SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JAMELLE EDWARD ARMSTRONG,

Defendant and Appellant.

CAPITAL CASE

Case No. S126560

SUPREME COURT
FILED

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The Honorable Tomson T. Ong, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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INTRODUCTION

On November 16, 2015, appellant filed a second supplemental brief ("SAOB") setting forth recent case development in *Batson/Wheeler*[1] analysis. While noting that none of the cases cited "represent a radical change in the case law" since his reply brief was filed in September 2013 (SAOB 1), appellant focuses his discussion on the first and third stages of the *Batson/Wheeler* inquiry and argues that a prima facie case of discrimination was established (SAOB 2-7) and that the prosecutor's proffered justifications were pretextual. (SAOB 7-13). To the contrary, the trial court did not err in denying appellant's *Batson/Wheeler* motions.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED APPELLANT'S *BATSON/WHEELER* MOTIONS AS TO PROSPECTIVE JURORS S.L. AND R.C.

At trial, appellant made four *Batson/Wheeler* motions relating to the prosecutor's peremptory challenges to four Black men, prospective jurors S.L., R.C., E.W., and R.P. The trial court found a prima facie case of discrimination was not shown as to S.L. and R.C., but was shown as to E.W. and R.P. The prosecutor then offered her reasons for the peremptory challenges as to all four jurors, which the trial court determined were race-neutral. In his opening brief, appellant argued that the prosecutor's peremptory challenges were racially discriminatory and that the court failed to undertake a sincere and reasonable evaluation of her explanations. (AOB 137-249.) In his second supplemental brief, appellant sets forth recent case development in the first and third stages of *Batson/Wheeler* analysis and argues that a prima facie case of discrimination was

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[1] *Batson v. Kentucky* (1996) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

established and that the prosecutor's proffered justifications were pretextual. (SAOB 2-13.) To the contrary, the trial court did not err in denying appellant's *Batson/Wheeler* motions. As to prospective jurors E.W. and R.P., respondent has previously set forth its response in the respondent's brief and does not repeat it here. (RB 136-143.) As to prospective jurors S.L. and R.C., the prosecutor's stated reasons were race-neutral, and comparative juror analysis shows the prosecutor's explanations were genuine.[2]

A. The Prosecutor's Stated Reasons for Excusing Prospective Jurors S.L. and R.C. Were Race-Neutral

1. Standard of review

In *People v. Scott* (2015) 61 Cal.4th 363 (*Scott*), the defendant brought a *Batson/Wheeler* motion following the prosecutor's dismissal of two Black prospective jurors. The trial court found the defendant failed to establish a prima facie case as to one juror, and the prosecutor did not offer any reasons for his excusal of the juror. As to the second juror, the trial court also found a prima facie case was not established, but the prosecutor provided his reasons for dismissing the second juror for the record. The trial court found no prima facie case of discrimination as to either juror, and also found, in the alternative, that the prosecutor's reasons for dismissing the second juror did not constitute purposeful discrimination. (*Id.* at pp. 381-383, 385.) The *Scott* Court found that any inference of bias was dispelled by the existence of nondiscriminatory reasons for striking both jurors. (*Id.* at p. 385.)

[2] More detailed accounts of S.L. and R.C.'s responses in their written questionnaires and voir dire were previously set forth in the Respondent's Brief. (RB 103-115.)

The Court also clarified proper appellate practice in reviewing *Batson/Wheeler* motions. Where the trial court finds no prima facie case of discrimination and permits the prosecutor to state his or her reasons for excusing the juror, but does not rule on the validity of the prosecutor's reasons, the appellate court should review the trial court's first-stage ruling. (*Scott*, *supra*, 61 Cal.4th at p. 386.)

On the other hand, where the trial court finds no prima facie case of discrimination and makes an alternative holding that the prosecutor's reasons were genuine after permitting the prosecutor to state his or her reasons for excusing the juror, the *Scott* Court recognized that its jurisprudence on the issue has been inconsistent. (*Scott*, *supra*, 61 Cal.4th at pp. 386-387.) After considering various "interests at stake," "practical considerations," and "the role a prosecutor's discriminatory reason" may play in an appellate court's review of a first-stage ruling (*id.* at pp. 387-391), the *Scott* Court delineated two different scenarios—one in which the prosecutor provides nondiscriminatory reasons, and another in which the prosecutor provides facially discriminatory reasons—and considered how the prosecutor's reasons might be considered. While the appellate court may not generally consider the prosecutor's reasons in reviewing the trial court's first-stage ruling, the appellate court may consider them in the second scenario when the prosecutor's reasons are facially discriminatory. (*Id.* at pp. 390-391.) Thus, in the first scenario, appellate review should begin with the trial court's first-stage ruling, and the claim is resolved if the appellate court agrees with the trial court. If the appellate court disagrees with the trial court, then a full record of the prosecutor's reasons would be available for review of the trial court's third-stage ruling. (*Id.* at p. 391.) In the second scenario, appellate review should also begin with the trial court's first-stage ruling. However, the Court noted that "the relevant circumstances, including the facially discriminatory justification advanced

by the prosecutor, would almost certainly raise an inference of discrimination and therefore trigger review of the next step of the *Batson/Wheeler* analysis." (*Id.* at pp. 391-392.)

Lastly, the Court considered a situation where a defendant has made multiple *Batson/Wheeler* challenges:

> Where the appellate court is already evaluating the sincerity of the proffered reason for excusing one juror as part of its review of all the evidence as it bears on the question whether the excusal of another juror constituted unlawful discrimination [citations], the appellate court may likewise begin its review of the denial of the *Batson/Wheeler* motion as to the first juror by evaluating the sincerity of the proffered reason.

(*Scott*, *supra*, 61 Cal.4th at p. 392 [recounting *People v. Ricarrdi* (2012) 54 Cal.4th 758, that where the trial court denies three of four *Batson/Wheeler* challenges based on the third stage, the appellate court may review the trial court's third-stage ruling as to all four jurors].)

In *Scott*, the Court found that its agreement with the trial court that the defendant failed to establish a prima facie case of discrimination was "sufficient" to resolve his *Batson/Wheeler* claim. (*Scott*, *supra*, 61 Cal.4th at p. 392.) The Court disagreed with Justice Liu's claim in his concurring opinion that the first-stage inquiry is moot under the plurality opinion in *Hernandez v. New York* (1991) 500 U.S. 352 [111 S.Ct. 1859, 114 L.Ed.2d 395]. The Court noted that *Hernandez* involved a different scenario in which the trial court did not consider whether a prima facie case of discrimination had been made but ruled on the third-step analysis of whether there was intentional discrimination. Where the trial court made a ruling that the defendant failed to make a prima facie showing of discrimination, the *Scott* Court found *Hernandez* did not apply. (*Scott*, *supra*, at p. 393.)

In the instant case, the trial court found a prima facie case of discrimination was not established as to prospective jurors S.L. and R.C., but was established as to E.W. and R.P. The prosecutor offered her reasons for the peremptory challenges as to all four jurors. Thus, under *Scott*, this Court may review the trial court's third-stage ruling as to all four jurors. (*Scott*, *supra*, 61 Cal.4th at p. 392.)

The standard of review in a third-stage inquiry has not changed. In the third-stage inquiry, the appellate court's review of the trial court's ruling is "deferential" and "examine[s] 'only whether substantial evidence supports its conclusions.' [Citation.]" (*People v. Johnson* (2015) 61 Cal.4th 734, 755.) It is presumed that a prosecutor who uses a peremptory challenge does so for a proper purpose other than to discriminate. (*Ibid.*, citing *People v. Burgener* (2003) 29 Cal.4th 833, 864.) "As long 'as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.' [Citation.]" (*Ibid.*)

As stated in *Miller-El v. Cockrell* (2003) 537 U.S. 322, 338-339 [123 S.Ct. 1029, 154 L.Ed.2d 931]:

> "[T]he critical question in determining whether a prisoner has proved purposeful discrimination" in connection with a third-stage inquiry "is the persuasiveness of the prosecutor's justification for his peremptory strike. At this stage, 'implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.' [Citation.] In that instance the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how

> improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy."

(*People v. Johnson*, *supra*, 61 Cal.4th at p. 755, brackets original.) "The focus at this point is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, *not* on the objective *reasonableness* of those reasons. [Citations.]" (*People v. Trinh* (2014) 59 Cal.4th 216, 241, italics original, internal quotations omitted; *People v. Chism* (2014) 58 Cal.4th 1266, 1317.)

2. Prospective Juror S.L.

Here, race-neutral grounds supported the prosecutor's challenge of prospective juror S.L., which was based on prospective juror S.L.'s feelings towards the death penalty. (16RT 3383-3385.) S.L. was ambivalent towards the death penalty. In his written questionnaire, prospective juror S.L. believed California should have the death penalty (6CT 1479 [Q. 186]), but was unsure that California should abolish the death penalty (6CT 1479 [Q. 187]). Prospective juror S.L. was not sure whether he was someone who says he supports the death penalty but could not personally impose it. (6CT 1479 [Q. 188].) He was not sure when the death penalty might be appropriate (6CT 1479 [Q. 191]), but later explained the death penalty would be appropriate "[i]f his background and what he did indicates that he will always kill people even in prison" (6CT 1482 [Q. 209]). Prospective juror S.L. believed that life without the possibility of parole (LWOP) was worse for a defendant as "they have to live with it for the rest of their life." (6CT 1480 [Q. 198].) He also believed LWOP was the more severe punishment as "[y]ou have the rest of your life to be punished." (6CT 1485 [Q. 227].)

In his *Hovey*[3] voir dire, prospective juror S.L. maintained that LWOP was the worse penalty. (9RT 1732, 1744.) Prospective juror S.L. also stated that LWOP would be appropriate for someone who did not have a prior criminal history and who could be rehabilitated (9RT 1730, 1732-1733, 1745-1746), although he later told defense counsel that he could impose the death penalty on someone without a prior criminal history (9RT 1747). A prospective juror's uncertainty, reservations, or skepticism about the death penalty is a race-neutral justification for a peremptory challenge. (*People v. Watson* (2008) 43 Cal.4th 652, 681; accord, *People v. Johnson*, *supra*, 61 Cal.4th at pp. 755-758 [prosecutor had valid neutral reasons for removing three prospective jurors who preferred leniency and was equivocal about her ability to impose the death penalty].) In denying appellant's *Batson/Wheeler* motion, the trial court noted that the prosecutor's motive to excuse prospective juror S.L. was based on her "perceived perception of this juror's inability to be able to impose death at the penalty phase." (15RT 3224.) Later, after hearing the prosecutor's reasons for the challenge, the court reiterated that the prosecutor's basis was race-neutral. (16RT 3385.) The record amply reflects that the trial court's assessment was supported by substantial evidence.

3. Prospective Juror R.C.

Similarly, race-neutral grounds supported the prosecutor's challenge of prospective juror R.C., which was based on his lack of an opinion on the death penalty and on which penalty was worse, his unwillingness to set aside his beliefs, his failure to answer questions or to answer them in a confusing manner, and what the prosecutor perceived to be a personality conflict with her. (16RT 3385-3394.) In his written questionnaire,

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[3] *Hovey v. Superior Court* (1980) 28 Cal.3d 1 (*Hovey*).

prospective juror R.C. expressed no opinion about the death penalty (6CT 1528 [Q. 178], 1529 [Q. 186]), about which penalty was worse for a defendant (6CT 1530 [Q. 198]), or about which penalty was more severe (6CT 1535 [Q. 227]). Yet when asked if he could set aside religious, social or philosophical convictions and decide the penalty question based solely upon the aggravating and mitigating factors, prospective juror R.C. crossed out "Cannot" and wrote "Will not" set aside his beliefs, explaining, "My life is predicated upon my belief systems." (6CT 1530-1531 [Q. 200].) In his *Hovey* voir dire, prospective juror R.C. maintained that he did not have an opinion about the death penalty or about which punishment was worse. (11RT 2279-2283.) He also reiterated that he would not set aside his beliefs. (11RT 2276-2279.) "A prospective juror's unresponsiveness concerning opinions about the death penalty is a valid nondiscriminatory basis for striking a juror. [Citation.]" (*People v. Trinh, supra*, 59 Cal.4th at p. 243.)

Further, because prospective juror R.C. claimed he did not have an opinion about the death penalty and that he would not set aside his beliefs in imposing the penalty, the prosecutor could plausibly conclude that she had no idea how prospective juror R.C. would determine the penalty even though a "prosecutor must seek a unanimous verdict." (*People v. Hensley* (2014) 59 Cal.4th 788, 805.) Moreover, prospective juror R.C.'s firm stance in his written questionnaire that he would not set aside his beliefs and that "[m]y life is predicated upon my belief systems" could have indicated to the prosecutor that R.C. would be unwilling to deliberate with other jurors based on his "belief systems." (6CT 1531 [Q. 200].) The prosecutor's reasons were nondiscriminatory. (*People v. Cash* (2002) 28 Cal.4th 703, 724-725 [the prosecutor's belief that a prospective juror had a "possible inability to get along with other jurors" was a race-neutral reason for exercising a peremptory challenge]; see also *People v. Jones* (2011) 51

Cal.4th 346, 360 [even a trivial, arbitrary, or idiosyncratic reason, if it is genuine and neutral, is sufficient justification for exercising a peremptory challenge, and such reasons may be based on hunches, gestures, or facial expressions].)

Also troubling for the prosecutor were her acrimonious exchanges with prospective juror R.C. during voir dire. (11RT 2280-2285, 2288-2292, 2303-2304.) At sidebar, the prosecutor noted that R.C. had used a sarcastic tone in calling her "amazing," and that he appeared to feel "threatened" by her. She felt that prospective juror R.C. was "prejudiced" against her. She noted that any "personality issue" prospective juror R.C. might have against her might result in his inability to return a guilty verdict and to impose the death penalty. (11RT 2285-2286.) Later, when the prosecutor told the court that she intended to exercise her peremptory challenge against prospective juror R.C., the court commented that prospective juror R.C. and the prosecutor "had some problems communicating during voir dire. He refuses to answer [the prosecutor's] questions." (16RT 3309.) Therefore, after hearing the prosecutor's reasons for challenging prospective juror R.C., the court stated:

> I have indicated earlier as to [R.C.] I can understand a race neutral basis for the People to excuse this juror. [¶] He does not respond to the questions posed upon him *and there seems to be a lot of friction between the prosecutor and the prospective juror or this prospective juror during the Hovey examination.*

(16RT 3394, italics added; see *People v. Wheeler*, *supra*, 22 Cal.3d at p. 275 [a prospective juror's act of glaring at one of the parties during jury selection is a race-neutral reason to exercise a peremptory challenge].) The record amply reflects that the trial court's assessment was supported by substantial evidence.

B. Comparative Juror Analysis Shows the Prosecutor's Justifications for Challenging Prospective Jurors S.L. and R.C. Were Race-Neutral

1. Applicable law regarding comparative juror analysis

The reviewing court must consider comparative juror analysis in the third-stage inquiry where the defendant has relied on such evidence and the record is adequately developed to permit such comparisons. (*People v. Chism*, *supra*, 58 Cal.4th at p. 1318.) "'[C]omparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination.' [Citation.]" (*Ibid.*) Courts have recognized that comparative juror analysis on a cold appellate records may be misleading. (*Snyder v. Louisiana* (2008) 552 U.S. 472, 483 [128 S.Ct. 1203, 170 L.Ed.2d 175]; *People v. Lenix* (2008) 44 Cal.4th 602, 622.) Indeed, this Court has explained the limited nature of comparative juror analysis evidence:

> "on appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact. 'Even an inflection in the voice can make a difference in the meaning.'" [Citation.] Moreover, we have recognized "that it is a combination of factors rather than any single one which often leads to the exercise of a peremptory challenge"; that "the particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box"; and that "the same factors used in evaluating a juror may be given different weight depending on the number of

> peremptory challenges the lawyer has at the time of the exercise of the peremptory challenge and the number of challenges remaining with the other side." [Citation.]

(*People v. Chism*, *supra*, 58 Cal.4th at p. 1318.) Such shortcomings provide "'good reason'" for the reviewing court to "'give great deference to the trial court's determination that the use of peremptory challenges was not for an improper or class bias purpose.' [Ciation.]" (*Ibid.*)

When conducting comparative juror analysis on appeal, the reviewing court may consider "'reasons the record discloses for not challenging other jurors even if those other jurors are similar in some respects to excused jurors.' [Citation.]" (*People v. Chism*, *supra*, 58 Cal.4th at p. 1319.) Challenging one prospective juror but not another with the same concern does not indicate that the challenge was illegitimate:

> "Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding." [Citation.]

(*Ibid.*)

2. Prospective Juror S.L.

Appellant contends Juror Nos. 4, 5, 9, 10, 12, and Alternate Juror No. 5 also gave conflicting answers in their questionnaire about which penalty was worse. He argues the prosecutor did not question these jurors about their responses, and that Juror No. 9 essentially provided the same response as prospective juror S.L. that they would ultimately follow the law. (AOB 202-205.) These jurors are not similar to prospective juror S.L.

Initially, the two questions singled out by appellant, 198 and 227, do not simply ask which penalty is worse or more severe in the abstract. Rather, question 198 asks the juror which punishment is "worse for a defendant," a subjective question, while question 227 asks which is "a more severe punishment," an objective question. That a juror answered these different questions differently does not indicate he or she held ambivalent views about the death penalty, and the prosecutor did not need to "clarify" the answers. (7CT 1927, 1932 [Juror No. 4]; 1976, 1981 [Juror No. 5]; 8CT 2225, 2230 [Juror No. 10]; 8CT 2176, 2181 [Juror No. 9]; 9CT 2571, 2576 [Alt. Juror No. 5].)

Further, these jurors' other answers indicated they lacked the same ambivalence towards the death penalty as prospective juror S.L. And none of these jurors mentioned a defendant's rehabilitation as a factor in imposing LWOP. Juror No. 4 believed the death penalty was sometimes warranted and that it was too seldom used. (7CT 1925 [Q. 178, 183].) She did not believe California should abolish the death penalty because it provided "[a]n awareness to criminals that they could pay the ultimate punishment." (7CT 1926 [Q. 187].) She did not have a problem personally voting to impose the death penalty and provided types of cases in which the death penalty would be appropriate. (7CT 1926 [Q. 188, 191].)

Juror No. 5 believed the death penalty was "needed though [a] sad way to punish someone." (7CT 1974 [Q. 178].) He once believed the death penalty was "cruel" but now believed it was necessary. (7CT 1974 [Q. 181].) He believed California should have the death penalty and not abolish it. (7CT 1975 [Q. 186, 187].) And unlike prospective juror S.L., he was not someone who supports the death penalty yet could not impose it. (7CT 1975 [Q. 188].)

Juror No. 10 believed California should have the death penalty and not abolish it because "[i]t's a deterrent." (8CT 2224 [Q. 186, 187].) He

was not someone who supported the death penalty yet could not impose it. (8CT 2224 [Q. 188].) And he "strongly" agreed that anyone who kills another without legal justification should receive the death penalty. (8CT 2225 [Q. 196].)

Juror No. 9 had "no problem" with the death penalty law and believed "[i]n some cases it is justice." (8CT 2174 [Q. 178, 179].) He believed California should have the death penalty and not abolish it because "[i]t is deserving in some cases." (8CT 2175 [Q. 186, 187].) And he was not someone who supported the death penalty yet could not impose it. (8CT 2175 [Q. 188].) During his *Hovey* voir dire, Juror No. 9 told the prosecutor that he could impose the death penalty if aggravating factors substantially outweighed mitigating factors. (14RT 3050.)

Alternate Juror No. 5 believed "[t]here may be times when [the death penalty] is necessary." (9CT 2569 [Q. 178].) She believed California should have the death penalty and not abolish it because "[t]here needs to be extreme consequences for some people." (9CT 2570 [Q. 186, 187].) She was not someone who supported the death penalty yet could not impose it. (9CT 2570 [Q. 188].) And she believed LWOP was not a severe sentence because "[y]ou are still living – you can read, write, talk to family" whereas death was a severe sentence because "[y]ou no longer exist, no family contact." (9CT 2575 [Q. 225, 226].)

As to Juror No. 12, her answer that she "would most likely lean towards" LWOP (8CT 2328 [Q. 224]) did not indicate the prosecutor should have further inquired about her answer as that question asked for her feelings about LWOP in general, without considering the evidence in the case. (See AOB 205.) Indeed, Juror No. 12's other answers showed no ambivalence towards the death penalty. Juror No. 12, unlike prospective juror S.L., believed death was worse for a defendant (8CT 2324 [Q. 198]) and that death was the more severe punishment (8CT 2329 [Q. 227]). She

believed California should have the death penalty (8CT 2323 [Q. 186]) and should not abolish it (8CT 2329 [Q. 187]). She was not someone who said they supported the death penalty but could not personally vote to impose it. (8CT 2323 [Q. 188].) She had told the court that she would not automatically vote for LWOP without considering the aggravating and mitigating factors. (11RT 2328-2329.) She clarified that she would not require the prosecution to show the defendant had a prior criminal history or that there were multiple victims. (11RT 2330-2332.) She affirmed that she could impose the death penalty if aggravating factors substantially outweighed mitigating factors. (11RT 2335.) Therefore, the prosecutor may have reasonably viewed Juror No. 12 as someone who supported the death penalty and was able to impose it in the right circumstance.

The identified jurors' responses were not comparable to prospective juror S.L., and appellant's comparative juror analysis should be rejected.

3. Prospective Juror R.C.

Appellant contends Juror Nos. 5, 8, and Alternate Juror Nos. 1 and 4 did not have any general feelings about the death penalty but were accepted by the prosecutor. (AOB 223-224.) These jurors are not similar to prospective juror R.C. In addition to not having any feelings about the death penalty, prospective juror R.C. also expressed an unwillingness to set aside his beliefs, did not answer some of the questions in the written questionnaire or answered in a confusing manner, and had a personality conflict with the prosecutor.

As noted above (*ante*, B.1), Juror No. 5 expressed a firm belief in the death penalty. He also stated that he could set aside any personal convictions and decide the penalty solely based upon the aggravating and mitigating factors. (7CT 1976-1977 [Q. 200].) Moreover, there were no

apparent personality conflicts with the prosecutor during voir dire. (7RT 1315-1318.)

Juror No. 8 also expressed a firm belief in the death penalty. His "general feelings" towards the death penalty was that "[i]f deserved so be it." (8CT 2124 [Q. 178].) He believed California should have the death penalty (8CT 2125 [Q. 186]) and not abolish it because "[i]t's a good tool of deterrent" (8CT 2125 [Q. 187]). He was not someone who supported the death penalty but could not personally vote to impose it. (8CT 2125 [Q. 188].) He believed death was worse for a defendant (8CT 2126 [Q. 198]) and that death was the more severe punishment (8CT 2131 [Q. 227]). He also stated that he could set aside any personal convictions and decide the penalty solely based upon the aggravating and mitigating factors. (8CT 2126-2127 [Q. 200].) Further, he did not have any apparent personality conflicts with the prosecutor during voir dire. (5RT 863-877.)

The same was true for Alternate Juror Nos. 1 and 4. Both had an opinion about the death penalty. (9CT 2372 [Alt. Juror No. 1, Q. 178: "It was voted in so use it"]; 9CT 2519 [Alt. Juror No. 4, Q. 178: "If the crime is severe enough, then the penalty should be severe"].) Both believed California should have the death penalty (9CT 2373, 2520 [Q. 186]) and that it should not be abolished (9CT 2373, 2520 [Q. 187]). They were not people who supported the death penalty but could not personally vote to impose it. (9CT 2373, 2520 [Q. 188].) They believed death was worse for a defendant (9CT 2374, 2521 [Q. 198]) and that death was the more severe punishment (9CT 2379, 2526 [Q. 227]). They also stated that they could set aside any personal convictions and decide the penalty solely based upon the aggravating and mitigating factors. (9CT 2374-2375, 2521-2522 [Q. 200].) Further, they did not have any apparent personality conflicts with the prosecutor during voir dire. (19RT 3992-3998, 4001-4011 [Alt. Juror No. 1]; 14RT 2914-2931 [Alt. Juror No. 4].) Indeed, the prosecutor asked

Alternate Juror Nos. 1 and 4 the same question she asked prospective juror R.C., whether the juror could look defendant in the eye and return a verdict of death, and was not met with hostility. (Compare 11RT 2304 to 19RT 4006 and 14RT 2924.)

Accordingly, the prosecutor may have reasonably viewed that these jurors had an opinion about the death penalty, that they could impose it in the right circumstance, that they could set aside their own beliefs, and that they did not have any hostility towards her. Therefore, the identified jurors' responses were not comparable to prospective juror R.C., and appellant's comparative juror analysis should be rejected.

CONCLUSION

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

Dated: March 14, 2016

Respectfully submitted,

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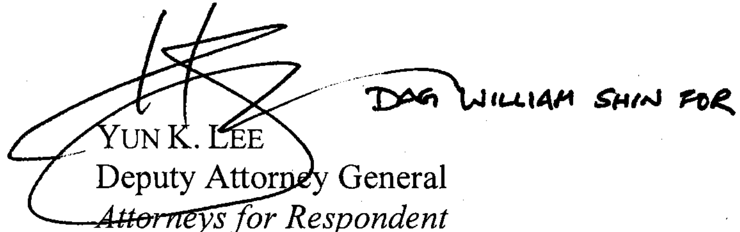

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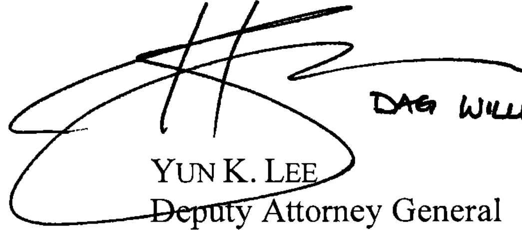
CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 4,574 words.

Dated: March 14, 2016

KAMALA D. HARRIS
Attorney General of California



YUN K. LEE
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE

Case Name: ***People v. Jamelle Edward Armstrong*** No.: **S126560 (CAPITAL CASE)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On March 14, 2016, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Glen Niemy
Attorney at Law
P.O. Box 3375
Portland, ME 04104

Maria Elena Arvizo-Knight
Death Penalty Appeals Clerk
Los Angeles County Superior Court
210 West Temple Street, Room M-3
Los Angeles, CA 90012

Governor's Office
Attn: Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814

Geraldine S. Russell
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P.O. Box 2160
La Mesa, CA 91943-2160

The Honorable Tomson T. Ong, Judge
Los Angeles County Superior Court
Governor George Deukmejian Courthouse
275 Magnolia, Department S19
Long Beach, CA 90802

Corene Locke-Noble, Deputy District Attorney
Los Angeles County District Attorney's Office
211 West Temple Street, Suite 1200
Los Angeles, CA 90012

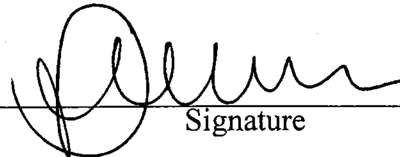
Joseph Schlesinger
Executive Director
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

On March 14, 2016, I caused eight (8) copies of the **SUPPLEMENTAL RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, San Francisco, CA 94102 by OnTrac, Tracking # B10290834826.

On March 14, 2016, I caused one electronic copy of the **SUPPLEMENTAL RESPONDENT'S BRIEF** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 14, 2016, at Los Angeles, California.

Frances Conroy
Declarant


Signature

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