IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	No. S066940
Plaintiff and Respondent,	(Orange County Superior Court No. 94CF0821)
vs.	
WILLIAM CLINTON CLARK,	
Defendant and Appellant.	***Automatic Appeal***

APPELLANT'S SECOND SUPPLEMENTAL REPLY BRIEF

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ISSUE 20(C): THE COURT ABUSED ITS DISCRETION WHEN IT EXCUSED PROSPECTIVE JUROR DF FOR CAUSE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

1. Overview.

Prospective juror DF was a retired engineer who owned his own home and had successfully raised four sons. (14 JQCT 3390-3401 at 3391.) He had been in the military from 1944 to 1946 as a seaman. (*Id.* at 3399.) As an engineer, he worked on large-scale automated military systems. (*Id.* at 3391.) In 1983 he served on a DUI jury in municipal court, which returned a "not guilty" verdict. (*Id.* at 3393.) There was nothing in his juror questionnaire that would have precluded him from serving as a juror on appellant's jury, although a prosecutor may well have felt that DF was a target for peremptory removal.

During voir dire, DF indicated that he was not eager to be on a capital jury, explaining that he had seen a lot of death in his life, in the military during WW2 and also in the "middle east" (RT 6497) (presumably when he worked on the large scale military automated systems) (JQCT 3391) and he was uncertain as to whether he could vote for a death sentence. In response to the Court's specific questions, DF indicated that he was not opposed to the death penalty. He believed the death penalty was appropriate in some cases, and he gave Bonin as an example of an instance where the death penalty had been appropriate. (RT 6496.) He agreed with the court's summary of his position - that he had no opposition to the death penalty, but he would rather not be the one having to decide. (RT 6497.) When questioned by defense counsel, he reiterated that he knew of cases where he believed the death sentence was appropriate, but he honestly didn't know if he would be able to vote for the death penalty:

> A: I don't honestly know. I hope you don't think I'm weaseling. I haven't been there before. **All these proceedings seem to me to ignore emotional**

content that *may or may not develop*. That's kind of where I am coming from. I can't honestly say, all the facts indicated this person should be put to death, could I vote for that. I don't know.

Q: I take it that intellectually, you would be able to reach a conclusion as to whether a case was appropriate for the death penalty. I'm not talking about voting, but intellectually, you'll be able to look and say yes –

A: Yes, within the framework of the judge's explanation, yes, I could follow that. Those are the rules.

Q: So intellectually the system, you would be able to work within, you're just saying that until you're there, you can't say what your emotions will do?

A: That's correct. That's correct.

(RT 6500-6501) (emphasis added).

The prosecutor began his voir dire of DF by stressing that if selected as a juror:

> you're going to be in trial the rest of the month of March, all of April, all of May, perhaps all of June, and you're going to be sitting in one of the seats that you're occupying right now, and the defendant who is here in court is going to be in court every day... you are going to see the defendant every day and he is going to be alive, and he is going to be sitting over there, and he is going to be doing human things like drinking water and breathing, and things that you and I are doing right now. ... Now, if at the end of the case, and we get to a penalty phase, you may very well be a participant in a decision that would result in the defendant losing his life. ... Now with all the things that I have said, and you know yourself better than anybody here, and I'm asking you to apply the emotional aspect of yourself. If you sit in a case, is this emotion, this personal feeling that you have, of such magnitude, that you think in your mind it would impair you, it would prevent you, whatever words you want to use, from considering imposing the death penalty.

(RT 6502-3.) Juror DF replied: "I think it would. I think the answer is yes." The prosecutor then went on to suggest that the impairment would be substantial, and Juror DF agreed. (*Id.* at 6503)

The trial court overruled defense objections and granted the prosecution motion to strike, finding:

> "I understood his last quantification to be that he was, his attitude would substantially impair his ability to give the death penalty. We spent so much time with him and had so many questions in there. He's obviously one of our more difficult jurors, in not only expressing himself, but finding out himself where he stands, that **it's not as clear-cut as those who have cemented opinions. But that's how I synopsize his final words, substantial impairment.** So if you have nothing further, the court is prepared to rule. ... I believe he has expressed such emotional dilemma concerning the death penalty **and quantifies his reluctance to implement it, no matter what the evidence is, as substantially impaired,** and I will excuse him."

(36 RT 6504-6505 (emphasis added).)

2. The trial court failed to properly exercise its discretion when it adopted the Prospective Juror's legal conclusion as the basis for excusing the juror.

Respondent argues that "Prospective Juror DF's inability to perform his duties as a juror and unwillingness to consider the death penalty under any circumstances was unequivocally established by his responses to the trial court's questions and the trial court correctly dismissed him from the jury." (RB at 89, citing *People v. Haley* (2004) 34 Cal.4th 283, 306-308.) Neither the record nor this court's case law support Respondent's position. The trial court's questioning did not establish grounds for exclusion, and the trial court did not base it ruling on anything other than DF's own characterization of his emotional dilemma as substantial impairment. The criteria relied on by the trial court were insufficient to excuse this juror for cause and because the trial court relied on the prospective juror's own assessment of a legal standard that was for the trial court to assess and not the prospective juror, there was an abuse of discretion and this Court must decide the issue *de novo*.

The prosecutor's "substantial impairment" question solicited the juror's legal conclusion about the legal effect of DF's answers. Thus Prospective Juror DF's response

was not competent evidence on the matter. (See Evid. Code, § 800; *People v. De Santis* (1992) 2 Cal.4th 1198, 1226; *Lombardo v. Santa Monica Young Men's Christian Assn.* (1985) 169 Cal.App.3d 529, 540.) As this Court stated in the analogous context of a trial witness who agreed on cross-examination that she had committed, under defense counsel's persistent questioning in this case, perjury, "a lay witness's conclusion about the legal effect of his own actions is incompetent..." (*People v. De Santis*, supra, 2 Cal.4th at p. 1226.) Juror DF could tell the court about his thoughts and feelings, but not whether those thoughts and feelings 'substantially impaired' him.

Prospective Juror DF's response to the prosecutor's "substantial impairment" question must be viewed in the context of his earlier responses, which unequivocally demonstrated he supported the death penalty and could follow the court's instructions and determine whether or not the case was appropriate for a death sentence if it came to that. He did not know how he would feel emotionally, so he could not say with certainty that he would in fact vote for a death sentence. (RT 6500-6501.)

By excluding Prospective Juror DF, despite his support for the death penalty and his ability to follow the law, solely because of emotions that might or might not develop, and because of his answer quantifying his 'impairment' as 'substantial,' "the State crossed the line of neutrality" and "produced a jury uncommonly willing to condemn a man to die," violating appellant's rights under the Sixth and Fourteenth Amendments. (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 520-521.)

3. The prosecution's reliance on *People v. Haley* is mistaken because the prospective jurors in *Haley* refused to vote for death, and the law of *Haley* has arguably been modified by this Court's recent decision in *People v. Leon.*

The prosecution's reliance on *People v. Haley* is misplaced, especially in light of recent legal developments. The prospective jurors excused in *People v. Haley* were very different from prospective juror DF, who supported the death penalty and intellectually

was able and willing to follow the law and determine whether or not a case was appropriate for a death sentence or life in prison. This is exactly the opposite of the three prospective jurors in *Haley* who said clearly on their questionnaires that they were opposed to the death penalty and could not vote for the death penalty. The trial court clearly had discretion to excuse them for cause. (*Haley* at 306-308). A fourth prospective juror excused in *Haley* was excused solely because of her ambiguous statements, and this court cited *People v Jones* (2003) 29 Cal.4th 1229 for the proposition that equivocal statements are sufficient basis for excusing a prospective juror. But that juror did not express clear support for the death penalty as did Prospective Juror DF in this case. As Respondent notes, the *Jones* court, reiterating longstanding precedent, repeated that the juror inquiry should show "that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror. [citations omitted.] *Jones*, 29 Cal.4th at 1246-47; RB at 87. Juror DF had stated that he favored the death penalty and would follow the court's instructions. His responses were qualitatively different from those that this court cited in *Haley* in affirming the trial court's rulings on challenges for cause, *e.g.*, "I don't believe it should be a death penalty. ... Man shouldn't take life." "[r]egardless of the evidence that might be revealed during the penalty phase of the trial, should we get there, you would automatically and absolutely refuse to vote for the death penalty in any case?" Answer: "Yes." "[y]ou, yourself, could not impose the death penalty?" Answer: "Right." *Haley*, 34 Cal.4th at 307-308. And *Haley* and *Jones* were decided long before *People v. Leon* (2015) 61 Cal.4th 569, which is discussed in the next section, but which requires trial courts to enquire further when there are equivocal statements, so that the trial courts have sufficient information to properly exercise their discretion.

In this case, the prospective juror's only hesitation was the possible emotional impact on him of a decision to impose death. This is not a proper basis for excluding a juror when he indicates his ability and willingness to intellectually follow the law. The fact that a defendant's humanity in the courtroom is an important factor to a particular

juror is not a basis for excluding that juror. The normative decision required for selecting sentence in a capital case should not be made only by jurors who can unflinchingly and without any hesitation inflict a death sentence in any case in which it is at all possible.

Appellant argued in his opening brief that Prospective Juror DF 's responses to the jury questionnaire and during voir dire demonstrated that he could fairly and impartially decide the case according to the law as set out by the trial court. (Appellant's Opening Brief ("AOB") Volume 1, pp. 234-244.) Last year, this Court issued its decision in *People v. Leon* (2015) 61 Cal.4th 569. In that decision, this Court emphasized that trial courts must make "a conscientious attempt to determine a prospective juror's views regarding capital punishment to ensure that any juror excused from jury service meets the constitutional standard...." (*Leon* at 592.) Here, the record does not support the dismissal of Prospective Juror DF. Written and oral voir dire responses of Prospective Juror DF did not give the court sufficient information to conclude he was incapable of performing his duty as a capital juror. (Id. at slip opn. p. 19, italics added; *People v. Stewart* (2004) 33 Cal.4th 425,451-452.)

Prospective Juror DF stated that he supported the death penalty and he could follow the law and the court's instructions and identify whether death was appropriate. The fact that he was uncertain as to *what his emotions might or might not be* at the point of rendering a sentencing verdict did not prevent or substantially impair his ability to return a verdict of death, as that term should be construed for the qualification of jurors for a capital trial. (RT 6500-6501). And his responses to the prosecutor's heavy handed questioning did not alter the fact that DF supported capital punishment and was able to intellectually follow the law and identify whether a case was appropriate a death sentence.

Defense counsel objected to dismissal of Prospective Juror DF on the ground that DF unequivocally stated he could follow the trial court's instructions, and his responses to the prosecutor's emotion laden questions required further exploration before they could

be a basis for exclusion, given the earlier answers to the trial court and to defense counsel. (RT 6504.)

It is true that "[t]o the extent the prospective juror's views were conflicting, this Court must defer to the assessment of the trial court that the juror entertained views substantially impairing the ability to perform the duties of a juror." (*People v. Salcido* (2008) 44 Cal.4th 93,135.) However, in this case, the trial court adopted the legal conclusion reached by Prospective Juror DF rather than making its own assessment. A *de novo* review of the evidence shows that DF's responses to the questionnaire and during voir dire do not support reasonable grounds for a finding of substantial impairment. (See *People v. Heard* (2003) 31 Cal.4th 946, 966; *Ross v. Oklahoma* (1988) 487 U.S. 81, 88.) "Under binding United States Supreme Court precedent, error in excusing a prospective juror for cause based on the juror's views about the death penalty requires *automatic* reversal of the penalty verdict." (*People v. Leon*, (2015) 61 Cal.4th 569, italics in original, citing *Gray v. Mississippi* (1987) 481 U.S. 648, 667-668.)

Reversal of the death judgment is required.

SUPPLEMENTAL BRIEF, ISSUE ONE: THERE WAS BATSON ERROR

The juror questionnaires relied on in support of this issue are as follows:

10 JQCT 2368 Prospective Juror PBM

12 JQCT 3390 Prospective Juror RBR

Dated: March 21, 2016

Respectfully submitted,

PETER GIANNINI
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I certify that the attached APPELLANT'S SECOND SUPPLEMENTAL REPLY BRIEF uses a 13-point Times New Roman font and contains 2,420 words.

Dated: March 21, 2016

Respectfully submitted,

PETER GIANNINI
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: **People v. William Clinton Clark**

No.: **S066940**

I declare:

I am a member of the California State Bar. I am 18 years of age or older and not a party to this matter. On March 21, 2016 I served the attached APPELLANT'S SECOND SUPPLEMENTAL REPLY BRIEF by placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid in the United States Mail, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on March 21, 2016.

PETER GIANNINI