IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent vs. KARL HOLMES, HERBERT McCLAIN, LORENZO NEWBORN, Defendants and Appellants.	S058734 Los Angeles County Superior Court No. BA092268

APPELLANT NEWBORN'S SUPPLEMENTAL BRIEF REGARDING BATSON-WHEELER DEVELOPMENTS

From the Judgment of the Superior Court of the Los Angeles County
Hon. J. D. Smith, Judge Presiding

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INTRODUCTION

This Supplemental Brief focuses on the legal development relating to peremptory challenges in jury selection since the filing of Appellant's Reply Brief in March 2010. The bottom line is that the trial court's failure to find a prima facie case of discriminatory use of peremptory challenges in 1995 was erroneous under the then-existing standards of Batson v. Kentucky (1986) 476 U.S. 79 and People v. Wheeler (1978) 22 Cal.3d 258; that failure is even more clearly erroneous when viewed under the currently applicable post-Johnson standards promulgated for pre-Johnson cases in People v. Sanchez (2016) 63 Cal.4th 411, 434-435, and its progeny; and the possibility of

similar failures in the future has been entirely eliminated by AB 3070, effective January 1, 2022.

AB 3070 was enacted as increasing evidence emerged that the constitutional goals of Batson and Wheeler were being systematically thwarted by a combination of prosecutorial evasion and trickeration in responding to Batson-Wheeler objections, and of unwarranted judicial deference to prosecutorial evasive tactics. See, e.g., AB 3070 legislative history, Assembly Floor Analysis, 8/31/2020. The AB 3070 Amendment to Code of Civil Procedure 231.7 was intended to rectify that unfortunate set of circumstances.

Appellants in this case require this Court's intervention to rectify the trial court's failure to redress the clear indicia of discriminatory use of peremptory challenges in a constitutionally compliant manner.

ARGUMENT

I. APPELLANT WAS DEPRIVED OF DUE PROCESS, EQUAL PROTECTION, AND A REPRESENTATIVE JURY IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE TRIAL COURT'S ERROR IN REFUSING TO REMEDY THE PROSECUTOR'S IMPROPER EXERCISE OF PEREMPTORY CHALLENGES BASED ON RACE AND SEX.

A. The Importance of Flowers v. Mississippi as A Guide for Conducting Batson-Wheeler Review.

Following the landmark decisions in Johnson v. California (2005) 545 U.S. 163 and Miller-El v. Dretke (2005) 545 U.S. 231, the decisional landscape from the United States Supreme Court has continued to provide guidance for the adjudication of objections to

peremptory challenges. The Supreme Court has repeatedly confirmed that "The 'Constitution forbids striking even a single prospective juror for discriminatory purpose'." Foster v. Chatman (2016) __ U.S. __, 136 S.Ct. 1737, 1747, quoting Snyder v. Louisiana (2008) 552 U.S. 472, 478.

With respect to the step one determination whether a prima facie case of discriminatory use of peremptory challenges has occurred, Flowers v. Mississippi (2019) __ U.S. __, 139 S.Ct. 2228, 2243 enumerated six categories of evidence that bear on the issue of whether a prosecutor's peremptory strikes were made on the basis of race.

- statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
- evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;
- side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck;
- a prosecutor's misrepresentations of the record when defending the strikes during the Batson hearing;
- relevant history of the State's peremptory strikes in past cases; or
- other relevant circumstances that bear upon the issue of racial discrimination. Id. at 2243.

Flowers' enumeration of the categories of evidence provides more specific guidance for determining whether a prima facie case of

discrimination has been established. Batson itself was far less detailed and focused as to the categories of relevant evidence.[1] Miller-El v. Dretke, supra, added specificity to the analysis by emphasizing the importance of "side-by-side comparisons" of struck jurors and seated jurors – "[m]ore powerful than mere statistics are side-by-side comparisons of some black venire panelists who were struck and white ones who were not." 545 U.S. at 241. Miller-El also added the prima facie evidentiary mix whether or not "[t]he state fail[ed] to engage in any meaningful voir dire on a subject the State alleges it is concerned about." 545 U.S. at 246.

Flowers affirmed the Court's continuing commitment to preventing discriminatory use of peremptory challenges – "In the decades since Batson, this Court's decisions have vigorously enforced and reinforced the decision, and guarded against any backsliding." 139 S.Ct. at 2243. A significant component of the continuing reinforcement of that commitment is the enumeration in Flowers of the six categories

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[1] In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors. Batson v. Kentucky (1986) 476 U.S. 79, 96-97.

of relevant evidence for determining whether a prima facie case has been established.

This Court has cited Flowers four times: in one majority opinion rejecting a Batson claim, People v. Baker (2021) 10 Cal.5th 1044, 1076; in two dissents from the denial of a Batson claim, People v. Miles (2020) 9 Cal.5th 513, 616 (Liu, J., dissenting) and People v. Johnson (2019) 8 Cal.5th 475, 529 (Liu J., dissenting); and in one dissent from a denial of a petition for review, People v. Triplett, S262052 (Liu, J., dissenting; Cueller J., concurring). Baker did not refer to, much less adopt and apply, the six-category analysis promulgated in Flowers. The two dissents on the merits both criticize the majority opinion for failing to correctly apply the teachings of Flowers. See People v. Johnson, supra, 8 Cal.5th at 537 ["that's not how we're supposed to review claims of discrimination in jury selection. See Flowers"]. Appellant urges this Court to conform its Batson-Wheeler analysis to the factors enumerated by the Supreme Court.

This Court has to date not adopted the Flowers analysis but has instead formulated and followed a separate and only partially overlapping roster of factors to guide its Batson-Wheeler review. People v. Johnson, supra, 8 Cal.5th at 506-507 has most recently reiterated this Court's version of most important Batson-Wheeler factors:

> We examined the entire record when conducting our review. [citation] Certain facts, however, are considered. Especially relevant: "These include whether a party has struck most or all of the members from identified group, whether a party has used a disproportionate number of

> strikes against members of that group, whether the party has engaged those prospective jurors in only desultory voir dire, whether the defendant is a member of that group, and whether the victim is a member of the group to which a majority of remaining jurors belong. [Citation.] We may also consider nondiscriminatory reasons for the peremptory strike that 'necessarily dispel any inference of bias,' so long as those reasons are apparent from and clearly established in the record."

There are two major factors in Flowers that are not contained in this Court's enumeration of "especially relevant" factors: (1) "side-by-side comparisons of prospective Black jurors who were struck and white prospective jurors who were not"; and (2) "a prosecutor's misrepresentation of the record when defending the strikes during the Batson hearing. Flowers at 224. People v. Rhoades (2019) 8 Cal.5th 393, 423, fn. 17, recognized the "utility of juror comparisons in conducting our independent appellate review of the first stage determination," albeit with a distinctly different perspective than endorsed in Flowers.[2] Finally, the entire process of judicially identifying possible non-discriminatory reasons for strikes to dispel an

[2] While Rhoades does acknowledge that "juror comparisons can play a role at the first phase of the Batson-Wheeler analysis," ibid, it appears that a majority of this Court views the role of comparative juror analysis "as an aid in determining whether the reasons we are able to identify on the record are ones that help to dispel any inference that the prosecutor exercised its strikes in a biased manner." Comparative juror analysis can play an equally important role in determining whether the reasons for the strikes hypothesized by this Court do not dispel an inference of bias because not applied to white-seated jurors.

inference bias, now ingrained in this Court's Batson review process,[3] is nowhere endorsed or approved by the Supreme Court.

B. The Application of Current Batson-Wheeler Case Law to the Facts of this Case.

The record in this case contains evidence in virtually all the categories of evidence enumerated by the United States Supreme Court and by this Court as establishing a prima facie case of discriminatory use of peremptory challenges. Appellant focuses on four categories of evidence: (1) the statistical indicia of discrimination; (2) the undisputed stature of the struck jurors as responsible, upstanding and contributing members of the community; (3) the absence of "readily apparent

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[3] See, e.g., People v. Rhoades, supra, 8 Cal.5th at 431 ["Here, the record reveals readily apparent reasons for the strikes that dispel the inference of bias"].

This formulation was first articulated by this Court in People v. Scott (2015) 61 Cal. 4th 363, 385:

> Although those facts may be probative on the issue of discriminatory intent (citation), the high court has directed us to consider the totality of the relevant facts in determining whether an inference of discrimination exists. (Johnson, supra, 545 U.S. at p. 168.) Viewed as a whole, the record in this case clearly establishes nondiscriminatory reasons for excusing R.C. and H.R. that dispel any inference of bias. (emphasis in original)

This formulation has been followed in six of this Court's decisions, and in numerous decisions of the Courts of Appeal.

grounds" for the strikes that dispel an inference of bias; (4) a comparative juror analysis to demonstrate the invalidity of respondent's proffered reasons; and (5) the absence of meaningful voir dire by the prosecutor as to the jurors' responses that respondent claims would cause any reasonable prosecutor to strike them.

1. The statistical indicia of discrimination.

a. The elimination rate.

The prosecutor had struck six of nine prospective Black female jurors at the time of the Batson-Wheeler motion and eight of the 12 Black female jurors seated in total, for an overall eliminate rate of 67%. That level of elimination rate has been repeatedly recognized in the case law as supporting an inference of discrimination. Shirley v. Yates (9th Cir. 2015) 807 F.3d 1090 ["Shirley had satisfied Batson Step One by showing that two out of three eligible black venire members were peremptorily struck and that the second, R.O., was similar to a white veniremember who was seated]; Currie v. McDowell (9th Cir. 2016) 825 F.3d 603.

b. The strike rate.

The strike rate is a calculation that is "computed by comparing the number of peremptory strikes the prosecution used to remove Black potential jurors with the prosecutor's total number of peremptory strikes exercised." Abu-Jamal v. Horn (3d Cir. 2008) 520 F.3d 272, 290. In this case, at the time the Batson-Wheeler motion was made, the prosecutor had exercised 12 total peremptory challenges and six of them against Black females. That supports an inference of

discrimination because it indicates a particular focus on striking Black females compared to all other prospective jurors.

c. The exclusion rate.

The statistic used in People v. Bell (2007) 40 Cal.4th 582, 597 "compares the proportion of a party's peremptory challenge used against the group to the group's proportion in a pool of jurors subject to peremptory challenge. At the time of the Batson-Wheeler motion, a total of 34 prospective jurors had been either seated or seated and struck, nine of whom were Black females. Thus, Black females constituted 27% of the pool of jurors subject to peremptory challenge. The exclusion rate is calculated by dividing the strike rate against Black female jurors (50%) by the representation rate in the selection process (27%). That yields a figure of 1.85, which means that the prosecutor was striking Black females at nearly twice the rate of their representation in the voir dire.[4]

In sum, all three statistical approaches to determining whether an inference of discrimination exists all converge in support of that inference.

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[4] An exclusion rate of 1.0 reflects that the prosecutor was striking members of the protected group in exactly the proportion that they appeared as eligible for prospective jurors. An exclusion rate of 1.0 does not support an inference of discrimination. As the exclusion rate calculation increases above 1.0, it constitutes an increasingly strong indicator of discrimination.

2. The undisputed stature of the struck jurors as responsible, upstanding and contributing members of the community.

Batson directed that "[i]n deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances:, 476 U.S. at 96 – 97. A good place to start is to scrutinize the struck jurors for a general assessment of whether they fall into the category of solid citizens, or whether they may be viewed as marginal, outliers, oddballs, etc. Of course, marginal members of society, outliers, and oddballs are eligible and entitled to serve on juries. "The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system." Powers v. Ohio (1991) 499 U.S. 400, 406, 111 S. Ct. 1364, 1368. However, in determining whether a prosecutor's strikes of a cluster of Black jurors "gives rise to an inference of discriminatory purpose," Johnson v. California (2005) 545 U.S.,163, it is highly probative of discriminatory purpose if all the struck jurors fit the profile of pillars of the community. In this case, they manifestly are.

a. Juror 37.

Juror 37 was a 58-year-old Black female who had been married for 35 years and had been employed as an educational counselor for 25 years. Her husband was a military veteran and had previously been employed as a CDCR correctional officer, 15 SCT 4263. The juror was active in her church and previously served on a jury that reached a

verdict. She had one son, then deceased, who had been in trouble with the law and had been a victim of a police assault. She believed that "there are circumstances or cases that I felt warrant the death penalty." 15 SCT 4294-95. In sum, Juror 37 was an entirely upstanding, stable, and involved member of the community, well qualified for jury service.

b. Juror 53.

Juror 53 was a 53-year-old female, employed by the IRS, as was her ex-husband. She was a practicing Catholic whose religious beliefs would not affect her ability to sit on a death penalty case. She had received one traffic citation in her life and "learned a lesson" to "be more observant at all times." 18 SCT 4935. She was overtly pro-death penalty – "The death penalty for certain crimes and under certain circumstances is the only vehicle to maintain safety." 18 SCT 4951.

c. Juror 48.

Juror 48 was a 67-year-old retired physical therapist who lived in Los Angeles for some 28 years and owned her home. 17 SCT 4717. She had a housemate, retired municipal court judge Mary Orero. She had served in the military and had been discharged as a second lieutenant. 17 SCT 4719. She owned a handgun, which she had obtained in the aftermath of a burglary and rape of a neighbor. She had previously sat as a juror in a robbery murder case, and a verdict was reached. 17 SCT 4725. Regarding the death penalty, she stated that it was imposed "too seldom," 17 SCT 4746, and that she herself could vote to impose it. 12 RT 727.

d. Juror 9.

Juror 9 was a 33-year-old Compton resident, employed by the U.S. Postal Service, and was the mother of a 12-year-old. 11 SCT 3118. She had recently been the victim of a carjacking and thought she had been fairly treated by the police. She was in favor of the death penalty in California and accepted the responsibility of being a juror in a capital case. 11 SCT 3155. She held strong religious beliefs, but those beliefs did not prevent her from sitting in judgment of another. 11 RT 608.

e. Juror 88.

Juror 88 was a 42-year-old mother of five and gainfully employed as an eligibility worker at the Los Angeles Department of Social Services. 23 SCT 6354. She identified the Bible as the most influential book for her and with respect to the death penalty, some circumstances warrant death. 23 SCT 6388. She accepted responsibility for making that decision – "If the crime warrants that I have no problem." 23 SCT 6391. She had a sister who was incarcerated in Texas and two cousins who had also been incarcerated. Her ex-husband also had several convictions, including armed robbery and accessory to murder. 23 SCT 6358. In voir dire, she was not questioned about her views toward her relatives' incarcerations. 12 RT 832-844.

f. Jury 94.

Juror 94 was a 33-year-old single mother of two and was employed by the U.S. Postal Service for 11 years. 24 SCT 6600. She characterized herself as "strongly in favor" of the death penalty, 24 SCT

6632, and requested a sidebar regarding question 77 about acquaintances in law enforcement. She also described in the sidebar an incident of domestic violence involving a former boyfriend.

In sum, the six struck jurors were all solid and upstanding citizens who shared the following characteristics:

- gainful employment – all six

-stable family relationship – all six

- religious affiliation – all six

- pro death penalty attitude – all six

Individually and collectively, the individual qualifications of the six struck jurors rendered them prime candidates to sit on a death-qualified jury. Batson, supra, 476 U.S. at 87 [Competence to serve as a juror ultimately depends on an assessment of individual qualification and ability impartially to consider evidence presented at a trial"]. The likelihood that each of them would have some disqualifying attitude or experience revealed in the questionnaire or during voir dire is negligible. The strength of the jurors' qualifications is an additional circumstance that supports an inference of discriminatory intent in the six strikes.[5]

[5] The additional two black females that the prosecutor struck after the denial of the Batson-Wheeler motion were equally upstanding and qualified. Juror 107 was a 57-year-old woman, a married homeowner, a churchgoer, and pro-death penalty, 25 SCT 7165-66. Juror 109 was a 45-year-old woman who had worked as a court clerk Santa Monica Superior Court for 15 years, 26 SCT 7246. The prosecutor's strikes against these jurors should be considered as part of the circumstances supporting an inference of discrimination.

3. The absence of "readily apparent grounds" for the strikes.

As stated in Rhoades, "when the record of a prospective juror's voir dire or questionnaire on its face reveals a race-neutral characteristic that any reasonable prosecutor trying the case would logically avoid in a juror, the inference that the prosecutor was motivated by racial discrimination loses force." 8 Cal.5th at 431. Stated differently, "an appellate court may take into account 'nondiscriminatory reasons for a peremptory challenge that are apparent from and clearly established in the record [citations] and that necessarily dispel any inference of bias." Ibid, citing People v. Scott, supra, 61 Cal.4th at 384. The "readily apparent grounds" appear to be the functional counterpart of the "self-evident" reasons for a strike referred to in People v. Gutierrez (2017) 2 Cal.5th 1140. One example of a readily apparent reason that all members of this Court have subscribed to the situation where "the struck juror 'was married to a convicted murderer' and '[n]one of the seated or alternate jurors had anything remotely similar in their backgrounds'." People v. Rhoades, supra, 8 Cal.5th at 467 (Liu, J., dissenting, quoting from People v. Jones (2013) 57 Cal.4th 899, 983. None of the reasons posited by respondent rise to that level.

a. Juror 37.

Regarding Juror 37, the 58-year-old church-going educational counselor married to a military veteran and former CDCR Correctional Officer, respondent offers three race-neutral reasons that could

conceivably have triggered the strike. First, respondent refers to the juror's deceased son and his drug problem and troubles with the law. Respondent refers to an incident in which the son was involved in an altercation with police and incurred a head injury, for which Juror 37 filed a complaint. Respondent argues that incident provided a basis for striking her because "the credibility of law enforcement is important because law enforcement officers testified as to the prior statements made by witnesses who recanted at trial." RB 136. However, the prosecutor asked her nothing about her deceased son, his troubles with the law, or her complaint about his injury while in custody. 12 RT 672.

Moreover, respondent's proffered reason is unpersuasive because nothing in Juror 37's experience indicated that she would necessarily be dubious or distrustful about the credibility of law enforcement testimony. Her complaint about the police related to police brutality, not to police mendacity. There is no issue in this case about police brutality in effecting an arrest, extracting a confession, or any other circumstance. Respondent's proffered reason is makeweight. That conclusion is confirmed by (1) her answer to questions 92 – "If a police officer testified, would you judge his or her testimony the same as any other witness? Yes." 15 SCT 4283; and (2) the absence of any prosecutorial voir dire as to her view of law enforcement credibility or any statements in her questionnaire regarding law enforcement credibility. 12 RT 677-79

The second reason proffered by respondent relates to Juror 37's response to question 91, i.e., whether the juror "would judge the

defendant's testimony the same as any other witness," to which she checked "yes." Her explanation is as follows:

> He/she is innocent until proven guilty. I have seen a defendant who is adamant about his innocence and on the day of trial guilt was admitted by another. The accused had been identified. The accused and the guilty was as different as night and day. I have also known of a person going free and was guilty when a dishonest juror sat on both cases trying the same individual. RB 136-137, citing 15 SCT 4282.

From this answer, respondent contends that "the prosecution was reasonably concerned with the response to question 91 because part of the prosecution's case was partly based on eyewitness identifications." RB 137. However, Juror 37's answer contains no statements of general skepticism toward eyewitness identification. Juror 37 did not express any opinion as to eyewitness identification testimony. 15 SCT 4284, Q-99.

In fact, the juror's explanation is somewhat tangential to the specific question asked, i.e., whether the juror would judge a defendant's testimony the same as any other witness. Nothing in Juror 37's answer suggests that she would give a defendant's testimony more weight than any other witness, or that she would be particularly skeptical of other witnesses who identified the defendant. Respondent's second attempt to identify a "readily apparent ground" for striking Juror 37 is makeweight.

Respondent's final effort is that "Juror No. 37's responses also indicated that she would not impose the death penalty in this case."

Respondent's support for this reason largely relates to jury questions 151 and 152 – "She disagreed somewhat with the statements that: (1) anyone who intentionally kills another person without legal justification, and not in self-defense, should receive the death penalty; and (2) anyone who intentionally kills more than one person without legal justification or in self-defense should receive the death penalty." RB 137.

Respondent's position is similarly unpersuasive as to this factor because any juror who agreed with those two statements would be subject to a challenge for cause, i.e., who believed the death penalty should automatically be imposed for an intentional killing without proof of a special circumstance and without proof that aggravation outweighed mitigation.

Next, respondent's putative reason flies in the face of Juror 37's answers to two specific questions:

> Q-141: What are your general feelings about the death penalty?
>
> A: There are circumstances or cases that I felt warrant the death penalty. 15 SCT 4294.
>
> * * *
>
> Q-166: If you vote to impose the death penalty, your vote would cause the defendant to be sentenced to death. Do you understand that?
>
> A: Yes.
>
> Q: How do you feel about the responsibility?

A: I do what I have to do. 15 SCT 4299.

Moreover, there is ample evidence that this is not a "readily apparent reason" for striking Juror 37 because (1) the prosecutor permitted numerous jurors to sit who also answered questions 151 and 152 as did Juror 37; and (2) the prosecutor asked Juror 37 only two questions about her views on the death penalty, including whether she would have "any problem imposing either life without parole or the death penalty," to which Juror 37 answered immediately and unequivocally, "No." 12 RT 679.[6]

In sum, Juror 37 was an upstanding, responsible, and longstanding member of the community whose questionnaire and voir dire did not reveal any attitude or experience that amounted to a "self-evident" or "readily apparent" ground for striking her. Moreover, to the extent that respondent has identifies attitude or experiences that a prosecutor could be "concerned" about, e.g., RB 137, those attributes or experiences cannot be deemed a "readily apparent reason" for the strikes because as set forth in section 3 below, multiple seated jurors had the same attitude or experiences.

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[6] Respondent also referred to Juror 37's disagreement with the statement, "the rights of the accused are too well protected." RB 136, citing 15 SCT 4288. This is similarly a non-starter because half of the seated jurors also disagreed with that statement. See Section 3, infra.

b. Juror 53.

Regarding Juror 53, the 53-year-old IRS employee and practicing Catholic, respondent has also offered three reasons purporting to justify the strike, but none amount to "readily apparent" or "self-evident" reasons. First, respondent contends that Juror 53 subscribed to "jury nullification." RB 138. Jury 53 had made an observation in her questionnaire that "a jury can ignore the letter of the law and follow his/her conscience." RB 138, citing 18 SCT 4932. The prosecutor did ask her about this, as did the court and counsel. 12 RT 722. The court and counsel clarified that during the guilt phase of the trial, she had to follow the law but during the penalty phase, she could "use [her] conscience," and she accepted that without reservation. 12 RT 727.[7]

Respondent recognizes that based on her voir dire, Juror 53 "could not be dismissed for cause," but notes that peremptory challenges are judged by a different standard. RB 138. However, the "readily apparent reason" standard that "any reasonable prosecutor" would strike her has not been met. While a prosecutor is not obligated to accept a juror's benign explanation or response to a red flag issue, the discretion given to an actual prosecutor to disbelieve a juror's explanation does not extend to a reviewing court in conducting its independent review to determine that any reasonable prosecutor would have disbelieved the explanation.

[7] The prosecutor challenged her for cause, and the trial court denied the challenge. 12 RT 728.

Respondent next asserts that "prospective Juror No. 53's responses in her questionnaire also suggested that she would be unable to impose the death penalty in this case." RB 138. First, a mere "suggestion" of an undesirable attitude is insufficient to constitute a readily apparent reason. Second, that is a contrived reading of the questionnaire and voir dire. Respondent holds it against Juror 53 that "she did not list any other circumstances [than criminally insane] for which the death penalty should be imposed." RB 139. However, respondent ignores her unequivocally pro-death penalty stance quoted above from 18 SCT 4951 – "the death penalty for certain crimes and under certain circumstances is the only vehicle to maintain safety."

Finally, respondent refers her answers to questions 151 and 152 regarding automatic imposition of the death penalty for an intentional killing and an intentional killing of more than one person but, as noted in section 4, virtually everyone on the seated jury gave the same responses.

c. Juror 48.

Regarding Juror 48, the 67-year-old retired physical therapist and military veteran, respondent could only muster the tepid observation that she "had at best lukewarm feelings toward the death penalty." RB 140. This characterization is inaccurate and in any case, is insufficient to establish a readily apparent or self-evident justification for the strike. Juror 48 expressly voiced her opinion that the death penalty was imposed "too seldom," 17 SCT 4746. She wrote that California should have the death penalty "to help deter crime."

Ibid., Q-146. In response to question 166, how she felt about the responsibility of voting for a death sentence, she wrote, "I would try to fulfill my responsibility as a good citizen." 17 SCT 4750. The prosecutor did not ask her any questions at all, much less any questions about her views on capital punishment. 12 RT 705. This is the single most flagrantly unjustifiable of the six strikes at issue here.

d. Juror 9.

Regarding Juror 9, the 33-year-old Compton resident, U.S. Postal Service employee and mother of a 12-year-old, respondent's proffered justification for the strike was that she made "peculiar responses in her questionnaire." RB 140. "Peculiar responses" do not constitute readily apparent or self-evident reasons for a prosecutorial strike.

Respondent focuses on her answer in question 50 which directed the prospective juror to "list two people that you most respect and explain why (excluding family members)." RB 140 – 141. Juror 9's first response was "God" because "he's the reason we awake every day." Her second answer was "law" because "they most of the time try to abind [sic] by their jobs to protect, and to serve." 11 SCT 3129. Juror 9 appears to have interpreted the directive to list two "people" somewhat metaphorically and offered two important "forces" or "influences" in her life that she respected, God first and law enforcement second. She wrote "law" as the second important influence, and her comment made it clear that she was referring to law enforcement generally, i.e., those whose jobs are "to protect, and to serve."[8] While Juror 9's manner of

[8] "To protect and to serve" has been the motto of the Los Angeles Police

responding to the question may have been somewhat "peculiar," the substance of the response was clearly pro-prosecution. The prosecutor asked her only whether her religious beliefs would prevent her from sitting in judgment of another person, and she unequivocally answered "no." 11 RY 608.

Respondent continues with "[m]ore significantly, prospective Juror No. 9 indicated that she believed the differing versions of an event by a witness automatically raised a reasonable doubt." RB 141, citing 11 SCT 3139. That answer was explored during voir dire, and she qualified her questionnaire answer as to the portion that a prosecutor "could be reasonably concerned with":

> Court: "… do you believe that differing versions of an event automatically raise a reasonable doubt? You put, "yes [on questionnaire]. Would your answer be different now?
>
> Prospective Juror No. 9: Yes. 11 RT 601-602.

Juror 9's questionnaire and voir dire fall far short of demonstrating a deal-breaking attitude that would have caused any reasonable prosecutor to exclude her from the jury.

Respondent also argues that Juror 9's responses "suggested that she would select life without the possibility of parole over the death penalty in this case," RB 141, but that is unsupported by the record. Nothing in her questionnaire or voir dire indicated that she was

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Department for decades. See https://www.lapdonline.org/lapd_manual/volume_1.htm -- "The motto, 'To Protect and To Serve,' states the essential purpose of the Los Angeles Police Department."

leaning toward or against the death penalty. She assured the court that she would consider all the evidence. Respondent incorrectly attributes to her the position that she "stated that if she heard that a defendant had problems growing up, she would not choose death over life without parole." RB 141, citing 11 RT 607. In fact, her response simply indicated that she would not consider "problems growing up" as an aggravating factor that militated in favor of the death penalty.[9]

e. Juror 88.

Regarding Juror 88, the 42-year-old mother of five and longstanding county employee, respondent first notes that her eldest child's father had been incarcerated, as had her sister and two cousins. RB 142. The trial court inquired regarding her sister's incarceration, and her answers were entirely innocuous. RT 833-834. She had served as a juror in two trials where no verdict was reached and was in the minority of jurors in one of those cases. Respondent contends that "the prosecution could reasonably be concerned that if prospective Juror No. 88 sat in the jury, there might be a hung jury." RB 142. That is highly speculative as opposed to a readily apparent reason for striking her because the prosecution had no way to know she was a holdout for

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[9] Ms. Hamburger: So if you hear that the defendant has had problems growing up, as Mr. Myers so eloquently put it before, you would choose death over life without parole? That was my question.

Prospective Juror #9: No, I would not. 11 RT 606-607.

acquittal or whether she was fighting tooth-and-nail for a conviction in the face of wooly-headed liberal jurors.

Juror 88 requested a sidebar to answer certain of the questions, and respondent contends without support in the record that her answers "did not appear to be forthright." RB 143. One of the issues at the sidebar was related to question 29, "Did you ever take a human life," and she answered at the sidebar that she had had an abortion some 25 years earlier. She had also not answered question 58 in writing as to whether her religious beliefs would interfere with her being a fair juror. At the sidebar, she immediately stated they would not. Respondent characterizes the judge's response to her question as "surprise" [unsupported by the record] and speculates that she probably thought her religious views would interfere with her jury duty but falsely claimed they would not. Respondent reads far too much into this colloquy at 12 RT 837:

> MR. MYERS: … page 12, question 58.
>
> THE COURT: …"Would your religious beliefs affect your ability to sit on a death penalty case? You initialed that. What does that mean?
>
> PROSPECTIVE JUROR NO. 88: No, it won't.
>
> THE COURT: So there is nothing about your religion. What is this: When you say in 57, "How would your religious principles affect your ability to determine the truth of a charge?" Your answer is no?
>
> PROSPECTIVE JUROR NO. 88: Yes.

The prosecutor asked her about her response to question 150:

> A: Some people say they support the death penalty; yet could not personally vote to impose it. Do you feel the same way?
>
> A: Yes. 23 SCT 6388.

She answered question 166 as to how she felt about the responsibility of voting to impose the death penalty – "If the crime warrants that, I have no problem." 23 SCT 6391.

Upon voir dire, she changed her "yes" answer to question 150 to "no," and explained, "I feel that if it is certain circumstances that, yes, the death penalty should be imposed." 12 RT 843. The prosecutor probed as to what circumstance would warrant the death penalty, and she answered, "my first thought was lying in wait," like "ambush," ibid, the very special circumstance charged in this case. No self-evident reason for striking her appears in the record.

f. Juror 94.

Regarding Juror 94, the 33-year-old single mother of two employed by the U.S. Postal Service, respondent asserts that her recent experience in an abusive domestic relationship could make her "sympathetic" toward appellant Newborn. RB 143. Respondent's rationale is convoluted, counter-intuitive, unpersuasive, and not in any way a readily apparent or self-evident reason why any reasonable prosecutor would strike her. Respondent argues that although she called the police in the aftermath of the abuse, she did not follow the police advice to obtain a restraining order because she had a "change of

heart," citing 12 RT 861-62. Respondent contends that because the prosecutor intended to introduce evidence of domestic violence on appellant's part at penalty trial, "[g]iven that prospective Juror No. 94 did not obtain a restraining order, she may have been sympathetic with appellant Newborn." That inference does not follow at all. Far more likely is that she would have sympathized with the battered women involved and viewed appellant particularly negatively based on those incidents.

Respondent appears to recognize the tenuous of the inference urged and concludes with the comment that "[a]t the very least, prospective Juror No. 94 presented a 'wildcard,' such that the prosecutor could have reasonably used a peremptory for reasons unconnected to prospective Juror No. 94's race and gender." RB 143.

Under this Court's jurisprudence, the possibility that a juror might be a "wildcard" does not rise to the level of a readily apparent or self-evident reason any reasonable prosecutor would strike her. The more logical inference is that Juror 94 would be less sympathetic to appellant Newborn and prospective jurors who had not personally experienced battering at the hands of a boyfriend.

Respondent also argues that "prospective Juror No. 94's responses in the questionnaire indicated that she would not impose the death penalty in this case," RB 143, referring to her comment on the questionnaire that the death penalty should be applied to people who are "caught in the act." 24 SCT 6633. During voir dire, 12 RT 865-66, she was informed that neither being caught in the act nor confessing

was a necessary prerequisite to impose the death penalty and she accepted that.

> THE COURT: – You can consider both life without the possibility of parole and the death penalty, right?
>
> PROSPECTIVE JUROR NO. 94: Uh-huh
>
> THE COURT: Would you need a confession and the person caught in the act to convict in order to do either of those?
>
> PROSPECTIVE JUROR NO. 94: No.

She may have been misunderstood about the qualifying circumstances under Penal Code section 190.2, but she never wavered from the position that she "strongly agree[d] with the death penalty." 24 SCT 6632-33.

In response to the question whether she accepted the responsibility of sentencing a defendant to death, she answered, "it's kind of scary." From this, respondent argues that "the prosecution reasonably had concerns whether prospective Juror No. 94 would actually impose the death penalty based upon her responses." RB 144. Respondent ignores that many of the sitting jurors also expressed entirely reasonable and appropriate recognition of the "scary" aspect of sitting on a capital jury. See Argument 4, below.

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4. Comparative juror analysis.

a. The commonality of the answers to questions 151 and 152 between the struck and seated jurors.

Respondent purports to justify the strikes of Black female Jurors #37, #53, #48, and #9 largely on their responses to questions 151 and 152 of the jury questionnaire:[10]

> 151. Anyone who intentionally kills another person without legal justification, and not in self-defense, should receive the death penalty. (circle one)
>
> a. Strongly Agree c. Agree Somewhat
> b. Disagree Somewhat d. Strongly Disagree
>
> 152. Anyone who intentionally kills more than one person without legal justification or in self-defense, should receive the death penalty. (circle one)
>
> a. Strongly Agree c. Agree Somewhat
> b. Disagree Somewhat d. Strongly Disagree

In defense of the prosecutor's strikes, respondent points out that Juror #37 "disagreed somewhat" with both statements (15 SCT-I 4296-7); that Juror #53 "strongly disagreed" with both statements (18 SCT-I 4953-4954); that Juror #48 "disagreed somewhat" with the statements (17 SCT-I 4747-8); and that Juror #9 "disagreed somewhat" with both statements (11 SCT-I 3150-1). RB 137; 139-141.

[10] See RB 137 (Juror #37); RB 139 (Juror #53); RB 140 (Juror #48); and RB 141 (Juror #9).

Respondent fails to address the fact that the majority of seated jurors provided similar answers. Five seated jurors "strongly disagreed" with one or both statements in questions 151 and 152 – Juror #29 (14 SCT-I 3969-70); Juror #30 (14 SCT-I 4010); Juror #63 (19 SCT-I 5363); Juror #104 (25 SCT-I 7045); and Juror #105 (25 SCT-I 7085-6). Three other jurors disagreed "somewhat" with one or both statements – Juror #34 (15 SCT-I 4174-5); Juror #124 (27 SCT-I 7699-7700); and Juror #133 (29 SCT-I 8068).

Respondent's reliance on the struck jurors' answers to questions 151 and 152 as readily apparent reasons for striking them conspicuously fails in light of the commonality of that attitude among the seated jurors.

b. The commonality of having relatives in trouble with the law between the struck jurors and seated jurors.

Respondent has contended that Juror 37 was a good candidate for a strike because her deceased son had been in trouble with the law, and that Juror 88 was a good candidate because she had a sister in prison in Texas and two cousins in and out of jail.

However, three of the seated jurors also had relatives who were arrested and/or prosecuted for criminal charges – Juror #63 had a brother who was prosecuted and convicted for an insurance scam, for which he served time in jail (19 SCT 5344-45); the spouse of Juror #79 had been prosecuted and convicted driving under the influence on more than one occasion (21 SCT-I 6000-01); and Juror #133 answered

affirmatively, although he was unaware of the specifics (29 SCT-I 8049-50).

c. The commonality as to question 117(a) as to the rights of the accused between the struck jurors and the seated jurors.

Respondent suggested that the prosecutor could have struck Juror 37 because "She strongly disagreed with the statement that the rights of the accuser are too well protected." RB 136. However, 10 of the seated jurors also disagreed with the statement, either moderately or strongly.[11]

d. The commonality of responses as to the weight of personal responsibility for imposing the death penalty between the struck jurors and seated jurors.

Notwithstanding the fact that all the struck jurors were generally in favor of the death penalty, respondent has argued that most of the would be reluctant to impose the death penalty in this case, referring, inter alia, to Juror 94's characterization of that responsibility as "kind

[11] Juror #29 moderately disagreed with that statement (14 SCT-I 3961); Juror #30 moderately disagreed with that statement (14 SCT-I 4002); Juror #34 strongly disagreed with that statement, as did struck Juror #37 (15 SCT-I 4166); seated Juror #63 moderately disagreed with that statement (19 SCT-I 5355); seated Juror #79 strongly disagreed with that statement (21 SCT-I 6011; Juror #98 moderately disagreed with that statement (24 SCT-I 6790); Juror #105 moderately disagreed with that statement (25 SCT-I 7077); Juror #124 moderately disagreed with that statement (27 SCT-I 7691; and Juror #133 moderately disagreed with that statement (29 SCT-I 8060).

of scary." RB 144. Respondent ignores the responses of seated Juror 29 who specifically said he would find it difficult to sit on a capital jury because of "the difficulty of making such a decision on another's life, in and of itself." 14 SCT 3971. When asked during voir dire how he felt about that responsibility, he answered, "I don't like the idea, but would fulfill my duty based on the evidence." Thus, Juror 29 established himself as having far more reservations about imposing the death penalty than did any of the struck jurors.

e. The commonality of having previously participated in a hung jury between the struck jurors and the seated jurors.

Respondent justified the strike of Juror 88 on the basis that she had sat on a jury that did not reach a verdict. However, both seated Jurors 63 and Juror 124 had previously sat on criminal cases that did not reach a verdict. 21 SCT 5941 and 27 SCT 7677.

5. The absence of meaningful voir dire as to four of the struck jurors.

Miller-El v. Dretke, supra, 545 U.S. at 246 clearly stated that "[t]he State's failure to engage in any meaningful voir dire examination on a subject the State it is concerned about is evidence suggesting the explanation is a sham and a pretext for discrimination." Accord: Fernandez v. Roe (9th Cir. 2002) 286 F.3d 1073, 1079 ["The prosecutor failed to engage in any meaningful questioning of any of the minority jurors"].

In this case, the prosecutor's voir dire of four of the six struck jurors was cursory or nonexistent as to the responses that respondent

contends would have caused any reasonable prosecutor to exercise a strike.

Here, the prosecutor's voir dire of Juror 9 was cursory and limited to whether her religious beliefs would prevent her from sitting in judgment of another person, and she answered "no." See 11 RT 608-610. The prosecutor asked Juror #37 only two innocuous questions about her understanding of the two penalty options and immediately struck her. 11 RT 679. The prosecutor asked Juror #48 no questions, but immediately struck her. 12 RT 705.

The prosecutor did ask Juror 88 a question relevant to question #150 on the questionnaire, the juror cleared up a misunderstanding, affirmed that she could impose the death penalty where there was a special circumstance like lying-in-wait (as was alleged in this case), but was nonetheless struck. 12 RT 843-844. This record of non-engagement supports an inference of discrimination.

CONCLUSION

WHEREFOR, for the foregoing reasons, appellant respectfully requests that this Court reverse his convictions.

Dated: May 11, 2021

esm

ERIC S. MULTHAUP, Attorney for Appellant LORENZO NEWBORN

CERTIFICATE OF WORD COUNT

I certify that this Appellant's Supplemental Brief Regarding Batson-Wheeler Developments consists of 6,796 words.

Dated: May 11, 2021

esm

ERIC S. MULTHAUP

DECLARATION OF SERVICE

RE: People v. Karl Holmes, Herbert McClain, Lorenzo Newborn, et al.; S058734
Los Angeles County Superior Court No. BA092268

I, Eric S. Multhaup, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at 35 Miller Avenue, Suite 229, Mill Valley, California 94941. I served the attached:

APPELLANT'S SUPPLEMENTAL BRIEF REGARDING BATSON-WHEELER DEVELOPMENTS

on the following individuals/entities by TrueFiling or by placing a true and correct copy of the document in a sealed envelope with postage thereon fully prepared, in the United States mail at Mill Valley, California, addressed as follows:

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I declare under penalty of perjury that service was effected on May 11, 2021 at Mill Valley, California and that this declaration was executed on May 11, 2021 at Mill Valley, California.

esm

ERIC S. MULTHAUP

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. HOLMES, McCLAIN & NEWBORN**
Case Number: **S058734**
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.

5/11/2021

Date

/s/eric multhaup

Signature

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