In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JAMELLE EDWARD ARMSTRONG,

Defendant and Appellant.

CAPITAL CASE

Case No. S126560

Los Angeles County Superior Court Case No. NA051938
The Honorable Tomson T. Ong, Judge

SECOND SUPPLEMENTAL RESPONDENT'S BRIEF

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INTRODUCTION

On November 14, 2017, appellant filed a third supplemental brief ("TAOB") setting forth recent case development in *Batson/Wheeler*[1] analysis in *Foster v. Chatman* (2016) 578 U.S. ___, 136 S.Ct. 1737 (*Foster*), and *People v. Gutierrez* (2017) 2 Cal.5th 1150 (*Gutierrez*). Appellant notes that *Foster* reemphasized the principles of *Batson* and that *Gutierrez*, while not changing the case law on *Batson/Wheeler*, clarified the duties of lawyers, trial judges, and appellate judges. (TAOB 5.) Applying these principles, appellant argues that the prosecutor's reasons for excusing the four Black prospective jurors were "pretextual, and at times utterly fantastical" and that such conclusion is supported by comparative juror analysis. He also argues the trial court's ruling is not entitled to deference as the court "failed to conduct a reasoned and sincere inquiry" into the prosecutor's reasons. (TAOB 13-14.) To the contrary, the prosecutor's justifications were credible, and the trial court's rulings are entitled to deference.

ARGUMENT

THE TRIAL COURT'S RULINGS, MADE AFTER REASONED EFFORTS TO EVALUATE THE PROSECUTOR'S NONDISCRIMINATORY JUSTIFICATIONS, ARE ENTITLED TO DEFERENCE, AND APPELLANT'S *BATSON*/*WHEELER* MOTIONS WERE PROPERLY DENIED

At trial, appellant made four *Batson/Wheeler* motions relating to the prosecutor's peremptory challenges to four Black men, prospective jurors S.L., R.C., E.W., and R.P. The trial court found a prima facie case of discrimination was not shown as to S.L. and R.C., but was shown as to E.W. and R.P. The prosecutor then offered her reasons for the peremptory

[1] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

challenges as to all four jurors, which the trial court determined were race-neutral. In his third supplemental brief, appellant argues the prosecutor's reasons for excusing these prospective jurors were "pretextual, and at times utterly fantastical" and that such conclusion is supported by comparative juror analysis. He also argues the trial court's ruling is not entitled to deference as the court "failed to conduct a reasoned and sincere inquiry" into the prosecutor's reasons. (TAOB 13-14.) To the contrary, the trial court's rulings are entitled to deference. The court conducted a reasoned and sincere inquiry into the prosecutor's reasons, which were supported by the record.

In *Foster*, *supra*, 136 S.Ct. 1737, Foster's trial occurred "months" after *Batson* was decided. (*Id*. at p. 1755.) Foster's *Batson* claim was denied by the state's high court on appeal, and the Supreme Court denied certiorari. (*Id*. at p. 1743.) Later, Foster filed a writ of habeas corpus in the superior court. This time, he obtained a copy of his trial file from the prosecution. (*Id*. at pp. 1743-1744.) Although "genuine questions" remained "about the provenance" of some of the documents in the file, the state habeas court found the file was admissible, while "reserving 'a determination'" as to the weight of each document. (*Id*. at p. 1748.) The Supreme Court agreed with the state habeas court's approach:

> We have "made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, *all of the circumstances* that bear upon the issue of racial animosity must be consulted." *Snyder* [*v. Louisiana*], 552 U.S. [472,] 478 [(2008)]. As we have said in a related context, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available." *Arlington Heights v.*

Metropolitan Housing Development Corp., 429 U.S. 252, 266 [ ] (1977).

(*Id*. at p. 1748, italics added, ellipses original in *Foster*.)

The Supreme Court considered *Batson*'s third step analysis as to two Black prospective jurors and concluded that the trial court's factual findings were not entitled to deference because they were "clearly erroneous." (*Foster*, *supra*, 136 S.Ct. at p. 1747; see *id*. at p. 1754 [prosecutor's proffered reasons for striking the two prospective jurors applied to "an otherwise-similar nonblack" prospective juror who was permitted to serve; there were "also the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file"].)

In *Gutierrez*, *supra*, 2 Cal.5th 1150, three Hispanic defendants made a *Batson*/*Wheeler* motion after the prosecutor exercised 10 out of 16 peremptory challenges to remove Hispanic individuals from the jury panel. (*Id*. at p. 1154.) The trial court found that defendants had established a prima facie case of discrimination and asked the prosecutor to explain his reasons for exercising the strikes. With respect to prospective juror number 2723471, the prosecutor explained that he struck her because she lived in Wasco but "was not aware of any gang activity going on in Wasco," and he was "unsatisfied by some of her other answers as to how she would respond" when she heard that a prosecution witness was from a criminal street gang in Wasco. (*Id*. at p. 1160.) The record showed that the prosecutor asked prospective juror 2723471 three questions, including whether she had been aware of gangs operating in Wasco. He did not ask any follow up questions on the subject. The prosecutor did not explain what "other answers" he was referring to in justifying his use of the peremptory challenge. (*Ibid*.) The trial court found that the prosecutor's race-neutral explanation for striking juror number 2723471 was credible. Noting that that the prosecutor had passed several times with juror number

2723471 still on the panel, the court stated that the juror had been "excused as a result of the Wasco issue and also lack of life experience." The prosecutor, however, never mentioned a lack of life experience as a reason for exercising a challenge against juror number 2723471. (*Id*. at p. 1161).

This Court found that the prosecutor's Wasco reason was "facially neutral." (*People v. Gutierrez*, *supra*, 2 Cal.5th at p. 1168.) In proceeding to the third step of the *Batson/Wheeler* inquiry, this Court highlighted that "[a]dvocates and courts both have a role to play in building a record worthy of deference." (*Id*. at p. 1171.) "Some neutral reasons for a challenge are sufficiently self-evident" and "require little additional explication" by the prosecutor. (*Ibid*.) But when the prosecutor's reasons are not self-evident, "the question of whether a neutral explanation is genuine and made in good faith becomes more pressing." (*Ibid*.) Such a concern is of particular import when the prosecutor has used "a considerable number of challenges to exclude a large proportion of members of a cognizable group." (*Ibid*.)

The trial court also "has its own obligations" under *Batson/Wheeler*: "'When the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient.' [Citation.]" (*People v. Gutierrez*, *supra*, 2 Cal.5th at p. 1171, internal brackets omitted.) Even as appellate courts "exercise great restraint in reviewing a prosecutor's explanations and typically afford deference to a trial court's *Batson/Wheeler* rulings," meaningful review is not possible without a record containing "evidence of solid value." (*Id*. at p. 1172.) "It is the duty of courts and counsel to ensure the record is both accurate and adequately developed." (*Ibid*.)

This Court found that the prosecutor's stated justification for challenging juror number 2723471 was "far from self-evident" (*People v. Gutierrez*, *supra*, 2 Cal.5th at p. 1171), as "[i]t is not evident why a

panelist's *unawareness* of gang activity in Wasco would indicate a bias against a member of a gang based in Wasco" (*id*. at p. 1169, italics in original). Also, the prosecutor asked prospective juror number 2723471 no follow up questions after ascertaining that she was unaware of gang activity in Wasco, including no questions about "how she would react if she heard that a member of a Wasco gang would testify in this case." (*Id*. at pp. 1169-1170.) The prosecutor's "brief questioning of this panelist failed to shed light on the nature of his apprehension or otherwise indicate his interest in meaningfully examining this topic." (*Id*. at p. 1171.) Additionally, juror number 2723471 was struck despite the fact that she had relatives in law enforcement, a characteristic the prosecutor considered "as an offsetting force" against other characteristics he viewed as negative. (*Id*. p. 1170.)

This Court concluded that the record failed to demonstrate that the trial court made a reasoned attempt to determine whether the prosecutor's explanation for striking juror number 2723471 was credible:

> The [trial] court here acknowledged the "Wasco issue" justification and deemed it neutral and nonpretextual by blanket statements. It never clarified why it accepted the Wasco reason as an honest one. Another tendered basis for this strike, the reference to the prospective juror's "other answers" as they related to an expectation of her reaction to [the prosecution witness], was not borne out by the record—but the court did not reject this reason or ask the prosecutor to explain further. In addition, the court improperly cited a justification not offered by the prosecutor: a lack of life experience. . . . Because the prosecutor's reason for this strike was not self-evident and the record is void of any explication from the court, we cannot find under these circumstances that the court made a *reasoned*

attempt to determine whether the justification was a credible one.

(*People v. Gutierrez*, *supra*, 2 Cal.5th at pp. 1171-1172, italics original.)

In contrast, here, substantial evidence supports the trial court's findings that the prosecutor's peremptory challenges against prospective jurors S.L., R.C., E.W., and R.P. were race-neutral. As to prospective juror S.L., the prosecutor offered the following reasons for exercising the strike: S.L. believed life without the possibility of parole ("LWOP") was the most severe sentence for a defendant; he believed whether a person had made "hateful decisions" would affect whether he would impose the death penalty; he believed LWOP would be better for someone who had committed the crime for the first time; he would require the prosecutor to prove all the special circumstances for a death verdict; he believed rehabilitation was important; and he said he would probably vote for LWOP if he believed the person would not commit crimes again. (16RT 3383-3385.) The prosecutor questioned prospective juror S.L. extensively on his views about the death penalty. (9RT 1732-1746.) She even challenged him for cause. (9RT 1752-1755.) While the court denied the challenge, it noted, "[I]t's a close call." (9RT 1756-1757.) Later, in finding that the defense had failed to make a prima facie showing of racial discrimination, the court noted that the prosecutor's motive to excuse S.L. was based on her "perceived perception of this juror's inability to be able to impose death at the penalty phase." (15RT 3224.) After the court found a prima facie showing was made as to prospective juror E.W. and the prosecutor tendered her reasons for her peremptory challenge to S.L., the court referred to its prior finding. (16RT 3385.)

As to prospective juror R.C., the prosecutor's strike was based on his lack of an opinion on the death penalty and on which penalty was worse, his unwillingness to set aside his beliefs, his failure to answer questions or

to answer them in a confusing manner, and what the prosecutor perceived to be a personality conflict with her. (16RT 3385-3394.) She questioned him extensively on his views about the death penalty. (11RT 2279-2283, 2290-2301, 2303-2305.) Their antagonistic exchanges were also evident on the record. (See RB 108-115.) She also challenged him for cause. (11RT 2318-2320.) While the court denied the challenge for cause, the court noted that R.C. was "not very keen to answering questions in the theoretical sense or in the abstract." (11RT 2321.) Later, in finding that the defense had failed to make a prima facie showing of racial discrimination, the court noted that R.C. had declined to answer the prosecutor's questions and left many of his answers on the questionnaire blank. The court also noted that the prosecutor and the juror "simply did not click." (16RT 3322-3323.) After the prosecutor tendered her reasons for her peremptory challenge to R.C., the court agreed that R.C. did not respond to questions and had "a lot of friction" with the prosecutor. (16RT 3394.)

As to prospective juror E.W., the prosecutor's strike was based on her belief that he would not impose the death penalty. (16RT 3375-3380.) E.W. had stated in his questionnaire that he believed LWOP was worse for the defendant and the worse punishment. (6CT 1580, 1585.) She questioned him extensively on the topic. (12RT 2405-2414, 2417-2421, 2423-2424.) E.W. stated that he did not have an opinion on the death penalty, but that it needed reform. (12RT 2411-2412.) In explaining her reason for the strike, the prosecutor noted that she had exercised her peremptory challenges on those who could not "say that they believe in the death penalty." (16RT 3378.) Noting that "none of the other jurors up on that panel right now have indicated life without the possibility of parole is the most severe sentence, with the exception of one who has indicated it is both," the prosecutor stated, "[t]hat was my primary motivation for exercising the peremptory challenge." (16RT 3381-3382.) In evaluating

the prosecutor's strike, the court acknowledged that the prosecutor's consistent challenge of "folks who cannot impose the death penalty or feel that life without parole is the most severe sentence" was a race-neutral reason. (16RT 3382.)

As to prospective juror R.P., the prosecutor's strike was based on her belief that he would not impose the death penalty. (16RT 3456-3463, 3470-3473.) R.P. had stated in his questionnaire that he believed LWOP was the worse punishment and that the death penalty was sometimes overused. (6CT 1628-1630, 1634-1635.) The prosecutor questioned him extensively on his views about the death penalty. (14RT 2880-2883, 2886-2900.) R.P. was concerned that some states had declared a moratorium on the death penalty and some convicts had been released due to DNA evidence. (14RT 2880-2882.) He was also concerned about the number of Black people on death row compared to other groups. (14RT 2893-2896.) Also, R.P., who had served as a juror on two cases including a murder case, said he found "judg[ing] your fellow man" to be "disturbing." (14RT 2885.) In evaluating the prosecutor's strike, the court cited three reasons: R.P.'s concern over judging another person; R.P.'s opinion that the death penalty was overused and that a moratorium had been declared in another state; and R.P.'s concern that there were a disproportionate number of Blacks on death row or prison. (17RT 3535-3538.)[2]

In each of these instances, the prosecutor did not rely upon any justification that was not supported by the record, and the trial court did not

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[2] Before finding that the prosecutor's reasons were race-neutral, the trial court initially granted the motion because it believed R.P. could impose the death penalty. The prosecutor argued that the court was applying the wrong standard and that whether the court believed R.P. could impose the death penalty was not the issue. After multiple hearings, the court vacated its previous ruling and found the prosecutor's reasons were race-neutral. (See RB 124-127.)

rely upon any justification not advanced by the prosecutor. Indeed, the prosecutor's concern about these prospective jurors' ability to impose the death penalty constitutes a "self-evident" reason for exercising peremptory challenges against them and required "little additional explication." (*People v. Gutierrez*, *supra*, 2 Cal.5th at p. 1171; see *People v. McDermott* (2002) 28 Cal.4th 946, 970-971 ["A prospective juror's views about the death penalty are a permissible race and group-neutral basis for exercising a peremptory challenge in a capital case"].) And because the trial court made a sincere and reasoned effort to evaluate the prosecutor's race-neutral justifications for exercising peremptory challenges against these prospective jurors, its conclusion that those justifications were credible and genuine is entitled to "considerable deference." (*People v. Howard* (1992) 1 Cal.4th 1232, 1155; see also *People v. Gutierrez*, *supra*, at p. 1159.) Moreover, as previously discussed, comparative juror analysis as to these prospective jurors showed that the prosecutor's explanations were genuine. (RB 139-143 [E.W. and R.P.]; SRB[3] 10-16 [S.L. and R.C.].) Because substantial evidence supports the trial court's findings regarding the absence of purposeful discrimination, its rulings must be affirmed. (*People v. Johnson* (2015) 61 Cal.4th 734, 755.)

[3] "SRB" refers to respondent's supplemental brief filed on March 15, 2016.

CONCLUSION

For the stated reasons, respondent respectfully asks that the judgment be affirmed.

Dated: December 28, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached SECOND SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 2,691 words.

Dated: December 28, 2017

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

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I declare:

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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 December 28, 2017, at Los Angeles, California.

Frances Conroy
Declarant

Signature

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