In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOE EDWARD JOHNSON,

Defendant and Appellant.

CAPITAL CASE

Case No. S029551

Sacramento County Superior Court Case No. 58961
The Honorable Peter Mering, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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INTRODUCTION TO SUPPLEMENTAL BRIEF

On May 1, 2018, this Court granted leave and appellant Joe Edward Johnson thereupon filed his Supplemental Opening Brief, in which he raises three additional arguments based on authorities decided after he filed his Reply Brief in 2014. First, Johnson contends the trial court erred by finding that he failed to make a prima facie showing that that the prosecutor's use of peremptory challenges supported an inference of discriminatory intent. Next, Johnson raises two challenges to the constitutionality of California's death penalty scheme. Pursuant to this Court's order, Respondent files this supplemental brief in response.

I. APPELLANT FAILS TO DEMONSTRATE THAT THE TOTALITY OF RELEVANT FACTS GIVES RISE TO AN INFERENCE OF DISCRIMINATORY PURPOSE

In his Opening Brief, Johnson, an African-American man, argued that the prosecutor's use of three peremptory challenges to excuse African-American women, coupled with an assertion that members of this group were otherwise heterogeneous, was sufficient to state a prima facie case of discriminatory intent within the meaning of *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). (AOB 64-89.) Respondent argued that the prosecution's use of its peremptory challenges did not give rise to an inference of discriminatory intent under the totality of relevant of facts. (RB 53-57.)

Johnson's revisited *Batson* claim fails because the record does not support a prima facie case of discriminatory intent under any standard of review.

A. *Batson*'s Three-Step Test Is Intended to Preserve the Practice of Peremptory Challenges While Upholding the Prohibition Against Purposeful Discrimination

The use of peremptory challenges to strike prospective jurors on the basis of racial group bias violates the Equal Protection clauses of the United States and California constitutions. (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158, citing *Batson*, *supra*, 476 U.S. at p. 89 & *Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.)

When a defendant raises a challenge to the prosecutor's use of a peremptory strike, the trial court uses a three-step process. First, the defendant must make a prima facie showing that the prosecutor exercised a peremptory challenge for a discriminatory purpose. The defendant makes a prima facie case "'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" (*People v. Harris* (2013) 57 Cal.4th 804, 833; see also *Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129] (*Johnson*) [disapproving of California's former "more likely than not" standard].)

Second, if the defendant makes a prima facie showing, the burden shifts to the prosecutor "'to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes." (*People v. Harris*, *supra*, 57 Cal.4th at p. 833, quoting *Johnson*, *supra*, 545 U.S. at p. 168.) Third, the court must examine the persuasiveness of the proffered legitimate reason and determine whether the moving party has demonstrated purposeful discrimination. (*Purkett v. Elem* (1995) 514 U.S. 765, 767; *People v. Riccardi* (2012) 54 Cal.4th 758, 786; *People v. Lenix* (2008) 44 Cal.4th 602, 612-613.) "'There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination.'" (*People v. Parker* (2017) 2 Cal.5th 1184, 1211*;* see *Purkett v. Elem*, *supra*, at p. 768

[the opponent of the strike bears the burden of persuasion regarding racial motivation].)

Appellant's trial predated the United States Supreme Court's decision in *Johnson*, *supra*, 545 U.S. 162, and "it was not clear from the record whether the trial court analyzed the *Batson*/*Wheeler* motion under *Johnson*'s standard of an inference of discriminatory purpose." (See *People v. Sánchez* (2016) 63 Cal.4th 411, 434, citing *People v. Scott* (2015) 61 Cal.4th 363, 393-384.) Thus, this Court independently reviews the record to determine whether the totality of the relevant facts give rise to an inference of discriminatory purpose. (*Sánchez*, at pp. 434-435.)

> In considering a first stage *Batson* challenge, the court independently reviews the totality of the circumstances as they existed when the defendant objected to determine whether the trial court correctly held that he had failed to state a prima facie case. (*People v. Sánchez, supra*, 63 Cal.4th at pp. 434-435.)

Although the Court examines the entire record on review, "certain types of evidence are especially relevant." (*People v. Reed* (2018) 4 Cal.5th 989, 999-1000 (*Reed*).) These are: (1) whether a party has struck most or members of the venire from an identified group; (2) whether a party has used a disproportionate number of strikes against members of that group; (3) whether the party has engaged those prospective jurors in only desultory voir dire; (4) whether the defendant is a member of that group; and (5) whether the victim is a member of the group to which a majority of remaining jurors belong. (*Ibid*.) A reviewing court "may also consider nondiscriminatory reasons for the peremptory strike that 'necessarily dispel any inference of bias,' so long as those reasons are apparent from and clearly established in the record." (*Ibid*.)

B. *Sánchez* Does Not Hold That a Prima Facie Case of Discriminatory Intent Can Only Be "Defeated" By "Overwhelmingly Clear and Obvious Reasons for Excluding a Challenged Juror"

Johnson asserts that a defendant's "prima facie case can be defeated only by facts that are "'"clearly established'" in the record and that necessarily dispel any inference of bias." (SAOB 20, Arg. II, citing *Sánchez, supra*, 63 Cal.4th at p. 434.) From there, he contends that this Court should clarify the standard of review in a first-step case by announcing a rule that a prima facie case for discriminatory intent at step one can only be "defeated" by "overwhelmingly clear and obvious reasons for excluding a challenged juror." (AOB 33.) Respondent disagrees. A requirement that a trial court find a prima facie case for discriminatory intent at step one, unless there are "overwhelmingly clear and obvious reasons for excluding a challenged juror" (AOB 33), would create a lower burden for *Batson* step one inquiries than the federal constitutional standard, that the defendant must show facts sufficient to support an inference of discriminatory purpose, and it would conflict with the principle that the party challenging the strikes bears the burden of persuasion regarding racial motivation. (See *Johnson v. California*, *supra*, 545 U.S. at p. 168; *People v. Reed*, *supra*, 4 Cal.5th at p. 999.)

Where the inquiry ended at the first stage of the proceeding, a reviewing court reviews the entire record of voir dire and applies *Johnson*'s standard of an inference of discriminatory purpose. (*Sánchez, supra*, 63 Cal.4th at p. 434; accord, *Parker*, *supra*, 2 Cal.5th at p. 1211.) "'A court reviewing a first-stage ruling that no inference of discrimination exists "may consider apparent reasons for the challenges discernable on the record" as part of its "consideration of 'all relevant circumstances'" [citation]' . . . ." (*Sánchez,* at p. 434; see *Reed*, *supra*, 4 Cal.5th at p. 1000 [in its overall context, the pattern of strikes by itself does not suggest the

inference of discrimination that might otherwise be drawn from the prosecutor's initial strikes].)

Appellant incorrectly characterizes this as looking for "any imaginable race neutral justification." (AOB 20.) He is wrong. The standard is objectively rooted in reasonableness. In *Sánchez*, after the second challenge was denied, the prosecutor stated his reasons for his specific challenges on the record. This Court considered those reasons as part of the totality of the circumstances when it evaluated the trial court's step one denial. This Court observed that, in addition to the prosecutor's articulated reasons, the record contained "further evidence dispelling any inference of bias in the struck jurors' questionnaires and answers during voir dire." (*Sánchez*, *supra*, 63 Cal.4th at pp. 435-439 & fn. 5 [considering nondiscriminatory reasons for peremptory challenges that are apparent from and "clearly established" in the record].)

In *Reed*, this Court reviewed the entire record of voir dire to determine that the totality of the relevant of facts did not support an inference of discriminatory intent based on reasonableness and typical prosecutorial litigation strategy. (See, e.g., *Reed*, *supra*, 4 Cal.5th at pp. 999-1000.) In other words, in a first-step case, a reviewing Court may consider clearly-established facts from the record that would reasonably cause *any* litigant to be concerned that the stricken juror holds an unfavorable view toward that party's case as part of its "'"consideration of 'all relevant circumstances'" [citation]' . . . ." (*Sánchez*, *supra*, 63 Cal.4th at p. 434.)[1]

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[1] By way of contrast, this Court has held that when a trial court does not rule on whether a prima facie case has been established, but instead permits the prosecutor to provide reasons for excusing a juror, and finds those reasons are valid, the reviewing court "skip[s] to *Batson*'s third stage to evaluate the prosecutor's reasons for" excusing that juror. (*People v.*

Johnson asks this Court to announce a new a rule stating that a defendant's attempt to satisfy his obligation to make a prima facie showing cannot be "defeated" by "any imaginable race neutral justification that the prosecution might have utilized in challenging the potential jurors at issue." (AOB 20-21.) He argues that "[t]he Supreme Court requires that a suspicion of discrimination be resolved at step three, based on facts, not speculation. This requirement is inconsistent with allowing anything other than overwhelmingly clear and obvious reasons for excluding a challenged juror to preclude a finding of a prima facie case at step one." (AOB 33.) Johnson misapprehends the applicable standards. The prima facie showing required is low, it does not require "overwhelmingly clear and obvious reasons," nor does it require that there be evidence to "defeat" it; but it is still the defendant's burden to show facts that support an inference of discriminatory purpose. (*People v. Reed*, *supra*, 4 Cal.5th at p. 999.) Johnson fails to articulate precisely how a reviewing court's analysis would change if it required "overwhelmingly clear and obvious reasons for excluding a challenged juror," as compared to considering "nondiscriminatory reasons for the peremptory strike that 'necessarily dispel any inference of bias,' so long as those reasons are apparent from and clearly established in the record. [Citation.]" (*Reed*, at p. 1000). In practice, Johnson's proposed rule would in effect function as a presumption that there was discriminatory intent whenever a *Batson* challenge was raised, and would collapse the distinction between the first and third stages of the *Batson* inquiry and shift the burden of persuasion to the responding party at the outset.

Mills (2010) 48 Cal.4th 158, 174; accord, *People v. Chism* (2014) 58 Cal.4th 1266, 1314; *People v. Booker* (2011) 51 Cal.4th 141, 165.)

Relying on his own interpretation of *Sánchez*, Johnson invokes various federal cases (see AOB 20-21 [citing, e.g., *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1110, *Currie v. McDowell* (9th Cir. 2016) 825 F.3d 603, 609-610 & *Shirley v. Yates* (9th Cir. 2015) 807 F.3d 1090, 1101], 30-38) to urge this Court to abandon the *Batson* framework in favor of his proposed rule requiring a trial court to find that an inference of discriminatory intent is "defeated" only by "overwhelmingly clear and obvious reasons for excluding a challenged juror." (AOB 33.) He relies on *Currie v. McDowell*, in which the Ninth Circuit Court of Appeals held that a federal district court had violated the procedure outlined in *Batson* when at step one the court offered its own speculation as to reasons the prosecutor might have challenged the juror before permitting the defense an opportunity to explain the objection. (*Currie v. McDowell*, *supra*, at pp. 609-610.) The Ninth Circuit cited its earlier holding in *Johnson v. Finn* (9th Cir. 2011) 665 F.3d 1063,1069, for the proposition that "grounds upon which a prosecutor could reasonably have premised a challenge does not suffice *to defeat* an inference of racial bias at the first step of the *Batson* framework." (*Ibid*., italics added.) In turn, *Johnson v. Finn* adopted language from *Williams v. Runnels*, an earlier Ninth Circuit case. (*Williams v. Runnels*, *supra*, at p. 1110.) The court opined that this principle was clearly established by the Supreme Court in *Johnson v. California*, *supra*, 545 U.S. 162. (*Currie*, at pp. 609-610.) It was wrong. The United States Supreme Court has never held that a trial court or a reviewing court is prohibited from reviewing the totality of the relevant facts and inferring "grounds upon which a prosecutor could reasonably have premised a challenge" in a first step case. Not only is this language wholly absent from the text of *Johnson v. California*, but such a rule would actually conflict with the three-step procedure the Supreme Court set forth in *Batson*.

The Supreme Court outlined a procedure in *Batson* which provided that the burden of demonstrating a prima facie case rests with the party challenging the use of strikes. In *Purkett v. Elem*, *supra*, 514 U.S. 765, the United States Supreme Court held that,

> The Court of Appeals erred by combining *Batson*'s second and third steps into one, requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive, i.e., a "plausible" basis for believing that "the person's ability to perform his or her duties as a juror" will be affected. 25 F.3d, at 683. It is not until the third step that the persuasiveness of the justification becomes relevant-the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. *Batson*, *supra*, at 98, 106 S.Ct., at 1723; *Hernandez*, *supra*, at 359, 111 S.Ct., at 1865 (plurality opinion). At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge may choose to disbelieve a silly or superstitious reason at step three is quite different from saying that a trial judge *must terminate* the inquiry at step two when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. Cf. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993).

(*Id*. at 768, italics added.) Thus, a trial court may reasonably determine that the defendant failed to make the requisite prima facie showing when there are "obvious race-neutral grounds" for excusing the prospective juror. (*People v. Davis* (2009) 46 Cal.4th 539, 584; see *People v. Howard* (2008) 42 Cal.4th 1000, 1118 [voir dire provided prosecution with "ample grounds" for excusing juror]; *People v. Williams* (2006) 40 Cal.4th 287, 313.) The Supreme Court provided for a three-step process to preserve a distinction between the burden to state facts in support of a prima facie inference of discriminatory intent, triggering the other party's obligation to articulate non-discriminatory reasons, and the trial court's third stage

evaluation of the prosecutor's actual articulated reasons for excusing a juror.

California's approach to step-one cases, particularly where the record does not contain direct evidence of a party's actual reasons for exercising a peremptory challenge, is not only consistent with its own precedent, but it is also consistent with preserving the balance struck by the high court with respect to remedying unlawful discrimination in jury selection within a system that permits peremptory challenges. (*People v. Lopez* (2013) 56 Cal.4th 1028, 1047-1050, overruled in part on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) While reasonable minds could debate the merits of a system which allows peremptory challenges, those arguments must be directed at the Legislature and not the court system. The United States Supreme Court explicitly balanced the interests at stake and it provided for a three-step inquiry based on the principle that the burden of ultimate persuasion rests with, and never shifts from, the opponent of the strike. (*Purkett v. Elem, supra*, 514 U.S. 765.)

C. The Totality of the Relevant Facts Does Not Support an Inference of Discriminatory Intent

The venire included 54 potential jurors, seven of whom, including Kenneth M., had self-identified as African Americans. (40 RT 13090, 13114.) Fifty-four of 56 panelists, and all seven African-American panelists, were called into the box before the court swore in the alternate jurors. D.D. and H.D. were the first two female African-American panelists to be called into the box. They both served as jurors. The prosecutor challenged the third, fourth, and fifth African-American panelists, who were also female. The sixth African-American panelist called into the box was male. He served as a juror. The prosecutor accepted the jury with three peremptory challenges remaining. Kenneth M. was called into the box as a prospective alternate juror. The prosecutor

used a peremptory challenge to excuse him. None of the alternate jurors served. In sum, African-American panelists (five females and two males) comprised 12.5 percent of the jury pool, and they ultimately comprised 25 percent of the jury who decided appellant's case.

1. Neither the "Strike Pattern" Nor a Statistical Comparison Support an Inference of Discrimination

Johnson renews his argument that the trial court's finding of no prima facie case was based on factually incorrect numerical comparisons. (SAOB 24.) Even if this Court were to isolate its analysis only to the facts known to the trial court at the time of Johnson's second *Batson* challenge,[2] rather than reviewing the entire record of voir dire, the record still would not support an inference that the prosecutor used peremptory challenges to minimize or exclude African-American representation on the jury.

After defense counsel's second *Batson* challenge, the trial court ruled that the prosecutor's use of three out of 15 peremptory challenges to remove prospective African-American panelists, while leaving two African-American panelists out of nine in the box, did not suggest a pattern of using peremptory challenges to minimize or exclude African-American representation on the jury. (RB 53-57.) The court's analysis was correct. While not conclusive, the prosecutor's retention of members of the cognizable group on the jury was properly considered as an indication of the prosecutor's good faith. (*People v. Lewis* (2008) 43 Cal.4th 415, 480; *People v. Huggins* (2006) 38 Cal.4th 175, 236, citing *People v. Snow* (1987) 44 Cal.3d 216, 225, 242 [prima facie case; "passing of certain jurors may be an indication of the prosecutor's good faith in exercising his

[2] In any event, appellant acknowledges that this Court's review "is not limited to counsel's presentation below, but [it may] consider 'the entire record of voir dire." (AOB 22, citation omitted.)

peremptory challenges, and may be an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection"]; *People v. Jones* (2017) 7 Cal.App.5th 787, 806 [fact two members of the group were ultimately seated on the jury supported the trial court's conclusion that defendant failed to make a prima facie showing].)

Johnson contends that discriminatory intent can be inferred from the fact that the prosecutor had "struck 34 percent of the non African-American jurors, compared to 60 percent of the African American jurors" at the time of the second *Batson* motion. (SAOB 24.) He argues that the "correct statistics" are "compelling" evidence of discriminatory intent. (SAOB 24.) Not so. Generally, in instances where courts have found that a prima facie case had been made, those courts saw percentage increases that were much higher than the expected number of strikes based on representation in the jury pool. (See, e.g., *Miller-El v. Dretke* (2005) 545 U.S. 231, 240-241 [striking 10 of 11 African-American jurors in the qualified pool raised inference of discrimination]; *Johnson*, *supra*, 545 U.S. at pp. 169-171 [excluding *all* African-American jurors in the pool established a prima facie case].) More to the point, in this case, the prosecutor's use of three out of five peremptory challenges to excuse members of a particular group did not suggest a desire to minimize or exclude that group from the jury, particularly where two members of the group seated before the struck jurors remained on a panel and actually served as jurors. (See *Reed*, *supra*, 4 Cal.5th at p. 1000; *Sánchez*, *supra*, 63 Cal.4th at p. 436 [use of two of eight peremptory challenges against Hispanic jurors was insignificant].) This Court has previously noted that "[w]hile the prosecutor did excuse two out of three [African-Americans], the small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible." (*People v. Bell* (2007) 40 Cal.4th 582, 597-598, fn. omitted.) The prosecutor here did not strike "most or all of the members of the venire

from an identified group," nor was three out of five a "disproportionate" number of the total group. (*Reed, supra,* at p. 999.) In a "small sample size the disparity carries relatively little information." (*People v. Bell,* at pp. 598, fn. 4.)

Appellant's statistical argument fares worse in light of the totality of the relevant facts. In *Reed*, this Court found that the totality of the facts did not support an inference of a prima facie case of discrimination, even though the prosecutor had struck five of six African-American panelists at the time of the *Batson* motion, and three members of the group ultimately sat on the jury. (*Reed, supra,* 4 Cal.5th at p. 1000.) Here, the statistical comparison in support of a prima facie case of discriminatory intent was far less persuasive than the showing in *Reed.*

Likewise, the record does not support appellant's claim that the prosecutor struck "an African-American juror whenever there were more than two African-Americans on the panel." (SAOB 21, 29.) The prosecutor accepted the jury with three peremptory strikes remaining. Had the prosecutor wanted to limit the number of African-American jurors, he could have used peremptory strikes to remove one, two or all three of the African American panelists who ultimately served as jurors. In any event, the jury would not have been constituted as it was finally had the prosecutor actually followed a pattern of striking an African-American panelist "whenever there were more than two African Americans on the panel."

In short, neither the "strike pattern" nor a comparison of numbers supports an inference that the prosecutor exercised peremptory challenges in a discriminatory manner. African-American jurors were represented on the jury in twice the percentage of their representation in the jury pool. No inference of discriminatory intent can fairly be drawn where fully one-quarter of trial jurors were African-American.

2. The Record Does Not Show That the Prosecutor Only Investigated Kenneth M.; Furthermore, the Record Contains Obvious Non-Discriminatory Reasons to Excuse Him from Service as an Alternate Juror

Appellant argues that this Court can infer the prosecutor's discriminatory intent from the fact that he only "obtained the criminal history" of Kenneth M., an African-American panelist. (AOB 26.) Appellant compares the facts here to the facts before the Nevada Supreme Court in *McCarty v. State* (Nev. 2016) 371 P.3d 1002, 1007 (*McCarty*). The comparison fails.

Johnson asserts that "the prosecutor [here] investigated only an African-American potential juror, and did so for no apparent reason."[3] (SAOB 28, see also 26.) On the contrary, the record shows that Kenneth M. was the only prospective juror about whom the prosecutor discovered information in conflict with his responses to the jury questionnaire. He was not the only panelist investigated. The prosecutor explained to the court that he had asked a secretary to "run" the names of "some of the jurors through the computer system at the district attorney's office, which has local contacts." (40 RT 12804.) The record is silent as to how many or which names.[4] The record also says nothing about the prosecutor's reasons

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[3] Appellant argues that the prosecutor had no apparent purpose, but at the same time asks this Court to infer that the prosecutor singled out Kenneth M. for a discriminatory purpose. His argument highlights the difference between a finding based on theoretical possibility that is unsupported by facts in the record, as compared to a decision based on reasonable inferences drawn from the totality of facts that are clearly established in the record.

[4] On the one hand, appellant asks this Court to accept only clearly established facts and "overwhelmingly clear and obvious [non-discriminatory] reasons" to exercise a peremptory challenge in a first stage case. (AOB 33.) But at the same time, he asks this Court to infer

for selecting some names and not others. But the record does unquestionably demonstrate that the prosecutor's underlying purpose was to determine whether a prospective juror had provided erroneous information about criminal history on the juror questionnaire. (40 RT 12805-12806.)

The prosecutor told the court that he had discovered, and had disclosed to the defense, information about prospective juror Kenneth M. contained in the district attorney's computer database. (40 RT 12804.) According to the database, Kenneth M. had been convicted of misdemeanor driving under the influence and he had pleaded guilty to misdemeanor battery for diversion. (40 RT 12805.) However, on the questionnaire, Kenneth M. had denied being previously accused of, or arrested for a crime, and he further denied "any difficulty with alcohol abuse." (40 RT 12805.) The prosecutor asked the court to question Kenneth M. to determine if he had omitted information, and if so, whether the omission was purposeful or the result of a mistake. (40 RT 12805-12806.) After hearing from both sides, the trial court ultimately ruled that defense counsel should be given the same opportunity to ask the district attorney's office to run a check on any prospective juror's background, and also that the prosecutor had to provide any contrary information he discovered about any prospective juror to the defense. (40 RT 12810-12814.) The prosecutor responded that Kenneth M. was the only prospective juror about whom he had obtained any additional or conflicting information.

During voir dire, the judge asked Kenneth M. if he had ever been arrested for any kind of crime, including a "major traffic thing" like driving under the influence. (39 RT 12990.) Kenneth M. acknowledged that he

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discriminatory intent by inferring the existence of "facts" that are not established in the record. A fair assessment requires application of the same standard and scope of inquiry, regardless of outcome.

had been arrested for driving under the influence in April of the same year. (39 RT 12990.) The judge asked how the case had resolved, and Kenneth M. responded: "I stopped drinking." (39 RT 12991.) The judge clarified that he meant a legal resolution, and Kenneth M. clarified that he had pleaded guilty. (39 RT 12991-12992.) When asked how he was treated by law enforcement, Kenneth M. responded: "I feel that myself I was not drunk. I did drink. I did have alcohol on my breath, you know. I did come out registered a .10," but he also said he would "just chalk it up as experience" and he knows now not to drink and drive "ever." (39 RT 12992.) Kenneth M. explained that he did not the disclose the conviction for driving under the influence on the questionnaire because he thought that it was not the type of "major crime" that the court and parties were interested in knowing about. (39 RT 12996.)

Defense counsel asked Kenneth M. if he had been arrested for anything else. He responded that his ex-wife had called the police on him, but then dropped the charges. (39 RT 12995.)

Kenneth M. also told the court that he was "extremely" interested in the reasons people commit crimes and the "opinions of psychologists would be important in determining some of the causes of crime," particularly a "person's background," "how they were treated as a child, and "how they responded to different phases in their life." (39 RT 13001.) He first became interested because his father was a police officer. (39 RT 13000.) In Kenneth M.'s view, a child who is abused, or sees abuse, will take that with them, as compared to an "individual that's cared for, you know, loved, taught the right thing, treated the right way and also depending on love." (39 RT 13002.) Kenneth M. explained that he had grown up seeing his father treat his mother "like an animal." (39 RT 13002.)

The record provides multiple obvious and non-discriminatory reasons for the prosecutor to remove Kenneth M. as an alternate juror. The first,

and most important reason, was that any verdict obtained with Kenneth M. as a juror could be invalidated after he admitted that he intentionally failed to disclose a prior arrest and conviction. In short, a prosecutor's use of a peremptory challenge to excuse a prospective juror who admitted that he intentionally omitted disclosing his criminal history is an obvious and inherently credible non-discriminatory reason to strike a prospective juror.

Appellant compares this case to *McCarty*, a third step case in which a Nevada court found that the prosecutor's proffered reason for striking a juror was a pretext for racial discrimination. (*McCarty*, *supra*, 371 P.3d at p. 1008.) In *McCarty*, the prosecutor explained that she had searched for the prospective juror, an African American, using the juror's maiden name in the Shared Computer Operations for Protection and Enforcement (SCOPE), in an effort to discover more about a conviction that the juror's brother had suffered. The prosecutor found no information under the juror's maiden name, but the search "turned up a work card authorizing [the juror] to work at a Las Vegas strip club called 'Sin.'" (*Id*. at p. 1012.) Although the juror had obtained the card three years earlier and was now attending college, the card was still current. The Nevada prosecutor justified the challenge of the juror at the third stage of the inquiry with an explanation that "the State of Nevada's not going to leave somebody who works at a strip club on their panel." (*Id.* at p. 1007.)

The court in *McCarty* reaffirmed the principle that the challenging party bears a heavy burden to show that the prosecutor's stated reason are a pretext for discrimination, but it found that burden met on the facts of the case. (*McCarty*, *supra*, 371 P.3d at p. 1008-1010.) The Court noted that legal employment as a "stripper" is not an inherently credible non-discriminatory reason to challenge a juror. The Nevada court concluded that the prosecutor used employment in a certain industry as an excuse to practice racial discrimination in part because the prosecutor admitted that

she had only researched this one prospective juror's employment status. (*Id.* at p. 1008.)

The facts of this case are not similar. Concealing one's criminal history on a juror questionnaire, particularly where Kenneth M.'s responses suggested that he might have lied because he wanted to be selected as a juror, is juror misconduct. Juror misconduct is an inherently credible non-discriminatory reason to challenge a juror.

The prosecutor's strike of prospective juror Kenneth M. as an alternate juror, after he discovered that Kenneth M. lied about his criminal history on the questionnaire, does not support an inference of discriminatory intent under the totality of the relevant facts of this case.

3. Neither Johnson's Race nor the Race of His Victims Supports an Inference of Discrimination Under the Totality of the Relevant Facts

Johnson argues that the trial court failed to consider appellant's race as evidence in support of a prima facie case of discriminatory intent. (SAOB 24-26.) Respondent disagrees. The record does not establish that the trial court failed to consider appellant's membership in the identifiable group in finding he did not make a prima facie showing. Further, the totality of the relevant facts do not support an inference of discriminatory intent.

Appellant's membership in an identifiable group was not direct evidence of the prosecutor's discriminatory intent. Membership in an identifiable group carries greater or lesser significance depending on the proportion of prospective jurors that the prosecutor excused from the jury who are also members of that group. Specifically, an inference of discriminatory intent lessens where the prosecutor retains several members of the identifiable group on the panel at the time of the *Batson* challenge, as he did here. It lessens further because the prosecutor retained these same

panelists as jurors, and because the identifiable group was ultimately well represented on the jury, as compared to their representation in the pool of available jurors. On this record, appellant's race, whether considered alone or in conjunction with other relevant factors, does not support an inference of discriminatory intent because the prosecutor did not use peremptory challenges to disproportionately exclude African American panelists.

Similarly, appellant argues that this Court should infer a prima facie case of discriminatory intent from the fact that victims Aldo Cavallo and Mary Siroky were Caucasian. (SAOB 26.) On the contrary, even if some of appellant's victims were Caucasian, and the majority of the panel self-identified as "White," it would be difficult to infer discriminatory intent from this record because appellant committed multiple violent acts against men and women of different races. (*People v. Thomas* (2012) 53 Cal.4th 771, 794 [no inference that the prosecutor exercised peremptory challenges based on race where one victim Caucasian, two others African-American].)

Johnson's argument that this Court should infer discriminatory intent because victims Cavallo and Siroky were of the same race as a majority of the jurors is not persuasive where he committed multiple acts of serious violence against victims of both genders and more than one race.

4. No Inference Can Be Drawn From The Prosecutor's Challenge of Panelists Willing to Impose Either Penalty

Johnson restates his prior argument that the trial court "ignored defense counsel's point that all the struck African-American jurors had expressed a willingness to impose the death penalty and that none was [sic] leaning toward a life sentence." (SAOB 25 [citations omitted].) The first question the judge asked of each panelist was whether he or she could impose either the death penalty or life without the possibility of parole, depending on the facts of the case. Every panelist who remained after the

challenges for cause had answered that question in a way that did not foreclose the possibility of either penalty. This Court cannot infer discriminatory intent from the prosecutor's challenge of prospective jurors who expressed a willingness to impose either penalty.

The prosecutor generally followed a pattern of striking prospective jurors whose experiences or life views suggested that they might be more sympathetic to evidence of child abuse and mental illness, regardless of race or willingness to impose either penalty. Courts have acknowledged that it is not a pretext for discrimination to excuse jurors with health care or social services experience because it could make them more sympathetic to a criminal defendant. (*People v. Trevino* (1997) 55 Cal.App.4th 396, 411.)

The prosecutor tended to favor panelists who expressed a more favorable, or less ambivalent, view about the death penalty and the criminal justice system. For example, juror H.D. wrote on her questionnaire that a person who takes a life "should be punished to the full degree." (37 RT 12203.) On voir dire, she clarified that she had been thinking about "life without the possibility of parole" but she felt she could impose either penalty depending on the circumstances of the crime. (37 RT 12023-1220.) W.B. wrote in his questionnaire, "I'm for capital punishment, if a person kills blatantly." (39 RT 12907.) However, the prosecutor tended to strike panelists of any racial background who had been abused as children, who worked with children who might have been abused, and those who seemed sympathetic to a mental health defense. Particularly, if the panelist also expressed ambivalence about imposition to the death penalty. The only exception was the prosecutor's challenge of Holmes, who expressed a favorable view of the death penalty. But there was an obvious race neutral reason to challenge Holmes. The evidence presented in aggravation involved allegations of rape and drug use. Holmes son had been twice arrested for drug offenses and rape, and she felt that the court system had

railroaded her son into pleading guilty to a rape that he did not commit. (15 CT 4398; 39 RT 12750-12751.)

Discriminatory intent cannot be inferred based on the prosecutor's striking panelists willing to impose the death penalty because all of those panelists who had not been excused for cause had expressed a willingness to impose either penalty. The record shows that prosecutor's use of strikes was consistent with typical prosecutorial strategy, and does not raise in inference that he was motivated by discriminatory intent.

D. No Inference of Discriminatory Intent Arises From a Prosecutor Striking a Prospective Juror Who Has Been The Victim of a Property Crime

Johnson correctly points out that the African American panelists struck by the prosecutor at the time of the second *Batson* motion had either been burglarized, or were related to someone who had been burglarized. (SAOB 30-31.) He argues that a person's status as a victim of burglary, or as a relation to a victim of burglary, is a favorable characteristic toward the prosecution. (SAOB 30.) No inference of discriminatory intent can be drawn from a prosecutor's decision to strike prospective jurors because they or their relatives have been victims of property crimes. In the penalty phase of a death penalty case, such prior experience could be a favorable characteristic for the prosecution. But it would be difficult to infer that a prosecutor's use of challenges was obviously motivated by discriminatory intent merely on the basis that he challenged a panelist or panelists with one characteristic that could be viewed as favorable. Common sense dictates that most, if not all, panelists likely reveal at least one characteristic that could possibly be viewed as favorable by either party.

In any event, a person's status as the victim of a property crime, or their relationship to someone who has been victimized, says nothing about that person's values or priorities. As part of its case in aggravation, the

prosecutor noticed and ultimately presented evidence that Johnson committed a home invasion murder, rape, attempted murders, and other violent assaults. These crimes were not similar to having one's unoccupied home burglarized, having a bicycle stolen, or being related to someone who has been burglarized (AOB 30). No matter how much someone loves his or her property, the loss of it would not generally dictate the resolution of a life and death decision for another human being. A person who has been the victim of crime could harbor positive or negative feelings toward law enforcement, either related to the resolution of that crime, or related to an entirely different and more personal experience. For example, panelist Holmes said that her adult son, who lived with her, had been arrested twice for drug possession and rape. (15 CT 4398.) She opined that the system had forced him to plead guilty to the rape because the consequences of being convicted were so much more severe that taking the plea agreement. (39 RT 12750-12751.) It would be reasonable to expect that a mother would have stronger feelings about her son being forced to plead guilty to a rape that he did not commit, than she would about having her unoccupied home burglarized.

Furthermore, to the extent that comparative analysis is helpful for the first time on appeal (RB 68-69), nothing in this record suggests that the prosecutor retained prospective Caucasian jurors who were victims of property crimes, while at the same time striking African American panelists who were otherwise similarly situated. In short, nothing in this record suggests that the prosecutor viewed a prospective juror's status as a victim of property crime, or a familial relationship to a victim of property crime, as tending to show that the panelist would be more likely to impose the death penalty, rather than life without the possibility of parole.

In summary, appellant's trial counsel failed to make a prima facie showing that the prosecutor used peremptory challenges in a discriminatory

manner. (RB 53-57.) Furthermore, a review of the totality of the relevant circumstances contained in the record, including a comparative of analysis for the first time on appeal, does not support an inference that the prosecutor used peremptory challenges to minimize or exclude jurors of a particular race from participating as jurors.

II. THE DEATH PENALTY STATUTE AND ACCOMPANYING JUROR INSTRUCTIONS SET FORTH THE CORRECT BURDEN OF PROOF

In his Opening Brief, Johnson argued that the jury should have been required to find beyond a reasonable doubt that the aggravating factors existed and that they outweighed the mitigating factors citing the Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, and *Blakely v. Washington* (2004) 542 U.S. 296. (AOB 178-211.) In supplemental briefing, Johnson asks this Court to reconsider prior precedent in light of the Supreme Court's decision in *Hurst v. Florida* (2016) __ U.S. __ [136 S.Ct. 616, 193 L.Ed.2d 504] (*Hurst*) (SAOB 41-55). Consistent with its prior decisions, this Court should decline and reject appellant's Claim 15.

A. The Jury Was Not Required to Find Beyond a Reasonable Doubt That Aggravating Factors Existed or That They Outweighed the Mitigating Factors

This Court has repeatedly found that juries in capital cases are not required under *Apprendi*, *Ring*, and *Blakely* or under the federal Constitution to "make findings that aggravating factors were present, that they outweighed the mitigating factors, or the factors were enough to warrant a judgment of death beyond a reasonable doubt." (*People v. Garton* (2018) 4 Cal.5th 485, 522; *People v. Henriquez* (2017) 4 Cal.5th 1, 45 [same]; *People v. Jones* (2017) 3 Cal.5th 583, 618-619 [same]; *People v. Merriman* (2014) 60 Cal.4th 1, 106 [same].) Moreover, to the extent appellant contends that California's death penalty scheme should be

invalidated like the Florida scheme was invalidated in *Hurst, supra*, 136 S.Ct. at p. 616 (SAOB 42-47), this Court has previously rejected such contentions. (See *People v. Smith* (2018) 4 Cal. 4th 1134, 1183; accord *People v. Becerrada* (2017) 2 Cal.5th 1009, 1038; *People v. Jackson* (2016) 1 Cal.5th 269, 374; *People v. Rangel*, *supra*, 62 Cal.4th at p. 1235 & fn. 16 [*Hurst* does not invalidate California's death penalty scheme because it is "materially different" than the scheme used in Florida].)

B. The Prosecution Does Not Need to Prove The Existence of Aggravating Factors Or The Comparative Weight Of The Circumstances Beyond a Reasonable

To the extent Johnson contends the burden of proof for factual determinations should be beyond a reasonable doubt (SAOB 52-55, "[i]t is settled . . . that California's death penalty law is not unconstitutional in failing to impose a burden of proof—whether beyond a reasonable doubt or by a preponderance of the evidence—as to the existence of aggravating circumstances, the comparative weight of aggravating and mitigating circumstances, or the appropriateness of a sentence of death." (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1331, citing *People v. Stanley* (2006) 39 Cal.4th 913, 964; accord *People v. Brown* (2004) 33 Cal.4th 382, 401; *People v. Lenart* (2004) 32 Cal.4th 1107, 1136.) Furthermore, this Court has found that jury instructions "are not constitutionally defective for failing to require the state to bear the burden of proof beyond a reasonable doubt or even the burden of persuasion that an aggravating factor exists, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate penalty." (*People v. DeHoyos* (2013) 57 Cal.4th 79, 149, citing *People v. Bramit* (2009) 46 Cal.4th 1221, 1249-1250; *People v. Jones*, *supra*, 3 Cal.5th at p. 619; *People v. Jackson*, *supra*, 1 Cal.5th at pp. 372-373.)

This Court has explicitly "rejected the claim that the prosecution bears the burden of persuasion at the penalty phase." (*People v. Lenart, supra*, 32 Cal.4th at p. 1137; *People v. Sapp* (2003) 31 Cal.4th 240, 317.) In *People v. Hayes* (1990) 52 Cal.3d 577, this Court observed that "[b]ecause the determination of penalty is essentially moral and normative, and therefore different in kind from the determination of guilt, there is no burden of proof or burden of persuasion. The jurors cannot escape the responsibility of making the choice by finding the circumstances in aggravation and mitigation to be equally balanced and then relying on a rule of law to decide the penalty issue. The jury itself must, by determining what weight to give the various relevant factors, decide which penalty is more appropriate." (*Id*. at p. 643, internal citations omitted.)

C. *Hurst* Does Not Support Appellant's Claim That the Jury's Weighing Determination is a Factfinding

Appellant contends that "[t]his Court's interpretation of Penal Code section 190.3's weighing directive" in *People v. Brown* (1985) 40 Cal.3d 512 (revd. on other grounds sub nom. *California v. Brown* (1987) 479 U.S. 538) recognizes that the jury's penalty determination is factfinding for purposes of the penalty determination. (SAOB 48.) This is not correct and such a conclusion is not compelled by this Court's holdings or by *Hurst, supra,* 136 S.Ct. at p. 622. Johnson thus repeats his same argument but stated in a different way. It fails for the same reasons, principally, that *Hurst* does not invalidate California's death penalty scheme because it is "materially different" than the scheme used in Florida. (See, *People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16.)

D. The Delaware Court's Decision in *Rauf v. State* Does not Require That This Court Reconsider Its Prior Decisions

In a variation on the same theme, Johnson cites to the Delaware Supreme Court's decision case in support of his assertion that a penalty determination "is an 'element' or 'fact' under *Apprendi*, *Ring*, and *Hurst* and must be found by a jury beyond a reasonable doubt. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.)" (SAOB 53-55, 73, 78, citing *Rauf v. State* (Del. 2016) 145 A.3d 430 (*Rauf*.)

Johnson contends that the *Rauf* decision stands for the proposition that "that the determination that the aggravating circumstances outweigh the mitigating circumstance, like the finding that an aggravating circumstance exists, comes within the *Apprendi*/*Ring* rule." (AOB 55.) Yet Johnson acknowledges that the Delaware death penalty system is different from California in several important ways. Notably, after a Delaware jury finds at least one aggravating circumstance to be true, but selects a life sentence, the judge can make additional factual findings related to non-statutory circumstances in aggravation and use those to impose the death penalty. (See *Rauf*, *supra*, 145 A.3d at pp. 433-434.)

Unlike California's death penalty scheme, the jury in a Delaware capital case appears to play an advisory role because the trial court can make additional factual findings to impose a death verdict and overrule the jury's determination that life without the possibility of parole is the proper sentence. In California, the jury's imposition of a life sentence is final, and unanimity is required only as to the appropriate penalty. There is no constitutional requirement for unanimous jury findings as to the existence of aggravating circumstances, including unadjudicated criminal activity. (See *People v. Wall*, *supra*, 3 Cal.5th at p. 1073; see also *People v. Jones*, *supra*, 3 Cal.5th at p. 619; accord *People v. Watkins* (2012) 55 Cal.4th 999,

1036; *People v. Cowan* (2010) 50 Cal.4th 401, 489 [no requirement that penalty phase jurors unanimously agree on the existence of aggravating factors]; *People v. Taylor* (2010) 48 Cal.4th 574, 651; *People v. Rogers* (2006) 39 Cal.4th 826, 893; *People v. Blair* (2005) 36 Cal.4th 686, 753.)

Johnson provides no compelling reason why this Court should reconsider its prior holdings. The Delaware Supreme Court's decision in *Rauf*, 145 A.3d at p. 430, reveals that the Delaware capital sentencing scheme is not sufficiently similar to California's, and that case provides no reason for California to depart from its previous precedents. This Court should reject Johnson's claim.

III. THIS COURT HAS FULLY ADDRESSED AND REJECTED JOHNSON'S ARGUMENT THAT THE SIXTH AMENDMENT REQUIRES A UNANIMOUS JURY DETERMINATION OF THE AGGRAVATING FACTORS BEYOND A REASONABLE DOUBT

In his next assignment of error, Claim 16, appellant contends that this Court has not "fully addressed . . . in decades of litigation regarding whether the basic requirements of a jury trial (particularly unanimity and proof beyond a reasonable doubt) apply to the aggravating factors and the verdict at the penalty phase of a capital trial." (SAOB 57.) On the contrary, as explained above, this Court has explicitly found, on numerous occasions, that the Sixth Amendment does not require unanimity or proof beyond a reasonable doubt as to the existence of aggravating factors or the relative weight to give each individual aggravating and mitigating circumstance. (See *People v. Wall* (2017) 3 Cal.5th 1048, 1073; see also *People v. Jones*, *supra*, 3 Cal.5th at p. 619; accord *People v. Watkins*, *supra*, 55 Cal.4th at p. 1036; *People v. Cowan*, *supra*, 50 Cal.4th at p. 489; *People v. Taylor*, *supra*, *supra*, 48 Cal.4th at p. 651; *People v. Rogers*, *supra*, 39 Cal.4th at p. 893, quoting *People v. Blair*, *supra*, 36 Cal.4th at p. 753.) In fact, this Court has exhaustively reviewed the arguments appellant raises in Claim 16. (SAOB 56-95.)

Appellant largely disregards California authorities that are directly on point, and instead favors a needlessly detailed historical account, dotted with citations to the common law. He argues that the Constitution allows for the state to leave a penalty determination with a judge. However, where a state chooses to provide a jury at the penalty phase, the Constitution requires the state to afford all other constitutional protections. (AOB 74-74.) This makes little sense and appears to misapprehend the proper state of the law. As a matter of constitutional and state law, the jury or trier of fact determines those facts that make a defendant eligible for the death penalty, and the validity of California's death penalty scheme is not altered by *Apprendi*. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1277-1278.)

This Court should reject his claim.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment.

Dated: August 29, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S SUPPLEMENTAL BRIEF uses a 13 point Times New Roman font and contains 8,254 words.

Dated: August 29, 2018

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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