IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JOE EDWARD JOHNSON** **Defendant and Appellant.**	No. S029551 Sacramento County Sup. Ct. No. 58961 Death Penalty Case

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

Appeal from Judgment of
The Superior Court of Sacramento County
The Honorable Peter Mering, Presiding

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THE TRIAL COURT ERRED IN HOLDING THAT APPELLANT HAD NOT ESTABLISHED A PRIMA FACIE CASE OF DISCRIMINATION IN THE PROSECUTOR'S EXERCISE OF PEREMPTORY CHALLENGES ON THE BASIS OF RACE

In his supplemental opening brief Mr. Johnson summarized and expanded on the evidence supporting the inference that the prosecutor had engaged in racial discrimination in selecting the jury in Mr. Johnson's penalty retrial and urged this Court to clarify the standards that apply in the first step of the *Batson/Wheeler*[2] analysis. Respondent largely fails to engage with Mr. Johnson's arguments, and instead makes a series of erroneous arguments, many of which are unsupported by any citation or are unsupported by the citations provided.

A. Mr. Johnson Established a Prima Facie Case of Racial Discrimination in the Prosecutor's Strikes of African-American Prospective Jurors

In his initial briefing and supplemental opening brief Mr. Johnson points to evidence more than sufficient to meet the low burden of establishing a prima facie supporting "inference that discrimination occurred." (*Johnson v. California* (2005) 545 U.S. 162, 170.) Respondent's efforts to refute that showing are unavailing. Mr. Johnson will not repeat the arguments made in his

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[1] In his supplemental opening brief (Supp. AOB) Mr. Johnson continued the numbering style used in his Opening Brief, numbering the *Batson* claim "2," consistent with the *Batson* claim in his opening brief, and his two new claims "15" and "16" following the numbering of the last claim in his opening brief. Respondent has chosen to number the arguments in its supplemental respondent's brief (Supp. RB) I-III. Mr. Johnson will continue with his original numbering in this brief for clarity.

[2] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). References to "*Batson*" should be understood to include the state constitutional right enunciated in *Wheeler*.

prior briefing. However, several misguided arguments, as well as errors and omissions, in respondent's supplemental brief, require correction

1. The Numbers and Pattern of Strikes

In discussing the statistical evidence supporting an inference of discrimination, respondent ignores the multiple errors committed by the trial court in its ruling. (See Supp. AOB at 23-24.) Instead of addressing those errors respondent asserts, without explication, that "[t]he court's analysis was correct." (Supp. RB at 18.)

Respondent relies heavily on the fact that the prosecutor did not strike every African-American juror. (See Supp. RB at 18-19.) In doing so it ignores that courts have made clear that this is hardly dispositive. Allowing the "fact that the prosecutor 'passed' or accepted a jury containing two Black persons" to end the *Batson* inquiry "would provide an easy means of justifying a pattern of unlawful discrimination." (*People v. Snow* (1987) 44 Cal.3d 216, 225; see also *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1170–1171 [passing five times before striking minority juror does not "preclude a finding that a panelist is struck on account of bias against an identifiable group, when such a strike occurs eventually instead of immediately"]; Supp. AOB at 30; AOB at 74-75; ARB at 17-18.) Respondent's approach would enable a prosecutor to limit, but not eliminate, minority jurors without fear of a *Batson* challenge. Such an approach is also entirely at odds with the United States Supreme Court's statement that "[t]he 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.' [citation]" (*Foster v. Chatman* (2016) ___U.S.___, 136 S.Ct. 1737, 1747.)

As to the actual statistics, Respondent asserts "[g]enerally, in instances where courts have found that a prima facie case had been made, those courts saw percentage increases that were much higher than the expected number of strikes based on representation in the jury pool." (Supp. RB at 19.) Respondent

supports this claim by citing two cases in which the number of excluded minority jurors were higher, but they neither stand for the proposition that such numbers are required, nor support respondent's assertion about what is "generally" true. At the same time Respondent ignores the cases to the contrary cited in both the original and supplemental briefing. (See AOB at 82-85; ARB at 17-18; Supp. AOB at 23-24.)[3]

2. Race of the Defendant

As discussed in Mr. Johnson's supplemental opening this Court has said that evidence that the defendant is a member of the group discriminated against in jury section "may prove particularly relevant" in determining the existence of a prima facie case. (*People v. Scott* (2015) 61 Cal.4th 363, 384.) Similarly, the United States Supreme Court has said that a case in which the defendant and the excused juror are the same race "may provide one of the easier cases to establish both a prima facie case and a conclusive showing that wrongful discrimination has occurred. (*Powers v. Ohio* (1991) 499 U.S. 400, 416; see also Supp. AOB at 24-25; AOB at 85.) Without addressing these cases, respondent asserts that Mr. Johnson's race is less significant because of the proportion of jurors excluded and the fact that some African-American jurors

[3] As discussed at greater length in the Opening Brief, the prosecutor used 20% of his strikes to remove 60% of the African-American jurors. In his opening brief Mr. Johnson cited a number of cases in which similar statistics were found to support an inference of discrimination (See AOB at 84-85 citing *Fernandez v. Roe* (9th Cir. 20002) 286 F.3d 1073, 1075-78 [for out of seven Hispanics stricken, 57% strike rate]; *Turner v. Marshall* (9th Cir 1995) 63 F.3d 807, 812 [five of nine African-American's jurors stricken, 56% strike rate]; *United States v. Alvarado* (1991) 923 F.2d 253, 255-256 [three of six African-American jurors stricken]; *United States v. Lorenzo* (9th Cir.1993) 995 F.2d 1448, 1453-1454 [three of nine Hawaiian jurors stricken, 33% strike rate]; *United States v. Bishop* (9th Cir.1992) 959 F.2d 820, 822 [two of four African-American jurors stricken, 50% strike rate].)

were seated, thus repeating the errors discussed above. Beyond the lack of factual support, respondent cites no case in support of its claim, which is unsurprising given that it is inconsistent with the both federal and state law cited by Mr. Johnson.

3. The Struck Jurors Supported the Death Penalty

Respondent asserts that, because the potential jurors had been death qualified, the fact that the prosecutor struck African-American potential jurors with death penalty views similar to those of non-African-American seated jurors cannot support an inference of discrimination. (Supp. RB at 26-27.) Respondent cites no case to support this claim, which is contrary to the case law. (See e.g. *Miller-El v. Dretke* (2005) 545 U.S. 231, 232 [struck African-American juror who "expressed unwavering support for the death penalty . . . should have been an ideal juror in the eyes of a prosecutor seeking a death sentence."].)[4]

Respondent also asserts that "[t]he prosecutor tended to favor panelists who expressed a more favorable, or less ambivalent, view about the death penalty and the criminal justice system." (Supp. RB at 27.) However, the record does not support respondent's assertion.

For example, one of the struck African-American potential jurors, Lois Graham,[5] said in her questionnaire that she had "no biases regarding the

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[4] Respondent does not repeat its claim, made in its Opening Respondent's Brief, that this Court cannot consider "traits that the prosecution could have viewed favorably" in determining whether Mr. Johnson established a prima facie case because such evidence is only relevant in the third step of the Batson analysis. (RB at 62; see also Supp. AOB at 25-26.)

[5] Respondent refers to the seated jurors by their initials. In all prior briefing jurors and prospective jurors have been referred to by their full names as this case predated enactment of the current version of Code of Civil Procedure section 237, subdivision (a)(2), which mandates the sealing of juror identifying information. (See 1995 Cal. Legis. Serv. Ch. 964 (S.B. 508)

penalties mentioned—would listen and try to be fair in my assessment." (15 CT 4283.) She also said that her feeling about the death penalty is that "[i]f it is the law and the system we are using I am not for or against exception [sic] based on evidence in case" and that she had no religious objections to the death penalty. (15 CT 4284.) Neither attorney asked her about the death penalty during voir dire.

Another struck African-American potential juror, Sharon Harrison, said in her questionnaire "[m]y general feeling is that some crimes warrant it—some don't." (15 CT 4352.) In response to a question from defense counsel she said that "Everything has to be considered" in deciding the sentence. (38 RT 12652.)

Comparing those statements to the statements of the seated, non-African-American jurors reveals views similar to those of the struck African-American jurors. Elizabeth Furtado said that she thought "there are some instances where the death penalty fits the crime . . . in each individual's case or circumstances." (14 CT 3924.) Dianne Maltese said that she "[b]elieves in its [the death penalty's] existence" on her questionnaire (14 CT 3967) and during voir dire said that she could not make an evaluation "until the situation is fully in front of me" (34 RT 11574). (This was in response to a question from defense counsel; the prosecutor asked her no questions about the death penalty.) Michael Feusi said "I feel the death penalty is justified in some instances and not in others. It would all depend on the evidence brought forth." (14 CT 3953.) (See also Ronald Hardwick (14 CT 3953 ["I believe there is a place for both life imprisonment and the death penalty."), (35 RT 11639 [the death penalty is "very serious. Life I hold very dearly."]; Jennifer Reese (14 CT

(West).) Therefore, Mr. Johnson will continue to refer to the seated jurors by name.

4013 ["I don't think just because someone killed another human being [they] should automatically be sentence[d] to the death penalty."], 36 RT 11918 [would not find death appropriate simply based on the facts of the crime], 36 RT 11929 [could vote for death if the prosecution met the required standard].)

In support of its argument respondent only cites statements from two African-American seated jurors, which it says shows they had a "more favorable" view of the death penalty than the struck African-American prospective jurors. (Supp. RB at 27.) It is not clear why respondent views this comparison as helpful to its position. The fact that the prosecutor preferred African-American jurors who were more favorably inclined toward the death penalty than either the other seated jurors or the struck African-American prospective jurors is further evidence *supporting* an inference of discrimination. Such a preference shows that the prosecutor was imposing a higher standard on African-Americans, than on jurors of other races and ethnicities. Indeed, the seated African-American juror not mentioned by respondent, Daniella Daniel, appears to be the most death inclined juror of any of those seated. She said that she had "no problem with the death penalty, an eye for an eye, tooth for tooth." (15 CT 4052.)

Respondent also asserts that "the prosecutor tended to strike panelists of any racial background who had been abused as children, who worked with children who might have been abused, and those who seemed sympathetic to a mental health defense. Particularly, if the panelist also expressed ambivalence about imposition to the death penalty." (Supp. RB at 27.) Respondent provides no citation to the record to support its assertions, and the record does not support them.

As to the question of jurors who had been, or worked with, abused children, the record does not support respondent's assertion. While it is true that one of the struck African-American jurors worked with abused adolescents (38 RT 12653) this was not a primary concern of the prosecutor given that he did

not ask *any* of the other seated jurors or prospective jurors a single question about whether they had worked with abused children.

Respondent's claim that the prosecutor tended to strike those who "seemed sympathetic to a mental health defense" is similarly unsupported by the record. Looking at the struck African-American jurors, their statements in this area are not notably different from those of the seated jurors. Lois Graham said that she thought psychological testimony "would be very helpful in making some decision or, at least, thinking about the evidence, giving you some thought patterns to work with." (37 RT 12317.) She agreed with the prosecutor that it was important to look at the facts underlying any opinion. (*Ibid*.) Sharon Harrison was doubtful, saying, "I find that some psychiatrists can be right on target in terms of a person's behavior and causes for it, and other ones that don't have a clue." (38 RT 12654.) Shanna Graham was even more dubious, saying that psychologists "can't explain the reason a person did something . . . ." (14 CT 4399.)

If anything these views were more skeptical of psychological testimony that those of many of the seated jurors. For example, Michael Feusi, in response to a question about mental health experts' ability to explain reasons for, and dynamics of, human behavior, said he believed they could provide such explanations and that "[t]here are people that have no idea of how people can do certain things to other people. Most of the time they [psychologists and psychiatrists] can derive at the reason." (14 CT 3950.) In response to the same question Betty Wyatt said that such experts "are well trained and can point out different behavior patterns that all involved would not be aware of." (14 CT 2979.) Gwen Nelson, again in answer to that question, said that she would "assume that they are learned on human behavior." (14 CT 4024.) On voir dire she elaborated that she would consider the opinion of an expert, such as a psychologist "higher than my own." (37 RT 12301-12302.)

Demonstrably, respondent's assertion that the prosecutor was striking those prospective jurors more inclined to accept psychiatric or psychological mitigation testimony is unsupported by the record. In short, respondent has not only failed to support any of its factual assertions with evidence, it has effectively conceded that the prosecutor had a higher standard for African-American jurors when it came to their views on the death penalty.

4. Race of the Victims

Respondent asserts that "it would be difficult to infer discriminatory intent from this record because appellant committed multiple violent acts against men and women of different races." (Supp. RB at 26.) Because respondent again provides no citation to the record in support of this statement respondent's reference is unclear. As respondent acknowledges, the only victim of the crime for which Mr. Johnson was convicted was white and the victim of the uncharged rape that was the primary aggravating evidence was also white. (*Ibid.*) While the prosecutor did present evidence of other violent incidents at the penalty retrial, appellate counsel's review of the record did not reveal testimony regarding the race of the victims in those incidents, nor does respondent cite to any. Even if some of those victims had been African-American, however, this case is clearly distinguishable from the single case cited by respondent, in which two of the three murder victims were African-American, as was the defendant. (See Supp. RB at 26, citing *People v. Thomas* (2012) 53 Cal.4th 771, 794.) Rather, the cases cited by Mr. Johnson are more akin to his own. (See Supp. AOB at 26, quoting *Johnson v. California, supra,* 545 U.S. at p. 167, quoting *People v. Johnson* (2003) 30 Cal.4th 1302, 1326 [finding "'highly relevant' [the] circumstance that a black defendant was 'charged with killing his White girlfriend's child.'"]; *People v. Scott, supra,* 61 Cal. 4th at p. 384 [observing that "certain evidence may prove particularly relevant" in determining the presence of a prima facie case including "that the

victim is a member of the group to which the majority of the remaining jurors belong"].) Thus the fact that Mr. Johnson is African American and the victims of the crime and the primary alleged aggravating evidence were white clearly supports an inference of discrimination.

5. The Prosecutor's Investigation of an African-American Potential Juror

Respondent asserts that because the prosecutor said that he had run a criminal history check on "some of the jurors" the record does not support Mr. Johnson's assertion that Kenneth Malloy, an African-American potential juror was the only potential juror investigated. (Supp. RB at 21, citing 39[6] RT 12804.) There is no evidence on the record that the prosecutor investigated more than one juror other than this vague statement. More importantly, there is *no evidence* that the prosecutor investigated any jurors who were not African-American. This absence in the record is the direct result of the prosecutor's refusal to reveal which jurors he had investigated. (39 RT 12810.)

Respondent asserts that the record "unquestionably demonstrates that the prosecutor's underlying purpose was to determine whether a prospective juror had provided erroneous information about criminal history on the juror questionnaire." (Supp. RB at 22, citing 39 RT 12805-12806.) Setting aside the issue of whether this Court should treat the prosecutor's self-serving statements as irrefutable evidence, the question is not what the prosecutor sought to determine, it is *why* the prosecutor chose to run a criminal history search on certain jurors, specifically on an African-American juror, and not others.[7] If the

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[6] Respondent consistently cites to volume 40 in this discussion, however the colloquy on this issue appears in volume 39. Respondent cites to the correct page numbers.

[7] Respondent's extensive discussion of why the prosecutor's strike of Malloy was justified by nondiscriminatory reasons is entirely irrelevant. (Supp. RB at 22-24.) That strike is not at issue here. The issue is whether the

motive theorized by respondent were the actual one, the prosecutor would have checked all of the prospective jurors. The fact that, based on the record, the prosecutor ran a criminal history check only on an African-American potential juror suggests he was searching for a pretext to exclude such jurors.

This is exactly the situation presented in *McCarty v. State* (Nev. 2016) 371 P.3d 1002 (*McCarty*), cited by Mr. Johnson in his Supplemental Opening Brief. (Supp. AOB at 28.) Respondent's discussion of *McCarty* misses the point. There, as here, the issue there was not whether the information discovered about the juror, standing alone, provided a nondiscriminatory basis for striking her. The relevant inquiry in *McCarty* was whether the fact that a prosecutor searched for such information only for a single African-American juror suggests discriminatory intent. The court held that it did. (*McCarty*, *supra*, 371 P.2d at pp. 1008-1009.) As the court noted in *McCarty*, and as is equally true here, if a prosecutor is concerned about an issue, he or she would not investigate only a single African-American juror, or even "some" jurors, but would check all potential jurors. The sort of selective investigation conducted here suggests that the prosecutor was searching for ostensibly race neutral reasons to support striking African-American potential jurors. (*Id.* at 1009.) The *McCarty* analysis highlights the importance of not having an excessively high bar for establishing an inference of discrimination at step one and for leaving the question of potential nondiscriminatory reasons for striking jurors for step three, where their veracity can be tested.

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prosecutor's selective, potentially race-based criminal history investigation supports an inference of racial bias.

6. The Struck African-American Prospective Jurors Were Crime Victims

In his opening brief Mr. Johnson argued that the fact that all of the struck African-American jurors or a close relative had been victims of burglary was evidence that supported an inference of discrimination. (Supp. AOB at 30-31.) Mr. Johnson cited several cases in support of the principal that such victimization is a factor that a prosecutor would normally consider favorable. (See Supp. AOB at 30-31 citing *People v. Gray* (2005) 37 Cal.4th 168, 191 [potential juror "had a fear his wife and children would be the victims of sexually based crimes; because defendant was charged with just such crimes, the prosecutor may have believed [he] would be a sympathetic juror"]; *People v. Turner* (1986) 42 Cal.3d 711, 719 ["backgrounds which suggested that, had they been white, the prosecution would not have peremptorily excused them" included fact that potential jurors had been victims of crimes]; cf. *Wheeler*, *supra*, 22 Cal. 3d at 275 ["a defendant may suspect prejudice on the part of one juror because he has been the victim of crime"].) In contrast, respondent does not cite any cases in its response.

Respondent asserts, again without citation to the record, that "nothing in this record suggests that the prosecutor retained prospective Caucasian jurors who were victims of property crimes, while at the same time striking African American panelists who were otherwise similarly situated." (Supp. RB at 29.) In fact, that is exactly what the record suggests.

Of the nine seated jurors who were not African-American, six had been victims of crimes or had close relatives who had been. (See, 39 RT 12817-20 [Drzewiecki, present for four bank robberies]; 14 CT 4035 [Branson, burglary]; 14 CT 3920 [Furtado, two thefts from car]; 35 RT 11636-11637 [Hardwick, wife was bank teller who was held at gunpoint three times during bank robberies]; 14 CT 3987 [Wyatt, theft]; 14 CT 3983 [Maltese, her car was

stolen; family members were victims of vandalism and burglary].)[8] Thus, contrary to respondent's assertion, the record strongly "suggests that the prosecutor retained prospective Caucasian jurors who were victims of property crimes, while at the same time striking African American panelists who were otherwise similarly situated." (Supp. RB at 29.)

B. This Court Should Clarify When an Appellate Court May Consider Evidence in the Record of Non-Discriminatory Reasons that Could Justify a Peremptory Strike in Step One of the *Batson* Analysis

In its initial brief, respondent asserted that a finding of no prima facie case in step one could be affirmed "'where the record *suggests* grounds upon which the prosecutor might reasonably have challenged the jurors in question.'" (RB at 59, quoting *People v. Guerra* (2006) 37 Cal.4th 1067, 1101 (emphasis added), disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151; see also Supp. AOB at 31.) Respondent also repeatedly used such speculative and conditional language in its argument that evidence of non-discriminatory reasons on the record defeated Mr. Johnson's prima facie case. (See Supp. AOB at 33-35.) As Mr. Johnson pointed out in his supplemental opening brief, this Court rejected, as impermissible under the federal constitution, that language in *People v. Sánchez.* (*People v. Sánchez* (2016) 63 Cal.4th 411, 435, fn.5 (*Sánchez*) ["under *Johnson [v. California], supra,* 545 U.S. 162, reviewing courts may not uphold a finding of no prima facie case *simply because the record suggests grounds for a valid challenge*" (emphasis added)]; Supp AOB at 31-32.)

Mr. Johnson urged this Court to clarify what it meant in *Sánchez,* which was decided after briefing in this case was completed, when it said that "[a]

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[8] None of the three seated African-American jurors had been crime victims.

court may also consider nondiscriminatory reasons for a peremptory challenge that are apparent from and 'clearly established' in the record [citations] and that necessarily dispel any inference of bias. [citations.]" (*Sánchez, supra*, 63 Cal.4th at p. 434; see also Supp. AOB at 31-38.)

While respondent does not directly address most of Mr. Johnson's argument, it does contend that "in a first-step case, a reviewing Court may consider clearly-established facts from the record that would reasonably cause *any* litigant to be concerned that the stricken juror holds an unfavorable view toward that party's case as part of its "consideration of 'all relevant circumstances [citation]' . . . ." (Supp RB at 13 quoting *Sánchez, supra*, 63 Cal.4th at p. 434.) It is not clear, and respondent does not explain, how it justifies converting this Court's statement that consideration of nondiscriminatory reasons is limited to those that "necessarily dispel any inference of bias" (*Sánchez, supra*, 63 Cal.4th at 434) into considering anything that "would reasonably cause *any* litigant to be concerned" (Supp RB at 13). Nor does Respondent explain how such a standard can be reconciled with this court's statement in *Sánchez* that "'refutation of the inference [of discrimination] requires more than a determination that the record *could have supported* race-neutral reasons for the prosecutor's use of his peremptory challenges,'" (*Sánchez, supra*, 63 Cal.4th at 434, quoting *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1110 (emphasis added).)

This inconsistency emphasizes Mr. Johnson's original point—this Court should clarify when and how nondiscriminatory reasons contained in the record may be considered at step one.

In his supplemental opening brief Mr. Johnson argued that this Court should clarify that only "overwhelmingly clear and obvious reasons for excluding a challenged juror to preclude a finding of a prima facie case at step one." (Supp. AOB at 33.) Respondent's arguments against this position are noteworthy first for what they do not say. Nowhere does Respondent address

the United States Supreme Court's caution to avoid "speculation" in the resolution of *Batson* challenges in favor or determining "actual answers to suspicions and inferences that discrimination may have infected the jury selection process." (*Johnson v. California, supra*, 545 U.S. at p. 172.) Rather, respondent asserts, without explanation, that this proposed standard would "create a lower burden for *Batson* step one inquires than the federal constitutional standard." (Supp. RB at 12.) Respondent also argues, again without explanation or any anchor in logic, that this rule would "in effect function as a presumption that here was discriminatory intent whenever a *Batson* challenge was raised, and would collapse the distinction between the first and third stages of the *Batson* inquiry." (Supp. RB at 14.)

This second assertion illustrates respondent's apparent confusion about the steps in the *Batson* analysis. At the first stage the question is whether the defendant can produce evidence sufficient to raise "an inference that discrimination has occurred." (*Johnson v. California, supra*, 545 U.S. at p. 170.) As Mr. Johnson discussed in his supplemental brief, though ignored by respondent, the United States Supreme Court has explained that the question in a *Batson* challenge is *not* whether the prosecutor might have had "good reasons" to strike a juror "what matters is the real reason they were stricken." (*Id.* at p. 172, quoting *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090; see also *ibid*, quoting *Holloway v. Horn* (3rd Cir. 2004) 355 F.3d 707, 725 ["speculation 'does not aid our inquiry into the reasons the prosecutor actually harbored' for a peremptory strike"].) Thus, respondent's position that any factor about a juror that would "concern" a prosecutor can be considered at step one (Supp. RB at 13) is inconsistent with what the United States Supreme Court has held and is also inconsistent with this Court's statement that only reasons which "*necessarily* dispel *any inference* of bias" can be considered at step one. (*Sánchez, supra*, 63 Cal.4th at p. 434 (emphasis added).) This follows from the structure of the *Batson* inquiry, which initially requires the defendant

to present evidence sufficient to support an *inference* of discriminatory intent at step one. It is only at step two that the prosecutor's actual reasons for striking the juror become relevant and must be presented, and only at step three that the ultimate question is asked—whether the explanation presented in step two is credible and persuasive. (See *Johnson v. California, supra,* 545 U.S. at p. 171-173.)

Respondent's confusion about the three step process is apparent in its discussion of *Purkett v. Elem* (1995) 514 U.S. 765 (*Purkett*). *Purkett* stands for the proposition that a judge cannot evaluate the credibility of a prosecutor's nondiscriminatory explanations for striking prospective jurors in step two, but that such an evaluation must take place in step three. Following an extensive quotation to that effect from *Purkett*, respondent asserts that "[t]hus a trial court may reasonably determine that the defendant failed to make the requisite prima facie showing when there are 'obvious race-neutral grounds' for excusing the prospective juror. [citations.]" (Supp. RB at 16.) Respondent does not explain how this conclusion follows from the quoted material. Indeed, if one can glean anything about step one from *Purkett*, a case involving steps two and three, it is a conclusion opposite from that offered by respondent.

The Court in *Purkett* stated, in the portion quoted by respondent, that a court could not terminate the *Batson* inquiry at step two even if the reasons for striking a potential juror presented by the prosecution are "silly or superstitious" because the persuasiveness of the justification is only at issue in step three. (*Purkett, supra,* at p. 768, quoted in Supp. RB at 16.) This simply highlights the fact that the ostensible nondiscriminatory reasons for removing a potential juror do not become relevant until step two. Thus, the only way that such nondiscriminatory reasons can be relevant at step one is if they so clearly disqualify the potential juror that continuing to steps two and three would be futile. Indeed the United States Supreme Court has never suggested, much less approved, considering possible nondiscriminatory reasons at step one. To the

contrary, that Court has specifically warned against speculating about the reason for a strike rather than simply asking the prosecutor to provide those reasons. (See *Johnsnon v. California, supra*, 545 U.S. at p. 172 ["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"].)

In setting forth the correct standard for evaluating a prima facie case at step one, Mr. Johnson cited several Ninth Circuit cases.[9] Respondent devotes a page of its brief to a somewhat confused discussion of these cases. Mr. Johnson cited the cases for the principle that "the fact that 'the record *could* have supported race neutral reasons for the prosecutor's use of his peremptory challenges' cannot defeat a prima facie case." (Supp. AOB at 21 quoting, *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1110.) Respondent asserts that the Ninth Circuit was "wrong" when it found that this was "clearly established Federal law." (Supp. RB at 15 citing *Currie v. McDowell* (2016) 825 F.3d 603, 609-610.)

First, it is not clear why respondent thinks that the question of clearly established federal law is relevant in a state court direct appeal, given that is a standard applicable in federal post-conviction review for reasons unrelated to state court direct appeals. The United States Supreme Court has explicitly stated that a finding that a ruling does not violate clearly established federal law is not equivalent to finding no error. (See, e.g. *Marshall v. Rodgers* (2013) 569 U.S. 58, 64 ["The Court expresses no view on the merits of the underlying Sixth Amendment principle the respondent urges. And it does not suggest or imply that the underlying issue, if presented on direct review, would be

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[9] See Supp. AOB at 21 citing *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1110; *Currie v. McDowell* (9th Cir. 2016) 825 F.3d 603, 609; *Shirley v. Yates* (9th Cir. 2015) 807 F.3d 1090, 1101.)

insubstantial. This opinion is instead confined to the determination that the conclusion of the California courts that there was no Sixth Amendment violation is not contrary to 'clearly established Federal law, as determined by the Supreme Court of the United States.'"].)

Second, respondent's assertion is unsupported by any substantive argument and diametrically opposed to the Ninth Circuit's explanation for its holding. As that Court explained in *Currie*, the principle that

> "the existence of grounds upon which a prosecutor *could* reasonably have premised a challenge does not suffice to defeat an inference of racial bias at the first step of the *Batson* framework" [citation] . . . "was clearly established" by the Supreme Court's decision in *Johnson v. California*. *Johnson* noted that "[t]he *Batson* framework is designed to produce *actual* answers to suspicions and inferences that discrimination may have infected the jury selection process," [citation] and quoted with approval our statement in *Paulino v. Castro*, 371 F.3d 1083, 1090 (9th Cir. 2004) that "it does not matter that the prosecutor might have had good reasons ...; what matters is the real reason they were stricken."

(*Currie v. McDowell, supra,* 825 F.3d at 609–610.)

Finally, respondent rather remarkably ignores that, in *Sánchez*, this Court cited favorably to two of the Ninth Circuit cases cited by Mr. Johnson and criticized by respondent, *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1110 and *Shirley v. Yates* (9th Cir. 2015) 807 F.3d 1090, 1101.[10] This court said that "*Shirley* and *Williams* appear correct that under *Johnson, supra,* 545 U.S. 162, reviewing courts may not uphold a finding of no prima facie case simply because the record *suggests* grounds for a valid challenge. But we believe *Johnson* permits courts to consider, as part of the overall relevant circumstances, nondiscriminatory reasons clearly established in the record that necessarily dispel any inference of bias." (*Sánchez, supra,* 63 Cal.4th 435, n.5.)

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[10] *Currie v. McDowell* was decided after this Court's decision in *Sánchez*.

Thus, in *Sánchez* this Court both disagreed with respondent about the viability of these federal cases and made clear the distinction between the mere presence of grounds for a valid challenge on the record, and the far higher bar of reasons that "*necessarily* dispel *any* inference of bias." (*Ibid* (emphasis added).)

Respondent's apparent confusion about the steps in the *Batson* analysis and continued reliance on an incorrect standard emphasizes the need for this Court to clarify the standard for reviewing a *Batson* claim that has been rejected at step one below.

C. Conclusion

In both his initial and supplemental briefing Mr. Johnson has stated the correct legal standard applicable to *Batson's* first step and highlighted evidence more than sufficient to meet the burden at that step. As the United States Supreme Court has emphasized, the burden at step one is intentionally minimal. That Court has made clear that "suspicions and inferences that discrimination may have infected the jury selection process" should be resolved at step three. (*Johnson v. California, supra,* 545 U.S. at p. 172.) That is because at step three, unlike step one "[t]he inherent uncertainty present in inquiries of discriminatory purpose" can be resolved without "engaging in needless and imperfect speculation" as respondent consistently has. (*Ibid*.) Instead "a direct answer can be obtained by asking a simple question." (*Ibid*.) The failure of the trial court to ask that simple question violated Mr. Johnson's state and federal constitutional rights. This Court should therefore reverse his death sentence.

15.

CALIFORNIA'S DEATH PENALTY STATUTE AND CALJIC INSTRUCTIONS, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATE THE UNITED STATES CONSTITUTION

In his supplemental opening brief Mr. Johnson argued that this Court should reconsider its previous decisions regarding the constitutionality of California's death penalty scheme, as challenged under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*), in light of *Hurst v. Florida* (2016) ___ U.S. ___, 136 S.Ct. 616 (*Hurst*). (Supp. AOB at 41-55; see also AOB at 180-186.) Respondent largely fails to address Mr. Johnson's claim, but rather reiterates the cases that Mr. Johnson argues this Court should reconsider. (Supp. RB at 30-35.)

Respondent does mischaracterize Mr. Johnson's discussion of *People v. Brown* (1985) 40 Cal.3d 512 (*Brown*), revd. on other grounds sub nom. *California v. Brown* (1987) 479 U.S. 538. Mr. Johnson does not assert that *Brown* "recognize[d] that the jury's penalty determination is factfinding for purposes of the penalty determination." (Supp. RB at 32, citing Supp. AOB at 48.) Rather, Mr. Johnson argued that, under California law as interpreted by this Court in *Brown*, a defendant is not eligible for the death penalty unless and until a jury has found that the aggravating factors outweigh the mitigating circumstances. (See Supp. AOB at 48-52.) Thus, both the existence of those aggravating factors and the determination that they outweigh the mitigating circumstances are findings "necessary to impose a sentence of death," which the jury must make unanimously and beyond a reasonable doubt. (*Hurst, supra*, 136 S.Ct. at p. 619.)

Respondent also asserts that the Delaware death penalty scheme at issue in *Rauf v. State* (Del. 2016) 145 A.3d 430 (*Rauf*) is distinguishable from California's because in Delaware the jury "appears to play an advisory role."

(Supp. RB at 33.) This is an incomplete description of both the scheme found unconstitutional in *Rauf* and the holding in that case. As Mr. Johnson explained in his supplemental opening brief, "[i]n Delaware, unlike Florida, the jury's finding of a statutory aggravating circumstance is determinative, not simply advisory." (Supp. AOB at 54 citing *Rauf, supra,* at p. 456 (per curiam opn.).) That is, under the Delaware scheme, as in California's, the jury's finding is "determinative as to the existence of any statutory aggravating circumstances (i.e. death eligibility factors)." (*Ibid.* (footnote and internal quotations omitted).) Under the Delaware scheme, after the jury made the initial eligibility finding, its weighing determination and decision on sentence were subject to override by the judge. Following respondent's logic all the Delaware court needed to do to correct the constitutional defect was eliminate that judicial override. The Court in *Rauf* rejected this argument, finding that the existence of any aggravating factors that the jury would consider in the weighing process and the weighing determination itself were subject to the requirements of unanimity and proof beyond a reasonable doubt. (*Id.* at 433-34 (per curium opn.).) In making this finding the Court held that the weighing determination constituted "a factual finding necessary to impose a death sentence." (*Id.* at 485 (conc. opn. of Holland, J.).) Other courts have reached the same conclusion. (See Supp. AOB at 55 and cases cited therein.) Thus, while there are differences between the Delaware and California statutes, those differences are not material to the ultimate question.

For the same reason, this Court's observation that the scheme in *Hurst* is "materially different" from California's (*People v. Rangel* (2016) 62 Cal.4th 1192, 1235, n. 16) is not dispositive of the issue. In *Apprendi,* the United States Supreme Court emphasized that the "relevant inquiry is one not of form, but of effect." (*Apprendi, supra,* 530 U.S. at p. 494.) As Justice Scalia later wrote in *Ring*, "all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense,

sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) Because a determination that the aggravating factors outweigh the mitigation is required before the jury can decide to sentence a defendant to death, that determination is subject to the requirements of *Apprendi*, *Ring*, and *Hurst*. Appellant was not sentenced under these standards. His death sentence must be reversed.

16.

BECAUSE THE CALIFORNIA PENALTY PHASE PROCEEDING IS A TRIAL ON ISSUES OF FACT, STATE AND FEDERAL LAW REQUIRE THAT THE PROPRIETY OF THE SENTENCE OF DEATH AND THE AGGRAVATING FACTORS BE PROVEN BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY

In his supplemental opening brief, Mr. Johnson argued that this Court should reconsider its prior decisions (largely based on the Sixth Amendment and now-reversed United States Supreme Court decisions interpreting it) denying basic jury protections of unanimity and proof beyond a reasonable doubt to fundamental questions answered in the penalty phase. (Supp. AOB at 56-95.) This argument focuses primarily on the *state* constitutional right to trial by jury and the debates surrounding its amendment, citing early *state* penal code enactments requiring that "issues of fact" be tried by jury, and early *state* cases, prior to incorporation of the Sixth Amendment. (Cal. Const. art. 1, section 6; Pen. Code, § 1042; Stats. 1850, Ch. 119, § 337, p. 299; *People v. Hall* (1926) 199 Cal. 451, 458 (*Hall*) [right to unanimity applies to penalty decision]; 3 Debates and Proceedings, Cal. Const. Convention of 1879, p. 1175 (statement of Mr. Reddy) [a "fundamental principle of criminal jurisprudence" is that "every man charged with a crime have the benefit of the doubt"].)[11]

Specifically, Mr. Johnson asked that this Court reconsider its prior holdings refusing to require unanimity in finding aggravating circumstances (or at least components thereof) that are themselves prototypical "issues of fact"—because they are accusations that Mr. Johnson committed various prior crimes. (See Supp. AOB at 60-67.) Mr. Johnson also asked this Court to reconsider its many decisions denying the proof beyond a reasonable doubt burden to the

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[11] Although Mr. Johnson also raised a parallel argument under federal law, it was premised on the conclusion that the questions answered in the penalty phase were "issues of fact" under state law. (Supp. AOB at 59.)

ultimate issue of punishment, because the ultimate issue in any case is also an "issue of fact" as understood at common law. (*Ibid*.)

A. Respondent Has Failed to Address the Merits of Mr. Johnson's Claim

Respondent does not address the merits of the above contentions in any meaningful way. The supplemental response addresses the form, rather than the substance, of the claim, chastising Mr. Johnson for providing a "needlessly detailed historical account, dotted with citations to the common law." (Supp. RB at 35.) Mr. Johnson provided a "detailed historical account" because this Court has explained that the drafters of the state jury right "looked to Blackstone" and other common law sources "not the Sixth Amendment, for a description of the common law right incorporated into the jury trial provision of the 1879 Constitution." (*Price v. Superior Court* (2001), 25 Cal.4th 1046, 1077.) And because the most basic feature of any common law trial was the "submission of issues of fact to a jury" (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 296), counsel focused on establishing the original meaning of the term "issues of fact." Mr. Johnson showed that constitutional jury protections, such as unanimity, extend "to all *issues*—character or degree of the crime, guilt *and punishment*—which are left to the jury." (*Andres v. United States* (1948) 333 U.S. 740, 748 (*Andres*), italics added; *People v. Green* (1956) 47 Cal.2d 209, 220, quoting *Andres*.)

Respondent does not address these cases or provide a definition of "issues of fact" contrary to the one offered by Mr. Johnson in his "detailed historical account." Nor does respondent attempt to resolve the conundrum that the jury protection of unanimity—but not reasonable doubt—has long applied to the jury's ultimate penalty-phase determination, and conversely that reasonable doubt—but not unanimity—extends to a finding regarding the existence of aggravating crimes. (*People v. Hall* (1926) 199 Cal. 451, 456;

Andres, supra, 333 U.S. at p. 748; cf. *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 231 ["jury unanimity and the standard of proof beyond a reasonable doubt are slices of the same due process pie"].)

Respondent also fails to address Mr. Johnson's two central arguments for this Court to reconsider its prior cases holding that this Court's doctrine that jury protections are inapplicable to the penalty phase. First, that those cases are based on flawed dicta from the incorrectly decided, and now overruled, *Spaziano v. Florida* (1984) 468 U.S. 447, overruled by *Hurst v. Florida* (2016) ___ U.S. ___, 136 S.Ct. 616, 624. (See also Supp. AOB at 71-75.) Second that those cases derive from the historical accident of this Court accepting, without analysis, positions taken by capital defendants. (Supp. AOB at 81-85.)

Respondent's legal analysis of Mr. Johnson's claim is limited to two cursory points. First, respondent provides a string citation to cases rejecting Sixth Amendment claims under *Apprendi v. New Jersey* (2000) 530 U.S. 466. (Supp. RB at 34).[12] Second, respondent offers bald statements that Mr. Johnson's argument "largely disregards California authorities that are directly on point" and "makes little sense and appears to misapprehend the proper state of the law." (Supp. RB at 34-35.)

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[12] These cases appear to rest primarily—if not exclusively—on interpretation of federal law. (*People v. Wall* (2017) 3 Cal.5th 1048, 1072-1073 [rejecting *Apprendi* attack on California death penalty]; *People v. Jones* (2017) 3 Cal.5th 583, 618-619 [holding that the federal constitution does not require jury protections at penalty]; *People v. Watkins* (2012) 55 Cal.4th 999, 1036 [defendant not denied "Sixth Amendment right to a jury trial"]; *People v. Taylor* (2010) 48 Cal.4th 574, 651 [noting previous rejection of claims that jury unanimity on the existence of adjudicated criminal conduct is required by the Sixth Amendment and that recent Supreme Court decisions "call for a different result on that issue"]; *People v. Rogers* (2006) 39 Cal.4th 826, 893 [rejecting claim based on the "United States Supreme Court's recent decisions interpreting the Sixth Amendment's jury trial guarantee"]; *People v. Blair* (2005) 36 Cal.4th 686, 753 [same].)

As to the first assertion, Mr. Johnson acknowledged this Court's holdings—which he does not challenge herein—that the "increases the statutory maximum" rule announced in *Apprendi* does not apply to the penalty phase of a capital trial. So a string citation to cases rejecting *Apprendi* claims is non-responsive. Respondent mischaracterizes Mr. Johnson's argument as a simple rehashing of previously propounded Sixth Amendment claims. Mr. Johnson did *not* say (as respondent suggests) that this Court has not "fully addressed . . . in decades of litigation" anything regarding the Sixth Amendment. (Supp. RB at 34; cf. Supp. AOB at 57 ["Much ink has been spilled over the question of whether aggravating factors in our capital scheme increase the permissible punishment, triggering Sixth Amendment protections under *Apprendi* . . . and its progeny"].)

Quite to the contrary, Mr. Johnson stated that the legal touchstones that this Court has not "fully addressed" are Penal Code section 1042 and Article I, Section 16 of the California Constitution and their clear application to "issues of fact." (Supp. AOB at 57.) Respondent ignores this argument. Yet, as a justice of this court recently noted it is a "crucial point [] that state courts, as the ultimate arbiters of state law, have the prerogative and duty to interpret their state constitutions *independently*." (*People v. Buza* (2018) 4 Cal.5th 658, 702 (dis. opn. of Liu, J.), italics in original; see also Cal. Const., art. I, § 24 [state and federal Constitutions are independent].)

As to the second assertion—that Mr. Johnson ignores cases on point—respondent is incorrect. Mr. Johnson is well aware of the pertinent case law and traced current doctrine to its origins in great detail. (Supp. AOB at 81-85.) More importantly, respondent cites no California authorities "directly on point." (Supp. RB at 35.) None of the cases cited by respondent directly cite or analyze the California jury right or discuss the historical application of jury protections to "issues of fact."

Nor does Mr. Johnson "misapprehend" California law. (Supp. RB at 35.) He apprehends it quite clearly: the most current holdings of this Court are against him. That is precisely why his argument contains extensive discussion of the common law and legal history that led to the current (flawed) doctrine. Respondent addresses none of this.

B. The Court Should Not Reject This Argument in the Absence of Substantive Briefing in Opposition

Mr. Johnson has provided a serious, well-researched, and well-reasoned argument that this Court should reconsider its prior decisions in this area in light of subsequent changes in the law, and informed by a fuller understanding of California legal history and the common law. Mr. Johnson is not merely reasserting legal reasoning that this Court has previously rejected. Rather, he is presenting an argument not previously considered by this Court.

This Court has long expressed the view that appellate counsel "serves both the court and his client by advocating changes in the law if argument can be made supporting change." (*People v. Feggans* (1967) 67 Cal.2d 444, 447–448.) Yet by failing to meaningfully engage with a request to reconsider the law, respondent deprives this Court of any assistance in evaluating the accuracy or persuasiveness of Mr. Johnson's arguments that it should reconsider its holdings. Mr. Johnson has presented a substantial claim that merits a meaningful response. Respondent's tactic of ignoring the merits of the claim thus fails to assist this Court in its foremost duty to "say what the law is." (*Marbury v. Madison* (1803) 5 U.S. 137, 177.)

Respondent's failure to address the substance of the claim potentially places this Court in the disfavored position of acting as "backup appellate counsel," which is "not the court's function." (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 546.) Of course, this Court is capable of researching and responding to the merits of Mr. Johnson's

arguments, even if the issues are not as settled as respondent claims. But the spirit of Government Code section 68081 is that the *parties* brief the arguments and set forth their respective positions, not that the Court raises novel arguments in its opinion without full adversarial briefing. (Gov. Code, § 68081.)

The premise of the adversary system is that the opposing parties will present issues about which there is a controversy and the courts will act as neutral arbiters of those controversies. The presumption is that the opposing parties have a vested interest in best presenting their views and will advance the facts and arguments that entitle them to relief. (*Greenlaw v. United States* (2008) 554 U.S. 237, 243-244.) When a party fails to do this, as respondent has here, it is appropriate for the reviewing court to issue a focus letter to the parties directing briefing on the issue. Mr. Johnson submits that rejecting his claim based upon the briefing currently before the Court would constitute a significant diminution of the adversary system and the Court should not permit it.

CONCLUSION

For the reasons stated in this brief and in Mr. Johnson's opening and reply briefs and supplemental opening brief, the judgment must be reversed.

Dated: November 26, 2018

Respectfully submitted,

Mary K. McComb
State Public Defender

/s/ Andrew C. Shear
Andrew C. Shear
Deputy State Public Defender

Attorneys for Appellant

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

I, Andrew C. Shear, am the Deputy State Public Defender assigned to represent appellant, Joe Edward Johnson, in this automatic appeal. I directed a member of our staff to conduct 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 7,597 words in length excluding tables, certificates and attachments.

Dated: November 26, 2018

/s/ Andrew C. Shear

Andrew C. Shear
Supervising Deputy State Public Defender

Attorney for Appellant

DECLARATION OF SERVICE

Case Name: ***People v. Joe Edward Johnson***
Case Number: **Supreme Court No. S029551**
Sacramento County Superior Court No. 58961

I, Jon Nichols, the undersigned, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 1111 Broadway, 10th Floor, Oakland, California 94607. I served a copy of the following document(s):

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San Quentin State Prison
San Quentin, CA 94974

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Honorable Peter Mering
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November 26, 2018

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November 26, 2018

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **November 26, 2018**, at Oakland, California.

/s/ Jon Nichols

_____
DECLARANT

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. JOHNSON (JOE EDWARD)**
Case Number: **S029551**
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Office of the State Public Defender

Law Firm