SUPREME COURT COPY

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No. S150509

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

SANTIAGO PINEDA,

Defendant and Appellant.

Los Angeles Co. Sup. Ct.
No. NA051943-01 c/w
NA061271-01

SUPREME COURT
FILED

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APPELLANT'S REPLY BRIEF

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

HONORABLE WILLIAM R. POUNDERS

MARY K. McCOMB
California State Public Defender

GARY D. GARCIA
Senior Deputy State Public Defender
California Bar No. 157612

1111 Broadway, 10th Floor
Oakland, CA 94607
Telephone: (510) 267-3300
Fax: (510) 452-8712
Email: Garcia@ospd.ca.gov

Attorneys for Appellant

DEATH PENALTY

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IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. SANTIAGO PINEDA, Defendant and Appellant.	No. S150509 (Los Angeles Sup. Ct. No. NA051943-01 c/w NA061271-01)

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this brief, appellant does not reply to respondent's arguments which are adequately addressed in appellant's opening brief. In addition, the absence of a response to any particular argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined. For the convenience of the Court, the arguments are numbered in conformity with the opening brief.[1]

[1] The record will be cited here in the same manner as in Appellant's Opening Brief: "CT" refers to the Clerk's Transcript and "RT" refers to the (continued...)

ARGUMENTS

I

THE TRIAL COURT'S ERRONEOUS EXCLUSION FOR CAUSE OF PROSPECTIVE JUROR JAMES WILIA REQUIRES REVERSAL OF APPELLANT'S DEATH JUDGMENT

A. Introduction

In his opening brief, appellant argued that the trial court committed reversible *Witt-Witherspoon* error[2] by excusing prospective juror James Wilia despite his willingness to fairly consider the issue of penalty, thereby violating appellant's rights to an impartial jury, a fair capital sentencing hearing, due process of law, and a reliable judgment of death under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution. (AOB 106-132.)

Respondent acknowledges, as it must, that a prospective juror may be excused for cause only when his views about capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (RB 60, quoting *Adams v. Texas* (1980) 448 U.S. 38, 45.) However, respondent contends that Wilia's excusal must be upheld because his written questionnaire answers, viewed in light of his answers and demeanor on voir dire, provided substantial evidence for the court's finding that he was disqualified to serve as a juror

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[1](...continued)
Reporter's Transcript. In addition, "AOB" refers to Appellant's Opening Brief and "RB" to Respondent's Brief.

[2] See *Wainwright v. Witt* (1985) 469 U.S. 412; *Witherspoon v. Illinois* (1968) 391 U.S. 510.

in this case. (RB 53-68.) Respondent further asserts that the trial judge expressly found that Wilia was "disqualified both on the general circumstances of the answers that he's given and on his penalty phase answers." (RB 62, fn. 49, citing 7 RT 1180.)

As appellant demonstrates below, respondent's contention is unpersuasive.

B. Contrary To Respondent's Position, The Trial Court's Finding That Wilia Was Disqualified To Serve On The Jury Was Not Supported By Substantial Evidence

Respondent contends that substantial evidence supported the trial court's finding that Wilia was unable to serve in this case. (RB 61.) Specifically, respondent (1) apparently contends that Wilia's questionnaire responses, in and of themselves, showed that he was disqualified (RB 61-63); (2) contends that substantial evidence supported the trial court's findings discrediting Wilia's voir dire responses (RB 63-66); and, (3) disputes appellant's argument that any uncertainty as to Wilia's views was due to the trial court's inadequate voir dire (RB 67). As appellant demonstrates below, respondent's contentions are incorrect.

1. Contrary to Respondent's Apparent Position, Wilia's Questionnaire Responses, In and Of Themselves, Did Not Show That He Was Disqualified

Respondent lists several responses from Wilia's questionnaire purportedly supporting its position that he was disqualified, including responses indicating that he would be unable to vote for the death penalty; that he could not set aside sympathy, bias or prejudice towards a victim, witness or defendant; that he would not consider the prior testimony of an unavailable witness read to the jury in the courtroom; and that, although instructed that the testimony of a single witness is sufficient if believed, he

would require more proof, even if he believed the witness. (RB 61-62, citing 8 CT 1993, 1995-1996, 1998-1999.) However, as respondent acknowledges (RB 62), still other responses in Wilia's questionnaire conflicted or appeared to conflict with some of those statements. (See, e.g., 8 CT 1990 [he would not automatically reject the testimony of an unavailable witness], 1993 [he would neither always vote for nor always vote against the death penalty], 1996 [he "strongly disagree[d]" with the statement that a person who intentionally kills should never get the death penalty], *id.* [indicating that anyone who intentionally kills another person should always get the death penalty, adding "an eye for an eye"].)

While it was indeed the province of the trial court to resolve those conflicts (RB 62, citing *People v. Duenas* (2012) 55 Cal.4th 1, 10, *People v. Clark* (2012) 52 Cal.4th 856, 895, and *People v. Weaver* (2001) 26 Cal.4th 876, 910), a fair reading of the record shows that, on the whole, Wilia's questionnaire responses indicated he could be fair and impartial. (AOB 111-112, 118-119.) However, even assuming Wilia's questionnaire responses were inconsistent, the record as a whole, including Wilia's voir dire responses, belies respondent's position that he was disqualified, as appellant discusses in the following section.

2. Respondent Incorrectly Contends That Substantial Evidence Supported the Trial Court's Findings Discrediting Wilia's Voir Dire Responses

Citing Wilia's demeanor and supposedly confusing voir dire answers, respondent next contends that substantial evidence supported the trial court finding that Wilia was substantially impaired. (RB 63-66.) As appellant demonstrates below, respondent's analysis is flawed.

Respondent incorrectly suggests that the trial court properly disbelieved Wilia's voir dire statements that he could be a fair juror and that

he was willing to vote for the death penalty if appropriate. (RB 63, citing 7 RT 1166, 1168-1171, 1177-1178.) First, unlike Wilia's questionnaire responses, his voir dire responses relating to penalty were informed by the trial court's explanations of the duties of capital jurors in reaching a penalty decision. (See 7 RT 1164 [before commencing its penalty-related voir dire, trial court pointed out that "[t]hese are tough trials, but we need to make sure people that we ask to serve and decide the facts in the case can [make a penalty decision] and do it fairly to both sides"], 1165 [trial court pointed out that "[u]nder the law and under our system of justice, not only you have the right but the obligation of citizenship to make a [penalty] decision . . . if you can do that"].)[3]

Similarly, Wilia's clarification of his views on matters other than penalty followed the court's explanations of relevant legal principles, which were largely if not entirely absent from the questionnaire. (See 7 RT 1161 [when the trial court, following up on Wilia's explanation as to why he had indicated in his questionnaire that he could not set aside any sympathy, bias or prejudice, noted that the verdict must be based on the evidence rather than emotions, Wilia affirmed that he could make a decision in that manner],[4] 1161-1162 [after the trial court explained at length how Raul Tinajero's testimony was to be read into evidence, Wilia assured the trial court that he could try to evaluate the testimony of an unavailable witness

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[3] Wilia's death-qualification voir dire is more thoroughly summarized at AOB 112-115.

[4] This exchange is discussed further below.

the way he would that of any other witness],[5] 1162-1164 [after trial court explained the definition and purpose of immunity, Wilia stated that he had no problem with the idea of granting immunity to someone bearing a lesser degree of guilt in order to introduce against the person who actually committed the crime][6].)

Second, while respondent claims that Wilia "repeatedly stated – or agreed with defense counsel's suggestions – that he could be fair and open-minded in both phases of the trial" (RB 58), defense counsel's questions were largely neutral and closed-ended (see, e.g., 7 RT 1168 ["And really the question is can you be fair in both [phases]?"], 1170 ["I want to know whether or not we come to the second phase of the trial, which is a trial, whether or not you'd be open minded to consider both options of death and life. [¶] Could you?"], *ibid.* ["Yes, you could be open minded?"], *ibid.*

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[5] Significantly, the two questions regarding the testimony of an unavailable witness appear several pages *before* the brief factual summary of the case, which referred to the allegations that the second murder victim (i.e., Tinajero) testified against appellant in the first preliminary hearing and trial and subsequently was murdered. (See 8 CT 1989-1990, 1993.) Arguably, the questionnaire may have misled prospective jurors such as Wilia to conclude that those questions related to a witness rendered unavailable due to illness, as opposed to death, and hence that they had nothing to do with Tinajero's testimony. (See 8 CT 1989 ["Will you consider along with all of the other evidence presented, the testimony of an unavailable witness (*for example, one who is too ill to come to court*) whose prior testimony is read to you?"], italics added.) Therefore, it cannot be assumed prospective jurors recognized that those questions had any connection to the information regarding Tinajero's testimony and subsequent death. At any rate, to the extent Wilia's questionnaire responses regarding immunity were inconsistent (8 CT 1990), he either misstated his views or simply did not understand the concept of immunity.

[6] The juror questionnaire defined immunity only as "freedom from prosecution." (8 CT 1990.)

["When you came to the second phase?"], 1171 ["And you could follow those [penalty phase] instructions?"], *ibid.* ["Could you just evaluate his background for what it is, make an honest decision about it?"].) To the extent defense counsel *suggested* Wilia could be fair and open-minded, he was simply referring to Wilia's own questionnaire responses. (See 7 RT 1169 ["And whether or not you'd be open minded as to both possibilities, and I think you indicated you would; is that right?"], 1175 ["I think you can be fair; is that right?"]; see also, e.g., 8 CT 1994 [he would neither always vote for nor always vote against the death penalty], 1999 [there was no reason why he would not be a fair and impartial juror for both the prosecution and the defense]).

Third, respondent is incorrect in contending that the trial court properly discredited Wilia's voir dire statements that he could be fair to the prosecution. (RB 64.) As appellant pointed out in his opening brief, this Court frequently relies on prospective jurors' concluding answers in determining whether they were qualified to serve. (AOB 119-120, fn. 45 and cases cited therein.) Here, there were good reasons to rely on Wilia's concluding answers and to dismiss any conflicting questionnaire responses. Again, Wilia's voir dire responses, unlike his questionnaire responses, were informed by explanations of pertinent legal principles. In addition, as appellant points out above, respondent incorrectly suggests that Wilia "repeatedly stated – or agreed with defense counsel's suggestions – that he could be fair and open-minded in both phases of the trial." (RB 58.) Finally, rather than "shift[ing] and lean[ing] in the direction of the prevailing current" (RB 64), Wilia consistently and unequivocally stated on voir dire that he could be fair and impartial, belying the trial court's comment that Wilia "list[ed] in the wind" (7 RT 1179).

Respondent's reliance upon *People v. Bryant* (2014) 60 Cal.4th 335, 401, is misplaced. (RB 63.) There, a prospective juror expressed in her questionnaire a long-standing and well-considered opposition to the death penalty. Among other things, the prospective juror stated that she did not "believe in the death penalty," but instead "believe[d] in life in prison without parole;" that her views were based on her "religious conviction" that "no one has the right to take a life;" that she would not "be able to vote for the death penalty on another person if [she] believed, after hearing all the evidence, that the penalty was appropriate;" that she would "automatically, in every case, regardless of the evidence, vote for life in prison without the possibility of parole;" and, that her views on the death penalty had not changed in the last 10 years. (*People v. Bryant*, *supra*, 60 Cal.4th at p. 401.) However, during voir dire the prospective juror stated that she did not want to serve on the jury, but now believed that, despite her religious views, she could vote for the death penalty "[i]f it was required under the law." She initially stated that she did not think she could be a fair juror because of the child victim, but when asked again whether she was biased, she claimed that she could be fair. When pressed, she stated that although she still did not believe in the death penalty, she could impose it in light of her "civic duty" even if she would not be "overjoyed" in doing so. Under those circumstances, the trial court plainly had reason to find that her in-court statements were "simply incredible in light of the decisiveness of the opposite views she had expressed in her questionnaire answers," this despite her claim that the change from her answers on the questionnaire were based on the trial court's "little speech this morning about weighing the good and the bad and the evidence that comes in before that." (*Ibid.*) (*Ibid.*)

In contrast, Wilia's questionnaire responses merely reflected uncertainty, even confusion, with respect to his views on the death penalty. (See, e.g., 8 CT 1992 [describing his general feelings about the death penalty as "[a]n eye for an eye"], 1993 [philosophically neutral with respect to death penalty], *ibid.* [would refuse to vote for guilt of first degree murder or to find special circumstance to be true, no matter what evidence showed, to keep case from going to penalty phase], 1994 [he would not always vote for or against death]; 7 RT 1165 [asked to explain his "eye for an eye" statement, he responded, "Well, you know, I thought about that question, and I had mixed emotions about it. And I wasn't sure whether I have the right to prosecute a person as an eye for an eye, and, you know, I really didn't know how to answer that question"], *ibid.* [explaining he had indicated he was neutral about the death penalty because he had been "undecided"].) This was not a stark about-face, as in *Bryant*. Instead, the voir dire in this case reflected the manner in which Wilia, a layperson suddenly confronted with the possibility that he would be required to make a penalty decision in a capital case, considered and resolved his views on the matter.[7]

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[7] Although respondent does not specifically discuss the challenges for cause at issue in *People v. Clark*, *supra*, 52 Cal.4th 856, that case is similarly distinguishable. There, the trial court found that prospective juror L.C.'s declaration that he could apply the law fairly and impartially was contradicted by his equivocal responses and his demeanor; among other things, it appeared to the court at several points that L.C. "might lose emotional control over himself," and it noted that he had difficulty swallowing and was "visibly upset and nervous." (*Id.* at pp. 896-897.) The trial court remarked that prospective juror A.K.'s responses were equivocal and conflicting, and that it had the "definite impression" she would be unable to truthfully and impartially apply the law; although she wrote in her

(continued...)

Respondent's reliance upon *People v. Gonzalez* (2012) 54 Cal.4th 1234 is similarly misplaced. (RB 63-64.) Although the prospective juror in that case stated on voir dire that she could be objective and consider the death penalty, she also made several statements on voir dire indicating opposition to the death penalty. (*People v. Gonzalez, supra*, 54 Cal.4th at pp. 1282-1284.) Significantly, her opposition to the death penalty was at least partly grounded in her belief that her uncle had been unjustly convicted of murder (*id.* at p. 1285), a circumstance wholly unlike any present in the instant case.

Respondent incorrectly suggests that appellant's argument is predicated on the assumption that this Court must accept Wilia's voir dire statements uncritically. (RB 64.) Rather, appellant argues that the trial court's comment that Wilia "list[ed] in the wind" was at odds with what Wilia actually said during voir dire. (Cf. *People v. Bryant, supra*, 60 Cal.4th at p. 401.) Moreover, while evaluation of a juror's demeanor indeed may be inherent in the voir dire process (RB 65), this Court has recognized at least some distinction between verbal responses and demeanor. (See, e.g., *People v. Clark, supra*, 52 Cal.4th at p. 895 [stating that "[t]he trial court is in the best position to determine the potential juror's true state of mind because it has observed firsthand the prospective juror's

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[7](...continued)
questionnaire that she supported the death penalty, during voir dire her responses were quite equivocal as to whether she could actually vote to impose the death penalty. (*Id.* at p. 898.) Finally, prospective juror P.Y. provided "lengthy, rhetorical, and sometimes cynical responses" to many of the death-qualification questions on the questionnaire. (*Id.* at p. 899.) Unlike these prospective jurors, Wilia made clear on voir dire that he could be fair and impartial, and nothing in his demeanor rose to anywhere near the levels noted by the trial court in *Clark*.