SUPREME COURT OF CALIFORNIA
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Supreme Court of California
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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent,

v.

JOHNNY DUANE MILES,

Appellant.

CAPITAL CASE

Case No. S086234

San Bernardino County Superior Court
Case No. FSB09438
Honorable James A. Edwards, Judge

RESPONDENT'S ANSWER TO AMICUS BRIEF

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INTRODUCTION

Amicus NAACP Legal Defense & Educational Fund, Inc. ("LDF") argues that the prosecutor at Johnny Duane Miles's trial violated *Batson v. Kentucky* (1986) 476 U.S. 79 by purportedly using prospective jurors' views on the O.J. Simpson verdict as a "proxy" for racial discrimination. Miles raised this issue in his opening brief and the parties have previously addressed it. (ASOB 15, fn. 3.)

LDF now expands on Miles's argument and asks this Court to declare that any peremptory challenge by a prosecutor of a Black prospective juror based in whole or in part on the latter's attitude toward the O.J. Simpson case is per se unconstitutional. As explained below, LDF's argument rests on faulty factual assumptions. Moreover, the categorical rule LDF seek to champion would, contrary to well-established precedent, effectively eliminate the third stage of the *Batson* analysis whenever prospective jurors are questioned about an issue that "disparately applies" to a cognizable group. (See Amicus Brief [AB] 5.) We urge the Court to reject LDF's ill-advised and ill-founded proposal.

ARGUMENT

LDF's argument assumes that any peremptory challenge based on a Black prospective juror's views towards the Simpson verdict is necessarily a race-based challenge. The assumption is faulty.

LDF insists that "[o]bjective evidence demonstrates that the O.J. Simpson Question and answer are inextricably tied to race." (AB 5,) The "objective evidence," however, is not nearly as clear as LDF suggests.

LDF points to a 1995 CBS poll showing that 79% of Whites but only 22% of Blacks believed Simpson was guilty. (AB 16.) Although we question what relevance polling data of this sort could ever have on the merits of a *Batson* challenge, Miles's own trial post-dates by four years,

and more recent data shows that the public's views regarding the Simpson verdict have significantly shifted over time. According to Washington Post-ABC News polls, the number of Blacks who believe Simpson was guilty more than doubled to 45% by 2007 and became a majority view of 57% by 2015. (Ross, *Two Decades Later, Black and White Americans Finally Agree on O.J. Simpson's Guilt*, Wash. Post (Mar. 4, 2016), https://www.washingtonpost.com/news/the-fix/wp/2015/09/25/black-and-white-americans-can-now-agree-o-j-was guilty/?noredirect=on&utm_term=.ddd094ef5328.)

Although Whites are still more likely than Blacks to think Simpson was guilty, it is no longer true that Blacks are *unlikely* to think he was guilty. (Ross, *supra*.) "[W]hat's noteworthy here is that both figures have reached an all-time high and are moving in the same direction." (*Ibid*.) Indeed, selection of *Miles's* jury occurred at a time when the percentage of Whites who believed Simpson guilty was *decreasing* and the percentage of Blacks who believed him guilty was *increasing*. (See *ibid*.)

LDF ignores other significant dimensions of Simpson's prosecution that split public opinion, most notably, the reputation and trustworthiness of police officers in general and the public's receptiveness or wariness towards allegations of evidence-planting and the framing of celebrity defendants. Contrary to LDF's argument, the Simpson case was not all about race.

At any rate, just as skepticism toward the criminal justice system, whatever its prevalence among African Americans. "is not exclusively associated with . . . race," neither is agreement with the Simpson verdict. (*People v. Calvin* (2008) 159 Cal.App.4th 1377, 1386.) Accordingly, "there is nothing 'inherent' in the criterion that suggests *intentional* racial discrimination." (*Ibid*. [emphasis in original].)

Put another way, if a prospective juror's "views . . . are shared by many not of his race or belonging to any racial minority," they are not "peculiar" to, and thus not a proxy for, race. (*Tolbert v. Gomez* (9th Cir. 1999) 190 F.3d 985, 989.) The views held by SG and KC were shared "by many not of [their] race or belonging to any racial minority," namely, 16% of Whites who (as of 1995) believed Simpson was not guilty. (*Ibid*.; AB 16.)

By mistakenly assuming that any use of or reference to the Simpson case is racially motivated, LDF would effectively obviate the inquiry posed under *Batson*'s third step. (AB 31-32.) At a minimum, LDF's approach would unjustifiably increase the People's third-step *Batson* burden by requiring them to rebut a false presumption. Forging the change in law urged by LDF is not warranted, and we urge the Court to decline the invitation to do so.

This Court's opinion in *People v. Melendez* (2016) 2 Cal.5th 1 is instructive. There, the prosecutor struck a Black potential juror, D.W., in part because the juror had a brother-in-law in prison. (*Id*. at p. 12.) Melendez claimed "the fact D.W. had a brother-in-law in state prison is not race neutral because more African-Americans have relatives in prison than members of other groups." (*Id*. at p. 16.) However, "[u]nder *Hernandez* [*v. New York* (1991)] 500 U.S. 352, defendant's argument that more African-Americans have relatives in prison than members of other groups, even if factually correct, does not establish that the criterion is not race neutral." (*Id.* at p. 18.)

So it is here. That more Blacks might be accepting of the Simpson verdict than members of other groups does not establish that the criterion is not race-neutral. (See also *People v. Calvin*, *supra*, 159 Cal.App.4th at p. 1386 ["We have assumed for the purpose of argument that the attitudes reflected in the jurors' questionnaire responses are common among

African-Americans and that rejecting jurors on these grounds will disproportionately exclude African-Americans as jurors. Yet that fact alone does not mean that the challenges fail the test for race neutrality"].)

In fact, the Court recently and unanimously confirmed that prospective jurors' feelings about the Simpson case can be a valid, race-neutral reason for challenging those individuals. (*People v. Smith* (2018) 4 Cal.5th 1134, 1153 & fn. 3.) In *Smith*, the prosecutor struck three Black prospective jurors, including Reginia S., based in part on their views of the Simpson case. (*Id*. at pp. 1148, 1151, 1154.)

Addressing Smith's *Batson* claim, the Court found, "The record . . . lends some support to the prosecutor's stated concern about Reginia S.'s views regarding the evidence presented in the O.J. Simpson c ase; asked on the questionnaire for her feelings about the case, she responded that '[i]f they couldn't prove he murdered Nicole, then the verdict was fair.'" (*People v. Smith*, *supra*, 4 Cal.5th at p. 1153.) This Court has "previously upheld challenges based on similar reasons." (*Ibid*., citing *People v. Mills* (2010) 48 Cal.4th 158, 184, and *People v. Winbush* (2017) 2 Cal.5th 402, 439.)

A criterion's disparate impact on minority prospective jurors may be relevant to the question of pretext. (*People v. Melendez*, *supra*, 2 Cal.5th at p. 18.) Such disparate impact does not, however, demonstrate a *Batson* violation in and of itself, especially where, as here, the prosecutor had multiple other race-neutral reasons for striking the jurors at issue. (See *ibid*.)

CONCLUSION

For the foregoing reasons and those stated in the Respondent's Brief and Supplemental Respondent's Brief previously filed in this Court, respondent respectfully requests that the judgment be affirmed in its entirety.

Dated: July 18, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWER TO AMICUS BRIEF** uses a 13-point Times New Roman font and contains **1,145** words.

Dated: July 18, 2018

XAVIER BECERRA
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Case No.: **S086234**

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 18, 2018, at San Diego, California.

B. Romero	***s/ B. Romero***
Declarant	Signature

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7/18/2018

Date

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