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

SUPREME COURT
FILED

MAY 19 2014

Frank A. McGuire Clerk

Deputy

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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Supreme Court

DEATH PENALTY

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ROBERT BOYD RHOADES,	
Defendant and Appellant./	

I. THERE IS A REASONABLE INFERENCE THAT THE PROSECUTORS IN MR. RHOADES'S CASE EMPLOYED RACE AND GENDER STEREOTYPES HISTORICALLY INVOKED TO EXCLUDE AT LEAST ONE OF FOUR AFRICAN-AMERICAN WOMEN FROM JURY SERVICE

The state contends that Mr. Rhoades's supplemental brief "details the ills of excluding prospective jurors based on race and gender and presents a historical overview ... [which] has no relevance or applicability to the instant case." (Supplemental Respondent's Brief [SRB] at 1.) The state also contends that this evidence "fails to demonstrate that the trial court erred in determining that appellant failed to make a prima facie showing of discrimination after the prosecutor used peremptory challenges to excuse [all] four African-American women." (SRB at 1.)

It is significant that the state does not dispute the substance of Mr. Rhoades's supplemental brief -- that prosecutors have historically employed race and gender stereotypes to exclude African-American women from jury service. (See *Batson v. Kentucky* (1986) 476 U.S. 79, 87, 95 [*Batson*].) Instead, the state

takes the opportunity to regurgitate its arguments from its initial brief and its irrelevant and skewed details about the challenged black prospective jurors. (SRB at 3-7; RB at 170-216.) Mr. Rhoades will not repeat his arguments about the specific jurors excused. (AOB at 162-180; ARB at 55-60.) Although the burden of persuasion remains with the defendant, it is not until the third step of the *Batson* procedure that the persuasiveness of the prosecutor's justification becomes relevant. (*Johnson v. California* (2005) 545 U.S. 162, 171 & fn. 7 [*Johnson*]; *United States v. Stephens* (7th Cir. 2005) 421 F.3d 503, 517-518 [remanding to permit the prosecutor to articulate its actual reasons for the peremptory challenges, because the state's detailed recitation of multiple factors for each individual prospective juror is more appropriate at the next stages of review].)

First, the state imagines that it is somehow relevant to parse *People v. Williams* (2013) 56 Cal.4th 630, *cert. denied* (2014) __ U.S. __, 134 S.Ct. 1279, because Mr. Rhoades's supplemental brief is based on an edited version of a portion of an amicus brief filed in support of Mr. Williams's petition for writ of certiorari. (SRB at 2-4.) Not so. A denial of certiorari is not a decision on the merits and thus has no precedential value. (*Teague v. Lane* (1989) 489 U.S. 288, 296.)

The intention of providing this Court with an historical context for the reasons why prosecutors have routinely excused African-American women from jury service based on racial and gender stereotypes – black women are least likely to render death verdicts -- is that it tends to refute the state's claim of innocent intent. It blinkers reality to suggest that it was simply happenstance -- a fortuitous accident -- that the prosecutors used four of eight peremptory challenges to excuse all four African-American women from Mr. Rhoades's jury and then refused to explain why they excused them -- allegedly because Mr.

Rhoades had not met the exacting and unconstitutional standard of showing a *strong likelihood* that the challenges were based on race and/or gender stereotypes. (30-RT 9046-9047 [emphasis added].)

In Mr. Rhoades's case, the prosecution repeatedly argued that a prima facie case required "a showing of *a strong likelihood* that [discrimination] is the reason we excused the jurors." (30-RT 9042, 9047, 9050.) The trial court agreed, finding Mr. Rhoades "had failed to establish a prima facie case under the governing state precedent," while using virtually the identical language used by the trial court in *Johnson, supra,* 545 U.S. at 165, 173 – "I'm very close." (30-RT 9050; 13-CT 3703-3705.)

Because the trial court expressed the same kind of reservations under the now overruled "*strong likelihood*" standard that the Court in *Johnson v. California* (2005) 545 U.S. 162, found significant, reversal is required:

> In this case, the inference of discrimination was sufficient to invoke a comment by the trial judge "that 'we are very close,'" and on review, the California Supreme acknowledged that "it certainly looks suspicious that all three African American prospective jurors were removed from the jury." 30 Cal.4th at 1307, 1326 . . . Those inferences that discrimination may have occurred were sufficient to establish a prima facie case under *Batson*. [¶] The facts of this case well illustrate that California's "more likely than not" standard is at odds with the prima facie inquiry mandated by *Batson*. (*Johnson v. California, supra,* 545 U.S. at 173.)

Simple logic dictates that if a trial judge's comment -- that it is a close call under the "more likely than not" standard -- is at odds with the prima facie inquiry mandated by *Batson*, then the same comment under the more exacting "*strong likelihood*" standard that the court used in Mr. Rhoades's case mandates the same conclusion. Yet, the state's arguments presume that Mr. Rhoades's prima facie burden is still equivalent to a "more likely than not" or a "strong likelihood"

standard in blatant defiance of the *Johnson* Court ruling establishing that showing an inference is not "onerous:"

> We did not intend the first step to be so onerous that a defendant would have to persuade the judge -- on the basis of all the facts, some of which are impossible for the defendant to know with certainty -- that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. (*Johnson v. California, supra,* 545 U.S. at 170.)

In *United States v. Collins* (9th Cir. 2009) 551 F.3d 914, 920, the court explained that the burden of proof at the prima facie stage of a *Batson* challenge is "small" and "easily met:"

> At the prima facie stage of a *Batson* challenge, the burden of proof required of the defendant is small, especially because proceeding to the second step of the *Batson* test puts only a slight burden on the government. This is because the government never bears the ultimate burden of persuading the district court that it did not act with a discriminatory purpose; that burden persists with the defendant. *Johnson*, 545 U.S. at 170-71. Rather, an easily met burden of proof momentarily shifts, at step two, to the government: to meet its burden, the government need only disclose its (nondiscriminatory) purpose for striking the potential juror. See *id.* at 171 (stating that the government satisfies its burden of proof even if it presents "only a frivolous or utterly nonsensical justification for its strike"). The ultimate burden then returns to the defendant at step three, and the defendant must persuade the district court that the government's (nondiscriminatory) reason is pre-textual. *Id.* A single inference of discrimination based on "all [the] relevant circumstances" and the "totality of relevant facts" is sufficient to move the *Batson* inquiry to step two. *See, e.g., Batson*, 476 U.S. at 94, 96.

There was certainly at least a "single inference of discrimination" in Mr. Rhoades's case, including the removal of all four African-American women from the jury, the use of a disproportionate number of strikes against them, the prosecutor's refusal to explain its reasons for excusing the black women, and the

misconception that because Mr. Rhoades was white, there was no inference of discrimination.

The state continues to labor under the same misconception as Mr. Rhoades's prosecutors -- that *Johnson v. California* (2005) 545 U.S. 162, 172, is distinguishable from Mr. Rhoades's case because Mr. Rhoades is white. (SRB at 7-9; 30-RT 9040-9041.) The defendant, however, need not be a member of the excluded group in order to object to the prosecutor's discriminatory use of peremptory challenges. (*Johnson, supra*, 545 U.S. at 172 [the "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice"]; *Powers v. Ohio* (1991) 499 U.S. 400, 412-416.)

The state also repeats the canard that the prosecutor's refusal to explain its reasons for excusing the four black women allows this Court to imagine and speculate about what reasons the prosecutor might have had. (SRB at 4-7; 30-RT 9047.) Yet, the trial court's ruling of no prima facie case -- at the prosecutor's urging -- precludes this Court from speculating about such reasons, or from ruling on the sincerity of the prosecutor's reasons for striking all the black jurors. (*Johnson, supra*, 545 U.S. at 172.)

The fallacy of a court making up reasons the prosecutor *might* have had relies on two false presumptions. First, it presumes the prosecutor has not been influenced by racism -- at least in the sense of racial stereotyping based on ignorance -- which Mr. Rhoades's supplemental brief proves has not been true. That is, even though there might be race-neutral reasons to excuse African-American women from a jury, the number and pattern of excusals supports an inference that the actual reason at least one of the prospective jurors was

excused was the race and gender stereotypes historically employed to exclude African-American women from jury service. Without requiring the prosecutors to explain their challenges, however, the courts are prevented from ruling whether racial and gender stereotyping played a role.

Second, making up reasons the prosecutors *might* have had presumes that the prosecutors would lie about allowing racial and gender stereotypes play a role in their decisions, even if they were a factor in their excusals. While it may be true that many prosecutors would lie about their real reasons for excusing black jurors, the entire foundation of *Batson* is that a trial judge is in the best position to evaluate prosecutors' reasons and determine whether the prosecutors are lying and whether their reasons are pretextual. Of course, when prosecutors do not give their reasons, even when asked, the trial judge cannot make any factual findings about whether the prosecutors are liars, or have been influenced by racial and gender stereotypes, such as black women are less likely to render death verdicts.

Here, the prosecutors' refusal to explain their reasons for excusing the four black women provides an inference of discrimination, not the opposite:

> In the unlikely hypothetical in which the prosecutor declines to respond to a trial judge's inquiry regarding his justification for making a strike, the evidence before the judge would consist not only of the original facts from which the prima facie case was established, but also the prosecutor's refusal to justify his strike in light of the court's request. Such a refusal would provide additional support for the inference of discrimination raised by a defendant's prima facie case. (*Johnson, supra*, 545 U.S. at 171, fn. 6.)

Second, the *Johnson* court explained that it is not proper to speculate about what reasons the prosecutor might have had to excuse black jurors:

> The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. The inherent uncertainty

> present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question. See *Paulino v. Castro*, 371 F.3d 1083, 1090 (CA9 2004) ("[I]t does not matter that the prosecutor might have had good reasons ... [w]hat matters is the real reason they were stricken" (emphasis deleted)); *Holloway v. Horn*, 355 F.3d 707, 725 (CA3 2004) (speculation "does not aid our inquiry into the reasons the prosecutor actually harbored" for a peremptory strike). (*Johnson, supra,* 545 U.S. at 172.)

As the court in *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1108, relying on the above language in *Johnson*, persuasively pointed out, a "*Batson* challenge does not call for a mere exercise in thinking up any rational basis." (See also *Miller-El v. Dretke*, *supra*, 545 U.S. at 251-252 ["the rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it"].)

The state, however, relies most heavily or, in its words, "most persuasively," on the allegedly "obvious, legitimate and demonstrable race-neutral reasons for challenging each of the four African-American women." (SRB at 9, 4-9.) Mr. Rhoades disagrees. Because the trial court did not make any credibility determinations in refusing to find a prima facie case there is nothing for this Court to review or defer to:

> Although we normally give great deference to a trial court's factual findings regarding purposeful discrimination in jury selection, this deference applies to the court's assessment of the prosecutor's state of mind and credibility. Because the trial judge made no inquiry into the prosecutor's reasons for excluding the African-American venirepersons, we need not defer to the judge's conclusory determination that there was no discrimination. (*Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 814, fn. 4, citing *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820, 826-827.)

Even under de novo review, this Court should not speculate that the prosecutors were actually relying on race-neutral reasons, such as the jurors' alleged misgivings about the death penalty, because the prosecutors refused to explain their reasons. Mr. Rhoades's case is a good example of the misuse of peremptory challenges that can be difficult to prove at the third stage – or as the state claims here, even to prove a mere inference of discrimination at the first stage -- because it is so easy to suggest a race-neutral explanation for excusing any juror and judges are reluctant to attribute excusals to bias. Only the most stupid prosecutors are caught -- and very infrequently -- at this game of making up excuses to challenge black jurors from juries, when their determinative reasons include relying on racial and gender stereotypes. The examples are legion, but Justice Breyer, relying on Justice Marshall's remarks in *Batson*, explained it well in *Miller-El v. Dretke* (2005) 545 U.S. 231, 267-268 [conc. opn. of Breyer, J.]:

> In his separate opinion, Justice Thurgood Marshall predicted that the Court's rule [in *Batson*] would not achieve its goal. The only way to "end the racial discrimination that peremptories inject into the jury-selection process," he concluded, was to "eliminat[e] peremptory challenges entirely." *Id.*, at 102-103 (concurring opinion). Today's case reinforces Justice Marshall's concerns.
>
> To begin with, this case illustrates the practical problems of proof that Justice Marshall described. As the Court's opinion makes clear, Miller-El marshaled extensive evidence of racial bias. But despite the strength of his claim, Miller-El's challenge has resulted in 17 years of largely unsuccessful and protracted litigation — including 8 different judicial proceedings and 8 different judicial opinions, and involving 23 judges, of whom 6 found the *Batson* standard violated and 16 the contrary.

It took two interventions by the U.S. Supreme Court to right this wrong done to Miller-El. (*Miller-El v. Cockrell* (2003) 537 U. S. 322; *Miller-El II, supra*, 545 U.S. 231.) Hopefully, it will not take Mr. Rhoades 17 years and two

interventions by the U.S. Supreme Court to establish that he has shown a mere inference of discrimination, which would simply require -- for the first time -- that the prosecutors explain their race-neutral reasons, if any, for excusing these four African-American women.

The state does not challenge Mr. Rhoades's argument that if the trial court committed error under *Batson* and *People v. Wheeler* (1979) 22 Cal.3d 258, reversal of the judgment of death is required. (RB 216; see *People v. Johnson* (2006) 38 Cal.4th 1096, 1105 [conc. opn. of Werdegar J.] [because "*Wheeler* was based on state law, nothing we decide today implicates the rule of automatic reversal this court has applied for state constitutional *Wheeler* error"].) Therefore, Mr. Rhoades stands by his opening brief. (AOB at 197-198.)

CONCLUSION

Appellant respectfully requests this Court to honor the holding of *Johnson,* which found that a prima facie case was established even though the trial judge's examination of the record convinced him that the prosecutors' strikes could be justified by race-neutral reasons. The facts in *Johnson* are virtually indistinguishable from Mr. Rhoades's case, except that the facts of Mr. Rhoades's case are more egregious, given the prosecutors refused to explain their reasons for excusing all four African-American women. The fact that Mr. Rhoades is white does not magically rebut the many inferences of discrimination.

Dated: May 16, 2014

Respectfully submitted,

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By Appointment Of
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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 May 16, 2014, by depositing copies in the United States mail at Redway, California, with postage prepaid thereon, and addressed as follows:

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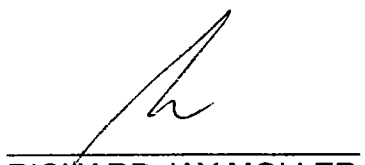
I declare under penalty of perjury under the laws of California that according to Microsoft Word the word count on this brief is 2740 words and that this declaration was executed on May 16, 2014, at Redway, California.



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