IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, v. JOHN ALEXANDER RICCARDI, Defendant-Appellant.	Crim. No. S056842

Appeal from the Superior Court of the State of California
County of Los Angeles (Case No. A086662)
The Honorable David D. Perez, Judge

APPELLANT'S SECOND SUPPLEMENTAL BRIEF

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SECOND SUPPLEMENTAL BRIEF

I. APPELLANT WAS DENIED HIS RIGHT TO A FAIR JURY AND A RELIABLE VERDICT WHEN THE COURT EXCUSED JURORS FOR CAUSE BASED ON QUESTIONNAIRE RESPONSES WITHOUT VOIR DIRE

A. INTRODUCTION

On December 9, 2003, appellant filed an opening brief. On June 22, 2004, appellant filed a supplemental brief, regarding *Crawford v. Washington* (2004) __U.S.__[124 S.Ct. 1354.] On September 7, 2004, respondent's brief was filed.

After appellant filed the first supplemental brief, this Court reversed a death judgment in *People v. Stewart*, 33 Cal.4th 425 (July 15, 2004), holding for the first time that the trial court erred in excusing for cause a number of jurors based solely

on the jurors' responses to questions in a written questionnaire concerning their views relating to the death penalty, without any opportunity for follow-up questioning. Appellant now raises this new issue, as the subsequent case law above clarified its importance.

In the case at bar, as outlined below, four jurors were excused by the trial court over defense objection, based solely on their written questionnaire answers. Without further oral questioning to clarify their written responses, it was error to excuse these jurors, requiring reversal of the penalty judgment. (*Wainwright v. Witt* (1985) 469 U.S.12; *Gray v. Mississippi* (1987) 481 U.S. 648.)

B. THE RECORD

In this case, the trial court, with input from counsel, prepared a 19 page written questionnaire for completion by the prospective jurors.

Questions No. 57 through 69 focused on prospective jurors' views concerning the death penalty--read in relevant part as follows:

Attitudes Regarding Death Penalty

57. What are your general feelings regarding the death penalty?

58. Have you watched TV shows about individuals facing execution or which depicted an execution?

59. Do you feel the death penalty is used too often, too seldom, or randomly?

60. Do you belong to any group which advocates either increased use or abolition of the death penalty?

61. Did you actively support passing the law which reinstated the death penalty in California?

62. Do you believe in the adage: an eye for an eye?
    A. Is your view based on a religious conviction?
    B. If you believe in an eye for an eye, how strong is your belief?

63. Do you believe the state should impose the death penalty upon everyone who for any reason:
    a. kills another human
    b. Intentionally kills another

64. Do you believe you should hear and review all of the circumstances surrounding the killing before you decide whether the state should impose the death penalty?

65. Could you set aside your personal feelings re what the law ought to be and follow the law as the court explains it to you?
    A. If the court instructs you that California has not adopted the eye for an eye principle, will you try to put the concept of eye for an eye out of your mind and apply the law the court gives you?
    How difficult would this be for you?
    Do you feel you can do this?

66. If the people prove to you beyond a reasonable doubt that the defendant is guilty of murder in the first degree, would you refuse to vote for such a verdict because you oppose the death penalty and know that voting for a guilty verdict would oblige you to consider the death penalty?

67. If the people prove the special circumstances alleged are true, would you refuse to vote for such a verdict because you oppose the death penalty and know that voting for a true special circumstance verdict would oblige you to consider the death penalty?

68. Do you have such an opinion concerning the death penalty

that regardless of the evidence, you would automatically refuse to vote for the death penalty in any case.

69. Do you have such an opinion concerning the death penalty that regardless of the evidence, you would automatically vote for the death penalty in any case and under no circumstances vote for a verdict of life imprisonment without parole?

(4 Supp CT 1016 - 1019.)

Jurors completed the questionnaire that included items intended to probe each potential juror's views on the death penalty. The trial judge and counsel then met to review the written responses and to rule on stipulated challenges for cause. Two jurors were excused for cause, without objection, or by stipulation. Three prosecutor challenges for cause were denied when the defense objected, and three defense challenges for cause were denied when the prosecutor objected. (5 RT 589-618.) However, four additional jurors were excused for cause over defense objection. That process resulted in four prospective jurors being excused for cause over defense objection, based solely on the questionnaire responses.

The questionnaires of the four disputed jurors were examined closely in closed session. While the prosecution contended that the questionnaires established a basis for dismissal for cause, defense counsel pointed out the amibiguity and confusion in the answers. (5 RT 591-607.)

The four disputed jurors expressed opposition to or support for the death penalty in their responses; one juror wrote "yes" that he would set aside his

personal feelings and follow the law as the court explained it; three responded "yes" that they would hear and review all the circumstances surrounding the killing before deciding whether the state should impose the death penalty. Three jurors wrote "yes" in answer to question 68, that they would refuse to vote for the death penalty. Written explanations of these responses further complicated the responses.

As to the four jurors, defense counsel lodged an objection to the prosecutor's motion to excuse for cause. The defense claimed that their written answers were ambiguous, and urged the judge to question these jurors personally before making a ruling. The objections were overruled, the trial court finding sufficient clarity in the questionnaire responses. (5 RT 593-596.)

The four jurors in question gave the following responses in writing:

Adan Kraus wrote "I disagree" in answer to question 57, regarding his general feelings about the death penalty. (4 Supp CT 1016.) As to question 59, he wrote that he thought the death penalty was used too often. But he wrote "yes" in answer to question 65, that he could set aside his personal feelings and follow the law. (4 Supp CT 1017.) He answered "yes" on question 66, asking that if the people prove beyond a reasonable doubt that the defendant is guilty of first degree murder, would he refuse to vote for such a verdict. And he answered "yes" to question 68, asking if he would refuse to vote for the death penalty in any case. (4 Supp CT 1019.)

Norma Klemm answered question 57 regarding general feelings about the death penalty, "In most cases it is not used enough. If the death penalty sentence is given it is not done for many years later. They are too leanente [sic] with the criminals." (7 Supp CT 2076.) Klemm wrote "yes" in answer to question 61, asking if she actively supported the reinstatement of the death penalty in California, and wrote "yes" in answer to question 62, which asked if she believed in "an eye for an eye." (7 Supp CT 2077.)

Klemm wrote "yes" in response to question 64, affirming that she believed she should hear all the circumstances surrounding the killing before deciding whether the state should impose the death penalty, but wrote "no" in response to question 65, asking whether she could set aside her own feelings and follow the law. (7 Supp CT 2077.) Klemm answered "yes" to 65 A, asking that if the court instructed her to put the concept of "eye for an eye" out of her mind, could she do so and apply the law the court gave her. (7 Supp CT 2078.) Klemm also wrote "yes" in response to question 66: that she would refuse to vote guilty on first degree murder because it would obligate her to consider the death penalty. She then answered "no" to question 67, whether she would refuse to vote for a finding of special circumstances for the same reason. (7 Supp CT 2079.) Klemm wrote "no" in answer to question 68, which asked whether her opinion was such that she would automatically refuse to vote for death, and "no" to question 69, whether she

would automatically vote for life. (Id.)

Eula Hawthorne wrote in answer to question 57, regarding her general feelings about the death penalty, "I think it is wrong to take a life for any reason, the chance of error is too great, I think to spend one's life in prison is a more severe punishment than death." In answer to question 59, she wrote that the death penalty was used "too random." (7 Supp CT 1816.) Hawthorne wrote "yes" in answer to question 64, which asked if she would hear and review all the evidence before deciding whether the state should impose the death penalty (7 Supp CT 1817.) In answer to question 65, about whether she could set aside her own feelings and follow the law, she wrote, "no, not if it includes the death penalty." (Id). Hawthorne provided contradictory answers on the next set of questions. She answered "no" to questions 66 and 67, asking if she would refuse to vote guilty if the people proved first degree murder or special circumstances, but she wrote "yes" to question 68, what asked, "do you have such an opinion regarding the death penalty that you would automatically refuse to vote for the death penalty. (7 Supp CT 1819.)

Jill Flomenhoft wrote in answer to question 57 that the government should not have the right to execute a citizen, that there is always a possibility that the accused is innocent, and that the cost of appeals us greater than the cost of imprisonment (3 Supp CT 736.) But she wrote "yes" in answer to question 64, that

she believed she should hear all the circumstances surrounding the killing before deciding whether the state should impose death. (3 Supp CT 737.) Flomenhoft wrote "no" in response to the question 65, asking whether she could set aside her personal feelings regarding what the law ought to be and follow the law as the court explains it. (Id.) And to question 68 she wrote "yes", she would automatically refuse to vote for death. (3 Supp CT 738.)

C. THE LAW

Appellant was entitled to a fair and impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution. (*Duncan v. Louisiana* (1968) 391 U.S. 145; *Turner v. Louisiana* (1965) 379 U.S. 466.). Appellant is also entitled to the Eighth and Fourteenth Amendment requirements of heightened reliability in the death-determination process (*Johnson v. Mississippi* (1988) 486 U.S. 486, 584; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

A prospective juror may be excluded for cause based upon his or her views concerning the death penalty only if the juror's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Adams v. Texas* (1980) 448 U.S. 38, 45; *Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Heard* (2003) 31 Cal.4th 946.)

In *People v. Stewart* (2004) 33 Cal.4th 425, this Court reversed a death judgment, holding that the trial court had erred in excusing for cause a number of

jurors based solely on the jurors' responses to questions in a written questionnaire, without giving an opportunity for additional voir dire by counsel or the judge. The language of the questionnaire was not clear, asking the juror whether his or her beliefs would "prevent or make it very difficult" for the juror to return a death sentence; the five excused jurors responded "yes" to that question, but "no" to questions whether their views as to the death penalty would affect their ability to return a guilty verdict or finding true a special circumstance allegation. In striking down this procedure, this Court held that U.S. Supreme Court decisions have made it clear that an individual's personal conscientious objection to the death penalty is not a sufficient basis for excusing the prospective juror for cause, the Court stated explicitly that a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instruction by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law. (*People v. Stewart, supra*, 33 Cal 4th at 446.) This Court noted that the jury questionnaire in *Stewart* did not provide enough information to determine whether the five prospective jurors in question felt so strongly about the death penalty that their performance as jurors would in fact be substantially impaired, and for that reason, reversed the penalty judgment.

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D. ANALYSIS

Before granting a challenge for cause concerning a prospective juror, over the objection of another party, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would prevent or substantially impair the performance of his or her duties as defined by the court's instructions and the juror's oath. (*Witt, supra*, 469 U.S. 412, 424); (*People v. Ochoa* (2001) 26 Cal.4th 398, 431.) The prosecution, as the moving party, bore the burden of demonstrating to the trial court that this standard was satisfied as to each of the challenged jurors. (*Witt, supra*, 469 U.S. 412, 423.)

A prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case under *Witt, supra*, 469 U.S. 412. Not all those who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176.)

It is true that in the case at bar, three of the four jurors at issue (Flomenhoft, Krause, Hawthorne), wrote "yes" in answer to question 68, "Do you have such an opinion concerning the death penalty that regardless of the evidence, you would

automatically refuse to vote for the death penalty in any case."

However, Kraus also affirmed in answer to question 65, that he could set aside his personal convictions and follow the law. The ambiguity apparent in these two answers made further questioning necessary. Absent clarifying follow-up examination by the court or counsel, during which the court would be able to further explain the role of jurors in the judicial system, examine the prospective juror's demeanor, and make an assessment of that person's ability to weigh a death penalty decision, the bare written response was not by itself, or considered in conjunction with the checked answer, sufficient to establish a basis for exclusion for cause.

Nor did the brief written answers supplied by the four prospective jurors, considered in conjunction with their checked answers to the questions, provide an adequate basis upon which to dismiss any of those jurors for cause.

As noted above, Prospective Juror Klem wrote "no" in answer to question 68, whether her opinion was such that she would automatically refuse to vote for death, and "no" to question 69, whether she would automatically vote for life. (7 Supp CT 2079.) Absent clarifying follow-up examination and an opportunity to assess her demeanor while examing this issue, excusing Klem for cause was error.

Prospective Juror Hawthorne wrote, "I think it is wrong to take a life for any reason, the chance of error is too great, I think to spend one's life in prison is a

more severe punishment than death." (7 Supp CT 1816.) These two sentences state a generalized opposition to the death penalty, and approval of the sentence of life in prison without possibility of parole. But as noted above, *Lockhart*, supra, 476 U.S. 162, 176, makes clear that many members of society--and thus many prospective jurors--may share those exact same sentiments, and yet remain qualified to sit as a juror under the standard set out in *Witt, supra*, 469 U.S. 412, 424. And this Court has said that the explanation given by Hawthorne reflecting a concern regarding the risk of error in the criminal justice process, is not disqualifying by itself or considered in conjunction with the checked answers. (*Stewart*, supra, 33 Cal 4th at 449.)

To be sure, prospective juror Flomenhoft's checked answer to question No. 68 and written comments quoted above provided a preliminary indication that the prospective juror might prove, upon further examination, to be subject to a challenge for cause. But disagreement with the current state of the law is not disqualifying by itself, either alone or considered in conjunction with the checked answers. (*Id.*) At a minimum, the jurors' written responses were ambiguous and showed a need for clarification on oral voir dire.

Appellant is unaware of any authority upholding the practice of excusal for cause over defense objection based solely on written questionnaires. In *U.S. v Chanthadara* (10th Cir. 2000), 230 F.3d 1237, the U.S. Court of Appeals for the

Tenth Circuit reversed a death judgment after the trial court, over objection, excused nine jurors for cause, based solely on their questionnaire.

In according deference on appeal to trial court rulings on motions to exclude for cause, appellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person's responses , noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor, gleans valuable information that simply does not appear on the bare appellate record. (*Chanthadara, supra*, 230 F.3d 1237, 1270.) The determination about whether a venireman is biased has traditionally been made through voir dire culminating in a finding by the trial judge concerning the venireman's state of mind, the judge's conclusion is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province. The manner of the juror while testifying is often more indicative of the real character of his opinion than his words alone. (*Witt, supra*, 469 U.S. 412, 428.)

In the present matter, however, the trial court's determination was informed by nothing beyond the cold and ambiguous record of the four prospective jurors' check marks and brief handwritten comments. As explained above, that information was insufficient to support an assessment, required by *Witt, supra*, 469 U.S. 412, 424, that any of the four prospective jurors would be unable faithfully to perform the duties required of a juror under the law.

E. REVERSAL IS REQUIRED

For the reasons set forth above, the record does not support the trial court's excusals for cause under the governing legal standard (*Witt, supra*, 469 U.S. 412, 424.) Under the compulsion of United States Supreme Court cases, as in *Stewart*, this error requires reversal of defendant's death sentence, without inquiry into prejudice. (*Gray v. Mississippi,* (1987) 481 U.S. 648, 659-667; *People v. Stewart, supra,* 33 Cal.4th at 682.)

The penalty judgment in this case must be reversed.

Respectfully submitted,

10/15/04

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John A. Riccardi

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff and Appellee,

No. S056842

v.

JOHN ALEXANDER RICCARDI,
Defendant and Appellant.

CERTIFICATE OF WORD COUNT

I, CARLA J. JOHNSON, counsel on appeal for appellant JOHN A. RICCARDI in Appeal No. S056842, certify that Appellant's Supplemental Opening Brief consists of 3206 words, excluding tables, proof of service, and this certificate, according to the word count of the word-processing program with which the brief was produced. (Cal. Rules of Court, rules 14 (c), 37(d).)

DATE: October 15, 2004

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PROOF OF SERVICE BY MAIL

I am a resident of the County of Los Angeles, I am over the age of 18 years and not a party of the within entitled action. My business address is: Attorney Carla J. Johnson, P.O. Box 30478, Long Beach, CA 90853.

On October 16, 2004, I served MOTION FOR 2ND SUPPLMENTAL BRIEF, DECLARATION OF COUNSEL, APPELLANT'S 2ND SUPPLEMENTAL BRIEF, CERTIFICATE OF WORD COUNT, by placing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at: Long Beach, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on October 16, 2004 at Long Beach, California.

Carla J. Johnson