

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	DEATH PENALTY
	)	CASE
Plaintiff and Respondent,)	
)	
v.	)	Riverside Co. Sup.
	)	Ct. No. INF 030802
FRED LEWIS WEATHERTON,)	
	)	Cal. Supreme Ct.
Defendant and Appellant.	)	No. S106489
)	

APPELLANT'S SUPPLEMENTAL BRIEF

APPEAL FROM THE JUDGMENT OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF RIVERSIDE

The Honorable James S. Hawkins, Presiding

SUPREME COURT
FILED
JUN 05 2013
Frank A. McGuire Clerk
Deputy

LISA SHORT, SBN 88757
MICHAEL R. SNEDEKER, SBN 62842
Snedeker, Smith & Short
Attorneys at Law
PMB 422
4110 SE Hawthorne Blvd.
Portland, Oregon 97214-5246
Telephone: 503-234-3584
Facsimile: 503-232-3215

Attorneys for Appellant
FRED WEATHERTON

DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	DEATH PENALTY
	)	CASE
Plaintiff and Respondent,)	
)	
v.	)	Riverside Co. Sup.
	)	Ct. No. INF 030802
FRED LEWIS WEATHERTON,)	
	)	Cal. Supreme Ct.
Defendant and Appellant.	)	No. S106489
)	

APPELLANT'S SUPPLEMENTAL BRIEF

**APPEAL FROM THE JUDGMENT OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF RIVERSIDE**

The Honorable James S. Hawkins, Presiding

LISA SHORT, SBN 88757
MICHAEL R. SNEDEKER, SBN 62842
Snedeker, Smith & Short
Attorneys at Law
PMB 422
4110 SE Hawthorne Blvd.
Portland, Oregon 97214-5246
Telephone: 503-234-3584
Facsimile: 503-232-3215

Attorneys for Appellant
FRED WEATHERTON

TABLE OF CONTENTS

INTRODUCTION 1

THE ERROR IN DISCHARGING JUROR NO. 2 AFTER
THE TESTIMONY OF NELVA BELL IN THE GUILT
PHASE REQUIRES THAT THE ENTIRE JUDGMENT
BE SET ASIDE. 1

CONCLUSION 5

TABLE OF AUTHORITIES

CASES

<i>Crist v. Bretz</i> (1978) 437 U.S. 28	4
<i>People v. Allen</i> (2011) 53 Cal.4th 60	4, 5
<i>People v. Gay</i> (2008) 42 Cal.4th 1195	2
<i>People v. Hernandez</i> (2003) 30 Cal.4th 1	4, 5
<i>Wade v. Hunter</i> (1949) 336 U.S. 684	4

CONSTITUTION

U.S. Const., Eighth Amend.	5
U.S. Const., Fifth Amend.	5
U.S. Const., Fourteenth Amend.	5
U.S. Const., Sixth Amend.	5

INTRODUCTION

The arguments raised herein were previously raised in Appellant's Reply Brief. As explained in appellant's application for leave to file a supplement brief, these arguments are being raised again here to ensure that (1) the arguments are properly before the Court, and (2) respondent is accorded a full opportunity to respond to them.

THE ERROR IN DISCHARGING JUROR NO. 2 AFTER THE TESTIMONY OF NELVA BELL IN THE GUILT PHASE REQUIRES THAT THE ENTIRE JUDGMENT BE SET ASIDE.

The trial judge erred in dismissing Juror No. 2 because of a religious belief as an Orthodox Jew that he could not vote for a death penalty if the only evidence of guilt was uncorroborated testimony of one witness. The juror was quite clear, in his letter to the court¹ and when questioned by the parties, that he had no trouble at all complying with the instruction that the testimony of one witness was sufficient to prove any fact, including guilt for murder. However, he required more to be able to consider imposing the

¹ In his letter to the trial court explaining why the testimony of one eyewitness would not be enough without either a second eyewitness or other form of corroboration for him to impose the death penalty, he wrote, "*with proof beyond a reasonable doubt, I could vote the defendant guilty, but in the penalty phase I could not vote the death penalty.*" (23 RT 4312-4313.)

death penalty, either a second eyewitness or the equivalent in corroboration. (See Claim XXI, AOB 348–354.)

Appellant has shown that residual doubt is a well-recognized basis for rejecting a death penalty. (See AOB 352–354; *People v. Gay* (2008) 42 Cal.4th 1195, 1221, 1227 [noting that California has “recognized the legitimacy of a lingering-doubt defense in the penalty phase of a capital trial” and that “residual doubt is perhaps the most effective strategy to employ at sentencing.”].) Nevertheless, the trial court discharged him because of the fact that murder is not a crime that requires corroboration as a prerequisite to conviction. (23 RT 4316.) The trial court misunderstood both the juror, who consistently distinguished between a finding of guilt and the imposition of death, and the law.

Respondent misleadingly writes, “The trial court then asked if the juror’s religious beliefs would permit him to follow an instruction that the testimony of a single witness would was sufficient to prove a fact and the juror said that he ‘would have a difficult time with that.’ (27 RT 4308).” (RB 132.)

If this were true, Mr. Weatherton would have no issue. The juror’s religion would have interfered with his ability to follow the law. But this is not what the juror said. Respondent omitted the juror’s effort to clarify what

phase of the trial was being discussed, and the trial court's response. The omitted language is in italics:

[THE COURT]: [T]hat is an instruction that the Court would give you as the law of the State of California, one witness is sufficient to prove a fact if you believe that witness. That's different than your religious beliefs. This is another question in the same form. Would you be able to follow that law?

JUROR NO. 2: *Are we talking about guilt or innocence or—*

THE COURT: No, we're talking about life versus death in the second phase.

JUROR NO. 2: I would have, without the corroborating evidence, Your Honor, I would have a difficult time with that.

(27 RT 4307–4308, emphasis added.)

The standard jury instruction that one witnesses suffices to prove any fact was never questioned by the juror. In fact, it was repeatedly affirmed. The trial court erred in stating that “an instruction that the Court would give you as the law of the State of California, one witness is sufficient to prove a fact if you believe that witness. That's different than your religious beliefs.”

(27 RT 4307.)

The juror's religious beliefs did not concern that question at all. They centered on what would be a sufficient factual showing for a determination

that the death penalty was warranted. The juror was a strong supporter of the death penalty (see 23 RT 4313-4314), but wanted to be very certain of the guilt of anyone whose life was in his hands. There is nothing whatsoever in California or federal law that disqualified him from serving on appellant's jury because of that belief.

In his opening brief, appellant asserted that this error required that the death penalty be set aside. (AOB 354.) On reflection, however, in light of respondent's brief and this Court's decisions in *People v. Allen* (2011) 53 Cal.4th 60, and *People v. Hernandez* (2003) 30 Cal.4th 1, it has become clear that the appropriate remedy is to set aside all verdicts against appellant. As appellant wrote in his Reply Brief, a defendant's "valued right to have his trial completed by a particular tribunal is 'an interest with roots deep in the historic development of trial by jury in the Anglo-American system of criminal justice.'" (*Crist v. Bretz* (1978) 437 U.S. 28, 36, citing *Wade v. Hunter* (1949) 336 U.S. 684, 689.)" (ARB 112.)

Although double jeopardy principles support the right to a decision from the chosen jury, they do not forbid the retrial of a case reversed because of the improper discharge of a seated juror. In *People v. Hernandez, supra*, this Court closely examined this question. After reviewing federal law as well as this state's jurisprudence, it concluded,

“We think that error in discharging a juror should be treated no differently from any other trial error leading to reversal on appeal, such as prejudicial instructional or evidentiary error or ordinary prosecutorial misconduct.”

(*Id.*, 30 Cal.4th at p. 10.)

The improper dismissal of Juror No. 2 midway through the guilt phase trial violated California law and Mr. Weatherton’s rights to a chosen impartial tribunal, due process, and a reliable judgment under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Accordingly, the entire judgment must be reversed. (*People v. Allen, supra*, 53 Cal.4th at p. 79 [“Because the court improperly discharged Juror No. 11 during guilt phase deliberations, both guilt and penalty phase judgments must be reversed.”].)

(ARB 112.)

CONCLUSION

For the foregoing reasons, this Court should set aside Mr. Weatherton’s guilt phase convictions as well as his death sentence.

Dated: _____

Respectfully submitted,

MICHAEL R. SNEDEKER

Attorney for Appellant

CERTIFICATE PURSUANT TO CAL. RULE OF COURT 8.630

I hereby certify that, according to my computer's word processing program, this brief, exclusive of tables, is 1,053 words, within the 2,800-word limit specified in the California Rules of Court.

Dated: _____

MICHAEL R. SNEDEKER

Attorney for Appellant
FRED WEATHERTON

DECLARATION OF SERVICE BY MAIL

Re: *People v. Weatherton*, Supreme Court No. S106489

I, Michael R. Snedeker, declare that I am over 18 years of age and am not a party to this action. My business address is PMB 422, 4110 SE Hawthorne Blvd., Portland, OR 97214-5246. I served a copy of the attached:

**APPELLANT'S SUPPLEMENTAL BRIEF; APPLICATION TO
FILE SUPPLEMENTAL BRIEF**

on each of the following by placing same in an envelope addressed respectively as follows:

Steven Parnes, Esq.
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Clark Head, Esq.
901 H St 6th FL
Sacramento, CA 95814

District Attorney
Riverside County
82675 Hwy 111 4FL
Indio, CA 92201

Riverside County Superior Court
46-200 Oasis Street
Indio, CA 92201

Daniel Rogers
Deputy Attorney General
P.O. Box 85266
San Diego, CA 92186

Fred Weatherton
PO Box T-52846
San Quentin State Prison
San Quentin, CA 94974

Each said envelope was then, on May 24, 2013, sealed and deposited in the United States mail in Portland, Oregon, with postage fully prepaid.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct .

Executed in Portland, Oregon, this 24th day of May, 2013.

MICHAEL R. SNEDEKER
Declarant