IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOHN ALEXANDER RICCARDI,

Defendant and Appellant.

S056842

CAPITAL CASE

Los Angeles County Superior Court No. A086662
The Honorable David Perez, Judge

SUPPLEMENTAL BRIEF IN RESPONSE TO APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

SHARLENE A. HONNAKA
Deputy Attorney General

STEPHANIE C. BRENAN
Deputy Attorney General
State Bar No. 183790

300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2056
Facsimile: (213) 897-6496

Attorneys for Respondent

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In a Second Supplemental Opening Brief, appellant contends that his rights to a fair and impartial jury and his entitlement to a reliable death determination process under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution were violated by the dismissal of four prospective jurors based solely on their responses to a written questionnaire. (Supp.II Brief at 1-14.) Appellant's contentions are meritless because the responses of all four jurors indicated that their views regarding the death penalty would have prevented or substantially impaired the performance of their duties as jurors. (See *Wainright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841] (*Witt*).)

A. Legal Standard

A prospective juror in a capital case may be challenged for cause based upon his or her views regarding capital punishment only if those views would "prevent or substantially impair the performance of the juror's duties" as defined by the court's instructions and the juror's oath. (*Witt, supra*, 469 U.S. at p. 424; *People v. Stewart* (2004) 33 Cal.4th 425, 440-441 (*Stewart*).) Prospective jurors may be properly excluded if they are "unable to conscientiously consider all of the sentencing alternatives, including the death

penalty where appropriate." (*Stewart, supra,* 33 Cal.4th at p. 441, quoting *People v. Cunningham* (2001) 25 Cal.4th 926, 975, internal quotation marks omitted.) "The real question is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror.* [Citation.]" (*People v. Heard* (2003) 31 Cal.4th 946, 958, quoting *People v. Ochoa* (2001) 26 Cal.4th 398, 431, internal quotation marks omitted, emphasis in original.)

In order to grant a challenge for cause of a prospective juror over a party's objection,

> 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) [citation] in the case before the juror [citation].

(*Stewart, supra*, 33 Cal.4th at p. 445, internal quotation marks omitted.)

"Substantial evidence is the standard of review applicable to a finding on the potential effect of a prospective juror's views related to capital punishment. [Citations.]" (*People v. Griffin* (2004) 33 Cal.4th 536, 558.) The same standard applies to "the threshold finding regarding the nature of such views: Such a finding, [this Court] [has] stated, is generally binding if the prospective juror's responses are equivocal . . . or conflicting. [Citations.]" (*Id.* at pp. 558-559, ellipses in original, internal quotation marks omitted.)

It appears, however, that the trial court's determination is not entitled to deference when the determination is made solely upon a written record. (*Stewart, supra,* 33 Cal.4th at p. 451.) When the decision is made on a written record, the trial court's decision is not based on an assessment of the prospective juror's demeanor or credibility which are traditionally entitled to deference. (*Ibid.*) When the trial court's determination is based solely on the

written record, the appellate court is presented with the same record and information as the trial court, and the trial court's determination does not receive the deference it would have been accorded if it were based on oral voir dire of the prospective juror. (*Ibid.*; see *United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1270 [observing that "the discretion generally accorded the [trial] court is based on its ability to assess the credibility of prospective jurors upon observing their demeanor in responding to questions," and thus reviewing *de novo* the trial court's determination that the prospective juror's questionnaire answers alone warranted dismissal for cause under *Witt*]; but see *United States v. Purkey* (8th Cir. 2005) 428 F.3d 738, 750-751 [rejecting *Chanthadara*'s "implicit assumption that a [trial] court's decision on the qualifications of a juror is entitled to deference only because of that court's superior position to assess a potential juror's demeanor and credibility," and instead applying abuse of discretion review to trial court's dismissal of prospective juror based solely on questionnaire answers].)

When a trial court erroneously excuses a prospective juror for cause on the ground that their views regarding the death penalty would substantially impair their ability to perform their duties as a juror, the defendant's death sentence is subject to reversal without any inquiry into prejudice. (*Stewart, supra,* 33 Cal.4th at p. 454; *Davis v. Georgia* (1976) 429 U.S. 122, 123 [97 S.Ct. 399, 50 L.Ed.2d 339].) But, the guilt verdict and the special circumstance findings are not subject to reversal. (*Stewart, supra,* 33 Cal.4th at p. 455.)

B. The Questionnaire

The prospective jurors in this case were provided with a questionnaire that asked the following questions regarding the death penalty:

57. What are your GENERAL FEELINGS regarding the death penalty?

58. Have you watched any television programs about individuals facing execution or which depicted an execution?

Yes __ No __

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

60. Do you belong to any group(s) which advocate(s) either increased use or abolition of the death penalty?

Yes __ No __

61. Did you actively support passing the law which reinstated the death penalty in California? Yes __ No __

62. Do you believe in the adage, "An eye for an eye"?

Yes __ No __

A. Is your view based on a religious conviction?

Yes __ No __ Explain:

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 being? Yes __ No __

B. Intentionally kills another? Yes __ No __

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?

Yes __ No __

65. Could you set aside your own personal feelings regarding what the law ought to be and follow the law as the court explains it to you?

Yes __ No __

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 "an eye for an eye" out of your mind and apply the new law the court gives you?

Yes __ No __

(1) How difficult would this be for you to do?

(2) Do you feel you can do this? Yes __ No __

Uncertain __

65.[1] In a death penalty case, there may be two separate phases or trials, one on the issue of guilty and the other on penalty. The first phase is called the "guilt" phase, where the jury decides whether the defendant is guilty of the charges against him and whether any of the "special circumstances" are true. The second phase is called the "penalty" phase. If, and only if, in the guilt phase, the jury finds the defendant guilty of first degree murder and further finds one or more of any alleged special

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1. The questionnaire contained two entries identified as number 65. The second entry informed jurors about the two phases of a capital trial, but it did not contain a question. Thus, in subsequent references to "question 65," respondent will be referring to the first entry inquiring whether the juror could set aside his or her personal feelings and follow the law as explained by the court.

circumstances to be true, then and only then would there be a second phase or trial in which the same jury would decide whether the penalty would be death or life imprisonment without possibility of parole. (Both "first degree murder" and "special circumstances" will be defined for you during the trial)

The jury determines the penalty in the second phase by weighing and considering certain aggravating factors and mitigating factors (bad and good things) that relate to the facts of the crime and the background and character of the defendant, including a consideration of mercy. The weighing of these factors is not quantitative, bu[t] qualitative. In other words, the jury, in order to fix the penalty of death, must be persuaded that the aggravating factors are so important and substantial in comparison with the mitigating factors, that death is warranted instead of life without parole.

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 obligate the jury to consider the death penalty?

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

68. Do you have such an opinion concerning the death penalty that, regardless of the evidence that might be developed during the penalty phase of the trial, should we get there, 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, should we get into the penalty phase of the trial, you would, in every case, automatically vote for a verdict of death and under no circumstances vote for a verdict of life imprisonment without the possibility of parole?

(7 Supp. CT 1816-1820.)

C. The Trial Court Did Not Err By Dismissing The Four Prospective Jurors

Relying on *Stewart*, appellant contends that the trial court erred by dismissing four prospective jurors: Adan K., Norma K., Eula H., and Jill F.[2/] (AOB 5-10.) Appellant contends that their views regarding the death penalty were, as expressed in the written questionnaires, ambiguous and that it was error for the trial court to dismiss these jurors based solely upon the written questionnaires and without allowing them to be questioned during oral voir dire. (AOB 10-14.) Appellant's contention is meritless because all four of the jurors were properly dismissed for cause based on their written statements regarding the death penalty.

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2. The record in this matter identifies the prospective jurors by name. (See Cal. Rules of Court, rules 31.3(c), 34.1(c).) Appellant also refers to the prospective jurors by their full names in his Second Supplemental Opening Brief. But, in order to protect the prospective jurors' identity from further dissemination, respondent will refer to the prospective jurors by first name and last initial. (See, e.g., *People v. Roldan* (2005) 35 Cal.4th 646, 696-699 [referring to two excused prospective jurors by their initials only].)

In *Stewart,* five prospective jurors were dismissed for cause based on their answers to questions regarding the death penalty in a written questionnaire. All five jurors had answered "yes" to question No. 35(1)(c), which asked whether they had a "conscientious opinion or belief about the death penalty which would prevent *or* make it very difficult" to "ever vote to impose the death penalty." (*Stewart, supra,* 33 Cal.4th at pp. 442-444, emphasis added.) The five jurors also provided explanations indicating a "general opposition" to the death penalty. (*Id.* at p. 448.)

On review, this Court in *Stewart* found the trial court had erred by dismissing the five prospective jurors based on their responses to the written questionnaire because "that information was insufficient to support an assessment, required by *Witt, supra*, 469 U.S. 412, 424, . . . that any of the five prospective jurors would be unable faithfully to perform the duties required of a juror by the law." (*Stewart, supra,* 33 Cal.4th at p. 451; see *id.* at pp. 441-452.) It concluded that question No. 35(1)(c) did not establish that the prospective jurors' views "prevent[ed] or substantially impair[ed]" their ability to perform as jurors, which this Court explained was the pertinent inquiry for disqualifying bias under *Witt*; rather, the question asked whether their opinions would "prevent or make it very difficult" to impose the death penalty, which was a nondisqualifying concept. (*Id.* at p. 447.) This Court explained:

> Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will "substantially impair the performance of his [or her] duties as a juror" under *Witt, supra,* 469 U.S.

412, 105 S.Ct. 844. In other words, the question as phrased in the juror questionnaire did not directly address the pertinent constitutional issue. A juror might find it very difficult to vote to impose the death penalty, and yet such 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 instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law.

(*Ibid.*) Thus, the trial court erred by equating "(i) the nondisqualifying concept of a very difficult decision by a juror to impose a death sentence, with (ii) the disqualifying concept of substantial impairment of a juror's performance of his or her legal duty . . . ." (*Ibid.*)

Furthermore, in *Stewart*, the five jurors' comments stating their "generalized opposition" to the death penalty also did not establish that they were subject to dismissal under *Witt* because a person who is generally opposed to the death penalty still may be able to set aside their personal convictions and fairly weigh the aggravating and mitigating circumstances. (*Stewart, supra,* 33 Cal.4th at pp. 447-448.)[3/] Consequently, the five prospective jurors' answers to the written questionnaire merely "provided a *preliminary* indication that each juror *might* prove, upon further examination, to be subject to a challenge for cause." (*Id.* at p. 449, emphasis in original.) But, their generalized opposition to the death penalty, even when combined with their ambiguous answer to question No. 35(1)(c), was not "sufficient information from which the court

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3. In *Stewart*, the jurors made the following specific statements: (1) Juror No. 8: "I do not believe a person should take a person's life. I do believe in life without parole." (2) Juror No. 53: "I am opposed to the death penalty." (3) Juror No. 59: "I do not believe in capit[a]l punishment." (4) Juror No. 93: "In the past, I supported legislation banning the death penalty." (5) Juror No. 122: "I don't believe in irrevers[i]ble penalties. A prisoner can be released if new information is found." (*Stewart, supra,* 33 Cal.4th at pp. 448-449.)

properly could determine whether a particular prospective juror suffered from a disqualifying bias under *Witt*." (*Id.* at p. 447.)

However, unlike the prospective jurors in *Stewart*, the views of the four prospective jurors at issue in the instant case were not ambiguous. All four of the jurors indicated that their views of the death penalty would prevent or substantially impair their ability to act as jurors, and the trial court properly dismissed them.

1. Prospective Juror Adan K.

In response to question 57 which asked the jurors to describe their general feelings about the death penalty, Prospective Juror Adan K. stated, "I desagri [sic]." (4 Supp. CT 1016.) He further indicated in response to question 59 that he believed the death penalty was used "to[o] often." (4 Supp. CT 1016.) In response to question 66, Adan K. indicated that, even if the People proved appellant's guilt beyond a reasonable doubt, he would refuse to find him guilty because of his opposition to the death penalty and the knowledge that a guilty verdict "would obligate the jury to consider the death penalty." (4 Supp. CT 1019.) Adan K. answered yes to question 68, which asked if he would "automatically and absolutely refuse to vote for the death penalty in any case" regardless of the evidence that was introduced in the penalty phase. (4 Supp. CT 1019.)

The prosecution sought Adan K.'s dismissal for cause due to his responses to questions 66 and 68, wherein he had stated that he would not find appellant guilty even if the prosecution proved his guilt beyond a reasonable doubt and that he would "automatically refuse to vote for death" regardless of the penalty phase evidence. The defense objected on the ground that he had stated in response to question 65 that he could set aside his personal feelings and follow the law. The court dismissed Adan K. for cause because his

answers were "unequivocal" and he had a "bias." (RT 606-607.)

The trial court did not err in dismissing Adan K. for cause. Unlike the prospective jurors in *Stewart*, Adan K. did not respond to an ambiguous, nondisqualifying question asking if he had a "conscientious opinion or belief about the death penalty which would prevent *or make it very difficult*" for him to impose the death penalty. (*Stewart, supra,* 33 Cal.4th at p. 444, emphasis added.) Rather, without qualification or equivocation, Adan K. answered "yes" to a question asking if he would refuse to find appellant guilty in order to avoid having to consider the death penalty. Further, he unequivocally and unqualifiedly answered "yes" to a question that asked if he would "automatically and absolutely refuse to vote for the death penalty" regardless of the evidence produced by the prosecution. (4 Supp. CT 1019.) These questions, unlike the question in *Stewart*, "directly addressed the pertinent constitutional question" because they asked about "the disqualifying concept of substantial impairment of a juror's performance of his or her legal duty . . . ." (See *Stewart, supra*, 33 Cal.4th at p. 447.)

Adan K.'s answers to these questions clearly demonstrate that his views regarding the death penalty "substantially impair" his ability perform as a juror in this case as defined in *Witt*. Adan K.'s answers did not indicate that he would find it "very difficult" to impose the death penalty, but stated that he would refuse to impose no matter what evidence was presented. His answers clearly show that "he [was] unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death [was] the appropriate penalty under the law." (*Stewart, supra,* 33 Cal.4th at p. 447; *id.* at p. 441 ["A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate."; internal quotation marks omitted].) Thus, Adan K. was properly dismissed

because his views regarding the death penalty "substantially impaired" his ability to perform as a juror. (*Witt, supra,* 469 U.S. at p. 424; *Stewart, supra,* 33 Cal.4th at p. 447-449.)

Appellant contends that there was an ambiguity because Adan K. indicated in response to question 65 that he could set aside his personal feelings about "what the law ought to be and follow the law as the court explains it to [him]." (Supp. II AOB 11, 4 Supp. CT 1017.) But, question 65 is a generalized question that does not reference the death penalty, and thus, Adan K.'s response to it does not indicate an ability to set aside his opinion regarding the death penalty. However, when specifically asked in questions 66 and 68 about how his opinion regarding the death penalty would impact his ability to fairly and impartially weigh the evidence in regard to appellant's guilt and the imposition of the death penalty, Adan K. answered that he would be unable to set aside his opinion and that he would not find appellant guilty or impose the death penalty due to his opposition to capital punishment. (4 Supp. CT 1019; see *People v. Cunningham*, *supra*, 25 Cal.4th at p. 982 [prospective juror properly removed for cause where she answered, among other things, that she would refuse to find the defendant guilty and find the special circumstances true in order to avoid discussing the death penalty].) Thus, Adan K.'s response to question 65 does not create an ambiguity regarding Adan K.'s ability to impose the death penalty.

2. Prospective Juror Eula H.

Appellant's challenge to Prospective Juror Eula H. is similarly unavailing. (Supp. II AOB 7, 11-12.) In response to question 57, which asked for her general feelings regarding the death penalty, Eula H. responded:

> 1. I think it is wrong to take a life for any reason. 2. [T]he chance of error is too great. 3. I think to spend one's life in prison is a more

severe punishment than death.

(7 Supp. CT 1816.) In response to question 59, Eula H. stated she thought that the death penalty was imposed too randomly. (7 Supp. CT 1816.) In response to question 65, which asked if she could set aside her personal feelings regarding what the law ought to be and follow the law as the court explains it, Eula H. marked the box indicating "no," and wrote next to the response, "not if it includes the death penalty[.]" (7 Supp. CT 1817.) In response to question 68, Eula H. indicated that her opinion of the death penalty was such that she would "automatically and absolutely" refuse to impose it regardless of the evidence introduced at the penalty phase. (7 Supp. CT 1819.)

The prosecution sought Eula H.'s dismissal due to her responses to questions 57, 59, and 68. The defense objected that Eula H.'s answer to question 64, indicating that she would listen to all of the evidence before deciding whether to impose the death penalty, and her answer to question 66, that she would find appellant guilty if the prosecution proved him guilty beyond a reasonable doubt, were in conflict with her other answers. The court found that Eula H. "could not be a fair and impartial juror," and dismissed her for cause." (CT 594-595.)

As with Prospective Juror Adan K., Eula H.'s answers to the questionnaire establish that her views regarding the death penalty substantially impaired her ability to act as a juror in this case. (*Witt, supra,* 469 U.S. at p. 424; *Stewart, supra,* 33 Cal.4th at p. 447-449.) In response to question 65, Eula H. explicitly wrote that she could not follow the law as explained by the trial court "if it include[d] the death penalty." (7 Supp. CT 1817.) Like Adan K., Eula H.'s answer clearly show that she was "unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death [was] the appropriate penalty under the law." (*Stewart, supra,* 33 Cal.4th at p. 447.) Furthermore,

her response to question 68 showed that her personal opinion would keep her from weighing the mitigating and aggravating factors because she would "automatically and absolutely" vote against the death penalty regardless of the evidence. (7 Supp. CT 1819.) As none of these questions were inherently ambiguous like the question in *Stewart*, Eula H. was properly dismissed as having a disqualifying bias. (*Witt, supra,* 469 U.S. at p. 424; *Stewart, supra,* 33 Cal.4th at p. 447-449.)

Appellant contends that Eula H.'s answers were contradictory because she indicated in response to questions 66 and 67 that she would find appellant guilty if the People proved the underlying crime and the special circumstances beyond a reasonable doubt. (Supp.II AOB 7.) However, Eula H.'s statement that she would convict appellant of the charged crime and special circumstances if the evidence supported such a verdict does not undermine or contradict her statements that she would automatically refuse to impose the death penalty. Thus, these answers do not prove, or even suggest, that Eula H.'s views were ambiguous when it came to her ability to impose the death penalty if warranted.

Relying on her responses to question 57, appellant contends that Eula H. only expressed a "generalized opposition" to the death penalty. (Supp.II AOB 11-12.) However, appellant fails to mention that Eula H. indicated in response to question 57 that she believed it was "wrong to take life for any reason." (7 Supp. CT 1816.) Moreover, appellant's argument completely ignores Eula H.'s responses to the other questions in which she stated her inability to follow the law and to impose the death penalty. Therefore, contrary to appellant's contentions, Eula H. expressed more than a generalized opposition to the death penalty; rather, she unequivocally stated that she was unwilling to impose it regardless of the law or the evidence.

3. Prospective Juror Jill F.

Appellant's challenge to the dismissal of Prospective Juror Jill F. is equally meritless. Jill F. answered question 57 regarding her general feelings toward the death penalty as follows:

> The government should not have the right to execute a citizen because there is always the possibility that the accused person is innocent. In addition, the cost of many appeals, etc . before an execution usually ends up being [far] greater than keeping someone in jail, I have been told.

(3 Supp. CT 736, emphasis in original.) Jill F. indicated that she had watched television programs regarding the death penalty and, based on these shows, the "government/justice system can make mistakes." (3 Supp. CT 736.) In response to question 59 asking about her feelings regarding the frequency the death penalty is used, she stated, "I feel uncomfortable whenever it [the death penalty] is used." (3 Supp. CT 736.) In response to question 65, Jill F. indicated that she could not set aside her personal feelings and follow the law as the court explained it. (3 Supp. CT 737.) Jill F. answered "Yes" to question 68, which asked if she would "automatically and absolutely" refuse to impose the death penalty regardless of the evidence developed at the penalty phase. (3 Supp. CT 739.)

The prosecution sought to have Jill F. dismissed due to her answers to questions 57 and 68. The defense objected on the ground that she had indicated in her answer to question 64 that she would review all of the circumstances of the crime before imposing the death penalty, and argued this raised a conflict in her answers. The trial court found that her answer to question 68 was cause for her dismissal. (Supp. CT 592-593.)

Like the prior dismissed prospective jurors, Jill F.'s answers to the questionnaire show that her personal opposition to the death penalty substantially impaired her ability to perform as a juror. She stated that she was

incapable of following the law as stated by the judge, and that she would refuse to impose the death penalty regardless of the evidence. (3 Supp. CT 737, 739.) Thus, Jill F. was "'unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate,'" and was properly dismissed. (*Stewart*, *supra*, 33 Cal.4th at p. 441, quoting *People v. Cunningham, supra,* 25 Cal.4th at p. 975.)

Without significant discussion, appellant conclusorily contends that Jill F.'s responses only "provided a preliminary indication that the prospective juror might prove, upon further examination, to be subject to a challenge for cause," and that her "responses were ambiguous and showed a need for clarification on oral voir dire." (Supp.II AOB 12.) But, there is no ambiguity in Jill F.'s responses indicating that she could not follow the law or impose the death penalty. Consequently, appellant's unsupported assertion that her responses were ambiguous must be rejected.

4. Prospective Juror Norma K.

Appellant raises a similarly meritless claim against Prospective Juror Norma K. (Supp.II AOB 6-7, 11.) In response to question 57 asking about her general feelings regarding the death penalty, Norma K. wrote:

> 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 to leanent [sic] with the criminals.

(7 Supp. CT 2076.) Norma K. indicated that she actively supported the passage of the law which reinstated the death penalty in California. (7 Supp. CT 2077.) However, in response to question 65, Norma K. stated that she could not set aside her own personal feelings and impose the law as explained by the court. (7 Supp. CT 2077.) In response to question 66, Norma K. indicated that she would not vote for a guilty verdict because she understood that it would

obligate the jury to consider imposing the death penalty. (7 Supp. CT 2078-2079.) In response to question 71, which asked if there was anything she felt that should be brought to the court's attention that might affect her ability to be fair and impartial, Norma K. marked, "Yes." (7 Supp. CT 2080.) Norma K. further explained, "I'm afraid I could not feel right in imposing the death penalty on someone even though I feel it is nessasary [sic] under some circumstances." (7 Supp. CT 2080.)

The prosecution sought to have Norma K. dismissed because she indicated in response to questions 66 and 71 that "she would vote against a verdict of guilt so that she wouldn't have to consider the penalty." The court noted that in response to question 65 that she had indicated that she "could not follow the law as the court explained it to her and set aside her own personal feelings." The defense cursorily objected, "We oppose the State's motion without further inquiry." The court then dismissed Norma K. for cause. (RT 595-596.)

Norma K.'s answers clearly indicated that her views about capital punishment "would prevent or impair" her ability to return a verdict of death. (*People v. Heard, supra,* 31 Cal.4th at p. 958.) Norma K. indicated that in spite of a theoretical support for the death penalty, she would not be able to personally impose it. (7 Supp. CT 2075-2076, 2080; see *People v. Griffin*, *supra*, 33 Cal.4th at pp. 559-560 [prospective juror properly excused for cause where she stated that "she supported the death penalty, [but] also stated that she did not know whether she actually could vote to impose the death penalty -- even in a case which she had concluded that the defendant deserved the death penalty[]"].) More significantly, she indicated that even if the prosecution proved appellant's guilt beyond a reasonable doubt, she would not vote for his guilt in order to avoid having to decide between the death penalty and life imprisonment. (7 Supp. CT 2078-2079; see *People v. Cunningham*, *supra*, 25

Cal.4th at p. 982.) Furthermore, she indicated that she was incapable of setting aside her personal views and following the law as explained by the court. (7 Supp. CT 2077; see *Stewart, supra*, 33 Cal.4th at p. 447.) Thus, her personal views substantially impaired her ability to act as a juror in this case, and she was properly dismissed for cause. (*Witt, supra,* 469 U.S. at p. 424; *Stewart, supra,* 33 Cal.4th at pp. 447-449.)

Appellant argues that there was a conflict in Norma K.'s answers because she had answered "no" to questions 68 and 69, which asked whether the prospective juror would automatically either impose the death penalty or automatically vote for a life sentence. (Supp. II AOB 11.) However, Norma K.'s responses to those questions were moot because she unequivocally indicated that she would avoid having to choose between death and life imprisonment by refusing to find appellant guilty in the first place. (7 Supp. CT 2078-2079.) Furthermore, Norma K.'s unequivocal statement that she could not put aside her personal biases and apply the law as explained by the trial court gave the court further grounds upon which to dismiss her. (7 Supp. CT 2077.) Consequently, the trial court did not err by dismissing Norma K. for cause.[4/]

D. The Dismissals Of The Four Prospective Jurors Based Solely On Their Responses To The Written Questionnaires Were Not Error

Appellant appears to question the practice of using questionnaires in dismissing prospective jurors for cause, stating that he "is unaware of any authority upholding the practice of excusal for cause over defense objection based solely on written questionnaires." (Supp.II AOB 12.) In *Stewart,* this

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4. Trial counsel's perfunctory objection to her dismissal, which was not supported by any legal argument, appears to indicate that even he knew Norma K. was subject to dismissal for cause. (RT 596.)

Court similarly noted that there was no "authority upholding such a practice." (*Stewart, supra,* 33 Cal.4th at pp. 449-450, footnote omitted.) But, in *Stewart*, this Court expressly stated that it was *not* holding "that a trial court never may properly grant a motion for excusal for cause over defense objection based solely upon a prospective juror's checked answers and written responses contained in a juror questionnaire." (*Id.* at p. 449, footnote omitted; see also *United States v. Chanthadara*, *supra*, 230 F.3d at p. 1269 ["[W]e reserve for another day the question of whether a trial court has an obligation to voir dire prospective jurors before removing them for cause based on their views on the death penalty."].) Appellant was unable to cite any authority barring this practice, and respondent also was unable to find any such authority.

The United States Supreme Court has stated that a prospective juror may be dismissed for cause when the record establishes that his or her views of the death penalty "prevent or substantially impair the performance of the juror's duties" as defined by the court's instructions and the juror's oath. (*Witt*, *supra*, 469 U.S. at p. 424.) The United States Supreme Court has never held that the record to support that determination must be based upon oral voir dire.

The skepticism expressed about the practice of excusing prospective jurors based solely on their written questionnaires appears to be based upon the trial court's inability to judge the prospective jurors' demeanor and credibility. (See *Stewart, supra,* 33 Cal.4th at pp. 448-450; *Chanthadara, supra,* 230 F.3d at p. 1269.) Recently, however, the Eighth Circuit rejected such skepticism and afforded deference to for-cause dismissals based solely on questionnaire answers, explaining:

> Other reasons, such as respect for the trial process, "the expertise developed by trial judges," and the desire to conserve judicial resources also underpin the fundamental principle that "appellate courts are not to decide factual questions *de novo*, reversing any findings they would

have made differently." [Citations.]

(*United States v. Purkey*, *supra*, 428 F.3d at p. 750.)

While it is undoubtedly true that the trial court cannot observe a juror's demeanor while he or she is answering written questions, written questionnaires enjoy numerous advantages in terms of guaranteeing accuracy that are not shared by oral voir dire. Unlike oral questioning, where the prospective jurors are required to give an immediate response to the question posed, written questionnaires allow jurors time to reflect upon the question asked before writing down an answer. Thus, the answers to written questions are likely to be a more thoughtful and accurate depiction of the prospective jurors' opinions because the jurors are provided the opportunity to carefully think out their answers before responding.

There is nothing suggesting that written questions are a less effective way of accurately determining a prospective juror's true feelings regarding the death penalty. While the absence of opportunity to make credibility determinations based on the prospective juror's demeanor might not warrant a trial court's excusal for cause, that should not make determinations for cause based on written questionnaires invalid per se. Rather, it must be remembered that a trial court may dismiss a prospective juror for cause if it has:

> 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) [citation] in the case before the juror [citation].

(*Stewart*, *supra*, 33 Cal.4th at p. 445, internal quotation marks omitted.) Consequently, the mere fact that all four jurors provided their disqualifying answers in response to a written questionnaire should not be grounds for reversal of the penalty.

CONCLUSION

Accordingly, respondent respectfully asks that the judgment be affirmed.

Dated: December 6, 2005

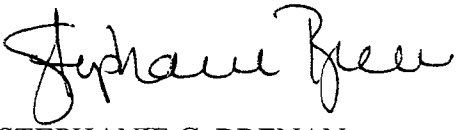
Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

SHARLENE A. HONNAKA
Deputy Attorney General



STEPHANIE C. BRENAN
Deputy Attorney General

Attorneys for Respondent

LA1997XS0008

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 5,995 words.

Dated: December 6, 2005

Respectfully submitted,

BILL LOCKYER, Attorney General
of the State of California

STEPHANIE C. BRENAN
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE

Case Name: **People v. John Alexander Biccardi**
Case No.: **S056842**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On December 6, 2005, I placed two (2) copies of the attached

SUPPLEMENTAL BRIEF IN RESPONSE TO APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

Carla J. Johnson
Attorney at Law
3233 E. Broadway
Long Beach, CA 90803

That I caused a copy of the above document to be deposited with the Clerk of the Court from which the appeal was taken, to be by said Clerk delivered to the Judge who presided at the trial of the cause in the lower court; and that I also caused a copy to be delivered to the appropriate District Attorney.

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on December 6, 2005, at Los Angeles, California.

Rina B. Genson

Rina B. Genson
Signature

SBC:rbg
LA 1997XS0008