In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ALFRED FLORES, III,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S116307

San Bernardino County Superior Court Case No. FVA015023
The Honorable Ingrid A. Uhler, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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ARGUMENT

THE TRIAL COURT EVENHANDEDLY APPLIED THE *WITT* STANDARD IN DETERMINING WHETHER TO EXCUSE PROSPECTIVE JURORS BASED ON THEIR VIEWS REGARDING CAPITAL PUNISHMENT

In his opening brief, as part of his claim that the trial court abused its discretion in dismissing Prospective Juror S.M. for cause, appellant contrasted voir dire answers given by S.M. with answers given by three other prospective jurors—L.T., D.S., and S.T.—and asserted that the trial court unevenly applied the standard articulated in *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841] (*Witt*) for excusing prospective jurors for cause based on their views regarding capital punishment. (AOB 70-78.) In his supplemental opening brief, appellant revisits his assertion that the court unevenly applied the *Witt* standard and expressly identifies that alleged failing as a violation of his state and federal constitutional rights. Specifically, he alleges that the court displayed "unfairness" and "bias" in favor of the death penalty in its questioning and treatment of three "ardently pro-death" penalty jurors and one "pro-life" juror during voir dire proceedings. (See Supplemental AOB 1, 2, 11.) Appellant relies on a scant portion of the proceedings in his attempt to support the claim. For the reasons set forth at pages 30-36 of the respondent's brief and those articulated below, appellant fails to demonstrate that he was denied an impartial jury based upon the trial court's voir dire or application of the *Witt* standard.

Preliminarily, to the extent appellant's claim may be interpreted as one of judicial bias or misconduct, he forfeited the claim by failing to object in the trial court on these grounds. (See *People v. Mills* (2010) 48 Cal.4th 158, 189, and cases cited therein; *People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 994.) To the extent, appellant is asserting that voir dire was

inadequate, he has forfeited the issue on appeal by failing to object below on these grounds. (*People v. Hernandez* (2003) 30 Cal.4th 835, 855-856.) To the extent appellant's claim encompasses an allegation that the trial court erroneously denied a challenge for cause as to Prospective Jurors D.S. and S.T.[1] or that a biased juror was allowed to serve on the jury, he forfeited the claim by failing to express to the trial court dissatisfaction with the jury as presently constituted. (See *People v. Bivert* (2011) 52 Cal.4th 96, 114; *People v. Virgil* (2011) 51 Cal.4th 1210, 1239-1240; *People v. Mills, supra,* 48 Cal.4th at p. 186, citing *People v. Bonilla* (2007) 41 Cal.4th 313, 339.)

The Sixth Amendment right to an impartial jury is protected when the standard utilized for excusing a prospective juror for cause based on his or her views regarding capital punishment is "whether the [prospective] juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt, supra,* 469 U.S. 412, 424; *People v. Clark* (2011) 52 Cal.4th 856, 895.) The *Witt* standard superseded one requiring that it be "unmistakably clear" that the prospective juror would "automatically vote against imposition of capital punishment without regard to any evidence that might be developed at the trial of the case." (See *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776].)

The federal Constitution "'does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury.'" (*People v.*

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[1] Appellant never even raised a challenge for cause against Prospective Juror L.T. below. Accordingly, he has failed to preserve any challenge on appeal to L.T. relating to his death penalty views. (*People v. Hinton* (2006) 37 Cal.4th 839, 860 [to preserve a claim of error based on trial court's failure to excuse juror for cause, defendant must challenge the juror for cause]; *People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 48 [same].)

Tafoya (2007) 42 Cal.4th 147, 168, quoting *Morgan v. Illinois* (1992) 504 U.S. 719, 729 [112 S.Ct. 222, 119 L.Ed.2d 492].) Both the United States Supreme Court and this court have recognized that voir dire is not a constitutional right, but rather a means to achieve the end of an impartial jury. (*People v. Tafoya, supra*, 42 Cal.4th at p. 168; *People v. Robinson* (2005) 37 Cal.4th 592, 613; *People v. Ramos* (2004) 34 Cal.4th 494, 512; *Ross v. Oklahoma* (1988) 487 U.S. 81, 88 [108 S.Ct. 2273, 101 L.Ed.2d 80].) There is no constitutional right to any particular manner of voir dire or selecting a jury "so long as such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries are not transgressed." (*People v. Ramos, supra*, 34 Cal.4th at p. 512.)

"'The trial court is in the best position to determine the potential juror's true state of mind because it has observed firsthand the prospective juror's demeanor and verbal responses.'" (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1328, quoting *People v. Clark, supra,* 52 Cal.4th at p. 895.) Trial courts therefore possess broad discretion in determining whether a prospective juror challenged for cause is qualified to serve, and that discretion is rarely disturbed on appeal. (*People v. Horning* (2004) 34 Cal.4th 871, 896; see also *Uttecht v. Brown* (2007) 551 U.S. 1, 9 [127 S.Ct. 2218, 167 L.Ed.2d 1014] ["Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors"].)

Here, as in his opening brief, appellant selectively summarizes the voir dire of three prospective jurors—L.T., D.S., and S.T.—he claims were "ardently pro-death." The prospective jurors initially said they would probably impose the death penalty if appellant was found guilty of shooting and killing three teenagers over a three-day period, but ultimately said they could remain open-minded regarding penalty. (Supplemental AOB 2-5.)

He also reiterates his opening brief summary of the voir dire of S.M., a prospective juror he claimed was improperly excused for cause. (Supplemental AOB 5-9.) He contends the trial court displayed unfairness by questioning the "pro-death" prospective jurors with leading questions to "rehabilitate them," but asking no questions of S.M. (See Supplemental AOB 2, 9.)

First, the trial court questioned only two of the three prospective jurors appellant now claims were rehabilitated by the court. (5 RT 842; 6 RT 1378-1379.) The other prospective juror—D.S.—was questioned by the parties, but not the court. Indeed, the court in its discretion concluded further questioning was unnecessary. (See *People v. Thornton* (2007) 41 Cal.4th 391, 425 [given court's discretion in its manner of questioning, finding of error cannot be predicated on number of questions asked by court and reviewing court should not require questioning of each prospective juror to be similar lest the court feel compelled to conduct needlessly broad voir dire].) As the court stated in denying appellant's challenge for cause, D.S. made it "very clear" during voir dire that he would "remain open minded and fair," and base his decision on the law and evidence. (5 RT 1021.) Second, appellant fails to mention that defense counsel made a challenge for cause immediately after questioning S.T., after which S.T. made clear on questioning by the *prosecutor* that she could examine the evidence and consider both life in prison and death as potential penalties. (6 RT 1376-1378.) The court *then* questioned S.T. for the purpose of sorting out what it deemed "mixed feelings" on the part of S.T. (6 RT 1378-1380.) In context, S.T. had already been "rehabilitated" by the prosecutor and the court's questioning of S.T. was a function of its assessment of S.T.'s sincerity to determine whether to grant appellant's challenge for cause. (See *People v. Mills, supra,* 48 Cal.4th at p. 190 [trial court's assessment of the sincerity of jurors' views given deference].)

Similarly, L.T. had already made clear in her questionnaire and on questioning by the prosecutor that she would be open-minded and consider the evidence before determining an appropriate penalty. (5 RT 839-841.) The court merely confirmed that this was so. (5 RT 841-842.)

On the other hand, S.M. candidly stated that he did not believe he would be a good juror in this case. (5 RT 943.) As further discussed in the respondent's brief, S.M. also stated that serving as a juror in a capital case would place him in a moral dilemma (5 RT 942) and might cause him to be unfair to the prosecution during the guilt phase (5 RT 942-943), and that he might be inclined to ignore the law and instead "look within" to determine whether special circumstances exist (5 RT 945). The court's implicit assessment that further questioning was not likely to render S.M. qualified to sit in a capital case is entitled to deference. (See *People v. Mills, supra,* 48 Cal.4th at p. 190.) The basis for a challenge for cause was so clear to the court that following inquiry of S.M. and another prospective juror by the parties, the court said, "I assume there's going to be a challenge for cause for [S.M.] and [the other prospective juror]?" (5 RT 950.)

Any insinuation by appellant that the trial court questioned only "pro-death" prospective jurors to clarify their views or did not impartially consider each party's challenges for cause is belied by the record. For example, after Prospective Juror D.J. repeatedly expressed doubt about being able to "vote for death" (5 RT 1001-1004), the trial court reminded her that the decision is difficult for everyone and elicited D.J.'s agreement that she could keep an open mind and hear the evidence before determining the penalty. (5 RT 1005.) Upon further questioning by the prosecutor, D.J. said the death penalty was "too harsh" and the court again sought to clarify her position. (5 RT 1006-1007.) Prospective Juror C.T. also expressed grave reservations about being able to consider death as a penalty; unless the evidence showed guilt was "one hundred percent clear conclusive," she

said she could not consider it. Upon inquiry by the defense, C.T. said she thought she could consider appropriate factors in determining a penalty. (8 RT 1593-1600.) The court ultimately denied challenges for cause by the prosecution as to both of these prospective jurors. (5 RT 1008; 8 RT 1601.) The court subsequently *granted* a challenge for cause brought by the defense against Prospective Alternate Juror C.H., even after C.H. said she could evaluate the circumstances and would not automatically vote for death. (5 RT 1726-1729.) These instances demonstrate not only that the trial court treated life-leaning and death-leaning prospective jurors similarly, but that it determined whether and how to question prospective jurors based on the individual characteristics of each juror. (See *People v. Mills, supra,* 48 Cal.4th at p. 190 [reviewing court assumes trial court formulated its questions based on the individual characteristics of each juror, including questionnaire answers and in-court demeanor].)

Based solely on answers to two questionnaire queries purportedly provided by members of the final jury panel, appellant contends that his jury "had no reservations about imposing" the death penalty and was thus "uncommonly willing to condemn a man to die." The first question regarded whether the prospective juror would vote to keep or abolish the death penalty in a hypothetical referendum and the second asked the juror to commit to one of five "groups" describing attitudes toward the death penalty—ten jurors placed themselves in a group that favored the death penalty, but would not apply it in all cases and could weigh and consider aggravating and mitigating circumstances (Group 2); six jurors placed themselves in a group that favored neither the death penalty nor life in prison (Group 3); and one juror identified with a group that had doubts about the death penalty, but would not vote against it in every case (Group 4). (See Supplemental AOB 10-11.) Appellant's reliance on just two of 35 questions relating to the death penalty in a 156-question questionnaire

provides an inaccurate assessment of whether the final jurors had reservations about the death penalty. A review of further questionnaire answers provided by members of the final jury that placed themselves in Group 2 shows they believed the death penalty should be used very sparingly and with great caution. For example, one juror placed herself in the group that generally favored the death penalty, but also said she had "mixed feelings" about it (11 CT 2831) and emphasized that it must only be used for "*extreme* charges" (11 CT 2834, emphasis in original). Another Group 2 juror expressed concern about innocent people being sentenced to death and said he believes it should be "used sparingly" and only when we are "absolutely positive the person is guilty." (11 CT 2944-2945.) Yet another said she thought the death penalty was necessary in "certain cases," but repeatedly stated she thought it should be used "very carefully." (11 CT 2979, 2981.) Still another juror that identified with Group 2 expressed reluctance and wrote, "I really don't want to put someone to death." (11 CT 3056, 3058.)

Moreover, the phrase "uncommonly willing to sentence a man to die" was used to describe the jury by the high court in *Witherspoon v. Illinois, supra,* 391 U.S. at p. 521, a case in which the trial judge at the outset of voir dire had said, "Let's get these conscientious objectors out of the way, without wasting any time on them," and in rapid succession had granted challenges for cause to 47 veniremen—only five of whom explicitly said that under no circumstances would they vote to impose capital punishment—without any effort to determine whether they could nonetheless return a verdict of death (*id.* at pp. 514-515). The circumstances involving voir dire in *Witherspoon* were vastly different than those of the instant case.

In light of the entire voir-dire process and the deference to be afforded the trial court in its assessment of the sincerity of jurors (*Uttecht v. Brown,*

supra, 551 U.S. at p. 9; *People v. McKinzie, supra,* 54 Cal.4th at p. 1328) and the questioning it deems necessary to make such an assessment, appellant fails to show that the trial court conducted voir dire in an unfair manner or displayed a "pro-death" penalty bias. Appellant has not shown that the trial court erroneously retained a prospective juror who should have been excused for cause, or erroneously excused for cause a prospective juror who should have been retained, or decided any challenge based on insufficient information, or allowed a biased juror to serve on his case. Accordingly, he has not shown a violation of his constitutional right to an impartial jury. (See *People v. Stitely* (2005) 35 Cal.4th 514, 540.)

CONCLUSION

For the foregoing reasons and those given in the respondent's brief, respondent respectfully requests that the judgment of the trial court be affirmed in its entirety.

Dated: August 21, 2014

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 2,403 words.

Dated: August 21, 2014

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DECLARATION OF SERVICE

Case Name: ***People v. Flores*, III**
No.: **S116307**

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 **August 21, 2014**, 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 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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On **August 21, 2014**, I caused one electronic copy of the **SUPPLEMENTAL RESPONDENT'S BRIEF** in this case to be served on the California Supreme Court by sending the copy to the Supreme Court's electronic service address pursuant to Rule 8.212(c).

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 **August 21, 2014**, at San Diego, California.

S. McBrearty
Declarant

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Signature

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