**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| PEOPLE OF THE STATE OF CALIFORNIA<br>Plaintiff/Respondent | ) | S126560 |
| | ) | Los Angeles County |
| vs. | ) | |
| | ) | NA051938-01 |
| JAMELLE ARMSTRONG<br>Defendant/Plaintiff | ) | |



# APPELLANT'S SECOND SUPPLEMENTAL BRIEF

TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT

On Automatic Appeal from the Judgment of the Los Angeles Superior Court, Honorable Tomson Ong, presiding.

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DEATH PENALTY

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| PEOPLE OF THE STATE OF CALIFORNIA<br>Plaintiff/Respondent | ) | S126560 |
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## APPELLANT'S SECOND SUPPLEMENTAL BRIEF

On Automatic Appeal from the Judgment of the Los Angeles County Superior Court, Honorable Tomson Ong, Judge.

## INTRODUCTION

On September 13, 2013, appellant filed his Reply Brief. Since that time, there have been many cases decided by this Court that are pertinent to appellant's *Batson/Wheeler* issue. Based upon this Court's recent rulings, although none of these cases represent a radical change in the case law as it existed in September, 2013, counsel hereby files his Second Supplemental Brief.

## I. RECENT DEVELOPMENTS IN *BATSON/WHEELER* CASE LAW IN THE CALIFORNIA SUPREME COURT

### A. INTRODUCTION

Both this Court and the United States Supreme Court have established the now familiar three part formula to determine the constitutionality of a peremptory challenge. (*People v. Davis* (2009) 46 Cal.4th 539, 582; *Johnson v. California* (2005) 545 U.S. 162, 168.) First, the defendant is initially burdened with establishing a prima facie case of discrimination "by showing that the totality of the relevant facts gives rise to an inference that the peremptory challenges are being used for a discriminatory purpose." Second, "once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes." The third step is "[i]f a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination."

### B. ESTABLISHMENT OF A PRIMA FACIE CASE OF DISCRIMINATION

In *People v. Scott* (2015) 61 Cal.4th 363, this Court stated "[t]he question at the first stage concerning the existence of a prima facie case depends on consideration of the entire record of the voir dire at the time the

entire record was made." (*Id.* at p. 384.) This Court then discussed some of the relevant factors in this determination. "Among these are that a party has struck most or all of the members of the identified group from the venire, that a party has used a disproportionate number of strakes against the group, that the party has failed to engage these jurors in more than a desultory voir dire, that the defendant is a member of the identified group, and that the victim is a member of the group to which the majority of the remaining jurors belong." (*Ibid.*)

*Scott* discussed this Court's practice in reviewing motions stating that an appellate court properly reviews a first stage ruling if the trial court has determined that no prima facie case of discrimination exists, even if it allows or invites the prosecutor to state reasons for excusing the jurors but refrains from ruling on the validity of those rulings. (*People v. Scott, supra,* 61 Cal.4th at p. 386; *People v. Taylor* (2010) 48 Cal.4th 574, 612-614.)

*Scott* then discussed "whether the same procedure applies when the trial court, having determined that no prima facie case was established and having heard the proffered justification, proceeded to make an alternate holding that those proffered justifications were genuine." (*People v. Scott, supra,* 61 Cal.4th at 386.) Scott answered this question by stating,

> In sum where (1) the trial court has determined that no prima facie case of discrimination exists, (2) the trial court allows or invites the prosecutor to state his or her reasons for excusing the juror for the record, (3) the prosecutor provides nondiscriminatory reasons, and (4) the trial court determines that the prosecutor's nondiscriminatory reasons are genuine, an appellate court should begin its analysis of the trial court's denial of the *Batson/Wheeler* motion with a review of the first-stage ruling. (*Id.* at p. 391.)

*Scott* further clarified the process by stating "when the appellate court is already evaluating the sincerity of the proffered reason for excusing one juror as part of its review of all the evidence as it bears on the question whether the excusal of *another* juror constituted unlawful discrimination (citations omitted), the appellate court may likewise begin its review of the denial of the *Batson/'Wheeler* motion as to the first juror by evaluating the sincerity of the proffered reason. (*People v. Scott, supra,* 61 Cal.4th at p. 392.) In addition, it held that a reviewing court may not rely on a prosecutor's statement of reasons to *support* a trial court's finding that the defendant failed to make a prima facie case of discrimination in Step 1. (*Ibid.*)

This Court seemingly took a different approach in *People v. Chism* (2014) 58 Cal.4th 1266, 1314 in which this Court stated when the trial court determines that defendant did not make a prima facie showing of group bias and "also rules on, indicates agreement or

satisfaction with, or otherwise passes judgment on the ultimate question of purposeful discrimination, the case is described as a first stage/third stage *Batson/Wheeler* hybrid, and the question whether a defendant established a prima facie case of group bias is rendered moot."[1] (See *People v. Riccardi* (2012) 54 Cal.4th 758, 786.)

However, in the instant case, regardless of which approach this Court takes the results are the same. As finding of a prima facie case as to the first two strikes (Mr. Leonard and Mr. Cook), respondent argued that there was no prima facie case of discrimination because no "pattern" of discrimination could occur after one or two challenges. (RB at p. 131) This is untrue as the law made it clear that even a single improper challenge can result in a discriminatory challenge. (*Snyder v. Louisiana* (2008) 552 U.S. 472, 478; see *People v. Trinh* (2014) 59 Cal.4th 216, 241-242; *People v. Sattiewhite* (2014) 59 Cal.4th 446, 467.)

Further, using the totality of relevant facts test as to the establishment of a prima facie case (*Miller-El v. Dretke* (2005) 545 U.S. 231, 239), it is clear that the "totality of the relevant facts gives rise to the

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1. In this regard *Chism* at p. 1314 adopted the plurality opinion of *Hernandez v. New York* (1991) 500 U.S. 352, 359 in which Justice Kennedy and three other Justices created this so-called first/third stage hybrid referenced in *Chism.* It is of note that none of the other five justices ever disputed the pluralities logic, and the failure to reach a majority opinion was unrelated to this particular part of the plurality decision.

inference that the peremptory challenges are being used for a discriminatory purpose." (*Johnson v. California, supra,* 545 U.S. at p. 168.) One of the most relevant facts is that the proponent of the strikes struck most or all of the members of the cognizable group in question. (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 342. ) In this case, *all* of the black male jurors were removed. In addition, that this case was particularly racially charged, with a crime, at least in part, racially motivated, is another strong factor in finding the existence of a prima facie case. (See *People v. Bell* (2007) 40 Cal.4th 582, 597; *People v. Box* (2000) 23 Cal.4th 1153, 1188-1189.)

This Court also held that in the determination of a prima facie case it is significant if the defendant is a member of the excluded group and the victim is a member of the group to which the majority of the remaining jurors belong. (*People v. Bell, supra,* 40 Cal.4th at p. 597; *People v. Cunningham* (2015) 61 Cal.4th 609, 664.) Such was the case here. As stated in *Cunningham,* that no members of the cognizable group were included in the ultimate jury is also a factor in determining whether there was a prima facie showing of discrimination. (*Cunningham* at pp. 664-665.)[2]

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2. In *People v. Cunningham* (2015) 61 Cal.4th 609 another case decided this year, this Court reiterated that to be timely, a *Batson/Wheeler* objection must be made before the entire jury, including the alternates are sworn. (*Id.* at p. 662; *People v. Howard* (1992) 1 Cal.4th 1132, 1154.)

Finally, as fully argued in appellant's prior briefings, the fact that there were no credible "race-neutral" explanations given for the excusal of these jurors also was a factor that a prima facie case was established. (See *People v. Scott, supra,* 61 Cal.4th at pp. 383-285.)

**C. THIRD STEP ANALYSIS**

*People v. Johnson* (2015) 61 Cal.4th 73 reiterated that in the third stage the appellate review is "deferential" and that the appellate court examines "only whether substantial evidence supports its conclusions." (Citations omitted) (*Id.* at p. 755.) [3]" (*Ibid.*)

However, *Johnson* also restated that the critical question is the determination of the persuasiveness of the prosecutor's justification for the peremptory strike and that at this stage "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." (*People v. Johnson, supra,* 61 Cal.4th at p. 755.) In essence, this Court stated that the ultimate determination comes down to whether the trial court was justified in finding the prosecutor's race-neutral explanations to be credible. "Credibility can be measured by, among other factors, the prosecutor's demeanor, how reasonable, or how improbable, the explanations are, and whether the proffered rationale has some basis in

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3. The *Johnson* Court stated "the identical standard applies to a comparative juror analysis."

accepted trial strategy." (*Ibid.*) In addition, the *Johnson* Court held that the presence or absence of a member of the cognizable group on the ultimate jury is relevant to the determination as to whether the prosecutor acted in good faith. (*Id.* at p. 760.)

The *Johnson* Court pointed out several examples of what might be, if not demonstrated to be otherwise, be considered race-neutral explanations . Prospective Juror Keith B, a black man[4], was properly excused because he "leaned on side of mercy," and his voir dire answers emphasized his Christian beliefs in leniency. (*People v. Johnson, supra,* 61 Cal.4th at p.756.) Vanessa H., another black prospective juror, was properly stricken because she said she believed in Jesus who said thou shalt not kill. (*Id.* at pp. 756-757.)[5]

In *People v. Chism, supra,* 58 Cal.4th at p. 1314, this Court reaffirmed that "if a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members, the trial judge may consider that act as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination"

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4. Defendant Johnson was black.

5. The discussion of comparative analysis in appellant's briefing clearly distinguishes this case from *Johnson* in that regard. In addition, as explained in said briefings, the cognizable group in this case is African-American *males*, of which *all* were challenged by the prosecution.

In *Chism* a 59-member venire included 4 or 5 African-Americans. The prosecutor used 18.2 of her challenges (2 of 11) to remove 40% (2 of 5) of this cognizable group. This Court did not find these numbers suggestive of improper discrimination. (*People v. Chism, supra,* 1315). This was certainly not the case here where all of the cognizable group members were removed from the jury.

*Chism* also restated that a peremptive challenge can be speculative or trivial as long as it is not based on impermissible group bias. (*People v. Chism, supra,* 58 Cal.4th at p. 1316), reiterating "[t]he proper fucus of a *Batson/Wheeler* inquiry, of course, is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, *not* on the objective *reasonableness* of those reasons. (*Ibid.* at p. 1317; *People v. Reynoso* (2003) 31 Cal.4th 903, 924.)

The *Chism* dissent cited to *Miller El v. Dretke, supra* 545 U.S. at p. 252, which mandated the following in a reviewing court's evaluation of the genuineness of the prosecutor's explanations.

> When illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reason he gives. A Batson challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have

been shown up as else." (*Chism, supra,* at p. 1314.)[6]

Regarding a comparative juror analysis, *Chism* held that such an analysis must be performed on appeal even when such an analysis was not conducted in the trial court, with the limitation that the trial court's finding is reviewed "on the record as it stands at the time of the *Batson/Wheeler* challenge was made." [7](*Id.* at p. 1318.)

In *People v. Hensley* (2014) 59 Cal.4th 788, 801-803 this Court discussed how a juror's lack of social skills and adaptability can serve as a race-neutral reason for a prosecutorial peremptive strike, as these types of jurors may lead to divisiveness in the deliberation room. (*Ibid.*) In addition, this Court held that "[r]igid jurors that appear to be emotionally detached and terse may be divisive during deliberations. They may not perform as well as open-minded jurors willing and able to articulate their views and explain others." (*Id.* at p. 801) Further if a prospective juror's trial responses seem "very mechanical" and "very guarded," the prosecutor could reasonably conclude that said juror's non-revealing responses might conceal views that would be unsympathetic to the prosecutor's case. (*Id* .at p. 803.) Again, in spite of the prosecutor's at times desperate attempts to

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6. Appellant strongly urges that this Court clear adopt this as the rule of this Court

7. The comparative analysis in this case was within this limitation.

show otherwise, appellant's briefings clearly showed all four African-American male jurors to be socially adept and willing to share their views with all present.

The *Hensley* Court further stated that "the fact that the objector (to the strike) thinks his opponent should feel comfortable with (the stricken juror) is not the relevant question. The question is whether the advocate exercising the challenge had an honest and racially neutral reason for doing so." (*People v. Hensley, supra,* 59 Cal. 4th at p. 803.) Again, in the instant case, the prosecutor's reasons for striking the four African-American males were clearly pretextual.

In *People v. Trinh, supra,* 59 Cal.4th 261, in addition to affirming that the improper striking of a single prospective juror can establish a *Batson/Wheeler* violation (*Id.* at pp. 241-242), this Court reiterated that all that was required to establish a prima facie case was to prove that it was "more likely than not that the challenge was improperly motivated,"not that there was a "strong likelihood " of discrimination. (*Id.* at p. 241; *People v. Sattiewhite, supra,* 59 Cal.4th at p. 470.) *Trinh* also stood for the proposition that when comparative analysis was the only factor tending to show discriminatory intent, the chance of there being an improper strike was lessened. (*Id.* at pp. 241-243.) In addition, *Trinh* supported the premise

that when doing a comparative analysis as to a stricken prospective juror, the trial court must consider all of the characteristics of said prospective jurors, in combination, and not in isolation. (*Ibid.*)

In the instant case, comparative analysis unfavorable to the prosecution argument was not the only indicia of racially based use of the prosecutor's peremptory challenged. The entire record was replete with the prosecutor's intemperate conduct, misrepresentations of four stricken jurors' positions, and improper attacks on the integrity of the stricken jurors and appellant's trial counsel. Her explanations for the strikes were "fantastical" (*People v. Johnson, supra,* 61 Cal.4th at p. 755), without any basis in trial strategy other than to remove from the jury room the voice of this cognizable group. Standing alone, without the weight of the other facts evidencing discriminatory intent, in venturing her factually unsupported and logically absurd opinion that Mr. Payne would surely "hang" the jury, the prosecutor was acknowledging that she did not want black men to serve, as their prospective and experience would damage her chances at a sentence of death.

In *People v. Duff* (2014) 58 Cal.4th 527, 545 this Court reiterated that the key question is "how persuasive the prosecutor's proffered justifications are considering, inter alia, their inherent plausibility and their

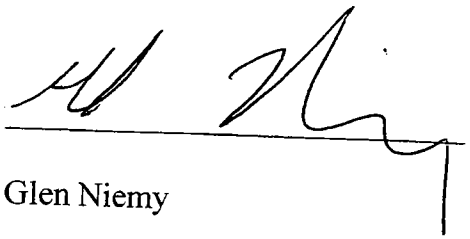
relationship to accepted trial strategy." This Court also recognized that a prosecutor cannot be expected to be perfect. "An isolated mistake or misstatement (from the prosecutor) that the trial court recognizes as such is generally insufficient to demonstrate discriminatory intent." (*People v Manibusan* (2013) 58 Cal.4th 40, 78.)

This was not a case of isolated misstatements or misrepresentations by the prosecutor. The record, when taken as a whole, overwhelming evidences a discriminatory intent leading to the striking of each and every black male from the jury.

## CONCLUSION

For the reasons stated in Appellant's Opening Brief, Appellant's Reply Brief, and this Brief, appellant's conviction must be reversed.

November 9, 2015



Glen Niemy

## CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Opening Brief was composed in a 13 point font, Times New Roman Type and consists of a total of 2,798 words.

November 10, 2015

Glen Niemy
Attorney for Appellant

**DECLARATION OF SERVICE**

re: People v. Jamelle Armstrong
Superior Court NA051938
Superior Court S126560

I, Glen Niemy, declare that I am over the age of 18 years, not a party to the within cause, my business address is P.O. Box 3375, Portland, ME 04104. I served a copy of the attached **Appellant's Second Supplemental Brief** to each of the following by placing the same in an envelop addressed (respectively)

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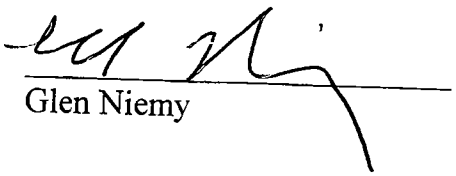
Each envelop was then on November 12, 2015, sealed and placed in the United States mail at Portland, Maine, County of Cumberland, the county in which I have my

office, with the postage thereon fully prepaid. I declare under the penalty of perjury and the laws of the states of California and Maine that the foregoing is true and correct this November 12, 2015 at Portland, ME.

November 12, 2015



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