IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. FRED LEWIS WEATHERTON, Defendant and Appellant.	**DEATH PENALTY CASE** Riverside Co. Sup. Ct. No. INF 030802 Cal. Supreme Ct. No. S106489

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF RIVERSIDE

The Honorable James S. Hawkins, Presiding

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THE ERROR IN DISCHARGING JUROR NO. 2 AFTER THE TESTIMONY OF NELVA BELL IN THE GUILT PHASE REQUIRES THAT THE ENTIRE JUDGMENT BE SET ASIDE

A. The Error

In respondent's supplemental reply brief, respondent tries to move the ground of this case from the midst of a jury trial during the presentation of evidence back to the jury selection stage, before a jury is sworn. Respondent cites *Wainwright v. Witt* (1985) 469 U.S. 412, *Ross v. Oklahoma* (1988) 487 U.S. 81, *Lockhart v. McCree* (1986) 476 U.S. 162, *Gray v. Mississippi* (1987) 481 U.S. 648, *People v. Roundtree* (2013) 56 Cal.4th 823,[1] *People v. Tate* (2010) 49 Cal.4th 635, and the Chief Justice's concurrence in *People v. Riccardi* (2012) 54 Cal.4th 758, 840–846, in support of respondent's arguments even though these opinions all are concerned with the process of choosing a jury, and the propriety of excusing prospective jurors, not sworn seated jurors. (Supplemental Reply Brief [SRB], pp. 1–9.)

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[1] Respondent cites *Rountree* for the principle that the *trial court may properly excuse a seated juror* when that juror has an "internal conflict" as evidenced by indicting "it would be very hard for him to ignore his belief system is order to carry out his duties as a juror." (SRB 2, emphasis added.) *Rountree* did not concern a seated juror. The prospective juror was being questioned during voir dire, and the issue there was whether the trial court's excusal was warranted.

The reason for this effort is likely found in the different standards of review applied by this Court in these two different contexts. When considering whether or not the excusal of a prospective juror for cause was appropriate, the review is highly deferential. The qualification of prospective jurors challenged for cause comes within the wide discretion of the trial court, and is seldom disturbed on appeal. (*People v. Horning* (2004) 34 Cal.4th 871, 896.) " 'On appeal, we will uphold the trial court's ruling if it is fairly supported by the record. . . .' " (*People v. Barnett* (1998) 17 Cal.4th 1044, 1114.) "When the prospective juror's answers on voir dire are conflicting or equivocal, the trial court's findings as to the prospective juror's state of mind are binding on appellate courts if supported by substantial evidence." (*People v. Duenas* (2012) 55 Cal.4th 1, 10.)

After the jury is sworn, however, the defendant has a Sixth Amendment right to a verdict delivered by that jury. (*Crist v. Bretz* (1978) 437 U.S. 28; see ARB 105–106.) Jurors may be dismissed during the trial, but only upon a showing of good cause. (Pen. Code, § 1089.) In reviewing the propriety of the dismissal of a seated juror, this Court takes a more active approach: "Because of the importance of juror independence, review of the decision to discharge a juror involves " 'a somewhat stronger showing' than is typical for abuse of discretion review. . . ." (*People v.*

Lomax (2010) 49 Cal.4th 530, 589.) The basis for a juror's discharge must appear on the record as a " 'demonstrable reality' " and "involves 'a more comprehensive and less deferential review' than simply determining whether any substantial evidence" supports the court's decision. (*Ibid.*) The reviewing court does not reweigh the evidence but looks to see whether the court's " 'conclusion is manifestly supported by evidence on which the court actually relied.' [Citation.]" (*People v. Allen* (2011) 53 Cal.4th 60, 71.)

Respondent does cite decisions of this Court addressing the discharge of a seated juror, but often gets them wrong. He writes, "even assuming the trial court erred in finding that Juror No. 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 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." (SRB 5.)

Neither *Howard* nor *Abbot* stand for this principle. There was no "erroneous removal of a juror" in either case. In *Howard*, a seated juror reported to the court after the testimony of two defense witnesses that she knew them, and was prejudiced against them and their testimony. (*Id.*, 211

Cal. at p. 323.) All parties agreed that she should be removed and replaced with one of the two alternates. Defendant later claimed that the removal of the juror required that a mistral be declared, even though the juror who had been removed was admittedly biased. This Court rejected that contention. (*Id.*, 211 Cal. at pp. 324–325.)

In *Abbot*, the issue was whether or not there was good cause for the discharge of a juror mid-trial. The trial court heard that the juror in question worked with and close by the defendant's brother, and had spoken with several people, one of whom reported him saying that the defendant had been framed. After questioning of the juror, the trial court did not find as a matter of fact that the juror had said such a thing, but discharged him on the basis that there was no dispute of his working proximity (within 25 feet) to the defendant's brother. This Court upheld the trial court's finding of good cause to dismiss the juror in question. (*Id.*, 47 Cal.2d at pp. 370–371.)

Respondent argues that Juror No. 2 was properly discharged because "his beliefs require adherence to a religious dictate as opposed to the law instructed by the court." (SRB 4, fn. 1.) Respondent does not cite to any principle of law that Juror No. 2 would be unable to follow, or that he would even have any difficulty in following. There is no evidence of any such principle or instruction.

As this Court recently observed in the context of jury selection, religious beliefs might support an excusal for cause, if they interfered with a prospective juror's functioning as a juror. In *Roundtree*, an excusal for cause was upheld because even though the prospective juror supported the death penalty because he could not sit in judgment of a fellow human being, and therefore could not function as a juror. (*Rountree*, 54 Cal.4th at 847.)

There is no hint of such an inability in Juror No. 2. There is also no suggestion of dogmatism; he testified that he would be willing to vote for death if there was a second witness "or its equivalent in corroboration." There is nothing illegal or immoral about his belief that a greater standard of proof is appropriate before imposing a death sentence. In fact, his beliefs are very close to those set forth in the American Law Institute's Model Penal Code, which recommends that the death penalty be imposed only when guilt is proven "beyond all doubt." (See AOB 371–372.) While this may not be the law at present, holding such a belief is no grounds for dismissal from a jury, certainly not in a jurisdiction like California which recognizes lingering doubt as a legitimate basis for mitigation of sentence. (*People v. Gay* (2008) 42 Cal.4th 1195, 1221.)

Respondent states that "the record amply supports the trial court's decision to remove Juror No. 2 based on his religious beliefs substantially

impairing his ability to perform his duties—both in the guilt and penalty phases." (SRB 4.) This assertion is not supported by a citation to any part of this record. Instead of "ample" support, there is no support at all, and no good cause, for Juror No. 2's dismissal after the testimony of Nelva Bell.

B. Prejudice

Respondent correctly points out that *People v. Hernandez* (2003) 30 Cal.4th 1, accepted the finding of prejudice by the court of appeals, and then considered the impact of the prejudicial removal of a juror mid-trial on the issue of whether or not a retrial was banned by the constitutional ban against double jeopardy. (SRB 6.) The *Hernandez* court did not expressly address the need for such a showing when a seated juror is erroneously discharged. Mr. Weatherton has been unable to find any case, state or federal, in which the erroneous removal of a juror mid-trial has *not* been found to be prejudicial.

The Court of Appeal in *Hernandez* (published at 116 Cal.Rptr.2d 379 before review was granted) found prejudice because the juror in question had made expressions indicating that she was less than impressed with the prosecutor's case. The court found the juror's impressions of the prosecutor, judge, and detective were not proper grounds for disqualification. (*Id.* at p. 387.) In discussing prejudice, the court found the

following language from this Court's decision in *People v. Hamilton* (1963) 60 Cal. 2d 105 to be "directly analogous":

> While it has been said repeatedly, in the cases cited above, that a defendant is not entitled to be tried by a jury composed of any particular individuals, but only by a jury composed of qualified and impartial jurors, this does not mean that either side is entitled to have removed from the panel any qualified and acting juror who, by some act or remark made during the trial, has given the impression that he favors one side or the other. It is obvious that it would be error to discharge a juror for such a reason, and that, if the record shows (as it does here), that, based on the evidence, that juror was inclined toward one side, the error in removing such a juror would be prejudicial to that side. If it were not, the court could 'load' the jury one way or the other. That is precisely what occurred here. The juror asked, in good faith and in order to be instructed by the court, questions which indicated that (temporarily at least) she was considering the probability of a life sentence. To dismiss her without proper, or any, cause was tantamount to 'loading' the jury with those who might favor the death penalty. Such, obviously, was prejudicial to appellant.

(*People v. Hamilton, supra*, 60 Cal.2d at p. 128, cited at *Hernandez*, *supra*, 116 Cal.Rptr.2d at 390.)

When there is no good cause for dismissal of a seated juror, the effect is that a valued constitutional right has been violated. Respondent has not cited to a single case where the erroneous removal of a seated juror from a jury sworn to try the cause has been without consequence.

Though not citing such a case, respondent argues that cases in which the erroneous removal of a juror occurred during deliberations, i.e., as in

People v. Allen, supra, can be distinguished from the case at bench, where the removal took place mid-trial. (SRB 6–7.) There is a strong likelihood, however, that the deliberations in this case would have been affected in a manner favorable to Mr. Weatherton had Juror No. 2 been allowed to continue.

If a prejudice showing is needed, prejudice can be discerned here because of the characteristics of Juror No. 2 (a strong person with principles; bright and articulate, not likely to be bowled over), the nature of defense (a reasonable doubt defense on issue of identity based, inter alia, on the significance of missing evidence that logically should have been present) and the prosecution evidence (a very emotional victim/eyewitness identification). The prosecutor immediately moved for the juror's removal, and did not want anyone on the jury who suggested that the case against Mr. Weatherton might be doubtful. (See 27 RT 4306–4316.) As to penalty, it would have helped appellant to have a juror who would be insistent on heightened certainty of guilt—particularly since appellant presented a strong reasonable doubt case.

Deliberations were contentious. (See AOB 127 et seq.) There were three votes to acquit Mr. Weatherton on the first ballot. One of these votes was discharged; the last holdout immediately regretted her shift after the

verdict was recorded and contacted Mr. Weatherton's attorneys, along with two alternates. It is not possible to say with any confidence that the removal of this juror would have had not had a favorable impact for Mr. Weatherton on the results in this case. (See *People v. Bowers* (2001) 87 Cal.App.4th 722, 728.)

II.
CONCLUSION

For the foregoing reasons, this Court should set aside all of Mr. Weatherton's convictions and his sentence of death.

Dated: _____

Respectfully submitted,

_____
MICHAEL R. SNEDEKER

Attorney for Appellant
FRED WEATHERTON

CERTIFICATE PURSUANT TO CAL. RULE OF COURT 8.630

I hereby certify that, according to my computer's word processing program, this brief, exclusive of tables, is 2039 words, within the 2,800-word limit specified in the California Rules of Court .

Dated: _____

_____

MICHAEL R. SNEDEKER

Attorney for Appellant
FRED WEATHERTON

DECLARATION OF SERVICE BY MAIL

Re: *People v. Weatherton*, Supreme Court No. S106489

I, Michael R. Snedeker, declare that I am over 18 years of age and am not a party to this action. My business address is PMB 422, 4110 SE Hawthorne Blvd., Portland, OR 97214-5246. I served a copy of the attached:

APPELLANT'S SUPPLEMENTAL BRIEF;
APPLICATION TO FILE SUPPLEMENTAL BRIEF

on each of the following by placing same in an envelope addressed respectively as follows:

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San Diego, CA 92186

Fred Weatherton
PO Box T-52846
San Quentin State Prison
San Quentin, CA 94974

Each said envelope was then, on July 22, 2013, sealed and deposited in the United States mail in Portland, Oregon, with postage fully prepaid.

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

Executed in Portland, Oregon, this 22d day of July, 2013.

MICHAEL R. SNEDEKER
Declarant

CORRECTED PROOF OF SERVICE

Re: *People v. Weatherton*, Supreme Court No. S106489

I, Michael R. Snedeker, declare that I am over 18 years of age and am not a party to this action. My business address is PMB 422, 4110 SE Hawthorne Blvd., Portland, OR 97214-5246. I served a copy of the attached:

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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Fred Weatherton
PO Box T-52846
San Quentin State Prison
San Quentin, CA 94974

Each said envelope was then, on July 22, 2013, sealed and deposited in the United States mail in Portland, Oregon, with postage fully prepaid. I am mailing a copy of this corrected proof of service to each party today.

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

Executed in Portland, Oregon, this 27th day of July, 2013.

MICHAEL R. SNEDEKER
Declarant