No. S119296

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. THOMAS LEE BATTLE, Defendant and Appellant.	(San Bernardino County Superior Court No. FVI012605)

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of San Bernardino

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DEATH PENALTY

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES

Page(s)

STATE CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

CONSTITUTION

STATE STATUTES

TABLE OF AUTHORITIES

Page(s)

STATE RULE

JURY INSTRUCTIONS

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INTRODUCTION

In this brief, appellant Thomas Lee Battle ("Battle") replies to contentions made by respondent ("the State") that necessitate an answer in order to present the issues fully to this Court. However, he does not reply to arguments that are adequately addressed in his opening brief. In particular, Battle does not present a reply on Argument VI, his challenges to the California death penalty statute, and Argument VII, his claim of cumulative prejudice resulting from errors at the penalty phase. The failure to address any particular argument, sub-argument or assertion made by the State, or to reiterate any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by Battle (see *People v.*

Hill (1992) 3 Cal.4th 959, 995, fn. 3), but reflects his view that the issue has been adequately presented and the positions of the parties are fully joined. The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief.[1]

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[1] All statutory references are to the Penal Code unless stated otherwise.

ARGUMENT

I.

THE TRIAL COURT ERRED IN FINDING NO PRIMA FACIE CASE OF RACIAL DISCRIMINATION WHERE THE PROSECUTOR PEREMPTORILY STRUCK AFRICAN-AMERICAN PROSPECTIVE JUROR J.B. AND SIX OF THE SEVEN AFRICAN-AMERICANS CALLED TO THE JURY BOX WERE EXCUSED

A. The Trial Court Applied The Wrong Standard

In his opening brief, Battle explains that the trial court applied the wrong legal standard in deciding his motion under *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). The trial court erroneously required a showing of "systematic exclusion" and evidence conclusively demonstrating racial motivation, instead of a mere inference of discrimination, at the prima facie stage. (AOB 63-68.) The State acknowledges that the trial court "invoked the term 'systematic exclusion,'" but contends it "did not articulate the standard it applied." (RB 14.) The State's argument is contradicted by the record. The trial court explicitly stated that to move "forward" beyond stage one, it would "ha[ve] to make a finding that there has been a systematic exclusion of a protective [sic] class." (5 RT 1128.) In case any ambiguity remained, the trial court immediately thereafter indicated that the "issue" it was deciding was "whether or not there's a systematic exclusion." (*Ibid.*) These statements were not idle references to an inapplicable legal term, but clear articulations of the legal issue the court believed it was required to address. The trial court plainly applied an incorrect legal standard. (*People v. Montiel* (1993) 5 Cal.4th 877, 907-908 [trial court's statement that it was "required to determine" whether there existed "systematic exclusion"

showed that it applied improper standard].)[2]

B. Remand Is The Appropriate Remedy

Battle sets forth why, under the facts of this case, this Court's customary remedy of reviewing the prima facie case de novo is insufficient to cure the trial court's explicit application of an incorrect legal standard. (AOB 68-79.) The State answers in a footnote. (RB 14, fn. 8; cf. *People v. Lucatero* (2008) 166 Cal.App.4th 1110, 1115, fn.1 [warning that "[a] footnote is not a proper place to raise an argument on appeal"].) The State contends that the basis for Battle's request for remand is a "general disagreement with this Court's practice" and is supported by "no compelling reason." (RB 14, fn.8.) To the contrary, Battle explains that his request for remand does *not* violate this Court's general practice, which is sufficient in the vast majority of *Batson/Wheeler* stage-one cases, where de novo analysis of undisputed statistical and demographic facts on a cold appellate record is appropriate and practical in the face of presumed trial court error. (AOB 74-76 & fns. 21, 22.)

In civil cases, it is commonplace to remand for redetermination of an issue reserved to the trial court when an appellate court finds the trial court applied the wrong standard or ignored evidence that it should have considered. (AOB 71; see also *Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 802 [collecting cases]; *In re Charlisse C.* (2008) 45 Cal.4th 145, 167 [collecting cases].) Remand is all the more appropriate here in

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[2] In any event, the State does not dispute that even setting aside the trial court's explicit application of the wrong legal standard, de novo review is required because the trial court presumably applied the incorrect legal standard later repudiated in *Johnson v. California* (2005) 545 U.S. 162. (See AOB 51.)

light of the fact that the trial court itself found this to be a "close" case. (5 RT 1130; *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 23 [remanding where "the District Court's application of these incorrect standards may well have influenced its ultimate conclusion, especially given that the court found this to be a 'close case'"].)

Remand for a *Batson* stage-one determination is a practice employed in both federal and state courts, including the United States Supreme Court. (AOB 72.) Battle asks no more than application of existing precedent to his case to cure the manifest defects in the trial court's determination. Contrary to the State's cursory claim (RB 14, fn. 8), stare decisis is not implicated.

C. The State's Claim That This Court Should Disregard Record Evidence Not Explicitly Argued By Trial Counsel Is Contrary To This Court's Precedent And Is Contradicted By The State's Own Arguments

This Court has long held that the reviewing Court "considers the entire record of voir dire" to determine whether a prima facie case is established under *Batson* and *Wheeler*. (*People v. Panah* (2005) 35 Cal.4th 395, 439.) The State challenges this view. It asserts that Battle presents "various new arguments and additional facts on appeal" (RB 22) and argues that no facts in the record or argument to be drawn from them should be considered by a reviewing court unless they were presented to the trial court at the hearing (RB 23). This very argument was considered and rejected over 20 years ago in *People v. Howard* (1992) 1 Cal.4th 1132 (*Howard*).

In *Howard,* this Court confronted a particularly bare-bones prima showing by defense counsel. Defense counsel relied solely on the fact that the prosecutor had challenged the only two black prospective jurors and "did not make any effort to set out the other relevant circumstances, such as the prospective jurors' individual characteristics, the nature of the

prosecutor's voir dire, or the prospective jurors' answers to questions." (*Howard, supra*, 1 Cal.4th at p. 1155.) The Court explained that, although the defense's presentation was "clearly inadequate, we have not limited our review in such cases solely to counsel's presentation at the time of the motion. This is because other circumstances might support the finding of a prima facie case even though a defendant's showing has been no more detailed than in the case before us." (*Ibid.*) Further, the Court underscored that a trial court cannot "blind itself to everything except defense counsel's presentation." (*Ibid.*; see also *People v. Neuman* (2009) 176 Cal.App.4th 571, 582 [attempt to "freeze[] the record at the time of the motion" and "ignore[] everything that happened thereafter. . . flies in the face of the rule that we examine the entire record."]; *People v. Trevino* (1997) 55 Cal.App.4th 396, 410 ["Despite defendant's failure to carry his burden under *Wheeler* to establish a prima facie case of purposeful discrimination, we must review the record to determine if there was any basis for his claim"].)

The rule articulated in *Howard* is particularly important for stage-one cases decided before the high court, in *Johnson v. California, supra*, 545 U.S. 162, overruled this Court's unduly stringent prima facie test. After all, the remedy for a trial court's use of an erroneous legal standard to judge a *Batson* claim is diligent, de novo review by the appellate court. If a trial court is not permitted to "blind itself" to factors unaddressed by trial counsel (*Howard, supra*, 1 Cal.4th at p. 1155), an appellate court attempting to cure legal error through de novo review cannot blind itself to evidence supporting an inference of discrimination simply because it was not highlighted at trial. This is particularly true where the trial court explicitly applied a legally incorrect standard to deny the defendant's claim.

The State contradicts its own proposed rule: it argues *against* a prima facie case by citing many facts not presented to the trial court at the time of the hearing. For instance, the State cites the seating of an African-American alternate juror. (RB 18-19 & fn.10.) Not only had this not occurred at the time of the motion, it did not occur until *after* the jury itself had been selected. The State's argument therefore contradicts cases upon which the State relies. (RB 18, citing *People v. Blacksher* (2011) 52 Cal.4th 769, 802 [no prima facie case where ultimate jury included African-Americans]; *People v. Clark* (2011) 52 Cal.4th 856, 906 [same].) The State's rule would require reviewing courts to ignore evidence routinely considered in *Batson/Wheeler* cases, e.g. the ultimate composition of the jury, acceptance of minority jurors by the prosecution, or comparative juror analysis, when this evidence was not presented (or even was impossible to present) to the trial court at the time of the ruling. Such a limitation is inconsistent with established law and should not be adopted by this Court.

D. Battle Established An Inference Of Racial Discrimination By The Prosecutor In His Peremptory Challenge Of J.B.

In his opening brief, Battle points to five factors supporting an inference of discrimination in the prosecutor's peremptory strike of Prospective Juror J.B.:

> (1) that the defendant and the stricken juror(s) were members of the same, identified minority group (African-American), and were similar only as to group membership, but were otherwise heterogeneous, while the victims and the majority of the remaining jurors were members of a different group (Caucasian); (2) that the prosecutor struck most of the members of the identified group and used a disproportionate number of his peremptory challenges against the identified group as well as against another minority group (Hispanics); (3) that the prosecutor engaged in disparate voir dire of the stricken juror at issue; (4) that the prosecutor appeared eager to

> allow one African-American prospective juror (J.K.) to be excused for hardship; and (5) that the prosecutor sought to stipulate to the excusal for cause of at least 50 percent (four of the eight) of the African-American jurors in the jury panel based on their questionnaires, despite the fact that these questionnaires did not necessarily support disqualification.

(AOB 80.) The State mistakenly attempts to minimize or simply ignore these factors.

1. The Demographic Composition of the Jury Supports an Inference of Discrimination, and Neither the Prosecutor's Delay in Striking African-American Jurors nor His Ultimate Acceptance of an African-American Alternate Undermines This Inference

The State cannot and does not challenge the fact that Battle, a black man, was tried and sentenced by an all-white jury for the murder of a white couple. The State concedes that in "some cases," the fact that an all-white jury sat in judgment of a black defendant "contributes" to an inference of discrimination. (RB 23; cf. AOB 81-82 [collecting cases holding that all-white or nearly all-white jury weighs strongly and even conclusively in support of an inference of discrimination]; see also *People v. Fuller* (1982) 136 Cal.App.3d 403, 419 [prima facie case established where three black jurors stricken and resultant jury was all-white].) However, the State claims that because defense counsel himself struck the final African-American juror (E.F.), Battle's reference to the indisputable racial composition of the jury is "misleading." (RB 24.) That defense counsel struck an African-American juror demonstrates only that defense counsel was not basing his decisions on racial stereotypes. It says nothing about the prosecutor or the evidence supporting an inference of discrimination. (*People v. Snow* (1987) 44 Cal.3d 216, 225 [the propriety of the prosecutor's peremptory challenges

must be determined without regard to the defendant's own challenges].)

Citing *People v. Blacksher*, *supra*, 52 Cal.4th 769 and *People v. Clark*, *supra*, 52 Cal.4th 856, the State asserts that two timing factors – that the prosecutor did not strike Prospective Jurors S.W. or J.B. "right away" and had not yet stricken Prospective Juror E.F. by the time defense counsel struck him – dispel any inference of discrimination. (RB 18.) The point in *Blacksher* was that the prosecutor had *accepted* six African-American jurors, who served on the jury, despite challenging two others. (*People v. Blacksher*, *supra*, 52 Cal.4th 769 at p. 802.) The jury that convicted and sentenced Battle to death had no African-Americans. In *People v. Clark* (2011) 52 Cal.4th 856, the Court also relied on the fact that an African-American served on the jury, in addition to the prosecutor's delay in striking African-American jurors, (*id.* at p. 906), so it too is distinguishable.[3]

To the extent that waiting to excuse African-American jurors has any relevance, it is minimal. A prosecutor's decision to delay immediately striking all African-American jurors does not affirmatively establish that the peremptory challenges were race-blind because it is equally consistent with a strategy to avoid detection of race-conscious strikes. (See *People v. Motton* (1985) 39 Cal.3d 596, 607 [even where prosecutor repeatedly accepts panel including black jurors and later strikes them, reviewing court must consider possibility that prosecutor's temporary acceptance was merely a ploy to hide his racially-discriminatory motive].)

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[3] For the reasons stated by Justice Kennard in her dissenting opinion, Battle disagrees with the conclusion in *People v. Clark* (2011) 52 Cal.4th 856 that the statistical showing in that case did not rise to the level of a prima facie case. (*Id.* at pp. 1009-1013.)

Here, as in *People v. Motton, supra*, 39 Cal.3d 596, the prosecutor did not merely delay striking E.F., but twice accepted a panel that included him. (6 RT 1199, 1204.) Although "not a conclusive factor, 'the passing of certain jurors may be an indication of the prosecutor's good faith in exercising his peremptories, and may be an appropriate factor'" to consider in analyzing a *Batson/Wheeler* objection [citation.]" (*People v. Reynoso* (2003) 31 Cal.4th 903, 926.) Given the "practical realities of jury selection," however, this Court has held that accepting a panel that includes an African-American does not dispel an inference of discrimination where a "highly undesirable juror" remains in the panel. (*People v. Motton*, *supra*, at p. 608; see *People v. Reynoso*, *supra*, at p. 942, fn. 6 (dis. opn. of Moreno, J.) [reliance on prosecutor's acceptance of jurors can be "misleading" without analyzing context]; *People v. Carasi* (2008) 44 Cal.4th 1263, 1320 (conc. and dis. opn. of Kennard, J.) [proper analysis of prosecutor's acceptance of jurors from protected group must assess "tactical realities of jury selection"].)

Immediately before the prosecutor first accepted a panel including E.F., the defense had lodged an unsuccessful cause challenge to Juror R.C., based on what defense counsel termed the juror's "very frightening" religious views and his statements both in his questionnaire and during voir dire suggesting that he would automatically impose death if the defendant were found guilty. (6 RT 1198.) It was only at this point that the prosecutor chose – for the first time – to accept the panel. (6 RT 1199.) Unsurprisingly, the defense immediately struck R.C. (6 RT 1199.) In other words, the prosecutor was virtually assured that the defense would not accept the panel, and thus the prosecutor was under no threat of seating E.F. by accepting the panel at that time.

Remaining on the panel at the time of the prosecutor's second acceptance of E.F. (and also present during the first acceptance) was R.H., another "highly undesirable" juror for the defense. (*People v. Motton, supra*, 39 Cal.3d at p. 608.) R.H. was a former member of the "San Bernardino Sheriff's Rangers," a group that rode with, and provided political and financial backing for, the San Bernardino County Sheriff. (6 RT 1112.) R.H.'s questionnaire stated, "I favor the death penalty." (13 CT 3582.) The San Bernardino Sheriff was responsible for interrogating Battle, and the defense challenged the interrogation tactics, including the failure to record portions of the interrogation. (12 RT 3150, 3192, 3220.) In addition, the admissions and confessions the sheriff deputies elicited from Battle were the centerpiece of the prosecution's case. Therefore, defense counsel was highly unlikely to accept a panel including a juror who both favored the death penalty and had with ties to the San Bernardino Sheriff's Department. Again unsurprisingly, defense counsel immediately struck R.H. after the prosecutor temporarily accepted the panel. (6 RT 1204.) R.H. was replaced by G.L., a psychology student working in social services who "would favor life in prison" (6 RT 1205-1206), and whom the prosecutor immediately excused (6 RT 1208).[4]

In these circumstances, because the defense was extremely unlikely to accept the panel as constituted at the time of the prosecutor's first or

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[4] Also present on the panel at the time of the prosecutor's second acceptance was juror Billie A. (21 CT 5919-5939 [questionnaire]), a different juror than B.A. (17 CT 4855-4876 [questionnaire]). Billie A., whose son was in law enforcement (21 CT 5928), not only answered that he favored the death penalty (21 CT 5934), but volunteered during voir dire that he had recently voted for it (6 RT 1200). Defense counsel excused him after he excused R.H. (6 RT 1214.)

second acceptance, there is "no way to determine whether the prosecutor would have challenged [E.F.] had the defense not done so first." (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 933 (dis. opn. of Kennard, J.); see *People v. Motton, supra*, 39 Cal.3d at p. 608 [prima facie case found where defense later struck one of the black jurors temporarily accepted by the prosecution].) In fact, the prosecutor earlier had *repeated* opportunities to seat E.F. when the defense passed, but instead chose to continue with further peremptory challenges. (6 RT 1145-1146, 1162.)

Equally importantly, the prosecutor's treatment of E.F. at the time he temporarily accepted the panel is of limited relevance because the court had already warned him that it was a "close" case. (5 RT 1130.) Not only was the prosecutor warned, but E.F. was the *sole remaining minority juror in the box* every time the prosecutor exercised a peremptory challenge after the denial of the *Batson/Wheeler* motion.[5] The optics of the prosecutor striking E.F., the last nonwhite juror in the box, would not have been good. Given that the trial court had found no inference of discrimination, striking E.F. might even have threatened the conviction on appeal. (See *Johnson v. California*, *supra*, 545 U.S. at p. 164 [striking three of three black jurors established prima facie case].) Therefore, little can be ascertained from the prosecutor's temporary acceptance of E.F. Certainly, it does not dispel the other significant evidence supporting an inference of discrimination.

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[5] Juror S.H., who wrote "white" under his race and ethnic origin (15 RT 4352), had a Hispanic surname. However, he was immediately stricken by the defense upon entering the panel (6 RT 1167), and thus the prosecutor never had the opportunity to strike while S.H. was in the box.

2. The Pattern of Strikes Provides a Strong Inference that the Prosecutor Preferred White Jurors

There is no denying the fact that, due to the small number of African-American prospective jurors subject to challenge in this case, there is significant element of uncertainty in relying solely on a statistical analysis of the proportion of African-Americans stricken. (See AOB 86.) However, the pattern of strikes was not limited to African-Americans. The State ignores Battle's holistic explanation of how the jury came to be an all-white one: the prosecutor targeted not only a disproportionate number of African-American jurors, but also Hispanic jurors. (See *United States v. Collins* (9th Cir. 2009) 551 F.3d 914, 921 ["Striking members of more than one protected group is also relevant and may indicate a discriminatory intent"].)

When the motion was considered, almost 50 percent of the prosecutor's strikes (5 of 11) were against Hispanic or African-American jurors. (See AOB 89-91.)[6] When J.B. was stricken, the numbers were even

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[6] Battle focuses on the time the motion was considered and the time of J.B. was excused for two reasons. First, these respective time frames are when the challenged strike occurred and the trial court made its ruling. Second, statistics based on the jurors who followed are not particularly useful because all jurors called after the *Batson/Wheeler* motion self-identified as white. (See 6 RT 1167 and *ante* fn. 5 [S.H. identified himself as white].) And, as noted above, E.F., the only other nonwhite juror, was stricken by the defense, a fact that provides little insight into the prosecutor's intent.

The prosecutor's first 11 strikes were against white juror D.S. (5 RT 986), Hispanic juror M.T. (5 RT 1003), Hispanic juror D.P. (5 RT 1020), Hispanic juror E.M. (5 RT 1026), African-American juror S.W. (5 RT 1032), white juror T.M. (5 RT 1043), white juror V.E. (5 RT 1050), white juror G.J. (5 RT 1091), African-American juror J.B. (5 RT 1099), white

(continued...)