IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S082101

THE PEOPLE, *Plaintiff and Respondent,* v. ROBERT BOYD RHOADES, *Defendant and Appellant.*	CAPITAL CASE Superior Court of California Sacramento County No. 98F00230 Jr. Loyd H. Mulkey

APPELLANT'S SECOND SUPPLEMENTAL REPLY BRIEF

Richard Jay Moller (SBN # 95628)
So'Hum Law Center of Richard Jay Moller
PO Box 1669
Redway, CA 95560-1669
(707) 923-9199
moller95628@gmail.com

Attorney for Defendant and Appellant ROBERT BOYD RHOADES

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A. Even If The Prosecutors May Have Had Non-Racial Reasons To Excuse The Remaining Four African-American Women, Nothing In The Record Supports The Speculation That The Prosecutors Did Not Also Harbor An Impermissible Racial Reason

The state argues that Rhoades failed to raise an inference of discrimination in this first-step *Batson/Wheeler* claim, asking this Court to speculate about the reasons the prosecutor may have had for excusing the remaining four African-American women from the jury panel. (Second Supplemental Respondent's Brief (SSRB) at 6–27; see *Batson v. Kentucky* (1986) 476 U.S. 79 *(Batson)*; *People v. Wheeler* (1979) 22 Cal.3d 258 *(Wheeler)*.) The state's position is directly contrary to *Johnson v. California* (2005) 545 U.S. 162, 171–172 & fn. 7 *(Johnson)*, which held that because the moving party will usually be without any direct evidence of discrimination at the prima facie stage, the prima facie burden is "minimal," and "not onerous." In all important respects, *Johnson* is virtually identical to the facts of this case -- and nothing the state argues alters that reality. If this Court were to accept the state's argument, it would make it more difficult to establish a prima facie case of racially-discriminatory strikes than to prove purposeful discrimination at the third step.

It does not matter that one can imagine some race neutral reason to support the excusal of a black candidate; what matters is what reasons the prosecutors actually had. (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1176 *(Gutierrez)* ["What courts should not do is substitute their own reasoning for the rationale given by the prosecutor, even if they can imagine a valid reason that would not be shown to be pretextual."].) This is true not only at the third step where the prosecutors' reasons become a factor, but at the first step:

> The existence of "legitimate race-neutral reasons" for a peremptory strike, can rebut at *Batson*'s second and third steps the prima facie showing of racial discrimination that has been made at the first step. But it cannot negate the existence of a prima facie showing in the first instance, or else the Supreme Court's repeated guidance about the minimal burden of such a showing would be rendered meaningless. (*Johnson v. Finn* (9th Cir. 2011) 665 F.3d 1063, 1071 [citation omitted].)

Johnson, *supra*, 545 U.S. at page 170, held that the Court "did not intend the first step to be so onerous that a defendant would have to persuade the judge -- on the basis of all the facts, some of which are impossible for the defendant to know with certainty -- that the challenge was more likely than not the product of purposeful discrimination." Rather, a defendant satisfies the requirements of *Batson's* first step "by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Ibid.*)

While a single inference of discrimination based on "all [the] relevant circumstances" and the "totality of relevant facts" is

sufficient to move the *Batson* inquiry to step two (*Johnson*, *supra*, 545 U.S. at p. 170*;* see *Batson*, *supra*, 476 U.S. at pp. 94, 96), there are at least half a dozen inferences in this case that support an inference of discrimination.

1. The prosecution used half of its peremptory challenges against four black women candidates for Rhoades' jury. (SSRB at 22.)

2. "Peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" (*Johnson*, *supra*, 545 U.S. at p. 169.) Because of their dual identities as African-Americans and women, black women are particularly vulnerable to discriminatory peremptory challenges. (Rhoades's First Supplemental Briefs.)

3. The prosecutors refused to explain their reasons for excusing the four black women, which *Johnson*, *supra*, 545 U.S. at page 171, footnote 6, recognized constitutes an inference of discrimination. (SSRB at 21, citing 30 RT 9022, 9046–9047.)

4. Rhoades' jury had no African-Americans on it. (SSRB at 23, citing 30 RT 9040.)

5. The trial judge stated "we are very close" under the erroneous "strong likelihood" standard, which is even more exacting than the "more likely than not" standard overruled in *Johnson*, which was one of the reasons the *Johnson* court found to support its decision that Johnson had satisfied his minimal, non-onerous burden of showing an inference of discrimination at step one. (SSRB at 25–26, citing *Johnson*, *supra*, 545 U.S. at p. 173; 30 RT 9050.)

6. The prosecution argued that there was no prima facie case because Rhoades was not black. (30-RT 9021 ["the defendant isn't

black."].) The state continues to argue this is a relevant consideration in step one analysis. (SSRB at 26.) It is not. The "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." (*Johnson*, *supra*, 545 U.S. at p. 172, quoting *Batson*, *supra*, 476 U.S. at p. 87.) Active discrimination by a prosecutor during [jury selection] condones violations of the United States Constitution within the very institution entrusted with its enforcement. (*Powers v. Ohio* (1991) 499 U.S. 400, 411–412.)

The state argues that all these inferences are trumped by the unfounded speculation that 1) the prosecutors were not influenced by racial stereotypes; and 2) the prosecutors were primarily or solely motivated by the views these jurors held about the death penalty. This Court should reject these speculations.

First, as the *Johnson* court held, "the *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." (*Johnson*, *supra*, 545 U.S. at 172 & fn. 7.)

Similarly, *People v. Sanchez* (2016) 63 Cal.4th 411, 435–436 & fn. 5, citing *People v. Scott* (2015) 61 Cal.4th 363, 390, held that "a reviewing court may not rely on a prosecutor's statement of reasons to support a trial court's finding that the defendant failed to make out a prima facie case of discrimination … because an

inference of discrimination rises or falls based on the circumstances in the record." A fortiori, a reviewing court may not rely on possible reasons the prosecutors might have had for excusing these four black women from Rhoades' jury now asserted by the state. (SSRB at 25.) Otherwise, the burden of proof at the first step becomes "meaningless." (*Johnson v. Finn*, *supra*, 665 F.3d at p. 1071.)

Second, the fallacy of a court making up reasons the prosecutor might have had erroneously presumes the prosecutor has not been influenced by the impermissible racial attitudes prevalent in our society.

Third, making up reasons to support the prosecutors' strikes undermines the process contemplated by *Batson*. Whether or not a prosecutor acknowledges his discriminatory reasons for excusing black female jurors, the entire foundation of *Batson* is that a trial judge is in the best position to evaluate prosecutors' reasons and determine whether they are pretextual. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 252 *(Miller-El II)*.) Of course, when prosecutors refuse to give their reasons, even when asked, the trial judge cannot make any factual findings about whether the prosecutors have been influenced by racial and gender stereotypes, such as black women are less likely to render death verdicts. To reiterate, the *Johnson* court has found this "unlikely" circumstance to support an inference of discrimination at step one. (*Johnson*, *supra*, 545 U.S. at p. 171, fn. 6.)

This point is especially relevant because only one impermissible reason requires reversal under *People v. Douglas* (2018) 22 Cal.App.5th 1162, 1172–1176. The state argues that whether the prosecutor had a mixed motive is irrelevant "because

this case involves a first-stage *Batson/Wheeler* challenge "where the prosecutors declined to provide their reasons for excusing the African-American jurors." (SSRB at 9–10, 20–21.) Here, the court applied the erroneous "strong likelihood" standard in refusing to ask the prosecutors their reasons for their strikes. The record in this case is simply inadequate to allow this Court to conclude that the prosecutor had no impermissible motive or was not motivated by race in striking these jurors, in part because the prosecutors refused to give *any* reasons for their challenges to these four African-American women. (SSRB at 21.) Of course, *Batson* may be violated by even a single discriminatory challenge. (*Foster v. Chatman* (2016) 578 US __, __, 136 S.Ct. 1737, 1747, 195 L.Ed.2d 1.)

Establishing an equal protection violation "does not require [proof] that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a . . . decision [was] motivated by a single concern or even that a particular purpose was the 'dominant' or 'primary' one. . . . When there is proof that a discriminatory purpose has been a motivating factor in the [governmental] decision, [that is enough]." (*Arlington Heights v. Metro. Hous. Dev.* (1977) 429 U.S. 252, 264; *Miller-El II*, *supra*, 545 U.S. at p. 265 [same].)

Finally, as Justice Marshall cautioned "[a]ny prosecutor can assert facially neutral reasons for striking a juror," and if courts accept these post hoc rationalizations, "the protection erected by the Court today may be illusory." (*Batson*, *supra*, 476 U.S. at p. 106 [conc. opn. of Marshall, J.].)

The position argued by the state would make it *more* onerous to establish an inference of discrimination at the first step than

establishing proof of discrimination at the third step. This is exactly backwards and explains why this Court should reject the state's argument that the record unequivocally establishes that prosecutors had race-neutral reasons to excuse these four female black jurors and its speculation that they had no impermissible discriminatory reasons for doing so.

The state concedes that this Court has approved comparative juror analysis at step one under *Batson*, and proceeds to conduct such an exegesis, even though the trial court refused Rhoades' request to explore comparative analysis during jury selection. (SSRB at 15–20; 30-RT 9036–9038, 9046–9048.) In response to the state's post-hoc effort to justify these strikes, Rhoades highlights his briefing showing that the record does not establish that race-neutral reasons were the only possible explanation for the prosecution's excusal of these four black women candidates, while accepting other jurors with similar views to sit in judgment of Rhoades. (See AOB at 180–196.)

In her juror questionnaire, Ms. Rakestraw, who listened to Rush Limbaugh, gave pro-prosecution responses such as: "I could not advocate letting a known guilty person go free under any circumstances." (23-CT 6868, 6885.) She believed that "the criminal justice system makes it too hard for the police and prosecutors to convict people accused of crime." (23-CT 6886.) She believed that the death penalty should be reserved for "premeditated, planned murder." She believed that the death penalty sometimes serves as a deterrent. (23-CT 6895.) She believed that LWOPP was more of a punishment than the death penalty. (23-CT 6897.) She later explained her answer that she

would always vote for LWOPP, given the choice between life and death, and said she could vote for death. (23-CT 6897; 24-RT 7666–7667.)

Ms. Ayers disagreed strongly with the proposition that it is better to let some guilty people go free than to risk convicting the innocent, believing in the appeal process. (22-CT 6429.) Ms. Ayers strongly agreed with the proposition that prison inmates who have been convicted of horrible crimes receive too many luxuries in prison. (22-CT 6429; see AOB at 181–183.) Ms. Ayers was moderately against the death penalty in principle. (22-CT 6438–6440.) Ms. Ayers, however, believed the death penalty should be imposed "if the act was premeditated," or it was an intentional killing. (22-CT 6440–41.) Ms. Ayers believed the death penalty is imposed "about right." (22-CT 6441; see AOB at 183–185.)

Ms. Spruill believed that the death penalty could be appropriate for all kinds of killings. (27-CT 7808.) Ms. Spruill believed the death penalty was imposed "about right." (27-CT 7808.) She believed that neither death nor LWOPP was the appropriate sentence in all cases. (27-CT 7808–10; AOB at 185–186.)

Ms. Richard thought the death penalty was acceptable in some cases, though imposed "randomly." (28-CT 8375, 8378.) In determining death or LWOPP, "the facts surrounding the event are important." (28-CT 8379; AOB at 187–188.)

In contrast, the prosecution accepted juror # 149 after she assured him she could chose death if she formed a "strong opinion." (26-RT 7830.) She believed the death penalty was

warranted in murder cases, depending upon the circumstances, particularly serial killers and parents who kill their children. (19-CT 5677–78, 5680–81; AOB at 188–189.)

The prosecutor accepted juror # 142 after she assured him she could chose death and be fair to both sides. (25-RT 7738, 7740–7741; 20-CT 5714.) If this woman had been black, the prosecutors would at least have had several reasons to challenge her, given her belief that victim impact evidence and the age of the victim and the defendant's past crimes would not be important to consider. (20-CT 5726.) The fact this woman remained on the jury, while black women with less surprising and objectionable answers were peremptorily excused, raised an inference of prejudice. (AOB at 190.)

Juror # 74 (4) was not in favor of the reinstatement of the death penalty, because it cost too much money. (20-CT 5809.) She believed the death penalty should be reserved for "international" crimes, mass murderers and serial killers. (20-CT 5810–11.) When presented with a list of possibilities, she also believed death would be appropriate for intentional killings, killing a child, killing of two or more people, and torture. (20-CT 5812; AOB at 191.) The four excused black prospective jurors did not hold such limiting beliefs about the death penalty.

Juror # 111 (5) thought the death penalty should be used sparingly. (20-CT 5853.) He believed the death penalty should be reserved for execution-style murders and murders for hire. (20-CT 5854.) When presented with a list of possibilities, he also believed death would be appropriate for intentional killings, killings with a gun, killing of two or more people, and torture.

(20-CT 5856; AOB at 191–192.) This white male juror's moderate and temperate views about the death penalty were no less moderate than the views of the challenged black women.

Juror # 86 (9) was mildly supportive of the death penalty for most killings. (21-CT 6027–30.) He wrote that he did not "know which is worse, the death penalty or life without parole." He stated: "Me, personally, I wouldn't want to spend the rest of my life in jail. . . . but I wouldn't want to be executed either. . . both punishments, in my mind, are on an even keel." (24-RT 7444; AOB at 193–194.)

While Rhoades agrees that he excused two black prospective jurors, this in no way excuses or justifies the prosecutors' impermissible strikes of black jurors based on racial and gender group bias. (SSRB at 21–26.) The propriety of the prosecution's peremptory challenges must be determined without regard to the validity of the defendant's own challenges. (See ARB at 39, fn. 3, citing *People v. Snow* (1987) 44 Cal.3d 216, 225; *Wheeler*, *supra*, 22 Cal.3d at p. 283, fn. 30.)

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

Rhoades agrees with the state that because the penalty phase jury was selected anew after the guilt phase jury could not reach

a decision on the appropriate penalty, the *Batson/Wheeler* error here would not require a reversal of his convictions, but only a reversal of his death sentence. (SSRB at 28–29.)

If this Court finds *Batson* error, the state, however, urges this Court to remand for a further hearing. (*Ibid.*) Rhoades believes that in light of the 20-year lapse of time since jury selection, in addition to the death of the trial judge, remand would be futile because there is no "realistic possibility" that the prosecutors' reasons for exercising these four strikes "could be profitably explored further on remand at this late date." (See *Snyder v. Louisiana* (2008) 552 U.S. 472, ___, 128 S.Ct. 1203, 1212, 170 L.Ed.2d 175 [no remand after reversal at step three of *Batson*].)

CONCLUSION

Rhoades respectfully requests this Court to honor the holding of *Johnson*, which held that the trial court erred in not finding a prima facie case at step one of the *Batson* inquiry, in part because the trial court believed the issue was very close under the erroneous "more likely than not" standard, which is virtually indistinguishable from Rhoades' case, where the trial court also found the *Batson* issue "very close" under the even more erroneous "strong likelihood" standard.

Respectfully submitted,

Dated: May 14, 2019

By: /s/ Richard Jay Moller

Attorney for Defendant and Appellant ROBERT BOYD RHOADES

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San Quentin, CA 94974

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Superior Court
720 9th Street
Sacramento, CA 95814

Sutter County District Attorney
446 Second Street, Courthouse
Yuba City, CA 95991

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aherron@capsf.org

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Moller, Richard (95628)
Last Name, First Name (PNum)

So'Hum Law Center of Richard Jay Moller
Law Firm