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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

<p>THE PEOPLE OF THE STATE OF CALIFORNIA,</p> <p>Plaintiff and Respondent,</p> <p>v.</p> <p>DARRELL LEE LOMAX,</p> <p>Defendant and Appellant.</p>
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CAPITAL CASE

S057321

Automatic Appeal from the Superior Court of the State of California
County of Los Angeles Superior Court No. NA023819
The Honorable Margaret M. Hay, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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DEATH PENALTY

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ARGUMENT

I.

THE TRIAL COURT'S REMOVAL OF JUROR NUMBER 5 WAS BASED ON THE CORRECT UNDERSTANDING OF THE PREREQUISITES FOR JURY SERVICE IN A CAPITAL TRIAL AND THE JURY'S FUNCTION DURING THE PENALTY PHASE

In appellant's tenth claim on appeal, he argues that the trial court improperly discharged a holdout juror, Juror Number 5, during penalty phase deliberations, in violation of appellant's right to trial by jury, guaranteed by the Sixth Amendment, and the California Constitution, the right to due process, and his right to be free from cruel and unusual punishment guaranteed by the Eighth and Fourteenth Amendments. (AOB 198-237.) In his Supplemental Opening Brief, appellant asserts that the trial court's removal of Juror Number 5 was based on an erroneous understanding of the jury's function in the penalty phase of a capital case. Specifically, appellant asserts that Juror Number 5 should not have been removed because he was "exercising his 'moral judgment' as to the appropriate punishment" based on evidence that was not before jury. To

support this assertion, appellant relies on this Court's opinion in *People v. Wilson* (2008) 44 Cal.4th 758. (SAOB 2-6.)

Respondent disagrees. The trial court's removal of Juror Number 5, as argued in the Respondent's Brief, was based on the correct understanding of the prerequisites for jury service in a capital trial and the jury's function during the penalty phase.^{1/} Moreover, as will be shown below, the opinion in *People v. Wilson* is inapposite to the material facts of the instant case. In the instant case, the trial court did not remove Juror Number 5 for exercising his moral judgment in a particular case. Rather, the trial court properly removed Juror Number 5 for four reasons: (1) he had a general conscientious objection to the death penalty; (2) he was unwilling or unable to participate in the penalty phase deliberations; (3) he refused to consider the evidence presented and refused to explain his views; and, (4) he had committed perjury during voir dire by indicating that he was moderately in favor of the death penalty. Accordingly, appellant's tenth claim on appeal should be rejected.

A. This Court's Opinion In *Wilson*

In *Wilson*, this Court concluded that the trial court had violated Penal Code section 1089^{2/} when it removed a juror during the penalty phase of a capital trial. This Court summarized the case as follows:

Defendant is African-American. One African-American served on his jury: [the Challenged Juror].^{3/} [The Challenged Juror] joined the other 11 jurors to convict defendant on all

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1. See Respondent's Brief at pages 195 through 213.
 2. This Court did not decide whether the juror's removal violated Wilson's constitutional rights.
 3. In *Wilson*, the juror removed during the penalty phase deliberations is referred to as "Juror No. 5." In the instant case, the removed juror is also referred to as "Juror Number 5." For sake of clarity and to avoid confusion, Respondent refers to the juror removed in *Wilson* as "the Challenged Juror."

counts at the guilt phase of the trial. Following the presentation of evidence at the penalty phase, the jury retired to deliberate the question of penalty. In the middle of these penalty phase deliberations, Juror No. 1 sent the court a complaint about [the Challenged Juror]. As discussed fully below, a lengthy investigation into the complaint ensued. This investigation, which involved questioning each of the jurors individually, revealed that [the Challenged Juror], although he had initially voted for death, changed his mind and was the only juror holding out for a life sentence. He explained his decision, both to the other jurors and to the trial court, as being based on his assessment of the strength of the mitigating evidence showing that defendant had been raised in an extremely dysfunctional family. [The Challenged Juror] asserted he ultimately found those mitigating circumstances predominated because, being African-American himself and having raised a son, he believed he had some insight into the negative family dynamics and harsh circumstances in which defendant was raised. After its investigation, the trial court - - citing multiple reasons - - removed [the Challenged Juror] and replaced him with an alternate juror. The court later removed that juror as well and appointed a second alternate juror. The jury as finally reconstituted eventually sentenced defendant to death.

(People v. Wilson, supra, 44 Cal.4th at p. 813.)

In *Wilson*, the trial court relied on four grounds as a basis to remove and replace the Challenged Juror: (1) he concealed bias on voir dire; (2) he relied on facts not in evidence when deliberating the penalty question; (3) he refused to follow the instruction that death was a more severe penalty than life in prison; and, (4) he prejudged the question of penalty.^{4/} This Court concluded that none of these grounds had been established as a demonstrable reality.

(People v. Wilson, supra, 44 Cal.4th at pp. 821-841.)

4. Respondent's Supplemental Brief does not include a discussion of this Court's opinion regarding the trial court's third and fourth reasons because the juror removed in the instant case (Juror Number 5) never suggested he believed life in prison was *worse* than the death penalty or that he had prejudged the penalty phase during the guilt phase of the trial.

1. Concealment On Voir Dire

As to the trial court's finding that the Challenged Juror concealed racial bias during voir dire, this Court concluded that "any concealment was unintentional and was insufficient to justify excusing him from the jury in the middle of penalty phase deliberations." (*People v. Wilson, supra*, 44 Cal.4th at p. 821.) The Court explained:

The record fails to demonstrate that [the Challenged Juror] concealed anything. He was never asked whether he would interpret evidence of any abuse defendant may have suffered as a child through the prism of his own experiences; *indeed, we expect jurors to use their own life experiences when evaluating the evidence.*

(*Id.* at p. 823, italics added.) Rather, this Court explained:

[The Challenged Juror] affirmed during voir dire that he would not consider defendant's race to benefit or disadvantage him and that he would treat him like he would anyone else. When questioned during the penalty phase, he affirmed his views, explaining that he viewed the mitigating evidence favorably because defendant came from a broken, disadvantaged family, not simply because he was African-American. He suggested that had defendant enjoyed the benefits his own son had growing up, he would consider death as a possible penalty for defendant's crimes. Under these circumstances, it is difficult to see what [the Challenged Juror] concealed.

(*Id.* at p. 823.)

This Court further explained that the trial court had inappropriately focused on the Challenged Juror's race and personal view regarding family dynamics. This Court found that this focus was logically untenable because:

To conclude otherwise would require accepting the notion that *the other jurors* were unable to perform *their* duty because they concealed *their* unstated assumption that the family dynamics in African-American families were no different from those occurring in non-African-American families, or that young males who grow up fatherless in Black families have exactly the same problems as young men raised without fathers in White, Hispanic or Asian families. We do not purport to resolve these questions, which are more in the realm of sociology and psychology, but we can and do conclude that [the Challenged Juror] did

not *conceal* his views on the subject because he was never asked about them.

(*Id.* at p. 824, italics original.) This Court also rejected the notion that any *unintentional* concealment of the intent to use personal knowledge of family dynamics could serve as a basis to remove a juror during deliberations. This Court reasoned that such unintentional concealment did not establish that a juror was unable to perform his or her duty as a demonstrable reality. (*Id.*)

2. Reliance On Facts Not In Evidence

As to the trial court's finding that the juror relied on facts not in evidence, this Court concluded that "the trial court erred because [the Challenged Juror] was merely relying on his life experiences to interpret the evidence presented." (*People v. Wilson, supra*, 44 Cal.4th at p. 825.) Moreover, this Court emphasized that penalty phase deliberations involve an "inherently moral and normative" function. (*Id.* at p. 830, quoting *People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) This moral and normative function during deliberations makes it "virtually impossible to divorce completely one's background from one's analysis of the evidence." (*Id.* at p. 830, quoting *People v. Steele* (2002) 27 Cal.4th 1230, 1266.) This Court applied these principles and concluded:

As is apparent, [the Challenged Juror] mentioned defendant's race during penalty phase deliberations, and the jurors discussed a variety of issues connected to defendant's family background. This was understandable, inasmuch as the defense case in mitigation consisted entirely of evidence of defendant's shockingly frequent physical abuse as a child growing up. . . . [¶] As an African-American man who had raised a son, [the Challenged Juror] believed he had some insight into these family dynamics, and those insights led him to conclude that because the circumstances of defendant's childhood sufficiently outweighed the aggravating evidence, defendant did not deserve the death penalty. In other words, based on the [Challenged Juror]'s life experiences, he weighed the mitigating evidence more heavily than did the other jurors. [The Challenged Juror]'s personal assessment

concerning what constituted mitigation, what was worthy of sympathy or compassion, and the weight such evidence deserved, is exactly what was at stake in the penalty phase.

(*People v. Wilson, supra*, 44 Cal.4th at p. 831.)

This Court again emphasized that the trial court had imposed an improper double standard based on race, stating:

The record does not demonstrate [the Challenged Juror]'s personal evaluation of the evidence was the product of improper racial considerations any more than the non-Black jurors' rejection of his evaluation was influenced by their personal racial views regarding the dynamics of an African-American family. Indeed, that the jurors themselves perceived the issue was not solely one of race is indicated by the reports of some that [the Challenged Juror]'s reasoning was based not on race but on cultural differences, leading the jury to undertake a discussion about the family dynamics they believed typical of other racial and ethnic groups. A juror whose personal view was that African-American defendants *never* should, or *always* should, receive the death penalty commits clear misconduct, both by not considering the particular facts of the case and by making the penalty decision based on racial bias. It would be equally objectionable were a juror to conclude *a particular defendant* deserved the death penalty or life imprisonment because of his or her race. But relying on an understanding, based on personal experience, of the effects of certain social environments and family dynamics on a young person growing up, when this understanding illuminates the significance or weight an individual juror would accord to related evidence in a particular case, is not misconduct.

(*People v. Wilson, supra*, 44 Cal.4th at p. 831, italics original.) Under these circumstances, this Court concluded that the record did not show, as a demonstrable reality, that the Challenged Juror relied on facts not in evidence, and therefore did not establish the Challenged Juror "was unable or unwilling to fulfill his oath and duty as a juror, justifying his removal from the jury." (*Id.* at p. 832.)

B. This Court's Opinion In *Wilson* Is Inapposite To The Instant Case

This Court's opinion in *People v. Wilson* is inapposite to the material facts of the instant case. In *Wilson*, the evidence showed the Challenged Juror was open to imposing the death penalty on the defendant, and had engaged in genuine deliberation with the other jurors before he decided to vote for life in prison rather than death. In *Wilson*, this Court specifically found that:

[A]t the beginning of the penalty phase deliberations, [the Challenged Juror] joined nine other jurors in a tentative, initial vote to impose the death penalty. Only four days later, *after* the two holdout jurors changed their minds, did he too change his mind and vote for life. These facts further indicate that [the Challenged Juror], was open to imposing the death penalty on defendant . . . [because] he voted to convict and initially voted for the death penalty.

(*People v. Wilson, supra*, 44 Cal.4th at pp. 840-841, italics original.) Moreover, the trial court's inquiry revealed that the Challenged Juror's stated reasons for changing his mind were based on his assessment of the strength of the mitigating evidence showing that the defendant had been raised in an extremely dysfunctional family. (*People v. Wilson, supra*, 44 Cal.4th at pp. 835-836.)

1. The Trial Court Properly Removed Juror Number 5 Because He Had A General Conscientious Objection To Death Penalty

In the instant case, Juror Number 5 was not removed for exercising his moral judgment during the penalty phase deliberations like the Challenged Juror removed in *Wilson*. In the instant case, Juror Number 5 was removed after the trial court concluded he had a general conscientious objection to imposing the death penalty in any case. In other words, unlike the Challenged Juror in *Wilson*, the evidence showed that Juror Number 5 was *not* open to imposing the death penalty on appellant. This core conclusion resulted in three additional grounds for removing Juror Number 5: he was unwilling or unable to

participate in the penalty phase deliberations; he refused to consider the evidence presented and refused to explain his views; and he had committed perjury during voir dire by indicating that he was moderately in favor of the death penalty. The trial court stated the core reason Juror Number 5 could not perform his duty as a juror as follows:

The entire death qualification part of the voir dire process was aimed at ensuring that no one sat on this jury who would automatically vote for death regardless of the evidence, nor anyone who would automatically refuse to vote for death regardless of the evidence. [Juror Number 5] was clearly in this later category. To have left [Juror number 5] on the jury would have made a mockery of the whole process of questioning potential jurors under oath as to their impartiality.

(10RT 2324-2335.)

The trial court's conclusions were supported by ample evidence which established, as a demonstrable reality, that Juror Number 5 was unable to perform his duty as a juror during the penalty phase of this capital trial (or any capital penalty phase proceeding). As fully detailed in the Respondent's Brief (see RB 196-207), the jury sent the trial court a note reporting that Juror Number 5 had a conscientious objection to the death penalty which made him unable to deliberate. (3CT 632.) After an investigation which included speaking with each juror, the record shows that all eleven jurors believed Juror Number 5 had a general conscientious objection to the death penalty *in any case*. According to the jury foreman, Juror Number 5 was *unable to state any case* in which he would impose the death penalty. The jury foreman also informed the court that all of the jurors, including Juror Number 5, had agreed on the wording of the note regarding Juror Number 5's status as a conscientious objector to the death penalty. (10RT 2297.) The jury foreman (Juror Number 2) expressly told the court that Juror Number 5 had not engaged in any deliberation with the other jurors during the penalty phase. (10RT 2298-2301.)

Juror Number 1 agreed with the jury foreman and told the court that

Juror Number 5 had a conscientious objection to the death penalty and that all 12 jurors agreed with wording of the note. (10RT 2304-2305.) Juror Number 3 and Juror Number 4 agreed with the foreman and added that Juror Number 5 was unable to recite or agree to any circumstances warranting the death penalty or give any reasons for his position. (10RT 2305-2308.) Juror Number 6 agreed with the foreman and further explained that Juror Number 5 had stated his position was based on his “conscientious objection.” (10RT 2309.) According to Juror Number 6, Juror Number 5 said: “I cannot in all conscience vote for the death penalty.” (10RT 2310.) Juror Number 7 agreed with the foreman and reported that Juror Number 5 had stated he had a conscientious objection to the death penalty. (10RT 2310-2311.) Juror Numbers 8, 9, and 10 all agreed with the foreman. (10RT 2312, 2314-2316.) Juror Number 10^{S/}

5. Appellant asserts that Juror Number 10's statements to the trial court corroborated Juror Number 5's claim he did not have a conscientious objection to the death penalty. (SAOB 5, fn. 2.)

Appellant's assertion is belied by the record. According to Juror Number 10, all jurors agreed with the wording of the note. Juror Number 10 believed that Juror Number 5 had a conscientious objection to the death penalty in the particular case. The court asked what Juror Number 5 had meant by “conscientiously objecting.” Juror Number 10 stated:

Yes. Well, by conscientiously objecting, he meant that he could not consider the death penalty regardless of the evidence of the case or the information that we were deliberating on because he conscientiously could not reach that decision.

(10RT 2315-2316.)

The court asked: “Regardless of the evidence?” Juror Number 10 continued: “Regardless of the evidence, regardless of our deliberations, he couldn't deliberate because he conscientiously was opposed to the death penalty.” (10RT 2316-2317.) The court asked if Juror Number 5 said he was opposed to the death penalty in this case as well as generally. Juror Number 10 replied:

Well, no, not exactly. He did apply it to this case. He stated - - he said he believed in the death penalty and that - - he said that he believed in the death penalty but he couldn't apply it in this case.

added that Juror Number 5 had expressly stated he could not consider the evidence for and against the death penalty in the case before the jury because he was conscientiously opposed to the death penalty. (10RT 2317.) Juror Numbers 11 and 12 agreed with the foreman. (10RT 2318–2319.) Juror Number 12 added that Juror Number 5 had stated his general conscientious objection to the death penalty. (10RT 2919.) Thus, all of the other jurors believed Juror Number 5 had a general conscientious objection to the death penalty.

Finally, Juror Number 5 admitted that he had agreed to the wording of the note which triggered the trial court’s inquiry, even though he later denied that he actually agreed with the wording. (10RT 2325-2327.) (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1199 [“Where equivocal or conflicting responses are elicited, the trial court’s determination of the prospective jurors’ state of mind is binding on an appellate court.”].) Thus, the record shows that Juror Number 5 harbored a disqualifying bias against the death penalty which made him ineligible for jury service in a capital case.

2. The Trial Court Properly Removed Juror Number 5 Because He Was Unable Or Unwilling To Participate In Penalty Phase Deliberations

Unlike the Challenged Juror in *Wilson*, Juror Number 5 was unwilling or unable to, and had refused to participate in the penalty phase deliberations by considering the evidence presented. In *Wilson*, the court found that

In other words, he couldn’t - - he said he couldn’t consider any of the information we had before us, any of the evidence that has been presented, and of our deliberation for or against the death penalty because he was conscientiously opposed to the death penalty in this case.

(10RT 2317.)

Challenged Juror engaged in genuine deliberations as evidenced by: (1) his decision to vote in favor of the death penalty during early deliberations; (2) the fact that he changed his mind on the fourth day of deliberations; and (3) his changed decision was based on the mitigating evidence presented at the penalty phase. (*People v. Wilson, supra*, 44 Cal.4th at pp. 835-836, 840-841.) Based on these facts, this Court concluded that the record did not show, as a demonstrable reality, that the Challenged Juror was unable or unwilling to participate in deliberations during the penalty phase.

In the instant case, in contrast, Juror Number 5's inability or unwillingness to deliberate appears in the record as a demonstrable reality. Here, Juror Number 5 did not initially vote in favor of the death penalty and change his mind after additional deliberations. Rather, the record shows that Juror Number 5 was conscientiously opposed to the death penalty from the outset of the penalty phase deliberations. In fact, the jury sent the trial court the note indicating Juror Number 5 had a conscientious objection to the death penalty after the jury had convened for *only five or six hours*. (10RT 2286, 2288-2289.)

Furthermore, in contrast to the Challenged Juror in *Wilson*, the jury foreman informed the court that Juror Number 5 was unable or unwilling to engage in deliberation with the other jurors. According to the jury foreman, Juror Number 5 *could not give any reasons* for his decision to vote for life in prison and refused to share his reasoning or his feeling "to any degree." The foreman also reported that Juror Number 5 was unable to state any condition where he could impose the death penalty and deflected questions by "hunting in areas that we have no understanding or knowledge of, trying to bring up things . . . that are really not there, what-ifs, histories, potential circumstances" - e.g., attempting to improperly discuss facts not in evidence. (10RT 2297, 2300.)

Finally, none of the other jurors indicated that Juror Number 5 had participated in deliberations. In fact, Juror Number 3 and Juror Number 4 specifically asserted that Juror Number 5 was unable to state any circumstances under which he could impose the death penalty. (10RT 2306-2307.) Juror Number 10 told the court that Juror Number 5 “could not consider the death penalty regardless of the evidence of the case or information that we were deliberating on because he is consciously opposed to the death penalty.” (10RT 2315-2316.) Juror Number 11 told the court that Juror Number 5 did not want to talk or even think about the death penalty. (10RT 2318-2319.)

3. Appellant’s Argument To The Contrary Is Based On Speculation

Appellant is simply speculating when he asserts: “[i]t is apparent from the record that in exercising his ‘moral judgement’ as to the appropriate punishment, Juror Number 5 did not view the aggravating factors in appellant’s case to be sufficiently egregious to warrant a death sentence.” (SAOB 5.) As discussed above, the jury was together for only five to six hours before informing the trial court about its concerns with Juror Number 5, all the jurors agreed that Juror Number 5 had a general conscientious objection to the death penalty, and Juror Number 5 refused to discuss the evidence or give reasons supporting his position. Under these circumstances, the trial court’s conclusion that Juror Number 5 “refused to deliberate in the penalty phase by refusing to consider the evidence presented[,]” should be upheld because the record shows as a demonstrable reality that not only did Juror Number 5 have a conscientious objection to the death penalty, but he was also unable or unwilling to participate in the penalty phase deliberations. (10RT 2335.) Accordingly, appellant tenth claim on appeal should be denied.^{6/}

6. As discussed in the Respondent’s Brief, the trial court also properly removed Juror Number 5 because he misled the trial court and the parties in his

II.

CALIFORNIA'S "DEMONSTRABLE REALITY" STANDARD IS CONSTITUTIONAL BECAUSE IT PRESERVES THE ESSENTIAL FEATURE OF A JURY AS REQUIRED BY THE SIXTH AND FOURTEENTH AMENDMENTS

Appellant also claims that the standard adopted by this Court for removing a deliberating juror fails to protect the federal constitutional jury trial rights of state court criminal defendants. Specifically, appellant asserts that: (1) the "demonstrable reality" standard violates the secrecy of jury deliberation and improperly influences the outcome; and, (2) permits a trial court to remove a juror for disagreeing with the majority of jurors regarding the merits of the prosecution's case. Appellant urges this Court to abandon the "demonstrable reality" standard and adopt the standard which prohibits removing a juror if there is a "reasonable possibility" the impetus for the jurors removal is based on the juror's view of the prosecution's evidence. (SAOB 7-13.)

Appellant's second claim should also be rejected. California's standard is constitutional because it preserves the essential feature of a jury as required by the Sixth and Fourteenth Amendments. Moreover, the Ninth Circuit Court of Appeals has already held that California's substitution procedure pursuant to California Penal Code section 1089 is constitutional. Finally, appellant has failed to establish any new meritorious grounds for this Court to reconsider its opinion in *People v. Cleveland* (2001) 25 Cal.4th 466 and its progeny.^{7/}

juror questionnaire and on voir dire that he could give equal consideration to the death penalty by setting aside his personal feelings about capital punishment. (RB 211-212.)

7. In the Respondent's Brief, the People argued that "the juror's inability to perform his duties must be shown on the record to be a demonstrable reality." (RB at 208, citing to *People v. Holt* (1997) 15 Cal.4th 619, 659, and *People v. Szymanski* (2003) 109 Cal.App.4th 1126, 1131-1132.)

A. The “Demonstrable Reality” Standard Is Constitutional

In *People v. Barnwell* (2007) 41 Cal.4th 1038, this Court sought to “dispel any lingering uncertainty” regarding California’s standard for the removal of a juror pursuant to Penal Code section 1089. (*Id.* at p. 1052.) This Court held that:

the more stringent demonstrable reality standard is to be applied in review of juror removal cases. That heightened standard more fully reflects an appellate court’s obligation to protect a defendant’s fundamental rights to due process and to a fair trial by an unbiased jury.

(*Id.* at p. 1052.) This Court explained that the “demonstrable reality test entails a more comprehensive and less deferential review.” (*Id.* at p. 1052.) Moreover, the demonstrable reality standard “requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was established.” (*Id.* at pp. 1052-1053, *emphasis* original.) Furthermore, “the reviewing court must be confident that the trial court’s conclusion is manifestly supported by evidence on which the [trial] court actually relied.” (*Id.* at p. 1053.)

This Court discussed the importance of the trial court’s responsibility to make credibility determinations and other findings of fact as conflicts will “often” arise when a juror is accused of being unable or unwilling to perform his or her function on the jury. (*People v. Barnwell, supra*, 41 Cal.4th at p. 1053 [the challenged juror will often deny any bias or failure to deliberate].) The trial court’s responsibilities include weighing the credibility of jurors while “taking into account the nuances attendant upon live testimony.” Credibility determinations may also include observations made during voir dire as well as the trial. These firsthand observations are entitled to deference from the reviewing courts and by taking these steps the trial court complies with its “duty to provide a record that supports its decision by a demonstrable reality.” (*Id.* at p. 1053 [trial court’s implicit finding that nine jurors accusing challenged juror

of bias were credible established juror's bias as a "demonstrative reality" on review].)^{8/}

B. California's Substitution Procedure Pursuant To California Penal Code Section 1089 Is Constitutional Because It Preserves The Essential Feature Of A Jury As Required By The Sixth And Fourteenth Amendments.

California Penal Code section 1089 is constitutional because it preserves the essential feature of a jury as required by the federal Constitution by preventing oppression by the government through the imposition of a group of laymen, drawn from the community, who participate in the shared responsibility of determining guilt or innocence. (See *Williams v. Florida* (1970) 399 U.S. 78, 100 [90 S.Ct. 1893, 26 L.Ed.2d 446], citing *Duncan v. Louisiana* (1968) 391 U.S. 145, 156 [88 S.Ct. 1444, 20 L.Ed.2d 491].) The Ninth Circuit Court of Appeals has already held that the "California substitution procedure" of dismissing jurors for "good cause," pursuant to California Penal Code section 1089, was constitutional because the procedure "preserved the 'essential feature' of the jury required by the Sixth and Fourteenth Amendments." (*Miller v. Stagner* (9th Cir. 1985) 757 F.2d 988, 995, fn. 3, quoting *Williams v. Florida, supra*, 399 U.S. at p. 100; see *Hernandez v. McGrath* (E.D. Cal. 2009) 595 F.Supp.2d 1111, 1141 [the Ninth Circuit has held that California Penal Code section 1089 does not violate constitutional rights because it preserves the

8. The United States Supreme Court has specifically found that it is the trial judge who is best situated to determine a juror's competency to serve impartially. (*Patton v. Yount* (1984) 467 U.S. 1025, 1036-1038 & fn.12 [104 S.Ct. 2885, 81 L.Ed.2d 847].) Notably, the Court explained that a juror's demeanor plays a fundamental role in determining credibility. (*Id.* at p. 1038, fn.14.) Thus, because demeanor plays a "fundamental role" in evaluating credibility, and only the trial court is in a realistic position to evaluate demeanor, a trial court's determinations as to credibility are entitled to "special deference." (*Patton v. Yount*, 467 U.S. at p. 1038; *Perez v. Marshall* (9th Cir. 1997) 119 F.3d 1422, 1426.)

essential feature of a jury required by the Sixth and Fourteenth Amendments].) Moreover, more recently, the Ninth Circuit affirmed that California Penal Code section 1089 is facially valid under the Sixth Amendment. (*Perez v. Marshall* (9th Cir. 1997) 119 F.3d 1422, 1422; see *Parker v. Pliler* (9th Cir. 2009) 307 Fed.Appx. 81, 2009 WL 117971, *2 [“[W]e have held that section 1089’s ‘good cause’ provision . . . does not facially violate the Sixth and Fourteenth Amendment right to an impartial jury.”]; *Diaz v. Alameida* (9th Cir. 2007) 223 Fed.Appx. 586, 587-588; *Rico v. Taylor* (9th Cir. 2005) 146 Fed.Appx. 143, 144.)

C. Appellant Has Failed To Establish Any New Meritorious Ground For This Court To Reconsider Its Holding That California’s “Demonstrable Reality” Standard Is Constitutional

In *People v. Cleveland* (2001) 25 Cal.4th 466, this Court agreed with some of the observations made in three federal cases *which originated in federal district court.*⁹ First, a trial court “may not dismiss a juror during deliberations because that juror harbors doubts about the sufficiency of the prosecution’s evidence.” Second, allegations of a juror’s inability or unwillingness to serve as a juror will initially be unclear. Third, trial courts must avoid undermining the sanctity of jury deliberations by taking care while inquiring into an allegation a juror is failing to deliberate. However, this Court expressly declined to adopt the “reasonable possibility” standard “promulgated in *Brown*, and refined in *Thomas* and *Symington*[.]” (*People v. Cleveland, supra*, 25 Cal.4th at pp. 483-484.) Rather, this Court reaffirmed the rule that when a California trial court is put on notice that a juror is unable or unwilling to deliberate, the court is authorized to make “whatever inquiry is reasonably

9. See *U.S. v. Brown* (D.C. Cir. 1987) 823 F.2d 591, *U.S. v. Thomas* (2d Cir. 1997) 116 F.3d 606, and *U.S. v. Symington* (9th Cir. 1999) 195 F.3d 1080.

necessary to determine” if there are grounds to discharge the juror *and* “to discharge the juror if it appears as a ‘demonstrable reality’ that the juror is unable or unwilling to deliberate.” (*People v. Cleveland, supra*, 25 Cal.4th at p. 484, citing *People v. Marshall* (1996) 13 Cal.4th 799, 843; *People v. Collins* (1976) 17 Cal.3d 687, 692.)

Appellant’s first complaint is that California’s standard invades the decision making process and in doing so violates the sanctity of jury deliberations and improperly influences the outcome of the case. (SAOB 12-13.) This Court has already rejected these arguments and appellant offers no new meritorious grounds for this Court to reconsider its prior holding regarding a trial court’s authority to investigate potential juror misconduct. (See *People v. Barnwell, supra*, 41 Cal.4th at pp. 1052-1053; *People v. Cleveland, supra*, 25 Cal.4th at pp. 475-485.)

The Sixth and Fourteenth Amendments guarantee a state criminal defendant accused of a non-petty offense the right to a fair trial by an impartial jury. (See *Duncan v. Louisiana, supra*, 391 U.S. at 156.) The prosecution also has a legitimate interest in a fair trial and a jury most likely to produce a fair result. (*Singer v. United States* (1965) 380 U.S. 24, 36 [85 S.Ct. 783, 13 L.Ed.2d 630].) “California courts have recognized the need to protect the sanctity of jury deliberations.” (*People v. Cleveland, supra*, 25 Cal.4th at p. 475.) “The need to protect the sanctity of jury deliberations, however, does not preclude reasonable inquiry by the court into allegations of misconduct during deliberations.” (*Id.* at p. 476.)

Once the trial court is notified of such allegations, “it is the court’s duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and failure to make this inquiry must be regarded as error.” (*People v. Cleveland, supra*, 25 Cal.4th at p. 477, citations omitted.) “Grounds for investigation or discharge of a juror may be established by his

statements or conduct, including events which occur during jury deliberations and are reported by fellow panelists.” (*Id.* at p. 478, citations and internal quotation marks omitted.) The trial court should focus on the jurors’ conduct rather than the content of the deliberations. The court’s focus should be as “limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury’s deliberations.” (*Id.* at p. 485.) “[A]ny investigation must be conducted with care so as to minimize pressure on legitimate minority jurors.” (*People v. Cleveland, supra*, 25 Cal.4th at p. 478, quoting *People v. Keenan* (1988) 46 Cal.3d 478, 533.)

It is important to keep in mind that the evidentiary standard set forth in *Brown, Thomas, and Symington* is necessarily intertwined with the correspondingly strict limitations on a *federal trial court’s* authority to inquire into potential juror misconduct. (See *Lowenfield v. Phelps* (1988) 484 U.S. 231, 239-240, fn. 3 [108 S.Ct. 546, 98 L.Ed.2d 568] [federal rule based on supervisory powers prohibiting district courts from inquiring into numerical division between the jurors does not apply to state courts]; *U.S. v. Symington, supra*, 195 F.3d at p. 1085 [dismissal of deliberating juror at a federal district court trial is reviewed for *abuse of discretion*]; F.R.C.P. Rule 23(b) [authorizing federal trial court to remove deliberating juror for “just cause”].) This Court is not bound by the calculus of the federal district courts or the Ninth Circuit in deciding federal constitutional issues. (*Arizonans for Official English v. Arizona* (1997) 520 U.S. 43, 58, fn.11 [117 S.Ct. 1055, 137 L.Ed.2d 170] [absent exclusive federal jurisdiction, state courts may interpret the federal Constitution differently from the federal courts]; *Lockhart v. Fretwell* (1993) 506 U.S. 364, 375-376 [113 S.Ct. 838, 122 L.Ed.2d 180] (Thomas J., concurring) [Supremacy Clause does not require state courts to follow rulings by federal courts of appeals on questions of federal law]; *ASARCO Inc. v. Kadish* (1989) 490 U.S. 605, 617 [109 S.Ct. 2037, 104 L.Ed.2d 696] [absent

a provision for exclusive federal jurisdiction, state court may render binding judicial decisions that rest on their own interpretations of federal law]; *People v. Burnett* (2003) 110 Cal.App.4th 868, 882 [federal authority is not binding in matters involving state law]; see also *Oxborrow v. Eikenberry* (9th Cir.1989) 877 F.2d 1395, 1399 [state court interpretation of state statute binding on federal court unless interpretation is a subterfuge or untenable].)

California law requires state trial courts to strike a different balance than that struck by the federal courts. (*People v. Barnwell, supra*, 41 Cal.4th at p 1052.) As previously noted, “[t]he demonstrable reality test entails a more comprehensive and less deferential review.” (*Id.*) In conducting this test, California trial courts must perform its functions with circumspection to avoid any improper influence on the deliberate process. (*People v. Barnwell, supra*, 41 Cal.4th at p. 1054, citing *People v. Cleveland, supra*, 25 Cal.4th at p 485 [inquiry should cease when court is satisfied juror is not committing an misconduct].) Moreover, by following this practice, a trial court commits no error by removing a juror that the court finds is unable or unwilling to perform his or her duties, even if the juror also entertains doubts about the sufficiency of the prosecution’s evidence. (See *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19 [trial courts have broad discretion under section 1089 to investigate and remove a juror in the midst of trial where it finds that the juror is no longer able or qualified to serve for any reason]; *Perez v. Marshall, supra*, 119 F.3d at p. 1427 [state judge’s knowledge that a juror accused of misconduct is a lone holdout juror does not invalidate the trial judge’s decision to remove a juror for cause]; see generally *Smith v. Phillips* (1982) 455 U.S. 209, 216, [102 S.Ct. 940, 71 L.Ed.2d 78] [the United States Supreme Court has held that an allegation of juror misconduct authorizes a hearing to determine what had transpired, the impact on the jurors, and whether or not it was prejudicial].) Accordingly, appellant has failed to show that California’s standard invades the

decision making process, violates the sanctity of jury deliberations, or improperly influences the outcome of the case.

Appellant also asserts that California's "demonstrable evidence" standard permits a trial court to remove a juror for disagreeing with the majority of jurors regarding the merits of the prosecution's case. (SAOB 10-13.) This assertion is simply erroneous. This Court expressly prohibits a trial court from removing a juror who has participated in deliberations for a reasonable amount of time and simply expresses the belief that further discussion will not alter his or her view. (*People v. Cleveland, supra*, 25 Cal.4th at p. 485, citing *People v. Castorena* (1996) 47 Cal.App.4th 1051, 1066-1067.)

Moreover, in the instant case, the record clearly shows that the court did not remove Juror Number 5 because he disagreed with the other jurors. It was not a matter of agreement or disagreement *about the evidence*, it was a matter of whether Juror Number 5 had *the capacity or willingness* to serve as a juror in the penalty phase of a capital case. Here, the trial court conducted a sensitive and careful inquiry after all 12 jurors tendered a note asserting Juror Number 5 had a conscientious objection to the death penalty. (See *People v. Cleveland, supra*, 25 Cal.4th at p. 478 [where the trial court is faced with allegations that a juror would refuse to impose the death penalty *under any circumstances*, the court was obligated to conduct an investigation].) This inquiry revealed that Juror Number 5 was in fact a general conscientious objector to the death penalty and, as a necessary result, that Juror Number 5 was unwilling or unable to participate in the penalty phase deliberations, had refused to consider the evidence, and had committed perjury by falsely stating that he was moderately in favor of the death penalty in the jury questionnaire. Under these circumstances, appellant has failed to show the trial court erred under state law, or violated the federal Constitution, when the court removed Juror Number 5.

Appellant further asserts that the trial court's inquiry into reasons Juror

Number 5 voted against the death penalty “are improper infringements on the right to a jury trial” and that such reasons “clearly fell within the forbidden realm of a jury’s thought process.” (SAOB 10.) Ironically, however, in his previous argument, appellant has no problem relying on the Challenged Juror’s stated reasons for concluding that life without parole was the appropriate penalty in contending that Juror Number 5 was similarly improperly discharged. (SAOB 2-3.) Appellant also relies on statements by the jury foreman regarding Juror Number 5 to support his claim that Juror Number 5 engaged in deliberations with the other jurors in his previous argument. (SAOB 3-4.) Appellant cannot have it both ways.

In any event, in the instant case, the trial court did not delve into Juror Number 5's reasons for voting against the death penalty. The trial court merely uncovered that Juror Number 5 had a general conscientious objection to the death penalty and refused to offer any reasons to support or explain his decision. The trial court did not delve into Juror Number 5's internal thought process underlying his conscientious objection to the death penalty or his reasons for not wanting to impose the death penalty in this case. The record does not reveal *why* Juror Number 5 had a conscientious objection to the death penalty. The trial court did not ask whether his conscientious objection was based on religious reasons, social reasons, political reasons, or the like. Rather, the trial court carefully limited its inquiry to avoid delving into the jury’s deliberations. For example, the court admonished the jury foreman that it did not want to discuss the content of deliberations (10RT 2294-2295), and limited its inquiry of Juror Number 5 (10RT 2335-2327.)

Finally, it should be recognized that any court inquiry into a situation where a juror is accused of refusing to deliberate necessarily involves some minimal inquiry into the “decision making process,” or the lack thereof, of the accused juror. Such inquiry is logically part of the trial court’s duty to “conduct

‘whatever inquiry is reasonably necessary to determine’ whether such grounds [of misconduct] exist.” (*People v. Cleveland, supra*, 25 Cal.4th at p. 480, quoting *People v. Burgener* (1986) 41 Cal.3d 505, 520. Indeed, in *Cleveland*, this Court stated that:

A refusal to deliberate consists of a juror’s unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, [and] refusing to speak with the other jurors

(*People v. Cleveland, supra*, 25 Cal.4th at p. 485.) This Court specifically found that in answering these questions, the trial courts must avoid undermining the sanctity of jury deliberations by taking care while inquiring into an allegation a juror is failing to deliberate. (*People v. Cleveland, supra*, 25 Cal.4th at pp. 483-484.) This is exactly the type of careful, circumscribed inquiry which occurred in the instant case. Therefore, this Court should reject appellant’s assertion that the trial court’s inquiry in this case amounted “improper infringements on the right to a jury trial” and “clearly fell within the forbidden realm of a jury’s thought process.” (SAOB 10.) Accordingly, appellant’s tenth claim on appeal should be denied.

CONCLUSION

Based on the foregoing, respondent respectfully requests that the judgment be affirmed.

Dated: May 1, 2009

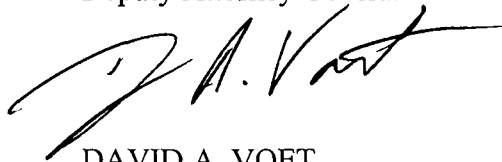
Respectfully submitted,

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A handwritten signature in black ink, appearing to read "D. A. Voet", written in a cursive style.

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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 7124 words.

Dated: May 1, 2009

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "D. A. Voet", with a long horizontal flourish extending to the right.

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Darrell Lee Lomax**

No.: **S057321**

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 that same day in the ordinary course of business.

On May 4, 2009, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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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 May 4, 2009, at Los Angeles, California.

Lily Hood
Declarant


Signature