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 SECOND SUPPLEMENTAL 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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XIII.

THIS COURT'S DECISION IN *PEOPLE V. GUTIERREZ* MANDATES REVERSAL IN THIS CASE

In his second supplemental opening brief, appellant explained why *People v. Gutierrez, Ramos*, *and Enriquez* (2017) 2 Cal.5th 1150 (*Gutierrez*) mandated reversal due to the improper excusal of Prospective Juror No. 28. "[T]he teaching of *Gutierrez* is simple: trial courts must play an active role in probing advocates' explanations when suspicious circumstances arise. When trial courts fail to do so, reversal is required because a sufficient record for appellate review does not exist – and can never be created – that would be sufficient to dispel the strong presumption of discrimination already present." (2nd Supp. AOB at 6.)

The suspicious circumstances in this case are extraordinary. First and foremost, the prosecutor had been caught red-handed discriminating against another African-American – Prospective Juror No. 46. – during jury selection. (5 RT 1085.) Second, the pretextual reason that the prosecutor gave for eliminating Prospective Juror No. 46 was essentially identical to the "primary" reason the prosecutor gave for his excusal of Prospective Juror No. 28, the juror at issue in this appeal.[1] Third, this allegedly undesirable characteristic – a failure to find death a more severe punishment than LWOP – was widely prevalent in the venire; thus the tendered justification fails comparative juror analysis. (AOB at 75-77.)

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[1] The prosecutor's excuse for striking Prospective Juror No. 46 – which the trial court found to be pretextual – was that the juror thought that a sentence of life without possibility of parole ("LWOP") was equivalent to a death sentence; his primary justification for striking No. 28 was that the juror believed LWOP was a more severe punishment than death. (5 RT 1079, 1081.)

Respondent almost completely ignores these central factual issues. The finding that the prosecutor discriminated and provided pretextual justifications in regard to No. 46 is relegated to a footnote, in which respondent claims that the finding is "not germane" because the trial court "appeared" to have applied an improper "for cause" standard. (2nd Supp. RB at 9, fn. 1.) This assertion fails for two reasons, both of which were explained in Appellant's Reply Brief. (ARB at 8-16). First, the record simply does not support respondent's characterization of the trial court's finding; second, this same "for cause" characterization was likewise asserted by the prosecutor below and rejected. Respondent's cursory reiteration that there was no legitimate finding of discrimination, a point made while simultaneously avoiding the many portions of the record that flatly contradict this unsupportable characterization, is perhaps the most telling aspect of its brief.[2]

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[2] Although declining to address the many parts of the record which conflict with its interpretation, Respondent attempts to buttress its mistaken argument – i.e., that the judge flouted well-settled *Batson/Wheeler* precedent and applied a "for cause" standard – by highlighting the fact that the trial court made mollifying comments about the prosecutor's professionalism even after the *Batson/Wheeler* violation. (2nd Supp. RB at 9, fn. 1.) Respondent appears to expect that a trial court will necessarily call out a prosecutor's misconduct more harshly – perhaps by labeling the prosecutor a liar or a racist in open court – instead of softening the blow, like the trial judge did when it came up again in this case. This assumption ignores the difficult position in which trial courts find themselves when dealing with the extremely sensitive issue of discrimination in jury selection. (ARB at 8-11.) At the very least, soothing statements such as those made by the trial court here should not be read as overcoming the legal presumption (much less the clear record in this case), that the trial court applied well-settled law correctly. (*In re Fred J.* (1979) 89 Cal.App.3d 168, 175.)

Respondent also ignores many of the other factual considerations that should have mandated further trial court inquiry under *Gutierrez*. The extreme similarity between the pretextual justification for the excusal of Prospective Juror No. 46 and the justification for the strike of Prospective Juror No. 28 is not addressed at all. Yet this highly pertinent fact is the obvious retort to Respondent's citation to the language in *Gutierrez* that "[s]ome neutral reasons for a challenge are sufficiently self-evident, *if honestly held*, such that they require little additional explication." (*Gutierrez*, supra, 2 Cal.5th at p. 1171, italics added; 2nd Supp. RB at 6.) In the usual case, it may be that a citation to a juror's belief that LWOP is more severe than death is sufficiently "self-evident" that it does not require further inquiry by the trial court. But that conclusion necessarily assumes that the prosecutor "honestly held" a belief that deviation from the view that death is the more severe punishment was strongly disqualifying. This case shows the opposite: the trial court found the prosecutor had used a nearly identical justification as a cloak for his discrimination against Prospective Juror No. 46. This finding necessarily implies that the trial court did not believe the prosecutor's attestation that this characteristic was strongly disqualifying.

And there was good reason for the trial court to have so found, for, as the court observed, "there were other jurors who said similar statements as [Prospective Juror No. 46]." (16 RT 3060-3061.) A questionnaire response that LWOP was either more severe than death or equivalent was fairly common. (AOB 75-76 [33 prospective jurors found LWOP more severe than death and 8 additional thought the two equivalent].) And of the 12 jurors initially seated, only half stated that the death penalty was more severe, and less than half of the alternates expressed that view. (AOB at

76-77; ARB 41-42.) These facts also should have triggered further questioning by the trial court as to why Prospective Juror No. 28 was singled out on this issue, *particularly* where defense counsel specifically brought to the court's attention the subject of comparative analysis. (5 RT 1079 [defense counsel's complaint that "many jurors" shared "those particular reasons" voiced by No. 28, including views about the comparative severity of death and LWOP].) And the obligation to probe more deeply attaches even if the seated jurors were not perfectly comparable to No. 28 on every issue. (*Gutierrez*, *supra*, 2 Cal.5th at p. 1173 ["The individuals compared need not be identical in every respect aside from ethnicity"].) The point is that when confronted with the existence of similarly situated seated jurors, the trial court should have inquired further as to whether No. 28's acceptance of a widely held view was a credible justification for his exclusion.

Respondent acknowledges that the prosecutor strangely asked no questions about Prospective Juror No. 28's "primary" disqualification (although he directly engaged with other jurors on this precise topic). (2nd Supp. RB at 7; see also AOB 67-70; ARB 29-32). In respondent's view, this failure to question is irrelevant because (1) there were questionnaires and (2) "the trial court extensively questioned the panelists regarding their views of the death penalty." (2nd Supp. RB at 7-8.) The second claim is a significant overstatement, at least with respect to Prospective Juror No. 28. His sole voir dire response to the trial court's questioning on the death penalty consisted of the word "four." (4 RT 878.)[3] And the existence of

[3] As explained in the opening brief, this response indicated that Prospective Juror No. 28 could consider both penalties. (AOB at 46.)

questionnaires does not eliminate the relevance of desultory questioning, nor does it relieve the trial court of the duty to probe suspicious circumstances: to do so would wrongly exempt virtually all capital cases (where questionnaires are routine) from scrutiny. (ARB 29-31 & fn. 7.)

Respondent closes by citing to the trial court's positive "personal professional experience" with the prosecutor, namely that the trial court had a "great deal of respect" for the prosecutor, held him "in high regard," "found him to be an utmost professional" and "never thought that he was trying to do anything underhanded." (2nd Supp. RB at 8; 5 RT 1084-1085.) Respondent seems to be suggesting that the trial court's past experience with the prosecutor relieves him of the duty to inquire under suspicious circumstances as outlined in *Gutierrez.* In fact, an argument can be made regarding the propriety of even relying on the trial court's past experiences with an individual prosecutor. (See *People v. Winbush* (2017) 2 Cal.5th 402, 491-492 (conc. opn. of Liu, J.) [questioning reliance on such difficult-to-rebut, non-record evidence].) After all, by it's very nature, discrimination in jury selection is conducting in secret, and it may not be discovered until years after the fact. (See, e.g., *Foster v. Chatman* (2016) ___ U.S. ___; 136 S.Ct. 1737.) A trial court's confidence in a prosecutor thus may prove impossible to impeach until future events transpire. This case presents just such an example: during the co-defendant's case the prosecutor was found to have *again* discriminated in jury selection only months after appellant's trial.[4]

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[4] 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.) If anything, respondent's argument that this Court should rely on the trial court's assessment of the prosecutor's

Whatever the merit of relying on the court's personal experience with a particular prosecutor, it certainly should not serve as a substitute for actual questioning and analysis in the face of suspicious circumstances. And regardless, respondent fails to mention that the cited statements were made *before* the trial court concluded that the prosecutor had in fact just misled it by covering up his discriminatory excusal of Prospective Juror No. 46 with pretext. As such, it is disingenuous for respondent to cite the trial court's positive statements regarding the prosecutor's general character as supporting a "sincere and reasoned" analysis of the strike at issue here.

In respondent's telling, all of the troubling facts of this case are irrelevant, because the prosecutor's reasons – ignoring the context around them – "were self-evident, plausible, and supported by the record." (2nd Supp. RB at 7.) Respondent's test for whether a reason is "self-evident" and "plausible" focuses exclusively on whether the prosecutor's "explanations have been found to be race-neutral by this Court in other cases." (*Ibid*.) Respondent asserts that, if the prosecutor's reasons have been accepted as a justification in some other reported decision, that transforms the justification into one that is "widely-accepted" and therefore irrefutably "self-evident and plausible," or stated differently, "so obvious . . . that no further explanation by the prosecutor or the trial court was necessary." (*Ibid*.)

Respondent's analysis ignores the fundamental principle, articulated by this Court and quoted by respondent in its own supplemental brief: "The

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good character provides yet another reason to grant appellant's motion for judicial notice.

Gutierrez Court explained that '[t]his portion of the *Batson/Wheeler* inquiry focuses on the subjective genuineness of the reason, not the objective reasonableness' of the prosecutor's stated reasons." (ARB at 4, quoting *Gutierrez*, *supra*, 2 Cal.5th at p. 1158; see also *Johnson v. California* (2005) 545 U.S. 162, 172 ["'It does not matter that the prosecutor might have had good reasons; what matters is the real reason they were stricken.'"] (citation and internal signals omitted).) Whether or not similar justifications were found to be "race-neutral by this Court in other cases" cannot and does not answer the question of whether, in *this* case, they were pretexts employed by the prosecutor to mask discrimination. The answer to that question is more appropriately found in the fact that the trial court had already found that the prosecutor engaged in invidious discrimination in regard to another prospective juror, even though the prosecutor had offered essentially the same, supposedly "race-neutral" justification for elimination of that juror.

Respondent's contrary reading of *Gutierrez* would eviscerate it. Trial courts would be forgiven for doing nothing – no matter how suspicious the surrounding circumstances, no matter how many similarly situated jurors are seated in the box – so long as the prosecutor does not misstate the record and can cite one of the scores of reasons this Court has accepted from other prosecutors in other cases. This is not the law. When the record contains significant red flags, "more is required of the trial court than a global finding that the reasons appear sufficient." (*Gutierrez*, *supra*, 2 Cal.5th at p. 1171.) That is what occurred here. (5 RT 1084-1085.) Reversal is thus required.

CONCLUSION

For the reasons set forth above, the judgment of conviction and the sentence of death must be reversed.

DATED: December 7, 2017

Respectfully submitted,

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CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(2))

I, Elias Batchelder, am the attorney assigned to represent appellant 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 is approximately 2985 words in length.

DATED: December 7, 2017

/s/ Elias Batchelder
ELIAS BATCHELDER

DECLARATION OF SERVICE

People v. Donte Lamont McDaniel

Supreme Court No. S171393
Superior Court No. TA074274

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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 December 7, 2017, at Oakland, California.

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STATE OF CALIFORNIA
Supreme Court of California

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