IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **CAPITAL CASE**

Plaintiff and Respondent, No. S082101

vs. Sacramento County Superior Court # 98F00230

ROBERT BOYD RHOADES,

Defendant and Appellant./

On Appeal From Judgment Of The Superior Court Of California

Sacramento County

Honorable Loyd H. Mulkey, Jr., Trial Judge

APPELLANT'S SECOND SUPPLEMENTAL BRIEF

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A. Introduction

Since Rhoades filed his reply brief seven years ago and his supplemental brief (focusing on a discrete issue) five years ago, there have been many developments in *Batson/Wheeler* jurisprudence that support his argument about first-step *Batson/Wheeler* error. (*Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1979) 22 Cal.3d 258 (*Wheeler*); see also *Flowers v. Mississippi* (2019) __ U.S. __, No. 17-9572 [Third-step *Batson* case, argued on March 20, 2019].)

Now, twenty years after jury voir dire, the state asks this Court either to make up reasons the prosecutor may have had for excusing all four African-American women from jury service, or, at least, to remand to permit the prosecutors to state their reasons, even after the prosecutor

refused the court's invitation to do so at the time of trial. (RB at 189-216.) While the prosecutors may not admit to racial bias or a belief in racial stereotypes upon remand, they may admit to forgetting after 20 years. Regardless of the prosecutors' memories, however, this Court should reverse for the blatant *Batson/Wheeler* first-step error in this case.

This Court's decision in *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1157-1174 (*Gutierrez*), is highly relevant to Rhoades' case, as it was the first time in 16 years, and the second time in over 25 years, that this Court has found a *Batson/Wheeler* violation. Concurring in *Gutierrez*, Justice Liu observed that appellate records "[r]arely … contain direct evidence of purposeful discrimination," and "courts cannot discern a prosecutor's subjective intent with anything approaching certainty." (*Id.* at 1182-1183 [conc. opn of Lui, J.].) Despite these difficulties, however, Justice Lui warned that courts must rise to the occasion "in light of the serious harms" discrimination in jury selection can cause to litigants, the public, and the public's confidence in the justice system. (*Ibid.*) Justice Liu further explained that "the finding of a [*Batson*] violation should [not] brand the prosecutor a liar or a bigot. Such loaded terms obscure the systemic values that the

constitutional prohibition on racial discrimination in jury selection is designed to serve." (*Id.* at 1183; see also *People v. Chism* (2014) 58 Cal.4th 1266, 1338-1353 [dis. opn. of Liu]; *People v. Harris* (2013) 57 Cal.4th 804, 863-898 [conc. opn. of Liu].)

In *People v. Cisneros* (2015) 234 Cal.App.4th 111, 117-122, the court held that the prosecutor failed to adequately respond to defense counsel's prima facie showing of group bias in her exercise of peremptory challenges. Citing *Batson, supra*, 476 U.S. at 97-98, the court explained that the prosecutor may not rebut the defendant's prima facie case "merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.' If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.' The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried."].)

In *Mitcham v. Davis* (N.D. Cal. 2015) 103 F. Supp. 3d 1091, 1101-1120, the court held that the trial attorney was ineffective by failing to make a *Wheeler* motion attacking the prosecutor's peremptory challenges against all eight African-American prospective jurors.

B. Even If There Were Non-Racial Reasons The Prosecutors May Have Had To Excuse All Four African-American Women, There Is Nothing In The Record To Support The Speculation That The Prosecutors May Not Have Also Harbored An Impermissible Racial Reason

In *Foster v. Chatman* (2016) 578 U. S. __, 136 S.Ct. 1737, 195 L.Ed.2d 1, the U.S. Supreme Court reinforced the need for careful scrutiny of prosecutors' peremptory strike decisions by finding a *Batson* violation even though only some of the prosecution's reasons for its strikes were pretextual, finding that the striking of black prospective jurors was "motivated in substantial part by discriminatory intent."

The Ninth Circuit has held it is *Batson* error if the prosecutor's use of a peremptory challenge for an African-American prospective juror was "motivated in *substantial* part" by race, "regardless of whether the strike would have issued if race had played no role." (*Crittenden v. Chappell* (9th Cir. 2015) 804 F.3d 998, 1002-1003 [affirming the district court's finding that the prosecutor was substantially motivated by race, and thus reversal was required]; see also *Shirley v. Yates* (9th Cir. 2015) 807 F.3d 1090, 1103-1113

[defendant met his burden at *Batson's* step three that a peremptory strike was "motivated in substantial part" by race].)

In *People v. Douglas* (2018) 22 Cal.App.5th 1162, 1172-1176, the court held that "when a party offers multiple rationales for a peremptory strike ('mixed motives'), only some of which are permissible, the taint from the impermissible reason(s) mandates reversal." The *Douglas* court rejected the weaker standard that *Batson* error occurs only when it is possible to prove the prosecutor was "substantially motivated" by race. (*Ibid.*)

Recently, this Court reaffirmed that African-American men, and other "groups lying at the intersection of race *and* gender," are a cognizable class for purposes of *Batson*. (*People v. Armstrong* (2019) 6 Cal.5th 735, 768-769 [emphasis in original].)

In light of these new developments, it would be impossible for this Court to divine that the prosecutor did not harbor any impermissible motive (along with possibly permissible reasons), or was not substantially motivated by race, in part because the prosecutors refused to give any reasons for their challenges to all four African-American women, and in part because the court refused Rhoades' request to further explore comparative analysis. (30-RT 9036-9038, 9046-9048.)

C. Many Courts Since 2012 Have Followed Supreme Court Law That, On Appeal, A Peremptory Strike Of A Prospective Juror In A Cognizable Group Must "Stand Or Fall" On The Explanation Provided At The Time Of The Ruling

Rhoades has explained the many inferences supporting a prima facie case, including the fact that 100 percent of the available African-Americans (four of four) were challenged. (30-RT 9035-9039; see *United States v. Alvarez-Ulloa* (9th Cir. 2015) 784 F.3d 558, 566 [out of a venire of 36 potential jurors containing five Hispanic individuals, the government used three of its seven peremptory strikes on Hispanics; striking sixty percent of Hispanic individuals and approximately eight percent of non-Hispanic individuals; sufficient to ground a prima facie case].)

Gutierrez directly contradicts the state's argument that all the inferences supporting a prima facie case are trumped by the unfounded speculation that 1) the prosecutors were not influenced by racial stereotypes; and 2) the prosecutors were primarily or solely motivated by the views these jurors held about the death penalty and other permissible matters.

The *Gutierrez* Court held:

> What courts should not do is substitute their own reasoning for the rationale given by the prosecutor, even if they can imagine a valid reason that would not be shown to be pretextual. "[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives.... 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 false." (*Miller-El v. Dretke, supra,* 545 U.S. 231, 252 (*Miller-El II*).

Similarly, *People v. Sanchez* (2016) 63 Cal.4th 411, 435-436 & fn. 5, citing *People v. Scott* (2015) 61 Cal.4th 363, 390, 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 out a prima facie case of discrimination … because an inference of discrimination rises or falls based on the circumstances in the record." A fortiori, a reviewing court may not rely on possible reasons a prosecutor might have had for excusing all four black women from Rhoades' jury.

Federal courts have continued to reiterate this fundamental principle, restated in *Johnson v. California* (2005) 545 U.S. 162, 171-

172 & fn. 7 (*Johnson*), that speculation about reasons the prosecutor might have had is not permissible at any step of the *Batson* inquiry. (*United States v. Petras* (5th Cir. 2018) 879 F.3d 155, 161 ["On appeal, the strike must 'stand or fall' on the explanation provided at the time of the ruling]; *Chamberlin v. Fisher* (5th Cir. 2017) 855 F.3d 657, 667 ["*Miller-El II* rejected prosecutors' ability to justify their strikes based on reasons not offered during jury selection and appellate courts' ability to come up with new rationales on prosecutors' behalf"]; *Bryan v. Bobby* (6th Cir. 2016) 843 F.3d 1099, 1110 ["No matter that the trial court or an appellate court may think of better, more plausible, more constitutionally acceptable reasons for the strike, the only explanation to be analyzed is the explanation the prosecutor in fact gave"].)

In 2017, the Supreme Court of Washington adopted a rule that "the trial court must recognize a prima facie case of discriminatory purpose when the sole member of a racially cognizable group has been struck from the jury." (*Seattle v. Erickson* (2017) 188 Wash.2d 721, 733-734, 398 P.3d 1124, 1131.) The court had previously acknowledged the difficulty of applying *Batson* because, while "racism itself has changed, … implicit biases … endure despite our best efforts to eliminate them. Racism now lives not in the open, but beneath the

surface." (*State v. Saintcalle* (2013) 178 Wash.2d 34, 46, 309 P.3d 326, 335.) The Washington court emphasized its ongoing concern that the court's "*Batson* protections are not robust enough to effectively combat racial discrimination during jury selection." (*Seattle v. Erickson, supra*, 188 Wash.2d at 733-734, 398 P.3d at 1125.)

In 2018, the Washington Supreme Court used its rulemaking authority to issue a first-of-its-kind rule that goes beyond *Batson* to provide greater protection against discriminatory peremptory strikes. (Washington General Rule 37.) The Washington rule diverges from *Batson* by eliminating the requirement to show purposeful discrimination. Instead, the new rule disallows a strike if "an objective observer could view race or ethnicity as a factor." (Rule 37 (e).) The rule defines an "objective observer" as a person who is aware of "implicit, institutional, and unconscious biases." (Rule 37 (f).) In addition to incorporating implicit bias, the Washington rule is groundbreaking by presuming that a strike is invalid or requires advance notice about the explanation for its use, for common reasons that have often been accepted by courts, but correlate strongly with race. (Rule 37 (g),(h), (i).) These include such reasons as prior contact with law enforcement, distrust of law enforcement due to racial

profiling, living in a high-crime neighborhood, or having an objectionable demeanor. (Rule 37 (f).)

Other state supreme courts have been careful to enforce *Batson.* In Nevada, the state supreme court reversed several capital and other cases on *Batson* grounds after detecting a pattern concerning jury selection practices in Clark County, which includes Las Vegas. (*Conner v. State* (Nev. 2014) 327 P.3d 503, 507; *McCarty v. State* (Nev. 2016) 371 P.3d 1002, 1006-1010; *Bradford v. State* (Nev. 2017) 404 P.3d 406; *Williams v. State* (Nev. 2018) 134 Nev. Adv. Op. 83.) In *Conner, supra*, 327 P.3d at 507, the Court wrote that "[d]iscriminatory jury selection is particularly concerning in capital cases where each juror has the power to decide whether the defendant is deserving of the ultimate penalty, death." These Nevada cases are also remarkable by taking seriously its duty to reverse convictions even when the *Batson* violations are not revealed by explicitly racist or biased statements, but by a closer look at records which demonstrated that prosecutors accepted certain characteristics in white jurors while simultaneously relying on those same attributes to justify striking minority jurors.

In 2017, the Iowa Supreme Court acknowledged the "general agreement that courts should address the problem of implicit bias in the courtroom." (*Iowa v. Plain* (Iowa 2017) 898 N.W.2d 801, 817, 825.) The court "strongly encourage[d] district courts to be proactive about addressing implicit bias," and approved an antidiscrimination jury instruction for that purpose. The court also changed its method for determining whether the racial composition of the jury pool violated the right to a jury drawn from a fair cross-section of the community. The Iowa court explained that its prior approach was "[a] test without teeth [that] leaves the right to an impartial jury for some minority populations without protection." (*Ibid.* [rejecting exclusive reliance on absolute disparity test for determining representativeness of a jury pool, and adopting a "flexible approach" that permits lower courts to rely on "multiple analyses … that are appropriate to the circumstances of each case"].)

In 2017, the District of Columbia Court of Appeals held that a trial court erred by excusing a potential black juror for cause simply because she believed the criminal justice system has a systemic bias against black men, especially when the juror indicated she could set that belief aside and remain impartial. (*Mason v. United States* (D.C. 2017)

170 A.3d 182, 185.) The court explained that this error required reversal, in part, because it would actually be beneficial to the deliberative process to include jurors who "doubt the racial fairness of the criminal justice system," a subject the court described as an "important matter [ ] of legitimate public debate." (*Id*. at 189-190.)

D. The Prosecutors' Discriminatory Exclusion Of All Four African-American Female Jurors Is Reversible Per Se, Because A Remand To Permit The Prosecutor To Explain Would Be Futile In Light Of The Judge's Death And The Delay Of More Than 20 Years

The *Wheeler/Batson* error committed by the trial court compels reversal of the charges and the judgment of death, as structural error. (AOB at 214.)

This Court and the Ninth Circuit have held that sometimes a remand for a further hearing is the appropriate remedy for a *Batson* error with respect to the first-step prima facie showing, but most of those cases did not involve a 20-year delay. For example, in *Batson*, which established the remand procedure, the time between trial and remand was two years. (*People v. Snow* (1987) 44 Cal.3d 216, 227.) In *People v. Johnson* (2006) 38 Cal.4th 1096, 1103, this Court overruled *Snow*, and remanded despite a delay of nearly eight years, but

acknowledged that "it is certainly possible that due to the passage of time or other reasons, the trial court will find that it cannot reliably determine whether the prosecutor exercised his peremptory challenges in a permissible manner. If that occurs, the court should order a new trial."

Here, the trial judge has died so it will be impossible for any judge to make a reliable determination about whether the prosecutor exercised these four peremptory challenges in a nondiscriminatory manner. (See *id*. [conc. opn of Werdegar, J.] ["On remand, the trial court may well decide that neither it nor the parties can reliably reconstruct events from so long ago, notwithstanding the existence of the jury questionnaires and verbatim transcript of the jury selection proceeding. (See *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1282 ['While we have every confidence in the good faith and professionalism of the parties, we have less confidence in their memories'"].)

In *Snyder v. Louisiana* (2008) 552 U.S. 472, ___, 128 S.Ct. 1203, 1212, 170 L.Ed.2d 175, the Court simply reversed, without a remand, for third-step *Batson* error, given that there was nothing "in the record showing that the trial judge credited the claim that Mr. Brooks was

nervous," and thus there was no "realistic possibility that this subtle question of causation could be profitably explored further on remand at this late date, more than a decade after petitioner's trial."

Rhoades believes that in light of the 20-year delay between jury selection and a remand and because of the death of the trial judge, it would be futile to remand, because there is no "realistic possibility" that the prosecutors' reasons for exercising these four strikes "could be profitably explored further on remand at this late date." (*Ibid*.; but see *Hooper v. Ryan* (7th Cir. 2013) 729 F.3d 782, 787 [remanding for a credibility determination although "[i]t seems unlikely that this can be done 32 years after the trial"]; *Morgan v. Chicago* (7th Cir. 2016) 822 F.3d 317, 332-333 [same].)

CONCLUSION

Rhoades respectfully requests this Court to honor the holding of *Johnson*, which held that the trial court erred in not requiring the prosecutors to explain their reasons for excusing all the African-American jurors at the first-step of the *Batson* inquiry, which is virtually indistinguishable from Rhoades' case.

Dated: March 26, 2019

Respectfully submitted,

_____

RICHARD JAY MOLLER
Attorney for Appellant By
Appointment Of The
Supreme Court

PROOF OF SERVICE and WORD COUNT CERTIFICATION

I, RICHARD JAY MOLLER, declare that I am, and was at the time of the service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. My business address is P.O. Box 1669, Redway, CA 95560-1669. I served the foregoing APPELLANT'S SECOND SUPPLEMENTAL BRIEF on March 26, 2019, by depositing copies in the United States mail at Redway, California, with postage prepaid thereon, and addressed as follows:

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RICHARD JAY MOLLER

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California Supreme Court (true filing)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 26, 2019, at Redway, California.

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RICHARD JAY MOLLER

STATE OF CALIFORNIA
Supreme Court of California

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