No. S171393

SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DONTE LAMONT MCDANIEL, Defendant and Appellant.	Los Angeles Superior Ct. No. TA074274

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles

HONORABLE ROBERT J. PERRY, JUDGE

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DEATH PENALTY

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INTRODUCTION

In this brief, appellant addresses specific contentions made by respondent that necessitate an answer in order to present the issues fully to this Court. Appellant does not reply to those of respondent's contentions which are adequately addressed in appellant's opening brief. In addition, the absence of a reply by appellant to any particular contention or allegation made by respondent, or to reassert any particular point made in appellant's opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in appellant's opening brief.

ARGUMENT

I.

THE PROSECUTOR VIOLATED *BATSON* AND *WHEELER* IN HIS PEREMPTORY CHALLENGE OF PROSPECTIVE JUROR NO. 28

A. Introduction

That the prosecutor engaged in invidious discrimination cannot reasonably be denied: The trial court found he did so when he eliminated Prospective Juror No. 46, and he was held to have violated the Constitution in the same way in the co-defendant's case.[1] It scarcely requires citation that a prosecutor "brings [his] history of *Batson*[2] violations with him." (*Currie v. McDowell* (9th Cir. 2016) 825 F.3d 603, 611; see also *People v. Fuentes* (1991) 54 Cal.3d 707, 722 (conc. opn. of Mosk, J.) [explaining that reversal stemmed from the fact that "only a few months earlier" the prosecutor had been found to have violated *Batson/Wheeler*[3] in another case, and he "failed—or refused—to learn his lesson"].) The prosecutor's repeated acts of discrimination in the instant case undermine his already dubious explanations for the excusal of Prospective Juror No. 28.

Respondent urges this Court to not even reach the issue of discrimination in jury selection, on the theory that the claim is forfeited. Respondent's contention is that objection to the discriminatory elimination of Prospective Juror No. 28 was forfeited because, when the trial court

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[1] See Appellant's Motion for Judicial Notice (filed August 6, 2015); Reply to Respondent's Opposition to Appellant's Motion for Judicial Notice (filed September 9, 2015.)

[2] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).

[3] *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

found discrimination against another juror (Prospective Juror No. 46), the defense agreed to have No. 46 reseated and did not press for a mistrial at that point. But the trial court never presented defense counsel with a remedy for the error at issue before this Court – namely, the discriminatory elimination of Prospective Juror No. 28. It may be true, as respondent contends, that defense counsel preferred reseating of jurors as a remedy, as opposed to mistrial. (RB at 60.) But neither reseating of No. 28, nor any other remedy with respect to the unlawful elimination of that juror, was ever offered. To assert that appellant "forfeited" a claim because he did not accept a remedy, never offered for it, is logically unsupportable.

Respondent also claims that the trial court must have meant something other than the obvious – a finding of purposeful discrimination – when it sustained the defense's *Batson/Wheeler* challenge as to Prospective Juror No. 46. According to respondent, the trial court did not find discrimination, but simply reseated Prospective Juror No. 46 by applying an incorrect "for cause" standard. Respondent provides no authority suggesting that the trial court's phrase "not a valid reason" means that it was erroneously employing a for-cause standard. More importantly, respondent's contention was presented to the trial court – and unequivocally rejected – during a fully briefed hearing on a motion for reconsideration of the ruling. The record supports the trial court's interpretation of its own ruling, and deference must be afforded a finding of discrimination just as surely as deference is given to findings of no discrimination. (*People v. Muhammad* (2003) 108 Cal.App.4th 313, 322 ["No less deference is due when the trial court finds the explanation to be pretext, ..."].)

On the other hand, respondent insists that great deference should be afforded the implicit finding that the prosecutor's justifications for excusing

Prospective Juror No. 28 were genuine. (RB at 62-67.) Both logic and precedent preclude deference to an implicit "no discrimination" finding where the trial court fails to take into account the prosecutor's other, adjudicated discriminatory acts. (See *People v. Turner* (1994) 8 Cal.4th 137, 168 [where prosecutor had prior *Batson* violation in the case, trial court decision was "sufficient" where it "stated it was conscious of the basis for the earlier [*Batson* violation] and had this history in mind when it ruled"].) Here, no such explicit account of the prosecutor's prior *Batson* violation was made, and context suggests this crucial evidence was never considered. Nor did the trial court expressly consider the issue – though raised before it – that the prosecutor's justifications failed comparative analysis. Because the trial court quite apparently failed to consider *all* of the relevant circumstances – as *Batson* requires – its denial of the claim regarding Prospective Juror No. 28 should be reviewed de novo.

Finally, respondent claims there is substantial evidence to support the trial court's decision because "all of the reasons advanced by the prosecutor have been found race neutral" in decisions of this Court. (RB at 69.) Respondent's formulation misunderstands the issue. The question is not whether the reasons were facially race neutral, or whether similar justifications have been found race neutral when offered by other prosecutors in other cases. The true question – in light of the fact that the prosecutor was already found to have engaged in race-based peremptory challenges *in this case* – is whether these justifications withstand the extremely careful scrutiny the circumstances demand. They do not.

The three proffered justifications for excusing Prospective Juror No. 28 were questionnaire responses that (1) a sentence of life without the possibility of parole ("LWOP") was more severe than death; (2) voiced

concern that the trial would be too long; and (3) his educational level. All three of the purported reasons for excusing No. 28. applied as well to dozens of the other prospective jurors. (See AOB 75-76 [33 prospective jurors found LWOP more severe than death]; 78-79 [33 prospective jurors had high school education or less]; 80-82 [over 50 jurors expressed concern stemming from the length of the trial].) Most fundamentally, many seated jurors accepted by the prosecution shared these characteristics.

Respondent does not dispute that several seated jurors shared the very characteristics which the prosecutor found disqualifying with regard to black jurors. Respondent is thus relegated to sifting through the juror questionnaires for possible grounds – none ever voiced by the prosecutor – upon which to distinguish the seated jurors from Prospective Juror No. 28. The high court has recently reiterated its rejection of this method. (See *Foster v. Chatman* (2016) 136 S.Ct. 1737, 1752 [fact that stricken juror's son had received a 12-month suspended sentence did not render him incomparable to seated jurors].) If simply identifying differences between seated and excused jurors was sufficient to defeat comparative analysis, there would be no purpose in performing it. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 247 fn. 6 [such a rule would render *Batson* "inoperable"].)

Respondent highlights this Court's statements that where comparative juror analysis was not broached at the trial level, and thus the prosecutor was never asked to distinguish seated jurors, appellate review is "necessarily circumscribed." (RB at 76 [citing *People v. Lenix* (2008) 44 Cal.4th 602, 624].) But critically, in this case the prosecution was *not* deprived of the opportunity to provide an explanation for failure to strike similarly-situated jurors. Defense counsel clearly raised the point in the trial court and the prosecution said nothing. Respondent therefore

improperly requests this Court to assume the role of prosecutor by providing explanations and distinctions never provided below when the opportunity presented itself.

Comparative analysis exposes the fact that traits the prosecutor claimed were disqualifying as to excused black jurors were shared by numerous seated jurors. And the record *already* demonstrates that the prosecutor engaged in discrimination against black jurors. The only question is the how far did this misconduct reach. The record, read in its totality, provides the answer. Appellant therefore requests what the law demands: that he be afforded a trial free from the taint of discrimination.

B. Because Counsel Repeatedly Opposed The Exclusion Of Prospective Juror No. 28 And Was Never Offered A Remedy, There Was No Forfeiture

The purpose of the forfeiture rule is "to encourage counsel to object and thereby give the trial court an opportunity to consider the objection." (*People v. Tuggles* (2009) 179 Cal.App.4th 339, 356.) Of course, counsel *did* object to the exclusion of Prospective Juror No. 28 – repeatedly. (5 RT 1072, 1079-1080.) Respondent nonetheless insists that the claim is forfeited because the only remedy now available for *this* violation – a new trial – was not sought by the defense as a remedy for a *different* violation. The argument does not withstand analysis.

The pertinent rule has been clearly enunciated by this Court. Defense counsel's failure to object "to the trial court's *proposed* alternative remedy *when the opportunity to do so arises*," serves as a waiver of the default remedy of mistrial. (*People v. Mata* (2013) 57 Cal.4th 178, 186, second italics in original.) But there was no "proposed" remedy for the improper exclusion of Prospective Juror No. 28, only for that of Prospective Juror No. 46. That is because the trial court only found a *Batson* violation –

and thus only offered a remedy – in regard to the latter. The defense therefore never had reason, much less an "opportunity" to object to a remedy he was never offered as to Prospective Juror No. 28.

Because defense counsel accepted the trial court's offer to reseat Prospective Juror No. 46, and did not insist on a mistrial, respondent assumes that counsel would not have asked for a mistrial had the court found *Batson* error in the elimination of Prospective Juror No. 28. This is of course just speculation: trial counsel could well have made a different strategic choice regarding the remedy for exclusion of a different juror, and it is thus improper for any court to assume what choice counsel would have made given that no choice was offered. (See *People v. Mata*, *supra*, 57 Cal.4th at p. 193 (conc. opn. of Werdegar, J.) [because of the "strategic nature of the decision, for the trial court to impose one remedy or another absent counsel's waiver or consent would be improper"].)

But even if respondent's assumption were correct, and trial counsel would have preferred to reseat Prospective Juror No. 28, it would make no difference now. Of course, had reseating of No. 28 been offered, the record suggests defense counsel would have accepted it, and the discrimination would have been remedied. But *that* remedy is no longer available (and, to reiterate, was never offered). The *only* remedy now for the prosecutor's discriminatory elimination of No. 28 is to afford appellant a new trial. Respondent's assertion that appellant cannot request the "very same remedy, i.e., a new trial, that he specifically rejected below" (RB at 60) is therefore specious. And respondent's citation to *People v. Burgener* (1986) 41 Cal.3d 505 (RB at 61), in which counsel affirmatively objected to the remedy he was offered for the error that had been identified in that case is simply inapposite. Appellant requests now what he has always requested, a

trial in which the invidious taint of discrimination has been remedied. Appellant's pursuit of a remedy is nothing new; it is the very reason defense counsel objected below. (5 RT 1072, 1079-1080.) It is because *no* remedy was offered for the exclusion of Prospective Juror No. 28 that appellant must now request a new trial, the only remedy now available.

C. The Trial Court Found That The Prosecutor Discriminated During The Course Of Jury Selection And The Trial Court Should Have Expressly Taken This Finding Into Account

In his opening brief, appellant argued this Court should give great weight to the trial court's finding of discrimination by the prosecutor against Prospective Juror No. 46, and should review the claim with respect to Prospective Juror No. 28 de novo because this critical finding was not taken into account. (AOB at 57-61.) Respondent raises two arguments with respect to the trial court's critical finding of discrimination. The first is to pretend that no such finding was ever made, asserting that the trial court was instead employing an erroneous "for cause" standard when it held that the prosecution's strike was "not valid." (RB at 65-67.) Respondent's second argument is that the trial court need not take a finding of discrimination into account absent an express request for reconsideration by the defense. Neither argument should be accepted.

1. Respondent's Contention That the Trial Court Employed the Wrong Standard Is Unsupported by the Record

Respondent does not appear to contest appellant's assertions that, short of an outright admission by the prosecutor, a finding of pretext by the trial court in the case before it is perhaps the strongest single piece of evidence of discrimination that could possibly be adduced at a *Batson* hearing. (AOB at 59.) Respondent's focus is instead on the claim, raised