No. S087560

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

GILES ALBERT NADEY, JR.,

Defendant and Appellant.

Automatic Appeal from a Judgment of Death
of the Superior Court of the State of California
County of Alameda
Case No. 129807
Honorable Alfred A. Delucchi

APPELLANT'S REPLY BRIEF

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INTRODUCTION

In this reply to respondent's brief on direct appeal, appellant replies to contentions by respondent that necessitate an answer in order to present the issues fully to this Court. Appellant does not reply to arguments that are adequately addressed in his opening brief. The absence of a reply to any particular argument, sub-argument or allegation made by respondent, or of a reassertion of any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (*see People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects his view that the issue has been adequately presented and the positions of the parties fully joined.

I. THE JUDGMENT MUST BE REVERSED DUE TO *BATSON/WHEELER* ERROR

Appellant Nadey in his opening brief has raised *Batson/Wheeler* error predicated on a comparative juror analysis (AOB 123-160).[1] The Attorney General (AG) in Respondent's Brief acknowledges that "in the main" appellant "asserts a comparative analysis by this Court of the challenged panelists . . . demonstrates purposeful discrimination." (RB 66.)[2] This Reply Brief will respond to the facts and authorities germane to appellant's asserted *Batson/Wheeler* error predicated on a comparative juror analysis.

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[1] All references to "AOB" are to Appellant's Opening Brief.

[2] All references to "RB" are references to Respondent's Brief.

A. The Trial Court Rulings on The *Batson/Wheeler* Motions.

At the conclusion of the first *Batson/Wheeler* motion involving four (4) black female jurors, Judge Delucchi denied the *Wheeler* motion as follows:

> [A]fter hearing the district attorney's reasons, I think that these . . . excuses are facially and racially neutral. I don't believe that any of these jurors are excused because of their race, and there is justification and cause for the excuse of each juror.
>
> In the Court's opinion, there is no showing of any exclusion of these jurors because they were black females.

(RT 3723:9-17.)

The trial court's ruling reflects a simple syllogism as follows:

MAJOR PREMISE - - Prospective jurors who are peremptorily challenged for "facially and racially neutral" reasons are not discriminated against in jury selection on the basis of race.

MINOR PREMISE - - The prosecutor's stated reasons for excusing each of the black female jurors were "facially and racially neutral."

CONCLUSION - - None of the black female jurors were excused on the basis of race.

The flaw in the trial court's reasoning lies in the Minor Premise – that the prosecutor's stated reasons were, in fact, the actual reasons for excusing each of the four black female jurors. Neither the trial court's ruling nor the record reflect any analysis by the trial court to ascertain whether the prosecutor's stated reasons for peremptorily challenging each of the black female jurors were, in fact, the prosecutor's actual reasons for

doing so. The trial court simply concluded that the prosecutor's stated reasons for excusing "each juror" were "facially and racially neutral," and hence, then concluded that there was "justification and cause for the excuse of each juror," i.e., the facially and racially neutral reasons. However, there is no inquiry or analysis by the trial court on the question of whether the prosecutor's stated reasons, albeit facially and racially neutral, were, in fact, the prosecutor's actual reasons for challenging each of the black female jurors.

At the conclusion of the second *Batson/Wheeler* motion involving another black female juror, Judge Delucchi again ruled:

> [W]ith respect to the last juror, Ms. Cornist, the Court finds that the excuses as put forth by . . . the prosecution . . . are genuine and facially neutral.
>
> I will consider that as a *Wheeler* motion, and that will also [be] denied for the reasons stated . . ..

(RT 3753:23-2754:1.)

Again, the flaw in the trial court's reasoning lies in the Minor Premise - - that the prosecutor's stated reasons were, in fact, the actual reasons for excusing prospective juror Cornist. Neither the trial court's ruling nor the record reflect any analysis by the trial court to ascertain whether the prosecutor's stated reasons for peremptorily challenging prospective juror Cornist were, in fact, the prosecutor's actual reasons for doing so. The trial court simply concluded that the prosecutor's stated reasons for excusing prospective juror Cornist were "genuine and facially neutral," and denied the motion on that basis.

In sum, there was no inquiry or analysis by the trial court on the question of whether the prosecutor's stated reasons were, in fact, the prosecutor's actual reasons for challenging each of the five African-

American female jurors. Moreover, a comparative juror analysis demonstrates that the prosecutor's stated reasons for challenging each of the five African-American female jurors were not the actual reasons and, in fact, the prosecutor's actual reasons were predicated on race.

B. Independent Review.

No deference should be given to the trial court's denial of appellant's *Batson/Wheeler* motions. The Attorney General (AG) argues at length that review of the trial court's denial of the *Batson/Wheeler* motion should be deferential, relying on *People v. Williams* (2013) 56 Cal. 4th 630, 649-650. (RB 68-69.) This includes, according to the AG, a comparative juror analysis raised for the first time on appeal, citing to *People v. Lenix* (2008) 44 Cal.4th 602, 623-624. (RB 70.)

The problem here is that appellate deference at the *Batson* third step is predicated on the trial court performing an appropriate on-the-record analysis of the prosecutor's stated reasons for the strike or strikes, as contemplated by the Supreme Court of the United States in *Snyder v. Louisiana* (2008) 552 U.S. 472 (*Snyder)*, and *Miller-El v. Dretke* (2005) 545 U.S. 231 (*Miller-El).* As outlined above, no such on-the-record analysis was performed by the trial court in this instance.

In his recent concurring opinion in *People v. Mai* (2013) 57 Cal.4th 986, 1058-1078, Justice Liu discussed at length the import of the requirement that the trial court perform an on-the-record analysis and that deference is unwarranted when the trial court fails to do so. Justice Liu analyzed the issue as follows:

> [D]eference is unwarranted "when a trial court fails to make explicit findings or to provide any on-the-record analysis of the prosecution's stated reasons for a strike." (*People v. Williams* (2013) 56 Cal.4th 630, 717

> (*Williams*) (dis. opn. of Liu, J.).) In such circumstances, "a reviewing court has no assurance that the trial court has properly examined 'all of the circumstances that bear upon the issue' of purposeful discrimination." (*Ibid.*, quoting *Snyder, supra*, 552 U.S. at p. 478; see *United States v. Rutledge* (7th Cir. 2011) 648 F.3d 555, 559 ["if there is nothing in the record reflecting the trial court's decision, then there is nothing to which we can defer"].) In this case, the trial court's statement that "no discriminatory intent is inherent in the explanations, and the reasons appear to be race neutral" does not indicate that it conducted the thorough and careful inquiry at *Batson*'s third step exemplified by the high court's decisions in *Snyder* and *Miller-El v. Dretke* (2005) 545 U.S. 231 (*Miller-El*). By erroneously deferring to the trial court's ruling, this court has once again effectuated "the denial of [a] defendant's *Batson* claim despite the fact that no court, trial or appellate, has ever conducted a proper *Batson* analysis." (*Williams*, at p. 700 (dis. opn. of Liu, J.).) [57 Cal.4th 1060]

(People v. Mai, supra, 57 Cal.4th at 1059 (conc. opn. of Liu, J.)).

Justice Liu also referenced his explanation in *People v. Williams* regarding the split of authority on the correct approach to appellate review of *Batson*'s third step, noting that this Court was on the wrong end of the split, as follows:

> [D]eference to *Batson* rulings unaccompanied by explicit findings or analysis falls on the wrong side of a split of authority on the correct approach to appellate review at *Batson*'s third step. (See *Williams, supra*, 56 Cal.4th at pp. 709-715 (dis. opn. of Liu, J.) [reviewing state and federal case law refusing to accord deference to unexplained *Batson* rulings, including *United States v. McAllister* (6th Cir. 2012) 693 F.3d 572, 581-582, *Rutledge, supra*, 648 F.3d at page 559, *Coombs v. Diguglielmo* (3d Cir. 2010) 616 F.3d 255, 261-265,

> and *Green v. LaMarque* (9th Cir. 2008) 532 F.3d 1028, 1031].)

(*People v. Mai*, *supra*, 57 Cal.4th at 1060 (Liu, J., concurring)). Justice Liu then sought to demonstrate how "unwarranted deference results in judicial inquiry that falls short of what is required in a proper *Batson* analysis." (*Id.* at 1060; *see generally, id.* at 1060-1078.)

Justice Liu then analyzes the majority opinion, noting that it properly concludes that deference is appropriate in those circumstances where the trial court makes "a sincere and reasoned effort" to evaluate the prosecutor's stated reasons for striking a majority juror, but takes issue with what constitutes "a sincere and reasoned effort." (*Id.* at 1060.)

Justice Liu analyzed further the requirement that the trial court make "a reasoned effort to analyze the prosecutor's explanation for the strikes." (*Id.*) Where there is "no reasoning" with regard to "the trial court's statement that 'no discriminatory intent is inherent in the explanations, and the reasons appear to be race neutral,' " (*Id.* (italicized emphasis omitted)), evidence of the requisite inquiry is inadequate:

> Taken at face value, the trial court's mere observation that "no discriminatory intent is *inherent* in the explanations, and the reasons *appear* to be race neutral" (italics added) does not address whether the race-neutral reasons given by the prosecutor were the *actual* reasons motivating the strikes. The inquiry at *Batson*'s third stage requires more than a determination of inherent or apparent plausibility; it "requires the judge to assess the plausibility of [the prosecutor's stated] reason in light of all evidence with a bearing on it." (*Miller-El, supra*, 545 U.S. at p. 252.) Nothing in the record shows that the trial court conducted the requisite inquiry.

(*Id.* at 1061 (italics in original).) It is submitted that this Court should change direction for the reasons set forth by Justice Liu in his concurring opinion in *People v. Mai* (2013) 57 Cal.4th 986, 1058-1078, and his dissenting opinion in *People v. Williams* (2013) 56 Cal. 4th 630, 649-650, and adopt the view finding deference unwarranted as to *Batson* rulings unaccompanied by explicit findings and analysis.

Here, even under the majority's analysis, the trial court's denial of the *Batson* motions are not entitled to deference because the record fails to reflect that the trial court made the required "sincere and reasoned effort" to evaluate the prosecutor's stated reasons for striking the five African-American female jurors. As noted, the trial court simply concluded that the prosecutor's stated reasons were "facially and racially neutral" as to four black female jurors, and "genuinely and facially neutral" as to the fifth black female juror. Judge Delucchi failed to make the requisite inquiry. Of note, the findings by Judge Delucchi do not "address whether the race-neutral reasons given by the prosecutor were the actual reasons motivating the strikes." (*People v. Mai, supra,* 57 Cal.4th at 1061 (Liu, J., concurring).) Consequently, the record fails to demonstrate that Judge Delucchi made the requisite inquiry with regard to whether the "race-neutral reasons given by the prosecutor were the actual reasons motivating the strikes." (*Id.*)

In *People v. Williams* (2013) 56 Cal.4th 630, 698-699, Justice Werdegar, in her dissenting opinion, concluded that under the circumstances presented in *Williams*,"no appellate deference" is due the trial court's determination that "the prosecutor's peremptory challenges were exercised on nondiscriminatory grounds." (*Id.* at 698.) Justice Werdegar concluded that "the trial court failed to make the 'sincere and

reasoned attempt to evaluate each stated reason' required for appellate deference under *People v. Silva* (2001) 25 Cal.4th 345, 386." (*Id.* at 699.) Here, the inquiry and findings by the trial court are similar to those in *People v. Silva*, and hence, the trial court failed to make the requisite "sincere and reasoned attempt to evaluate each stated reason" provided by the prosecutor to warrant appellate deference.

In *People v Silva*, 25 Cal.4th 345, as to the first *Batson/Wheeler* motion, the defense challenged the prosecutor's peremptory challenge against three prospective jurors of Hispanic ancestry. The trial court asked the prosecutor to explain the reasons for the challenges and, based on the prosecutor's request, the reasons were provided *ex parte* out of the presence of the defendant and defense counsel. When the proceedings resumed in the presence of the defendant and defense counsel, the trial court denied the first *Batson/Wheeler* motion. The trial court said only that the prosecutor "did provide an explanation with regard to" the three peremptory challenges and that "I think there was a good excuse with regard to all of these people." (*Id.* at 376, and 382.) There was a second *Batson/Wheeler* motion regarding two more prospective jurors, both of Hispanic ancestry or surnames, which again was held *ex parte*, in which the prosecutor gave reasons for the challenges. (*Id.* at 382.) When the proceedings were resumed in the presence of the defendant and defense counsel, the trial court said "I did hear the explanations presented by the prosecutor with regard to peremptory challenges exercised" as to the new prospective jurors. The trial court noted "they appear to be very valid reasons for those excuses." (*Id.* at 383.) As a consequence, no Hispanic served on the jury that returned the verdict selecting the penalty of death. (*Id.*) After the jury returned the death verdict, the trial court sealed the transcripts of the *ex*

parte hearings in which the prosecutor had stated his reasons for the peremptory challenges of the five Hispanic prospective jurors. The defendant moved for a new trial on the ground, among others, that the prosecutor had failed to give valid and sufficient reasons for exercising the five peremptory challenges. In denying the new trial motion, the trial court explained as follows: " 'Well, the Court held an in camera hearing with regard to the exclusion of several jurors, and the Court felt that there was sufficient reason for the exclusion of those witnesses–I mean those jurors. So your motion is denied for a new penalty phase trial.' " (*Id.* at 384.)

In *Silva*, what we have is the trial court simply concluding that there was "a good excuse," "very valid reasons," and "sufficient reason" for the exclusion of the prospective jurors. These reasons are similar to those noted by the trial court in the instant case with regard to the prosecutor's stated reasons for exclusion being "facially and racially neutral" and "genuine and facially neutral" without more. Neither the trial court in *Silva* nor the trial court in the instant case made the requisite "sincere and reasoned attempt to evaluate each stated reason" provided by the prosecutor for excusing the prospective jurors. In *Silva*, this Court held as follows:

> Although we generally "accord great deference to the trial court's ruling that a particular reason is genuine," we do so only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror."

(*Id.* at 385-386 (citations omitted).) Here, the trial court failed to make the requisite inquiry contemplated by the Supreme Court of the United States in *Snyder* and *Miller-El*, or by this Court in *Silva*. Consequently, under the circumstances of this case, no appellate deference is due the trial court's denial of the *Batson/Wheeler* motions.

C. The Prosecutor's Death-Penalty Scale.

The prosecutor employed a death-penalty scale in evaluating each prospective juror during jury selection. The prosecutor asked each prospective juror where they stood philosophically on the death penalty based on a scale of one (1) to ten (10), with one (1) representing Mother Teresa and ten (10) representing Rambo or the Terminator (*see*, e.g., RT 1414-1415) (AOB 129), and obtained a numerical ranking as to each prospective juror. (AOB 130-132.) The court endorsed both the prosecutor's question and scale on a number of occasions by clarifying the question or adding to the question; for example, as to: Juror No. 10 (RT 1276), Alternate Juror No. 5 (RT 1730), and prospective juror Cornist (RT 2091) (*see* discussion, AOB 129-130). The prosecutor was seeking jurors who were predisposed to "impos[e] the death penalty." (RT 3751-3752) (AOB 128). Hence, the death-penalty scale was the cornerstone of the prosecutor's voir dire examination and evaluation of prospective jurors. However, a comparative juror analysis, predicated on the prosecutor's death-penalty scale, reflects that the exclusion of the five African-American jurors was pretextual. (*See* AOB 126-133.)

The A.G. seeks to undermine the import and utility of the death-penalty scale employed by the prosecutor during the jury selection process (RB 79-82). The A.G. acknowledges that the "prosecutor was the one who asked most of the prospective jurors to rate themselves" regarding the death penalty (RB 79). Moreover, a review of the record confirms that it was the prosecutor, Jim Anderson, who employed the death-penalty scale of 1 to 10, and posed the lengthy question regarding the death penalty, comprising on average 25 lines of text, to each juror (AOB 129-131), each alternate juror (AOB 131), and to each of the challenged prospective jurors who were the

subject of the *Batson/Wheeler* motions (AOB 132-133). Further, the prosecutor repeatedly referred to the death-penalty scale as "my scale." (*Id.*)

The A.G. also asserts that the prospective jurors "self-reported score" did not provide a "primary basis" as to any of the prosecutor's challenges. (RB 79) This statement is belied by the record and a comparative juror analysis. (*See* AOB 126-133, discussing "comparative juror analysis – macro view.") In fact, the score provided by each prospective juror was in direct response to the lengthy death penalty question posed by the prosecutor. For example, the question posed by the prosecutor to Juror No. 12 is illustrative of the questions posed by the prosecutor to all prospective jurors regarding the death-penalty scale as follows:

> Q. [MR. ANDERSON] Let me ask you another question that has nothing to do with this case. This just has to do with your feelings philosophically about how you feel about the death penalty as a punishment for murder.
>
> So assume a scale of one to ten.
>
> A one on the scale, the low end, is going to be somebody who is never, ever going to impose a death penalty on anybody. Doesn't matter if you have Ted Bundy; it doesn't matter if you have Timothy McVeigh, some mass murderer. A one on my scale is going to look for the good in everybody no matter. Every time they are going to look to excuse his conduct. There has to be a reason for it. And they are just a kind, charitable person, somebody like Mother Teresa.
>
> A. [JUROR NO. 12] (Nods head.)
>
> Q. A ten, on the other hand, is somebody who believes that if you kill somebody, you murder them in a criminal way -- you know, not accident or not justifiable or even, you know, somebody is beating you up or robbing you and you

> kill them in self-defense, nothing like that. You commit a murder, there is only one appropriate penalty for a ten on my scale, and that's the death penalty, eye for an eye. You kill, you be killed.
>
> And we've been using Rambo or the Terminator or somebody out of those Hollywood movies to show what we mean by a ten.
>
> So if you had to choose a number between one and ten which shows us philosophically, mentally, how you feel about the death penalty as a punishment for murder, what number do you think you'd take, JN. 12?
>
> A. I guess I would be six.

(RT 2324:26-2325:27) (emphasis added). (For further illustration, *see* question posed to Juror No. 8, RT 3648:22-3649:26.)

The lengthy, detailed, and graphic nature of the question demonstrates the import placed by the prosecutor on the prospective jurors' numerical ranking on the death-penalty scale, which the prosecutor referred to as "my scale." As noted, the prosecutor was seeking jurors who were predisposed to "impos[e] the death penalty." (RT 3751-3752) (AOB 128). The prospective jurors' numerical ranking on the prosecutor's death-penalty scale were elicited in each incidence to achieve that goal, i.e., a juror who is predisposed to impose the death penalty. However, when the excluded African-American female jurors have higher numerical rankings and/or equivalent numerical rankings to the seated jurors and alternates on the prosecutor's death-penalty scale, this comparison reflects that the exclusion of the five African-American female jurors was pretextual. (*See* AOB 126-133.)