Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically RECEIVED on 1/29/2024 10:50:19 AM

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 1/29/2024 by Celia Wong, Deputy Clerk

DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S174886

THE PEOPLE,
Plaintiff and Respondent,

v.

RICKY RENE MADISON,
Defendant and Appellant.

DEATH PENALTY CASE

AUTOMATIC APPEAL

Superior Court of California
Los Angeles County
No. SA062408
Hon. James R. Dabney

SUPPLEMENTAL BRIEF

JEANNE KEEVAN-LYNCH (SBN 101710)
Attorney at Law
P.O. Box 2433
Mendocino CA 95460
Tel: 707- 895-2090
Email JKL@MyWord.WS

Attorney for Defendant and Appellant
RICKY RENE MADISON

TABLE OF CONTENTS

Page

COVER PAGE 1

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 3

SUPPLEMENTAL BRIEF 6

STATEMENT OF THE CASE 6

I. THE NINE-YEAR SENTENCE ENHANCEMENT IMPOSED PURSUANT TO SUBDIVISION (B) OF SECTION 667.5 MUST BE STRICKEN PURSUANT TO SECTION 1172.75..... 9

II. REMAND TO THE TRIAL COURT FOR RECONSIDERATION OF APPELLANT'S ENTIRE SENTENCE IS REQUIRED IF THE CONVICTION IS AFFIRMED 10

III. REVERSAL OF THE ENTIRE JUDGMENT IS REQUIRED BECAUSE OF FAILURE TO COMPLY WITH THE LEGISLATURE'S CLEARLY EXPRESSED LIMITATION ON DEATH QUALIFICATION OF CALIFORNIA JURIES IN THE WAKE OF *HICKS V. OKLAHOMA* 11

A. Introduction..... 11

B. This Claim Was Not Forfeited 12

C. Appellant Had a Due Process Right to Have the Court Apply the Plain Meaning of Section 229 and Remove Only Those Death Penalty Opponents Who Could Not Return a Guilty Verdict .. 13

D. Reversal of the Entire Judgment is Required 21

CONCLUSION 24

CERTIFICATE OF COMPLIANCE 25

PROOF OF SERVICE 26

TABLE OF AUTHORITIES

Page

Cases:

Gray v. Mississippi
(1987) 481 U.S. 648 20

Hicks v. Oklahoma
(1980) 447 U.S. 343 ..... 6, 8, 12, 13

Hovey v. Superior Court
(1980) 28 Cal.3d 1 ..... 12, 14, 15

Lockhart v. McCree
(1986) 476 U.S. 162 ..... 13, 22

Morgan v. Illinois
(1992) 504 U.S. 719 ..... 20, 21

People v. Buycks
(2018) 5 Cal.5th 857 10

People v. Jennings
(2019) 42 Cal.App.5th 664 9

People v. Monroe
(2022) 85 Cal.App.5th 393 10

People v. Morse
(1964) 60 Cal.2d 631 ..... 12, 14

People v. Riser
(1956) 47 Cal.2d 566 ..... 12, 14

People v. Saldana
(2023) 97 Cal.App.5th 1270 ..... 9, 10

People v. Soto
(2018) 4 Cal.5th 968 16

People v. Stewart
(1857) 7 Cal. 140 23

People v. Stewart
(2004) 33 Cal.4th 425 24

People v. Suarez
(2020) 10 Cal.5th 116 ..... 8, 11, 13, 22

People v. Wheeler
(1978) 22 Cal.3d 258 19

Scher v. Burke
(2017) 3 Cal.5th 136 ..... 16, 18

Steen v. Appellate Div. of Superior Court
(2014) 59 Cal.4th 1045 ..... 16, 17

Union Bank v. Wolas
(1991) 502 U.S. 151 16

Wainwright v. Witt
(1985) 469 U.S. 412 20

Witherspoon v. Illinois
(1968) 391 U.S. 510 ..... 19, 21

Statutes:

Code Civ. Proc., § 229 ..... 11, 14

Health & Saf. Code, § 11351 7

Health & Saf. Code, § 11351.5 7

Health & Saf. Code, § 11360 7

Pen. Code, § 187 6

Pen. Code, § 190.2 6

Pen. Code, § 192 6

Pen. Code, § 192.1 6

Pen. Code, § 245 6

Pen. Code, § 496.1 6

Pen. Code, § 665 8

Pen. Code, § 667.5 6

Pen. Code, § 995 7

Pen. Code, § 1074 ..... 11, 14, 15

Pen. Code, § 1172.75 ..... 6, 8, 9

Pen. Code, § 1202.4 8
Pen. Code, § 1203 6
Pen. Code, § 11359 7
Pen. Code, § 12022 6
Veh. Code, § 23152 6

Constitutions:

Cal. Const., art. I § 7 12
Cal. Const., art. I, § 16 19
U.S. Const., 6th Amend. 19
U.S. Const., 14th Amend. 11, 13, 19

Other:

Garrett, Krauss & Scurich, *Capital Jurors in an Era of Death Penalty Decline* (2017) 126 Yale L.J. F. 417 ..... 18, 19

Haney, Zurbriggen, and Weill, *The Continuing Unfairness of Death Qualification: Changing Death Penalty Attitudes and Capital Jury Selection* (2022), Psychology, Public Policy, and the Law 28(1) 1 ..... 19, 22

O'Scainlain, D., *Remarks: "We Are All Textualists Now": The Legacy of Justice Antonin Scalia* (2017) 91 St. John's L. Rev. 303 15

Supplemental Brief

STATEMENT OF THE CASE

On December 13, 2013, this Court directed appellant to file by January 29, 2004, a supplemental brief addressing relevant changes in the law after the reply brief was filed. The following history is pertinent to this brief, which seeks this Court's application of new Penal Code section 1172.75, and *Hicks v. Oklahoma* (1980) 447 U.S. 343.

By information filed September 21, 2007, appellant Ricky Madison and co-defendant Kenneth Mitchell were charged with one count of murder (Pen. Code,[1] § 187), personal use of a deadly weapon (§ 12022, subd. (b)(1)), and a single special circumstance of murder in the commission of torture within the meaning of section 190.2, subdivision (a)(18). (3CT 708.)

The information further alleged that appellant had been convicted of two prior serious felonies: on August 20, 1981, a violation of section 192.1 (non-vehicular voluntary manslaughter, now section 192), and on December 3, 1985, a violation of section 245, subdivision (a)(2) (assault with a firearm).

The information also alleged prior convictions of lesser felonies within the meaning of sections 667.5, subdivision (b) and 1203, subdivision (e)(4): on November 4, 1987, a conviction for receiving stolen property, in violation of section 496.1; on March 27, 1990, convictions for driving while having blood alcohol at or above .10 in violation of Vehicle Code section 23152, subdivision (b),

[1] 1. Unless otherwise indicated all subsequent statutory references refer to the California Penal Code.

possession of cocaine base and marijuana for sale in violation of Health and Safety Code sections 11351.5 and 11359, and sale of marijuana in violation of Health and Safety Code section 11360; on October 24, 1991, a conviction for sale of marijuana in violation of Health and Safety Code section 11360; on March 20, 1995, a conviction for possession of a controlled substance for sale in violation of Health and Safety Code section 11351; and on September 25, 1996, a conviction of possession of cocaine base for sale in violation of Health and Safety Code section 11351.5. (3CT 709–710.)

Appellant pled not guilty and denied all sentencing allegations. His motion to set aside the information under section 995 was denied on April 16, 2008. (3RT 756, 760.)

The District Attorney and co-defendant Mitchell's counsel agreed to have a separate jury selected for each defendant. (4CT 823.)

Potential jurors for appellant's trial deemed unable or unwilling to impose the death penalty were excluded notwithstanding their willingness and ability to return a guilty verdict in a case where the death penalty would be sought.

On May 19, 2009, appellant's jury found him guilty of murder in the first degree, and found true the special circumstance of murder in the commission of torture. The jury found the weapon use allegation not true. (15CT 3788, 3792.)

On May 21, 2009, co-defendant Mitchell's jury found him not guilty of any offense. (15CT 3845–3846.)

Appellant's penalty jury verdict fixed his penalty at death. (15CT 3873.)

On July 17, 2009, the court imposed (and stayed pending reversal or modification of the death sentence) a term of nineteen years for the prior convictions and prior prison terms. This term included nine years for the prior prison term enhancements pursuant to Penal Code section 665, subdivision (b). The court imposed a $10,000.00 restitution fine pursuant to section 1202.4, subdivision (b), and victim restitution of $7500.00 payable to the Victims Compensation Board. (17CT 4279–4281, 4293–4295.)

Appellant's Opening and Reply Briefs on appeal raised claims of constitutional error in excluding for cause prospective jurors who were willing and able to return a verdict of guilt but not a death penalty for the guilty. (See Arguments III and IV) Those briefs were filed prior to counsel's development, in *People v. Thomas*, No. S219382 (AOB filed 12/17/2019), of an independent claim based on California's statutory limitation on death qualification and *Hicks v. Oklahoma*, *supra*, 447 U.S. 343. That claim was referenced, but the *Hicks* issue was not fully acknowledged or addressed – indeed, *Hicks* was nowhere cited – in this Court's decisions in *People v. Helzer* (S0123256, filed 1/22/24) and *People v. Suarez* (2020) 10 Cal.5th 116. The briefing is presented below.

First, this brief will address changes in California respecting sentencing, specifically, the repeal of the statute authorizing one-year sentence enhancements for prior prison term service. Appellant's sentence has yet to be reconsidered in light of current law, despite new Penal Code section 1172.75's demand that the CDCR notify the superior court of the need to recall sentences of persons whose sentences were enhanced for service of prior prison terms not related to violated sexual offenses.

I. THE NINE-YEAR SENTENCE ENHANCEMENT IMPOSED PURSUANT TO SUBDIVISION (B) OF SECTION 667.5 MUST BE STRICKEN PURSUANT TO SECTION 1172.75

Appellant was sentenced in 2009. After briefing was complete in his pending automatic appeal, the legislature invalidated appellant's prison sentence enhancements for prior prison term service not served for sexually violent offenses. (*People v. Jennings* (2019) 42 Cal.App.5th 664, 681.) Subdivision (a) of the new section 1172.75 declared:

> Any sentence enhancement that was imposed prior to January 1, 2020, pursuant to subdivision (b) of Section 667.5, except for any enhancement imposed for a prior conviction for a sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code is legally invalid. (Pen. Code, § 1172.75, subd. (a).)

The information filed in this case shows no convictions for sexual offenses, and only two serious felony convictions.

Thus, nine of the 19 years of the sentence enhancement that the trial court imposed and stayed must be stricken.

This is so even though the enhancements were stayed. (*People v. Saldana* (2023) 97 Cal.App.5th 1270, 1277.)

II. REMAND TO THE TRIAL COURT FOR RECONSIDERATION OF APPELLANT'S ENTIRE SENTENCE IS REQUIRED IF THE CONVICTION IS AFFIRMED

"By its plain terms, section 1172.75 requires a full resentencing, not merely that the trial court strike the newly `invalid' enhancements." (*People v. Monroe* (2022) 85 Cal.App.5th 393, 402.)

As observed in *Saldana, supra*:

> Section 1172.75 expressly provides that if a judgment includes a qualifying prior prison term enhancement, the trial court shall recall the sentence and resentence the defendant. (§ 1172.75, subd. (c).) At any such resentencing, the court shall "apply any other changes in law that reduce sentences or provide for judicial discretion so as to eliminate disparity of sentences and to promote uniformity of sentencing." (§ 1172.75, subd. (d)(2).)

People v. Saldana, *supra*, 97 Cal.App.5th at p. 1276.

This Court has endorsed holistic approaches to mandatory re-sentencing in general. (*People v. Buycks* (2018) 5 Cal.5th 857, 893 ["when part of a sentence is stricken on review, on remand for resentencing `a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances'"].)

Consequently, this Court should remand the case to the trial court for a full reconsideration of appellant's sentence in light of the circumstances at the time of re-sentencing if it otherwise affirms the judgment on appeal.

III. REVERSAL OF THE ENTIRE JUDGMENT IS REQUIRED BECAUSE OF FAILURE TO COMPLY WITH THE LEGISLATURE'S CLEARLY EXPRESSED LIMITATION ON DEATH QUALIFICATION OF CALIFORNIA JURIES IN THE WAKE OF *HICKS V. OKLAHOMA*

A. Introduction

Code of Civil Procedure section 229 limits challenges to jurors for bias against the death penalty in unambiguous terms: "A challenge for implied bias may be taken for one or more of the following causes, and for no other: ... (h) If the offense charged is punishable with death, the entertaining of such conscientious opinions *as would preclude the juror finding the defendant guilty*; in which case the juror may neither be permitted nor compelled to serve." (Emphasis added.)

As shown in Appellant's Opening Brief, the trial court followed this court's precedents and removed panelists whose conscientious opinions about the death penalty would not prevent them from returning a guilty verdict. The trial court relied on the rulings of this Court allowing it to remove all life-leaning panelists whose removal was not precluded by the federal constitution as construed by this Court.

In *People v. Suarez*, *supra*, 10 Cal.5th at p. 138 this Court spoke to arguments similar to this appellant's, and declined to reconsider its precedents and direct lower courts to follow Code of Civil Procedure section 229 (formerly Penal Code section 1074).

Suarez did not, however, answer the arguments made here:

First, adherence to the plain language of the statute is compelled by the capital defendant's due process right (U.S.

Const., 14th Amend., Cal. Const., art. I § 7; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346) to the protection from arbitrary deprivation of the procedural protection of the jury trial right enshrined in a state statute.

Second, adherence to the plain language of the statute is appropriate in recognition of the state constitutional separation of powers. The legislature was and is empowered to determine whether California's current death penalty scheme requires repeal or revision of the restriction on death penalty cases that the legislature itself enacted. This Court's precedents relieving the legislature of that power and responsibility represent an encroachment on that branch's power, one that sacrificed appellant's right to a unbiased jury.

Since appellant pled not guilty, he was entitled to the benefit of the statute at guilt in selecting the jury that found him guilty. The entire judgment should be reversed.

B. This Claim Was Not Forfeited

This Court has long held that the statutory language at issue here should be disregarded when jurors who may oppose the death penalty are being selected to try the penalty case as well as determine the defendant's guilt. (*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 9.) The lead case was *People v. Riser* (1956) 47 Cal.2d 566, 576, overruled on other grounds in *People v. Morse* (1964) 60 Cal.2d 631, 637–638.) Objection at trial would have been futile. Accordingly, lack of objection should be excused.

C. Appellant Had a Due Process Right to Have the Court Apply the Plain Meaning of Section 229 and Remove Only Those Death Penalty Opponents Who Could Not Return a Guilty Verdict

"Where ... a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, [Citation], and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. [Citations.]" (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

A statutory right to a jury that has not been purged of all who say they will not impose death is, like the right to a jury with sentencing discretion in *Hicks*, one "that substantially affects the punishment imposed." (*Ibid.*) Indeed, that purging creates a jury that will be particularly likely to find the defendant guilty. "[A]lthough the United States Supreme Court in *Lockhart v. McCree* (1986) 476 U.S. 162, 168–173 [90 L. Ed. 2d 137, 106 S. Ct. 1758], rejected arguments that the death process leads to conviction-prone juries, "a range of studies have continued to emerge post-Lockhart that build on the research [submitted in Lockhart] showing that death-qualified jurors are quite different from non-death-qualified jurors." [Citations.] (*People v. Suarez*, *supra*, 10 Cal.5th at pp. 192–193.)

The statutory language at issue here was enacted in 1872 as part of the initial codification of California's penal laws and has remained intact since then. (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at 9, fn. 7, 9 [acknowledging language in the old statute, section 1074 subdivision (8)].) As noted in *Hovey*, this Court has long provided a "judicial gloss" to this statutory language so as to allow the "for cause" removal of jurors whose views would preclude them from imposing a death penalty, notwithstanding their ability to find the defendant guilty of a capital crime. (See *Hovey v. Superior Court*, *supra*, at 9, fn. 7, 9, and cases cited therein interpreting the language of Code Civ. Proc., § 229, subd. (h) in former Pen. Code, § 1074, subd. 8.)

The case that made that "judicial gloss" obscure the plain meaning of the statute's terms was *People v. Riser*, *supra*, 47 Cal.2d at p. 576, overruled on other grounds in *People v. Morse*, *supra*, 60 Cal.2d at pp. 637–638.) In an opinion authored by Justice Traynor, the decision gave no effect to the plain language of the statute because it was somehow "ambiguous" and the Court concluded that "it would be doing violence to the purpose of these sections of the Penal Code [authorizing capital punishment], however, to construe" the statutory language at issue here "to permit these jurors [who are not open to imposing death] to serve. It would in all probability work a de facto abolition of capital punishment, a result which, whether or not desirable of itself, it is hardly appropriate for this court to achieve by construction of an ambiguous statute." (*People v. Riser*, *supra*, at p. 576.)

In *Hovey*, this Court advanced a historical justification for the non-statutory death qualification scheme created by *Riser*,

reasoning that although Riser was decided in an era when the jury decided guilt and penalty in a single trial, with the later enactment of legislation providing for a bifurcated trial on guilt and penalty, the "legislative 'preference for one jury qualified to act throughout the entire case' [Citation] would seem to be inconsistent with a literal reading of section 1074, subdivision 8, and thus supports the judicial gloss placed on that section by *Riser* and its progeny." (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at p. 9, fn. 9.) The rationales advanced in *Riser* and *Hovey* for ignoring the language of the statute are irrelevant to its proper construction.

They are creature of the earlier judicial practice of relieving the legislature of its right and duty to revise statutes that courts find to be out-of-step with current affairs. That habit has been repudiated at the highest levels of the federal judiciary. (See O'Scainlain, D., *Remarks: "We Are All Textualists Now": The Legacy of Justice Antonin Scalia* (2017) 91 St. John's L. Rev. 303.)

When *Riser* was decided, "the approach was `what should this statute be,' rather than what do `the words on the paper say.' Our law schools made common law lawyers of future judges, who believed it was the role of the judiciary to make law, not merely to interpret it, as Justice Scalia famously observed in his book: A Matter of Interpretation. To quote Justice Kagan, the entire judicial endeavor was `policy-oriented' with judges and law students alike `pretending to be congressmen.'" (*Id*., at pp. 304–305.) Yet, "`As Justice Scalia repeatedly proclaimed, our job is not to make the law; it is to apply the law as already written.'" (*Id*., at p. 312.)

The language of the statute is unambiguous in authorizing removal of only those death penalty opponents who would be unable to return a guilty verdict in a capital case. "Where statutory text `is unambiguous and provides a clear answer, we need go no further.'" (*Scher v. Burke* (2017) 3 Cal.5th 136, 148.) This Court should only "`reject a literal construction that is contrary to the legislative intent apparent in the statute or that would lead to absurd results.'" [Citation.] (*People v. Soto* (2018) 4 Cal.5th 968, 982, diss. opn of Liu, J.) There is nothing absurd about precluding trial courts from implying bias based on attitudes toward capital punishment that will not interfere with the juror's ability to find the defendant guilty or render a death verdict if the juror thinks it appropriate.

The fact that the legislature did not anticipate the impanelment of juries empowered to decide not only guilt but the appropriateness of imposing capital punishment is not a sufficient reason for the High Court to rewrite or ignore the plain meaning of a statute. (*Union Bank v. Wolas* (1991) 502 U.S. 151, 158.) Respect for the Separation of Powers under the California constitution can and should require that state courts let the legislature determine whether new developments require an amendment or revision. (*Steen v. Appellate Div. of Superior Court* (2014) 59 Cal.4th 1045, 1053.)[2] The legislature can amend that

---

[2] As stated in *Steen:*

The separation of powers doctrine owes its existence in California to article III, section 3 of the state Constitution, which provides that "[t]he powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." We have described the doctrine as limiting

statute, or provide for additional peremptory challenges in capital cases, if it wishes to ensure a continued flow of death penalty verdicts from communities where only a shrinking minority believes that imposing the death penalty is a reasonable response to aggravated murder.

In addition to being clear, the statutory language is also consistent with the governing federal constitutional law, which, as discussed in prior arguments, acknowledges a legitimate state interest in removing death penalty opponents only if they cannot or will not follow their oaths.

In California, that oath requires the return of a guilty verdict when guilt is shown beyond a reasonable doubt, but it does not require return of a death verdict unless the juror determines that it is the more appropriate of the two penalties after weighing the evidence and finding that aggravation substantially outweighs mitigation. The plain language of the statute had been applied at appellant's trial, no legitimate state interest would have been compromised. And the result would likely be the impanelment of a jury on which life-leaning panelists could not be eliminated without using peremptory challenges.

Respondent may argue that the legislature has tacitly approved of the *Riser* rule in reenacting the statute without expressing disapproval. "Arguments based on supposed

---

the authority of one of the three branches of government to arrogate to itself the core functions of another branch. Although the doctrine does not prohibit one branch from taking action that might affect another, the doctrine is violated when the actions of one branch defeat or materially impair the inherent functions of another. [Citations.] (*Steen v. Appellate Div. of Superior Court*, *supra*, 59 Cal.4th at p. 1053.)

legislative acquiescence rarely do much to persuade. [Citation.] Regardless, while `it may sometimes be true that legislative inaction signals acquiescence when there exists both a well-developed body of law interpreting a statutory provision and numerous amendments to a statute without altering the interpreted provision, that is not the case here.'" [Citation.] *(Scher v. Burke*, *supra*, 3 Cal.5th at p. 147.)

This Court's decisions did not interpret the language of subdivision (h) in the course of affirming death judgments. They ignored it unless the case involved a juror who was clearly subject to exclusion by the terms of the statute.

When addressing exclusion of prospective jurors who could comply with the oath and California's jury instructions but would not impose death, this Court has, for many decades, cited no statute, but rather its own precedents construing federal constitutional cases. It looked as though the power to shape juries through death qualification had been given to this Court by the federal case law. The legislature was made to appear powerless to restrict for-cause challenges of life-leaning panelists.

Meanwhile, prosecutors wishing to pursue death sentences in communities that are not wholly supportive of their actions have been protected from encroaching public opinion by this Court's death qualification case law. (Garrett, Krauss & Scurich, *Capital Jurors in an Era of Death Penalty Decline* (2017) 126 Yale L.J. F. 417, 425.) All the legislature has been able to do is limit the progress of the post-conviction review process by exercising its "power of the purse."

In protecting appellant's capital prosecution with a "firewall" against changing public opinion, the trial court made appellant's

jury venire unrepresentative of the community as a whole. Research centered on Orange County in 2015 confirms that a larger than previously noted percentage of those called for jury duty are likely to be disqualified from serving in any death penalty case. "[R]oughly 24% said that they would not feel comfortable finding a person guilty of first-degree murder knowing that a death sentence could follow [and] 32% said they would automatically vote for life imprisonment;...". (Garrett, et.al, *Capital Jurors in an Era of Death Penalty Decline, supra*, 126 Yale L.J. F. 417, 425.) What remains is a non-representative venire, one in which the scales were tipped deliberately towards death. (U.S. Const., 6th Amend., *id.*, 14th Amend.; *Witherspoon v. Illinois* (1968) 391 U.S. 510, 521; Cal. Const., art. I, § 16; *People v. Wheeler* (1978) 22 Cal.3d 258 [finding the right to a jury representing a cross section of the community implied by state constitutional right to an impartial jury].)

More recent research confirms that death qualification removes the views of large and important sectors of the public from consideration in capital trials and insulates the death penalty from changing public opinion. (Haney, Zurbriggen, and Weill, *The Continuing Unfairness of Death Qualification: Changing Death Penalty Attitudes and Capital Jury Selection* (2022), Psychology, Public Policy, and the Law 28(1) 1–31.)[3]

To be sure, *Witherspoon* permitted exclusion of those who "would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them." (*Witherspoon v.*

---

[3] https://doi.org/10.1037/law0000335 (accessed 10/11/23).

Illinois, *supra*, 391 U.S. at p. 522, fn. 21.) That proviso, which accorded with *Riser*'s demand for jurors who were open to imposing the death penalty depending on the evidence presented, does not aid the state in this case. In accordance with this Court's precedents, the trial court did not reach the question of whether any of the death-scrupled jurors it excused would automatically vote for life.

Moreover, *Witherspoon*'s "automatically vote against" standard was abrogated in *Wainwright v. Witt* (1985) 469 U.S. 412, 423. In all the years and all the cases decided in between *Witt* and the present day, the high court has never recognized any state right to exclude death scrupled jurors on grounds broader than that of impairment or inability to follow the juror's instructions and oath. Instead, it has affirmed that the state has no right to a jury open to giving the prosecutor a death penalty in every case where it might be warranted. As stated more than once, "[t]he State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes *by not following their oaths.' Wainwright v. Witt* [1985] 469 U.S. [412] at 423, 105 S. Ct. 844, 83 L. Ed. 2d 841." (*Gray v. Mississippi* (1987) 481 U.S. 648, 658–659.)

Likewise, as noted in appellant's opening brief, the statement of the majority in *Morgan v. Illinois* declaring it "clear" that a "juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause" (*Morgan v. Illinois* (1992) 504 U.S. 719, 728) is unhelpful to the State where, as here, the

instructions do not require a vote for death under any circumstances. As previously noted, "A direction to a person to consider whether there are `sufficient' reasons to do something does not logically imply that in some circumstance he must find something to be a `reason,' and must find that reason to be `sufficient.'" (*Id.* at p. 744, fn. 2 [Scalia, J., dissenting from decision authorizing removal of capital jurors who will always vote for death, calling the inference that such a juror will not follow Illinois law (which requires a death vote absent sufficient mitigating circumstances) "plainly fallacious."].) A juror who will not impose death where her instructions do not require her to do "is not promising to be lawless." (*Id.* at p. 754 (dis. opn. of Scalia, J.).)

D. Reversal of the Entire Judgment is Required

In *Witherspoon v. Illinois*, the Court held that a jury drawn from a venire purged of all those who expressed scruples about the use of capital punishment is a jury biased toward the ultimate punishment. The Court did not, however, settle the question of whether such a jury is also biased in favor of conviction. Rather, it found that the record in that case did not support a guilt verdict reversal, nor enactment of a per se rule requiring a new trial on guilt for all cases in which the venire was purged like that in *Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 510, 515–518.

And, although the United States Supreme Court rejected arguments that the death qualification process leads to

conviction-prone juries in *Lockhart v. McCree*, *supra*, 476 U.S. at pp. 168–173, the data supporting that argument has grown since then. As noted by Justice Liu in a recent concurrence:

> [A] range of studies have continued to emerge post-*Lockhart* that build on the research [submitted in *Lockhart*] showing that death-qualified jurors are quite different from non-death-qualified jurors. (Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States* (2014) 89 N.Y.U. L.Rev. 513, 569, fn. 247 (hereafter Levinson); see *id.* at pp. 543, 568–569 [critiquing *Lockhart* and citing studies finding that *death-qualified jurors tend to be more conviction-prone than ordinary jurors*]; Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation* (2006) 38 Ariz. St. L.J. 769, 784–785 [study of 1,201 capital jurors from over 350 trials found that death-qualified jurors have disproportionately punitive orientations, are more likely to hold racial stereotypes, and are more likely to be pro-prosecution and conviction-prone]; see also Butler, *Death Qualification and Prejudice*: *The Effect of Implicit Racism, Sexism, and Homophobia on Capital Defendants' Right to Due Process* (2007) 25 Behav. Sci. & L. 857; Butler & Wasserman, *The Role of Death Qualification in Venirepersons' Attitudes Toward the Insanity Defense* (2006) 36 J. Applied Soc. Psych. 1744.)

(*People v. Suarez*, *supra*, 10 Cal.5th at pp. 192–193, Liu, J. Concur.)

More recent research confirms that death qualification removes the views of large and important sectors of the public from consideration in capital trials and insulates the death penalty from changing public opinion. (Haney, Zurbriggen, and

Weill, *The Continuing Unfairness of Death Qualification: Changing Death Penalty Attitudes and Capital Jury Selection* (2022), Psychology, Public Policy, and the Law 28(1) 1–31.)[4]

In short, it is now beyond cavil that a venire purged of all who will not impose a death penalty is one comprised of entirely of citizens who are, as a group, conviction-prone.

The precedent for granting relief as to the guilt judgment is this Court's decision in *People v. Stewart* (1857) 7 Cal. 140, 143–144. Before reversing a murder conviction for violation of the statute in *Stewart*, this Court noted but rejected the State's claim that "the prisoner has not been injured by the allowance of the challenge, and that it is the duty of this Court to affirm the judgment, unless it clearly appears that error has intervened. In other words, that the prisoner having been fairly tried by a competent jury, we are not at liberty to say that the result would have been different if the Court had not excluded the particular juror excepted to." (*Ibid.*) It explained:

> What the result might have been under such circumstances, we are of course unable to say, but the human mind is so constituted, that facts and circumstances do not always produce the same results; the judgment of two men upon the same state of facts may be diametrically opposite, particularly in the determination of a criminal case, when every doubt is carefully weighed and scrupulously balanced.

(*People v. Stewart*, *supra*, 7 Cal. at p. 144.)

---

[4] https://doi.org/10.1037/law0000335 (accessed 10/11/23).

The more recent decision in *People v. Stewart* (2004) 33 Cal.4th 425, 455, is not to the contrary. There, this Court noted the defendant's argument for guilt phase relief and his failure to "provide[] any persuasive basis upon which to . . . view the trial court's error as a `structural defect' that impugned the entire proceeding below." (*Ibid.*)

The only "structural defect" identified in *Stewart* was the trial court's reliance on a questionnaire when voir dire was needed on capital punishment issues. While that may be viewed as a sort of structural error, it is not one that biases or tilts the venire in favor of convicting the defendant of capital murder. Exclusion of all who are unable or unwilling to impose a death does so plainly. If it is not a structural error, it is clearly not harmless beyond a reasonable doubt.

CONCLUSION

The requested relief should be granted.

Respectfully submitted,

Dated: January 29, 2024

By: /s/ /s/ Jeanne Keevan-Lynch

Attorney for Defendant and Appellant
RICKY RENE MADISON

CERTIFICATE OF COMPLIANCE

This brief is set using **13-pt Century Schoolbook**. According to TypeLaw.com, the computer program used to prepare this brief, this brief contains **4,724** words, excluding the cover, tables, signature block, and this certificate.

The undersigned certifies that this brief complies with the form requirements set by California Rules of Court, rule 8.204(b) and contains fewer words than permitted by rule 8.520(d) or by Order of this Court.

Dated: January 29, 2024 By: /s/ Jeanne Keevan-Lynch

PROOF OF SERVICE

I declare:

At the time of service I was at least 18 years of age and not a party to this legal action. My business address is P.O. Box 2433, Mendocino, CA 95460. I served document(s) described as Supplemental Brief as follows:

By U.S. Mail

On January 29, 2024, I enclosed a copy of the document(s) identified above in an envelope and deposited the sealed envelope(s) with the US Postal Service with the postage fully prepaid, addressed as follows:

Ricky Madison
AA3100
San Quentin State Prison
San Quentin, CA 94974

I am a resident of or employed in the county where the mailing occurred (Mendocino, CA).

By TrueFiling

On January 29, 2024, I served via TrueFiling, and no error was reported, a copy of the document(s) identified above on:

Los Angeles District Attorney

State Attorney General

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: January 29, 2024 By: /s/ Jeanne Keevan-Lynch

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 1/29/2024 by Celia Wong, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. MADISON (RICKY RENE)**
Case Number: **S174886**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **JKL@MYWORD.WS**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
SUPPLEMENTAL BRIEF	S174886_SB_RickyReneMadison

Service Recipients:

Person Served	Email Address	Type	Date / Time
Jeanne Keevan-Lynch Attorney at Law 101710	JKL@MYWORD.WS	e-Serve	1/29/2024 10:50:18 AM
Attorney Attorney General - Los Angeles Office Amanda V. Lopez, Deputy Attorney General	docketinglaawt@doj.ca.gov	e-Serve	1/29/2024 10:50:18 AM
Colleen Tiedemann CA Attorney General's Office - Los Angeles 208787	colleen.tiedemann@doj.ca.gov	e-Serve	1/29/2024 10:50:18 AM
Attorney Attorney General - Los Angeles Office Esther Kim, Deputy Attorney General 225418	esther.kim@doj.ca.gov	e-Serve	1/29/2024 10:50:18 AM
DISTRICT ATTORNEY	Truefiling@da.lacounty.gov	e-Serve	1/29/2024 10:50:18 AM
CAP	FILING@CAP-SF.ORG	e-Serve	1/29/2024 10:50:18 AM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

1/29/2024
Date

/s/JEANNE KEEVAN-LYNCH

Signature

KEEVAN-LYNCH, JEANNE (101710)

Last Name, First Name (PNum)

LAW OFFICES OF JEANNE KEEVAN-LYNCH

Law Firm