

No. S171393

**SUPREME COURT COPY**

**COPY**

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

**SUPREME COURT  
FILED**  
MAY 10 2017  
Jorge Navarrete Clerk  
Deputy

**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

MARY K. McCOMB  
State Public Defender  
ELIAS BATCHELDER  
Deputy State Public Defender  
State Bar No. 253386  
1111 Broadway, 10th Floor  
Oakland, CA 94607  
Telephone: (510) 267-3300  
Facsimile: (510) 452-8712  
batchelder@ospd.ca.gov

Attorneys for Appellant

**DEATH PENALTY**



**TABLE OF CONTENTS**

	Page
INTRODUCTION.....	1
ARGUMENT.....	2
I. THE PROSECUTOR VIOLATED <i>BATSON</i> AND <i>WHEELER</i> IN HIS PEREMPTORY CHALLENGE OF PROSPECTIVE JUROR NO. 28.....	2
A. Introduction. ....	2
B. Because Counsel Repeatedly Opposed The Exclusion Of Prospective Juror No. 28 And Was Never Offered A Remedy, There Was No Forfeiture. ....	6
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.....	8
1. Respondent’s Contention That the Trial Court Employed the Wrong Standard Is Unsupported by the Record. ....	8
2. This Court Should Be Extremely Hesitant to Nitpick the Language of a Trial Court’s Grant of a <i>Batson/Wheeler</i> Motion . ....	9
3. The Record Does Not Overcome the Presumption That the Trial Court Here Employed the Correct Standard. ....	12
D. Because Of The Trial Court’s Failure To Expressly Address Powerful Evidence Of Discrimination And Pretext, This Court Should Review The Trial Court’s Decision De Novo. ....	17

TABLE OF CONTENTS

	Page
1. The Trial Court’s Failure to Expressly Account for It’s Own Crucial Finding of Discrimination and Pretext Warrants Close Appellate Scrutiny. . . . .	17
2. It Is Unlikely that the Trial Court Took the Discriminatory Excusal of Prospective Juror No. 46 into Account, and Failure to Analyze this Evidence Is a Circumstance in which Deference to an Unreasoned Denial Is Inappropriate. . . . .	20
3. This Court Should not Defer to Detailed Comparative Juror Analysis that the Trial Court Did not Expressly Perform, and which this Court’s Precedent Indicates Could not Have Been Performed without the Aid of the Prosecutor. . . . .	22
E. Where a Prosecutor Has Been Caught <i>In Flagrante Delicto</i> Discriminating Against Black Jurors, The Fact That The Jury, As Subsequently Accepted, Includes Black Jurors Has No Significance. . . . .	27
F. The Prosecutor’s Failure To Question Prospective Juror No. 28 About Any Of The Alleged Bases For His Excusal Is Extremely Suspect. . . . .	28
1. Failure to Question on the Severity of LWOP Is Suspicious Because the Prosecution Questioned Other Juror’s on Precisely this Point . . .	29
2. Failure to Question Any Juror on Their Education Level Is Suspicious in Light of the Vast Range of Educational Attainment of the Seated Jurors and the Ambiguity in Their Questionnaire Responses. . . . .	32

**TABLE OF CONTENTS**

	Page
3.	The Failure to Question Prospective Juror No. 28’s Time Concerns Is Further Evidence of Pretext where the Prosecutor Extensively Questioned Another Juror with Similar Concerns . . . 33
G.	The Prosecutor’s Inexplicably Negative Rating of Prospective Juror No. 28 Provides Further Evidence of Discrimination. . . . . 35
H.	Respondent’s Comparative Juror Analysis Improperly Relies On Distinctions Never Mentioned By The Prosecutor And Fails On Its Own Terms.. . . . 38
1.	It Is Inappropriate for a Reviewing Court to Assume the Role of Prosecutor in Providing Points of Distinction when the Issue Was Raised in the Trial Court and the Prosecutor Had the Opportunity to Make his Points Himself. . . . . 39
2.	Comparative Juror Analysis Supports the Evidence of Pretext and the Hypothetical Grounds of Distinction for Seated Jurors Posed by Respondent Are Unpersuasive. . . . . 41
a.	The severity of LWOP.. . . . 41
i.	Seated Juror No. 4. . . . . 43
ii.	Seated Juror No. 8. . . . . 45
iii.	Alternate Juror No. 2. . . . . 46
iv.	Alternate Juror No. 4. . . . . 46

**TABLE OF CONTENTS**

Page

- b. The education justification was untethered to the facts of the case and fell disproportionately against black jurors. . . . . 47
  - i. Seated Juror No. 5. . . . . 49
  - ii. Seated Juror No. 7. . . . . 49
  - iii. Seated Juror No. 10. . . . . 50
- 3. Willingness to serve on a jury. . . . . 51
- I. Conclusion. . . . . 51
- II. THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION TO SUPPRESS, THEREBY VIOLATING HIS FOURTH AMENDMENT RIGHTS AND REQUIRING REVERSAL OF THE ENTIRE JUDGMENT. . . . . 53
  - A. There Was No Forfeiture By Appellant. . . . . 54
  - B. This Court Should Not Extend The Rule of *Maryland v. Wilson* (1997) 519 U.S. 408 To Restrict A Passenger's Freedom To Walk Away. . . . . 59
  - C. There Was No Reasonable Suspicion Or Articulable Threat to Safety When Appellant Was Detained. . . . . 61
  - D. The Inevitable Discovery Doctrine Does Not Apply. . . . . 65
  - E. Suppressing the Murder Weapon Is A Paradigmatic Example Of Prejudicial Error. . . . . 66

## TABLE OF CONTENTS

	Page
III. THE TRIAL COURT IMPROPERLY ADMITTED HEARSAY EVIDENCE THAT WAS THE BASIS FOR OTHERWISE IRRELEVANT AND PREJUDICIAL GANG TESTIMONY . . . . .	71
A. This Court Should Not Find Appellant’s Argument Forfeited.. . . .	71
B. Appellant’s Argument For Exclusion Of The Collateral Hearsay Statements Is Supported By This Court’s Recent Decision in <i>People v. Grimes</i> (2016) 1 Cal.5th 698 . . . . .	74
C. Nothing In Garner’s Testimony – Either As Proffered At The In Limine Hearing Or Later Presented At Trial – Indicated That Brooks Robbed Carey. . . . .	77
D. The Erroneous Admission Of The Hearsay Was Prejudicial. . . . .	81
IV. BECAUSE THE GUILT AND PENALTY PHASE JURIES IMPROPERLY CONSIDERED HIGHLY INFLAMMATORY GANG ENHANCEMENTS FOR WHICH THERE WAS INSUFFICIENT EVIDENTIARY SUPPORT, REVERSAL OF APPELLANT’S CONVICTION AND SENTENCE IS REQUIRED . . . . .	84
A. The Was No Forfeiture. . . . .	85
B. The Rule Of <i>Prunty</i> . . . . .	86
C. This Court Should Decline Respondent’s Invitation To Overrule <i>Prunty</i> In All But Name. . . . .	88
D. In its Prejudice Analysis, Respondent Incorrectly Presumes That Trial Court Would Have Admitted Into Evidence All Of The Gang Expert Testimony.. . . .	92

**TABLE OF CONTENTS**

	Page
V. THIS COURT SHOULD INDEPENDENTLY REVIEW THE REPORTER’S TRANSCRIPTS OF THE IN CAMERA PROCEEDINGS AND THE UNDERLYING DOCUMENTS REVIEWED DURING THE PROCEEDINGS TO DETERMINE WHETHER THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT’S PITCHESS MOTION.....	95
VI. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE THAT ONE OF THE VICTIMS HAD BEEN STRICKEN BY CANCER AND ALLOWING THE PROSECUTOR TO ARGUE THAT THIS TERRIBLE PLIGHT, WHOLLY UNRELATED TO VICTIM IMPACT EVIDENCE, SHOULD SUPPORT A DEATH SENTENCE FOR APPELLANT. ....	96
VII. THE TRIAL COURT ERRED IN REJECTING APPELLANT’S REQUEST FOR A LINGERING DOUBT INSTRUCTION AT THE PENALTY RETRIAL, AND BY INSTRUCTING THE JURORS THAT THEY HAD TO ACCEPT THE GUILT AND OTHER FINDINGS MADE BY THE PRIOR JURY, INCLUDING THAT APPELLANT WAS THE ACTUAL SHOOTER OF VICTIM ANNETTE ANDERSON. ....	102
A. The Trial Court Abused Its Discretion By Denying A Lingerin g Doubt Instruction On The Basis Of A Factor That Militates In Favor Of Providing An Instruction. ....	104
B. There Is Significant Evidence That The Jury Likely Believed They Were Conclusively Bound By The Prior Jury’s Findings And Therefore Could Not Give Mitigating Effect To Evidence Of Lingerin g Doubt . . . . .	107
C. The Error Was Prejudicial. ....	109



## TABLE OF CONTENTS

	Page
VIII. PENAL CODE SECTION 1042 AND ARTICLE I, SECTION 16 OF THE STATE CONSTITUTION REQUIRE THAT A SENTENCE OF DEATH AND THE AGGRAVATING FACTORS BE PROVEN BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY. ....	111
IX. CALIFORNIA’S DEATH PENALTY STATUTE AND CALJIC INSTRUCTIONS, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT’S TRIAL, VIOLATE THE UNITED STATES CONSTITUTION. ....	113
X. REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT.....	114
CONCLUSION. ....	115

## TABLE OF AUTHORITIES

Page(s)

### Federal Cases

<i>Batson v. Kentucky</i> (1986) 476 U.S. 79.....	Passim
<i>Bumper v. North Carolina</i> (1968) 391 U.S. 543.....	66
<i>Chapman v. California</i> (1967) 386 U.S. 18.....	66, 100, 101
<i>Crawford v. Washington</i> (2004) 541 U.S. 36.....	72
<i>Crittenden v. Ayers</i> (9th Cir. 2010) 624 F.3d 943. ....	15
<i>Currie v. McDowell</i> (9th Cir. 2016) 825 F.3d 603. ....	2
<i>Dolphy v. Mantello</i> (2d Cir. 2009) 552 F.3d 236.....	48
<i>Fernandez v. Roe</i> (9th Cir. 2002) 286 F.3d 1073. ....	28
<i>Florida v. Harris</i> (2013) 133 S.Ct. 1050.....	62
<i>Foster v. Chatman</i> (2016) 136 S.Ct. 1737.....	Passim
<i>Green v. LaMarque</i> (9th Cir. 2008) 532 F.3d 1028. ....	37, 45
<i>Harris v. Hardy</i> (7th Cir. 2012) 680 F.3d 942. ....	27

## TABLE OF AUTHORITIES

	Page(s)
<i>Hernandez v. New York</i> (1991) 500 U.S. 352.....	48
<i>Kesser v. Cambra</i> (9th Cir. 2006) 465 F.3d 351. ....	36
<i>Maryland v. Buie</i> (1990) 494 U.S. 325.....	64
<i>Maryland v. Wilson</i> (1997) 519 U.S. 408.....	59
<i>McGahee v. Alab. Dept. Of Corrections</i> (11th Cir. 2009) 560 F.3d 1252. ....	27
<i>Miller-El v. Dretke</i> (2005) 545 U.S. 231 fn. 6. ....	Passim
<i>Purkett v. Elem</i> (1995) 514 U.S. 765.....	14
<i>Snyder v. Louisiana</i> (2008) 552 U.S. 472.....	Passim
<i>Stringer v. Young’s Lessee</i> (1830) 28 U.S. 320.....	98
<i>Terry v. Ohio</i> (1968) U.S. 1.....	Passim
<i>U.S. v. Brown</i> (7th Cir. 2016) 809 F.3d 371. ....	30
<i>U.S. v. I.E.V.</i> (9th Cir. 2012) 705 F.3d 430. ....	55

## TABLE OF AUTHORITIES

	Page(s)
<i>U.S. v. Martinez-Fuerte</i> (1976) 428 U.S. 543.....	62
<i>U.S. v. Paguio</i> (9th Cir. 1997) 114 F.3d 928. ....	76
<i>U.S. v. Williams</i> (4th Cir. 2015) 808 F.3d 238. ....	63
<i>United States v. Atkins</i> (6th Cir. 2016) 843 F.3d 625. ....	29
<i>United States v. Stephens</i> (7th Cir. 2008) 514 F.3d 703. ....	21, 27

### State Cases

<i>Chisolm v. State</i> (Miss. 1988) 529 So.2d 635.....	13
<i>Floyd v. State</i> (2002) 118 Nev. 156. ....	99, 100
<i>Guthrey v. State of California</i> (1998) 63 Cal.App.4th 1108. ....	79
<i>In re Fred J.</i> (1979) 89 Cal.App.3d 168. ....	12, 26
<i>In re Marriage of Cornejo</i> (1996) 13 Cal.4th 381. ....	106
<i>In re Sakarias</i> (2005) 35 Cal.4th 140. ....	70, 76
<i>In re Tony C.</i> (1978) 21 Cal.3d 888. ....	62

## TABLE OF AUTHORITIES

	Page(s)
<i>In re Zeth S.</i> (2003) 31 Cal.4th 396. ....	79
<i>Lyttle v. State</i> (2006) 279 Ga.App. 659. ....	63
<i>Miller v. State</i> (Okla. Crim. App. 1998) 977 P.2d 1099. ....	96
<i>People v. Abel</i> (2012) 53 Cal.4th 891. ....	101
<i>People v. Albarran</i> (2007) 149 Cal.App.4th 214. ....	73
<i>People v. Alvarez</i> (1996) 14 Cal.4th 155. ....	19
<i>People v. Asghedom</i> (2015) 243 Cal.App.4th 718. ....	12
<i>People v. Avila</i> (2006) 38 Cal.4th 491. ....	18, 19, 20
<i>People v. Barrick</i> (1982) 33 Cal.3d 115. ....	68
<i>People v. Bell</i> (2007) 40 Cal.4th 582. ....	29
<i>People v. Bower</i> (1979) 24 Cal.3d 638. ....	55, 60
<i>People v. Brendlin</i> (2006) 38 Cal.4th 1107. ....	57, 60

## TABLE OF AUTHORITIES

	Page(s)
<i>People v. Brenn</i> (2007) 152 Cal.App.4th 166. ....	72
<i>People v. Brown</i> (1988) 46 Cal.3d 432. ....	100, 101
<i>People v. Burgener</i> (1986) 41 Cal.3d 505. ....	7
<i>People v. Butler</i> (2003) 31 Cal.4th 1119. ....	85
<i>People v. Chapman</i> (1990) 224 Cal.App.3d 253. ....	65
<i>People v. Chism</i> (2014) 58 Cal.4th 1266. ....	38, 40, 49
<i>People v. Clark</i> (2011) 52 Cal.4th 856. ....	29, 30, 48
<i>People v. Clay</i> (1984) 153 Cal.App.3d 433. ....	17
<i>People v. Cunningham</i> (2015) 61 Cal.4th 609. ....	12
<i>People v. DeSantis</i> (1992) 2 Cal.4th 1198. ....	107
<i>People v. Duarte</i> (2000) 24 Cal.4th 603. ....	75, 76
<i>People v. Frierson</i> (1991) 53 Cal.3d 730. ....	75, 76

## TABLE OF AUTHORITIES

	Page(s)
<i>People v. Fuentes</i> (1991) 54 Cal.3d 707. ....	2
<i>People v. Garcia</i> (1984) 36 Cal.3d 539. ....	83
<i>People v. Gay</i> (2008) 42 Cal.4th 1195. ....	Passim
<i>People v. Gonzales and Soliz</i> (2011) 52 Cal.4th 254. ....	105, 106
<i>People v. Gonzalez</i> (1992) 7 Cal.App.4th 381. ....	53, 59
<i>People v. Grimes</i> (2016) 1 Cal.5th 698. ....	74, 75, 76
<i>People v. Hall</i> (1983) 35 Cal.3d 161. ....	26
<i>People v. Hamilton</i> (2009) 45 Cal.4th 863. ....	18
<i>People v. Hawthorne</i> (2009) 46 Cal.4th 67. ....	12
<i>People v. Hernandez</i> (2004) 33 Cal.4th 1040. ....	93, 94
<i>People v. Hill</i> (1992) 3 Cal.4th 959. ....	1
<i>People v. Holloway</i> (2004) 33 Cal.4th 96. ....	74

## TABLE OF AUTHORITIES

	Page(s)
<i>People v. Huggins</i> (2006) 38 Cal.4th 175. ....	46
<i>People v. Johnson</i> (1989) 47 Cal.3d 1194. ....	9
<i>People v. Johnson</i> (1992) 3 Cal.4th 1183. ....	104
<i>People v. Johnson</i> (2003) 30 Cal.4th 1302. ....	23, 25, 27
<i>People v. Jones</i> (2011) 51 Cal.4th 346. ....	25, 40
<i>People v. Khoa Khac Long</i> (2010) 189 Cal.App.4th 826. ....	34
<i>People v. Lanphear</i> (1980) 26 Cal.3d 814. ....	73
<i>People v. Lawley</i> (2002) 27 Cal.4th 102. ....	75, 76, 83
<i>People v. Leach</i> (1975) 15 Cal.3d 419. ....	75
<i>People v. Lenix</i> (2008) 44 Cal.4th 602. ....	5, 23, 25, 39
<i>People v. Loker</i> (2008) 44 Cal.4th 691. ....	97
<i>People v. Loudermilk</i> (1987) 195 Cal.App.3d 996. ....	56



## TABLE OF AUTHORITIES

	Page(s)
<i>People v. Manibusan</i> 58 Cal.4th 40.....	45
<i>People v. Marzett</i> (1985) 174 Cal.App.3d 610. ....	68
<i>People v. Mata</i> (2013) 57 Cal.4th 178. ....	6, 7
<i>People v. Medina</i> (2003) 110 Cal.App.4th 171. ....	62
<i>People v. Melendez</i> (2016) 2 Cal.5th 1. ....	48
<i>People v. Mickey</i> (1991) 54 Cal.3d 612. ....	108
<i>People v. Morgan</i> (2005) 125 Cal.App.4th 935. ....	72
<i>People v. Morris</i> (1991) 53 Cal.3d 152. ....	74
<i>People v. Moss</i> (1986) 188 Cal.App.3d 268. ....	24
<i>People v. Muhammad</i> (2003) 108 Cal.App.4th 313. ....	3, 9, 14, 28
<i>People v. Nicholes</i> (2016) 246 Cal.App.4th 836. ....	90, 91, 92
<i>People v. O'Malley</i> (2016) 62 Cal.4th 944. ....	Passim

## TABLE OF AUTHORITIES

	Page(s)
<i>People v. Pitts</i> (2004) 117 Cal.App.4th 881. ....	62
<i>People v. Prunty</i> (2015) 62 Cal.4th 59. ....	Passim
<i>People v. Reynoso</i> (2003) 31 Cal.4th 903. ....	47, 48
<i>People v. Robles</i> (2000) 23 Cal.4th 789. ....	65, 66
<i>People v. Sanchez</i> (2016) 63 Cal.4th 665. ....	82
<i>People v. Scott</i> (2015) 61 Cal.4th 363. ....	20, 52
<i>People v. Smith</i> (1998) 64 Cal.App.4th 1458. ....	85
<i>People v. Souza</i> (1994) 9 Cal.4th 224. ....	60
<i>People v. Streeter</i> (2012) 54 Cal.4th 205. ....	12
<i>People v. Taylor</i> (2010) 48 Cal.4th 575. ....	29, 30
<i>People v. Tewksbury</i> (1976) 15 Cal.3d 953. ....	67
<i>People v. Trevino</i> (1985) 39 Cal.3d 667. ....	28

## TABLE OF AUTHORITIES

	Page(s)
<i>People v. Tuggles</i> (2009) 179 Cal.App.4th 339. ....	6
<i>People v. Tully</i> (2012) 54 Cal.4th 952. ....	99
<i>People v. Turner</i> (1986) 42 Cal.3d 711. ....	21
<i>People v. Turner</i> (1994) 8 Cal.4th 137. ....	4, 21
<i>People v. Vibanco</i> (2007) 151 Cal.App.4th 1. ....	63
<i>People v. Ward</i> (2005) 36 Cal.4th 186. ....	28
<i>People v. Wattier</i> (1996) 51 Cal.App.4th 948. ....	54
<i>People v. Wheeler</i> (1978) 22 Cal.3d 258. ....	2, 24, 48
<i>People v. Williams</i> (1999) 20 Cal.4th 119. ....	54, 56, 58
<i>People v. Williams</i> (2006) 40 Cal.4th 287. ....	52
<i>People v. Williams</i> (2013) 56 Cal.4th 630. ....	9, 22, 40
<i>People v. Woodell</i> (1998) 17 Cal.4th 448. ....	73

## TABLE OF AUTHORITIES

	Page(s)
<i>People v. Zambrano</i> (2007) 41 Cal.4th 1082. ....	12
<i>Pitchess v. Superior Court</i> (1974) 11 Cal.3d 531. ....	95
<i>Sanchez v. Unemployment Ins. Appeals Bd.</i> (1977) 20 Cal.3d 55. ....	24
<i>Short v. State</i> (Okla. Crim. App. 1999) 980 P.2d 1081. ....	99, 100
<i>State v. Clay</i> (Mo. 1998) 975 S.W.2d 121. ....	100, 101
<i>State v. Gill</i> (Mo. 2005) 167 S.W.3d 184. ....	100
<i>Winograd v. American Broadcasting Co.</i> (1998) 68 Cal.App.4th 624. ....	12

### Constitutional Provisions

U.S. Const., amends.	4. ....	Passim
	8. ....	72
Cal. Const., art. I, §	16. ....	111

### State Statutes

Evid. Code, §§	350. ....	98
	1230. ....	74, 75, 76
Pen. Code, §	1042. ....	111

## TABLE OF AUTHORITIES

Page(s)

### Other Authorities

<i>Aggravation and Mitigation in Capital Cases: What Do Jurors Think?</i> (1998) 98 Colum. L. Rev. 1538.....	70
Batson “Blame” and Its Implications for Equal Protection Analysis (2012) 97 Iowa L. Rev. 1489.....	10, 11
<i>From Proving Pretext to Proving Discrimination: The Real Lesson of Miller-El and Snyder</i> (2012) 81 Miss. L.J. 491.....	9
Johnson v. California and the Initial Assessment of Batson Claims (2006) 74 Fordham L. Rev. 3333. ....	10
<i>Tolerating Deception and Discrimination After Batson</i> (1997) 50 Stan. L. Rev. 9.....	10



No. S171393

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**

**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.<sup>1</sup> It scarcely requires citation that a prosecutor "brings [his] history of *Batson*<sup>2</sup> 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*<sup>3</sup> 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

---

<sup>1</sup> 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.)

<sup>2</sup> *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).

<sup>3</sup> *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 reseal 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 reseal 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