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SUPREME COURT
FILED

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SEP 08 2009

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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

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APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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

The Honorable Judge Margaret Hay

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,)	
)	
Plaintiff and Respondent,)	CRIM. S057321
)	
vs.)	Los Angeles County Superior Court No.
)	NA023819
DARRELL LEE LOMAX,)	
)	
Defendant and Appellant.)	
<hr/>		

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

I.

UNDER THE PRINCIPLES ARTICULATED IN *PEOPLE V. WILSON*, JUROR NO. 5 WAS IMPROPERLY DISCHARGED FOR CONSIDERING FACTS NOT IN EVIDENCE AND FOR NOT JUSTIFYING HIS DECISION TO VOTE FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE TO HIS FELLOW JURORS ON THE BASIS OF THE EVIDENCE PRESENTED AT TRIAL

As appellant has previously argued, the trial court erroneously found that Juror No. 5's failure to justify his penalty decision to the other jurors on the basis of specific evidence presented during the trial, constituted a refusal to deliberate. This Court's decision in *People v. Wilson* makes clear that each juror in a capital case must reach his or her own moral decision as to whether the death penalty should be imposed, and that a penalty phase juror may properly decide to vote for life without the possibility of parole (LWOP) in a particular case by considering mitigating factors that have not been

established by the evidence at trial. (*People v. Wilson* (2008) 44 Cal.4th 758, 830.) In *Wilson*, the Court held that a penalty juror was improperly discharged for basing his decision to vote for LWOP on inferences drawn from his own life experience rather than from the actual evidence presented during the trial. (*Id.* at pp. 831-832.)

Respondent asserts that *Wilson* is distinguishable because Juror No. 5 “was unwilling or unable to, and had refused to participate in the penalty phase deliberations by considering the evidence presented.” (Supplemental RB 11).¹ However, in both *Wilson* and the instant case, the respective jurors at issue were discharged because they based their sentencing decisions on factors not established by the evidence presented during the trial. This Court’s decision in *Wilson* makes clear that a penalty juror is not “unwilling or unable to deliberate,” because he considers such factors.

In the instant case, the trial court found that Juror No. 5's consideration of “*outside information which is not in evidence,*” and his failure to “*discuss and deliberate on the evidence in this case,*” constituted a refusal to deliberate, warranting discharge. (10RT 2324, 2329, emphasis added; see also 10RT 2335 [“Mr. L. refused to

¹Respondent also attempts to distinguish the instant case from *Wilson* on the basis that that Juror No. 5 was removed because he had “a general conscientious objection to the death penalty,” not because he exercised his moral judgment. (Supplemental RB 8.) Appellant has already fully briefed the question of whether the trial court’s finding that Juror No. 5 had a “general conscientious objection” to the death penalty is supported by the record (AOB 224-227; ARB 84-87; Supplemental AOB 5-6), and will not repeat those arguments herein.

deliberate in the penalty phase by refusing to consider the evidence presented”].) The court based these findings on the statement of the jury foreperson (Juror No. 2), that:

From the beginning of the penalty phase Juror No. 5 has stood out in the group, *has continually attempt[ed] 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 that is not available to us and not for our consideration, *I believe that he is allowing his projections of those facts that are not in evidence to form a picture for him that is not anywhere – is not necessarily reality.*

(10RT 2301, emphasis added.)

It is readily apparent from the above-quoted statement, that Juror No. 5 did in fact participate in the penalty deliberations, but wanted to “discuss facts not in evidence.” *Wilson* clarifies that was this was permissible, and the trial court’s determination that it was not was therefore erroneous.

Juror No. 2 also complained that “everyone in the room gave extensive reasons for their decision and his decision was not backed up by anything. It was more of a feeling that he said he had in spite of all evidence and facts that were presented.” (10RT 2294.) *Wilson* reaffirms that the penalty decision in a capital case is “inherently moral and normative, not factual.” (*People v. Wilson, supra*, 44 Cal.4th at p. 830.) Accordingly, Juror No. 5 was not required to articulate a “factual” justification for his decision to vote for LWOP, and his failure to do did not constitute a refusal to deliberate.

* * * *

II.
**CALIFORNIA'S "DEMONSTRABLE REALITY"
STANDARD DOES NOT ADEQUATELY PROTECT
AGAINST WRONGFUL REMOVAL OF JURORS AND
JUDICIAL INTERFERENCE WITH THE FACT-
FINDING ROLE OF THE JURY**

Respondent asserts that California's "demonstrable reality" standard is constitutional because it ensures that the trial court has "good cause" for removal of a juror, and that its finding of "good cause" is "manifestly supported by evidence on which [it] relied." (RB15.) The problem, however, is that California law does not restrict trial courts from interfering with, and improperly influencing the deliberative process by conducting inquiries into the substance of disputes between minority and majority jurors over how the case should be decided, and erroneously removing minority jurors.

As appellant demonstrated in his supplemental opening brief, every other jurisdiction – both state and federal -- that has addressed this issue has adopted a bright-line rule barring further inquiry and removal of a juror if there is a reasonable possibility that the impetus for the juror's dismissal stems from the juror's views regarding the merits of the case. (See Supplemental AOB 7-9.) This rule is not applicable only to federal trials, as respondent suggests (RB 19), but instead has been deemed necessary to protect the constitutional right to a jury trial guaranteed by the Sixth and Fourteenth Amendments. 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. 8, 101 [essential feature of jury trial lies in the interposition between

accused and accuser of common sense judgment of laymen who are able to deliberate as a group free from outside attempts at intimidation].) Therefore, disputes among jurors concerning how the case should be decided should not be investigated by trial judges.

Despite this Court's holding in *People v. Cleveland* (2001) 25 Cal.4th 466 that a trial court may not dismiss a juror because that juror harbors doubts about the sufficiency of the prosecution's evidence, its subsequent decision in *People v. Barnwell* (2007) 41 Cal.4th 1038, 1048-1054, makes clear that California law permits a trial court to explore the reasons for a juror's dissension from the majority, and remove the juror if it concludes that the juror's reasons are improperly based. In *Barnwell*, the Court upheld 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.

Respondent argues that the standard enunciated in *Cleveland* adequately protects the sanctity of jury deliberations, because *Cleveland* admonishes trial courts to focus on the jurors' conduct rather than the content of their deliberations, and cautions that "the court's focus should be as 'limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations.'" (RB 19, quoting from *People v. Cleveland, supra*, 25 Cal.4th at p. 485.)

However, such a vague standard provides little, if any, guidance to trial courts confronted with a situation, such as the one herein, in which the majority jurors complain that a dissenting juror is not deliberating properly. In contrast, a rule which bars removal of the dissenting juror once the court determines that the complaint

concerns a dispute over how the case should be decided, defines the parameters of the trial court's authority and provides clear guidance as to how to resolve the matter. Moreover, notwithstanding its admonition in *Cleveland* to focus on conduct rather than content, the Court both *People v. Barnwell*, *supra* and *People v. Wilson*, *supra*, expressed no concern that the trial court's inquiry focused on the reasons given by the dissenting juror for his vote and his views concerning particular evidence.²

Respondent further contends that a trial court commits no error by removing a juror whom the court finds unable or unwilling to perform his or her duties, even if the juror also entertains doubts about the sufficiency of the prosecution's evidence. (RB 20.) However, the cases respondent cites in support of that proposition – *People v. Boyette* (2002) 29 Cal.4th 381, 461-462 and *Perez v. Marshall* (9th Cir. 1997) 119 F.3d 1422 -- involve situations where jurors approached the court and asked to be removed because they believed themselves unable to perform their duties. These cases are therefore distinguishable from the instant case and others in which a dissenting juror was discharged based upon the complaints of the majority jurors that he or she was not deliberating properly.

Not only does the standard used in California fail to protect against judicial interference with the deliberative process, but

² Respondent notes that in his first argument appellant relies on statements by the jury foreman to support his claim that Juror No. 5 engaged in deliberations, and complains that “[a]ppellant cannot have it both ways.” (RSB 22.) Appellant's first argument was that based on the record, the trial court's ruling did not satisfy the standard used in California. The point of the present argument is that the California standard is defective.

substitution of an alternate juror after dismissing a juror who believes that the prosecution has not met its burden of proof, or as in the present case, believes that a death sentence is not warranted, conveys the impression that the court is seeking a verdict of guilt, or in this case, of death, in violation of the defendant's constitutional right to a fair trial by an impartial jury.

Other states have reached the conclusion that a mistrial must be declared under such circumstances. For example, the New Jersey Supreme Court held that removal of a holdout juror during deliberations, although justifiable under the circumstances of that case, required the granting of a mistrial, because it was clear that the remaining jurors had already made up their minds to convict the defendant, and it was entirely unrealistic to have expected them to proceed with an open mind when instructed to begin deliberations anew with an alternate juror. The court held that the replacement of the dismissed juror with an alternate under those circumstances violated the defendant's right to a fair trial by an impartial jury. (*State v. Jenkins* (N.J., 2004) 861 A.2d 827, 840; see also *State v. Hightower* (N. J., 1996) 680 A.2d 649, 656 [juror bias discovered during deliberations is not a circumstance susceptible to discharge and substitution, only available remedy is mistrial; substitution of juror under these circumstances violates defendant's right to a fair trial by an impartial jury]; *State v. Roberts* (Minn., 2002) 651 N.W.2d 198, 204 [reconstituting jury in midst of jury deliberations presents substantive fair trial and due process problems]; *People v. Garcia* (Colo. 2000) 997 P.2d 1, 8 [wherever it appears that a jury may be reconstituted in order to reach a particular result, the guarantee of a fair and impartial jury is meaningless]; accord *People v. Gallano* (Ill.

2004) 821 N.E.2d 1214,1224; *State v. Elmore* (Wash. 2005) 123 P.3d 72, 79 ["if a holdout juror is dismissed in a way that implies his dismissal stems from his views on the merits of the case, then the reconstituted jury may be left with the impression that the trial judge prefers a guilty verdict"]; *Riggs v. State of Indiana* (Ind. 2004) 809 N.E.2d 322, 329 [right to fair trial by impartial jury violated where dissenting juror replaced with alternate juror and reconstituted jury not expressly instructed that dismissal of juror in no way reflected approval or disapproval of views he expressed]; *People v. Connor* (Mass. 1984) 467 N.E.2d 1340, 1346-1347 [if juror is discharged and alternate substituted, jury must be instructed not only to begin deliberations anew, but also that reason for discharge is entirely personal and has nothing to do with discharged juror's views on the case or his relationship with fellow jurors].)

The trial court's inquiry in the instant case not only interfered with the deliberative process, in violation of appellant's right to trial by jury, but by removing Juror No. 5 and replacing him with an alternate juror, the trial court effectively coerced a verdict of death, in violation of his right to a fair trial by an impartial jury. Thus, even if the trial court did not abuse its discretion in conducting its inquiry and removing Juror No. 5, at a minimum it should not have permitted further deliberations with a substitute juror, but should have instead declared a mistrial.

Appellant therefore urges this Court to reconsider this issue, and afford him a new penalty trial.

* * * *


CONCLUSION

For of all of the foregoing reasons and those discussed in appellant's previously-filed briefs, appellant's defendant's conviction and death sentence must be reversed.

Dated: September 8, 2009

Respectfully submitted

Michael J. Hersek
State Public Defender

A handwritten signature in cursive script, reading "Jessica K. McGuire". The signature is written in black ink and is positioned above the printed name.

Jessica K. McGuire
Assistant State Public Defender

Attorneys for Appellant

**CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))**

I am the Assistant State Public Defender assigned to represent appellant, Darrell Lee Lomax, in this automatic appeal. I conducted a word count of the brief using our office's computer software. On the basis of that computer generated word count, I certify that this brief, excluding the tables and certificates, is 2,217 words in length.

Dated: September 8, 2009


Jessica K. McGuire

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:
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APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **September 8, 2009**, at Sacramento, California.


Ricardo Silahua