IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT NEWBORN'S SUPPLEMENTAL REPLY BRIEF

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

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Appellant replies to Respondent's Supplemental Brief as follows.

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 Relevance of Flowers v. Mississippi to this Court's Review of the Sufficiency of a Prima Facie Showing of Discrimination Under Batson-Wheeler.

Respondent opposes the incorporation of the factors enumerated in Flowers v. Mississippi (2019) __ U.S. __, 139 S.Ct. 2228 into this Court's review of claims regarding the sufficiency of prima facie showings under Batson-Wheeler. Supplemental Respondent's Brief, p. 7 (hereafter "SRB"). Respondent's rationale for this position is that "Flowers is a step 3 case

and does not hold that the enumerated factors are to be applied at step 1." Ibid. Respondent thereafter concludes that "[c]ontrary to appellant's assertion (see ANSB 9-10), the high court did not suggest that these factors were relevant in the determination of whether a prima facie case of racial discrimination has been established." Ibid (emphasis in original). Respondent fails to recognize that the Flowers discussion of the six particularly relevant categories of evidence occurred during a review of the Batson process as a whole, not limited to a particular step.

Flowers began its analysis with a review of broad principles governing Batson regarding "evidentiary and procedural issues" in Batson:

> First, what factors does the trial judge consider in evaluating whether racial discrimination occurred? Our precedents allow criminal defendants raising Batson challenges to present a variety of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race. For example, defendants may present:
>
> • 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 in the case;
>
> • 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. 139 S.Ct at 2243.

Read in context, the Supreme Court provided an illustrative list of categories of evidence relevant to the process as a whole for determining whether a discriminatory use of peremptory challenges had occurred. Nothing in the Supreme Court's statements suggested that the enumerated categories of evidence were relevant only at the step 3 stage of Batson analysis, and not at the step 1 prima facie review.

There is no credible rationale to support respondent's position that the Supreme Court's enumeration of relevant categories of evidence regarding discrimination should only apply to the step 3 analysis and not to step 1 analysis (and respondent does not offer one). The same substantive issue is present at Batson step 1 and Batson step 3, the only difference is the applicable burden of proof, not the substantive question involved. At step 1, the objector must provide sufficient evidence from the record to support an inference of discriminatory intent. At step 3, the objector must establish discriminatory intent by a preponderance of the evidence. The categories of evidence relevant to step 1 and step 3 are identical, and the only difference is the different burden placed on the objector. Therefore, appellant reiterates his argument that this Court should incorporate the categories of evidence enumerated in Flowers to this and every other Batson-Wheeler cases before it.

B. The Utility and value of Comparative Juror Analysis at the Step 1 Prima Facie Determination.

Next, respondent notes this Court's longstanding reluctance to conducting comparative juror analysis at step 1 of Batson, SRB 8, while noting that People v. Rhoades (2019) 8 Cal.5th 393, 432, fn. 17 has acknowledged its utility at Step 1.

Rhoades correctly recognized that "comparative juror analysis has a role to play 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 prosecution exercised its strikes in a biased manner." 8 Cal.5th at 432, fn. 17.[1] Respondent is correct that "neither the trial court nor the prosecutor stated reasons regarding the challenged jurors" in this case, SRB 8-9, and has attempted to fill that void by pointing out characteristics and/or attitudes that constitute purportedly "readily apparent reasons for the strikes that dispel the inference of bias." Rhoades at 431. Now, this Court has the task of assessing whether respondent's proffered reasons are in fact "self-evident," People v. Gutierrez (2017) 2 Cal.5th 1140, and so "readily apparent" that "any reasonable prosecutor would logically avoid in a juror." Rhoades at 431.

When this Court reviews either respondent's proffered race neutral reasons for challenged strikes, or its own proffered reasons, a very handy method of determining whether the reasons under consideration are "readily apparent" and "self-evident" dealbreakers or disqualifiers from a prosecutorial perspective is comparative juror analysis. If the prosecutor in the case at bar accepted one or more seated jurors who share the same characteristic that is under consideration, that characteristic loses steam very quickly as a "self-evident" and "readily-apparent" disqualifier of the struck juror.

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[1] The corollary to that proposition is that "comparative juror analysis has an equally important role to play as an aid in determining whether the reasons we are able to identify on the record do not help to dispel an inference that the prosecution exercised its strikes in a biased manner."

In sum, once respondent argues against a prima facie case on the basis of self-evident/readily apparent reasons for the strikes, this Court's evaluation of these reasons should consider whether jurors with the same characteristic or attitude were allowed to sit. In this case, that comparative juror analysis undermines respondent's reliance on the proffered reasons.

C. Respondent's Misguided Contention that Comparator Juror Analysis Only Includes Comparisons to White Seated Jurors, Not to All Seated Jurors.

Respondent next makes an unfounded argument that "[c]omparative juror analysis compares the responses of the challenged prospective jurors with those of the seated jurors who were not members of the challenged jurors' cognizable group." SRB 9 (emphasis in original), citing People v. Miles (2020) 9 Cal.5th 513, 541, and other cases.

Respondent misses the of comparative juror analysis. The point of prospective juror analysis is to determine whether a putative reason for a challenged strike was consistently applied, i.e., where the putative reason applied only to struck jurors and not to seated jurors. Respondent's effort to limit comparative juror analysis to seated jurors who were not members of the challenged jurors cognizable group is entirely illogical. That is clear from the description of the basic principle of comparative juror analysis in Rhoades:

> This case illustrates the utility of juror comparisons in conducting our independent appellate review of the first stage determination. By comparing the excused jurors to those the prosecutor retained on the identified characteristics, we test the hypothesis that these characteristics were distinct enough to account for the challenge and dispel any inference of bias. 8 Cal.5th at 432, fn 17.

The focus of the inquiry is to "compar[e] the excused jurors to those the prosecutor retained on the identified characteristics." It does not matter whether the prosecutor retained White jurors with the identified characteristic or retained Black jurors with the identified characteristic or both. The fact that the prosecutor retained any jurors with the identified characteristic supports an inference that the identified characteristic did not play a significant role in the prosecutor's selection strategy.

In sum, if the identified characteristic purports to be a dealbreaker that for "any reasonable prosecutor trying the case would logically avoid in a juror," then it should be a dealbreaker of equal force for jurors of any race. Respondent has declined to accept that logic and has declined to address petitioner's comparative juror arguments related to seated Black female jurors. SRB 9-10. Appellant urges this Court to apply the comparative juror analysis in the logical manner described in Rhoades.

Respondent purports to find support for this illogical view in Miller El v. Dretke (2005) 545 U.S. 231, 241, SRB 10, but that support is illusory. The comparative juror analysis conducted in Miller El did make a pointed comparison between the prosecutor's reason for striking Black jurors that "applie[d] just as well to an otherwise-similar non-Black who is permitted to serve." Nothing in that analysis suggests that inconsistent application of a prosecutor's proffered reason for striking a Black panelist to a variety of seated jurors, Black and non-Black, in any way dilutes the inference of pretext. As a practical matter, comparative juror analysis frequently involves the prosecutor's inconsistent use of a particular characteristic between Black jurors who are struck and White jurors who are seated. That is largely attributable to (1) the low proportion of Black jurors in the

venire; and (2) the frequency with which the prosecutor strikes all Black jurors, leaving no seated Black jurors available for comparative juror analysis.

That typical scenario does not in any way lessen the inference of discrimination where a putative reason to strike a challenged Black juror was not used to strike seated jurors who are White, Black, and/or other.

D. Respondent's Unavailing Effort to Neutralize the Indisputable Fact that Many Seated Jurors Shared the Purported Disqualifying Characteristics of the Struck Jurors.

Appellant has demonstrated in his Argument I-B-4 that several of respondent's proposed reasons for striking Black female jurors were shared by other seated jurors. That showing undercuts support for respondent's contention that the cited reasons constitute "readily apparent" reasons for the strikes.

Respondent attempts to neutralize the results of the comparative juror analysis by shifting focus from the shared characteristics of the seated and challenged jurors (that respondent proposed as the readily apparent dealbreaker) to other characteristics of the seated and challenged jurors. Under the aegis of People v. Miles, supra, respondent launches a campaign to persuade the Court that the characteristic proposed as a readily apparent dealbreaker for the struck jurors that was not a dealbreaker for the seated jurors because other characteristics of the seated jurors could conceivably have compensated for the otherwise deal-breaking effect of the proposed characteristic. Respondent expends eight pages, SRB 9-17, fly-specking the struck jurors versus the seated jurors to make a case that a reasonable prosecutor could have concluded that the seated jurors managed to have dodged the bullet of the deal-breaking

characteristic by virtue of other characteristics that lifted them into the zone of acceptability.

Respondent's approach fails for a number of reasons. First and foremost, Miles is a Step 3 Batson-Wheeler case in which the prosecutor's stated reasons on the record, i.e., there were actual reasons to be evaluated, not merely the hypothetical reasons proffered considered in pre-Johnson Step 1 review cases like this one. Where the prosecutor has given actual reasons, the reviewing court has the clear task of determining whether those reasons hold up in light of the entire record, including comparative juror analysis.

Second, Miles was explicit that in conducting comparative juror analysis in the course of appellate review, the proposed compensating characteristics of the seated jurors had to be "material" factors, not merely colorable or arguable factors.

In the context of reviewing a pre-Johnson Step 1 denial, the proposed compensatory characteristics would have to be as "self-evident" and "readily apparent," e.g., "material," as the proposed deal-breaking characteristics. Otherwise, the review process is eviscerated of substance in the following manner. Respondent proposes a particular characteristic of the struck juror as a readily apparent reason for the strike. Assume that comparative juror analysis renders the proposed characteristic not so "readily apparent" because it is shared by multiple seated jurors.

To overcome the doubt cast on the proposed reason, respondent must be required to identify a self-evident and readily apparent reason why the seated juror is so clearly pro-prosecution that any reasonable prosecutor would keep the seated jury notwithstanding the onus of

sharing a putative deal-breaking characteristic with the struck juror. Respondent has failed to identify any such readily apparent pro-prosecution characteristics and instead slogs through a litany of merely colorable or arguable distinctions between the struck juror and the seated jurors.

Thus, respondent invites the Court to enmire itself in "the imprecision of relying on judicial speculation to resolve a plausible claim of discrimination." People v. Battle (2021) __ Cal.5th __, 2021, Lexis 4444, *119, Lie, J., dissenting, citing Johnson v. California (2005) 545 U.S. 162, 173. Appellant urges the Court to reject this invitation and accept that respondent's "readily apparent reasons for the strikes [are] in close inspection, not so readily apparent at all." People v. Battle at * 119-120.

E. Respondent's Unavailing Effort to Neutralize the Inference of Discrimination from the Prosecutor's Lack of Voir Dire.

Respondent argues that no inference of discrimination can be drawn from the prosecutor's lack of meaningful voir dire as to four of the struck jurors. SRB 16-17. Respondent asserts that appellant's contention is "undercut by his ability to allege less than meaningful voir dire as to all of the challenged jurors." (emphasis in original) Respondent's position is undercut by the undeniable fact that the prosecutor failed to conduct meaningful voir dire as to most of the struck jurors. The inference of discrimination urged by appellant would be marginally stronger if the prosecutor had failed to conduct meaningful voir dire of all six struck jurors as opposed to only four of the struck jurors, but the fact that the majority of struck jurors were not subject to meaningful voir dire weighs in favor of an inference of discrimination.

Respondent also argues that no inference of discrimination should be drawn from the prosecutor's voir dire because "the trial court did not allow the attorneys to conduct general voir dire." SRB 17. Rather, "the trial court only allowed specific follow-up questions based on the responses in the questionnaires in the court's voir dire." Ibid. Respondent misses the point that a prosecutor in that situation would have had significant incentive to focus his limited voir dire on areas of concern raised in the questionnaire or voir dire to determine whether to make a possible strike.

Given that the trial court put limits on the voir dire, this Court should presume that the prosecutor expended its limited voir dire time cutting to the chase on the topics that were most important to him. Where the prosecution did not voir dire on matters that respondent now claims were likely dealbreakers for any reasonable prosecutor, the inference is weakened that respondent's proffered characteristics are so readily apparent as to dispel an inference of discrimination. If the reasons now propounded by respondent were the actual reasons for the prosecutor's strikes or were so self-evident that any reasonable prosecutor would have acted on them, the prosecutor would likely have focused his limited voir dire opportunity on those areas of concern. For these reasons, the failure of meaningful voir dire supports an inference of discrimination and confirms that a prima facie case of discrimination was established.

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CONCLUSION

WHEREFOR, for the foregoing reasons, appellant respectfully requests that this Court vacate appellant's convictions.

Dated: July 14, 2021

esm

ERIC S. MULTHAUP, Attorney for
Appellant LORENZO NEWBORN

CERTIFICATE OF WORD COUNT

I certify that this Appellant's Supplemental Reply Brief consists of 2,501 words.

Dated: July 14, 2021

esm

ERIC S. MULTHAUP

DECLARATION OF SERVICE

RE: People v. 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 REPLY BRIEF

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I declare under penalty of perjury that service was effected on July 14, 2021 at Mill Valley, California and that this declaration was executed on July 14, 2021 at Mill Valley, California.

esm
_____
ERIC S. MULTHAUP

STATE OF CALIFORNIA
Supreme Court of California

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Date

/s/eric multhaup

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