IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. THOMAS LEE BATTLE Defendant and Appellant.	No. S119296 San Bernardino County Superior Court Case No. FVI012605 Death Penalty Case

Appeal from the Judgment of the Superior Court
of the State of California for the County of San Bernardino

Honorable Eric M. Nakata, Judge

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. THOMAS LEE BATTLE, Defendant and Appellant.	Case No. S119296 (San Bernardino County Superior Court Case No. No. FVI012605) Death Penalty Case

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

INTRODUCTION

Generation after generation of American rulemakers, and in particular American courts, have wrestled with the problem of discrimination in jury selection, beginning after Reconstruction with the seminal decision of *Strauder v. West Virginia* (1880) 100 U.S. 303. Reviewing this difficult legal history, a hopeful pattern nonetheless emerges: many subsequent eras have looked back at their predecessor's attempted solutions, and—recognizing manifest deficiencies—have proposed new and more comprehensive ones.

California, a state with an extremely diverse population and a history of forward-thinking leaders, has repeatedly stood at the forefront in tackling the problem of discrimination in the exercise of peremptory challenges. *People v. Wheeler* (1978) 22 Cal.3d 258

(*Wheeler*), one of the most significant decisions ever issued by this Court, examined the prevailing rules governing discriminatory use of peremptory challenges. Recognizing that existing federal rules were ineffectual, the Court proposed a then-radical solution based on the California Constitution: demanding an explanation for why parties were disproportionately striking jurors from a protected class. Silence and presumed good faith were no longer enough. The high court soon followed suit. (*Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).)

Concluding that *Batson* and *Wheeler* have still not been effective at rooting out discrimination, California again acted. Last year, the Legislature passed Assembly Bill 3070, which enacts major reforms limiting the reach of discrimination in the use of peremptory challenges. (Stats 2020, ch. 318, §§ 1-3 ("AB 3070").)

A tempting judicial response to the reforms embodied by AB 3070 might be to passively accept the Legislature's proposed solutions. One could postulate that the problems inherent in *Wheeler* and *Batson*, to the extent they even existed in the first place, have been addressed by statute and that no further constitutional discussion or revision of the *Batson/Wheeler* framework is necessary. The purpose of this brief is to dispute this contention, and to invite this Court to revise its current constitutional rules.

Although statutory reforms are an important feature of democratic progress in the battle against racism, constitutional requirements occupy a special place in our legal system.

Constitutional rules signal to society that the values embodied in the right at issue occupy an "elevated position in the universe of American law." (*People v. Villa* (2009) 45 Cal.4th 1063, 1068.) Thus, the purpose of the rules of *Batson* and *Wheeler* is to send a powerful message: that courts "will not tolerate prosecutors' racially discriminatory use of the peremptory challenge[,]" a rule that serves as "a statement about what this Nation stands for, rather than [merely] a statement of fact. [Citation]." (*J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 149 (conc. opn. of O'Connor, J.).) Thus, it remains up to this Court to refine the underlying constitutional procedure to ensure that it functions effectively—regardless of statutory changes. In doing so, however, it behooves the Court to pay particular attention to the problem areas identified by the Legislature.

Among the recognized shortcomings in the current procedure which were a special focus of legislative concern was a portion at issue in this case, the first or "prima facie case" stage. As will be traced in this brief, the prima facie stage of the process—though designed to require only a modest showing, easily satisfied—has turned out to be an insuperable barrier in countless cases. The reasons for this will also be discussed, including defects in the methods employed for assessing showings at that stage. But particular emphasis must be placed on the fact that prosecutors

have been carefully and effectively trained in techniques designed to evade judicial review by short-circuiting the prima facie analysis.[1]

While the response of the California Legislature—and, for that matter, every other body to enact or recommend reform in this area[2]—has been to abolish the prima facie stage entirely, what

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[1] Fifteen county district attorney offices produced some or all of their jury selection training materials in response to a California Public Records Act request by the American Civil Liberties Union of Northern California in 2019. The materials were reviewed by the Berkeley Death Penalty Law Clinic as part of producing the report that accompanied the passage of AB 3070. Semel et al., *Whitewashing the Jury Box How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* (June 2020) (*Whitewashing the Jury Box*). The materials were made available online. (See Berkeley Law, *California District Attorney Jury Selection Training Materials*, https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/whitewashing-the-jury-box-how-california-perpetuates-the-discriminatory-exclusion-of-black-and-latinx-jurors/california-district-attorney-training-materials/ (last visited February 5, 2021.) The training materials are contained in PDF files in subfolders on this website associated with each county, and will be referred to in this brief by county, file name, and page number of the PDF file. These materials will be discussed in more detail below.

[2] (See Report of the Jury Selection Task Force to Chief Justice Richard A. Robinson (Dec. 31, 2020), p. 16 [discussing Connecticut's response to the issues of discrimination in jury selection and recommending court rule eliminating the prima facie case of *Batson*]; Proposed GR 37—Jury Selection Workgroup, Final Report, p.4 [noting, despite disagreement on other issues, unanimous agreement among members that "instead of requiring the defendant or objecting party to prove a *prima facie* case of discrimination

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appellant asks this Court to do as a matter of *constitutional* rule-making is more modest. The legislative findings, and the academic research which support those findings, commend three limited constitutional reforms that should be embraced by this Court to resolve some of the concerns highlighted by the passage of AB 3070. These three proposed reforms respond to the following three flaws in current doctrine:

- 1) *Batson/Wheeler* has been incorrectly interpreted to provide a blanket exemption from judicial inquiry into strikes for low sample sizes, even where the sample suggests a preliminary pattern of disproportionate—or even total—exclusion of jurors from a particular class;
- 2) Cases often accord undue weight to prosecutors for temporarily accepting Black jurors or accepting one or two Black jurors, particularly where prosecutors have been trained to do so to avoid suspicion; and

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against a particular juror . . . the burden should be carried by the striking party to give reasons to justify the peremptory challenge"]; Washington General Rule 37 [eliminating prima facie case of *Batson*]; Miss. Sen. Bill No. 2211, (2021 Reg. Sess.) introduced Jan. 8, 2021 [proposed bill eliminating prima facie burden]; Petition to Amend the Rules of the Supreme Court of Arizona to Adopt Proposed Rule 24—Jury Selection (filed Jan. 8. 2021), p. 13 [proposed court rule, which "eliminates [the prima facie] requirement"].)

- 3) Appellate courts have been allowed to rely on unvoiced justifications to "dispel" an otherwise existing inference of discrimination.

Taking those points in order:

First, this Court should return to its original practice of recognizing a prima facie case even where the absolute number of strikes exercised is low. (See *People v. Turner* (1986) 42 Cal.3d 711, 719 (*Turner*) [two strikes against Black jurors "amply" supported prima facie finding].) Subsequent cases have eroded *Turner*'s simple guidance. But a straightforward rule of decision—and the easiest way to assure that the prima facie case is and remains a low burden—is to hold that whenever the prosecution's pattern of strikes appears to favor White jurors, and in particular when jurors of a protected class have been entirely excluded, the prima facie burden is met.

A contrary rule which allows courts to ignore disproportionate strikes when there are only a few peremptories[3] routinely allows prosecutors to eliminate most or all of the protected class without providing any explanation. As such, it stymies one *Batson/Wheeler*'s primary functions—preventing anti-Black discrimination—in large swaths of California where few Black jurors are called to jury service. (*Flowers v. Mississippi* (2019) 139

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[3] (See *People v. Bell* (2007) 40 Cal.4th 582, 598 (*Bell*) and *People v. Bonilla* (2007) 41 Cal.4th 313, 343 (*Bonilla*); see also section I, *infra*.)

S.Ct. 2228, 2239 [*Batson* adopted largely in light of anti-Black discrimination because "[s]imple math" meant that prosecutors could "exercise peremptory strikes in individual cases to remove most or all black prospective jurors"].)

Second, this Court's methodology for assessing the prima facie case must be reassessed in the face of evidence that prosecutors have been trained to systematically evade the finding of a prima facie case. As prime examples, prosecutors throughout California have been trained to leave on "at least one" Black juror to defeat suspicion, and that temporarily accepting jurors from a cognizable class is useful because it undermines a claim of discrimination.[4]

These trainings render this Court's routine practice of resting heavily on the presence—or even temporary acceptance—of single Black jurors highly problematic. (See *People v. Smith* (2019) 32 Cal.App.5th 860, 881 (*Smith*) (conc. opn. of Streeter, J.) [collecting cases showing how "often … over the years" this Court has relied on "willingness to accept same-race juror" as rebutting claimed discrimination].) Equally troublesome, the explicitly race-conscious advice to leave on a member of the protected class strongly threatens to infect the entire process with racial discrimination. The pregnant implication of leaving on "at least one" juror from the protected class is that—having internally vouched for one's own absence of racial motivation by beneficently refraining from discrimination—prosecutors should be more free to remove *other*

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[4] (See, *infra* section II.)

jurors from that same class without careful examination of their group bias. Little or no weight should be accorded to a prosecutor's good faith when, as in this case, he or she temporarily accepts a single Black juror.

Third, this Court should revisit its practice of ignoring disparate patterns of exclusion where voir dire suggests what may seem to be "obvious" reasons—never articulated by the prosecutor—which *could* have motivated the strikes. (See *People v. Rhoades* (2019) 8 Cal.5th 393, 431 (*Rhoades*).) As the Legislature has recognized, many commonly proffered, *i.e.* "obvious," reasons that prosecutors might have advanced, and that trial courts would often have accepted had they been advanced, are actually discriminatory. (AB 3070, § 1 subd. (b).) This Court's current doctrine tasks appellate courts with hypothesizing why a prosecutor *might* have stricken a juror in order to invalidate otherwise suspicious pattern of disproportionate exclusion. (*People v. Sánchez* (2016) 63 Cal.4th 411, 435 & fn.5 (*Sánchez*) [appellate courts can rely upon nondiscriminatory reasons "clearly established in the record that necessarily dispel any inference of bias" in negating a prima facie case].) Time and again, for purposes of analyzing the prima facie case, this Court has relied on the very problematic justifications which the Legislature has found demand far greater scrutiny. (See, e.g., *Rhoades*, *supra*, 8 Cal.5th at pp. 471-474 (dis. opn. of Liu, J.) [listing numerous cases in which "a prospective juror's (or a family member's) negative experience or negative view of law enforcement was hypothesized as a reason for the strike"].)

Judicial speculation, even informed speculation, at stage one does little to serve the interest upon which the prima facie case is premised—namely the interest of the party challenging a prospective juror in keeping their jury selection strategy confidential. The prosecutor's interest in maintaining confidentiality is not served when the reason is, as this Court has described it, "obvious." (*Rhoades*, *supra*, 8 Cal.5th at p. 431.) Even more important, relying on hypothetical reasons makes little sense if the task is to identify prosecutors who have willfully decided to break the rules prohibiting discrimination. For these prosecutors, the existence of reasons—even substantial reasons—for striking the jurors of color they choose to target is largely, or even completely, irrelevant. That the record supplies a basis for their conscious and preexisting plan to discriminate does not dispel an inference of bias. It is merely fortuitous. As such, the rules allowing appellate and trial courts to hypothesize why the prosecutor might have stricken prospective jurors at the prima facie stage should be reconsidered.

I. BECAUSE THE PRIMA FACIE CASE SETS A THRESHOLD BELOW WHICH THERE IS NO JUDICIAL SCRUTINY, THE BAR MUST BE SET LOW. WHERE THE PROSECUTION IS DISPROPRTIONATELY EXCLUDING MEMBERS OF A PROTECTED CLASS, OR THERE IS TOTAL EXCLUSION, COURTS SHOULD ALWAYS DEMAND AN EXPLANATION, REGARDLESS OF SMALL SAMPLE SIZE

If a prima facie case is not met, there is no judicial scrutiny in evaluating the basis for a prosecutor's strikes. Thus, in assessing

how strictly to enforce the prima facie burden, courts have universally accepted the premise that the prima facia case presents a "low threshold[.]" (*People v. Scott* (2015) 61 Cal.4th 363, 384 (*Scott*); see also *United States v. Collins* (9th Cir. 2009) 551 F.3d 914, 920 [prima facie burden is "small" and "easily met"]; AOB at 60 [collecting cases].) For cases with a Black defendant and Black stricken jurors, meeting that threshold is supposed to be easier still. (*Powers v. Ohio* (1991) 499 U.S. 400, 416 [racial identity between defendant and stricken juror presents "one of the easier cases" to establish a prima facie case].) Criminal trials such as Mr. Battle's case—with White victims and in which both the defendants *and* the stricken jurors are Black—are to be singled out for even more rigorous attention. (*Wheeler*, *supra,* 22 Cal.3d at p. 281, [placing emphasis on circumstances in which "alleged victim is a member of the group to which the majority of the remaining jurors belong"]; *People v. O'Malley* (2016) 62 Cal.4th 944, 980 [interracial crimes and racial identity between defendant and struck juror raise "heightened concerns"].)

In this Court's decisions over the last three decades, however, the burden of establishing a prima facie case has not been low, or easily met. Nor is there any indication in this Court's decisions that a prima facie case from striking Black jurors in trials with Black defendants and White victims is more readily established. It has been more than thirty years since this Court has found a prima facie case of discrimination. (See *People v. Snow* (1987) 44 Cal.3d 216, 226.) And the Court has continued to reject prima facie cases

despite nearly two decades of decisions independently reviewing scores of rulings by trial judges who, like the judge here, erroneously applying too high a standard. (See *Rhoades, supra*, 8 Cal.5th at p. 458 (dis. opn. of Liu, J.) ["Not once did this court find a prima facie case of discrimination — even though all 42 cases were tried before *Johnson v. California*[5][.]" and therefore reviewed de novo.)

Among the central reasons that the prima facie case remains out of reach in so many cases are rules which indicate that disproportionate strikes can and should be ignored where the sample size is low. (*Bell*, *supra*, 40 Cal.4th at p. 598 and *Bonilla, supra*, 41 Cal.4th at p. 343.) Such rules are in tension with prior, and still controlling, law which held that a prima facie case based on disproportionate exclusion can be supported despite a small number of total strikes against the protected class. (*Turner*, *supra*, 42 Cal.3d at p. 230.) This Court should resolve this tension by issuing a simple holding: whenever prosecutors' strikes disproportionately target a protected class, and certainly whenever this results in the total exclusion of members of such a class, they must be explained and evaluated by trial courts.

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[5] (*Johnson v. California* (2005) 545 U.S. 162.)

A. AB 3070's Elimination of the Statutory Right to Conceal the Basis for Strikes Against Jurors from a Cognizable Class Presents a Basis to Reconsider the Current Constitutional Rules

The *Batson/Wheeler* prima facie case requirement evolved out of a need to balance competing interests. One the one hand, there was and is a compelling need to rein in discrimination through the use of peremptory challenges. As *Wheeler* recognized, "[c]ommunity participation in the administration of the criminal law, . . .is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system." (*Wheeler*, *supra*, 22 Cal.3d a t p. 270.) On the other, there existed a traditional practice of shrouding the basis for non-cause challenges of prospective jurors in secrecy. (See former Penal Code § 1069 ["no reason need be given" for a peremptory challenge], accord Code of Civil Proc. § 226.) As this Court explained in *Scott*, *supra*, 61 Cal.4th 363, this balancing governs the interpretation of the prima facie case:

> In formulating an approach to the question [regarding the prima facie case] before us, we must be mindful of the interests at stake. The *Batson/Wheeler* framework is designed to enforce the constitutional prohibition on exclusion of persons from jury service on account of their membership in a cognizable group. It is also designed to otherwise preserve the historical privilege of peremptory challenges free of judicial control, which 'traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury.' [Citation.] A balancing of these competing interests explains why the party exercising a peremptory challenge has the burden to come forward with nondiscriminatory reasons

> only when the moving party has first made out a prima facie case of discrimination.

(*Scott, supra*, 61 Cal.4th at p. 387.)

Wheeler recognized that the second, statutory interest "must give way to the constitutional imperative" when there exists a prima facie pattern of discrimination. (*Wheeler supra*, 22 Cal.3d at p. 282, fn. 28.) Importantly, *Wheeler* also recognized that the interest in maintaining as confidential the basis for peremptory challenges in the first place was purely a legislative creation. (*See ibid.* [unexplained peremptory challenges are "not a constitutional necessity but a statutory privilege" and "[t]he matter of peremptory challenges rests with the Legislature, limited only by the necessity of having an impartial jury. [Citation.]." (*Ibid.*) Now, however, the Legislature has signaled that the interest in secrecy must always give way in this context, for it has abolished the ability to conceal the basis for peremptory challenges of jurors from a protected class.

Critically, it is not merely the Legislature that has identified that there exists no reason to conceal the basis for peremptory challenges. Prosecutors themselves have come to the same conclusion. In all current District Attorney training materials, prosecutors are instructed to put their reasons on the record—whether or not a prima facie case has been found.[6] In other words,

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[6] (See, e.g, Alameda County District Attorney Training Materials, *Training Materials re Batson v. Kentucky and People v.*

Footnote continued on next page

there is no interest in secrecy left for the prima facie case to protect. Prosecutors and the Legislature have both come to the same conclusion: it is better to always place the basis for a challenged strike on the record. Yet protecting the confidentiality of these reasons is the basis for the current rules. (*Scott*, *supra*, 61 Cal.4th at 387.) As the Civil Code explains, "[w]here the reason of a rule ceases, so should the rule itself." (Civil Code § 3510.)

The Washington Supreme Court, with respect to stage three of *Batson*, has already demonstrated how and why courts should reevaluate their own constitutional *Batson* procedures in light of non-constitutional reforms. (*State v. Jefferson* (2018) 192 Wash.2d 225, 249 (*Jefferson*) [modifying its constitutional *Batson* framework in light of the deficiencies recognized by Washington General Rule

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Wheeler_Redacted.pdf at p. 61 ["It is . . . not only permissible, but recommended for a prosecutor to put neutral reasons on n the record" even where there is no prima facie finding]; Marin County District Attorney Training Materials, *2019.09.11 Marin Batson Training Materials* at 105 ["Editor's Note" "it still makes sense to state the reason for exercising the challenges even if the trial judge finds no prima facie case"]; Monterey County District Attorney Training Materials, *2019.09.13 Monterey Materials Recieved.pdf* at p. 10 ["If the trial court finds the defense has failed to make a prima facie case, place reasons for excluding on the record for appellate purpose"]; Orange County District Attorney Training Materials, *Wheeler – Batson (Price – 09-26-17).pdf* at p.7 ["if the court rules there was no prima facie showing, ask to state your justification . . . in order to preserve your justification for appeal"].)

37].) The doctrinal path in California, which has its own state constitutional procedure to prohibit discrimination in jury selection—*Wheeler*—is decidedly simpler. This Court has, again, the ability to lead the way in the effort to combat discrimination. In light of the changed landscape governing the prima facie case, it should do so.

B. AB 3070 Recognized that *Batson* and *Wheeler* as Applied in this Court's Decisions Were Failing to Achieve Their Purported Goals. This Recognized Failure Supports Reconsideration of the Rules Governing the Prima Facie Case

Critical to Mr. Battle's request that this Court modify the existing approach to assessing the prima facie case is a recognition that the approach itself is deeply flawed. The passage of AB 3070 confirms the Legislature and Governor's conclusion that the existing constitutional rules were not effective at preventing discrimination.

According to the bill's author, Assemblymember Dr. Shirley Weber, the *Batson/Wheeler* procedure has "failed to achieve its constitutionally mandated purpose." (Archived Audio Testimony, Assemb. Jud. Comm. (May 11, 2020) at 4:20:57-4:21:02, available at https://www.assembly.ca.gov/media-archive?page=1 (Statement of Assemblymember Weber); see also AB 3070, Assem. Approp. Comm. Analysis of AB 3070, July 2, 2020 [bill proponent arguing that "[e]xisting law has wholly failed to prevent discrimination in jury selection. Members of the California Supreme Court, Courts of Appeals and numerous commentators have lamented the failure of the *Batson* framework to prevent the discrimination in the selection

of jurors"].) According to the bill's author, the "existing procedures have been especially detrimental to African Americans, Latinos, and other people of Color . . . who prosecutors have historically and continue to remove disproportionately from juries." (Sen. Comm. on Public Safety, Analysis of AB 3070 (2019-2020 Reg. Sess.) (August 5, 2020) at p.9.) A lengthy report, accompanying the bill and provided to every member of the Legislature, provided an in-depth analysis of why the *Batson/Wheeler* framework, including specifically the prima facie case, was broken. (See generally Semel et al., *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* (June 6, 2020) (*Whitewashing the Jury Box*) at pp.53-57 [detailing the California cases erecting an "unconstitutionally high" burden at *Batson/Wheeler* step one].)

During committee hearings on the bill, California Attorneys for Criminal Justice (CACJ), the bill's primary sponsor, offered the testimony of this report's author, Professor Elisabeth Semel. Professor Semel underscored to the Legislature in her testimony Justice Marshall's prediction[7] that courts might interpret *Batson* in a fashion making it "extremely difficult for defendants to establish a prima facie showing at *Batson's* first step" and that the "record of the California Supreme Court confirms Justice Marshall's prediction[.]" (Archived Audio Testimony, Assemb. Jud. Comm. (May 11, 2020) (statement of Professor Semel) at 4:29:10-33,

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[7] (*Batson, supra*, 476 U.S. at p.105 (conc. opn. of Marshall, J.).)

available at https://www.assembly.ca.gov/media-archive?page=1.) It was due to this functional failure at stage one of *Batson/Wheeler* that AB 3070, like its predecessor Washington GR 37, eliminated the prima facie case. (*Ibid.*) In short, in enacting AB 3070, the Legislature came to the unequivocal determination that this Court's existing constitutional framework, in particular the prima facie case, was not working properly to achieve what is ostensibly the goal of *Batson* and *Wheeler*: reducing discrimination in jury selection.

C. This Court Should not Insulate Disproportionate Strikes from Judicial Scrutiny Simply Because There Exists a Small Sample Size

In light of the Legislature's findings and the functional problems with a prima facie case that is so rarely met, Mr. Battle asks that this Court reconsider the constitutional rules governing the prima facie case. In the final analysis, the determination of the height of the prima facie burden presents a functional question: how much suspicious behavior should be tolerated without any meaningful judicial scrutiny. As this Court and others have concluded, the threshold is intended to be low. (*Scott*, *supra*, 61 Cal.4th at 384; *Overton v. Newton* (2d Cir. 2002) 295 F.3d 270, 279, fn. 10 [burden is "minimal"]; *Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, 1145 [prima facie threshold "quite low"].) However, beginning with this Court's last finding of a prima facie case in 1987, the Court began to retreat from appellate enforcement of the prima facie case.

Many decisions over the last 34 years describe instances of egregiously strong patterns of discrimination yet conclude that there exists no inference of discrimination. Chief among these is *People v. Carasi* (2008) 44 Cal.4th 1263 (*Carasi*). (*See id.* at pp. 1291-1295 [even under de novo review, finding no prima facie case of gender discrimination despite the fact that the prosecutor used 20 out of 23 peremptory challenges against female prospective jurors]; see also *People v. Thomas* (2012) 53 Cal.4th 771, 796 [citing *Carasi*'s analysis with approval].) Searching this Court's past opinions, it is not difficult to find numerous other cases in which strong arguments can be made that "the circumstances plainly gave rise to an inference of discrimination." (*Rhoades*, *supra*, 8 Cal.5th at p. 466 (dis. opn. of Liu, J.) [collecting what Justice Liu, and occasionally other members of this Court, regarded as wrongly decided step-one cases].) However, as a point of doctrine, these cases are *not* the primary source of the flawed legal landscape. Even recognizing that they were wrongly decided would not cure the existing shortcomings of the prima facie case.

Instead, Mr. Battle urges reconsideration of several fundamental flaws impeding the effective operation of the current rules. In this section, Mr. Battle calls for reconsideration of the rule which incorrectly exempts from judicial inquiry a disproportionate pattern of exclusion where there exists a small number of strikes of jurors from the protected class.

1. Doctrine which eschews judicial scrutiny of strikes against Black jurors in counties with few Black jurors, and often a significant history of racism, should be reconsidered

As this Court has stated, where there is a small sample size (e.g. only one, two, or perhaps three strikes) against a protected class, it is "impossible" to establish a pattern of discrimination simply from a numerical showing of disproportionality. (*Bell*, *supra*, 40 Cal.4th at p. 598 [two of three Black female jurors stricken from 47 person pool]; *Bonilla*, *supra*, 41 Cal.4th at p. 343 [two of two Black jurors stricken]; *People v. Garcia* (2011) 52 Cal.4th 706, 747 [extending "small sample size" rule to three strikes].) As *Bell* instructs, even assuming there is non-numerical evidence, "in the ordinary case . . . to make a prima facie case after the excusal of only one or two members of a group is very difficult." (*Bell*, *supra*, 40 Cal.4th at p. 598.) In effect, these cases allow prosecutors in jurisdictions with small percentages of Black jurors drawn for service to eliminate them from the jury box with complete impunity. (See *Batson*, *supra*, 476 U.S. at p. 105 (conc. opn. of Marshall J.) [warning of the possibility that "where only one or two black jurors survive the challenges for cause, the prosecutor need have no compunction about striking them from the jury because of their race"]; see also (Sen. Comm. on Public Safety, Analysis of AB 3070, *supra*, at p. 8 [AB 3070 needed because "[t]rial courts rarely even require attorneys to present their reasons for excluding a juror"].)

From the perspective of preventing anti-Black discrimination, *Bell* and *Bonilla* create a perverse functional rule. California's Black population is less than 6 percent of its total population. (U.S. Census, American Community Survey, California Hispanic or Latino Origin by Race (2018) available at https://data.census.gov/cedsci/table?q=B03002&g=0400000US06&tid=ACSDT1Y2018.B03002&hidePreview=true.) And even in counties where the percentages are higher, Black Californians are systematically underrepresented in juries. (See generally Fukurai & Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System* (1994) 13 Nat'l Black L.J. 238) [tracing the numerous features of jury selection which disproportionately exclude Black Californians from jury service].) Thus, ignoring small sample sizes rules out enforcement of *Batson* and *Wheeler* for strikes against Black prospective jurors in the vast majority of cases. In areas where such enforcement desperately needed, there is simply no meaningful enforcement mechanism.

It is worth underscoring that San Bernardino County is a county that has itself struggled mightily with racial, and in particular anti-Black, discrimination. San Bernardino County was, near the time of Mr. Battle's trial, widely recognized as the regional headquarter for the Klu Klux Klan. (Josh Dulaney, *Honoring King in Former KKK Hotbed*, The Press Enterprise, Jan. 11, 2012; see also Juan de Lara, Inland Shift: Race, Space, and Capital in Southern California, 123-124 [California's Inland Empire, including San Bernardino County, had "one of the highest concentrations of

hate groups in the country" and reference to one of San Bernardino's towns as "Klan territory" were pervasive in the 1990s]; see also Ingraham, *The most racist places in America, according to Google*, Washington Post (April 1, 2015) [reporting on study identifying San Bernardino County, between 2004 and 2007, as region within California with the highest proportion of internet search queries containing traditional spelling of the "N-word"].)

Overt racial discrimination has hovered over capital trials in San Bernardino County. During the prosecution of Kevin Cooper, a Black man, for the murder of a white family, a crowd gathered outside a San Bernardino courthouse and "displayed signs reading 'hang the Nigger'" and "displayed a noose around a stuffed gorilla."[8] In the case of Floyd Smith, recently affirmed by this Court, the Black defense attorney received anonymous, racially-motivated death threats, resulting in the trial court granting defense counsel funding for a private security detail. His tires were later slashed outside the courthouse. (Petition for Certiorari, *Smith v. California*, No. 18-7904 (filed Dec. 15, 2018) at p.3.) San Bernardino County was also home to the infamous Donald Ames, a defense attorney in whose cases the Attorney General has recently conceded error due to his repeated used of racial slurs and other expressions of racial animus against his own clients. (See *Ellis v. Harrison* (9th Cir. 2020) 947 F.3d 555, 556.)

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[8] Kristoff, *Was Kevin Cooper Framed for Murder*, N.Y. Times (May 17, 2018).

In the past three consecutive *Batson/Wheeler* cases before this Court originating out of San Bernardino County (including this one), the prosecutors obtained juries with no Black members four times. (*People v. Smith* (2018) 4 Cal. 5th 1134, 1147 [prosecution struck all four Black seated jurors after prior trial in which he struck both seated Black jurors]; *People v. Miles* (2020) 9 Cal.5th 513, 531-532 [four black jurors stricken].) In *Smith*, justifications relating to Black jurors' views on the O.J. Simpson murder trial were applied to five of the six jurors stricken over two trials. In *Miles*, the same question was used to strike both Black jurors subject to the *Batson/Wheeler* challenge. (See generally, *People v. Miles*, *supra*, 9 Cal.5th at pp. 606-617 (dis. opn. of Liu, J.) All three cases involved Black defendants and White victims.

In sum, any constitutional rule which provides a near-blanket exemption from judicial supervision of strikes in areas, such as San Bernardino, which struggle with racial tensions, ought to be reconsidered.

2. There exists strong doctrinal support for a rule requiring a prima facie finding where strikes are disproportionate, even where the absolute number of strikes is low

Where the percentage of strikes exercised against protected jurors significantly exceeds their percentage in the pool of jurors subject to peremptory challenges, or when all jurors from the class have been excluded, prosecutors should be required to explain their challenges. The rule that Mr. Battle proposes, allowing for a prima

facie finding based on the disproportionate or total exclusion of jurors from a protected class—even where there are few strikes—has significant support in case law across the country.

As the federal courts, including the United States Supreme Court, have recognized in civil rights cases, statistical comparisons lose significance when *all* members of a protected class are excluded and what is left is "the inexorable zero."[9] (See, e.g., *International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, 347 fn. 23.) Thus, several jurisdictions (including states where there are a low percentage of Black prospective jurors statewide) have held that total exclusion of a protected class of jurors itself establishes a prima facie case, even where the numbers are low. (See *City of Seattle v. Erickson* (Wash. 2017) 398 P.3d 1124 [single strike established prima facie case when it resulted in total exclusion, necessary to "ensure a robust equal protection guaranty"]; *United States v. Chalan* (10th Cir.1987) 812 F.2d 1302, 1314 [exercise of a peremptory challenge to strike the last remaining juror of defendant's race is sufficient to raise an inference of discrimination]; *Pearson v. State* (Fla. Dist. Ct. App. 1987) 514 So.2d 374, 375-376 [prima facie case established when prosecutor struck only member

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[9] It is important in this regard to recall that *Batson* jurisprudence is designed to mirror the burden-shifting framework adopted in federal civil rights and equal protection cases, including the prima facie case stage. (See, e.g., *Johnson v. California* (2005) 545 U.S. 162, 171 fn. 7; *Batson*, *supra*, 476 U.S. at pp. 94-98 & fns. 18, 19 & 21.)

of jury venire of the same race as defendant]; *People v. Portley* (Colo. Ct. App. 1992) 857 P.2d 459, 464 [prima facie case of discrimination is established if no members of a cognizable racial group are left on a jury as a result of the prosecutor's exercise of peremptory challenge]; *Hollamon v. State* (Ark. 1993) 846 S.W.2d 663, 666 [appellant "clearly" established prima facie case "when he pointed to a peremptory strike by the state dismissing the sole black person on the jury"]; *State v. Rhodes* (Wash. Ct. App. 1996) 917 P.2d 149, 154 [striking only Black prospective juror on panel created a prima facie case of discrimination]; *Highler v. State* (Ind. 2006) 854 N.E.2d 823, 827 [removal of the only Black juror raises an inference that the strike was racially motivated].) Several other jurisdictions have "have essentially eliminated Batson's first step." (*Rhoades*, *supra*, 8 Cal.5th at p. 469 (dis. opn. of Liu, J.).) In short, there already exists support for the principle that low numbers should not bar strict enforcement of the prima facie case when strikes are disproportionate or exclusion is total.

This Court's own case law supports this view. Earlier in the course of its *Batson*/*Wheeler* jurisprudence, this Court expressed the view that even small numbers of excluded jurors could establish a prima facie case of discrimination. In *Turner*, *supra*, 42 Cal.3d 711, the prosecutor used two early peremptory challenges to remove the only Black jurors tentatively seated. This Court noted that the trial court's implied finding of a prima facie case "was amply supported

by the record." (*Id.* at p. 719)[10] Several years later, in *People v. Howard* (1992) 1 Cal.4th 1132 (*Howard*), Justice Kennard implored the Court to retain the rule applied in *Turner*. Responding to the majority's claim that the statistical showing of two-out-of-two Black jurors eliminated was "meager" (*id.* at 1154), Justice Kennard wrote: "it is no answer to an otherwise sufficient showing of a prima facie case that no more than two jurors have been improperly struck. To hold otherwise would *improperly sanction the use of racially motivated challenges when only one or two members of the targeted race are present in the venire.* (*Howard*, *supra*, 1 Cal.4th at p. 1207 (conc. opn. of Kennard, J.), italics added.)

Johnson v. California, *supra*, confirmed that Justice Kennard was correct, reminding lower courts that the burden at stage was not "onerous" and requires only a relatively slight "inference" that discrimination is afoot. (545 U.S. at p. 171.) This interpretation of *Johnson* is precisely the one adopted by the leading author of *Batson/Wheeler* training materials for prosecutors. (See Jerry Coleman, *Wheeler Federalized by 2 U.S. Supreme Court Opinions: These Changes are Seismic!* (October 2005) ["The bottom line is simple: *it takes very little to raise an inference; a second juror of the same protected class challenged is certainly likely to reach that mark.*

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[10] The prosecutor in *Turner* later exercised a peremptory challenge against a third African–American juror who was called after the defendant had made his *Wheeler* motion. The Court noted that this event served to "confirm" the existence of a prima facie case. (*People v. Turner*, *supra*, 42 Cal.3d at pp. 719–720.)

Even a first challenge of such a class member, if done on no voir dire, may be sufficient."].)[11] Notwithstanding the contrary rule suggested by *Bell* and *Bonilla*, some trial courts have come to precisely the same conclusion. (See *People v. Baker* (Cal., Feb. 1, 2021, No. S170280) 2021 WL 318247, at *14 [where prosecutor struck both Black prospective jurors, trial court "found a prima facie case of discrimination based solely on 'sheer numbers'"].)

The vast majority of trial courts, however, have steadfastly followed the rules announced in *Bell* and *Bonilla*. As a result, this Court's jurisprudence reviewing trial court decisions that erred under *Johnson v. California* has produced a truly notable number of cases in which there was a total or near-total exclusion of Black or Hispanic jurors and in which trial courts found no prima facie case. Of the 42 decisions listed in Justice Liu's *Rhoades* dissent, and including this case as the 43rd, over 50 percent found no prima facie case despite total or near-total exclusion of Black or Hispanic jurors (i.e. a single juror from the protected class remaining).[12]

Doctrinally, the modification of law that Mr. Battle requests is not that large. This Court has *already* held that that total or near-total exclusion is "especially relevant" to the first-stage inquiry. (*People v. Woodruff* (2018) 5 Cal.5th 697, 749*; People v. Reed* (2018)

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[11] (Los Angeles County District Attorney Training Materials, *jury kelberg 1-08212019-175303.pdf*, at p. 19.)

[12] (See Appendix 1, List of Cases Reviewed De Novo Since *Johnson v. California* (2005) 545 U.S. 162.)

4 Cal.5th 989, 999.) Thus, altering the existing rules merely requires this Court to jettison the contradictory proposition that, where the sample size is small, total or near-total exclusion is on its own *irrelevant*. (*Bell*, *supra*, 40 Cal.4th at p. 599; *Bonilla*, *supra*, 41 Cal.4th at p. 343 & fn. 12.)

It is true, as *Bell* and *Bonilla* suggest, that small sample sizes create large margins of error, such that although a prosecutor's strikes may show a preliminary pattern of preferring White jurors, this pattern is not statistically rigorous. (*Bell*, *supra*, 40 Cal.4th at p. 599; *Bonilla*, *supra*, 41 Cal.4th at p. 343 & fn. 12.) But this simply begs the question of who should bear the risk that the initial pattern of disproportionate exclusion is merely temporary noise rather than part of a systematic effort to retain White jurors. The burden of resolving this uncertainty should be placed on the party hoping to avoid judicial scrutiny of potential discrimination, not vice versa. (See *Johnson v. California*, *supra*, 545 U.S. at p. 172 [because of the "inherent uncertainty present in inquiries of discriminatory purpose" doubts should be construed in favor of a finding of a prima facie case].)

Looked at properly, however, this case is *not* one in which the prosecutor's preference for White jurors is hard to discern from the numerical pattern alone. A well-respected statistician, Professor Jay Kadane of Carnegie-Mellon University, undertook an analysis of the strike pattern in this case (and others) and published a peer-

reviewed research paper detailing his findings.[13] (See generally Kadane, *Statistics for Batson challenges* (2018) 17 Law, Probability and Risk 1-13.) His conclusions are stark. Taking into account the prosecutor's strikes of Hispanic jurors, the prosecutor in this case exhibited an *extremely strong statistical preference for White jurors*. The odds of the prosecutor would randomly engage in this pattern of preference for White jurors was less than 3 in 100. (*Id*. at p. 10.) Ultimately, Professor Kadane concluded not only that the pattern was statistically significant (*ibid*.), but that there was "a very strong probability of discrimination against [non-white] jurors." (*Id.* at p. 10-11.)

II. THIS COURT SHOULD RECONSIDER THE RULES GOVERNING THE PRIMA FACIE CASE BECAUSE PROSECUTORS HAVE BEEN TRAINED TO EVADE A PRIMA FACIE FINDING

A. Instead of Training Prosecutors in How to Sensitively and Rigorously Confront Their Own Personal Biases, District Attorney Offices Have for Decades Provided Trainings that Serve as Roadmaps to Avoid Meaningful Judicial Scrutiny of Strikes Against Jurors from Protected Classes

As noted above, *supra*, fn. 1, numerous prosecutors' offices recently disclosed decades-worth of trainings on *Batson* and *Wheeler*

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[13] Mr. Kadane received no compensation for his work on this case, which was performed based on his own academic interest in establishing a statistical method for assessing strike patterns in criminal cases involving *Batson/Wheeler* challenges.

in response to Public Records Act requests. Notably, none of the trainings obtained confront the longstanding practice of prosecutors disproportionately eliminating Black and Hispanic jurors, identified by the Legislature when it enacted AB 3070. Nor do the disclosed trainings provide any specific guidance on how to identify subtle and deeply ingrained implicit biases against Blacks and Hispanics. These materials do, however, demonstrate that prosecutors throughout the state have been trained with a variety of tactics to thwart the prima facie case and, more generally, to avoid suspicion of discrimination at all stages. These trainings are, at best, highly problematic. Under any view, they strongly support a call for change of the current constitutional rules.

1. Prosecutorial trainings on *Batson/Wheeler* frequently include tactics to deliberately obscure evidence of discrimination

Prosecutorial trainings disclosed and reviewed as part of the report in *Whitewashing the Jury Box* advise prosecutors to engage in a number of deliberate tactics that make courts' task of ferreting out discrimination significantly more difficult.

A 1998 training obtained from Los Angeles County reminds prosecutors: "Question all jurors you *plan* to challenge, *to develop specific bias*"[14] In other words, whatever your *actual* reason may be

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[14] (Coleman, *Meeting the* Wheeler *Challenge: Legal Ethical, & Tactical Approaches to Jury Selection* (1998) in Volume XIX CDAA, *The Prosecutor's Notebook*, italics added ("Meeting the *Wheeler* Challenge") at p.11.)

for striking a person of color, make sure to create a record of justifications in case there is an objection. A 2005 training even warns prosecutors, in light of *Miller-El*[15], that "[y]our notes may even be subpoenaed into an appellate record, so don't make any note of any protected categories" and reminds prosecutors to write down for reference in future litigation only their "good justifications" for striking jurors while suggesting prosecutors "bite [their] tongue" if a reason that they have conceived "sounds bogus or pretextual."[16]

Prosecutors are also trained to defeat comparative analysis by *never* relying on a single reason, and by actively developing dissimilarities between White jurors and the jurors they already plan to challenge. In one widely-disseminated CDAA training from 2006—Jerry Coleman's "Mr. Wheeler goes to Washington"—prosecutors are advised "[d]o not base any challenge against a member of a cognizable group on a single reason. Especially if that reason is weakened when subjected to comparative analysis. . . . If you develop multiple reasons, any one reason susceptible to comparative analysis will not be found wanting on pretextual grounds in light of other reasons."[17]

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[15] (*Miller-El v. Dretke* (2005) 545 U.S. 231 (*Miller-El*).)

[16] Los Angeles County District Attorney Training Materials, *jury kelberg 1-08212019-175303.pdf*, at p. 19-20.)

[17] (San Francisco County District Attorney Training Materials, *SAgarwal_ACLU_Public Record 4 (8.22.2019).pdf* at p. 23.) The "Mr. Wheeler Goes To Washington" outline was apparently quite influential, and formed the basis for trainings throughout the state,

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A recent 2018 training from Orange County echoes this advice, under the rubric "Practical Tips" encouraging prosecutors to "Give multiple reasons for each challenge" and to "[d]evelop dissimilarities" between similarly situated jurors to avoid suspicion.[18] An earlier 2011 training from Orange County echoes these strategies: "Give multiple reasons for each challenge" "[h]ighlight things that serve to set two jurors apart. Ask questions *to develop dissimilarities*."[19]

> One feature is common among virtually all prosecutorial trainings: deputy district attorneys are provided lengthy lists of supposedly "race-neutral" reasons to employ during *Batson/Wheeler* proceedings. Instead of simply telling prosecutors to provide their *own* reasons, hundreds, perhaps thousands of hours have been spent researching, and then training prosecutors, on the myriad reasons *other* prosecutors have used that have survived judicial scrutiny. Several decades ago, an Illinois Court of Appeal ruefully remarked that "[s]urely, new prosecutors are given a manual, probably entitled, 'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral

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including the widely disseminated "Inquisitive Prosecutor's Guide." (See Inquisitive Prosecutor's Guide, *IPG19 Batson-Wheeler Outline.pdf* at p. 1.)

[18] (Orange County District Attorney Training Materials, *Batson-Wheeler (Mestman – 08-16-18).pdf* at p.13.)

[19] (Orange County District Attorney Training Materials, *Batson-Wheeler (Mestman – 09-23-11).pdf* at p.15.)

Explanations' in order to overcome *Batson* challenges." (*People v. Randall* (Ill. App. Ct. 1996) 283 Ill.App.3d 1019, 1025.) The Illinois court was right, except for underestimating the number of reasons provided to prosecutors. The "Inquisitive Prosecutor's Guide"—one of the most widely distributed California trainings on *Batson/Wheeler*—supplies not 20 but no less than 47 facially neutral reasons (many with multiple subparts) for prosecutors to reference when deciding to exclude jurors.[20]

In several instances, a list of reasons will include both a claimed characteristic and its opposite, calling into question the relevance of the characteristic and the sincerity of the prosecutor who relies on it (e.g., juror has "too much" or "too little" education, lack of "family ties" or "too many family ties," "reluctance to serve" and "eagerness to serve").[21] For the line prosecutor who might have a hard time remembering such a long list, some offices have created short (and self-entitled) "Cheat Sheets," apparently for ready in-court reference. (See Orange County District Attorney Training Materials, *Wheeler-Batson cheat sheet 02.15.18* ("Orange County Cheat Sheet"); see also Coleman, *supra*, *Wheeler* Federalized by 2 U.S. Supreme Court Opinions: These Changes are Seismic! [imploring prosecutors: "[t]ake to court a list of acceptable justifications which have been affirmed on appeal"];

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[20] See Inquisitive Prosecutor's Guide, *IPG19 Batson-Wheeler Outline.pdf* at p. 4-6, 51-80.)

[21] (*Id.* at pp. 4-6.)

Alameda County District Attorney Training Materials, *Training Materials re: Jury Selection redacted.pdf* at p. 17 ["Study/bring to court cases upholding race-neutral explanations"].)

A notable feature of the "Cheat Sheet," and other more comprehensive lists of facially "race-neutral" reasons, is that they contain numerous justifications which disproportionately apply to Black and Latino jurors. (See *Whitewashing the Jury Box, supra*, at p. 45 ["Nearly all of the training materials emphasize that *Batson* permits prosecutors to base their strikes on membership in groups in which African Americans are overrepresented"].) Although some of these justifications which disproportionately apply to jurors of color correlate, at least theoretically, to potential anti-prosecution bias, not all do. For instance, after listing numerous professions which prosecutors might legitimately strike based on presumed profession-wide bias, "The Inquisitive Prosecutor's Guide" explains that "[e]ven jurors who work in profession that do not reflect an orientation toward rehabilitation or sympathy for defendants may be challenged."[22] The training provides "postal worker" as one example of a profession that—for unexplained reasons—might simply make "bad prosecution

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[22] (See Inquisitive Prosecutor's Guide, *IPG19 Batson-Wheeler Outline.pdf* at p. 4-6, 51-80.) An Alameda training emphasizes the breadth of such employment-based challenges: highlighting a case where "concern over the fact that the juror has unemployed *children* was held to be race-neutral[.]" (Alameda County District Attorney Training Materials, Alameda County Training Materials re Batson v. Kentucky and People v. Wheeler_Redacted.pdf at p.325.)

jurors." (*Ibid.*) Postal workers are similarly singled out in several other trainings. (Alameda County District Attorney Training Materials, *Alameda County Training Materials re Batson v. Kentucky and People v. Wheeler Redacted.pdf* at p. 328 [listing "postal workers" as a group a prosecutor might challenge based on the "[p]rosecutor's *own* idiosyncratic biases"], italics in original; Orange County District Attorney Training Materials, *Batson-Wheeler (Mestman – 08-16-18).pdf* at p.8 [listing postal worker as occupation prosecutors could consider striking].) It is surely not a coincidence that members of protected classes are heavily represented in that field of work. (See United States Postal Service, Comprehensive Statement on Postal Operations, Workforce Diversity and Inclusiveness (2010) ["The Postal Service is one of the leading employers of minorities and women" in the United States, with nearly 40 percent of its workforce being composed of racial or ethnic minorities].)

2. Prosecutors are trained to evade the prima facie case

Of greatest relevance to this first-stage case, prosecutors have been explicitly advised to engage in practices that will avoid judicial suspicion at the prima facie stage. One prominent tactic is to retain at least one member of a cognizable group. As the 2006 "Mr. Wheeler Goes to Washington" advises, "[i]f possible, keep on the jury one or more members of each cognizable group from which you are challenging persons" or more succinctly, in another 2018 training

"[k]eep a member of a cognizable group if possible."[23] A 1998 training obtained from the Los Angeles County District Attorney gives the same advice: keep on a member of the cognizable group "if you possibly can."[24] These and other trainings essentially advise prosecutors not only to be cynical, but openly-race conscious in order to defeat suspicion. As put by a training authored by a Los Angeles County District Attorney but obtained from San Diego: "I am concerned about covering my rear on *Wheeler* motions. I don't dump jurors because of their race . . . I try not to have a jury that does not have at least one person that is a member of the defendant's race."[25]

Similarly, prosecutors have been trained to rely on the hurdle of the prima facie stage to strike disfavored jurors of a protected class before a challenge can be successful. In "Mr. Wheeler Goes to Washington," Mr. Coleman suggests striking the jurors that prosecutors "feel" are "very hostile" immediately—"before your opponent has built up enough steam to make a successful

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[23] (San Francisco County District Attorney Training Materials, *SAgarwal_ACLU_Public Record 4 (8.22.2019).pdf* at p. at 23; Orange County District Attorney Training Materials, *Batson-Wheeler (Mestman – 08-16-18).pdf* at p.13).

[24] (Meeting the *Wheeler* Challenge*, supra*, at p.11.)

[25] (San Diego County District Attorney Training Materials, *San Diego_CPRA 19-16 1990-1994* at 35.) The attorney presenting this training wrote that his race-consciousness was not discriminatory because "I personally favor having a defendant being told by members of his own race rather than from some other race, that they disapprove of his conduct and that they would like to see him in the state prison." (*Ibid.*)

Batson/Wheeler challenge[.]"[26] An Orange County training similarly instructs "[c]onsider kicking off most hostile jurors first [b]efore defense gains 'evidence' for *Wheeler* objection."[27]

Prosecutors are also taught that passing on a juror, even if not choosing to ultimately accept that juror, can create the appearance of "good faith." (See Orange County Cheat Sheet, *supra*, at p. 1 [noting that prosecutors can "rebut the prima facie case" by asserting that the DA "passed with the excused juror on the panel"].) A Monterey County training similarly advises prosecutors that "[a]rguments to make" include the "DA passed with the excused juror on the panel."[28] Alameda County provides parallel instruction: "If a prosecutor has passed on a panel that includes members of the cognizable class, this fact should be mentioned as it undercuts an inference of discrimination."[29] District attorneys have also been trained to place into the record the difficult-to-disprove fact that

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[26] (San Francisco County District Attorney Training Materials, *SAgarwal_ACLU_Public Record 4 (8.22.2019).pdf* at p. 34.)

[27] (Orange County District Attorney Training Materials, *Batson-Wheeler (Mestman – 08-16-18).pdf* at p. 13).

[28] (Monterey County District Attorney Training Materials, *2019.09.13 Monterey Materials Received.pdf* at p. 9.)

[29] (See Alameda County District Attorney Training Materials, *Alameda County Training Materials re Batson v. Kentucky and People v. Wheeler_Redacted.pdf* at 61; see also *id.* at 332 [advising attorneys to point out passing with a member of the cognizable group, or even a different cognizable group, on the panel].)

they in fact wanted to retain a Black juror who had been excused earlier for cause, or that they were "reluctant to stipulate to [a prior] hardship."[30]

Ultimately, conscious efforts to block trial courts from evaluating prosecutors' decisions to strike jurors from protected classes calls for a judicial response. Whether or not deploying any of these individual strategies to defeat judicial scrutiny is itself proof of intentional discrimination, these tactics warrant rules that give less leeway to prosecutors hoping to cloak their decisions in secrecy.

B. Treating Acceptance or Temporary Acceptance of Jurors as an Important Signal of Good Faith is Problematic, Particularly Where Prosecutors Have Been Trained to Retain a Small Number of Jurors from the Protected Class to Defeat Suspicion

In *Smith*, *supra*, 32 Cal.App.5th 860, Justice Streeter recently wrote separately to emphasize that courts may have been giving too much weight in the *Batson/Wheeler* context to the fact that a prosecutor has accepted a juror from a protected class or "passed" with one or more members of the protected class in the panel. (*See id.* at pp. 881-884 (conc. opn. of Streeter, J.).) Mr. Battle urges this Court to cease, or vastly reduce, its practice of according significant weight to the good faith of prosecutors who accept, or temporarily accept, one or two jurors from a protected class.

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[30] (*See supra*, fn. 28 at p. 333.)

To begin with, Justice Streeter noted that the existing case law *already* suggests caution in relying on such evidence. Citing *People v. Snow* (1987) 44 Cal.3d 216 (the last time this Court found a prima facie case), Justice Streeter remarked that "attaching too much significance to the prosecutor's willingness to pass the panel with one or two same-race jurors serving on it 'would provide an easy means of justifying a pattern of unlawful discrimination which stops only slightly short of total exclusion.' [Citation]." (*Smith*, *supra*, 32 Cal.App.5th at p. 881 (conc. opn. of Streeter, J.); see also ARB 9-11 [summarizing case law suggesting that the temporary acceptance of a lone black juror had minimal relevance in context].) The *Smith* concurrence emphasizes that "it is certainly not correct to say, as the trial court did here, that the prosecutor's acceptance or willingness to accept a same-race juror and a same-race alternate was 'powerful' evidence rebutting the prima facie case of discrimination." (*Id.* at p. 883.) Finally, Justice Streeter warned that permitting prosecutors to rest on acceptance (or temporary acceptance) of jurors from a protected class would serve to sanction what psychologists refer to as "moral licensing." (*Id.* at p. 883-884.) As trailblazing female writer and producer (and co-author of the popular book "Lean In"), Nell Scovell, explains: "moral licensing is the fancy way to say, 'But some of my best friends are Jewish.' And it's using the fact that you weren't discriminatory in the past to excuse actual discriminatory behavior." (Recode Media Podcast, *What it's like to be the only woman in a TV writers' room* (Mar. 21, 2018) at 28:55-29:13.)

Justice Streeter's concurrence is even more persuasive when read in conjunction with training materials that explicitly direct prosecutors to leave on "if possible" members of the protected class. (See *supra*.) Such advice—which is explicitly race-conscious—exposes serious flaws in how prosecutors have been trained to treat the *Batson/Wheeler* process. It is hard to conceive of an explanation for giving this form of advice that does not involve intentionally disguising patterns of discrimination that would otherwise exist. Moreover, this guidance, by implication, invites prosecutors to more readily discharge other nonwhite jurors—or even the very same juror that that they had initially accepted.

III. THIS COURT SHOULD ABANDON ITS PRACTICE OF USING UNVOICED JUSTIFICATIONS—EVEN SUBSTANTIAL ONES—IN ORDER TO REBUT AN OTHERWISE EXISTING PATTERN OF DISCRIMINATION

As the high court has taught: "It does not matter that the prosecutor might have had good reasons; what matters is the real reason [jurors] were stricken." (*Johnson v. California*, *supra*, 545 U.S. at p. 172, alterations omitted.) This Court, however, has repeatedly insisted that the existence of substantial justifications is a central focus of the prima facie analysis.

At least two things are clear from the legislative history and passage of AB 3070. First, the Legislature disapproved of the current method of using appellate hypothesis in place of judicial scrutiny of actual justifications, a practice that is commonly

employed in this Court's *Batson/Wheeler* jurisprudence. (See Cal. Code Civ. Proc. § 231.7 subd. (d)(1) [appellate courts "shall not speculate on, or assume the existence of . . . possible justifications for the use of the peremptory challenge"].) While this Court is the only body with the responsibility and authority to interpret California's constitutional rules, the Legislature's disagreement in approach at least warrants a close inspection of the existing methods.

Second, the Legislature concluded that "many of the reasons *routinely advanced* to justify the exclusion of jurors from protected groups are in fact associated with stereotypes about those groups or otherwise based on unlawful discrimination." (AB 3070, § 1 subd. (b)., italics added.) The educated guesswork necessarily applied by this Court to dispel an inference of discrimination often flows through the very reasons which the Legislature flagged as demanding far more careful consideration. (*Rhoades*, *supra*, 8 Cal.5th at p. 471 (dis. opn. of Liu, J.) [cataloging the many decisions in which a "prospective juror's (or a family member's) negative experience or negative view of law enforcement was hypothesized as a reason for the strike"].)

Relatedly, members of this Court have strongly suggested that the Court ought to bring a more sensitive focus to the discrimination that occurs when Black and Latino jurors are stricken on the basis of their experience with racist policing. (*People* v. *Triplett* (2020) 48 Cal.App.5th 655, 692 (stmt. of Liu, J.) ["our case law rewards parties who excuse minority jurors based on

ostensibly race-neutral justifications that mirror the racial fault lines in society. This approach is not dictated by high court precedent, and it is untenable if our justice system is to garner the trust of all groups in our communities and to provide equal justice under law."].) If this Court does revisit this practice, it will inevitably have to reconsider countless step one decisions relying on these problematic justifications to dispel an inference of bias. The simplest course is simply to abandon the practice of hypothesizing why prosecutors strike jurors. As discussed below, this practice does not serve the interest upon which the prima facie case is premised. Moreover, it is inevitably inaccurate, and is not dictated by high court precedent. Finally, the approach ultimately engages in a speculative analysis of justifications with little or no relevance to the decisions of prosecutors—consciously engaging in discrimination—whom *Batson/Wheeler* currently targets.

A. The Rule of Unguided Judicial Speculation Embraced in Earlier Opinions Has Already Been Modified, but the Practice of Assuming What Motivated the Prosecutor's Strikes Instead of Simply Demanding Answers Should be Abandoned Entirely

The rule that California appellate courts should be allowed substantial leeway to intuit why a prosecutor might have stricken the jurors to defeat a prima facie case originated in this Court's decision in *Howard*, *supra*, 1 Cal.4th 1132. *Howard*, among its other flaws, *see infra*, held that "when the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the

jurors in question, we affirm." (*Id.* at 1155.) This broad rule was later repeated, verbatim, in *People v. Box* (2000) 23 Cal.4th 1153, 1189 (*Box*).)

Two Ninth Circuit decisions—*Shirley v. Yates* (9th Cir. 2015) 807 F.3d 1090 (*Shirley*), and *Johnson v. Finn* (9th Cir. 2011) 665 F.3d 1063, 1069—made clear that what they denominated the "*Box* rule" violated clearly established high court precedent under *Johnson v. California*, *supra*. (See *Shirley*, *supra*, 807 F.3d at p. 1101.) In response to *Shirley*, this Court in *Sánchez* implicitly disapproved of the rule, at least as broadly formulated in *Howard*. (*Sánchez*, *supra*, 63 Cal.4th at p. 435, fn. 5.) While not abandoning entirely the practice of resting on judicial hypothesis of the prosecutor's motivations at *Batson* step one, this Court held that "*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." (*Ibid.*)

It is critical to note that, although this Court's cases have "often hypothesized reasons for a disputed strike as part of first-stage *Batson* analysis, the United States Supreme Court has never approved this practice." (*Reed*, *supra*, 4 Cal.5th 989, 1023 (dis. opn. of Liu, J.).) Indeed, the high court has suggested precisely the opposite, explaining that the prima facie case is set at a low threshold precisely to *avoid* judicial speculation. (*Johnson v. California*, supra, 545 U.S. at p. 172.)

In *Rhoades*, this Court recently agreed with this principle in large part: "the very purpose of *Batson's* first step is to elicit the

prosecution's actual reasons for exercising its strikes when other circumstances give rise to an inference of discrimination[]." (*Rhoades*, *supra*, 8 Cal.5th at p. 430–431.) Thus, "[i]t follows that speculation about reasons the prosecutors might have had for striking the jurors would go beyond our proper role in assessing the prima facie case." (*Id.* at 431.) The Court nonetheless declined to repudiate the practice altogether. The Court explained that "where the record reveals '*obvious* race-neutral grounds for the prosecutor's challenges to the prospective jurors in question,' those reasons can definitively undermine any inference of discrimination that an appellate court might otherwise draw from viewing the statistical pattern of strikes in isolation." (*Id.* at 431, italics in original.)

B. Relying on Reasons not Given by Prosecutors to Dispel a Prima Face Case Is a Rule that Warrants Reconsideration

Several flaws undermine this Court's existing doctrine allowing examination of "obvious" justifications to dispel an inference of bias.

First, and as a threshold matter, the *Sánchez* rule does nothing to serve the very interests on which the prima facie case is premised. As discussed above, the prima facie case is a compromise between the interest in maintaining confidentiality in the basis of peremptory challenges and the compelling need to end discrimination in jury selection. (*Scott*, *supra*, 61 Cal.4th at 387.) But if, as *Sánchez* and *Rhoades* indicate, the reasons "necessarily dispel" the inference of bias because they are "obvious," then there is

no need for, or value served by, protecting the prosecutor's desire for secrecy. (*Sánchez*, *supra*, 63 Cal.4th at p. 435, fn. 5; *Rhoades*, *supra*, 8 Cal.5th at p. 430.) Simply put: There is no secret to be kept.

Second, despite the view expressed in *Rhoades* that there is no speculation where the reasons are "obvious," any process in which judges predict the unexpressed motivations of another person is necessarily imperfect. As various members of this Court have demonstrated, the definition of "obvious" is inevitably subject to some dispute. (See, e.g., *Reed*, *supra*, 4 Cal.5th at p. 1019-1031 (dis. opn. of Liu, J.); *id.* at p. 1031 (dis. opn. of Kruger, J.); *Johnson*, *supra*, 8 Cal.5th at pp. 528-536 (dis. opn. of Liu, J.); *id.* at pp. 536-547 (dis. opn. of Cuellar, J.) In *Sánchez*, for instance, the Court cited among the reasons that "necessarily" dispelled the inference of bias the fact that the juror was the victim of sexual abuse—though ordinarily, being a victim of crime is considered *favorable* to the prosecution. (*Sánchez*, *supra*, 63 Cal.4th at p. 437; cf. *Ali v. Hickman* (9th Cir. 2008) 584 F.3d 1174, 1185 [stricken juror's experience of having her daughter molested by her stepson "would suggest that she was more likely than the average juror to identify with the *victim* of the crime"], italics in original.) Each case is contextual, and the juror in *Sánchez* had other potentially unfavorable qualities, but the case's analysis demonstrates that there is no definitive limiting principle governing which characteristics "obviously" support exclusion.

Even assuming judges could agree in principle as to reasons they feel are substantial and "obvious," it is difficult—if not

impossible—to divine with any certainty what reasons a prosecutor would in fact have provided. Experience demonstrates that, even in a case in which there appears to be an "obvious" reason for excluding a juror, the prosecutor's *actual* reason for the strike might be one that evidences unlawful discrimination. (See, e.g., *People v. Douglas* (2018) 22 Cal.App.5th 1162, 1167-1168 [reversing where prosecutor supplied justification that applied stereotypes to homosexual jurors, despite the fact that the record contained other, substantial, reasons for striking the jurors in question].)

Such a disconnect between the "obvious" reason and the actual one is especially likely to occur in cases, like this one, in which the Attorney General presents only one justification for each juror that it believes dispels the inference of discrimination: their views on the death penalty. (RB at 19-20.) Experience has taught that prosecutors rarely give just one basis for striking a juror (indeed, they are trained never to do so). So the premise that *this* prosecutor would have supplied nothing more than what the Attorney General, or this Court, selects as the "best" justification is faulty—as is the assumption that the prosecutor would not also (or instead) have provided a justification that demonstrated bias.

Third, this Court's views of "obvious" justifications may often rely on the speculative premise. Namely, justifications credited by this Court often assume that the prosecutor did not believe the jurors' in-court testimony responding to exactly the purported concern the Court selects as the basis for dispelling the inference of bias. For instance, in *People v. Harris* (2013) 57 Cal.4th 804, this

Court said that any inference of bias was dispelled as to Black prospective juror K.P. (despite total exclusion of all Black jurors) because the juror had a brother who was charged with selling marijuana. (*Id.* at p. 836.) Although on voir dire K.P. explicitly "stated that her brother's case would not affect how she viewed defendant's case" the Court held that nonetheless the disbelieved her. (*Ibid* [""prosecutor could reasonably have been concerned"].) Similarly, this Court has repeatedly held that "opposition to the death penalty, even when combined with some subsequent equivocation [in voir dire], reasonably dispels any inference of discrimination." (*Reed*, *supra*, 4 Cal.5th at p. 1002.) Both of these cases suggest, at least in part, that the subsequent statements made in court are disregarded in favor of potentially problematic (and unconsidered) answers made in a questionnaire. (See, e.g., *Sánchez*, *supra*, 63 Cal.4th at p. 439 ["During voir dire, she said she could vote for the death penalty, but her questionnaire answers provided a strong reason for a prosecutor to excuse her out of concern about her views and not for a discriminatory purpose"].) It is extremely difficult for appellate courts to make determinations that voir dire explanations of potentially problematic questionnaire responses were insufficient to assuage a prosecutor's concerns, without simultaneously making inherently speculative credibility determinations about how the prosecutor understood a prospective juror's in-court testimony.

And indeed, the Attorney General posits just such an argument in this case. Although J.B. made uncontextualized

statements in her questionnaire about death by lethal injection or gas being cruel and inhumane—which certainly could have signaled opposition to the death penalty despite contrary questionnaire responses—she explained these statements in voir dire as being related to specific cases in Texas in which the defendant had been exonerated. (AOB at 56.) Thus, whether J.B.'s statements would lead to bias in a case without strong claims of innocence is entirely unclear. But the Attorney General presumes that the prosecutor *must* have disbelieved her testimony that she could apply the death penalty and follow the law. (See RB at 19 [arguing that "[w]hile J.B. ultimately agreed that she could follow the law, the prosecutor was unlikely convinced . . ."].)

For this Court to assume that the prosecutor did not believe a juror's earnest testimony flies in the face of the well-established principle that credibility determinations are not supposed to be conducted on an appellate level. If, as this Court held in *Rhoades*, appellate speculation is forbidden at step one, the "obvious" justification should not depend on the assumption that prosecutors disbelieve jurors. (*Rhoades*, *supra*, 8 Cal.5th at p. 431.) The question cannot be whether a juror *might* have disbelieved the juror, but whether it any prosecutor would necessarily have done so. There is no way to do so on this record, or in most cases, without significant speculation. Indeed, the trial court in this case clearly did *not* find that there existed justifications which dispelled an inference of bias. Instead, it stated that the prima facie case was a close one, notwithstanding J.B.'s questionnaire response and voir

dire on that issue raised by respondent. (See 5 RT 1130 ["I can say this: you're close" to a prima facie case].)

There is a final, more fundamental flaw in negating a prima facie case because the court perceives what it regards as an "obvious" (though unarticulated) justification for the strike. The approach assumes that the prosecutor's intention to strike a juror from the protected class arose because of what occurred in voir dire, at or around the time the prosecutor exercised the strike. Instead, what cases have shown is that at least some prosecutors go in with a plan to strike jurors of color and then look for justifications as they go along. The current law states that if the record supports a substantial justification for the strike, the inference of suspicion is dispelled. But this approach gives cover to prosecutors who consciously discriminate.

Prosecutors have been instructed (and presumably some believe) that the preferable course of action is to "[q]uestion all jurors you *plan* to challenge, *to develop specific bias*."[31] This advice is, of course, tinged with discrimination, because the "plan" presumes what the voir dire process is *intended* to explore: that the juror possesses bias. It may be that many prosecutors do not approach jury selection with this self-fulfilling prophesy as guidance. But it is clear from reviewing high court precedent that the cases in which discrimination has been found generally involve

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[31] (*Meeting the* Wheeler *Challenge*, *supra*, at p. 11, italics added.)

just such premeditated plans to give weight to group bias in striking Black jurors.

In *Miller-El*, the "plan" was evident long before the strikes and was demonstrated by disparate questioning and utilization of the "jury shuffle" to avoid Black jurors. (*Miller-El*, *supra*, 545 U.S. at 255-260, 265.)[32] In *Snyder v. Louisiana* (2008) 552 U.S. 472, although not discussed in the opinion, there was strong evidence that the prosecutor looked at the case through a racialized lens from its inception, referring to the Black male defendant and White female victim case as his "O.J. Simpson case" and improperly analogizing to the Simpson case to the jury. (See generally Nelson, *Batson, O.J., and Snyder: Lessons from an Intersecting Trilogy* (2008) 93 Iowa L. Rev. 1687, 1704-1705 [discussing prosecutor's repeated and improper invocation of the Simpson case to the all-white jury]; see also Tr. of Oral Arg. at p. 37, *Snyder v. Louisiana*, *supra*, 552 U.S. 472 [questioning counsel for Louisiana's inability to connect race and the O.J. Simpson case].) In *Foster v. Chatman* (2016) 136 S.Ct. 1737, the plan was strongly evident in notes taken before the strikes. (*Id.* at p. 1744 [notes included, among other things, a notation that "If it comes down to having to pick one of the black jurors, [this one] might be okay."].) And in *Flowers v.*

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[32] Under Texas practice at the time, either party could reshuffle the cards bearing panel members' names, "thus rearranging the order in which members of a venire panel are seated and reached for questioning." (*Id.* at p. 253.)

Mississippi (2019) 139 S.Ct. 2228, the plan to exclude Black jurors spanned numerous trials over many years.

Although in discussing these cases, the high court focused its analyses on a handful of jurors as to whom the strikes were most inexplicable, it is fair to say that the prosecutors in each and every one of these cases preferred White jurors to Black jurors as a general matter, or at least chose to do so in the specific case. And this preference did not arise at the moment of the strikes, nor at the earlier moment the questioning occurred, and quite likely preceded the moment the questionnaires were filled out. These prosecutors were open to discrimination from the moment the cases began and the evidence of their discriminatory tendencies increased as the process moved forward.

Thus, it is not fair to assume, as did this Court in *Sánchez* and *Rhoades*, that the existence of hypothetical reasons that a prosecutor might have relied upon dispels an inference of bias. (*Sánchez*, *supra*, 63 Cal.4th at p. 435, fn. 5; *Rhoades*, *supra*, 8 Cal.5th at p. 430-431.) For prosecutors engaging in the intentional discrimination which *Batson* and *Wheeler* are intended to curb, the existence of reasons to strike Black jurors is frequently—if not always—simply a happy coincidence. The existence of credible reasons for a peremptory makes the plan to strike Black jurors more simple. But the statistical pattern generated by a prosecutor set on violating *Batson* and *Wheeler* would look quite similar to the pattern in this case: one resulting in an all-white jury.

This Court should abandon its practice of relying on unvoiced justifications to dispel an inference of discrimination. The emphasis of the prima facie analysis, instead, must always be on the evidence that the prosecutor may have preferred White jurors, and in general treated Black jurors differently than White jurors. Not simply at the moment of the strikes, but throughout the process—and regardless of whether some jurors had qualities that could have led a prosecutor to strike them. The evidence on that ground in this case is powerful and is not dispelled by the existence of reasons to strike the juror at issue.

C. Even Assuming "Obvious" Reasons Dispel an Inference of Discrimination, this Reasoning Only Applies to Statistical Patterns. Some of The Strongest Evidence in this Case is not Statistical

As this Court recently explained in *Rhoades*, the rule of *Sánchez* only applies to "undermine any inference of discrimination that an appellate court might otherwise draw *from viewing the statistical pattern of strikes in isolation*." (*Rhoades*, 8 Cal.5th at p. 431, italics added.) As explained in *People v. Johnson* (2019) 8 Cal.5th 475 (*Johnson*), when there is no statistical pattern of discrimination, this Court does not, under *Sánchez*, "resort to examining the record for obvious race-neutral reasons for the prosecutor's peremptory strikes that would '"necessarily dispel any inference of bias.]' [Citation]." (*Id.* at p. 510, fn.7.)

In other words, forms of non-statistical evidence which show, irrespective of any numerical patterns, that prosecutors are treating

Black and White jurors differently cannot be brushed aside by the existence of justifications to strike jurors, even substantial ones. This is especially true where this evidence may suggest, as it does in this case, a preexisting plan to discriminate.

At every point in the jury selection process, the prosecutor in this case treated Black jurors differently. The prosecutor urged that four Black jurors be excused for cause where the record did not clearly warrant excusal. (AOB at 101-116; ARB at 22-28; cf. *Sánchez*, *supra*, 63 Cal.4th at p. 437 ["a specious challenge for cause" may "support an inference of bias in a prosecutor's peremptory challenges"].) At least one of these jurors was a clearly a pro-prosecution juror: a former police officer, from a family of police officers, who strongly favored the death penalty. (AOB at p. 111-113, & fn 49.) Astoundingly, the prosecutor refused to explain this pattern even when the allegation that he had generated a pre-formed plan to exclude Black jurors was raised at the *Batson/Wheeler* hearing. Ultimately, although the issue was directly presented, the trial court which—inexplicably and erroneously—believed that these efforts to have Black jurors excused would only be relevant if the prosecutor had not also offered to stipulate to the excusal of White jurors as well. (5 RT 1129.)

The possibility of a preexisting plan to remove Black jurors was also strongly reinforced by the fact that the prosecutor talked to Black jurors differently. (AOB at 92-98; ARB at 19-20.) The phrasing of the death qualification questions he asked Black jurors was almost uniformly more intense than those posed to White

jurors. As Mr. Battle pointed out in his opening brief, the fact "[t]hat six of the seven African-American jurors questioned by the prosecutor" were given "added emphasis [in their death qualification questioning], is, at the very least, suspicious" (AOB at 95-98.)

Moreover, the prosecutor's questioning of Black jurors was between 200 and 300 percent longer than his questioning of White seated jurors. (See AOB at 93-95.) In another San Bernardino capital case, recently reversed for *Batson/Wheeler* error, the court found significantly smaller disparities to be persuasive evidence of discriminatory intent. (*Mayfield v. Broomfield*, No. CV 97-3742 FMO (C.D. Cal., June 6, 2020) at p. 6 [Black prospective jurors questioned 22 percent longer on opposition to the death penalty, and 30 percent longer overall than non-Black prospective jurors].)

Finally, the prosecutor chose to advocate for the hardship excusal of another Black juror, whose alleged scheduling conflict was unclear. (AOB at 98-101; ARB 21-22.) While this does not in itself establish a preference for White jurors or a plan to exclude Black jurors, it is certainly consistent with it. This Court has, in the past, relied on the prosecution's purported desire to *retain* a Black juror excused for hardship as dispelling evidence of discrimination. (See *People v. Jones* (2011) 51 Cal.4th 346, 363 [prosecutor's alleged "desire to have had as jurors" some "who were excused for hardship" helped negate claimed discrimination].) There was no obvious reason that the prosecutor needed to advocate one way or the other as to this Black juror's hardship request. In light of the other strongly suspicious evidence, this choice, too, supports a finding of a

prima facie case. The total exclusion of all non-White jurors in this case cannot be dispelled by speculating on "obvious" reasons that this or some other prosecutor may or may not have harbored.

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CONCLUSION

For all the reasons argued above, and those stated in Mr. Battle's prior briefs, the judgment against him must be reversed.

DATED: February 9, 2021

Respectfully submitted,

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State Public Defender

/s/
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CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630(b)(2))

I am the Supervising Deputy State Public Defender assigned to represent appellant, THOMAS LEE BATTLE in this automatic appeal. I conducted 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, excluding tables and certificates is 12,947 words in length.

DATED: February 9, 2021.

/s/
ELIAS BATCHELDER

APPENDIX 1

First-stage *Batson* Decisions by the California Supreme Court Since *Johnson v. California* (2005) 545 U.S. 162

An asterix (*) denotes that the record was unclear as to the number of jurors from the protected class who were subject to peremptory challenges

A dagger (†) denotes that all but one juror from the protected class who were subject to peremptory challenge were stricken by the prosecutor

A double dagger (‡) denotes that all jurors from the protected class who were subject to peremptory challenge were stricken by the prosecutor

1. *People v. Cornwell* (2005) 37 Cal.4th 50 66-74 [Black defendant, one of two Black prospective jurors in the box stricken by prosecution, one seated] †
2. *People v. Gray* (2005) 37 Cal.4th 168, 183-192 [Black defendant, one of two Black jurors in the box stricken by prosecution, one seated] †
3. *People v. Avila* (2006) 38 Cal.4th 491, 540-558 [Hispanic defendant, three of four Black prospective jurors in the box stricken by prosecution, one seated] †
4. *People v. Williams* (2006) 40 Cal.4th 287, 309-313 [White defendant, two of two Hispanic prospective jurors in the box stricken by prosecution] ‡
5. *People v. Guerra* (2006) 37 Cal.4th 1067, 1099-1109 [Hispanic defendant, prosecution struck three of three Hispanic prospective jurors in the box] ‡
6. *People v. Bell* (2007) 40 Cal.4th 582, 594-601 [Black defendant, two of three Black female jurors in the box stricken] †
7. *People v. Lancaster* (2007) 41 Cal.4th 50, 73-78 [Black defendant, three of six Black female prospective jurors in the box stricken]
8. *People v. Bonilla* (2007) 41 Cal.4th 313 340-350 [Hispanic defendant, two of two Black prospective jurors in the box stricken] ‡
9. *People v. Hoyos* (2007) 41 Cal.4th 872, 899-903 [Hispanic defendant, three of four Hispanic jurors in the box stricken by prosecution] †
10. *People v. Kelly* (2007) 42 Cal.4th 763, 778-781 [Black defendant, no Black prospective jurors in the box stricken, one Black alternate stricken]
11. *People v. Howard* (2008) 42 Cal.4th 1000, 1016-1020 [Black defendant, two Black prospective jurors in the box stricken by prosecution, eight seated]; see also *id.* at pp. 1032-1036 (conc. opn. of Kennard, J.)
12. *People v. Carasi* (2008) 44 Cal.4th 1263, 1291-1296, [Male defendant, 20 of 23 prosecution strikes against female prospective jurors, five female jurors seated]; see also *id.* at pp. 1318-1323 (conc. opn. of Kennard, J.)
13. *People v. Hamilton* (2009) 45 Cal.4th 863, 897-909 [Black defendant, six of six Black prospective jurors in the box stricken by prosecution] ‡

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14. *People v. Hawthorne* (2009) 46 Cal.4th 67, 77-84 [Black defendant, three Black prospective stricken by prosecution, racial composition of venire and seated jury unknown] *
15. *People v. Davis* (2009) 46 Cal.4th 539, 582-584 [White defendant, prosecutor struck five of six Hispanic surnamed prospective jurors who made it into the box, one stricken by defense, none seated] †
16. *People v. Hartsch* (2010) 49 Cal.4th 472, 485-490 [White defendant, five of six Black prospective jurors stricken by prosecution at the time of the motion, one seated] †
17. *People v. Taylor* (2010) 48 Cal.4th 574, 611-617, 640-644 [Black defendant, prosecutor struck one Black prospective juror from guilt jury, two Black prospective jurors and one Hispanic jurors from penalty jury, composition of venire unclear]*
18. *People v. Blacksher* (2011) 52 Cal.4th 768, 800-803 [Black defendant, two Black prospective jurors stricken by prosecution, six Black jurors seated]
19. *People v. Garcia* (2011) 52 Cal.4th 706, 746-750 [Hispanic defendant, three female jurors stricken by prosecution, ten of twelve seated jurors were female]
20. *People v. Clark* (2011) 52 Cal.4th 856, 903-908 [Black defendant, White victim, four of five Black prospective jurors stricken by prosecutor, one seated];[1] see also *id.* at pp. 1009-1013 (conc. and dis. opn. of Kennard, J.) †
21. *People v. Dement* (2011) 53 Cal. 4th 1, 18-21 [Male defendant, ten of thirteen challenges against female prospective jurors, six women seated]
22. *People v. Thomas* (2012) 53 Cal.4th 771, 795-796 [Black defendant, prosecution struck six Black prospective jurors, at time of motion, two Black prospective jurors and one half-Black prospective juror remained on panel]
23. *People v. Streeter* (2012) 54 Cal.4th 205, 220-226 [Black defendant, at time of motion prosecutor had had stricken three of seven Black prospective jurors in the box, defense had stricken two, two remained on panel; one Black juror ultimately seated]
24. *People v. Elliott* (2012) 53 Cal.4th 535, 559–574 [Black defendant, White victim, two of two Black prospective jurors in the box stricken by prosecution]‡

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[1] The parties discussed the fact that there was a lone Black juror who remained in the box. The Court had no definitive understanding of the race of the remaining seated jurors, but assumed they were mostly White. (*People v. Clark* (2011) 52 Cal.4th 856, 906.) The seated jury in fact had 11 White and Hispanic surnamed jurors and one Black juror. (Petition for Habeas, Clark v. Chappelle, (E.D. Cal. No. 12-cv-00803 LJO) at p. 227).

25. *People v. Pearson* (2013) 56 Cal.4th 393, 420-423 [Black defendant, one of three Black prospective jurors in the box stricken by prosecution, one was later stricken by defense, single Black juror was seated]
26. *People v. Lopez* (2013) 56 Cal.4th 1028, 1192-1194 [Hispanic defendant, two of two Black prospective jurors stricken by prosecution] ‡
27. *People v. Edwards* (2013) 57 Cal.4th 658, 697-699 [single prosecution strike against Black prospective juror, racial composition of venire and seated jury unknown]*
28. *People v. Harris* (2013) 57 Cal.4th 804, 833-838 [Black defendant, two of three prospective Black jurors stricken by prosecution, one Black juror seated]; see also *id.* at pp. 859-863 (conc. opn. of Kennard, J.); *id.* at pp. 863-898 (conc. opn. of Liu, J.) †
29. *People v. Jones* (2013) 57 Cal.4th 899, 916-920 [Black defendant, prosecutor excused four of seven Black prospective jurors stricken, three seated]
30. *People v. Manibusan* (2013) 58 Cal.4th 40, 75-84 [Black defendant, prosecution challenged two of six Hispanic prospective jurors, four Hispanic jurors seated]; see also *id.* at pp. 106-109 (Liu, J. conc.)
31. *People v. Montes* (2014) 58 Cal.4th 809, 847-857 [Hispanic defendant, prosecutor struck six Black prospective jurors and five Hispanic prospective jurors, racial composition of panel unclear] *
32. *People v. Sattiewhite* (2014) 59 Cal.4th 446, 467-470 [Black defendant, prosecutor excused only Black qualified prospective juror in the box]‡
33. *People v. Cunningham* (2015) 61 Cal.4th 609, 649-654 [prosecutor struck four of six Black prospective jurors in the box, two Black jurors seated]
34. *People v. Scott* (2015) 61 Cal. 4th 363, 379-394 [Black defendant, two of two Black prospective jurors who made it into the box stricken by prosecution] see also *id.* at pp. 409-415 (conc. opn. of Liu, J.) ‡
35. *People v. Sanchez* (2016) 63 Cal.4th 411, 433-440 [Hispanic defendant, prosecutor struck four of six Hispanic prospective jurors in the box, defense struck one Hispanic prospective juror, one Hispanic juror seated]; see also *id.* at pp. 872-879 (conc. opn. of Liu, J.)
36. *People v. Clark* (2016) 63 Cal.4th 522, 566-569 [Black defendant, prosecutor struck only Native American juror in the box] ‡
37. *People v. Zaragoza* (2016) 1 Cal.5th 21, 42-45 [Hispanic defendant, prosecutor struck two Hispanic jurors with his first two peremptory challenges, dispute as to whether two or five Hispanic jurors seated]
38. *People v. Parker* (2017) 2 Cal.5th 1184, 1206-1213 [Black defendant, prosecutor struck two of two Black prospective jurors in the box] ‡

39. *People v. Reed* (2018) 4 Cal.5th 989, 998-1003 [Black defendant, prosecutor struck five of eight Black prospective jurors in the box, three Black jurors seated] see also *id.* at pp. 1019-1031 (dis. opn. of Liu, J.); *id.* at 1031 (dis. opn. of Kruger, J.)
40. *People v. Woodruff* (2018) 5 Cal.5th 697, 746-756 [prosecutor struck three of four Black prospective jurors who made it into the box, one Black juror seated] †
41. *People v. Johnson* (2019) 8 Cal.5th 475, 503-510 [three of six Black prospective jurors in the box stricken by prosecution, three Black jurors seated] see also *id.* at pp. 528-536 (dis. opn. of Liu, J); *id.* at pp. 536-547 (dis. opn. of Cuellar, J.)
42. *People v. Rhoades* (2019) 8 Cal.5th 393,423-437 [four of four Black prospective jurors who made it into the box stricken by the prosecution] see also *id.* at pp. 456-470 (dis. opn. of Liu, J.) ‡

DECLARATION OF SERVICE

Case Name: *People v. Thomas Lee Battle*
Case Number: Supreme Court Case No. S119296
San Bernardino County Sup. Ct., No. FVI012605

I, KECIA BAILEY, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county where the mailing took place. My business address is 1111 Broadway, Suite 1000, Oakland, California 94607. I served a true copy of the following document:

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

by enclosing it in envelopes and placing the envelopes for collection and mailing with the United States Postal Service in a sealed envelope with postage fully prepaid. The envelopes were addressed and mailed on February 9, 2021, as follows:

Thomas Battle, CDC # V-05994
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San Quentin, CA 94974

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San Diego, CA 92101

California Appellate Project
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San Francisco, CA 94104

Habeas Corpus Resource Center
303 Second Street, Suite 400 South
San Francisco, CA 94107

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on February 9, 2021, at Sacramento, CA.

/s/ Kecia Bailey
KECIA BAILEY

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. BATTLE (THOMAS)**
Case Number: **S119296**
Lower Court Case Number:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

2/9/2021
Date

/s/Kecia Bailey

Signature

Batchelder, Elias (253386)

Last Name, First Name (PNum)

Office of the State Public Defender

Law Firm