. The U.S. Supreme Court has found this tactic suspicious. *Foster*, 136 S. Ct. at 1748.

Here, Mr. Jones' prosecutor employed this suspect practice, giving a laundry list of reasons for striking Black veniremembers. *People v. Jones*, 57 Cal. 4th 899, 917 (Cal. 2013). For example, prospective juror Y.J. was ranked low because of their occupation, marital status, and views on police conduct, among other reasons. *Id.* at 917–18. For Mr. Jones to have a fair opportunity to rebut these facially neutral reasons at *Batson* step three, he will need all evidence bearing on the prosecutor's state of mind in striking Y.J., including the prosecutor's jury notes. *See, e.g.*, *Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003) (*Miller-El I*) ("The supposition that race was a factor could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards."). Otherwise step three of *Batson* becomes meaningless. *See Miller-El II*, 545 U.S. at 240.

Whether learned or not, prosecutors are exploiting *Batson*'s weaknesses by satisfying the low prong two threshold with facially neutral reasons. *Batson*'s step three, which requires courts to assess whether purposeful discrimination was the true reason for the strike, is of the utmost

significance. As discussed below, courts must use all the tools necessary to smoke out discriminatory peremptory strikes.

III. Courts are Empowered to Consider All Relevant Evidence in Assessing Peremptory Strikes.

In a series of cases over the last 15 years, the U.S. Supreme Court has repeatedly reaffirmed that prosecutors' facially neutral reasons for striking prospective Black jurors must be carefully scrutinized in light of all of the evidence to determine whether they are in fact pretexts for discrimination. *See Flowers*, 139 S. Ct. at 2250–51 (holding proffered reasons for striking prospective Black juror were pretextual when similarly situated white jurors were not struck); *Foster*, 136 S. Ct. at 1751–52 (strike of prospective Black juror whose son was same age as defendant was pretextual); *Snyder v. Louisiana*, 552 U.S. 472 (2008) (striking a juror purportedly because he had student-teaching obligations was pretext for race discrimination); *Miller-El II*, 545 U.S. at 245–46 (excluding prospective Black juror for the stated reason that his brother was convicted of a crime was in fact pretext for discrimination).

To take this precedent seriously, courts must allow discovery of *all* relevant evidence. That is the only way to determine whether a stated justification for striking a prospective Black juror is pretextual. Allowing production of prosecutors' jury notes is therefore a necessary step in fulfilling *Batson*'s goal of eliminating racial discrimination.

A. Prosecutor's Jury Notes Should be Considered in Discerning Actual Reasons for Peremptory Strikes.

Batson objections present a rare situation in which the court is tasked with assessing the credibility of the prosecutor's stated justifications for striking prospective jurors, determining their plausibility, and discerning the actual reasons for the strikes "in light of all evidence with a bearing on it." *Miller-El II*, 545 U.S. at 252. The prosecutor's jury notes are needed to shed light on the genuineness of a prosecutor's proffered reasons and whether the prosecutors unconstitutionally struck Black veniremembers. *See Johnson v. California*, 545 U.S. 162, 172 (2005) ("The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process.").

Importantly, courts have been assisted in determining the "actual answers" for prosecutors' peremptory strikes by reviewing the notes they took during jury selection. *See id.* at 172. In *Foster*, 136 S. Ct. at 1744, for example, the U.S. Supreme Court determined that notes from the prosecution's files were key evidence of the prosecutor's intent; the Court relied on those notes to determine that the prosecutor's proffered race-neutral reasons were pretexts for discrimination. *Id.* at 1749–50 (noting prosecutor's assertion he considered allowing one Black prospective juror to serve was belied by the prosecution's file). Even though there were questions in *Foster*

about the exact provenance of the notes, the Court refused "the State's invitation to blind [itself] to [the notes'] existence." *Id.* at 1748.

Foster did not address the specific question here, because the Court did not consider a work-product objection to the production of a prosecutor's notes. But the Court's recognition of the importance of those notes in vindicating a *Batson* claim, and its repeated emphasis that courts must consider all relevant evidence at *Batson* stage three, *see, e.g.*, *Miller-El*, 545 U.S. at 232, are highly instructive.

Indeed, lower courts have ordered the production of prosecutor's notes at step three of *Batson*. In Georgia, where *Foster* originated, a court has recognized that *Batson* trumps work product protection and ordered the production of prosecutor's jury notes notwithstanding the State's invocation of the work product doctrine. *See* Order Regarding Rulings Made at the January 31, 2018 Hearing, *State v. Gates*, No. SU-75-CR-38335 (Ga. Super. Ct., Muscogee County. Feb. 8, 2018). Numerous other courts have likewise ordered disclosure of prosecutors' jury selection notes in connection with an actual or anticipated *Batson* claim. *See*, *e.g.*, *Holloway v. Horn*, 355 F.3d 707, 723 n.11 (3d Cir. 2004); *In re Beard*, 383 Fed. App'x 136, 137 (3d Cir. 2010); *Johnson v. Finn*, Nos. CIV S-03-2063 RBB JFM P, CIV S-04-2208 RBB JFM P, 2007 WL 3232253, at *3–4 (E.D. Cal. Oct. 31, 2007); *Simmons v. Simpson*, No. 3:07-CV-313-S, 2009 WL 4927679, at *22–23 (W.D. Ky.

Feb. 12, 2009); *State v. Peterson*, No. 116,931, 2018 WL 4840468 (Kan. Ct. App. Oct. 5, 2018).

By contrast, allowing prosecutors to proffer race-neutral reasons while withholding their contemporaneous jury notes because of an evidentiary rule would enshrine *Batson* as a "toothless tiger[.]" *State v. Holmes*, 221 A.3d 407, 429 (Conn. 2019). It signals acceptance of state-sanctioned unconstitutional race discrimination as long as it is only written, and not spoken.

B. Granting Discovery of a Prosecutor's Jury Notes Does Not Offend the Work Product Doctrine.

Granting Mr. Jones access to the relevant prosecutor jury notes in this posture—after the State has proffered race neutral reasons for his strikes—is consistent with the aims of both the work-product doctrine and *Batson*. The State's argument to the contrary is without merit. *See* Jones Answer Brief, at 38–59.

The work product doctrine provides qualified protection for documents and information prepared in anticipation of litigation. This means work product protections extend to documents and information that contain a lawyer's opinions and legal impressions about litigation strategy. *See* Cal. Code Civ. Proc. Sec. 2018.030(a) (stating work product protection applies to a writing "that reflects an attorney's impressions, conclusions, opinions, or legal research or theories . . .").

Therefore, any prosecutor's jury selection notes that do not reflect opinions or mental impressions related to the theory of the underlying case are not entitled to the same bar against discoverability that protects core work product. And jury selection notes generally do not reveal the prosecutor's thoughts or strategy about the underlying case necessitating work product protection. *See Johnson v. Finn*, 2007 WL 3232253, at *2–*4 (E.D. Cal. Oct. 31, 2007) (granting petitioner's motion for prosecutor's jury notes because those notes were unlikely to reveal prosecutor's strategy).

Furthermore, if the prosecutor's jury notes support the stated reasons for the strikes, the work product doctrine, even if applicable, is no longer offering any protection as the strike notes will reveal "no additional strategy[.]" *State v. Peterson*, No. 116,931, 2018 WL 4840468, at *7 (Kan. Ct. App. Oct. 5, 2018). If, however, the notes are inconsistent with prosecutor's stated reasons, they stand as powerful evidence of pretext. Given the fundamental equal protection rights at issue, the work product doctrine should not be used to protect unconstitutionally discriminatory trial strategy. *See id.*

Simply put, work product doctrine must yield when, as here, it would result in withholding of evidence necessary for a petitioner to vindicate his constitutional rights. *See Mincey v. Head*, 206 F.3d 1106, 1133 n.63 (citing 2 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 254, at 81 & n.60 (2d ed. 1982)) (noting that Constitutional claims

"override[] court-made rules of procedure" such as work-product privilege). It would be fundamentally unfair, and inconsistent with Mr. Jones' rights under the Sixth and Fourteenth Amendments, for the State to proffer its reasons for striking Black veniremembers while withholding key evidence that would allow Mr. Jones to test their credibility.

C. A Prosecutor's Race Is Not Probative to Whether Racial Discrimination Infected Jury Selection.

After Mr. Jones established a prima facie case that the prosecution had discriminatorily struck Black veniremembers in his trial, the court ordered the prosecutor to provide his justification for the strikes. Curiously, the white prosecutor started his explanation by first noting that a colleague who assisted him in scoring prospective jurors was a "two-time minority." Jones Answer Br. at 16. The prosecutor did not reference his colleague by name.

It appears the prosecutor noted his colleague was a "two-time minority" in order to bolster his assertion that the laundry list of justifications he was about to proffer was race-neutral. Specifically, he stated: "And I might indicate that assisting me in the evaluation of the questionnaire was one person who is a two-time minority; female from a minority racial group." Jones Answer Br. at 16.

Aside from being tasteless, referring to a colleague as a "two-time minority" is wholly irrelevant to the *Batson* inquiry. Whether or not a person of color (or a person with any protected characteristic) aided the prosecutor

in evaluating a questionnaire does not shield that prosecutor from a finding that he violated *Batson*. Even putting aside the fact that we do not know whether the prosecutor's "two-time minority" colleague agreed with the lead prosecutor's assessment of all of the jurors, the U.S. Supreme Court has unequivocally rejected the prosecutor's premise that a "minority" will not "discriminate against other members of their group." *See Castaneda v. Partida*, 430 U.S. 482, 499 (1977) ("Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group."); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) ("[I]n the . . . context of racial discrimination in the workplace we have rejected any conclusive presumption that an employer will not discriminate against members of his own race.").

The prosecutor's belief that a colleague who is a minority could not discriminatorily strike jurors reflects a misunderstanding of discrimination in the jury selection process. Such discrimination is not limited to pure racial animus; it encompasses racial stereotypes and assumptions.

Prosecutors are prohibited from striking a Black veniremember based on the assumption or belief that she would favor a Black defendant. *Flowers*, 139 S. Ct. at 2241; *see also Wheeler*, 22 Cal.3d at 281. As the Court in *Flowers* recognized, the guarantee of equal protection would be meaningless were the Court to approve exclusion of jurors based on stereotypes or

assumptions arising from the juror's race. 139 S. Ct. at 2241. For this reason, courts have deemed it "especially relevant" to the discrimination inquiry whether the defendant and the excused jurors are members of the same group and whether the victims are members of the group to which a majority of the remaining jurors belong. *People v. Reed*, 4 Cal. 5th 989, 999 (2018).

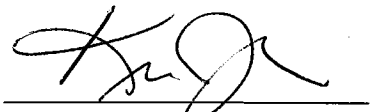
Yet, a prosecutor may harbor such racial stereotypes and assumptions about prospective jurors and try to capitalize on them no matter the prosecutor's racial identity. What is relevant to the peremptory strikes is evidence that sheds light on the prosecutor's state of mind and actual reasons for the strikes. Whether the prosecutor struck a Black veniremember because of pure racial animus, or because of the "assumption or belief that the black juror would favor a black defendant" (an assumption not limited to white prosecutors), the strike is unconstitutional. *Flowers*, 139 S. Ct. at 2241.

CONCLUSION

For these reasons, amicus curiae LDF respectfully urges this Court to affirm the Court of Appeal's denial of District Attorney's request for relief.

Dated: March 13, 2020

Respectfully submitted,



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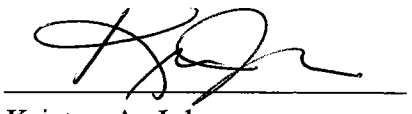
CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.204(c)(1), I certify that the foregoing BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF REAL PARTY IN INTEREST contains 5,622 words, not including the Table of Contents, Table of Authorities, this Certificate or the Certificate of Service, the caption page, or signature block.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF REAL PARTY IN INTEREST has been sent via certified delivery to the following parties, postmarked this 13th day of March 2020.

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