IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S132256

THE PEOPLE, *Plaintiff and Respondent,* v. GLEN TAYLOR HELZER, *Defendant and Appellant.*	CAPITAL CASE Superior Court of California Contra Costa County No. 3-196018-6 Mary Ann O'Malley

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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INTRODUCTION

This supplemental opening brief addresses authorities respecting Appellant's Opening Brief Argument II, a *Witt* error claim, that were not extant when appellant's Reply Brief was filed in 2017 and to raise a new argument for relief based upon the trial court's failure to follow the statutory restriction on for-cause removal of venire members in death penalty cases.

I. *ARMSTRONG* BOLSTERS APPELLANT'S *WITT* ERROR CLAIM

In *People v. Armstrong* (2019) 6 Cal.5th 463, 756, this Court observed:

> A court can abuse its discretion by applying an erroneous legal standard or by making a ruling unsupported by substantial evidence. [Citation.] Both problems are present here.

Here, as in *Armstrong*, the trial court granted the State's request to remove an openly life-leaning panelist for bias against the death penalty. The decision was not supported by substantial evidence, and was based on mistaken recollection or other human error about what the challenged panelist said, as well an erroneous legal standard, one ensuring removal of panelists who are particularly unlikely to impose death but show no impairment of ability to follow this state's jury instructions and oath.

The errors underlying the trial court's removal decision are, as in *Armstrong*, revealed in its statement of decision, and confirmed by the record as a whole.

In excusing for cause Prospective Juror Jeanne Wolf (JW), the court declared, "I do believe that Ms. Wolf has a bias against the death penalty such that I think she said in one percent she might have been thinking – considering it, but in all reasonable likelihood, not very likely. I will excuse Ms. Wolf for cause." (12RT 3005.)

First, JW never indicated she could not or would not consider the death penalty. On the contrary, she told the court that she had been doing so during group voir dire. (12RT 2952.) Her questionnaire responses likewise indicate that *she thought she would be* "willing to listen to all of the evidence, as well as the judge's instructions on the law, and give honest consideration to both life in prison without parole and death before reaching a decision" if seated as a juror. (Question 106, CT 3693.)

When the court asked on voir dire if she was then "of a frame of mind where you can consider both" possible penalties, she said that she had been "going over it and over it sitting here." (12 RT 2952.) She then told the court, "I have to say that if I had to vote on the death penalty I would vote against it. That being said, could I just – don't know what I would do." (12RT 2953.)

JW's statement to the court about how she would "vote on the death penalty" is not a statement that she would not "consider imposing the death penalty" if seated as a juror. As the prosecutor recognized, JW's answers had not established

unwillingness or impaired ability to consider the death penalty if seated nor unwillingness to impose it if she thought it was the more appropriate of the two sentencing options.

But, rather than establish that JW's consideration of the death penalty would be impaired, he established that she would not likely find death to be the more appropriate sentence under California's jury instructions after considering own her values as the instructions permit.

Before examining JW, the prosecutor noted that she had written that she was inclined to be against the death penalty (12RT 2964.) Asked if she would do what the system required of her, she said "I would like to say that I would, you know, you just don't know until the time comes, what you're going to." (12RT 2966.)

The prosecutor explained that the law "never tells you you have to impose the death penalty. . . .¶ The court gives you factors A through K. They basically – they outline different subject matter that kind of tries to direct your attention to certain areas to look in this area and see what you see . . . . The test the judge is going to give at the conclusion of this case is, you can impose the death penalty if, and only if, the evidence in aggravation is so substantial in comparison to the evidence in mitigation that it warrants the death penalty, okay. . . .¶ You're not going to get an instruction from the Court defining aggravation, except something that – something along the line of increasing the enormity. ¶ You're going to get a definition of mitigation. You're surely not going to get a definition of what is warranted. All of those things are up to you. ¶ And you're not going to get an indication from the court that you must abandon

your beliefs, okay. . . . . ¶ In fact, there's an instruction that says, `Jurors may consider the moral or sympathetic value of the evidence in making a determination ... in this kind of a trial,' ... ¶So you bring your emotions in here with you. You bring your moral compassion in here with you, and that you use. ¶So if your moral compass says 'I'm opposed o the death penalty, and the Court tells us you can use your moral compass for purposes of making a decision in that context, kind of inconsistent with whether you are to vote for the death penalty, wouldn't it?" JW said, "Yes, it would." (12RT 2966–2967.)

The prosecutor asked JW if she would agree that "it would be very difficult if not impossible for you, given your belief structure, to ever impose the death penalty?" JW replied, "I think when I was thinking about it, I would say one percent chance." The prosecutor asked, "So 99 times out of 100 you would not? Would that be based upon your moral or philosophical beliefs about the death penalty?" JW said yes. (12RT 2967–2968.)

The trial court's misstatement of what JW said appears to be based on mis-recollection if not a confirmation bias, one respecting a decisive issue as a matter of law.

A panelist who says that she will not *consider* imposing the death penalty as a penalty juror in 99 out of 100 cases is saying that she will not follow her instructions.

But a panelist who says what JW said about *imposing* death under the instructions described by the prosecutor says nothing of the sort. On the contrary, estimating a one percent chance that she would impose death under those instructions indicates that she will consider imposing death as the law requires if seated as a juror.

The trial court's reliance on mistaken recollection of the material statements made by challenged prospective jurors was one of two independent grounds for finding reversible *Witt* error in *Armstrong*.

In *Armstrong* the trial court "asserted that S.R. `picks and chooses the special circumstances that he believes he would be able to consider the penalty of death on.'" (*People v. Armstrong*, *supra*, 6 Cal.5th at p. 756.) This Court found that the "record does not support this assertion. S.R. never indicated he could not consider death as an option for the charged special circumstances. He simply expressed uncertainty as to how he would vote if each of several of the charged special circumstances was the only one found true." (*Ibid.*)

This Court found the same error respecting the trial court's removal of G.P., about whom the trial court noted that he "`flat out said he could not impose death on a getaway driver' but the record was to the contrary: When asked, "What penalty would you impose on the person in the car, who didn't go inside? He didn't shoot. He wasn't the actual killer," G.P. responded, `I probably wouldn't impose the death penalty.'"].)

Also pertinent here, *Armstrong* recalls that a "juror who indicates he could vote for death, but is unwilling to guarantee he would do so, is not subject to excusal for cause. (*People v. Pearson* (2012) 53 Cal.4th [306] at p. 332.)"

Here, as in *Armstrong,* "the record reveals no substantial evidence that [the potential juror] would have had any difficulty following the court's instructions in determining the appropriate sentence." (*People v. Armstrong*, *supra*, 6 Cal.5th at pp. 756–757.)

Also, as in *Armstrong*, the record in the case at bar shows that the trial court applied an erroneous standard to the question of qualification – in addition to expressly relying on a factual basis that was not supported by the record.

As in *Armstrong*, the erroneous standard – one that elided the juror's ability to follow the jury instructions and oath -- was suggested by the prosecutor. But unlike in Armstrong, the prosecutor did not ask the court to accept his theory. He devised and implemented a workaround to disqualify JW, and the Court went along.

When questioned by the court about the life-leaning answers on her questionnaire, JW told said that she would follow the law stated in the court's instructions, even if she disagreed with the law, and even if it was hard to do so, because she has to follow the law, as one who believes in our system. (12RT 2948.)

Soon the focus shifted to the question of whether JW would vote to impose death under instructions that would not direct her to do so. Rather than question whether Prospective Juror JW can follow the law as stated in her instructions (after she has told the court she will do so, even if it is hard), the prosecutor focused on asking whether she would impose the death penalty when the instructions invite her to apply her own values. (12RT 2968.)

The trial court's statement of decision mirrors the prosecutor's presumption that a prospective juror can be removed, notwithstanding her readiness to follow the law stated in her instructions and return her honest verdicts, if there appears to be little or no possibility that her honest verdict on penalty would please the prosecutor.

This improvised standard excludes life-leaning prospective jurors who *will* consider imposing death *as a reasonable possibility*, and fairly consider evidence favoring the death penalty, but are less likely to vote to impose death than other panelists. It strikes at the defendant's constitutional rights by allowing the State to exclude for cause those who the state has not shown to be impaired or unable to follow their oath's and instructions. (See AOB 334–331.)

This is not a case in which other aspects of the record suggest that the trial court correctly understood and applied the law restraining removal of life-leaning panelists for cause.

It is thus unlike *People v. Caro* (2019) 7 Cal.5th 463, in which the trial court's examination and dismissal of other life-leaning panelists revealed that the trial court applied the Witt standard properly, despite it's occasional use of the term "neutral" in describing the inquiry.[1] (*Id*. at p. 481.)

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[1] The record in *Caro* supported this Court's conclusion:

In discussing whether Prospective Juror [] could be "neutral," the trial court expressed doubt that [] could "reasonably consider both punishments" as instructed by the court. The court, too, considered Prospective Juror D.S.'s "ability to be neutral" to mean his ability to "give serious consideration to both potential punishments." When the court explained the purpose of voir dire to prospective jurors on several occasions, it conveyed-correctly-that it could only accept "jurors who will not vote automatically for or against the death penalty." The court also emphasized that jurors did not need "to choose between religious and ethical beliefs" and "the law," as long as they nonetheless "obey[ed] and follow[ed] the law." Moreover, we note the trial court did not excuse all jurors who had misgivings about the death penalty. In reviewing the sum of voir dire, we believe the trial court properly focused the inquiry on whether a juror could "weigh[] the aggravating and mitigating circumstances of the case and

In the case at bar, the trial court made no remarks indicating it recognized that JW was qualified if she was able to "give serious consideration to both potential punishments" and able to "weigh[] the aggravating and mitigating circumstances of the case and determin[e] whether death is the appropriate penalty under the law." (*Caro*, *supra*, 7 Cal.5th at pp. 481–482.)

The trial court's voir dire of several panelists suggested that the ability to be "objective" with respect to both sentencing alternatives was the trial court's initial test of death qualification. (RT 2265, 2290, 2519, 3112.) Yet "objectivity" in considering the death penalty is not required. Like "neutrality" toward the death penalty, the objectivity standard verbalized by the trial court incorrectly suggests that a juror cannot serve "if he tends to disfavor the death penalty." (*Caro*, *supra*, 7 Cal.5th at p. 481.)

Moreover, an improvised "objectivity" standard respecting the death penalty is implicit in the trial court's explanation for removing JW for "bias against the death penalty." Biases for and against the death penalty are not grounds for removing prospective jurors who can and will follow their instructions and oath. Notably, the prosecutor effectively convinced the trial court that bias for imposition of the death penalty is not important, and to refrain from applying any objectivity test to panelists who presented themselves as openly biased for death. The prosecutor had only to establish that those panelists were open to the

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determin[e] whether death is the appropriate penalty under the law" [citation], not just their personal views on the death penalty. (*Caro*, *supra*, 7 Cal.5th at pp. 481–482.)

possibility of returning a life verdict despite their preference for the death penalty should they deem that verdict appropriate in light of possible mitigation. (13RT 3038, 3068, 3098–3102.)

Unlike in *Caro*, all life-leaning jurors challenged for cause (or obviously challengeable for cause) were removed from the panel by stipulation. Thirty-seven venire members wrote that they could not or would not impose a death sentence and were excused by stipulation, most without voir dire.23 One who said he could impose the death penalty despite his religious belief that such would be a bad decision, was excused by stipulation after he acknowledged a trauma-related inability to look at the photographs of the decedents' remains. (12RT 2215–2218, 2240.)

Two other life-leaning panelists were questioned by the court and excused by stipulation after saying that they could not consider or impose the death penalty. (12RT 2356, 2496, 2552.)

The voir dire they received revealed the court's brief inquiries into their ability to follow the law as stated in the court's instructions, and decisive focus on whether the panelist would vote for death after hearing the case. (12RT 2356, 2496.)

Also, unlike the trial court in *Caro*, appellant's trial court did not announce, let alone "emphasize[] that jurors did not need to choose between religious and ethical beliefs" and "the law," as long as they nonetheless "obey[ed] and follow[ed] the law.'" (*Ibid.*)

Finally, it bears mention that defense counsel was precluded from asking death-leaning panelists about the likelihood that they would actually return a life verdict. When defense counsel tried, the prosecutor objected to questions calling for jurors to make a decision on whether they stand on a quantified scale.

Defense counsel said the prosecutor had asked such a question of a pro-life panelist. The court correctly recalled that JW had "volunteered" the one percent figure, and declared that it would not allow counsel to "have these jurors break down percentage-wise where they are in this field." (13RT 3068.) While that preclusion was within the court's discretion, it occluded the significance the court's explanation for removing JW.

II. THIS COURT'S POST-BRIEFING DECISIONS REJECTING *WITT* ERROR CLAIMS INVOLVED NO ERRONEOUS QUALIFICATION TESTS, NO MISSTATEMENT OF WHAT THE PANELISTS SAID IN DECLARING THEM DISQUALIFIED, AND EVIDENCE THAT THEY HAD AN ACTUAL IMPAIRMENT OF THEIR ABILITY TO FOLLOW THE COURT'S INSTRUCTIONS

People v. Caro, supra, falls into this category. Removal of one panelist was justified because said he would worry about potential damage to his relationship with his wife when acting as a juror and said that it "[p]erhaps" would impair his ability to "impose death in a case that called for it.' ... On this record, [his] marital concerns justified such an impression." (*Id.* at pp. 483–482.) Removal of the other panelist was justified by his stating, inter alia, that he would not impose the death penalty unless there was a threat to society. (*Id.* at p. 486.)

At the time of this writing, the most recent decision in which this Court has rejected a *Witt* error claim is *People v. Camacho* (2022) 14 Cal.5th 77. Substantial evidence to support the trial judge's determination included the panelist's repeated voir dire assertions that she "`can't imagine myself condemning somebody

to die' and her feeling that `too many innocent people have been put to death' and `[if] one [such] person is put to death, that's too many for me.' She followed by observing that she would not want to participate in rendering a death verdict because to do so would be to endorse a system of death penalty law that she believed to be unfair. '" (*Id.* at p. 135.)

Caro, *Camacho*, and most of this Court's other recent decisions rejecting *Witt* error claims have similarly solid records of juror statements describing strong moral opposition to the death penalty or other extraneous influences that have a logical relationship to some impairment if not inability to follow their oath and instructions.

The few cases in which the challenged panelists made only ambiguous and equivocal statements about their attitudes toward the death penalty also presented express trial court findings respecting the panelists' demeanor.

None involve the trial court's application of an erroneous qualification standard or misrepresentations of the panelists' statements.

All such decisions filed after Appellant's Reply Brief was filed will be discussed in descending order by year to ensure complete coverage.

In *People v. Poore* (2022) 13 Cal.5th 266, 294–296, this Court rejected a *Witt* error claim involving two panelists. Both had volunteered that they did not believe they could impose the death, even if they believed it to be the appropriate sentence. "Our death penalty cases are replete with similar examples of panelists whose excusals were upheld after they expressed

doubts about their personal ability to vote for the death penalty even when objectively, in their judgment, the facts would warrant it. [Citations.]" (*Id.* at pp. 295–296.)

In *People v. Pineda* (2022) 13 Cal.5th 186, 214–217, this Court found that the trial court acted within its broad discretion in removing, after voir dire, a panelist who had responded "yes" to the questionnaire inquiry, "No matter what the evidence shows, would you refuse to vote for guilt as to first degree murder or refuse to find the special circumstances true in order to keep the case from going to the penalty phase, where death or life in prison without the possibility of parole is decided?" (*Id.* at p. 214) This Court noted that some of the panelist's responses, "if credited, indicated an ability to properly discharge the duties of a juror, there was also sufficient evidence of substantial impairment to support a contrary determination." (*Id.* at p. 217.) The trial court's comments that the panelist "`lists in the wind' and that his `statement that he can be fair isn't the final conclusion' convey a critical assessment of the prospective juror's credibility during voir dire" clearly justified by the panelist's meandering and inconclusive statements on voir dire. (*Id.* at p. 215.)

In *People v. Johnson* (2022) 12 Cal.5th 544, 620–621, the challenged prospective juror expressed doubt about whether she could "personally recommend the death sentence for another human being," and felt that a life sentence was her "punishment of choice for all but the most extreme cases." "Critically, she stated that her "religious scruples," rather than "principles of law," would be "foremost," and when asked if she could follow the

law, she responded: `I really don't know whether I could do it or not. I have a feeling it would be something that would weigh on me terrible."

In *People v. Scully* (2021) 11 Cal.5th 542, this Court found the record fairly supported excusing a panelist who stated that she did not want to be responsible for deciding death because doing so would not be good for her mental health and she questioned whether people have the right to do so. She stated that she did not know if she would be able to set aside her personal beliefs about the death penalty and apply the law, rules, and instructions as given to her by the court, and later conveyed that she did not think she could do so. She said, "I would certainly try – but I am subject to emotions like anyone else, and I do rely on intuition to guide me through much of life." (*Id.* at pp. 577–578.)

In *People v. Baker* (2021) 10 Cal.5th 1044, 1086–1088, this Court deferred to a trial court's express demeanor-based findings of substantial impairment in its removal of two panelists, one of whom who gave "I don't know" answers about the ability to impose death if that was the appropriate sentence. (*Id.* at p. 1086.) The other one anticipated difficulty sentencing someone to death if doing so ran counter to the judge's instructions. When asked whether he would feel comfortable serving as a juror, he indicated that he was "going to have a hard time with my own feelings of guilt if I start to tend towards the guilty aspect." (*Id.* at p. 1087.) This Court noted that it was the "finding of substantial impairment that supports the excusal" of that panelist. (*Id.* at p. 1087, fn. 4.)

In *Poore, Pineda, Johnson, Scully,* and *Baker,* and in most of the earlier cases to be discussed, the panelists *also* spoke words

akin to JW's statements respecting the death penalty. But the fact that some of their responses indicated moderate opposition to the death penalty, leanings against it, or otherwise resemble JW's responses, does not matter. What matters is that JW's responses do not include any of the references to any mental weakness or extraneous influences having the power to dictate her verdict. The individual moral values that the instructions invite jurors to consider are *not* extraneous influences or mental impediments to performing the duties of a capital juror, according to the instructions and as declared by the prosecutor on voir dire.

In *People v. Turner* (2020) 10 Cal.5th 786, this Court found substantial evidence supporting the removal of Prospective Juror No. 4 who said she "would not vote for death" when the court asked if she could do so and whose demeanor and other answers on voir dire satisfied the trial court that she would not do so fairly. (*Id.* at pp. 812–814.) Likewise, removal of Prospective Alternate Juror No. 1 was affirmed despite his equivocal answers. "Although the juror said he would `do his duty,' the court found his answers indicated he would not be able to vote for death, `especially if there were any people in the courtroom related to the defendant.'" (*Id.* at pp. 814–815.)

In *People v. Schultz* (2020) 10 Cal.5th 623, this Court found no error in removing Prospective Juror A.A. and M.M. The former wrote on his questionnaire that his religious and moral views would make it difficult for him to be fair in a death penalty case, and that his feelings against the death penalty were so strong that he would always vote against it. (*Id.* at p. 648.) On voir dire, he said he thought he could follow the court's instruction, and that he would try to do so, but he would always pick life in prison

if given th choice. This court noted that the answers given by A.A. included a statement of belief that the death penalty was "unbiblical," that it served no purpose, and would always choose life if given a choice. (*Id.* at pp. 650–651.) Prospective Juror M.M. had declared, on voir dire, that she could never impose the death penalty. (*Id.* at pp. 652–654.)

In *People v. Silveria & Travis* (2020) 10 Cal.5th 195, this Court found substantial evidence to support the disqualification of Prospective Juror J-56 who said, *inter alia*, "I do not think that I could award the death penalty to someone. A person should not take another person's life" and would be hard to keep my feelings about sentencing another person to death from my final analysis (and yet follow[] the law as it was explained)." He answered "Yes" when asked if he had any home or work problems "that might interfere with [his] ability to concentrate during this trial," noting in part "the expected stress of knowing that I am part of the decision process for awarding [the] death penalty." (*Id.* at pp. 246–247.) This Court also found no error in excusing Prospective Juror E-45 who wrote that he would always reject death as a sentencing option regardless of the evidence (*id.* at pp. 250–252) or Prospective Juror F77, who said he considered the death penalty to be state-sanctioned murder. (*Id.* at p. 255.)

In *People v. Suarez* (2020) 10 Cal.5th 116, 142–143, this Court heard no claim against the trial court's qualification test or the factual basis for the ruling, and substantial evidence for excusing Prospective Juror Deborah B., who said she did not believe the imposition of the death penalty should be "up to" her and "there is no reason to put on a penalty phase because [she] wouldn't listen to or weigh the aggravating and mitigating circumstances

in any meaningful way because whatever ended up happening [she'd] be voting for life without parole rather than death anyway."

In *People v. Flores* (2020) 9 Cal.5th 371, 387–388, this Court likewise faced no issue respecting the trial court's qualification test or factual basis for the ruling, and found substantial evidence to support the removal of S.M., a panelist who, when asked about his ability to set aside his personal views and follow the law, gave equivocal and inconsistent answers and "acknowledged he was not sure he could `in good conscience' vote for death and agreed that serving as a juror in a capital case would put him in `a moral dilemma.'"

In *People v. Beck & Cruz* (2019) 8 Cal.5th 548, 604–620, the removal of nine panelists was supported by the record of their statements. Panelist D.D. had said that she would "be fine during the guilt phase of the proceeding; but once we got to the penalty phase, I'm sure that it would take a lot-it would take really a serious leap of some sort-and I'm not sure I'd be able to make it-to impose the death penalty." (*Id.* at p. 605.) No matter how aggravated the case, she would "still believe it was not right to have a part in the death of someone else in this manner." (*Ibid.*)

Panelist B.D. told the court that he would never impose the death penalty and that his feelings about the death penalty would interfere with his ability to function as a juror. (*Id.* at p. 611.)

Panelist C.F. told the court she did not think the death penalty was appropriate in any situation, and that her feelings

about it were so strong that he could not find a defendant guilty of first degree murder or find a special circumstance to be true. (*Id.* at p. 612.)

Panelist E.D. wrote that she had religious views that would not allow her to vote for the death penalty, and confirmed same on voir dire. (*Id.* at 614–615.)

Panelist C.S. expressed similar religious views, adding that anyone who takes a life has God's judgment upon him. (*Id.* at pp. 615–616.)

Panelist C.D. wrote that he would never under any circumstances impose the death penalty, and confirmed on voir dire that he believed his feelings about the death penalty would interfere with his ability to function as a juror in this case. (*Id.* at pp. 616–617.)

Panelist D.M.'s voir dire confirmed that she felt the same way as C.D., and added that she did not think she could put aside her beliefs and vote for the death penalty. (*Id.* at p. 617.)

Panelist C.G.'s voir dire confirmed the same disqualification grounds as C.D. and D.M. (*Id.* at p. 618.) Panelists E.M. and P.J.'s voir dire produced the same, plus religious grounds for refusing to impose death. (*Id.* at p. 619.)

In *People v. Johnson* (2019) 8 Cal5th 475, 513–514, this Court found no abuse of discretion in the removal of a panelist who revealed on voir dire that she would not be open to returning a verdict of death after being informed that her instructions would not require her to do so.

There was no challenge to the qualification test, and no misstatement of the record by the trial court. Deference was given to the trial court's ruling accordingly. Nevertheless, it bears

mention that JW made no statements indicating lack of openness to imposing the death penalty in reaction to the prosecutor's disclosure that no instruction would require her to impose death, nor to set aside her own values in considering whether to do so. The trial court's mistaken recollection that JW said she would consider imposing death only in one percent of the cases does not support an inference that JW was like the panelist in *Johnson*.

In *People v. Spencer* (2018) 5 Cal.5th 642, this court found no error in excusing a panelist who, when asked in the questionnaire whether he could put aside his "personal feelings" and "follow the law as the court explains it to you," answered "Yes," but "with the possible exception of the death penalty." He also mentioned his "reluctance about the death penalty" as something which may affect his ability to be a juror or his participation as a juror in this trial. He further stated that he did not know whether he could choose the death penalty even "in the appropriate case." (*Id.* at p. 659.)

When probed by the court during oral examination about whether he "would always vote against the death penalty despite any aggravating or negative evidence that may have been presented," the juror answered "I don't know." (*Id.* at p. 659.) In discounting the panelist's answer that he could "imagine things horrible enough to get [him] to vote for the death penalty" the trial court noted that he thought a long time before giving his answer. (*Id.* at p. 662.)

In *People v. Penunuri* (2018) 5 Cal.5th 126, 141, the challenged panelist wrote on his questionnaire that he was "not sure" whether his religious objections to the death penalty would affect his ability to render a death verdict. And on voir dire, he

raised his hand to include himself within the group of prospective jurors who could not vote for the death penalty under any circumstances, which was consistent with his response on the questionnaire that he was "not sure that any" types of cases justify the death penalty.

In *People v. Hardy* (2018) 5 Cal.5th 56, the first challenged panelist "made clear that he could impose the death penalty only if the law compelled him to do so. " (*Id.* at p. 72.) The second one repeatedly indicated that his religious upbringing and views might interfere with his ability to decide whether to impose the death penalty. (*Id.* at p. 73.)

In *People v. Rices* (2017) 4 Cal.5th 49, 79, the challenged panelist said, "I remember this robbery happening very well. . . . I just have a very unsettling feeling in my stomach" and other things indicating making a penalty decision would be exceptionally stressful for her, and that she could only try to be fair.

In *People v. Wall* (2017) 3 Cal.5th 1048, 1062, the challenged panelist said, "I feel that I'm not the one to make a judgment on something like that" and said she had "a problem with dealing with that particular part of being a juror."

Finally, in *People v. Jones* (2017) 3 Cal.5th 583, 613, the challenged panelist "explained that he was Roman Catholic, and that he accepted the church`s view of capital punishment, which he articulated as follows: `The death penalty should only be imposed when life in prison without possibility of parole cannot be "absolutely" implemented to protect society.'"

Appellant's Reply Brief was filed on June 28, 2017. In compliance with Rule 8.520 (d)(1), this supplemental brief will

not attempt to discuss earlier decisions. But it is fair to observe that this Court's many older decisions rejecting *Witt* error claims create no better template than the most recent cases for rejecting this appellant's claim. They involved no erroneous qualification test, no misstatement of what the panelists said in declaring them disqualified, and substantial evidence supporting an inference of impairment in ability to follow the court's instructions and the juror's oath.

And, as *Armstrong* makes clear, finding a juror to be disqualified without substantial evidence, and the application of an erroneous legal standard, are independent grounds for granting relief.

III. FAILURE TO COMPLY WITH THE LEGISLATURE'S CLEARLY EXPRESSED LIMITATION ON DEATH QUALIFICATION OF CALIFORNIA JURIES VIOLATED THE SEPARATION OF POWERS AND APPELLANT'S CONSTITUTIONAL RIGHTS

A. Introduction

California 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 previous arguments, the trial court did not follow the dictates of the statute, and instead 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* (1980) 447 U.S. 343, 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 guilty, only the penalty judgment needs to be reversed if this Court accepts appellant's arguments.

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. The Decision of this Court in People v. Riser Deprived Appellant of Federal Due Process by Directing Trial Courts to Ignore Statutory Language in Purging Death Penalty Opponents Whose Views Precluded Return of a Death Sentence, but Did Not Impair Their Ability to Find The Defendant Guilty

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*, *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*, *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*, *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 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,

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[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 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.)

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. under any circumstances. If 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 like JW 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 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., Amends. 6, 14; *Witherspoon v. Illinois* (1968) 391 U.S. 510, 521; Cal. Const. art I, sec. 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*, *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

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

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, 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 Penalty Judgment is Required

In addition to lacking federal constitutional footing, the persistence of the *Riser* rule violated appellant's federal constitutional rights. A statutory right to a jury that has not been purged of death penalty objectors who are able to decide guilt is, like the right to a jury with sentencing discretion in *Hicks*, one "that substantially affects the punishment imposed." (*Hicks v. Oklahoma*, *supra*, 447 U.S. at pp. 343, 346.) Although the People are entitled to remove death penalty opponents by peremptory challenge, the number of such challenges is limited by statute. The State cannot prove the error harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Also, there is more than a reasonable possibility that at least one juror would have voted for life if the panel had not been tilted in favor of death by the application of a non-statutory death qualification standard. (*People v. Brown* (1988) 46 Cal.3d 432, 446–449 [applying this standard to all penalty phase errors].)

CONCLUSION

For all the reasons argued above, the sentence of death must be reversed.

Respectfully submitted,

Dated: October 16, 2023

By: /s/ Jeanne Keevan-Lynch

Attorney for Defendant and Appellant
GLEN TAYLOR HELZER

CERTIFICATE OF COMPLIANCE

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Dated: October 16, 2023 By: /s/ Jeanne Keevan-Lynch
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STATE OF CALIFORNIA
Supreme Court of California

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