In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **WILLIAM CLINTON CLARK,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S066940

Orange County Superior Court Case No. 94CF0821
The Honorable John J. Ryan, Judge

RESPONDENT'S RESPONSE TO APPELLANT'S SECOND SUPPLEMENTAL REPLY BRIEF

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THE TRIAL COURT PROPERLY DISMISSED PROSPECTIVE JUROR DF FOR CAUSE BASED ON HIS INABILITY TO IMPOSE THE DEATH PENALTY

On March 22, 2016, Clark filed an "Application for Leave to File Appellant's Second Supplemental Reply Brief[,]" which this Court granted. The Second Supplemental Reply Brief expands upon Clark's Argument XX, subdivision (C), in which he argues that the trial court abused its discretion during voir dire by excusing Prospective Juror DF for cause based on his inability to impose the death penalty. Clark claims that, under this Court's recent decision in *People v. Leon* (2015) 61 Cal.4th 569, the trial court fail to conduct an adequate oral examination of Prospective Juror DF and his professed inability to impose the death penalty and that the record therefore does not support the trial court's excusal of Prospective Juror DF for cause. (2nd Supp. Reply Brf. at 7-10.) Clark further argues that, in doing so, the trial court improperly permitted Prospective Juror DF to give his own legal conclusion that his ability to impose the death penalty was substantially impaired in violation of California Evidence Code section 800.[1] (2nd Supp. Reply Brf. at 6-7.)

Clark is wrong in both particulars. Unlike in *Leon*, the trial court here, aided by counsel, conducted a thorough and appropriate oral examination of Prospective Juror DF's inability to impose the death penalty. The trial court's ultimate decision to excuse Prospective Juror DF for cause was well-supported by his responses to those inquiries, which demonstrated Prospective Juror DF's inability to impose the death penalty.

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[1] Evidence Code section 800 permits a lay witness to testify as to his or her opinion where such opinion is rationally based on the witness's perception and is helpful to clearly understand the witness's testimony. (Evid. Code, § 800.)

Finally, the record does not support the notion that the trial court relied on any legal conclusion of Prospective Juror DF that he met the substantial impairment standard set forth by the United States Supreme Court in *Wainwright v. Witt* (1985) 469 U.S. 412, 424.

A. The Oral Examination Of Prospective Juror DF By The Trial Court And Counsel Was Appropriate Under *Leon*

A prospective juror in a capital case may be excused for cause where the juror's views on the death penalty "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) A prospective juror is "substantially impaired" under *Witt* if the juror "'is unable to follow the trial court's instruction and "conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate.'" (*People v. McKinnon* (2011) 52 Cal.4th 610, 635, quoting *People v. McWhorter* (2009) 47 Cal.4th 318, 340.)

In *People v. Leon*, *supra*, 61 Cal.4th at pp. 590-91, three prospective jurors in a capital case responded to questions in a written jury questionnaire regarding their ability to impose the death penalty by stating that they would automatically vote for life in prison without the possibility of parole over the death penalty, but that they would change their position on automatic voting if instructed to set aside their personal views. The trial court then inquired of the prospective jurors orally by simply repeating the questions in the written questionnaire. *Id.* at p. 591. When the prospective jurors simply reaffirmed their responses to the questionnaire, the trial court dismissed them for cause over a defense objection and without further inquiry as to whether they could set aside their personal views and follow the court's instructions. *Id.*

This Court found the trial court's dismissal of the prospective jurors to be error. (*People v. Leon*, *supra*, 61 Cal.4th at p. 593.) As this Court explained, if a prospective juror's responses to a written questionnaire are inconsistent and thereby do not clearly resolve the question of whether the prospective juror's views on the death penalty would either prevent or substantially impair the prospective juror's ability to follow the court's instructions and discharge his or her duties as a juror, then the trial court must conduct additional questioning to clarify the prospective juror's views before granting a challenge for cause. (*Id.* at pp. 592-593 ["a two-part inquiry" contemplated by *Lockhart v. McCree* (1986) 476 U.S. 162].) This is because, prior to granting a challenge for cause,

> the "court must have *sufficient information* regarding the prospective juror's state of mind to permit a *reliable determination* as to whether the juror's views would '"prevent or substantially impair"'" performance as a capital juror. [Citation.]

(*Id.* at p. 592, original italics.) This Court found the inquiry of the trial court in *Leon* to be insufficient for this purpose. (*People v. Leon*, *supra*, 61 Cal.4th at p. 593.)

The scope of the inquiry made of Prospective Juror DF in this case satisfied the "two-part inquiry" required under *Leon*. Here, the trial court first questioned Prospective Juror DF as to his personal views regarding the death penalty. Prospective Juror DF responded that "I don't honestly know if I could participate in a death penalty in saying yes to it." (36 RT 6496.) When asked if he opposed the death penalty in principle, Prospective Juror DF said, "No," and indicated that it could be an appropriate punishment in some circumstances, citing the Bonin case as an example. (36 RT 6496.) The trial court then asked if it was fair to say that Prospective Juror DF had no opposition to the death penalty in principle, but did "not want to accept

that responsibility of ever voting to put someone to death?" (36 RT 6496-6497.) Prospective Juror DF agreed that this was a fair characterization of his position. (36 RT 6497.) The trial court went further and asked if Prospective Juror DF felt "[i]t's okay for other citizens to put someone to – give someone a death penalty, but you don't want to do it yourself[?]" (36 RT 6497.) Again, prospective Juror DF agreed, explaining that he had "seen a lot of death" personally and in his military service and that "as long as I'm at arm's length from this, I'm more comfortable." (36 RT 6497.)

The trial court then permitted defense counsel to question Prospective Juror DF. Defense counsel asked, "[I]f you were satisfied in your mind that [the death penalty] was appropriate, would you be able to return that verdict?" (36 RT 6498.) Prospective Juror DF responded, "I don't know." (36 RT 6498-99.) Defense counsel then asked if Prospective Juror DF could vote for death "[o]n a case where you felt that the facts of the case were bad enough, and/or in combination the person was bad enough that you came to believe that death was appropriate?" (36 RT 6500.) Prospective Juror DF responded,

> I don't honestly know. I hope you don't think I'm weaseling. I haven't been there before. All these proceedings seem to me to ignore emotional content that may or may not develop. That's kind of where I'm coming from. I can't honestly say, [if] all the facts indicated this person should be put to death, could I vote for that. I don't know.

(36 RT 6500.)

Defense counsel then asked,

> I take it that intellectually you would be able to reach a conclusion as to whether a case was appropriate for the death penalty. I'm not talking about voting, but intellectually you'll be able to look and say yes --

(36 RT 6500-6501.) Prospective Juror DF replied, "Yes, within the framework of the judge's explanation, yes, I could follow that. Those are the rules." (36 RT 6501.) Prospective Juror DF then agreed with defense counsel that he would be able to work within the system intellectually, but that "until [he is] there [he] can't say what [his] emotions will do." (36 RT 6501.)

The trial court then permitted the prosecutor to question Prospective Juror DF. The prosecutor asked,

> If you sit in a case, is this emotion, this personal feeling that you have, of such magnitude that you think in your mind it would impair you, it would prevent you, whatever words you want to use, from considering imposing the death penalty?

(36 RT 6503.) Prospective Juror DF answered, "I think it would. I think the answer is yes. (36 RT 6503.)

The prosecutor then asked Prospective Juror DF if he understood the "dictionary meaning" of the word "substantial" and Prospective Juror DF replied that he understood the word to mean "an abundance." (36 RT 6503.) The prosecutor then asked Prospective Juror DF,

> I want you to attempt, if you can, if you could quantify in your own mind your impairment that you've described, would it be small, would it be moderate, would it be abundant or substantial? In your mind, what degree, what quantum would that impairment be?

(36 RT 6503.) Prospective Juror DF stated that his degree of impairment "would be substantial." (36 RT 6503.)

This is a far cry from the perfunctory questioning this Court found to be inadequate in *Leon*. In this case, the trial court, aided by counsel, probed deeply into the nature and severity of Prospective Juror DF's misgivings about his ability to vote for the death penalty and whether he could set those misgivings aside. It was clear from his responses that he could not. Prospective Juror DF's answers to the questions put to him varied from being uncertain as to whether he could vote for the death penalty to being certain that he could not vote for the death penalty. Never did Prospective Juror DF ever indicate that he could put aside his personal feelings and vote for the death penalty if it was appropriate in light of the evidence and instructions. Although Prospective Juror DF indicated in response to defense counsel that intellectually he could follow the court's instructions and reach a conclusion regarding the appropriateness of the death penalty, defense counsel prefaced the question by saying that he was "not talking about voting" and Prospective Juror DF qualified his answer by explaining that he could imagine his intellectual response, but did not know what his emotional response would be. (36 RT 6500-6501.) Indeed, Prospective Juror DF indicated that he could accept the appropriateness of the death penalty in the abstract, but could only be comfortable doing so "at arm's length[.]" (36 RT 6497.) Of course, a juror in a death penalty case is anything but at arm's length in making a penalty determination. (See CALCRIM 766 ["You have sole responsibility to decide which penalty (the/each) defendant will receive."].)

This was not, as Clark argues, an indication that Prospective Juror DF could set aside his personal views and follow the court's instructions, but instead a demonstration that the nature of Prospective Juror DF's inability to fulfill his duties as a juror lay not with his intellectual response to the death penalty in the abstract, but with his emotional response to the enormity of the responsibility of voting to impose the death penalty.

Further, Prospective Juror DF declined to characterize the degree of his inability to fulfill his responsibilities as a juror in a death penalty case as "small" or "moderate," instead characterizing the inability as "abundant" or "substantial." (36 RT 6503.)

"'A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate.'" (*People v. Jenkins* (2000) 22 Cal.4th 900, 987, citations omitted.) As the United States Supreme Court has recognized, "the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." (*Uttecht v. Brown* (2007) 551 U.S. 1, 9.) Prospective Juror DF's answers to the questions put to him indicated that he was not such a juror. The trial court noted that Prospective Juror DF was "one of our more difficult jurors, in not only expressing himself, but finding out himself where he stands" and that therefore ascertaining Prospective Juror DF's position was "not as clear-cut as those who have cemented opinions." (36 RT 6505.) However, "[t]here is no requirement that the prospective juror's bias against the death penalty be proved with unmistakable clarity." (*People v. McWhorter*, *supra*, 47 Cal.4th at p. 340.) The trial court did not err in excusing Prospective Juror DF for cause.

B. The Prosecutor's Questioning Of Prospective Juror DF Regarding His Impairment In Performing His Duties As A Juror Was Proper And The Trial Court Did Not Improperly Rely On Prospective Juror DF's Answer

Clark's claim that the trial court improperly permitted Prospective Juror DF to testify that his ability to function as a juror would be substantially impaired is equally without merit. As discussed above, the prosecutor, in an effort to quantify the level of impairment Prospective Juror DF would experience in fulfilling his duties as a juror, asked,

> I want you to attempt, if you can, if you could quantify in your own mind your impairment that you've described, would it be small, would it be moderate, would it be abundant or substantial? In your mind, what degree, what quantum would that impairment be?

(36 RT 6503.) Prospective Juror DF stated that his degree of impairment "would be substantial." (36 RT 6503.)

In the first instance, Clark has forfeited any challenge to this line of questioning by the prosecutor by failing to object in the trial court. (See *People v. Carasi* (2008) 44 Cal.4th 1263, 1288, fn. 14, citing *People v. Robinson* (2005) 37 Cal.4th 592, 639 [failure to object and suggest changes to written and oral questions during death qualification forfeits complaints about their scope and content].)

Further, Clark has offered no authority for the proposition that Evidence Code section 800 precludes a prospective juror from being asked whether he believes that his views on the death penalty would substantially impair the prospective juror in fulfilling his duties as a juror. In the first instance, Clark has not demonstrated whether and to what degree the Evidence Code applies to voir dire generally. Respondent has been unable to find a decision of this Court addressing the question. Neither *De Santis* or *Lombardo*, the two decisions cited by Clark, are applicable as neither involved an opinion offered during voir dire. (*People v. De Santis* (1992) 2 Cal. 4th 1198, 1226 [cross-examination at trial]; *Lombardo v. Young Men's Christian Assn.* (1985) 169 Cal.App.3d 549, 540 [motion for summary judgment].) Indeed, it is beneficial to ask prospective death penalty jurors precisely whether their views on the death penalty would prevent or substantially impair the performance of their duties. (See e.g. *People v. Stewart* (2004) 33 Cal.4th 425, 452 ["[W]e note that even if the questionnaire had tracked the "prevent or substantially impair" language of

Witt, we still would find that the prospective jurors could not properly be excused for cause without any follow-up oral voir dire by the court.].)

The fact that the trial court noted that Prospective Juror DF had quantified his level of impairment as substantial (36 RT 6504-6505) does not mean that the trial court somehow abdicated its responsibility to make this legal determination to Prospective Juror DF. The trial judge is required to "determine that the prospective juror would be unable to faithfully and impartially apply the law in the case before him or her." (*People v. McWhorter*, *supra*, 47 Cal.4th at p. 340.) Where, as here, an appropriate factual inquiry has been made by the trial court, the trial court's determination as to the prospective juror's state of mind is entitled to deference. (*People v. Leon*, *supra*, 61 Cal.4th at p. 593.) Prospective Juror DF repeatedly indicated that he was uncertain as to whether he could ever vote to impose the death penalty. (36 RT 6496-6500.) Although he agreed that he could follow the trial court's instructions in considering the death penalty as an intellectual exercise, he nonetheless felt that his emotions could prevent him from voting for the death penalty even if he considered it appropriate on an intellectual level. (36 RT 6500-6501.) The record therefore supports the trial court's decision to dismiss Prospective Juror DF for cause.

CONCLUSION

For the foregoing reasons, Respondent respectfully asks that the judgment of the trial court be affirmed.

Dated: March 28, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S RESPONSE TO APPELLANT'S SECOND SUPPLEMENTAL REPLY BRIEF** uses a 13 point Times New Roman font and contains 2,652 words.

Dated: March 28, 2016

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. William Clinton Clark**
No.: **S066940**

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; my business address is 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266.

On March 28, 2016, I served the attached **RESPONDENT'S RESPONSE TO APPELLANT'S SECOND SUPPLEMENTAL REPLY BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Diego, California, 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 March 28, 2016, at San Diego, California.

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