SUPREME COURT COPY

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IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

ROBERT BOYD RHOADES,

Defendant and Appellant./

CAPITAL CASE

No. S082101

Sacramento County Superior Court # 98F00230

On Appeal From Judgment Of The Superior Court Of California

Sacramento County

Honorable Loyd H. Mulkey, Jr., Trial Judge

APPELLANT'S SUPPLEMENTAL BRIEF

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Supreme Court

DEATH PENALTY

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SUPPLEMENTAL ARGUMENT IX

I. WITH RESPECT TO THE COURT DENYING MR. RHOADES' FIRST-STAGE *WHEELER/BATSON* MOTIONS AFTER THE PROSECUTORS PEREMPTORILY EXCUSED ALL FOUR AFRICAN-AMERICAN WOMEN FROM HIS JURY, THE PROSECUTORS EMPLOYED RACE AND GENDER STEREOTYPES HISTORICALLY INVOKED TO EXCLUDE AFRICAN-AMERICAN WOMEN FROM JURY SERVICE

With respect to Argument IX, about the court denying Mr. Rhoades' first-stage *Wheeler/Batson* (*Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1979) 22 Cal.3d 258) motions after the prosecutors peremptorily excused all four African-American women from his jury, the prosecutors employed race and gender stereotypes historically invoked to exclude African-American women from jury service. It was no accident that the prosecutors used four of eight peremptory challenges to excuse all four African-American women from Mr. Rhoades' jury and refused to explain why. (30-RT 9039.)

Exclusions based on race and gender continue to perpetuate stereotypes. (See *Miller-El v. Dretke* (2005) 545 U.S. 231, 270 [conc. opn. of Breyer, J.] [commenting that "the use of race- and gender-based stereotypes in the jury selection process seems better organized and more systematized than ever before"].) "Competence to serve as a juror ultimately depends on . . . individual qualifications and ability impartially to consider evidence presented at a trial." (*Batson, supra*, 476 U.S. at 87, citing *Thiel v. S. Pac. Co.* (1946) 328 U.S. 217, 223-224.) The use of a juror's membership in a racial or gender group as a proxy for competence or impartiality "'open[s] the door to ... discriminations which are abhorrent to the democratic ideals of trial by jury.'" (*J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 145, fn.19, quoting *Thiel, supra*, 328 U.S. at 220). As the *Batson* Court observed: "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." (*Batson, supra*, 476 U.S. at 87.) Inadequate judicial enforcement of the prohibition on discriminatory jury selection validates skepticism about the fairness of our legal system. (Sandra Day O'Connor, *Public Trust as a Dimension of Equal Justice: Some Suggestions to Increase Public Trust* (Fall 1999) 36 Ct. Rev. 10, 11, available at http://aja.ncsc.dni.us/htdocs/publications-courtreview.htm. [observing that "[t]he perception that African-Americans are not afforded equality before the law is pervasive, and requires us to take action at every level of our legal system, especially at the local level"].)

The stereotype that African-Americans will be partial to a defendant of the same race has long been used to exclude them as jurors. (See *Batson, supra*, 476 U.S. at 103-104 [conc. opn. of Marshall, J.] [providing examples of prosecutors' routine and undisguised use of peremptory challenges to strip juries of African-Americans].) Before *Batson*, prosecutors employed peremptory strikes to remove African-Americans from trials in which the accused was black as "'a

matter of common sense'" and a regular "'practice.'" (Frederick L. Brown et al., *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse* (1978) 14 New Eng. L. Rev. 192, 202, 205 (*Brown*) [citations omitted] [quoting judicial opinions describing prosecutors' jury selection practices]; see also *id.* at 214, fn.126, quoting *State v. Jack* (La. 1973) 285 So.2d 204, 210 [dis. opn. of Barham, J.] [explaining how strikes "'were exercised systematically and discriminatively for the purpose of excluding all blacks from the jury'"]; *Reed v. Quarterman* (5th Cir. 2009) 555 F.3d 364, 382 [describing a manual used by the Dallas County District Attorney's Office, instructing prosecutors to avoid selecting "'any member of a minority group'" because "'[m]inority races almost always empathize with the Defendant'"].)

Although *Batson* created a new legal test, allowing a defendant to rely "solely on the facts . . . in his case" to demonstrate purposeful discrimination (*Batson, supra*, 476 U.S. at 95), prosecutors continue to base peremptory strikes on racial stereotypes. (See, e.g., *People v. Randall* (Ill. App. Ct. 1996) 671 N.E.2d 60, 65 [surmising that "new prosecutors are given a manual, probably entitled, 'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations'"]; Equal Justice Initiative, *Illegal Racial Discrimination in Jury Service: A Continuing Legacy* (2010) at 14-30 [describing the prevalence of "racially biased use of peremptory strikes" post-*Batson*, and cataloguing examples of reasons that "explicitly incorporate race" or "correlate strongly with racial stereotypes"].)

As the Supreme Court discussed at length, "gender, like race, is an unconstitutional proxy for juror competence and impartiality." (*J.E.B., supra,* 511 U.S. at 129.) In extending *Batson's* protection to women, the *J.E.B.* Court disavowed stereotypes historically used to exclude women from civic engagement, including jury service. (*Id.* at 131-136.) For generations, women's

exclusion from civic life was based on gender stereotypes that cast them as either too sensitive or singularly focused on their roles as wife and mother. (See, e.g., *Hoyt v. Florida* (1961) 368 U.S. 57, 62 [upholding women's exemption from jury service because women occupy a unique position "as the center of home and family life"]; *Bailey v. State* (Ark. 1949) 219 S.W.2d 424, 428 [observing that criminal trials "often involve ... elements that would prove humiliating, embarrassing and degrading to a lady"].)

These stereotypes were widely used by prosecutors when *J.E.B.* was decided. (See Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service* (1993) 61 U. Cin. L. Rev. 1139, 1172 [describing "trial manuals and jury selection tracts" predicting how women jurors would behave]; *Brown, supra*, at 224 fn. 181 [quoting the Dallas County District Attorney's manual instructing that "'women's intuition can help you if you can't win your case with the facts,'" but that "'[y]oung women too often sympathize with the Defendant'"].) These stereotypes continue to animate jury selection practices. (See *Miller-El, supra*, 545 U.S. at 271 [conc. opn. of Breyer, J.] [describing a trial consulting firm's jury selection technology for civil and criminal cases that specifies "'exact demographics,'" including race and gender, to enable lawyers to identify "'the type of jurors you should select and the type you should strike'"].)

Because of their dual identities as African-Americans and women, black women are particularly vulnerable to discriminatory peremptory challenges. Extending *Batson's* protection to women, the *J.E.B.* Court acknowledged the relationship between race and gender discrimination in the use of peremptory challenges:

> "Failing to provide jurors the same protection against gender discrimination as race discrimination could frustrate the purpose of *Batson* itself. Because gender and race are overlapping categories, gender can be used as a pretext for racial

> discrimination. Allowing parties to remove racial minorities from the jury not because of their race, but because of their gender, contravenes well-established equal protection principles and could insulate effectively racial discrimination from judicial scrutiny." (*J.E.B., supra*, 511 U.S. at 145.)

The *J.E.B.* Court also observed that "[t]he temptation to use gender as a pretext for racial discrimination may explain why the majority of the lower court decisions extending *Batson* to gender involve the use of peremptory challenges to remove minority women" and that "[a]ll four of the gender-based peremptory cases to reach the Federal Courts of Appeals . . . involved the striking of minority women." (*Id.* at 145, fn.18; see, e.g., *United States v. Omoruyi* (9th Cir. 1993) 7 F.3d 880, 881-882 [foreshadowing *J.E.B.'s* recognition that gender may be used as a proxy for race].)

As in other contexts, African-American women are often subjected to a double dose of discrimination in jury selection. (See *People v. Motton* (1985) 39 Cal.3d 596, 606 [noting that during jury selection, "black women face discrimination on two major counts—both race and gender—and their lives are uniquely marked by this combination"]; Jean Montoya, *"What's So Magic[al] About Black Women?" Peremptory Challenges at the Intersection of Race and Gender* (1996) 3 Mich. J. Gender & L. 369, 400 [observing that African-American women experience "intersectional or race and gender discrimination," which "is necessarily race discrimination and gender discrimination"]; *Babcock, supra*, at 1163 [arguing that "in the case of minority women, allowing gender strikes subjects them to the most virulent double discrimination: that based on a synergistic combination of race and sex"]; see *Commonwealth v. Basemore* (Pa. 2000) 744 A.2d 717, 730 [describing the same training videotape referenced above, in which prosecutor McMahon instructs that "'young black women'" are also "'very bad'" because "'they got two minorities, they're women and they're [ ]

blacks, so they're downtrodden in two areas. And they somehow want to take it out on somebody, and you don't want it to be you'"].)

Striking African-American women based on "gross generalizations" regarding group views on capital punishment offends the equal protection clause. To a prosecutor, black women may be seen as undesirable jurors based on the assumption that they are unlikely to impose the death penalty. (See, e.g., Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate* (2008) 63 Am. Psychol. 527, 530 [observing that "[i]n practice, attorneys' chief objective . . . is to select jurors whom they believe will be sympathetic to their side of the case"].) Polling data shows that women and African-Americans oppose capital punishment somewhat more frequently than men and Whites, respectively. (See Gallup poll conducted December 19-22, 2012 (published January 9, 2013), http://www.gallup.com/poll/159770/death-penalty-support-stable.aspx; Gallup poll conducted June 4-24, 2007 (published July 30, 2007), http://www.gallup.com/poll/28243/Racial-Disagreement-Over-Death-Penalty-Has-Varied-Historically.aspx) There is, however, social science research demonstrating that jurors do not decide verdicts based on their racial or gender identity. (See Carol J. Mills & Wayne E. Bohannon, *Juror Characteristics: To What Extent Are They Related to Jury Verdicts* (1980) 64 Judicature 22, 27 [finding that black women are more inclined to convict defendants of color before deliberation than whites]; see also *Sommers & Norton*, *supra,* at 531 [stating that though "juror [racial] stereotypes tend to be global," juror behavior is "more context dependent"].)

As a matter of constitutional law, stereotypes may not be the basis of governmental action. The exclusion of African-American women based on any "gross generalizations" about their character, capabilities, or views violates the

Equal Protection Clause, "even when some statistical support can be conjured up for the generalization." (*J.E.B., supra*, 511 U.S. at 139 & n.11.) Because juror competence is an individual matter, a prosecutor may not use a juror's membership in a particular racial or gender group as a proxy for "juror competence and impartiality." (*Id.* at 129.)

Judges may be just as prone as attorneys and jurors to flawed decision-making based on their own biases. (See, e.g., Jerry Kang et al., *Implicit Bias in the Courtroom* (2012) 59 UCLA L. Rev. 1124, 1146 [concluding that "the extant empirical evidence" shows that "there is no inherent reason to think that judges are immune" from bias]; Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions* (2010) 4 Harv. L. & Pol'y Rev. 149, 150 [chronicling one judge's upsetting discovery that he harbored implicit biases]; Jeffrey Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?* (2009) 84 Notre Dame L. Rev. 1195, 1197 [finding that "[j]udges hold implicit racial biases" that "can influence their judgment"].)

Moreover, trial judges may overestimate their impartiality, compounding the impact of judicial bias. For example, 97 percent of judges recently surveyed believe they are in the top half relative to their colleagues in "avoid[ing] racial prejudice in decisionmaking" relative to other judges. (See *id* at 1225.) These findings suggest that "judges are overconfident about their ability to avoid the influence of race and hence fail to engage in corrective processes." (*Id.* at 1225-1226.)

Given that trial judges harbor biases and overestimate their impartiality, it is troubling -- though perhaps not surprising -- that they accept the overwhelming majority of attorneys' race-neutral justifications. (See K. J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*

(1996) 71 Notre Dame L. Rev. 447, 461 [finding that prosecutors' race-neutral explanations for peremptory strikes were accepted 80 percent of the time]; M. J. Raphael & E. J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky* (1993) 27 U. Mich. J. L. Reform 229, 235 [concluding that "only a small percentage of the neutral explanations for peremptory strikes were rejected"].)

Concurring in *Batson*, Justice Marshall cautioned that because "[a]ny prosecutor can assert facially neutral reasons for striking a juror," there is a danger that courts will accept these post hoc rationalizations and "the protection erected by the Court today may be illusory." (*Batson*, *supra,* 476 U.S. at 106 (conc. opn. of Marshall, J.].) More than thirty years on, "lawyers have simply learned to mask discriminatory peremptories" by furnishing race-neutral and gender-neutral reasons, and there are raging inconsistencies between trial judges' scrutiny at step three. (Nancy S. Marder, *Justice Stevens, The Peremptory Challenge, and the Jury* (2006) 74 Fordham L. Rev. 1683, 1707-1708, fns.170-171 [describing cases in which virtually identical facially neutral reasons were found satisfactory at step three by some judges and pretextual by others]; *Sommers & Norton, supra*, at 534 [surveying studies showing the boundless range of race-neutral reasons].) It is in this context, that Mr. Rhoades urges this Court to review the prosecutor's peremptory challenges of all four African-American women in his case. (30-RT 9039.)

CONCLUSION

Appellant respectfully requests this Court to honor the holding of *Johnson v. California* (2005) 545 U.S. 162, which held that the trial court erred in not requiring the prosecutors to explain their reasons for excusing all the African-American jurors at the first-stage of the *Batson* inquiry, and which facts are virtually indistinguishable from Mr. Rhoades' case.

Dated: March 19, 2014

Respectfully submitted,

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By Appointment Of
The Supreme Court

PROOF OF SERVICE and WORD COUNT CERTIFICATION

I, RICHARD JAY MOLLER, declare that I am, and was at the time of the service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. My business address is P.O. Box 1669, Redway, CA 95560-1669. I served the foregoing APPELLANT'S SUPPLEMENTAL BRIEF on March 19, 2014, by depositing copies in the United States mail at Redway, California, with postage prepaid thereon, and addressed as follows:

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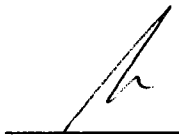

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