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.	No. S119296 San Bernardino County Superior Court Case No. FVI012605 Death Penalty Case

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

Honorable Eric M. Nakata, Judge

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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APPELLANT'S SUPPLEMENTAL REPLY BRIEF

INTRODUCTION

The fundamental basis of Mr. Battle's supplemental brief is that the *Batson/Wheeler*[1] framework is not—and has not been—working effectively to prevent discrimination in jury selection. Mr. Battle does not stand alone in his recognition of these shortcomings. In passing AB 3070,[2] the Legislature and the Governor, like Mr. Battle, have concluded that the existing doctrine is not serving its central purpose. Nor is the Legislature the only body recognizing problems in the jury selection process. In January of 2020, this Court created "a Jury Selection Work Group to examine and report on issues of discrimination and inclusivity in the selection and composition of juries in California courts[.]" (*People v. Triplett* (2020) 48 Cal.App.5th 655 (stmt. of Cantil-Sakauye, C.J.).) Among other issues, it initially aimed to focus on how *Batson* and *Wheeler* "operate in practice in California" and whether "modifications" were warranted. (*Ibid.*; see also Balassone, *Supreme Court Announces Jury Selection Work Group*, California Courts Newsroom (Jan. 29, 2020) [group to study whether "current standards of appellate

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

[2] (Stats. 2020, ch. 318, §§ 1-3 ("AB 3070").)

review of peremptory challenges in California adequately serve the goals of [*Batson* and *Wheeler*] jurisprudence"].) The supplemental brief, beginning from the shared premise that something is not working in the *Batson/Wheeler* framework, and in particular the principles governing the prima facie case, argues that the doctrine should be revisited as a matter of constitutional principle.

To address concerns regarding the effectiveness of *Batson/Wheeler* and the prima facie doctrine, Mr. Battle has proposed three modest reforms: 1) reaffirm prior caselaw holding that an inference of discrimination may be established based on small sample sizes of stricken jurors, (Supplemental Opening Brief [SAOB] at 21-40), 2) eliminate or vastly reduce reliance on the acceptance or temporary acceptance of lone jurors from a protected class because prosecutors have been trained to leave at least one such juror on the jury to avoid suspicion, (SAOB at 40-50), and 3) end the practice of rejecting a prima facie case based on the existence of hypothetical justifications for strikes that would be largely irrelevant to those with a "mind to discriminate"[3] that *Batson/Wheeler* currently targets.

The Attorney General's responsive brief does nothing to refute, or even address, the core argument that *Batson/Wheeler* is not functioning properly. Nowhere in his brief is there a single assertion that current *Batson/Wheeler* doctrine has effectively

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[3] (*Batson*, *supra*, 476 U.S. at p. 96.)

eliminated—or even reduced—discrimination in the exercise of peremptory challenges. Indeed, the Attorney General does not even respond to the powerful critique that, in most California counties, current *Batson/Wheeler* doctrine is incapable of doing *anything* to enforce the prohibition of anti-Black discrimination in peremptory challenges. (SAOB at 18-19, 32.) Nor could he, as the argument is founded on indisputable demographic data and rudimentary math: in counties where there are few Black prospective jurors, the existing rule—which exempts (at least) two strikes from judicial scrutiny—is a rule which effectively bars *Batson/Wheeler* enforcement for strikes against them. (SAOB at 32.)

Instead of arguing that the constitutional system is currently functioning properly, the Attorney General relies almost entirely on the principle that the prima facia case requires analysis of "all relevant circumstances." (Supplemental Respondent's Brief [SRB] at 5, 7, 9, 10.) In the Attorney General's view, this bland and unobjectionable guidepost for how defendants can establish a prima facie case acts as a pair of shackles which prohibit this Court from reforming constitutional doctrine. This argument is misguided.

Mr. Battle does not seek to restrict analysis of the totality of the circumstances in *establishing* a prima facie case. He seeks to reduce or eliminate the Court's undue reliance on factors of ambiguous meaning in *dispelling* an inference of discrimination, in situations in which a prima facie case should otherwise be established. Even if the Court feels bound to consider the factors

criticized in the supplemental opening brief under the totality of the circumstances, it should give them far less weight.

Under the facts of this case, the prosecutor showed 1) a very strong statistical preference for White jurors and 2) treated Black jurors differently (by, among other things, subjecting them to lengthier and more intense questioning and singling them out for cause stipulations where the evidence on that issue was, at best, ambiguous). Under de novo review—whether applying some, all, or none of the rules proposed by Mr. Battle—a prima facie finding, and a limited remand, is warranted.

I. WIDELY DISSEMINATED PROSECUTION TRAINING MANUALS INSTRUCTING PROSECUTORS ON TACTICS TO AVOID JUDICIAL SCRUTINY ARE A PROPER SUBJECT FOR CONSIDERATION IN FASHIONING EFFECTIVE CONSTITUTIONAL RULES

Before addressing the merits of the Attorney General's brief, Mr. Battle addresses a question of procedure: the Attorney General's demand that the Court refuse to consider various prosecution training manuals cited in Mr. Battle's opening brief. (SRB at 8.)

A central reason that the current constitutional rules should be modified is the existence of detailed prosecution training manuals which encourage prosecutors to engage in a variety of tactics to thwart judicial scrutiny of peremptory challenges against jurors of a protected class. As detailed in the opening brief, many of these tactics are problematic, and some (such as advice to leave at least

one juror from the protected class on the jury "if you can") are explicitly race-conscious. (See SAOB at 41-48.)

Although not questioning the accuracy or authenticity of the cited training materials, the Attorney General argues that they are irrelevant, as they are neither from the office which prosecuted Mr. Battle nor contained within the record of the case. (SRB at 8.) Moreover, the Attorney General notes that Mr. Battle has not filed a motion for judicial notice of these materials. (*Ibid.*)

It is true, as the Attorney General contends, that the cited materials were not received from the San Bernardino County District Attorney, the office which tried this case. The San Bernardino County District Attorney ignored the original request for materials from the ACLU of Northern California, and when Mr. Battle's counsel respectfully renewed a similar public records request for training materials that would shed light on their office's tactics, the San Bernardino District Attorney refused, citing several privileges that other—more transparent—district attorney offices had not.[4]

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[4] (See Letter from San Bernardino Deputy District Attorney Mark Vos to Elias Batchelder (Feb. 1, 2021) ("Although such records [*Batson/Wheeler* training materials] may be of general application within this office" claiming that all responsive records, even "generalized statements of law expressed within the[m]" are "absolutely privileged attorney work product" and covered by the "pending litigation exemption[,]" as well as the deliberative process privilege exemption, copyright privilege, and general exemptions for unduly burdensome requests).)

This does not mean that San Bernardino District Attorney training materials or work product were not included within disclosed materials from other counties. For instance, in the acknowledgements to his seminal 1998 article "*Meeting the Wheeler Challenge: Legal, Ethical, & Tactical Approaches to Jury Selection*," Jerry Coleman (the foremost author on prosecution *Batson/Wheeler* trainings in California) specifically thanks an attorney from the San Bernardino District Attorney office for his help.[5] Mr. Battle urges this Court to pay particularly close attention to this training, as it appears to have been the most comprehensive and widely disseminated prosecution training on *Batson/Wheeler* prior to Mr.

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[5] (Coleman, *Meeting the Wheeler Challenge: Legal, Ethical, & Tactical Approaches to Jury Selection* (1998) in Volume XIX California District Attorneys Association (CDAA), The Prosecutor's Notebook (*"Meeting the Wheeler Challenge"*) [acknowledgements].) This manual had not been made publicly available on the Berkeley Law website at the time the SAOB was filed. It is now available on the website, under "Additional Los Angeles District Attorney Training Materials." (See Berkeley Law, *California District Attorney Jury Selection Training Materials* https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/whitewashing-the-jury-box-how-california-perpetuates-the-discriminatory-exclusion-of-black-and-latinx-jurors/california-district-attorney-training-materials/ (last visited March 18, 2021).) As suggested from the Bates stamping, this manual was provided by the L.A. District Attorney in discovery in the habeas case *In re George Brett Williams*, No. S156682, in which this Court issued an order to show cause on July 13, 2016 after finding a prima facie case of an alleged *Batson/Wheeler* violation.

Battle's trial, before the high court's decisions in *Johnson*[6] and the two *Miller-El*[7] cases markedly changed the legal landscape.

The Attorney General is also correct that Mr. Battle presented no affirmative evidence that Mr. Mazurek, the prosecutor in this case, was trained with these manuals. (SRB at 8.) It would be odd, of course, to assume that a CDAA manual such as the "Prosecutor's Notebook," with its comprehensive discussion of *Batson/Wheeler* in *Meeting the Wheeler Challenge* (apparently made available in numerous editions to all CDAA members throughout the state), did not influence in any way the training in San Bernardino County in general, or Mr. Mazurek in particular. Holistic review the disclosed trainings suggest the opposite: Mr. Coleman's trainings were widely influential and copied, often verbatim, in regional trainings by individual prosecutor's offices throughout the state.[8] It is also true, however, that numerous cited

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[6] (*Johnson v. California* (2005) 545 U.S. 162.)

[7] (*Miller-El v. Cockrell* (2003) 537 US 322; *Miller-El v. Dretke* (2005) 545 U.S. 231.)

[8] Santa Clara's Inquisitive Prosecutor's Guide outline states that it derives from Mr. Coleman's work. (Inquisitive Prosecutor's Guide, *IPG19 Batson-Wheeler Outline.pdf* at p. 1 [outline premised on work of Mr. Coleman's, who "provided unique and continuing guidance as this outline has evolved over the course of the years"].)

manuals post-date Mr. Battle's trial and could not possibly have influenced Mr. Mazurek's actions below.

Regardless, the Attorney General's demand that these materials be ignored because they are not in the record misses an important, overarching point. The purpose of presenting these guides is not to aid the Court in assessing the facts in *this* case, but to offer insight into the contours of an appropriate legal rule for *all cases*. Courts have long looked to law enforcement training manuals to inform how they should fashion rules of constitutional procedure.

Perhaps most famously, the United States Supreme Court in *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) provided an extensive analysis of the widely adopted "Reid technique" for interrogation of criminal suspects. Returning to the same subject years later, the high court was forced to confront cynical trainings which had been created by various law enforcement organizations to circumvent the rules of *Miranda*. (*Missouri v. Seibert* (2004) 542 U.S. 600, 609 (*Seibert*) [noting that the "technique of interrogating in successive, unwarned and warned phases raises a new challenge to *Miranda*" and surveying national trainings and local policies which adopted this technique].) California courts have likewise relied on law enforcement training manuals to properly fashion constitutional rules regarding suspect interrogations. (See, e.g., *In re Elias V.* (2015) 237 Cal.App.4th 568, 579-583 [surveying manuals on interrogation techniques in assessing juvenile's voluntariness

claim].)[9] Just as in *Seibert*, adaptions by law enforcement made to avoid legal scrutiny call for a change in the underlying rules. New rules are necessary not simply due to trainings in a single jurisdiction, but because of the troubling guidance contained in various prosecution trainings throughout the state and over the course of many years.

II. WHERE THE PROSECUTION PATTERN OF STRIKES SHOWS A PREFERENCE FOR WHITE JURORS, OR WHERE THERE IS TOTAL EXCLUSION OF JURORS FROM A PROTECTED CLASS, COURTS SHOULD ALWAYS DEMAND AN EXPLANATION, REGARDLESS OF SMALL SAMPLE SIZE

As discussed in Mr. Battle's supplemental brief, this Court should adopt a straightforward and easy-to-apply rule: whenever a prosecutor's pattern of strikes disproportionately favors White jurors, and in particular when jurors of a protected class have been entirely excluded, the prima facie burden is met—regardless of small sample size. (SAOB at 18.) Any other rule guarantees that *Batson/Wheeler* will be ineffectual throughout most of California in fulfilling perhaps its most central promise—prohibiting anti-Black discrimination by prosecutors. As the high court explained after surveying the history of anti-Black discrimination that led to

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[9] For similar reasons, Courts routinely rely on defense guidelines in assessing constitutional claims. (See, e.g., *In re Welch* (2015) 61 Cal.4th 489, 515 [citing ABA Guidelines].)

adoption of *Batson* rule, "Given that blacks were a minority of the population, in many jurisdictions the number of peremptory strikes available to the prosecutor exceeded the number of black prospective jurors. So prosecutors could routinely exercise peremptories to strike all the black prospective jurors and thereby ensure all-white juries." (*Flowers v. Mississippi* (2019) 139 S.Ct. 2228, 2239-2240.) In California, this is precisely what a rule precluding a prima facie case based on numerical showing of small sample size *continues* to permit, decades after *Wheeler* and *Batson* were adopted. Prosecutors can strike those few Black jurors who make it into the box, and no explanation need be given, because any "pattern" of discrimination is "impossible" to establish from the numbers. (See *People v. Bell* (2007) 40 Cal.4th 582, 598 (*Bell*); *People v. Bonilla* (2007) 41 Cal.4th 313, 343 (*Bonilla*) [hereinafter "*Bell/Bonilla* rule".)

For the more visually inclined, below is a map based on 2010 census figures[10] that shows California's Black population by county, and which exposes the scope of the problem.

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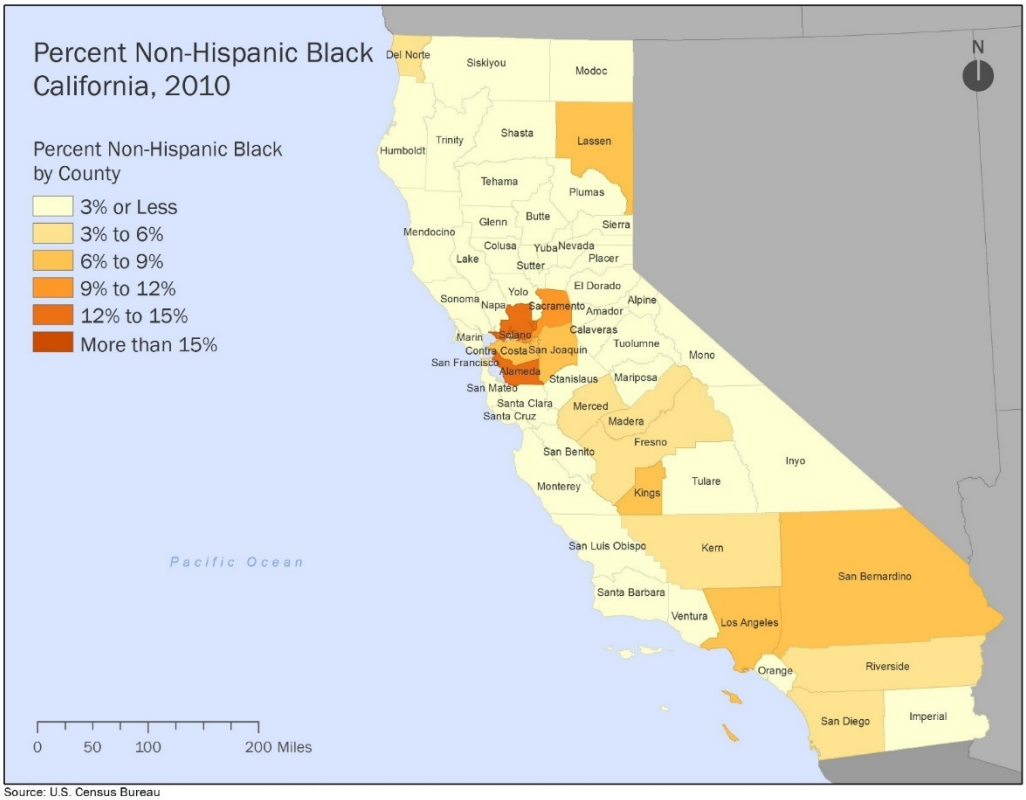
[10] (See *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1167 (*Gutierrez*) [relying on census data].) Though based on census data, the map appears in a separate publication. (Othering and Belonging Institute, *Demography, Inequality and our Future* (Apr. 18, 2018) available at https://belonging.berkeley.edu/next-california (last visited March 18, 2021).)



Source: U.S. Census Bureau

As can be seen, in the vast majority of California counties Black residents number less than three percent of the population. Only a handful of counties have Black populations over 9 percent. And, as noted in the supplemental brief, a series of features in the jury selection process render the percentage of Black jurors available and qualified to serve significantly lower than their percentages in the population. (SAOB at 32, citing Fukurai & Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System* (1994) 13 Nat'l Black L.J. 238.) Thus, in virtually every county in the state, and in most criminal trials, prosecutors can routinely remove all Black prospective jurors free of any judicial scrutiny based on the *Bell/Bonilla* rule.

This is a flawed rule. And prosecutors have trained one another to take advantage of it. Existing trainings are replete with references to the *Bell/Bonilla* rule prohibiting a prima facie finding based on numerical showing involving small sample size.[11]

According to the Attorney General, this Court is powerless to address the problem under *Wheeler* or *Batson*. This is allegedly so because such a rule would "greatly depart" from the requirement that a trial court consider "all relevant circumstances" in deciding whether a defendant established a prima facie case. (SRB at 7, citing *People v. Rhoades* (2019) 8 Cal.5th 393, 429 (*Rhoades*) and *Batson, supra*, 476 U.S. at 96-99.) This argument is a non sequitur.

As noted in the supplemental brief, this Court has *already held* that two strikes can "amply support[]" a prima facie finding. (See SAOB at 36-37 [analyzing *People v. Turner* (1986) 42 Cal.3d 711, 719 (*Turner*)]; see also *People v. Moss* (1986) 188 Cal.App.3d 268, 277 [two strike against Black jurors established prima facie case: *Turner* "makes it clear that two peremptory challenges can make a prima facie case"].) There is "no arbitrary numerical cutoff so that if only one or two Black jurors are on the venire or survive

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[11] (See, e.g., Alameda County District Attorney Training Materials, *Alameda County Training Materials re Batson v. Kentucky and People v. Wheeler_Redacted.pdf* at pp. 57, 92, 122, 235, 287; Marin County District Attorney Training Materials *2019.09.11 Marin Batson Training Materials* at p. 6; Orange County District Attorney Training Materials, *Batson-Wheeler (Mestman – 08-16-18).pdf* at p.5; Riverside County District Attorney Training Materials, *Batson-Wheeler Outline_redacted.pdf* at p. 38.)

challenges for cause 'the prosecutor need have no compunction about striking them from the jury because of their race.'" (*Ibid.*, citing *Batson*, *supra*, 476 U.S. at p. 105. (Marshall, J. concurring.).)

Attorney General does nothing to address the conflict within the Court's cases. Moreover, numerous other jurisdictions have adopted bright line rules under which a prima facie showing is satisfied by for the total exclusion of jurors from a protected class. (SAOB at 35-36, citing authorities.) The Attorney General fails explain how or why this Court's prior holding in *Turner*, or other jurisdiction's total exclusion rules, violate a requirement of considering the totality of relevant circumstances. Indeed, total or near-total exclusion of jurors from a protected class is unquestionably among the "totality of the circumstances" that trial courts should consider. As the Third Circuit recognized, it is "easier to establish a prima facie case when all blacks are excluded from a jury, or when one or two blacks are excluded from a panel in a district with a relatively low black population." (*United States v. Clemons* (3d Cir. 1988) 843 F.2d 741, 748.) Recognizing as much is critical in light of self-described "tactics" provided to prosecutors to "create an adequate record" for appellate courts, including "keep[ing] on" a member of protected class "if you possibly can." (*Meeting the Wheeler Challenge*, *supra*, at 11; see also SAOB at 46-47.)

While the Attorney General argues that such widely prevalent trainings are outside the record, he does not deny that telling prosecutors to "[k]eep a member of the cognizable group if

possible" to avoid suspicion (SAOB at 46-47) is openly race conscious. Nor does he dispute that it is extremely likely that prosecutors will follow the advice in these trainings—leading to precisely the pattern observed in this case: the exclusion of all Black jurors but one by the prosecution. Moreover, it is hard to know whether the prosecutor in this case planned on striking the final black juror after temporarily accepting him (another piece of advice offered to prosecutors to avoid suspicion)[12] before the defense ultimately chose to do so.

The Attorney General finally cites Justice Liu's concurrence in *People v. Harris* (2013) 57 Cal.4th 804, 870 (conc. opn. of Liu, J.) and Justice Cuellar's recent dissent in *People v. Johnson* (2019) 8 Cal.5th 475, 542 (*Johnson*) (dis. opn. of Cuellar, J.), both of which recognized the prevailing rule under which a prima facie case is not established—despite disproportionate challenges against the protected class—when there is small sample size. (SRB at 7.) These opinions argued that even *within* the existing framework utilized by the majority in those cases, a prima facie case could (or in the case of the *Harris* concurrence, might) have been established, despite low sample sizes.

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[12] (See, e.g, *Meeting the Wheeler Challenge*, *supra*, at pp. 58-59 [where trial court has denied prima facie case, "make a record" including "[h]ow many members of cognizable group you have passed" see also SAOB at 48-49.)

The Attorney General's reliance on Justice Cuellar's dissent in *Johnson* highlights the problem inherent in the *Bell/Bonilla* rule for different reasons. The reality is that *Batson/Wheeler* cases pose problems of statistical uncertainty not just in cases involving one or two strikes, in which the rule of *Bell* and *Bonilla* has most commonly been applied. *Johnson*, for instance, involved the strike of three Black jurors. (*Johnson*, *supra*, 8 Cal.5th at p. 503.) Justice Cuellar acknowledged that even three strikes constitutes a small sample size, which reduces the ability of a court (or even an expert) to conclusively determine the existence of strong pattern. (*Id.* a p. 542 (conc. opn. of Cuellar, J.).) But the small sample size problem extends beyond two, and even three strikes against a protected class, to a huge number of *Batson/Wheeler* claims. Indeed, the case which Justice Cuellar cited for the principle of uncertainty involved the "small sample" of six out of eight Black prospective jurors excused. (*Ibid*., citing *Carmichael v. Chappius* (2d Cir. 2017) 848 F.3d 536, 549, fn. 79.) Thus, a rule premised on the uncertainty of small sample sizes threatens to swallow the entire *Batson/Wheeler* framework. Even a rule limited to two or three strikes against jurors from a protected class blocks enforcement of *Batson/Wheeler* in a huge number of cases. (SAOB at 31 [*Bell/Bonilla* rule applied in case of three strikes].)

The question posed by Mr. Battle's brief is not whether there exists statistical uncertainty in analyzing patterns suggested by peremptory challenges—there virtually always is. The question is who should shoulder the burden of that uncertainty, particularly in

jurisdictions in which it is impossible to establish a prima face case when a small sample size of jurors from the protected class has been stricken. If the aim is to reduce discrimination in peremptory challenges, the burden should fall on the party seeking to avoid judicial scrutiny, not vice versa.

Relatedly, and perhaps most importantly, the Attorney General provides no basis to conclude that the existing rule is more effective at rooting out discrimination from jury selection, the central intention of *Batson* and *Wheeler*. Even in which the number of stricken jurors is low, total or near-total exclusion is a factor that "carries considerable weight when courts consider *Batson* challenges." (*Kesser v. Cambra* (9th Cir. 2004) 392 F.3d 327, 347 (dis. opn of Rawlinson, J.), reversed by *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351 (en banc) [in case where two strikes removed only Native American prospective jurors, analogizing to civil discrimination rule of the "inexorable zero"]; see also SAOB at 35 [same].) Because the low sample size rule of *Bell* and *Bonilla* frustrates the ability of *Batson* and *Wheeler* to address discrimination, it should be reconsidered.

III. A PROSECUTOR'S TEMPORARY ACCEPTANCE OF A SINGLE BLACK JUROR DOES NOT ESTABLISH A LACK INTENT TO EXCLUDE OTHERS BASED ON THEIR RACE

As set forth in the supplemental opening brief, this Court should reduce or eliminate the reliance trial and reviewing courts place on the acceptance or temporary acceptance of a lone member of the protected class in determining whether there is a prima face

case. (SAOB at 40-51.) Such a modification is warranted particularly because prosecutors have been given detailed trainings on how to avoid judicial scrutiny by, inter alia, accepting (or temporarily accepting) at least one juror from the protected class. (SAOB at 46-48.)

The Attorney General provides two critiques of these arguments. First, although not denying that prosecuting attorneys throughout the state have been trained in the manner detailed in the supplemental opening brief, the Attorney General argues that there is insufficient evidence that the attorney in *this* case was so trained, and that the training materials are not part of the record. (SRB at 8.) This argument was addressed above. The rules adopted by this Court apply to all prosecutors and should not be crafted based merely on the facts of an individual case. The point is simply that the rules of this Court must effectively address widely prevalent strategies to evade the prima facie finding made available to prosecutors in decades of trainings.

Next, the Attorney General cites *Johnson* and *People v. Reed* (2018) 4 Cal.5th 989, 1000 (*Reed*) as evidence that this Court, and even some of its dissenting members, have recently affirmed the importance of a prosecutor accepting Black jurors in determining discriminatory intent. (SRB at 8-9.) As a threshold matter, in neither *Johnson* nor *Reed* were the issues and supporting training manuals presented in this case raised, resolved, or considered. Moreover the holdings of those cases would not even be affected by the Court's adoption of the rule proposed here.

In *Johnson* the seated jury "consisted of three African-American jurors, seven Caucasian jurors, one Hispanic juror, and one mixed-race juror" and "African-American representation on the seated jury was almost twice that reflected in the eligible jury pool." (*Johnson*, *supra*, 8 Cal.5th at pp. 506, 508.) Similarly, in *Reed*, "three black jurors ultimately sat on the jury" which was "only barely" lower than the percentage of Black jurors in the venire. (*People v. Reed* (2018) 4 Cal.5th 989, 1000.) In contrast, in this case, the jury that was ultimately accepted by the prosecution was all-white.

The rule proposed in the supplemental opening brief—which takes into account the possibility of prosecutors adopting a cynical strategy of accepting a *single* Black juror (or in this case temporarily accepting a lone Black juror when jurors wildly unfavorable to the defense remained in the box (ARB at 9-11))—would not have been implicated in *Reed* or *Johnson*. (See SAOB at 20 ["Little or no weight should be accorded to a prosecutor's good faith when, as in this case, he or she temporarily accepts a single Black juror"].) Under the facts of cases such as *Reed* and *Johnson*, where numerous Black jurors were not only temporarily passed upon but ultimately accepted, prosecutors clearly did not adopt the simple strategy set forth in many prosecution trainings. (See, e.g., Orange County District Attorney Training Materials, *Batson-Wheeler (Mestman – 08-16-18).pdf* at p.13 ["Practical Tips" include "Keep a member of a cognizable group if possible"].).

In cases where the prosecutor accepts multiple Black jurors, Mr. Battle agrees with the Attorney General (and the dissenting opinions in *Johnson* cited in his brief), that the acceptance of Black jurors "may lessen" the inference of discrimination, and is a "nondispositive, nonconclusive indication of the prosecutor's good faith." (SRB at 9.) However—in light of pervasive trainings advising prosecutors to accept at least one juror of the protected class—according "good faith" to prosecutors who choose to adopt this practice does not fulfill the purposes of *Batson* and *Wheeler*. In fact, the rule undermines them. (*People v. Smith* (2019) 32 Cal.App.5th 860 (conc. opn. of Streeter, J.) [discussing the problem of moral licensing].) It should be reconsidered.

IV. THIS COURT SHOULD ABANDON ITS PRACTICE OF USING HYPOTHETICAL JUSTIFICATIONS—EVEN SUBSTANTIAL ONES—IN ORDER TO REBUT AN OTHERWISE EXISTING PATTERN OF DISCRIMINATION

In the supplemental opening brief, Mr. Battle set forth four reasons that this Court should cast aside its practice of "dispelling" the existence of a prima facie case based on hypothetical reasons never actually adopted by the prosecutor. (SAOB at 51-62.)

First, if the reason is in fact "obvious," then the very basis of the prima facie hurdle's existence—allowing prosecutors to keep confidential the basis for the strikes—is not served. (SAOB at 55-56.) If the reason is truly obvious, there is simply no secret to hide and prosecutors should be required to state their reason.

Second, despite this Court's insistence that there is no speculation when the unstated justification is substantial, it is impossible to know with surety what a prosecutor's actual reasons for a strike without him or her stating them. (SAOB at 56-57.) Relatedly, prosecutors generally provide multiple reasons for every challenge (as they are trained to do), and thus it is impossible to know the *other* bases for a prosecutor's strike and whether these would undermine even a relatively strong facially neutral reason selected by a reviewing court as dispelling an inference of discrimination. (SAOB at 57.)

Third, "obvious" justifications often derive from ill-considered statements provided by prospective jurors in questionnaires. Perspective jurors routinely explain such troublesome questionnaire responses during voir dire in ways that—if believed—mitigate, and may even dispel entirely, the potential bias the initial comments possibly reflected. That happened in this case. (SAOB at 57-58.) When appellate courts select questionnaire responses as dispelling any suspicion of discrimination, their logic often requires a finding that a prosecutor would not credit the prospective juror's in-court voir dire explaining that they willing to follow the law and are not in fact biased against the prosecution. (*Ibid.*) Relying on questionnaire responses without acknowledging the possibility that the prosecutor *believed* the prospective jurors earnest voir dire

response thus contradicts well-established doctrine that appellate courts are not supposed to assess credibility.[13]

Fourth and finally, the existence of potential race-neutral reasons—even substantial ones—is largely irrelevant to a prosecutor who enters the jury selection process with an intent to discriminate. (SAOB at 60-62.) Thus, relying on unstated reasons to dispel an inference of discrimination is of no utility in identifying prosecutors who have chosen to violate *Batson/Wheeler*.

The Attorney General responds to none of these arguments. Instead, his brief merely recites the existing law and asserts that it is consistent with the duty to consider "all relevant circumstances." (SRB at 9-10.) The Attorney General fails to explain how looking at unstated justifications is required under a totality of the circumstances test. To the contrary, the only method that the high court has explicitly sanctioned to dispel an inference of discrimination is the prosecutor's recitation of his or her reasons for dismissing the prospective jurors at issue. (*Johnson v. California*, *supra*, 545 U.S. at p. 170 ["The *Batson* framework is designed to

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[13] The Attorney General's supplemental response urges precisely this form of speculative appellate assessment of credibility in analyzing Prospective Juror J.B.'s voir dire. (See SRB at 12 ["While J.B. ultimately agreed that she could follow the law, a reasonable procedure might not have been unconvinced[.]"].)

produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process"].)

The proposition that hypothetical justifications are not to be considered at stage one flows quite naturally from the civil rights cases upon which the high court premised *Batson* framework, and in particular the prima facie case. (See *Johnson v. California*, *supra*, 545 U.S. at 171 n.7 [noting that its analysis of the prima facie case "comports with our interpretation of the burden-shifting framework in cases arising under Title VII of the Civil Rights Act of 1964"]; *Batson*, *supra*, 476 U.S. 79, 94 ["the operation of prima facie burden of proof rules" are explained by "[o]ur decisions concerning 'disparate treatment' under Title VII of the Civil Rights Act of 1964"].)

Under Title VII cases, courts have universally determined that consideration of the employer's reasons for an adverse action is not permitted at the prima facie stage. (*MacDonald v. Eastern Wyoming Mental Health Center* (10th Cir. 1991) 941 F.2d 1115, 1119, abrogated on other grounds by *Randle v. City of Aurora* (10th Cir. 1995) 69 F.3d 441, 451 ["the common thread running through all [circuit court] decisions is the courts' refusal to consider a defendant's proffered reasons for discharge in assessing the existence of a prima facie case"]; *Cicero v. Borg-Warner Automotive, Inc.* (6th Cir. 2002) 280 F.3d 579, 585 [court must assess prima facie case "independent of the employer's proffered nondiscriminatory reasons for discharge"]; *A.C. ex rel. J.C. v. Shelby County Bd. of Educ.* (6th Cir. 2013) 711 F.3d 687, 697 [error to "premature[ly]

plac[e] on Plaintiffs at the prima facie stage the burden of overcoming [employer's] stated reasons for its actions"]; *Thomas v. Denny's, Inc.* (10th Cir. 1997) 111 F.3d 1506, 1510 ["[R]elying on a defendant's reasons for the adverse action as a basis for ruling against a plaintiff at the prima facie stage raises serious problems under the *McDonnell Douglas* framework. . ."]; *Davenport v. Riverview Gardens Sch. Dist.*, 30 F.3d 940, 944 (8th Cir. 1994) [consideration of employer's justifications at prima facie stage improper; prima facie burden "not so onerous"].)

And these Title VII cases are ones in which the reasons were *actually provided*. If considering actual reasons is inappropriate at the prima facie stage, considering hypothetical reasons is even less so. Counsel is unaware of any Title VII case in which trial or appellate courts were permitted to take into account reasons never proffered by the employer. To the contrary, as the Fifth Circuit persuasively explained, Title VII

> requires the *defendant* to articulate a legitimate reason relied upon in taking the action being challenged. [citation] The trial court may not assume this task; "[i]t is beyond the province of a trial or a reviewing court to determine-after the fact-that certain facts in the record might have served as the basis for an employer's personnel decision." [citation.] We are concerned with what an employer's actual motive was; hypothetical or post hoc theories really have no place in a Title VII suit.

(*E.E.O.C. v. West Bros. Dept. Store of Mansfield, La., Inc.* (5th Cir. 1986) 805 F.2d 1171, 1172, italics in original; see also *Miller v. WFLI Radio Inc.* (6th Cir. 1982) 687 F.2d 136, 138 [improper to rely on

"nondiscriminatory 'business reasons' for [plaintiff's] discharge other than those advanced by the defendant"]; *Carpenter v. Central Vermont Medical Center* (1999) 170 Vt. 565, 567 [trial court's "reaching out to find reasons it would not choose to promote plaintiff was inappropriate"]; *Department of Corrections v. Chandler* (Fla. Dist. Ct. App. 1991) 582 So.2d 1183, 1185 (opn. on rehearing) [acknowledging that in its own prior opinion the reviewing court had inappropriately "'sifted through the record' and identified a nondiscriminatory reason—the friendship that existed between the employee promoted and the chairperson of the three-person interview team that made the nomination" that had not been proffered below; "in doing so we violated certain principles of law developed in the federal sector construing Title VII of the Civil Rights of 1964" upon which state analog was based; appropriate response was to remand to the trial court].) Applying a contrary rule in the *Batson/Wheeler* context, in which the defendant has far less opportunity to gather and present evidence of discrimination, is inconsistent with the origin and purposes of the rule.

California Courts of Appeal, although dutifully following this Court's guidance, have repeatedly underscored the speculation inherent in the existing doctrine. (See *People v. Buckley* (1997) 53 Cal.App.4th 658, 667 ["It is clearly uncomfortable for an appellate court to postulate hypothetical reasons a prosecutor might have challenged each juror"]; *People v. Trevino* (1997) 55 Cal.App.4th 396, 409 ["a reviewing court often has to move into the realm of speculation concerning why a party 'may' have a reason to challenge

a juror[.]"]; *People v. Johnson* (Cal. Ct. App. 2001) 105 Cal.Rptr.2d 727, 737 affirmed by *Johnson v. California*, *supra*, 545 U.S. 162 ["the appellate court, under the position taken by the California Supreme Court in *Howard*[14], is placed in the almost untenable position of culling from the record possible race-neutral reasons for excusal"].)

Even prosecutors have (internally) recognized the problem. In *Meeting the Wheeler Challenge*, Jerry Coleman explained the tension that underlies this Court's doctrine, "[a]ttempting to determine if the record 'suggests' a nondiscriminatory basis for a challenge forces a reviewing court to speculate." (*Id.* at p. 10.) In fact, it was in light of this tension—and the fact that appellate courts would nonetheless review prima facie claims denied by trial courts—that Coleman devised a set of "tactics" to "create an adequate record" for the prima facie stage, which included accepting at least one member of the protected class. (*Id* at p. 9-11.)

In short, the rule allowing reviewing courts to step into the prosecutor's shoes and provide reasons for a peremptory challenge to dispel a prima facie case is inconsistent with high court precedent. It frustrates the ability of *Batson* and *Wheeler* to achieve their purposes, and forces appellate courts into a difficult and speculative position when the simpler solution is simply to require actual answers to suspicions, leaving further analysis to the third stage, as

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[14] (*People v. Howard* (1992) 1 Cal.4th 1132, 1154.)

the high court has instructed. Even if this Court believes that it must rely on hypothetical justifications at the prima facie stage, at a minimum it should not give them the essentially determinative weight that this Court's prior cases have afforded.

Finally, assuming the Court to retains the rule that hypothetical justifications which "necessarily dispel" the inference of discrimination can be considered, *People v. Sánchez* (2016) 63 Cal.4th 411, 435 & fn.5, the rule is only applicable to numerical showings of disproportionate exclusion of jurors from the protected class. (SAOB at 63-65). To reiterate, the statistical showing in this case, as reviewed by an accomplished statistician, is actually quite strong. (SAOB at 39-40.) But some of the strongest evidence presented by Mr. Battle is non-statistical: differential treatment of Black prospective jurors by the prosecution.

The Attorney General refuses to acknowledge, much less respond to, this evidence. Instead, the responsive brief highlights the irrelevant fact that Mr. Battle, not the prosecution, struck one of the Black jurors. (SRB at 11; cf. *People v. Snow* (1987) 44 Cal.3d 216, 225 [defense counsel's allegedly discriminatory strikes have no bearing on the propriety of prosecutor's strikes].) The Attorney General also discusses hypothetical justifications that the prosecutor might have employed in striking the Black jurors. (SRB at 11-12.) But this analysis is unresponsive to the point made in the supplemental opening brief: If evidence suggests that the prosecutor had a plan to subject Black jurors to greater scrutiny *ab*

initio, the fact that hypothetical justifications exist for striking the Black juror's does not dispel an inference of discrimination.

Even if unaddressed by the Attorney General, evidence of such differential treatment exists. Because this evidence is set forth in detail in the opening brief, and summarized in the supplemental brief, Mr. Battle will not repeat it here. Suffice it to say, there is significant evidence that the prosecutor entered jury selection with the intent of holding Black prospective jurors to a different standard. This alone should establish a prima facie case.

CONCLUSION

For all the reasons argued above, and those stated in Mr. Battle's prior briefs, the judgment against him must be reversed.

DATED: March 23, 2021

Respectfully submitted,

MARY K. MCCOMB
State Public Defender

/s/
ELIAS BATCHELDER
Supervising Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL

I am the Supervising Deputy State Public Defender assigned to represent appellant, THOMAS LEE BATTLE in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates is 6,188 words in length.

DATED: March 23, 2021.

/s/
ELIAS BATCHELDER

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Case Number: Supreme Court Case No. S119296
San Bernardino County Sup. Ct., No. FVI012605

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on March 23, 2021, at Sacramento, CA.

/s/ Kecia Bailey
KECIA BAILEY

STATE OF CALIFORNIA
Supreme Court of California

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