SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **FRED LEWIS WEATHERTON,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S106489

Riverside County Superior Court
Case No. INF030802
Honorable James Hawkins, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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THE TRIAL COURT PROPERLY DISCHARGED JUROR NUMBER 2 AND EVEN ASSUMING ERROR, WEATHERTON WOULD NOT BE ENTITLED TO RELIEF

In his Opening Brief, Weatherton contended his death sentence had to be reversed because the trial court erred in removing Juror Number 2. (AOB 348-354.) In his Supplemental Opening Brief, Weatherton revisits his claim, arguing that Juror Number 2's death penalty views did not prevent or substantially impair him from performing his duties under the court's instructions and juror's oath, and the trial court's erroneous conclusion to the contrary requires both guilt and penalty phase verdicts be reversed. (Supp AOB 4-5.) Even assuming arguendo that Weatherton is correct that Juror Number 2's religious beliefs did not constitute views on the death penalty that justified his removal, he still would not be entitled to relief because the trial court correctly found that Juror Number 2's religious views substantially impaired him from following the court's instructions. Alternatively, assuming this Court were to conclude that the trial court erred in finding that Juror Number 2's religious beliefs impaired his ability to follow the court's instructions, then it is axiomatic that he is not entitled to the reversal of the guilt phase. Absent impacting Juror Number 2's ability to follow the instructions on the charges and allegations that were the subject of the guilt phase, Weatherton cannot show the requisite prejudice for reversal of the guilt phase based on the erroneous removal of a juror.

Juror Number 2's personal religious beliefs as an Orthodox Jew required him to adhere to Deuteronomy, chapter 17, verse 6 — "at the mouth of two witnesses, or three witnesses, shall he that is to die be put to death; at the mouth of one witness he shall not be put to death." (27 RT 4308, 4313, 4316, 4319.) As this Court recently observed, a trial court

may properly excuse a seated juror in a capital case when that juror has an "internal conflict" as evidenced by indicating "it would be very hard for him to ignore his belief system in order to carry out his duties as a juror." (*People v. Rountree* (2013) 56 Cal.4th 823, 848.) Juror Number 2's statements to the court evidenced an internal conflict supporting his removal from the jury as he clearly expressed he would not set aside his belief system to perform a capital juror's duties.

Weatherton complains that Respondent "misleadingly" characterized the colloquy between the trial court and Juror Number 2 as indicating that the juror would have a difficult time, based on his religious beliefs, in following an instruction that the testimony of a single witness was sufficient to prove a fact. (Supp. AOB 2, citing 27 RT 4308.) There is nothing misleading in Respondent's Brief, as it is expressly noted that in response to the trial court's questions that Juror Number 2 stated he would not have an issue with such an instruction as it pertained to determining guilt, but would have a difficult time determining penalty without a second eyewitness or corroboration equivalent to a second eyewitness. (RB 132-133, citing 27 RT 4306-4307.) However, the trial court determined that Juror Number 2's religious beliefs would prevent him from following the court's instructions on the law, particularly the law holding that corroboration is not legally required to prove the crime of murder. The trial court was concerned about Juror Number 2's willingness to follow the law and make decisions, guilt or penalty, based on the testimony of a single witness. (27 RT 4310, 4312.) Notwithstanding Juror Number 2 indicating he was not opposed to the death penalty (27 RT 4313-14), the trial court also concluded that Juror Number 2's religious beliefs, requiring him to disregard the law as to the sufficiency of the testimony of a single witness, might result in his unwillingness to impose the death penalty in this case. (27 RT 4310, 4312.)

Weatherton complains that Juror Number 2 could not have been successfully challenged on his death penalty views on the basis of his statement that his religious beliefs would require a higher quantum of evidence than a single witness could provide before reaching a death verdict. (Supp. AOB at 2.) A prospective juror in a capital case may be excused for cause on the basis of his or her death penalty views, but only if those views would prevent or substantially impair the performance of a juror's duties under the court's instructions and the juror's oath. (*Wainright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841].) Weatherton reasons that Juror Number 2's religious beliefs, requiring a higher quantum of evidence, were not contrary to the applicable law governing the penalty phase, and were consistent with principles of lingering doubt as a basis for choosing a punishment less than death. (Supp. AOB at 2.) While a defendant can assert possible innocence in mitigation and the jury may consider lingering doubt in determining the appropriate penalty (*People v. Gay* (2008) 42 Cal.4th 1195, 1221), the requirement imposed by Deuteronomy requiring two witnesses or three witnesses before a person is put to death is not the same as entertaining lingering doubt. A person could personally have no doubt as to the guilt of a defendant, but be foreclosed from returning a verdict of death based on the requirement of Deuteronomy simply because the person's guilt was not attributable to the "mouth of two witnesses, or three witnesses." Accordingly, Juror Number 2's religious beliefs that compelled adherence to the requirement of Deuteronomy substantially impaired his performance of duties under the court's instructions and the juror's oath.

Since in response to questioning by the court, Juror Number 2 indicated his difficulty would only come in determining penalty, Weatherton contends that the trial court erroneously discharged the juror "because of the fact that murder is not a crime that requires corroboration as

a prerequisite to conviction." (Supp. AOB at 2.) But Weatherton neglects the trial court's additional statement that it did not believe it had any choice but to discharge the juror because there was "a situation in a case like this were he's never going to vote for the death penalty" (27 RT 4312), thus indicating concern that the juror's religious views substantially impaired his ability to perform as a capital juror in accordance with the instructions and oath. In any event, a juror does not have to admit to a particular bias before a court can discharge a sitting juror for reasons that would have supported a challenge for cause. (*People v. Lomax* (2010) 49 Cal.4th 530, 589.) Rather, the basis for removing the juror must appear in the record as a demonstrable reality. (*Id.*) The trial judge is in the best position to assess a juror's state of mind on the issue of bias. (*People v. Clark* (2011) 52 Cal.4th 856, 971.) Here, the record amply supports the trial court's decision to remove Juror Number 2 based on his religious beliefs substantially impairing his ability to perform his duties – both in the guilt and penalty phases.[1] (*People v. Rountree*, *supra*, 56 Cal.4th at p. 848.)

Even assuming the trial court erred in finding that Juror Number 2's religious beliefs impaired his ability to perform his duties, Weatherton is not entitled to reversal of both guilt and penalty phases. There is no

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[1]Weatherton appears to argue that nothing about Juror Number 2's adherence to Deuteronomy principles would prevent him from following the law at the guilt phase. To the extent his argument can be construed to suggest he is entitled to a juror adhering to Deuteronomy principles in the guilt phase, however, the argument is contrary to the principle that no defendant would ever be entitled to a juror whose beliefs require adherence to a religious dictate as opposed to the law as instructed by the court. (*Lockhart v. McCree* (1986) 476 U.S. 162, 177-178 [106 S.Ct. 1758, 90 L.Ed.2d 137].) The State too has a "concededly legitimate interest in obtaining a *single* jury that can properly and impartially apply the law to the facts at *both* the guilt and sentencing phases of a capital trial." (*Id.* at pp. 175-176.)

prejudice when it cannot be said that the erroneous removal of a seated juror could only have benefitted the prosecution and prejudiced the defendant. (*People v. Howard* (1930) 211 Cal. 322; *People v. Abbott* (1956) 47 Cal.2d 362.) Moreover, no prejudice results simply from the absence of a particular viewpoint among the jurors. (*People v. Ricarrdi* (2012) 54 Cal.4th 758, 840-846 (conc. opn. of Cantil-Sakauye, C.J.), citing *Lockhart v. McCree*, *supra*, 476 U.S. at pp. 177-178.) Accordingly, if this Court were to find that the trial court misapplied *Witt* principles in discharging Juror Number 2, any error was harmless.

As the Chief Justice of this Court recently observed, in *Gray v. Mississippi* (1987) 481 U.S. 648, 666 [107 S.Ct. 2045, 95 L.Ed.2d 622], the United States Supreme Court examined two theories upon which harmless error analysis might be applied to a violation of the review standard created under *Witherspoon-Witt*. (*People v. Riccardi*, *supra*, 54 Cal.4th at pp. 840-846 (conc. opn. of Cantil-Sakauye, C.J.).) As the Chief Justice concluded in *Riccardi*, "*Gray* stands for the proposition that *Witherspoon-Witt* error is reversible per se because the error affects the composition of the panel '"as a whole"' [citations] by inscrutably altering how the peremptory challenges were exercised [citations]." (*Id.* at p. 842 (conc. opn. of Cantil-Sakauye, C.J.).) But as the Chief Justice also noted in *Riccardi*, one year after *Gray*, the high court in *Ross v. Oklahoma* (1988) 487 U.S. 81 [108 S.Ct. 2273, 101 L.Ed.2d 80], rejected the *Witherspoon-Witt* remedy as well as the rationale developed for it in *Gray*, as applied to a wrongly included pro-death juror, explaining that the Sixth Amendment is not implicated simply by the change in the mix of viewpoints held by jurors (be they death penalty supporters or skeptics) who are ultimately selected. (*People v. Riccardi, supra*, at pp. 842-844 (conc. opn. of Cantil-Sakauye, C.J.).)

Witherspoon protects capital defendants against the State's unilateral and unlimited authority to exclude prospective jurors based on their views

on the death penalty; it is a limitation on the state's power to exclude as to opposed to a ground for challenging a juror. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 423.) The simple misapplication of the *Witherspoon-Witt* standard does not invoke this protection because it does not grant the prosecution the unilateral and unlimited power to exclude death-scrupled jurors; and as this Court has recognized, no cognizable prejudice results simply from the absence of any viewpoint or the existence of any particular balance of viewpoints among the jurors. (*People v. Riccardi*, *supra*, 54 Cal.4th at pp. 843-844 (conc. opn. of Cantil-Sakauye, C.J.); *Lockhart v. McCree*, *supra*, 476 at pp. 177-178.) Accordingly, in this substantially similar context, the erroneous discharge of a juror through misapplication of the *Witherspoon-Witt* standard results in mere "technical error that should be considered harmless[.]" (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 666.)

Weatherton's reliance on *People v. Hernandez* (2003) 30 Cal.4th 1 (*Hernandez*) for the opposite conclusion is unavailing. In *Hernandez*, this Court made abundantly clear at the outset of the opinion that for purposes of its review, it was accepting the determination of the lower court that the trial court had committed prejudicial error warranting reversal in discharging a juror. (*Id.* at p. 4.) The issue before this Court in *Hernandez* was whether double jeopardy barred retrial not whether the erroneous discharge of a juror is prejudicial per se. (*Ibid.*) Notably, in *Hernandez*, this Court cited to *People v. Hamilton* (1963) 60 Cal.2d 105, 128, a case in which this Court ruled that errors including the erroneous dismissal of a juror during the penalty phase of a capital trial required reversal of the penalty phase only. (*People v. Hernandez*, *supra*, 30 Cal.4th at p. 4, citing *People v. Hamilton*, *supra*, 60 Cal.2d at p. 128, overruled on other grounds in *People v. Morse* (1964) 60 Cal.2d 631.) Accordingly, *Hernandez* does not assist Weatherton in that it does compel the result he urges, and the

result he urges cannot be reconciled with cases such as *Hamilton* in which only the penalty phase was reversed. (See also *People v. Wilson* (2008) 44 Cal.4th 758, 814 [error in removing sole holdout juror in penalty phase required reversal of penalty phase judgment only].) *Hernandez* does not require the reversal of an entire capital judgment, guilt and penalty, upon the erroneous removal of a juror; rather it stands for the proposition that *where the erroneous removal of single juror warrants the remedy of reversal*, double jeopardy does not bar retrial. (*People v. Hernandez*, *supra*, 30 Cal.4th at pp. 10-11.)

Weatherton's reliance on *People v. Allen* (2011) 53 Cal.4th 60 (*Allen*) is equally misplaced. In *Allen*, this Court found the dismissal of a juror during guilt phase *deliberations* of a capital trial constituted error warranting reversal of both the guilt and penalty verdicts. In *Allen*, the court disrupted deliberations, questioned all 12 jurors, and erroneously removed a potential "holdout" juror. (*Id.* at p. 71.) In finding the erroneous removal required reversal of the entire judgment, this Court noted that the "court's intervention may upset the delicate balance of deliberations. . . ." (*Ibid.*) But here, the removal of Juror Number 2 did not have any potential of impacting the delicate balance of deliberations as the removal occurred after the prosecution had called its first witness in the guilt phase. (26 RT 4099.) Moreover, where there could be no impact on juror deliberations from erroneously removing a juror, requiring that Weatherton demonstrate prejudice before being entitled to reversal of either guilt or penalty phase is consistent with the remedy for the erroneous grant of a challenge for cause based on religious views.

> [T]he improper excusal for cause of a prospective juror for reasons other than his or her views on the death penalty does not require reversal of either the guilt or penalty judgments unless the defendant can show that the improper excusal resulted in the

seating of a biased juror, or of a sworn jury that was not fair and impartial.

(*People v. Tate* (2010) 49 Cal.4th 635, 666-667, citing *People v. Holt* (1997) 15 Cal.4th 619, 656.) This is true even where a defendant is "denied a juror with scruples against the death penalty" who could not otherwise have been challenged on *Witt* grounds. (*Ibid.*; *Holt*, *supra*, 15 Cal.4th at p. 656.)

If this Court accepts Weatherton's interpretation of the record as Juror Number 2's removal being completely unrelated to anything other than his death penalty views, then that precludes the reversal of the guilt phase. At most, an error in granting a challenge for cause based solely on death penalty views requires the reversal of the penalty phase. (*People v. Clark*, *supra*, 52 Cal.4th 856, 895, citing *Gray v. Mississippi* (1987) 481 U.S. 648, 663-666 [95 L.Ed.2d 622, 107 S.Ct. 2045]); *People v. Tate*, *supra*, 49 Cal.4th at p. 666; *People v. Stewart* (2004) 33 Cal.4th 425, 454-455; but see *People v. Riccardi*, *supra*, 54 Cal.4th at pp. 840-846 (conc. opn. of Cantil-Sakauye, C.J.).) Regardless of the fact Juror Number 2 was removed in the guilt phase as opposed to being challenged for cause during voir dire, the remedy should be no more than if he was improperly removed for his death penalty views and no other reason justified his removal. A defendant is entitled to jurors who are qualified and competent, not to any particular juror, even one who does not voice strong support for the death penalty. (*People v. Tate*, *supra*, 49 Cal.4th at p. 672.)

Accordingly, if the trial court erred in excusing Juror Number 2 based on reasons unrelated to his views on the death penalty, because Weatherton has not established that the result of any purported error resulted in the seating of a biased juror or that he was otherwise tried by an unfair jury, he would not be entitled to reversal of either the guilt or penalty verdicts. (*People v. Tate*, *supra*, at p. 672.) If instead, Juror Number 2 was

erroneously excluded based on his death penalty views, and no other basis supported his removal, then the remedy cannot exceed reversal of the penalty phase since that is the most he would have been entitled to if Juror Number 2 had been erroneously excused for cause during voir dire.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Respondent's Brief, respondent respectfully requests that the judgment be affirmed in its entirety.

Dated: July 2, 2013

Respectfully submitted,

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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 2,619 words.

Dated: July 2, 2013

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DECLARATION OF SERVICE BY U.S. MAIL

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No.: **S106489**

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 July 3, 2013, I served the attached Supplemental Respondent's Brief 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 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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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 July 3, 2013, at San Diego, California.

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