SUPREME COURT COPY

In the Supreme Court of the

State of California

People of the State of California, Plaintiff and respondent, v. Alfred Flores III, Defendant and appellant.	)	No. S116307

Appellant's Supplemental Reply Brief

Automatic Appeal From a Judgment of Death
Of the Superior Court of The State of California,
County of San Bernardino
Honorable Ingrid A. Uhler, Judge
No. FVA-015023

Robert Derham
Attorney at Law
State Bar No. 99600
769 Center Boulevard # 175
Fairfax, CA 94930
Tel.: 415-485-2945
rhderham@gmail.com

Attorney for defendant and
appellant Alfred Flores III

DEATH PENALTY

In the Supreme Court of the

State of California

People of the State of California, Plaintiff and respondent, v. Alfred Flores III, Defendant and appellant.	)	No. S116307

Appellant's Supplemental Reply Brief`

Automatic Appeal From a Judgment of Death
Of the Superior Court of The State of California,
County of San Bernardino
Honorable Ingrid A. Uhler, Judge
No. FVA-015023

Robert Derham
Attorney at Law
State Bar No. 99600
769 Center Boulevard # 175
Fairfax, CA 94930
Tel.: 415-485-2945
rhderham@gmail.com

Attorney for defendant and
appellant Alfred Flores III

Table of Contents

Argument 1

I. The Court's Failure To Apply *Witherspoon/Witt* Even-Handedly and Impartially Violated Flores's Rights To Due Process, To A Reliable Penalty Determination, And To A Fair And Impartial Jury Under The Sixth, Eighth, and Fourteenth Amendments To The United States Constitution and Article I, sections 7, 15, 16, and 17 of the California Constitution. 1

A. The claim has not been forfeited for failure to object in the trial court 1

B. The transcript of the voir dire shows the court applied a different standard in evaluating challenges for cause to jurors who supported the death penalty than it did in evaluating challenges to jurors who opposed it 5

Conclusion 13

Word Count Certificate 13

TABLE OF AUTHORITIES

STATE CASES

People v. Boyde (1988) 46 Cal.3d 212 ..... 2, 11

People v. Brown (2004) 33 Cal.4th 892 ..... 2, 9, 12

People v. Clark (2011) 52 Cal.4th 856 2

People v. Hawthorne (1992) 4 Cal.4th 43 ..... 2, 11

People v. Holmes (1960) 54 Cal.2d 442 ..... 2, 4

People v. Martinez (2009) 47 Cal.4th 399 2

People v. McKinzie (2012) 54 Cal.4th 1302 ..... 2, 9

People v. Partida (2005) 37 Cal.4th 428 2

People v. Saunders (1993)5 Cal.4th 580 ..... 3, 4

People v. Stowell (2003) 31 Cal.4th 1101 3

People v. Thornton (2007) 41 Cal.4th 391 2

People v. Whalen (2013) 56 Cal.4th 1 ..... 2, 3, 8

People v. Williams (1998) 17 Cal.4th 148 ..... 3, 4

People v. Yeoman (2003) 31 Cal.4th 93 ..... 3, 4

FEDERAL CASES

Tuilaepa v. California (1984) 512 U.S. 967 ..... 3, 11

Witherspoon v. Illinois (1968) 391 U.S. 510 ..... 3, 12

Argument

I. The Court's Failure To Apply *Witherspoon/Witt* Even-Handedly and Impartially Violated Flores's Rights To Due Process, To A Reliable Penalty Determination, And To A Fair And Impartial Jury Under The Sixth, Eighth, and Fourteenth Amendments To The United States Constitution and Article I, sections 7, 15, 16, and 17 of the California Constitution.

A. The claim has not been forfeited for failure to object in the trial court.

Respondent claims the claim raised in the supplemental opening brief has been forfeited by Mr. Flores because his attorney failed to object. Respondent claims the defendant's attorney failed to assert a challenge for cause to prospective juror L.T., and failed to object to judicial bias, misconduct, inadequate voir dire, and the seating of a biased juror. (Respondent's Supplemental Brief ("RSB") at 2 & fn. 1.) The claim has not been forfeited.

First, prospective juror L.T. was challenged for cause. (5 RT 878.) Counsel stated, "I still would challenge Miss [T.] because she really — I believe that her religious opinions of an eye for an eye and if somebody murdered and killed, then they should forfeit it with their life. I know that's what she put on the questionnaire, and I know she backed off a little bit when questioning her, but I would still challenge for cause." (5 RT 878.) The court denied the challenge. (5 RT 878-

879.) The court acknowledged L.T. "did have some strong opinion about an eye for an eye," but she made it clear "she will be willing to keep an open mind and listen to all the facts and the evidence and make a determination based on the facts and the law." (5 RT 879.) Respondent's argument that Flores has forfeited his claim for failure to challenge prospective juror L.T. is unfounded.

Second, Flores argues here that the court below erred "by applying different and more stringent criteria to evaluate life-leaning prospective jurors than it applied to death-leaning prospective jurors." (*People v. Whalen* (2013) 56 Cal.4th 1, 41.) In *Whalen*, the Court acknowledged it has addressed this claim on merits, "notwithstanding defendant's failure to object on these precise grounds in the trial court." (*Ibid.*, citing *People v. Clark* (2011)52 Cal.4th 856, 902, fn. 10; *People v. Martinez* (2009) 47 Cal.4th 399, 439, fn. 8; *People v. Thornton* (2007) 41 Cal.4th 391, 419–425.)

Third, given that the court denied Flores's challenges for cause to prospective jurors L.T., D.S., and S.T., it would have been futile for Flores to rephrase his objection on other grounds. "The rule that failure to object bars appellate review applies only if a timely objection or request for admonition would have cured the harm."

(*People v. Hamilton* (1989(48 Cal.3d 1142, 1184, fn. 27.) The purpose of the contemporaneous-objection rule is to avoid an error that could have been corrected or avoided. (*People v. Stowell* (2003) 31 Cal.4th 1101, 1114.) Thus, "no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and apply a legal standard similar to that which would also determine the claim raised on appeal." (*People v. Yeoman* (2003) 31 Cal.4th 93, 177-188 [holding a *Wheeler* objection sufficient to preserve a *Batson* claim as well].) Here, the claim of uneven application of *Witherspoon/Witt* is not identical to a claim of an erroneous ruling on a for-cause challenge, but it is similar enough that it is highly unlikely the court would rule differently.

Fourth, the issue here concerns the fundamental constitutional right to a fair and impartial jury in a death penalty case. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights. (See *People v. Saunders* (1993)5 Cal.4th 580, 592; [holding plea of once in jeopardy may be raised for first time on appeal];

People v. Holmes (1960) 54 Cal.2d 442, 443–444 [holding constitutional right to jury trial may be raised for first time on appeal].)

Fifth, a party's failure to object does not deprive the reviewing court of the discretionary authority to act and correct error. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [holding appellate court had discretionary authority to review the soundness of trial court's reasons for dismissing a prior felony conviction even though the prosecutor had failed to object to those reasons].)

For all these reasons, the Court should reach the merits of the issue. Defense counsel objected to prospective jurors L.T., D.S., and S.T. on the ground each one's ardent support of the death penalty prevented him or her from considering life without parole as a realistic alternative to the death penalty in this case. A comparison of these jurors' responses to the responses given by prospective juror S.M. shows that the court did not apply *Witherspoon/Witt* evenhandedly.

//

//

//

B. The transcript of the voir dire shows the court applied a different standard in evaluating challenges for cause to jurors who supported the death penalty than it did in evaluating challenges to jurors who opposed it.

Respondent makes three arguments to support its claim that there was no error in the court's application of the *Witherspoon/Witt* standard. First, respondent asserts the court was justified in denying a challenge to three jurors whom the defendant challenged because each ultimately stated he or she could remain "open-minded" about the penalty. (RSB at 3.) But so did prospective juror S.M., who was successfully challenged by the prosecutor. The issue is not whether the prospective jurors ultimately agreed to remain open-minded. All four prospective jurors at issue here did so.

The question is whether the court used a different standard to deny challenges to the three jurors who voiced strong pro-death views than the standard it used to grant a challenge to S.M., who expressed reluctance to impose the death penalty but also said he could be open-minded about the penalty, and could impose death in the appropriate case. The fact that three prospective jurors who voiced ardent support for the death penalty on moral and religious grounds could be rehabilitated simply by agreeing to keep an open mind, whereas S.M.

voiced only mild reluctance to impose death yet was discharged for cause, is ample evidence that the court used a different standard to evaluate the fitness of pro-death jurors than it did for a juror who opposed the death penalty on policy grounds.

A comparison of the voir dire responses of the jurors at issue reveals the different standard at work. Respondent concedes that three prospective jurors – L.T., D.S., and S.T. – each said he or she would probably impose the death penalty if defendant was convicted of killing three people. (RSB at 3.) Taken in context, the statements of these three prospective jurors suggest their preference was strongly for the death penalty under the circumstances of the case.

For example, L.T. favored the death penalty and believed in an "eye for an eye." (22 CT 6123.) She was only "somewhat" comfortable considering both aggravating and mitigating circumstances in deciding the proper penalty. (22 CT 6123.) She admitted she "probably" would vote for death if defendant was convicted of murdering three people: "I would say probably, yes." (5 RT 839.) On the other hand, S.M. was not "fundamentally opposed" to the death penalty, and could vote for it in an "appropriate case." (5 RT 943, 946.) He was "very much" comfortable weighing aggravating and

mitigating circumstances in deciding proper penalty. (18 CT 4942.) Ultimately, both said they could impose either life or death; yet S.M. was discharged and L.T. was not.

Similarly, prospective juror D.S. favored the death penalty and would vote to keep it. (22 CT 6013-6014.) He admitted he would have a "hard time" choosing life without parole under the facts of this case, because he believed the defendant deserved the death penalty. (5 RT 1010-1012.) This was no different than S.M. saying he would be "uncomfortable" imposing death, yet S.M. was discharged and D.S. was not. D.S. eventually stated that he "guessed" he "would be as fair as [he] possibly could." (5 RT 1016.) Based on this, he was considered rehabilitated and the challenge for cause was denied. On the other hand, S.M. was discharged even though he stated he would not automatically vote for life without parole but would "weigh the evidence and circumstances." (18 CT 4942.)

Finally, prospective juror S.T. believed her religion prescribed the death penalty in cases of murder. She said the Bible teaches that "if you shed the blood of someone – yours should be shed as well." (22 CT 6162.) She forthrightly admitted she "could not" impose life without parole if defendant was convicted of killing three people. "I

could say it depends on the circumstances and all the evidence and all that, but I guess I would go to the death penalty." (6 RT 1375-1376.) After questioning by the prosecutor and the court, during which the court reminded her that the court wanted "all the potential jurors to have an open mind," S.T. agreed to keep an open mind about the penalty. (6 RT 1380.) Questioning by the court and prosecutor can lead a prospective juror to the very answer the juror thinks the court wants him or her to give. (See *People v. Whalen, supra*, 56 Cal.4th at p. (conc. opn. of Liu, J.)[observing that "the formality of the setting of a superior court, over which the trial judge presides in a commanding display of authority" makes it natural for a prospective juror to defer to the judge and to answer accord deference to the judge and "to answer 'yes' when the judge individually instructs the juror on the law and asks "can you follow my instructions?"].)

If prospective juror S.T. voiced an anti-death penalty view as strongly as she gave her support for it, there is no doubt she would have been discharged. Her support for the death penalty was far greater than S.M.'s opposition to it, yet she was not discharged for cause, even though she expressed a strong preference for the death penalty under the very circumstances of this case. (6 RT 1375-1376.)

S.M.'s policy-based reservations about the death penalty paled in comparison to S.T.'s religious conviction that the death penalty was authorized by her God, yet S.M. was dismissed and she was not.

Respondent next explains away the stark discrepancy in the court's treatment of these jurors by noting the trial court is in the position to observe "the prospective juror's demeanor and verbal responses." (RSB at 3, quoting *People v. McKinzie* (2012) 54 Cal.4th 1302, 1328.) But the record does not support the assertion that the court found something in S.M.'s demeanor that caused the court to disbelieve S.M.'s avowal that he would keep an open mind in deciding the penalty. Nor did the trial prosecutor argue that S.M.'s demeanor was what distinguished him from the pro-death jurors who first said they would vote automatically for death, and then hedged away from their beliefs under questioning by the court and prosecutor. Respondent cannot assert a ground to uphold a challenge to a juror that it did not raise at trial. (*People v. Brown* (2004) 33 Cal.4th 892, 901 [holding a new theory cannot be raised on appeal where the opposing party did not have the opportunity to present evidence to rebut it at trial].)

Respondent next asserts that S.M. asserted he did not believe

he would be a good juror in this case, that serving on the jury would put him in a moral dilemma, that he would be unfair to the prosecution in the guilt phase, and that he would ignore the law and use his own standard to determine if special circumstances existed. (RSB at 5.) The argument misconstrues the record.

First, respondent focuses on S.M.'s responses to the prosecutor's leading questions in voir dire. All the key words here – "moral dilemma," not a "good juror," not "fair to the prosecution" – were used by the prosecutor, not S.M. (5 RT 942-943.) And respondent fails to disclose that S.M. qualified his agreement with these questions. Taken in context, S.M. said only that he was "uncomfortable with being placed with the responsibility of taking someone's life." (5 RT 942.) He did not say he would be unfair to the prosecution; he said he did not know what he would do because he had never been placed in the situation before. (5 RT 942.)

Moreover, S.M. did not say he would ignore the law and decide for himself what a special circumstance was. He stated, "I understand the law defines it one way, but I have to look within and decide whether I can use that factor in determining whether I can take someone's life or vote that someone's life be taken." (5 RT 945.) This

sort of soul searching is *exactly* what the law requires. The decision to impose life or death does not rest ultimately on the existence of a special circumstance, or the number of aggravating factors. To the contrary, the decision is "inherently moral and normative." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) There is no burden of proof; each juror assigns whatever weight to the circumstances that he or she deems appropriate, and each juror decides for himself or herself whether death is appropriate. (*Ibid.*; *Tuilaepa v. California* (1984) 512 U.S. 967, 979 [holding jury "need not be instructed how to weigh any particular fact in the capital sentencing decision"]; *People v. Boyde* (1988) 46 Cal.3d 212, 253 [holding a juror in a capital case is "free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider"].) S.M. correctly stated he would have to decide for himself whether the circumstances were sufficient to warrant the death penalty.

Nor did S.M.'s admission that he would be "uncomfortable" sitting as a juror in a death penalty case disqualify him. Neither a reluctance to impose the death penalty, nor the moral discomfort caused by the prospect of imposing a death sentence is a valid ground

to excuse a prospective juror. "Every right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow man." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 515, fn.8.) A juror "might find it very difficult to vote to impose the death penalty, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*People v. Stewart, supra,* 33 Cal.4th at p. 447.)

Finally, respondent claims the jury as seated was not predisposed to vote for death. (RSB at 7.) Respondent points to four jurors who expressed the belief that the death penalty should be used sparingly. (RSB at 7.) But respondent does not deny that nearly every person who sat on the final jury strongly favored the death penalty as a punishment; only one had any reservations about it. (RSB at 7.) This group of jurors did not represent the different attitudes about the death penalty shared by the public at large. This jury came to the case ready and willing to choose death.

The transcript of the voir dire permits no conclusion other than

that the court applied a different standard for pro-death jurors and anti-death penalty jurors. The court's disparate treatment was an abuse of discretion that resulted in an unfair trial. The court violated defendant's rights to due process, to an impartial jury drawn from a fair cross-section of the community, and to a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, section 15 and 17 of the California Constitution. (See *Morgan v. Illinois, supra,* 504 U.S. at p. 727; *People v. Fauber, supra,* 2 Cal.4th 792, 816.) Reversal of the conviction and sentence is required.

Conclusion

For the reasons stated above, and in the opening and reply briefs, the conviction and sentence must be reversed.

Date:

Respectfully submitted,

_____

Robert Derham

Attorney for defendant and appellant
Alfred Flores III

Word Count Certificate

The appellant's supplemental reply brief contains 3227 words, within the limit set forth in rule 8.630(d) of the California Rules of Court.

_____

Robert Derham

Certificate of Service

I, Robert Derham, am an attorney admitted to the State Bar of California. My business address is 769 Center Boulevard #175, Fairfax, CA 94930. I am not a party to this action. On December ____, 2014, I served the **Appellant's Supplemental Reply Brief** upon the parties and persons listed below by depositing a true copy in a United States mailbox in San Anselmo, CA, in a sealed envelope, postage prepaid, and addressed as follows:

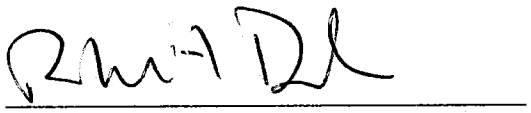
Office of the Attorney General
Attn: Heather Crawford, Deputy Attorney General
PO Box 85266
San Diego, CA 92186-5266

California Appellate Project
101 Second Avenue, Suite 600
San Francisco, CA 94105

Mr. Alfred Flores III
P-02321
San Quentin State Prison
Tamal, CA 94974

Superior Court
County of San Bernardino
351 N. Arrowhead Ave
San Bernardino, CA 92415

I declare under penalty of perjury that the foregoing is true and correct. Executed on December ____, 2014, in San Anselmo, California.



Robert Derham