IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **SHELDON VAUGHN SILAS, REGINALD WHITLEY, JR., LAMAR MICHAELS, AND LINDA CHANEY,** Defendants and Appellants.	Case No. A150512

Contra Costa County Superior Court, Case No. 51407097
The Honorable Clare Maier, Judge

ANSWER TO AMICUS BRIEF

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The brief of amici curiae makes several important and powerful points with which respondent agrees. Specifically, they argue that support for Black Lives Matter (BLM) is not a race-neutral justification for a peremptory strike, and support for BLM does not give cause to question a juror's fitness for service. (ACB 14-15.) Respondent agrees with both arguments in principle. We further agree that any perception that BLM is "inherently lawless" or that support for BLM, on its own, shows that a person cannot follow jury instructions is misguided and offensive.

Despite these points of agreement, respondent disagrees with amici's contention that the trial court erred in finding no prima facie case of purposeful discrimination based on the prosecutor's use of a peremptory strike against JN275. (*Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.) While the prosecutor's questions of JN275 about her support of BLM were no doubt inaccurate and inflammatory to the extent they attempted to link the BLM movement to rioting and property destruction, the record shows that JN275's support of BLM was not the reason that the prosecutor dismissed her. The record further shows that the trial court did not assert that a juror who supports BLM is unfit to serve. Accordingly, there was no *Batson* violation in the case, and the conviction should be affirmed.

A. Points of Agreement and Recent Developments

Although respondent ultimately disagrees that this case should be reversed on *Batson/Wheeler* grounds, we agree with many of the larger points raised in the amici's brief. The Attorney General agrees with amici's description of the history and purpose of BLM, and its assertions that BLM uses peaceful protest and the political process to effect change, that BLM does not promote violence or jury nullification, that support for BLM is correlated with race, and that the nonviolent direct action and civil disobedience tactics used by BLM have been used historically in this country to gain civil rights for Black people. The Attorney General further agrees that support for BLM, on its own, is not a valid basis to strike a prospective juror.

The Attorney General also acknowledges Justice Humes's concurring opinion in *People v. Bryant* (2019) 40 Cal.App.5th 525, which observed that there are "serious shortcomings with the *Batson* framework," and that meaningful reform is in order. (*Id.* at p. 544.) Reform efforts are, in fact, underway.

In January, the Supreme Court announced the creation of a Jury Selection Work Group to study changes or new measures to guard against impermissible discrimination in jury selection. (https://newsroom.courts.ca.gov/news/supreme-court-announces-jury-selection-work-group.) Among other things, the group will study whether a purposeful discrimination standard imposes an appropriate burden on litigants attempting to raise a *Batson/Wheeler* challenge, whether current standards of appellate review of peremptory challenges in California

adequately serve the goals of *Batson/Wheeler* jurisprudence, and whether allowing peremptory challenges based on a prospective juror's negative experience or views of law enforcement or the justice system results in disproportionate exclusion of jurors of certain backgrounds. (*Ibid.*) The Attorney General's Office is actively engaged in this process, with a representative serving on the work group in an advisory capacity. (See https://newsroom.courts.ca.gov/news/california-supreme-court-names-jury-selection-work-group.)

The state legislature is also considering legislative reforms. The Legislature passed Assembly Bill No. 3070, which seeks to address deficiencies in the *Batson*/*Wheeler* approach by designating several justifications as presumptively invalid and providing a remedy for conscious and unconscious bias in the use of peremptory challenges. (Assem. Bill No. 3070 (2019-2020 Reg. Sess.) [awaiting action by Governor Newsom].)

Ultimately, steps taken by the Judicial Council or the Legislature are the most direct means of structural reform in this context given *Batson*'s status as established Supreme Court precedent.

B. The Prosecutor Did Not Dismiss JN275 Because She Supported BLM nor Did the Judge Question JN275's Fitness To Serve as a Juror Based on Support for BLM

While we agree that reforms to the jury selection system are in order to better protect Black prospective jurors and others from discrimination and implicit bias, and while we agree that support for BLM, in and of itself, is not a valid reason to

challenge a prospective juror's fitness to serve, we disagree that there was reversible error in this case. Contrary to amici's argument, JN275 was not challenged or excused due to support for BLM.

1. The Challenge to JN275

As explained in our Respondent's Brief, the discussion of the reasons supporting excusal occurred primarily in the context of the prosecutor's motion to excuse JN275 for cause. (Compare 7SRT 1245-1261 with 16SRT 2812.) The defense objected to that motion, arguing that the prosecutor aggressively questioned the juror about her support for BLM, causing the juror to react negatively.

In evaluating the questioning and the court's ruling on both the for-cause challenge and the *Batson* challenge, the full context of that questioning must be considered. Jury selection in this case took place over 17 days. The venire was divided into small groups for questioning, hardship inquiries, and for cause challenges. JN275 was questioned in a group with 11 other potential jurors, none of whom ultimately served on the jury. The court questioned the group first, followed by the prosecutor, and then defense counsel. The court noted that JN275 had her arms crossed the entire time the court was speaking to her. (7SRT 1258.)

The prosecutor's questioning of the jurors in JN275's group spans 50 pages of reporter's transcript. (7SRT 1113-1163.) Her questioning of JN275 on the topic of BLM occurred toward the end of her time. (7RT 1156-1158.) The prosecutor's questions to

JN275 about BLM were not asked out of the blue. They were based on the juror's responses to the questionnaire, which was a joint creation by all the parties.

All parties and the court conferred and agreed upon the content of the jury questionnaire to be used in this case. (5 Aug. RT [10/20/15] 795-800.) The juror questionnaire asked if any of the juror's family members or close friends "belong to or have an affiliation with any law or justice-focused special interest groups," giving as examples "Mothers Against Drunk Driving, National Rifle Association, ACLU, Prisoner's Rights Groups, Victims' Rights Groups, Death Penalty Information Center, Death Penalty Focus, Amnesty International, Black Lives Matter, Blue Lives Matter, etc." (7SCT 1857.) JN275 marked yes and wrote, "I support Black Lives Matter." (7SCT 1857.) Based on that response, the prosecutor followed up with questioning on that topic.

Significantly, the trial court found that the prosecutor did not question all Black prospective jurors the way she did JN275; the prosecutor's individual questioning, rather, was spurred by the juror's responses on the questionnaires. (7SRT 1259 ["Ms. Smith . . . has not done this with every African-American person. It's when they have certain characteristics in their jury questionnaire that indicate that it could be a problem and she does probe them"].) The court also noted that JN275 had her arms crossed while she was speaking to the prosecutor, just as she had while speaking to the court, whereas she was more open when speaking to defense counsel. (7SRT 1258.) Based on the

court's observation, JN275 was "not connecting with Ms. Smith from the get-go." (7SRT 1260.) The prosecutor's for-cause excusal motion was not based on the juror's support for BLM, but rather on the entirety of her interaction with the court, the prosecutor, and defense counsel before and during voir dire.

Although the various attorneys for the defense disagreed with the cause challenge and took serious issue with the tenor of the prosecutor's questioning, they also acknowledged during this discussion that asking the juror whether she agreed with BLM's civil disobedience tactics was a "legitimate voir dire question" (7SRT 1248 [Silas]), that the prosecutor's observations regarding the juror's demeanor with her "might justify a peremptory challenge" (7SRT 1251 [Michaels]), and that the juror was "not particularly forthcoming" when answering the court's and prosecutor's questions (7SRT 1251 [Whitley]).

2. The Court's Ruling

In addressing the motion, the court noted several reasons supporting the prosecutor challenge to JN275. The court observed that the juror was "not connecting with Ms. Smith [the prosecutor] from the get-go, not just when Ms. Smith had asked the questions about Black Lives Matter" (7SRT 1260), that the juror's responses were reluctant and her arms were crossed when she spoke to the court and prosecutor, but that she was much more open when she spoke to defense counsel (7SRT 1258-1259), and that unlike the other jurors, JN275 did not affirmatively nod when the court asked the group if they could treat witnesses equally, and specifically police officers, which prompted the court

to elicit her confirmation individually (7SRT 1258; see 7SRT 1079-1081).

On the specific topic of questioning JN275 about her support for BLM, the court observed that based on then-recent events, it was well-known that there were some protestors who supported BLM and engaged in civil disobedience, and that the prosecutor had a right to question whether a prospective juror who supported BLM might also support civil disobedience:

> Going to the Bay Bridge and locking arms and stopping traffic and going to downtown Oakland and, you know, organizing when they don't have a permit and, you know, over and over, you hear about other cities where the same things are occurring. If that's supported by the person, it gives cause to question whether to not they're going to support our system here. It's disobeying the law.

(7SRT 1259-1260.)[1]

However, the court also observed that "with Black Lives Matters . . . there are not leaders. It's a nonstructured

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[1] For additional context, voir dire in this case took place in August 2016. In July 2016, there were nationwide protests after the shooting deaths by police of Philando Castile in Minnesota and Alton Sterling in Louisiana. (https://www.twincities.com/2016/07/09/amid-racial-strife-hundreds-seek-answers-in-protests-church-service/.) Locally, a group of more than 1,000 demonstrators marched through Oakland. Individuals threw red paint on the police station door, and a large group blocked Interstate 880 in Oakland for several hours, chanting "Black lives matter." (https://www.latimes.com/local/lanow/la-me-oakland-police-20160707-snap-htmlstory.html; https://www.sfgate.com/crime/article/Protest-against-police-shootings-planned-Thursday-8346623.php.)

organization. Right? [¶] So there is not a spokesperson that says, 'I'm speaking for them.' And at times, you know, the social media is what brings them together and causes them to, you know, block the Bay Bridge and commit certain acts of civil disobedience and agree to meet somewhere and do what they do. So there isn't per se advocacy of it." (7SRT 1247-1248.)

The court further noted that "the word 'rioting' was loaded," and asked that the prosecutor, when questioning any other jurors about their support of BLM, focus solely on civil disobedience engaged in by supporters of BLM. (7SRT 1259; see also 7SRT 1157 [sustaining objection to DA's characterization of protests as "riots"].)

C. The Trial Court Did Not Assert that a Juror Who Supports BLM Is Unfit To Serve

Respondent recognizes that the prosecutor's questions to JN275 about BLM were insensitive, to say the least, and were inaccurate and inflammatory to the extent they linked the BLM movement to rioting and property destruction. As noted earlier, we agree that neither BLM as an organization nor BLM as a social justice movement promote such activity. While such activity by individuals sometimes occurs during peaceful protests supporting the movement for Black lives, that is also the case with many public events involving large crowds of people directed at showing dissatisfaction with the status quo or advancing a cause.

It should therefore come as no surprise that JN275 took offense to such questions. We agree with amici that prosecutors and judges should use proper caution and respect when asking

questions about support for BLM in voir dire (ACB 22), because of the importance of the aims and goals of the movement and all it represents. To be clear, we do not condone the particular manner in which the prosecutor questioned JN275 about her support for BLM in this case.

At the same time, as amici acknowledge, BLM does engage in strategically targeted acts of civil disobedience (ACB 30), and because of BLM's decentralized structure (ACB 24), an expression of support for BLM can "signal a range of views," from general sympathy to the cause, to active participation in protests and activism. (ACB 34.) As a general matter, prosecutors are permitted to question where on that spectrum prospective jurors fall, and to inquire about their views regarding the criminal justice system and police officers to determine whether they hold views of the criminal justice system that would impact their ability to serve as a juror within that system. (See generally *People v. Barber* (1988) 200 Cal.App.3d 378, 394 [discussing strikes based on perceived partiality].)

Amici fault the trial court for permitting the prosecution to probe this area in her questioning. In doing so, they misportray the trial court's words. The court never asserted or suggested that "a supporter of Black Lives Matter is automatically unqualified to serve on a jury." (ACB 51.) No doubt, such a suggestion by any court would be staggeringly wrong and intolerable. But that is simply not what occurred in this case.

The court stated that if a person supported civil disobedience, "it gives cause to question whether or not they're going to support

our system here." (7SRT 1259-1260.) Amicus read this statement as going to the ultimate conclusion of whether a prospective juror is qualified to sit, as opposed to describing the process of opening the door for further questioning to learn the extent of those views. The distinction is important.

Here, the context of the inquiry reflected that the court was acknowledging that if there was a legitimate basis to believe that a prospective juror would support civil disobedience in furtherance of criminal justice reform, that would open the door for further inquiry about whether that endorsement of civil disobedience would extend to actions while participating on a jury. (7SRT 1259-1260.) The meaning of the court's statement is evident from its immediately preceding remarks, where it explained "[t]he reason I overruled the objections with regard to Ms. Smith asking the questions about Black Lives Matter," and ruled that "if we have another person in here who supports Black Lives Matter, I believe you [Ms. Smith] have a right to go into whether or not they're supporting civil disobedience." (7SRT 1259.) The court did not suggest that such support was itself a disqualifier.[2]

It goes without saying that not everyone who supports BLM supports civil disobedience. More importantly, it is beyond cavil that that endorsement of, or even engagement in, civil disobedience in support of a political or social cause directed at

[2] Notably, the court agreed with the defense that the prospective juror's responses to the questioning favored rejection of the prosecutor's for-cause challenge. (7SRT 1260-1261.)

criminal justice reform does not mean that a person would also support disobedience to the court while serving on a jury or should automatically be deemed unfit for jury service. However, that disconnect does not mean that, once legitimately raised, it is an inappropriate avenue of inquiry during the voir dire process. Under the *Batson* framework, the prosecution (as well as the defense) is entitled to inquire about the scope and extent of a prospective juror's negative views about the criminal justice system, and whether such views would extend to the courtroom in a particular case—such as by not applying the law as given by the court if they disagree with it, by not giving the testimony of police officer witnesses or the arguments made by the prosecutor fair and appropriate consideration, or by engaging in jury nullification.

We also agree, however, that any such questioning must be undertaken in a sensitive, balanced, and fairminded manner, free of mischaracterizations or stereotypes about the BLM movement, and with a full recognition of the fundamental problems that gave rise to the BLM movement, so as to avoid further alienating prospective jurors of color who have long been marginalized by the flaws inherent to the system that are the precise focus of the BLM movement. We do not dispute that the prosecutor's questioning of JN275 here fell below this level of sensitive and fairminded discourse, and the trial court should have taken a firmer hand in guiding the inquiry. But those failings do not undermine the court's finding that there was not a *Batson* violation in this case.

D. No *Batson* Violation

The trial court's determination that appellants failed to make a prima facie showing at the first stage of *Batson/Wheeler* review is supported by substantial evidence. (*People v. Bonilla* (2007) 41 Cal.4th 313, 341.) As the trial court noted in its earlier remarks addressing the for cause challenge, JN275 did not connect with the prosecutor "from the get-go," not just when she was asked about BLM. (7SRT 1260.) Her body language was defensive, and her demeanor closed in comparison to how she responded when questioned by defense counsel. (7SRT 1258-1259.) She had to be asked individually whether she could treat testimony from police officers the same way she would that of other witnesses because she did not nod yes along with everyone else in the jury box. (7SRT 1258.) Michaels's counsel even conceded at the time of the for cause challenge that "perhaps all of those things that were being described by Ms. Smith might justify a peremptory challenge." (7SRT 1251.) The trial court, which observed the juror firsthand, thus found that her dismissal did not come close to making a prima facie showing of purposeful discrimination. (16SRT 2812.) The nondiscriminatory reasons for the challenge were "apparent from and 'clearly established' in the record." (*People v. Scott* (2015) 61 Cal.4th 363, 384.)

The trial court's ruling is supported by the broader circumstances of the case as well. At the time the prosecutor excused JN275, who was questioned as a prospective alternate juror, the twelve-member jury had already been selected, with two Black women seated as jurors. (16SRT 2812.) The

prosecutor used her fifteenth peremptory challenge against JN275. Only one of her previous fourteen challenges was against a Black juror. (*People v. Scott*, *supra*, 61 Cal.4th at p. 384 [prosecutor's striking of all, most, or a disproportionate number of jurors from the identified group is relevant evidence in determining whether prima facie case of discrimination has been shown].) The prosecutor's questioning of JN275 about BLM was based on JN275's responses to the questionnaire and did not reflect a pattern of disparate questioning of jurors along racial lines, on this topic or other topics. Other Black prospective jurors were not questioned about BLM. (Compare *Flowers v. Mississippi* (2019) __ U.S. __, 139 S.Ct. 2228, 2246-2247 [fact that prosecutor engaged in dramatically disparate questioning of Black and white prospective jurors supported inference of discriminatory purpose].) Also, there is little reason for concern that the questioning of JN275 could have had an impact on other prospective jurors given that the prospective jurors were questioned in small groups on different days.

Finally, the circumstances of the crime did not militate in favor of an inference of discriminatory purpose. This was not a case pitting white victims and witnesses against Black defendants. (Cf. *ibid.* [noting relevant circumstances the court may consider in determining the existence of a prima facie case such as cross-racial victims].) The two victims Silas gunned down on the street with the help of Whitley and Michaels, and the two primary eyewitnesses Chaney threatened, were also

Black. The trial court's finding of no prima facie case of discrimination as to JN275, should be affirmed.

CONCLUSION

Amici raise several powerful and important issues, and we agree with much of amici's concerns and goals. California, along with the rest of nation, still needs to take important steps to ensure that the jury selection process is inclusive, fair, and not subject to abuse. We also agree with amici on the importance of BLM as a social justice movement. And we recognize the need for respect and careful court oversight for any questioning on this topic during voir dire. Ultimately, we disagree with amici that the problems they have identified prejudicially impacted the specific facts of this case. Our disagreement with amici in this case, however, in no way diminishes the importance of the broader points amici have raised.

Accordingly, except as otherwise noted in the Respondent's Brief, the judgment should be affirmed.

Dated: September 4, 2020

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
LANCE E. WINTERS
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/s/ Jeffrey M. Laurence

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER TO AMICUS BRIEF uses a 13 point Century Schoolbook font and contains 3,365 words.

Dated: September 4, 2020

XAVIER BECERRA
Attorney General of California

/s/ Jeffrey M. Laurence

JEFFREY M. LAURENCE
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DECLARATION OF SERVICE

Case Name: ***People v. Silas et al.*** No.: **A150512**

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 September 4, 2020, I served the attached **ANSWER TO AMICUS BRIEF** on the parties by transmitting a PDF version of the document to the parties listed below through TrueFiling e-service:

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Additionally, I served the said document by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Superior Court of California County of Contra Costa Wakefield Taylor Courthouse 725 Court Street Martinez, CA 94553-1233	

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on September 4, 2020, at San Francisco, California.

J. Wong	/s/ J. Wong
Declarant	Signature