IN THE SUPREME COURT OF THE STATE OF CALIFORNIA



PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

vs.

DARRELL LEE LOMAX

Defendant and Appellant

Case No. S057321

Los Angeles County
Superior Court No.
NA023818



# APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles

The Honorable Judge Ronald M. George

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## APPELLANT'S SUPPLEMENTAL OPENING BRIEF

## INTRODUCTION

Defendant and appellant Darrell Lee Lomax files this supplemental brief in order to discuss the recent decisions of this Court in *People v. Wilson* (2008) 44 Cal.4th 75 and *People v. Barnwell* (2007) 41 Cal.4th 1038, as they apply to the issue concerning the trial court's removal for cause of Juror No. 3 during the penalty phase deliberations, set out in Argument X of appellant's opening brief and Argument IX of appellant's reply brief. These cases were decided by the Court subsequent to Appellant's Reply Brief, which was filed on December 21, 2006.

## I.

## THE TRIAL COURT'S REMOVAL OF JUROR NO. 5 WAS BASED ON AN ERRONEOUS UNDERSTANDING OF THE JURY'S FUNCTION IN THE PENALTY PHASE OF A CAPITAL CASE

In *People v. Wilson*, this Court reversed a death sentence because the trial court improperly removed a holdout juror during penalty phase deliberations. The trial court in that case had dismissed and replaced the sole juror voting for a sentence of life without parole, in part because the juror's decision was based on factors that were not established by the evidence presented at trial. Specifically, the juror expressly relied on his own life experience as an African-American to draw inferences about the nature and impact of the defendant's upbringing, a mitigating factor which he felt tipped the balance in favor of life. The trial court ruled that this was misconduct warranting removal. (44 Cal.4th at pp. 813-820.)

In holding that there was no misconduct on the part of the juror, this Court emphasized the "inherently moral and normative" nature of the jury's penalty determination. The Court explained that the jury's function at the penalty phase differs substantially from its function at the guilt phase:

> That the alleged problems with Juror No. 5 arose during deliberations at the penalty phase rather than the guilt phase is significant. Rather than the factfinding function undertaken by the jury at the guilt phase, *'the sentencing function [at the penalty phase] is inherently moral and normative, not factual*; *the sentencer's power and discretion . . . is to decide the appropriate penalty* for the particular offense and offender under all the relevant circumstances'. . . .Given the jury's function at the penalty phase under our capital sentencing scheme,

> for a juror to interpret evidence based on his or her own life experiences is not misconduct.

(*Id.* at p. 830, citation omitted, emphasis added.)

The Court made clear that because the penalty decision of each juror in a capital case is subjective in nature, it is permissible for a juror to assign greater weight or importance to a particular mitigating factor or factors based upon moral views shaped by the juror's own life experiences. The Court thus held that Juror No. 5 acted properly:

> [B]ased on the juror's life experiences, he weighed the mitigating evidence more heavily than did the other jurors. Juror No. 5's personal assessment concerning what constituted mitigation, what was worthy of sympathy and compassion, and the weight such evidence deserved, is exactly what was at stake in the penalty phase.

(*Id.* at p. 831.)

In the instant case, holdout Juror No. 5 was removed by the trial court after his fellow jurors complained that he had a "conscientious objection" to the death penalty that "causes [him] to be unable to continue to deliberate." (10RT 2323.) When asked by the court to describe conduct on the part of Juror No. 5 that led the jury to say he was not deliberating, the foreperson (Juror No. 2) explained that Juror No. 5's decision (to vote for LWOP) was "not backed up by anything," and was "more of a feeling that he said he had in spite of all the evidence and facts that were presented." The foreperson further indicated that when challenged by the other jurors to defend his position, Juror No. 5 "couldn't or wouldn't come up with any reasonable foundation . . .for his decision." Although he was

prodded by the other jurors to try to convince them to change their minds, all Juror No. 5 would do was "sit there" and say "I don't know." (10RT 2294-2295.) In response to the trial court's question as to whether Juror No. 5 had participated in the deliberations, the foreperson stated:

> From the very beginning of the penalty phase Juror Number 5 has stood out in the group, has continually attempting (sic) to discuss facts not in evidence. He is hunting in areas that we have no understanding or knowledge of, trying to bring things in that really are not there, what-ifs, histories, potential circumstances. And whenever that is done, someone will mention that this is not available to us and not for our consideration. I believe he is allowing his projections of those facts that are not in evidence to form a picture of [appellant] that is not anywhere – is not necessarily reality.

(10RT 2301.)

In the eyes of the foreperson and the other jurors, Juror No. 5's "unreasonable" adherence to his decision to vote for LWOP, and his failure to justify it to them on the basis of specific evidence presented, constituted a refusal to deliberate, which (they inferred) was due to a "conscientious objection" to the death penalty. The trial court erroneously concurred. (10RT 2324; 2328-2329; 2334-2335.)[1]

As *Wilson* makes clear, it was not improper for Juror No. 5, in defending his decision to vote for a life sentence, "to discuss facts not in evidence," and to allow "his projections of those facts that are not in evidence to form a picture of [appellant]" supporting such a sentence. The trial court's finding that Juror No. 5 was not deliberating because he was "using outside information, that which is

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[1] See AOB 198-215 for more detailed recitation of the facts.

not in evidence" and "refusing to discuss and deliberate on the evidence in this case" (10RT 2324), was therefore erroneous.

It is apparent from the record that in exercising his "moral judgment" as to the appropriate punishment, Juror No. 5 did not view the aggravating factors in appellant's case to be sufficiently egregious to warrant a death sentence. Penalty jurors are permitted to decide that the defendant and his crime are simply not bad enough to warrant a death sentence, irrespective of whether any mitigating evidence is presented. (*People v. Duncan* (1991) 53 Cal.3d 955, 979 ["[t]he jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death"].) Thus, Juror No. 5 was not required to give weight to the aggravating factors that the other jurors evidently felt compelled a death sentence.

Furthermore, contrary to the trial court's finding that Juror No. 5 "stated he is a conscientious objector" (10RT 2324), the record reflects that Juror No. 5 never told the other jurors that he would automatically vote for LWOP, regardless of the evidence, due a conscientious objection to the death penalty. As Juror No. 10 told the court, Juror No. 5 "*stated* that he was conscientiously objecting to the death penalty *in this case*." (10RT 2315-2316, emphasis added.) When asked whether he meant that Juror No. 5 "has a conscientious objection to the death penalty so therefore he can't apply it in this case," Juror No. 10 replied "[N]o, not exactly. He said he believed in the death penalty but he couldn't apply it in this case."[2] (10RT 2317.)

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[2] Juror No. 10's account corroborates Juror No. 5's statement to the court denying that he ever said he had a conscientious objection to (continued...)

Review of the record reveals that none of the other jurors questioned by the court contradicted Juror No. 10's description of what Juror No. 5 actually said during the deliberations. (See AOB 198-211.)

For all of the above reasons and those stated in appellant's opening and reply briefs, the trial court's removal of Juror No. 5 was an abuse of discretion.

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[2](...continued)
the death penalty. Juror No. 5 further told the court that he was not opposed to the death penalty in general. (10RT 2292-2293; 2235-2237.)

## II.

## THE STANDARD ADOPTED BY THIS COURT FOR WHEN A DELIBERATING JUROR MAY BE REMOVED IS INADEQUATE TO PROTECT THE JURY TRIAL RIGHTS OF CRIMINAL DEFENDANTS

This Court held in *People v. Cleveland* (2001) 25 Cal.4th 466, 484, that a juror can be removed during deliberations if "it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate." "Demonstrable reality" has since been defined by the Court as "a showing that the court, as trier of fact did rely on evidence that, in light of the entire record, supports its conclusion that [juror misconduct] was established." (*People v. Barnwell*, *supra*, 41 Cal.4th at pp. 1051-1052.)

In *Cleveland*, the Court expressly declined to adopt the evidentiary standard employed by every other state and federal jurisdiction that has addressed the question of when a deliberating juror can properly be dismissed. All of these other jurisdictions bar removal of a juror when there is a reasonable possibility that the impetus for the juror's dismissal stems from the juror's views on the merits of the case. (See *United States v. Brown* (D.C. Cir. 1987) 823 F.2d 591, 596 [a court may not dismiss a juror during deliberations if the request for discharge stems from doubts the juror harbors about the sufficiency of the evidence]; accord *United States v. Thomas* (2d Cir. 1997) 116 F.3d 606,622; *U.S. v. Symington* (9th Cir. 1999) 195 F.3d 1080, 1088; *United States v. Abbell* (11th Cir. 2001) 271 F.3d 1286, 1302; *United States v. Kemp* (3rd Cir. 2007) 500 F.3d 257, 304; *State v. Elmore* (Wash. 2005) 155 Wash.2d 758, 778, 123 P.3d 72, 82; *People v. Gallano* (Ill. 2004) 354 Ill. App.3d 941, 954, 821

N.E.2d 1214, 1224; *Shotikare v. United States* (D.C. 2001) 779 A.2d 335, 345; *State v. Robb* (Ohio 2000) 88 Ohio St.3d 59, 81, 723 N.E. 2d 1019, 1043;[3] see also *Riggs v. State* (Ind. 2004) 809 N.E.2d 322, 328 [failure to agree on merits of case is grounds for mistrial, not removal of the obstacle to unanimity]; *Commonwealth v. Connor* (Mass. 1984) 392 Mass. 838, 845, 467 N.E.2d 1340, 1346 ["good cause" for dismissal of deliberating juror includes only reasons personal to juror, having nothing whatsoever to do with the issues of the case or juror's relationship with fellow jurors]; *State v. Valenzuela* (N.J. 1994) 136 N.J. 458, 472-473, 643 A.2d 582, 589 [unless record adequately establishes that juror suffers from an inability to function that is personal and unrelated to the juror's interaction with the other jurors, juror cannot be discharged during deliberations].)

The standard for removal of a deliberating juror has been equated with the reasonable doubt standard for establishing guilt in a criminal trial. (*U.S. v. Symington*, *supra,* 195 F.3d at p. 1087, fn.5 ["properly analogized to the 'reasonable possibility' context, the

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[3] Some courts have held that dismissal is barred when there is *any* possibility the request to discharge stems from the juror's view of the sufficiency of the government's evidence (*U.S. v. Brown*, *supra*, 823 F.2d at p. 596; *U.S. v. Thomas, supra*, 11 F.3d at p. 622; *State v. Robb*, *supra*, 72 N.E.2d at p. 1043), while others have held it is barred where there is a reasonable possibility, (*U.S. v. Symington*, *supra*, 190 F.3d at p. 1087; *U.S. v. Kemp*, *supra*, 500 F.3d at p. 304; *People v. Elmore*, *supra*, 123 P.3d at p. 82; *People v. Gallano*, *supra*, 821 N.E.2d at p. 1224; *Shotikare v. U.S.*, *supra*, 779 A.2d at p. 345), or a substantial possibility (*U.S. v. Abell*, *supra*, 271 F.3d at p. 1302), that this is the case. These slight differences in standards do not reflect disagreement and are "interchangeable." (*U.S. Kemp*, *supra*, 500 F.3d at p.304; *U.S. v. Abbell*, *supra*, 271 F.3d at p. 302, fn. 14.)

standard states that unless the available evidence is sufficient to leave one firmly convinced that the impetus for a juror's dismissal is unrelated to her position on the merits, the dismissal is improper"]; *U.S. v. Abbell*, *supra*, 271 F.3d at p. 1302 ["we mean for this standard to be basically a 'beyond reasonable doubt' standard"]; *U.S. v. Kemp*, *supra*, 500 F.3d at 304 [reasonable possibility standard corresponds with the burden of establishing guilt in a criminal trial].)

All of the above-cited jurisdictions have deemed such a rigorous standard necessary to protect fundamental constitutional rights. "The evidentiary standard protects not only against the wrongful removal of jurors; it also serves to protect against . . . judicial interference with, if not usurpation, of the fact-finding role of the jury." (*U.S. v. Thomas*, *supra*, 116 F.3d at p. 622.) A criminal defendant's right to have a jury decide his case without judicial interference or coercion is an implicit component of the jury trial right, as interpreted by the United States Supreme Court. (*Williams v. Florida* (1970) 399 U.S. 78, 101 [essential feature of jury trial lies in interposition between accused and accuser of common sense judgment of group of laymen who are able to deliberate as a group free from outside attempts at intimidation]; see also *United States v. United States Gypsum Co.* (1978) 438 U.S. 422, 459-60 [reversal required where trial judge encroached on verdict and foreclosed possibility of a no-verdict outcome by conveying impression to jury foreman during ex parte meeting that judge wanted a verdict "one way or the other"].)

Although it initially appeared from the *Cleveland* opinion that the "demonstrable reality" standard adopted by the Court would

effectively protect against judicial interference with the jury's deliberative process, the recent decisions of the Court make apparent that the standard does not in fact prevent such interference, because it permits trial courts to conduct inquiries into the substance of disputes between minority and majority jurors over how the case should be decided. Not only does this violate the secrecy of jury deliberations, but it also has a coercive effect in that it conveys to the jurors that their individual views will be subject to judicial scrutiny, and that dissension from the majority view will be treated as a failure to deliberate resulting in removal from the jury.

For example, in *People v. Barnwell*, *supra*, this Court sanctioned the trial court's inquiry into the reasons given by a holdout juror for his decision to vote for acquittal; i.e., that he did not believe the prosecution's witnesses. (41 Cal.4th at p.1054.) Similarly, in *People v. Wilson*, *supra*, 44 Cal.4th at pp.813-841, the Court, despite finding removal of the holdout juror in that case was erroneous, took no issue with the trial court's inquiry into the juror's reasoning in voting for LWOP, a subject which clearly fell within the forbidden realm of the jury's thought processes. In the instant case, the trial court's inquiry similarly delved into Juror No. 5's decision to vote for LWOP, eliciting opinions from other jurors as to whether or not his decision was "backed up" by specific facts or evidence and what his substantive responses were to questions posed by other jurors during deliberations. Inquiries of this nature are improper infringements on the right to a jury trial.

In addition, the "demonstrable reality" standard is inadequate to protect against wrongful removal of jurors, because it addresses only the quantum of evidence necessary to support a trial court's

exercise of discretion, and not the much more fundamental question of whether or not the conduct complained of actually constitutes misconduct justifying the juror's dismissal. Thus, in *Barnwell*, the Court upheld the trial court's removal of a holdout juror who voted for acquittal because he did not believe the prosecution's law enforcement witnesses, without giving any consideration at all to whether the juror's views regarding the witnesses' credibility might have been formed on the basis of the evidence and argument presented during the trial. The Court held that it was permissible for the trial court to break the jury deadlock by removing the holdout juror simply because a majority of the other jurors felt that the holdout's refusal to change his vote to "guilty" was based on a preexisting bias against police officers. (41 Cal.4th at p. 1053) Had the Court applied the rule deemed constitutionally imperative by every other jurisdiction that has addressed the issue of when a juror can properly be removed – i.e., that a juror cannot be removed during deliberations if there is a reasonable possibility that his or her dissent from the majority stems from doubts regarding the sufficiency of the evidence – it would necessarily have had to consider whether the juror's refusal to capitulate to the majority could have been based on his views regarding the merits of the prosecution's case. Indisputably, removal of a seated juror for such reason would be improper. However, in declining to adopt the "reasonable possibility" standard, the Court was effectively able to side-step that issue in the *Barnwell* case.

In *State v. Elmore*, *supra*, the Washington Supreme Court observed that "the California standard [as enunciated in *People v. Cleveland*] seems to flip the presumption [against dismissal],

allowing dismissal if there is a 'demonstrable reality' that the juror was acting improperly, rather than prohibiting dismissal if there is any reasonable possibility that the juror was acting properly." (123 P.2d at p. 81.) The Washington Supreme Court noted that in contrast to California's "demonstrable reality standard," the "any reasonable possibility" standard "takes into account our presumption that jurors have followed the court's instructions in that it requires the court, where there is conflicting evidence, to retain a juror if there is any reasonable possibility that the dispute among the jury members stems from disagreement on the merits of the case." (*Id.* at p. 82.) Although the Washington court queried whether California's standard would produce a different outcome (*Id.* at p. 81, fn.8), this Court's subsequent decision in *Barnwell* demonstrates that California in fact permits dismissal of deliberating jurors who could not properly be discharged under the standard universally applied outside of this state.

In the instant case, the record reveals that the dispute between Juror No. 5 and the other jurors stemmed from the fact that the other jurors felt that Juror No. 5's decision to vote for LWOP was unjustified and unreasonable. The dispute thus stemmed from the juror's views regarding the merits of the prosecution's case for death, and therefore was not proper grounds for his removal from the jury.

In sum, recent decisions of this Court applying the "demonstrable reality" test adopted by this Court in *People v. Cleveland*, demonstrate that this standard for removal of a juror during deliberations does not adequately protect the jury trial rights of criminal defendants guaranteed by the 6th and 14th Amendments to the United States Constitution. First, it permits a trial court to

conduct an inquiry into the decision-making process of the jury, which not only violates the secrecy and sanctity of the jury deliberations but also improperly influences their outcome. Second, it fails to restrict a trial court from breaking a jury deadlock by removing a minority juror who disagrees with the majority regarding the merits of the prosecution's case. Appellant therefore urges this Court to reconsider its decision in *Cleveland*, and adopt the "reasonable possibility" rule, which not only has been adopted by all of the other state and federal courts that have addressed this issue, but which also protects the jury trial rights of criminal defendants far better than the "demonstrable reality" standard enunciated in *Cleveland* and further clarified in *Barnwell*.

In any event, because the record in the instant case fails to show that Juror No. 5 either refused or failed to participate in the penalty deliberations, even under the "demonstrable reality" standard, the trial court's removal of the juror was an abuse of discretion, and appellant is thus entitled to reversal of his death sentence.

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## CONCLUSION

For all of the reasons stated in the AOB and in this Supplemental AOB, appellant's death sentenced must be reversed

Dated: January 23, 2009

Respectfully submitted,

Michael J. Hersek
State Public Defender

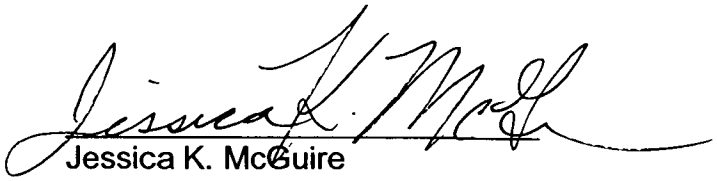
Jessica K. McGuire
Supervising Deputy State Public Defender

Attorneys for Appellant

**CERTIFICATE OF COUNSEL**
**(Cal. Rules of Court, rule 36(b)(2))**

I, Jessica K. McGuire, am the Supervising Deputy State Public Defender assigned to represent appellant, Darrell Lee Lomax, in this automatic appeal and conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 3,387 words in length excluding the tables and this certificate.

DATED: January 23, 2009



Jessica K. McGuire
Supervising Deputy State Public Defender

Attorney for Appellant

## DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Darrell Lee Lomax***
Case Number: **Superior Court No. NA023819**
**Supreme Court No. S057321**

I, the undersigned, declare as follows:
I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 801 K Street, Suite 1100, Sacramento, California 95814. I served a copy of the following document(s):

**APPELLANT'S SUPPLEMENTAL OPENING BRIEF**

by enclosing them in an envelope and
/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
/ **X** / **placing** the envelope for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelope was addressed and mailed on **January 23, 2009,** as follows:

David Voet
Deputy Attorney General
300 S. Spring Street
Los Angeles, CA 90013

Darrell Lee Lomax
P.O. Box K-27402
San Quentin State Prison
San Quentin, CA 94974

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **January 23, 2009**, at Sacramento, California.

**Saundra Alvarez**

**DECLARATION OF SERVICE BY MAIL**
**(Amended)**

ORIGINAL

SUPREME COURT
FILED

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Frederick K. Ohlrich Clerk

Deputy

Case Name: ***People v. Darrell Lee Lomax***
Case Number: **Superior Court No. NA023819**
**Supreme Court No. S057321**

I, the undersigned, declare as follows:
I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 801 K Street, Suite 1100, Sacramento, California 95814. I served a copy of the following document(s):

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by enclosing them in an envelope and
/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
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The envelope was addressed and mailed on **January 28, 2009**, as follows:

David Voet
Deputy Attorney General
300 S. Spring Street
Los Angeles, CA 90013

Clerk of the Superior Court
(For delivery to Judge Hay)
L.A. County Superior Court
210 W. Temple Street
Los Angeles, CA 90012-3210

Darrell Lee Lomax
P.O. Box K-27402
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San Quentin, CA 94974

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **January 28, 2009**, at Sacramento, California.

Saundra Alvarez

**Saundra Alvarez**