No. S138052

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. TUPOUTOE MATAELE, Defendant and Appellant.	Orange County Superior Court Case No. 00NF1347 Hon. James A. Stotler, Judge On Automatic Appeal From A Judgment and Sentence of Death

Appellant Tupoutoe Mataele's Reply Brief

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Appellant Tupoutoe Mataele's Reply Brief

Introduction

Appellant Tupoutoe Mataele[1] submits this reply to respondent's brief. Appellant replies to contentions by respondent necessitating an answer to present the issues fully to this Court. Appellant does not reply to arguments that are adequately addressed in the opening brief. The

[1] Appellant's true name as shown on his birth certificate is "T-Strong Mataele." (RT 31:6993; RB 11, fn. 11.)

absence of a reply to any particular argument, sub-argument or allegation made by respondent, or of a reassertion of any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant, but reflects the view that the issue has been adequately presented and the positions of the parties fully joined. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

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Jury Selection Issues

1. The dismissal for cause of Prospective Juror N. requires reversal of the death judgment because she could fairly and impartially return a verdict for either life or death.

Appellant explained in his opening brief that Prospective Juror N.'s responses to the jury questionnaire and during voir dire demonstrated that she could fairly and impartially decide the case and return a verdict for either life or death, and thus the finding of substantial impairment is not supported by substantial evidence. (Appellant's Opening Brief ("AOB") 59-65.)

Just last week this Court issued its decision in *People v. Leon* (June 29, 2015, S056766) __ Cal.4th __, wherein the Court made a statement equally applicable to this case:

> Here, *the record does not support the dismissals.* Written and oral voir dire responses of the three excused panelists *did not give the court sufficient information to conclude they were incapable of performing their duties as capital jurors*.

(*Id.* at slip opn. p. 19, italics added; *People v. Stewart* (2004) 33 Cal.4th 425, 451-452.)

Prospective Juror N. stated that she could follow the law, she could return a verdict of death in an appropriate case, and her personal

views of capital punishment, including religious beliefs, would not prevent or substantially impair her ability to return a verdict of death. (RT 9:2209-2211; CT JQ 13:3600-3635.)[2]

Trial defense counsel objected to dismissal on the ground that Prospective Juror N. unequivocally stated she could be fair and impartial, and any confusion in her responses was caused by the prosecutor's ambiguous questions. (RT 9:2259-2260 [prosecutor "pretty much twisted her belief in the presumption of innocence that she was giving the two defendants and kind of getting her to equate the presumption of innocence to mean she was unfair"].)

Respondent argues that "Prospective Juror N.'s responses were equivocal, and she stated that she could not be impartial." (Respondent's Brief ("RB") 38.) Respondent is mistaken. Prospective

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[2] References to rules are to the California Rules of Court. "RT" designates the Reporter's Transcript. "CT" designates the Clerk's Transcript of Jury Trial. "CT JQ" designates the Clerk's Transcript of Juror Questionnaires. "CT Supp. AA" designates the Supplemental Clerk's Transcript on Appeal as to Accuracy. "CT Supp. TC" designates the Clerk's Supplemental Transcript as to Completeness, dated January 30, 2006. "CT Sealed 987.2" designates the Sealed Clerk's Transcript of 987.2 Material. "CT Sealed 987.9" designates the Sealed Clerk's Transcript of 987.9 Material. Volume and page references are in the format "volume:page."

Juror N.'s written responses to the questionnaire, and her responses during voir dire, unequivocally demonstrate that she could fairly and impartially decide the case and return a verdict for either life or death. (RT 9:2209-2211; CT JQ 13:3600-3635.)

Prospective Juror N. stated that she did not think that the death penalty was a deterrent and she would rather not have the responsibility for imposing the death penalty. (CT JQ 13:3629-3630.) She noted appellant's youth. (CT JQ 13:3622.) But after expressing her personal views she stated unequivocally, "*I would not have a problem voting for the death penalty.*" (CT JQ 13:3631, italics added.)

Respondent acknowledges that during voir dire Prospective Juror N. stated unequivocally that she could impose the death penalty: "'It's something I don't want to do [i.e., impose the death penalty]. *I can do it.* I've been in trials before where I had to take the facts, but it's going to be very hard.'" (RB 39, quoting RT 9:2228, italics added.)

Respondent also acknowledges that when further questioned by the prosecutor during voir dire, Prospective Juror N. stated unequivocally that she was *not* opposed to the death penalty. (RB 39; RT 9:2234.)

In the face of these unequivocal statements, respondent nonetheless asserts that Prospective Juror N. could not be fair and impartial because she stated that as she sat there (1) she saw two innocent men who appeared young, (2) she did not want to get to a second phase of the trial, and (3) she would hold the prosecution to its burden of proof. (RB 39; RT 9:2210, 2227-2228, 2234-2238.) Each response was entirely legitimate, and did not provide a basis to exclude Prospective Juror N. from the jury.

First, the statement about "two innocent men" was made in connection with the presumption of innocence – i.e., that as she viewed the two men sitting there during voir dire, they were presumed innocent until proven guilty. (RT 9:2210, 2239-2240.)

> "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."

(*Estelle v. Williams* (1976) 425 U.S. 501, 503, quoting *Coffin v. United States* (1895) 156 U.S. 432, 453.)

Second, appellant's youthful appearance did not provide a valid basis for removal. Youth is a relevant factor in mitigation. (Pen. Code,

§ 190.3, subd. (i); see e.g., *Abdul-Kabir v. Quarterman* (2007) 127 S.Ct. 1654, 1672-1673; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 397 [youth at the time of crime mitigating]; see also *People v. Osband* (1996) 13 Cal.4th 622, 708-709 [age may be considered a factor in mitigation or aggravation].)

Nor did Prospective Juror N.'s concern that she might be sympathetic toward appellant because of his youthful appearance provide a valid basis for removal. (RB 38; CT JQ 13:3622.) In the penalty phase, sympathy for defendant may be based on a juror's in-court observations. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1420; *People v. Lanphear* (1984) 36 Cal.3d 163, 167.)

Prospective Juror N.'s forthright answer did not provide a basis for her removal because she stated that she could return a death verdict notwithstanding appellant's youthful appearance. (RT 9:2228 ["I can do it."]; CT JQ 13:3631 ["I would not have a problem voting for the death penalty."].)

Third, the statements about not wanting to get to a second phase of the trial, and holding the prosecution to its burden of proof, did not provide a valid basis for removal. (CT JQ 13:3630-3631.) These

statements were made in the context of Prospective Juror N.'s explanation that she preferred that the responsibility regarding imposition of the death penalty be given to someone else, but if given the responsibility she could follow the law and impose a death verdict. (CT JQ 13:3630-3631; RT 9:2209-2210, 2236-2237; see *People v. Davenport* (1995) 11 Cal.4th 1171, 1224 [prosecution bears burden of proof at the guilt phase].)

> . . . *But personal opposition to the death penalty is not an automatic ground for excusal.* "It is important to remember that not all 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 state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law."

(*People v. Leon, supra*, __ Cal.4th __ [June 29, 2015, No. S056766], slip opn. p. 21, italics added, citing *Lockhart v. McCree* (1986) 476 U.S. 162, 176.)

Respondent argues that Prospective Juror N. stated that she would be substantially impaired in her ability to render a fair verdict. (RB 42; RT 9:2240.) The prosecutor questioned Prospective Juror N. at some length about the burden of proof (RT 9:2236-2239), during which time

she stated unequivocally, "*If you have enough [evidence] to convince me, I don't mind getting to the second phase.* But, you know, if you're asking me how do I feel about the second phase, I don't want to get to the second phase if at all possible." (RT 9:2238, italics added.) The prosecutor ended the questioning with a convoluted question, which he acknowledged was "legal speak" (RT 9:2240), asking whether "it" would substantially impair her "ability to render a fair verdict, either at the guilt or the penalty phase[.]" Prospective Juror N. responded, "Yes." (RT 9:2240.)

Appellant explained in his opening brief – and as noted by trial defense counsel – Prospective Juror N.'s response to the prosecutor's "substantial impairment" question was taken out of context. (AOB 64-65; RT 9:2259-2260.)

The "substantial impairment" question also called for a legal conclusion about the legal effect of her answers, and thus Prospective Juror N.'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 perjury:

> Under defense counsel's persistent questioning in this case, Masse stated that he had committed perjury; but 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.)

Prospective Juror N.'s response to the prosecutor's "substantial impairment" question must be viewed in the context of her earlier responses, which unequivocally demonstrated she could follow the law and impose a death verdict. (RT 9:2209-2211, 2227-2240; CT JQ 13:3600-3635.)

The moving party bears "the burden of demonstrating to the trial court that the [*Witt*] standard [is] satisfied as to each of the challenged jurors." (*People v. Stewart, supra*, 33 Cal.4th at p. 445.)

> As with any other trial situation where an adversary wishes to exclude a juror because of bias, . . . it is the adversary seeking exclusion who must demonstrate through questioning that the potential juror lacks impartiality . . . . It is then the trial judge's duty to determine whether the challenge is proper.

(*Wainwright v. Witt* (1985) 469 U.S. 412, 423.)

To the extent that Prospective Juror N.'s response to the prosecutor's "substantial impairment" question was equivocal, thereby suggesting a need for further questioning of her, the prosecutor's failure to engage Prospective Juror N. in further voir dire shows that the prosecution failed to meet its burden of demonstrating to the trial court that the *Witt* standard was satisfied. (See *People v. Stewart, supra*, 33 Cal.4th at p. 445 [moving party bears the burden of demonstrating to the trial court that the *Witt* standard is satisfied as to each of the challenged jurors]; *Wainwright v. Witt, supra*, 469 U.S. at p. 423; *People v. Leon, supra*, __ Cal.4th __ [June 29, 2015, No. S056766], slip opn. pp. 19-24.)

Prospective Juror N.'s statement that she did not "mind getting to the second phase" if the prosecution carried its burden of proof in the guilt phase (RT 9:2238) – *together with the assurance that she could set aside her personal views and apply the law* (RT 9:2228; CT JQ 13:3631) – demonstrate that the record does not support a conclusion that Prospective Juror N. was disqualified. (See *People v. Leon, supra*, __ Cal.4th __ [June 29, 2015, No. S056766], slip opn. pp. 21-23.)

> The *Lockhart* approach contemplates a two-part inquiry. It recognizes that a prospective juror may have strong feelings about capital punishment that would