

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent

v.

ARTHUR LOURDES LENIX,

Defendant and Appellant

No. S148029

Court of Appeal

No. F048115

Kern County Superior Court, No. BF100124B
Honorable Arthur Wallace, Judge

**APPLICATION OF CALIFORNIA PUBLIC DEFENDERS
ASSOCIATION AND CALIFORNIA ATTORNEYS FOR
CRIMINAL JUSTICE TO APPEAR AS AMICUS CURIAE
AND BRIEF OF AMICUS CURIAE IN SUPPORT
OF APPELLANT ARTHUR LOURDES LENIX**

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**APPLICATION OF
CALIFORNIA PUBLIC DEFENDERS ASSOCIATION
AND
CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE
TO APPEAR AS AMICUS CURIAE**

TO: THE HONORABLE RONALD GEORGE, CHIEF JUSTICE, AND
ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE
STATE OF CALIFORNIA:

Pursuant to Rule 8.520, California Rules of Court, the California Public Defenders Association and California Attorneys for Criminal Justice hereby apply for permission to file the attached brief as amicus curiae in support of defendant and appellant Arthur Lourdes Lenix. At issue in the case at hand is whether comparative juror analysis may be conducted for the first time on appeal in the determination of a *Batson*¹ challenge where no comparative jury analysis was offered or raised by appellant in the trial court. This is an issue of statewide importance.

The California Public Defenders Association (hereinafter referred to as, "CPDA") is the largest organization of criminal defense attorneys in the State of California. Our membership includes over 4,000 attorneys who are employed as public defenders or are in private practice. CPDA has been a leader in continuing legal education for defense attorneys for over 26 years and is recognized by the California State Bar as an approved provider of Mandatory Continuing Legal Education. Our programs deal with both adult and juvenile justice.

CPDA has been granted leave to appear as amicus curiae in some 40 California cases resulting in published opinions. (See e.g., *Chambers v. Superior Court* (2007) 42 Cal.4th 673; *People v. Warner* (2006) 39 Cal.4th 548; *San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839.) CPDA

¹ *Batson v. Kentucky* (1986) 476 U.S. 79.

has also served as amicus curiae in the United States Supreme Court.
(*Monge v. California* (1998) 524 U.S. 721.)

Members of the CPDA Legislative Committee and the organization's legislative advocate attend key Senate and Assembly committee meetings on a weekly basis and take positions on hundreds of bills in a constant effort to ensure that our criminal and juvenile justice procedures, and rules of evidence, remain fair and balanced. Moreover, as the largest organization of criminal defense trial counsel in the state of California, CPDA is particularly qualified to address the practical consequences that will ensue if this Court rules that defense counsel's failure to offer a comparative juror analysis at trial, precludes appellant from offering such an analysis on appeal. In sum, CPDA is one of the key voices in the administration of justice that speaks on behalf of the collective interests of persons accused of crime and has the necessary expertise to serve this Court as amicus curiae.

California Attorneys for Criminal Justice (hereinafter, "CACJ") is a nonprofit California corporation. According to Article IV of its by-laws, CACJ was formed to achieve objectives including "to protect and insure by rule of law those individual rights guaranteed by the California and Federal Constitutions, and to resist all efforts made to curtail such rights." In addition, CACJ has as a purpose to engage in activities which will advance and promote "justice and the common good of the citizens of the United States." (Article IV, subparagraphs A and C, by-laws of CACJ.) CACJ is administered by a Board of Governors, comprised of criminal defense lawyers practicing within the State of California. CACJ presently has over 1,700 dues-paying members who are primarily criminal defense lawyers practicing before federal and state courts. These lawyers are employed both in the public and private sectors, and are distributed around the state of California. CACJ members represent individuals accused of criminal

offenses of every variety, in every court in the State of California. As such, California Attorneys for Criminal Justice has a strong interest in the decision to be ultimately reached herein.

In addition, CACJ has been granted leave to appear as amicus curiae in over 40 decisions by the California Supreme Court. (See, e.g., *People v. Superior Court (Vidal)* (2007) 40 Cal.4th 999; *People v. Leal* (2004) 33 Cal.4th 999; *People v. Sanders* (2003) 31 Cal.4th 31; *People v. Neal* (2003) 31 Cal.4th 63.) CACJ has also served as amicus curiae in the United States Supreme Court. (See, e.g., *Unites States v. Patane* (2004) 542 U.S. 630 [124 S.Ct. 2620, 159 L.Ed.2d 667]; *Stogner v. California* (2003) 539 U.S. 607 [123 S.Ct. 2446, 156 L.Ed.2d 544].) Thus, CACJ has the necessary experience to assist this Court as amicus curiae.

CPDA and CACJ recognize that the present application is untimely under subdivision (f) of Rule 8.520, California Rules of Court. However, CPDA and CACJ respectfully ask this Court to accept filing of the application because of the unusual circumstances in which this Court requested supplemental briefing in this case. Specifically, the issue addressed in the attached amicus brief was raised by this Court on March 26, 2008, when this Court requested supplemental briefing from the parties “on the issue of whether an appellate court must perform a comparative juror analysis for the first time on appeal to evaluate the genuineness of the prosecutor's reasons for preemptorily challenging prospective jurors.” Both parties then filed their supplemental letter briefs on April 7, 2008, and respondent filed a supplemental reply brief on April 17, 2008. The present application of CPDA and CACJ to file the attached amicus brief is being submitted within the 30 day limitation ordinarily allotted under subdivision (f)(2) of Rule 8.520. Further, given the extremely short length of the attached amicus brief, consisting of a mere 4 pages, CPDA and CACJ respectfully urge this Court to find good cause to allow filing of the

untimely application.

Dated: May 2, 2008.

Respectfully submitted,

California Public Defenders Association

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**BRIEF OF
CALIFORNIA PUBLIC DEFENDERS ASSOCIATION
AND
CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE
AS AMICUS CURIAE IN SUPPORT OF
APPELLANT ARTHUR LOURDES LENIX**

On April 28, 2008, the California State Conference of the National Association for the Advancement of Colored People, et. al. (“NAACP”) filed a brief herein as amicus curiae in support of defendant and appellant, Arthur Lourdes Lenix. At pages 22 through 31 of their brief, NAACP discusses some of the practical considerations that favor permitting comparative juror analysis to be conducted for the first time on appeal, at least in the context of evaluating reasons that were based on the substantive answers given by prospective jurors during voir dire, as distinguished from reasons based on the demeanor of the jurors during voir dire. As the largest organizations of criminal defense lawyers in California, and consisting primarily of trial lawyers, CPDA and CACJ bring to the Court’s attention the following concerns and considerations that derive from the experience of its members in the trial courts.

There can be no dispute that comparative juror analysis is not possible without resort to the precise questions asked and answers given during jury selection. Comparative juror analysis involves an assessment of the similarity and differences in both trial counsel’s questioning of prospective jurors (see, e.g., *Miller-El v. Dretke* (2003) 537 U.S. 322, 332-333, 340), and the substantive responses by the prospective jurors. Oftentimes, the analysis will turn on the precise words or language used by counsel or the jurors. Thus, meaningful juror analysis is dependent on the availability of verbatim transcripts of the jury selection and/or audio recordings of the jury selection process. (See, e.g., Pen. Code, section 190.9; Rule 1.150, subdivision (d), California Rules of Court; *People v.*

White (1990) 220 Cal.App.3d 919, 921.)

However, as a general rule, daily transcripts are not provided in any criminal trial other than death penalty cases. (Cf. Pen. Code, section 190.9.) Counsel has no right to use a personal audio recording device during jury selection but, instead, requires the trial court's permission to do so. (Rule 1.150, subdivision (d), California Rules of Court.) Therefore, in most criminal trials, trial counsel will not have access to the record of the voir dire necessary to engage in a reliable comparative juror analysis. By contrast, a verbatim reporter's transcript will be available on appeal.

Standing alone, the provision of daily transcripts or allowance of a personal recording device will not enable trial counsel to engage in a meaningful comparative juror analysis. Counsel must have sufficient opportunity to review the voir dire transcripts and/or listen to the recording of jury selection to extract the information that will be the basis of a comparative juror analysis. Just as the jury selection process may take days or longer to complete, a similar length of time will be required for counsel to review and analyze the questions and answers.

For purposes of a comparative juror analysis, trial counsel often cannot know which portions of the voir dire will become important until voir dire is completed. For example, counsel often has good reason not to make a *Batson* challenge until after opposing counsel strikes a number of jurors who are members of a protected class. There are also circumstances in which counsel will not raise a *Batson* challenge until the conclusion of voir dire. In short, the determination of which particular voir dire colloquies are important to a comparative juror analysis is typically made as jury selection progresses, and often, not until voir dire has concluded. A comparative juror analysis cannot be conducted reliably unless the time-consuming process of reviewing daily transcripts and/or audio recordings of jury selection occurs after peremptory challenges have been exercised

and jury selection has otherwise been completed. Moreover, comparative juror analysis will require a lengthy hearing, further increasing the delay before the jury is empanelled.

In sum, if comparative juror analysis must be conducted in the trial court it will add many hours, if not days, to the jury selection process, which will be inserted in between the completion of jury selection and the final empanelment of the jury. As any trial judge will attest, lengthy delays at this point of the proceedings are sure to frustrate, if not anger, jurors, and may have an adverse impact on their ability to fairly and impartially decide the case. These problems will be avoided, however, if comparative juror analysis may be reserved for appeal, at least with respect to the substantive questions and answers on jury voir dire.

Therefore, amicus CPDA and CACJ respectfully submit that this Court should rule that a court reviewing the denial of an otherwise timely and specific objection to the discriminatory use of peremptory challenges may undertake a comparative juror analysis based upon questions and answers during the voir dire whether or not such a comparison was presented in the trial court. Comparative juror analysis is a method of evaluating the merits of the objection that was made; not a new and different objection. Moreover, as a practical matter, a reliable comparative juror analysis will not be possible at trial in most cases because of the lack of a verbatim record of jury selection; and in those relatively few cases where a verbatim record is timely provided, the process of conducting

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a reliable juror analysis will require the consumption of substantial time, to the frustration of jurors and detriment to the efficient conduct of an impartial trial.

Dated: May 2, 2008.

Respectfully submitted,

California Public Defenders Association

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California Attorneys for Criminal Justice

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Certificate of Compliance

I certify that the attached Brief of Amicus Curiae California Public Defenders Association and California Attorneys for Criminal Justice in support of appellant Arthur Lourdes Lenix uses a 13 point Times New Roman font and contains 1,909 words as measured by the word count function of Word, the word processing program used to prepare this brief.

Dated: May 2, 2008.

Respectfully submitted,

California Public Defenders Association

Michael S. Ogul
Attorney at Law
Chief Deputy Public Defender,
Solano County
California State Bar No. 95812

DECLARATION OF SERVICE BY MAIL

The undersigned deposes and says:

That I am an employee of the County of Solano; that I am over the age of 18 years and not a party to the above-mentioned action; that my business address is the Office of the Public Defender, 675 Texas Street, Suite 3500, Fairfield, California 94533-6339.

That I served a true copies of the Application to Appear as Amicus Curiae and Brief of California Public Defenders Association and California Attorneys for Criminal Justice as Amicus Curiae in Support of Appellant Arthur Lourdes Lenix, Supreme Court No. S148029, (Kern County Superior Court No. BF100124B) by placing said copies in envelopes addressed to:

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and thereafter on May 5, 2008, deposited said copies in the United States Mail at Fairfield, California.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 5th day of May, 2008, at Fairfield, California.


Alisa Freeman
Legal Secretary