In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **MARCHAND ELLIOTT,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S027094

Los Angeles County Superior Court
Case No. VA008051
The Honorable Philip H. Hickok, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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Respondent files this Supplemental Brief pursuant to California Rules of Court, Rule 8.520(d) and this Court's "Notice to Counsel Appearing for Oral Argument" mailed to Respondent on November 10, 2011. This Supplemental Brief addresses new cases that were not available at the time Respondent's Brief on the merits was filed on September 16, 2008. Specifically, appellant has raised as Ground Two of his Opening Brief a claim that the prosecutor excluded prospective jurors on the basis of their race or gender, in violation of *Batson v. Kentucky* (1986) 476, 79, 84-89 [106 S.Ct. 1712, 90 L. Ed.2d 69] and *People v. Wheeler* (1978) 22 Cal.3d 258. Respondent addresses death penalty cases decided in 2011 in which this Court analyzed claims of *Batson/Wheeler* error.

ARGUMENT

CASES DECIDED AFTER THE FILING OF RESPONDENT'S BRIEF FURTHER SHOW THAT GROUND TWO, APPELLANT'S CLAIM OF *BATSON/WHEELER* ERROR, IS MERITLESS

This Court's recent cases addressing *Batson/Wheeler* claims demonstrate that a reviewing court, in the first stage of a *Batson/Wheeler* analysis, may examine the entire record of voir dire in finding that race- and gender-neutral reasons support a prosecutor's use of peremptory challenges, even if the prosecutor did not state reasons. This Court's recent cases also show that the purpose of a *Batson/Wheeler* analysis is not to challenge a prosecutor's memory. Also, this Court's recent cases show that though comparative juror analysis may be performed for the first time on appeal, that analysis has inherent limitations.

A. *People v. Garcia* (2011) 52 Cal.4th 706: In Assessing the First Stage of the *Batson/Wheeler* Test, This Court May Examine the Entire Record of Voir Dire for Race and Gender Neutral Reasons Supporting Peremptory Strikes, Even If a Prosecutor Had No Chance To Explain Them

Here, the prosecutor was not required to explain her peremptory challenges as to eight Hispanic jurors because the trial court found appellant had failed to demonstrate a prima facie case of discrimination. (4RT 814.)[1] This Court may examine the juror questionnaires and the jurors' responses during voir dire in finding that race-neutral reasons supported the prosecutor's challenges to these jurors, even though the prosecutor was not required to explain her reasons. This Court may further use the fact (that there were race-neutral reasons supporting these peremptory challenges) as one of relevant circumstances showing that no inference of discrimination had been raised, and that appellant thus failed to meet his burden of demonstrating a prima facie case of discrimination.

In *People v. Garcia* (2011) 52 Cal.4th 706, 745-750, only the first stage of the *Batson/Wheeler* test (whether there was a prima facie case of bias in the use of peremptory challenges) was at issue. In order to demonstrate a prima facie case, a defendant must show that the totality of the relevant facts gave rise to an inference that the prosecutor used peremptory challenges due to a discriminatory purpose. (*Id.* at p. 746.) In *Garcia*, this Court, in conducting independent review of whether the defendant established a prima facie case, noted it could examine the entire record created on voir dire. (*Id.* at p. 747.) As part of this prima facie case analysis, this Court noted that the record contained gender-neutral reasons

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[1] As to a ninth Hispanic juror, Mary G., the trial court did not expressly find a prima facie case of discrimination, but asked the prosecutor to explain her challenge of Mary G. (4RT 798.)

supporting the prosecutor's use of three peremptory challenges. (*Id.* at p. 748.) Specifically, as to one juror "whose peremptory challenge the prosecutor had no chance to explain," this Court examined her responses in the juror questionnaire and during voir dire in finding there was a gender-neutral reason to exclude her. (*Id.* at p. 749.) This Court noted two other prior decisions in which it found gender-neutral reasons for excusing female prospective jurors, where the prosecutor had not provided explanations as part of the first stage *Batson/Wheeler* analysis. (*Ibid.*, citing *People v. Bonilla* (2007) 41 Cal.4th 313, 346-349; *People v. Panah* (2005) 35 Cal.4th 395, 439-42.)

Here, eight Hispanic jurors who were peremptorily challenged by the prosecutor and the portion of the Supplemental Clerk's Transcript including their questionnaires was noted in Respondent's Brief. (RB at pp. 51-52.) Those questionnaires show the prosecutor had race and gender-neutral reasons for challenging these jurors. Specifically, the prosecutor stated, in response to a *Batson/Wheeler* objection as to a Black female prospective juror, that she was challenging all prospective jurors she perceived as being "weak on death" based on their questionnaire responses. (4RT 795.) The questionnaires and voir dire of the eight Hispanic jurors show that seven of them were "weak on death" and that the eighth (Inez A.) had issues indicating he was would not be a favorable prosecution juror, including that he did not want to serve as a juror in this case, that he would not be an attentive juror, and that he had reported a crime, but "dropped the charges" because he feared retaliation. The record of responses during jury voir dire also shows there were other issues indicating these persons were not jurors the prosecutor would have wanted to serve.

1. Vincent R.

Vincent R.'s questionnaire shows that he made several responses indicating antipathy toward the death penalty. Vincent R., in response to

what he thought about the saying, "an eye for an eye," wrote that, "because someone take[s] a person[']s lifes [*sic*]. Dose [*sic*] not mean we can take his life." Vincent R. also wrote there were religious reasons which would cause him to not vote for the death penalty, explaining, "suppose[d] to forgive what a person dose [*sic*]." Vincent R. also wrote that life without the possibility of parole ["LWOP"] was a worse punishment for a defendant than death. (5SCT 1206-1207.)

During voir dire, Vincent R. acknowledged he had responded in his questionnaire that he had religious reasons that would cause him not to vote for the death penalty. He also agreed that he would always disregard the death penalty and vote for LWOP because of his religious beliefs. (4RT 734, 737.) After the prosecutor challenged Vincent R. for cause, additional voir dire was conducted in which Vincent R. stated he was "teeter-tottering" on whether he could vote for death. Vincent R. later said he "probably could" vote for the death penalty. (4RT 741-745.)

2. Elaine G.

Elaine G. wrote in her questionnaire that she believed the death penalty "is an effective deterrent to be used only in extreme circumstances." She also wrote that LWOP was a worse punishment than death for a defendant. (8SCT 1987, 1990.)

During voir dire, Elaine G. stated that she might favor LWOP over the death penalty. (3RT 419-421.) She also stated that she felt the death penalty was warranted in certain cases involving "just very severe things where things have been premeditated, and if there's a previous history." (3RT 454-455.)

3. Guadalupe O.

Guadalupe O. wrote in her questionnaire that she did "not believe in death penalty," and that she did not believe in the saying "an eye for an

eye." In response to a question about her thoughts about the benefit of imposing a death sentence, Guadalupe O. wrote, "Can't do." Guadalupe O. wrote that she did not want to sit on this case because of the seriousness of the charges. (7SCT 1876-1878, 1880.)

Guadalupe O. stated during voir dire that she did not want to sit as a juror in this case. (3RT 477-478.) She also acknowledged that she did not believe in the death penalty, and would be uncomfortable deciding the death penalty. (3RT 504-506.)

4. Kelley E.

Kelly E. wrote that LWOP was a worse punishment than death for a defendant. (5SCT 1346.) Kelly E. stated during voir dire that LWOP "would be long" and "would be a real punishment." (3RT 584.)

5. Inez A.

Inez A. wrote in his questionnaire that he "really would not like to sit [on the jury in this case]. So that my heart and con[science] will never bother me. But if I sit, it will be my duty, as I did serve in the Army." (5SCT 1153.) Inez A. also wrote that, "I believe that I don't have any business judging anyone." (5SCT 1136-1137.)

During voir dire, Inez A. acknowledged that he had indicated in his questionnaire that the fact there was a question about penalty suggested to him that appellant was guilty. Inez. A. stated that he did not remember that response because he was in a hurry to fill out the questionnaire. (4RT 648.) Inez A. also stated that he had reported a crime, but "dropped the charges" because the suspects lived too close to his place of work, and he was a target there. (4RT 682.)

6. Laurie H.

Laurie H.'s questionnaire showed she had reservations about the death penalty. She wrote that she "sometimes" believed in the saying, "an eye for

an eye . . . if it is a premeditated brutal murder." She also stated that the death penalty "should only be utilized in select cases . . . I don't think it should always be used." (5SCT 1289, 1291.)

During voir dire, the prosecutor noted Laurie H. had stated in her questionnaire that she would want to reach a verdict that she "could never doubt in the future. If I felt questionable later – it would bother me for a lifetime. I couldn't let that happen." Laurie H. stated that after being in court, she understood the difference between all possible doubt and reasonable doubt. (3RT 600-601; see 5SCT 1276.)

7. Angelita O.

The record regarding Angelita O.'s responses in her questionnaire and during voir dire are set forth in Respondent's brief. (See RB at 70-71.) The trial court, without seeking an explanation from the prosecutor, stated that Angelita O.'s questionnaire showed she stated did not believe in the death penalty and that she changed that position in voir dire. The record support's the trial court's finding. (3RT 503-504; 6SCT 1455-1459.)

8. Angela F.

Angela F. wrote in her questionnaire that she was "more in favor [of] life without parole, but I still believe in death penalty." Angela F. also wrote that she "sometimes" believed in the saying "an eye for an eye," but "I'm somewhat swaying from that." She also wrote that LWOP was a worse punishment than death. (3SCT 589-590.)

During voir dire, trial counsel asked the jurors if any of them would rather not sit on the case. Trial counsel noted that Angela F. was "ready to jump out" of her chair. Angela F. also acknowledged that she wrote a note to the court indicating that she did not want to serve. Later, Angela F. stated she was a teacher's aide, and her biggest concern was some of the

children she worked with would fall behind if she had to serve as a juror. (3RT 581, 589, 600-606.)

According, the record shows there were race-neutral reasons for the prosecutor's peremptory challenges to these Hispanic prospective jurors. Specifically, seven of these jurors had antipathy or reservations about the death penalty, and the eighth, Inez A., had other issues indicating that he would be a favorable prosecution juror, including that he did not want to serve as a juror and had could not remember a response he wrote in the questionnaire because he was in a hurry to fill it out, strongly suggesting he may not be an attentive juror. These race and gender-neutral reasons, along with other circumstances noted in Respondent's Brief, including that five Hispanics served on the jury that decided appellant's case, show that, based on the totality of relevant circumstances, appellant failed to demonstrate a prima facie case of discrimination.

B. *People v. Jones* (2011) 51 Cal.4th 346: The Purpose of a *Batson/Wheeler* Motion Is Not To Test the Prosecutor's Memory

Appellant contends that the prosecutor's explanation for challenging Mary G., a Hispanic female prospective juror, was not valid because the prosecutor "falsely misrepresented" to the trial court that Mary G. was another juror, Erlinda L. (AOB 137-143.) A similar argument was raised and rejected in *People v. Jones* (2011) 51 Cal.4th 346, 366.

In *Jones*, this Court rejected the argument that the prosecutor's misstatement about a prospective juror's answer to a question showed racial bias, stating that there was no reason to assume the prosecutor intentionally misstated the matter, and that the prosecutor "may simply have misremembered the record." (*Ibid.*) This Court noted that a prosecutor must keep track of dozens of prospective jurors, thousands of pages of jury

questionnaires, and several days of voir dire. (*Ibid.*) This court stated that

> The purpose of a hearing on a *Wheeler/Batson* motion is not to test the prosecutor's memory but to determine whether the reasons given are genuine and race neutral.

(*Ibid.*)

Here, for the same reasons in *Jones*, this Court should not assume that the prosecutor intentionally misrepresented the identity of Mary G. to the trial court. As explained further in Respondent's Brief, the prosecutor's stated reason for challenging Mary G. applied regardless of incorrectly identifying prospective Fern R. as the juror whom Mary G. was sitting next to. (RB at p. 69.) The prosecutor stated that Mary G., when she was "on the stand" had "came very close to being a challenge for cause," and explained she had challenged Mary G. because Mary G. "changed her tune." (4RT 798.) Thus, based on the prosecutor's description, Mary G. came close to being a challenge for cause based on her initial statements in voir dire, but Mary G. changed those answers and was not dismissed for cause. That description accurately describes Mary G., who initially raised her hand during voir dire, indicating that she would never vote for the death penalty, then changed that answer. (4RT 636-638, 686-688.) Further, the prospective juror whom appellant claims the prosecutor actually was referring to (Erlinda L.) in fact was excused for cause because she did not waver from her questionnaire response that she could not vote for the death penalty. (4RT 639-642, 692, 694-695.) In other words, the prosecutor's description of the challenged juror applied to Mary G., not Erlinda L. Thus, the prosecutor's mistake or misstatement in identifying Mary G. does not compel the conclusion that the prosecutor's reason for challenging her was not sincere.

C. *People v. Jones* (2011) 51 Cal.4th 346: The Limited Use of and Problems with Comparative Juror Analysis on Appeal

In *Jones*, this Court noted limitations and problems regarding conducting comparative juror analysis for the first time on appeal, including: (1) such an analysis may be misleading; (2) that a court should be mindful that the jurors in question were not really comparable; (3) that in the relevant United States Supreme Court cases, comparative juror analysis was not the sole reason showing a *Batson* violation, but supplemented strong evidence that challenges were improper; and (4) a problem of comparative juror analysis is that the prosecutor generally has not provided or been asked for reasons for not challenging allegedly comparable jurors. (*People v. Jones, supra*, 51 Cal.4th at pp. 364-366.)

Those limitations and problems with comparative juror analysis apply in this case. As set forth more fully in Respondent's Brief, the jurors who were not challenged by the prosecutor were not really comparable to Myron G. and Patricia J., because their answers on the questionnaires and during voir dire showed that they were more desirable as jurors to the prosecutor. (See *People v. Jones, supra*, 51 Cal.4th at p. 365 [noting that two panelists may have same answer on a particular point, but the risk posed by one panelist may be offset by other answers or experiences that make one juror more desirable].)

CONCLUSION

Accordingly, for the reasons set forth above and in Respondent's Brief, respondent respectfully requests that the judgment be affirmed.

Dated: November 23, 2011 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S SUPPLEMENTAL BRIEF uses a 13 point Times New Roman font and contains 2,617 words.

Dated: November 23, 2011

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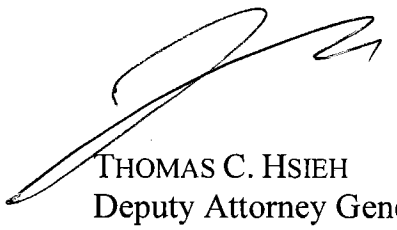

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***PEOPLE v. MARCHAND ELLIOTT*** Case No.: **S027094**

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **November 23, 2011**, at Los Angeles, California.

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