No. S119296 - CAPITAL CASE

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

THOMAS BATTLE,
Defendant and Appellant.

San Bernardino County Superior Court, Case No. FVI012605
The Honorable Eric M. Nakata, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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INTRODUCTION

In his opening brief, Battle contends the trial court erred in finding that he failed to make a prima facie case that the prosecutor exercised a peremptory challenge against a Black prospective juror based on her race. (AOB 50–117; Reply Br. 17, fn. 9.) In response, respondent challenged the inferences Battle sought to draw from a statistical analysis of the prosecutor's challenges and the lack of support for a prima facie case of impermissible discrimination. (RB 12–26.)

In his supplemental opening brief, Battle argues that—in light of the recent enactment of Assembly Bill AB 3070 and various criticisms of the Court's method of analyzing first-step (i.e., prima-facie-stage) cases on appeal—the Court should adopt a new approach to first-step *Batson* cases as a matter of constitutional law. This Court should reject Battle's arguments, as the Court's well-established approach to analyzing first-step claims on appeal comports with the requirement to consider "all relevant factors" to determine whether a prima facie case has been made. Applying that approach here, this Court should find that the totality of the circumstances does not give rise to an inference of discrimination in this case.

ARGUMENT

Battle argues that, in light of the enactment of AB 3070 and various criticisms of the Court's method of analyzing prima-facie-stage cases on appeal, the Court should adopt a new approach to the prima-facie requirement in *Batson* cases as a matter of constitutional law. (Supp. AOB 13–21.) AB 3070 effectively

eliminates the first step of *Batson*—the prima-facie showing requirement (see Code Civ. Proc., § 231.7, subd. (c), Stats. 2020, ch. 318). As Battle impliedly concedes, however, AB 3070 is unambiguously prospective and therefore does not apply to his *Batson* claim. (Code Civ. Proc., § 231.7, subd. (i) ["This section applies in all jury trials in which jury selection begins on or after January 1, 2022"].) Battle's reliance on AB 3070 is limited to the reform serving as a basis for this Court reformulating a new approach as a matter of constitutional law. Battle asks the Court to modify its approach in three ways:

First, he suggests the Court give more weight to the striking of Black prospective jurors in situations where the total number of Black prospective jurors stricken is low. (Supp. AOB 21–40.) Second, he contends the Court should give no weight (or perhaps less weight) to a prosecutor's acceptance or temporary acceptance of a Black juror, because prosecutors have purportedly been trained to accept Black jurors in order to avoid suspicion. (Supp. AOB 40–51.) Third, he argues the Court should abandon its practice of looking for "readily apparent" or "obvious" race-neutral reasons for striking a Black prospective juror when those reasons were never articulated by the prosecutor. (Supp. AOB 51–66.) While Battle makes policy arguments supporting his three new rules, he fails to tether those arguments to constitutional principles justifying a departure from the Court's established approach.

Battle's first proposed rule is that "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." (Supp. AOB 23.) This would greatly depart from the requirement that the trial court consider "all relevant circumstances" in assessing whether a prima facie case has been established. (See *People v. Rhoades* (2019) 8 Cal.5th 393, 429, quoting *Batson v. Kentucky* (1986) 476 U.S. 79, 96–99). California courts already consider whether the prosecutor "has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group." (*Rhoades*, *supra*, at p. 423.) However, as this Court has explained, "[a]s a practical matter, the challenge of one or two jurors can rarely suggest a pattern of impermissible exclusion" that establishes an inference of discrimination for *Batson*'s first step. (*People v. Harris* (2013) 57 Cal.4th 804, 835, citing *People v. Bonilla* (2007) 41 Cal.4th 313, 343, italics omitted; see also *Harris*, at p. 870 (conc. opn. of Liu, J.) ["Given the small number of black jurors, I agree that the prosecutor's strikes of two black jurors did not amount to a pattern that conclusively raises an inference of discrimination"]; *People v. Johnson* (2019) 8 Cal.5th 475, 542 (dis. opn. of Cuéllar, J.) [recognizing small sample sizes limit the significance of disparities, and those disparities should be considered in the context of all other relevant facts].) Battle has not reconciled his proposed categorical rule with the established requirement to consider "all relevant circumstances," nor has he provided a constitutional basis to justify abandoning that requirement. (See generally Supp. AOB 21–40.)

Battle argues that his second proposed rule—giving no weight to the prosecutor's acceptance of other Black prospective juror—is appropriate because, he alleges, prosecutors are trained to accept jurors of a cognizable class to avoid suspicion. (Supp. AOB 40–51.) As an initial matter, none of the training manuals Battle cites appear to be from the office that prosecuted him (the San Bernardino District Attorney's Office), and none of them is in the record or the subject of a motion for judicial notice. (See *People v. Wilson* (2005) 36 Cal.4th 309, 344 ["'we cannot consider on appeal evidence that is not in the record. [Citation.]'"], quoting *People v. Fairbank* (1997) 16 Cal.4th 1223, 1249.) There is also no indication that the prosecutor in Battle's case was trained with these manuals or followed them in exercising his peremptory challenges.

In any event, as this Court recently explained in *Johnson*, *supra*, "'While acceptance of one or more black jurors by the prosecution does not necessarily settle all questions about how the prosecution used its peremptory challenges, these facts nonetheless help lessen the strength of any inference of discrimination that the pattern of the prosecutor's strikes might otherwise imply.'" (*Johnson*, *supra*, 8 Cal.5th at p. 508, quoting *People v. Reed* (2018) 4 Cal.5th 989, 1000 and citing *People v. Clark* (2011) 52 Cal.4th 856, 906.) The Court further explained, "We have previously held that the prosecutor's acceptance of a jury panel including multiple African-American prospective jurors, 'while not conclusive, was "an indication of the prosecutor's good faith in exercising his peremptories, and . . . an

appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection . . . ."'" (*Johnson*, *supra*, at p. 508, quoting *People v. Hartsch* (2010) 49 Cal.4th 472, 487.) Notably, the dissenting justices in *Johnson* did not disagree with this reasoning in principle but, rather, believed it was not dispositive in that case. (*Johnson*, at p. 533 (dis. opn. of Liu, J.) ["And as for the prosecutor's acceptance of the other two black jurors on the panel, this fact may lessen but hardly dispels an inference of discrimination"]; *id.* at p. 543 (dis. opn. of Cuéllar, J.) [while the acceptance of Black jurors in this case "may '"help lessen the strength of any inference of discrimination that the pattern of the prosecutor's strikes might otherwise imply"' [citation], the lessening of the inference in this case is slight"].)

The Court's current practice of treating the acceptance or temporary acceptance of jurors from the challenged class as a nondispositive, nonconclusive indication of the prosecutor's good faith appears to strike a fair balance between Battle's concerns about possible contrary interpretations of the prosecutor's actions and the Court's role in assessing "all relevant circumstances." (*Rhoades*, *supra*, 8 Cal.5th at p. 429, quoting *Batson*, *supra*, 476 U.S. at pp. 96–97.)

Battle's third rule would foreclose any consideration of readily apparent or obvious race-neutral reasons for a prosecutor's challenge when the prosecutor did not give those reasons in the trial court. (Supp. AOB 51–66.) In recently reaffirming its practice of considering such reasons, this Court explained, "By referring to 'readily apparent' grounds for the

strikes, we do not mean merely that we can imagine race-neutral reasons the prosecutors might have given if required to do so at the second step of the *Batson* inquiry." (*Rhoades*, *supra*, 8 Cal.5th at p. 430.) But "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 p. 431, quoting *People v. Davis* (2009) 46 Cal.4th 539, 584.) "[W]hen 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." (*Rhoades*, *supra*, at p. 431.) Accordingly, "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.*, quoting *People v. Scott* (2015) 61 Cal.4th 363, 384.) Again, the Court's approach is consistent with its duty to consider "all relevant circumstances."

Finally, Battle's supplemental brief scarcely touches upon the facts of his case. His *Batson* claim is based on the prosecutor's striking of J.B., a Black prospective juror. (AOB 50, 56; Reply Br. 17, fn. 9; see also 5 RT 1123.) By the time he struck J.B., the prosecutor had struck another Black prospective juror, S.W. (5 RT 1032, 1099.) In total, the prosecutor struck two of the

three Black prospective jurors who made it into the jury box. The prosecutor did not strike those jurors right away, but rather passed on striking them after a few rounds of peremptory challenges. (4 RT 893, 1032, 1036, 1099.) Moreover, at the time of the defense's *Batson* motion, the prosecutor had exercised more than half of his peremptory challenges but had not excused E.F., another Black prospective juror who had been in the jury box from the very beginning. (5 RT 893.) Ultimately, it was defense counsel—not the prosecutor—who struck E.F.; at the time defense counsel struck E.F., the prosecutor had exercised 18 of his 20 peremptory challenges, had passed on striking E.F. every time, and twice accepted the jury with him on it. (See 4 RT 893; 6 RT 1199, 1204, 1219, 1226.) Although the resulting jury was all white, a Black juror ultimately served as an alternate. (6 RT 1263–1266; see also 8 CT 2027.)

With respect to the two Black prospective jurors the prosecutor challenged, the record reveals readily apparent, race-neutral reasons a prosecutor would want to strike them. As for S.W., during voir dire, the prosecutor asked the prospective jurors whether they had "concerns that when it actually came down to it [and] the defendant really d[id] deserve the death penalty" that they "could vote for it[.]" (5 RT 948.) S.W. answered, "I don't—I'm not sure. I don't know. It would just be too difficult. I don't know if I could do death." (5 RT 948.) When asked further questions directly, S.W. said that she did not want to "have any part of it" and did not want to do it. (5 RT 949.) The prosecution was reasonable in excusing a juror who expressed

such reluctance to impose the penalty the prosecution would be advocating.

J.B., in her questionnaire, wrote that it was "[cru]el" and "[i]nhumane" for a jury to vote for a person to be sentenced to death. (14 CT 4088.) While J.B. ultimately agreed that she could follow the law, a reasonable prosecutor might have been unconvinced given her statement during voir dire that it was "unfortunate that if it's proven that he's guilty [she has] to go along with the law" rather than by how she "feels." (5 RT 1041.) In striking J.B., the prosecutor reasonably removed a prospective juror who found it "unfortunate" to have to "go along with the law" that the prosecution sought to apply. (See, e.g., *People v. Woodruff* (2018) 5 Cal.5th 697, 747–748 [finding relevant the fact that juror, who said he had an "open mind" and had "no feeling" about the death penalty, also said he would sit on a jury if he had to, and that he could make a decision regarding the death penalty if he had to].)

For these reasons, and those set forth in the respondent's brief (RB 16–26), this Court exercising an independent review of the trial court's prima-facie-stage determination should find that the totality of the circumstances does not give rise to an inference of discrimination.

CONCLUSION

For these reasons, and those set forth in the respondent's brief, respondent respectfully requests that the judgment be affirmed in its entirety.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13-point Century Schoolbook font and contains 2,104 words.

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March 2, 2021

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STATE OF CALIFORNIA
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