SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff & Respondent, v. LESTER HARLAND WILSON Defendant and Appellant.	(California Supreme Court No. S189373) Riverside County Superior Court No. RIF 079858 AUTOMATIC APPEAL

AUTOMATIC APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF RIVERSIDE COUNTY

THE HONORABLE ELISABETH SICHEL

SUPREME COURT
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APPELLANT'S REPLY BRIEF

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DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA	)	(California Supreme Court No. S189373)
Plaintiff & Respondent,	)	Riverside County Superior Court No. RIF 079858
v.	)	
LESTER HARLAND WILSON	)	AUTOMATIC APPEAL
Defendant and Appellant.	)	

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APPELLANT'S REPLY BRIEF

Argument

I

Double jeopardy barred the penalty phase retrial following the trial court's erroneous discharge of the lone juror holding out for the life option.

Appellant argues the state should not have been given a second opportunity to seek death after the trial court manipulated the penalty phase jury to obtain a death verdict. (AOB 19-52.) The retrial is

contrary to the cases interpreting double jeopardy principles, and the reasoning behind those cases.

Respondent argues that the trial court's erroneous discharge of a defense-favorable juror is like any other legal error, and that absent a finding of insufficient evidence, double jeopardy does not bar a second penalty trial.[1] (RB 10.) Respondent also argues there is no evidentiary support for the claim that the trial court manipulated the verdict, and that the policy considerations cited by appellant are not strong enough to support the defense argument. (RB 10, 27-30.)

Respondent claims "this court ordered the case remanded to the trial court to retry the penalty phase..." and that is what happened. (RB 17.) But this court did not, in its opinion, order that the penalty phase case be retried even though the prosecutor incorrectly made that point. (1 RT 149.)

Respondent fails to answer the pressing question of whether the law should allow the state to conduct a second penalty phase trial, seeking an execution where the original jury included a juror who accepted the defense theory of the case but the court discharged him,

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[1] Respondent claims that appellant forfeited any issue of judicial bias by not raising it in the trial court (RB 10, 26), but appellant does not raise a legal claim of judicial bias.

the newly constituted jury had a juror who accepted the defense argument but the court also discharged him, and the third jury returned a death verdict.

Appellant argues this is unlike a traditional legal error resulting in the reversal of a conviction, and the law should discourage this attempted jury-shaping by the trial court.

Sattazahn v. Pennsylvania

Respondent first argues the reversal of the penalty judgment in the present case was not due to an acquittal, and therefore "jeopardy does not attach." Respondent relies on *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, to support this claim. (RB 18.)

In *Sattazahn*, the trial court imposed the life term in a capital case after the jury was unable to reach a unanimous penalty verdict. The judgment was thereafter reversed for a sentencing error, and the state sought and received a death verdict at the retrial. (*Id.* at p. 105.) The High Court later held in a 5-4 opinion, with Justice Scalia writing the majority opinion, that the death verdict at the retrial did not violate double jeopardy because neither the initial juror deadlock nor the trial court's imposition of the life term constituted an "acquittal" for double jeopardy purposes. (*Id.* at p. 109.)

But *Sattazahn* has little to do with the present case, where appellant makes no claim that the juror discharge was similar to an acquittal for double jeopardy purposes. It offers no guidance on the present question of whether the state should be given a second chance at a death verdict where the trial court improperly removed a juror who agreed with the defense theory of the penalty phase case.

Respondent next addresses the better comparison between the present case and *People v. Hernandez* (2003) Cal.4th 1, where the court found that double jeopardy did not bar a retrial following the improper discharge of a juror in a regular (noncapital) trial. (*Id.* at p. 3.)

Appellant argues the reasoning of *Hernandez* does not apply to the retrial of the penalty phase of a capital case for several important reasons. First, unlike the stated concerns of this court in *Hernandez*, that a double jeopardy finding would allow a guilty person to go unpunished, the finding in the present case would still allow the state to punish the defendant with life in prison without parole–the second worst punishment available in our justice system. (AOB 44-45.) Moreover, retrial in a noncapital case could begin within days or weeks of the decision, rather than years, which is the standard in capital cases. (AOB 45.) And this delay would likely hurt the defense

presentation of mitigating evidence (as it did here) and allow the prosecution to strengthen its case (as it did here by finding an expert who disagreed with its first expert and found there was evidence to support a claim that appellant used a blowtorch against the victim). (AOB 45-46.)

Respondent rejects those arguments, first by claiming that while accepting the double jeopardy argument wouldn't give appellant a "free pass" as it would the defendant in *Hernandez*, it nevertheless would have resulted in a lesser punishment. (RB 22.) Respondent invokes the idea that "death is different" to support its position that invoking double jeopardy would prevent the state from receiving the highest possible penalty. (RB 22, citing, *Gregg v. Georgia* (1976) 428 U.S. 153, 188.) Appellant agrees that "death is different" is an important aspect of appellate litigation in death penalty cases, but it has never been used by a court to reduce the impact of a trial court's error, and has instead been consistently applied to show that the difference in penalties (and the irreversible nature of an execution) requires a heightened reliability and the need for additional protection for the accused in capital cases. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Respondent is misusing "death is different" to manufacture an entitlement of the

prosecutor to the opportunity to seek a death penalty.

Respondent rejects as nonbinding, points raised in the concurrence in *Hernandez*, which highlighted the "narrowness" of the decision, and emphasized the outcome may have been different if that discharged juror favored the defense position, or more than one juror was dismissed (both of which occurred in this case). (RB 24; and see *People v. Hernandez, supra,* 30 Cal.4th at pp. 11-13.) Respondent finds no significance in the fact that the discharged juror in the present case (who this court determined was not biased) strongly favored the defense theory of the case. (RB 24-25.)

Respondent also argues the discharge of the alternate in the present case adds little to appellant's argument because "Juror No. 17's dismissal was clearly justified." (RB 23.) But that juror was death-qualified during voir dire, and once seated on the jury during penalty phase deliberations indicated that he too accepted the defense penalty phase argument. The other jurors thereafter informed the court of a new dissenting juror, and it was only after pointed questioning by the court that the juror stated the position that, after listening to the facts and arguments in this case, he could no longer vote for the death option. (Original RT 3550-3554.) When initially questioned by the

court, he said he could not be certain that he would never impose the death penalty. It was only later, when he was brought back for further questioning, that he agreed he could no longer vote for death. (Original RT 3552.) So at the time the alternate was reported by the others for his dissent, he was still properly qualified and simply disagreed with the others, but they were empowered by the court's original erroneous discharge of Juror No. 5 to report the alternate. Respondent notes that the alternate indicated at that time "it would be impossible for him to impose the death penalty..." (RB 23.) But it was the evidence and argument of counsel at trial that influenced him to that position. The trial court's actions can only reasonably be considered as reshaping a jury favorable to the death sentence.

Respondent only briefly addresses the important argument that the Unites States Supreme Court has emphasized that double jeopardy principles may apply where a trial court exercises its authority in a way that helps the prosecution's case. (See *United State* v *Jorn* (1971) 400 U.S. 470, 484; *Wade v. Hunter* (1949) 336 U.S. 684, 690.) Respondent simply claims that the court's refusal to give the prosecution "a second bite at the apple" only applies to cases where there were retrials following acquittals, and the theory does not apply to a retrial of a

penalty phase in a capital case. Respondent offers no reason to distinguish the error as it related to penalty phase manipulation by the trial court, and indeed, there is none.

Respondent also notes that double jeopardy principles should not apply here because if Juror No. 5 had not been discharged, the result would have been a deadlock, and appellant would have faced a penalty retrial anyway. (RB 28; citing *United States v. DiFrancisco* (1980) 449 U.S. 117, 130.) But this argument fails to appreciate that double jeopardy does not apply in cases of manifest necessity, such as in the case of a natural juror deadlock, but it applies where the court manipulates the trial to help the prosecution. Prohibiting a retrial under these principles would send the message that there is a consequence to such proactive measures to help one side in a case.

Respondent claims that by barring retrial, appellate courts might be less inclined to scrutinize the record for prejudicial errors. (RB 21-22.) But it is not tenable to suggest a reviewing court will ignore prejudicial error, i.e., uphold an unconstitutional death sentence rather than limit the penalty to life without possibility of parole.

The trial judge presiding over a case with a dissenting juror is often faced with the dilemma of whether to remove the juror and risk a

retrial if the appellate court finds the ruling was improper, or proceed with the jury knowing that a deadlock will require a new trial. It is not a sure thing that the state will decide to invest the resources in a second trial, having failed to succeed initially and there is no guarantee that an erroneous juror discharge will be remedied on appeal. Nevertheless, there should be some consequence for the trial court's decision to shape a jury – in this case in favor of the death penalty. Double jeopardy principles prohibited the penalty retrial in the present case.

II

The trial court's error resulting in a penalty phase retrial also violated appellant's right to due process.

Appellant argues that allowing a penalty phase retrial after the juror discharge also violated his Fourteenth Amendment due process rights. (AOB 52-55.) This is so for two reasons.

First, the new penalty phase trial under these circumstances could impair the defendant's fair opportunity to challenge the state's evidence, detract from the heightened reliability requirement, and fails to recognize the qualitative difference accompanying a death sentence. (See *Woodson v. North Carolina, supra,* 428 U.S. at p. 305; *Zant v. Stephens* (1983) 462 U.S. 862, 277, 884.)

Moreover, this court did not review the issue of the discharge of the alternate that was raised in the first appeal after reversing on the improper discharge of Juror No. 5. In that argument, appellant claimed that discharging the alternate was akin to reopening voir dire, and this was an important part of Justice Werdegar's analysis in her concurring opinion in *Hernandez*. (AOB 54-55.)

Respondent argues, without analysis, that appellant has failed to show the penalty phase retrial lacked reliability or failed to account for the difference between capital and noncapital cases. (RB 31.) Respondent further claims that addressing the dismissal of the alternate juror issue was not necessary as part of the first appeal, and that the trial court's action did not amount to re-opening voir dire. (RB 31.) But the trial court did not simply inquire whether the lone dissenting juror could perform his duties as a juror, it determined that his change of heart after listening to the case would make it difficult for him to apply the death penalty in this case, and the court later questioned the juror again–this time getting the juror to acknowledge that after further thought, he probably could not impose death in any case. This additional questioning went beyond the accepted practice of finding out whether the juror could perform his duty, and became

classic death-qualifying of the juror after hearing all of the evidence. And the judge only did this when questioning the dissenting juror — she made no attempt to see if any of the other jurors had changed their attitudes, perhaps becoming stronger advocates for the death penalty.

For the reasons stated in the opening brief, appellant argues the trial court's actions violated his right to due process.

III

The trial court prejudicially erred by failing to inquire into the conflict of interest described by appellant after the trial court appointed trial counsel with ineffective assistance of counsel claims pending in the habeas case, and by failing to conduct a *Marsden* inquiry.

Appellant objected to the reappointment of attorney Michael Belter for purposes of the penalty phase retrial, because there were allegations of ineffective assistance of counsel pending in his habeas corpus proceedings that included Mr. Belter's failure to present evidence of appellant's cognitive deficits and other mental impairments at the original penalty trial. After being apprised of the issue when appellant stated his objection to the appointment, the court asked no questions about the issue. At the penalty phase retrial, Belter again presented only social history in mitigation despite the substantial and available mental impairment evidence described in the habeas petition.

Appellant argues here that the trial court's failure to inquire about a conflict of interest, after being apprised of the issue, and the failure to conduct an inquiry under *People v. Marsden* (1970) 2 Cal.3d 118, requires reversal of the present judgment. (AOB 63; *People v. Lewis* (1979) 20 Cal.3d 498, 499.)

Respondent first argues that no conflict was apparent to the trial court and so the court had no duty to inquire. (RB 36.) But respondent's claim ignores the record. Appellant personally told the trial court, " I have an objection to Mr. Belter." (1 RT 28.) The court responded that appellant could take the issue up with Belter "or wait until the next hearing." (1 RT 28.)

Belter appeared for the first time at the next hearing, and informed the court that certain issues still existed because of the pending habeas case, and he needed more time to address those issues after discussing them with appellant's habeas and direct appeal lawyers. (1 RT 35.) Appellant then started to speak up regarding potential issues involving the habeas case, but the court told him to speak through counsel. (1 RT 36-37.) At the next hearing, Belter informed the court that appellant's habeas counsel had not even filed the reply brief at that point and noted the decision in the habeas case

could affect the penalty retrial. (1 RT 40.)

So all of this discussion that took place before Judge Sichel, on the record, addressed appellant's concern that he was being appointed a lawyer for his penalty phase trial who had a conflict of interest.

Appellant had challenged Belter's effectiveness for not presenting mental impairment evidence at the original penalty phase trial, and now the trial judge wanted to reappoint Belter. The court at this point needed to do more than "sell" Belter to appellant by saying he was good lawyer. The court needed to investigate appellant's concern.

The failure to present this evidence (which is a standard part of a penalty phase defense) because doing so would support the pending (or inevitable federal court) ineffective assistance of counsel claim, created an actual conflict of interest. (*Mickens v. Taylor* (2002) 535 U.S. 162, 171.) The conflict here affected Belter's performance at the retrial where he again presented only social history evidence, despite the existence of significant mental impairment evidence disclosed in the habeas petition. (See *People v. Bonin* (1988) 47 Cal.3d 808, 837-838.)

Respondent argues there was no conflict because "counsel presented very detailed evidence regarding Wilson's social history. . ." (RB 38.) But a proper defense at this stage of a capital case involves

both a social history showing the problems associated with the defendant's background, and evidence showing that appellant had brain damage that could mitigate his actions. Evidence of a dysfunctional childhood combined with neurological impairment help to show appellant was not the "worst of the worst" for whom we reserve the death penalty. There would be no legitimate reason for conflict-free counsel to forego presentation of significant brain damage to a penalty phase jury. Contrary to respondent's claim, the fact that counsel presented social history evidence did not negate the existence of a conflict.

Respondent next argues that appellant's express objection to the appointment of Belter need not have been considered a motion to appoint another attorney pursuant to *People v. Marsden, supra,* 2 Cal.3d at p. 118. (RB 39.) Respondent argues that appellant should have done more than simply object once, and that his failure to renew the objection later is fatal to the present claim. (RB 39.)

But appellant did more. At the next hearing, he informed Belter that he had a problem with his representation due to the pending habeas claim, and counsel then informed the court. When appellant attempted to speak up and state his position, the court cut him off and

told him to speak through counsel. (1 RT 36-37.)

The court had earlier said the issue would be addressed later if it remained unresolved, but after hearing counsel's version and preventing appellant from speaking directly to the court, there was no further discussion.

This was a death penalty case, and appellant expressly objected to the appointment of counsel who he had argued was ineffective at the first penalty trial. The trial court should have conducted a more thorough inquiry into the matter, but instead, simply told appellant that Belter was a good lawyer.

The failure to conduct an appropriate inquiry requires reversal as it cannot reasonably be said that the trial court "thoughtfully exercised" its discretion in the manner required by *Marsden.* *(People v. Miranda* (1987) 44 Cal.3d 57, 77.)

Conclusion

The death judgment should be reversed due to the court's improper discharge of jurors who accepted the defense theory of the case. This court should impose a life without parole term.

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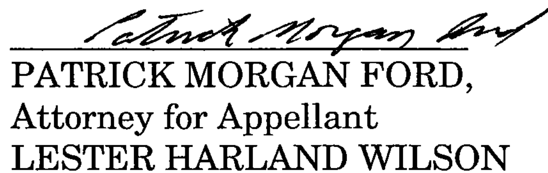
Reversal of the death judgment is also required because of the trial court's failure to properly inquire into the conflict of interest that existed between appellant and trial counsel.

Dated: 10/16/15 Respectfully submitted,



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Certificate of Compliance

I, Patrick Morgan Ford, certify that the within brief consists of 3,694 words, as determined by the word count feature of the program used to produce the brief.

Dated: 10/16/15

PATRICK MORGAN FORD

People v. Lester Harland Wilson CASE NO. S189373

DECLARATION OF SERVICE BY U.S. MAIL AND ELECTRONIC SERVICE — SUPPLEMENTAL

I, Esther F. Rowe, say: I am a citizen of the United States, over 18 years of age, and employed in the County of San Diego, California, in which county the within-mentioned delivery occurred, and not a party to the subject case. My business address is 1901 First Avenue, Suite 400, San Diego, CA 92101. I served an *Appellant's Reply Brief*, of which a true and correct copy of the document filed in the case is affixed, by placing a copy thereof in a separate envelope for each addressee respectively as follows:

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Additionally, I electronically served a copy of the above document as follows: 1) California Supreme Court, Courts.CA.gov/supremecourt and 2) Attorney General, ADIEService@doj.ca.gov. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on October 19, 2015, at San Diego, California.

Esther F. Rowe