SUPREME COURT COPY

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, v. JEAN PIERRE RICES, Appellant.	)	S175851 San Diego County Case No. SCE266581

APPELLANT'S REPLY BRIEF

Appeal From The Judgment Of The Superior Court
Of The State Of California, San Diego County

Honorable Lantz Lewis, Judge

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DEATH PENALTY

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A. Introduction.

Defendant Jean Pierre Rices is black. (6 CT 1337.) Because he pled guilty, the only question the jury in this case would be asked to answer was whether he should live or die.

In answer to question 53 on the juror questionnaire, prospective juror T.T. admitted she "believe[d] black and mexican[s] are more likely to be violent." (6 CT 6237.) She forthrightly told defense counsel during voir dire that he would have an "uphill battle" to convince her to impose life without parole rather than death. (7 RT 1167, 1172.)

Similarly, prospective juror L.M. explained her view that "Hispanic [and] African-Americans" were more violent (19 CT 4479.) Before hearing any evidence in the case, L.M. advised defense counsel that she leaning towards imposing death. (7 RT 1167,

1189.)

Defense counsel challenged both jurors for cause. (7 RT 1232, 1233.) The trial court denied both challenges. (7 RT 1234, 1235.) Eventually, both T.T. and L.M. were called into the jury box. (8 RT 1276, 1277.) Defense counsel was forced to exercise peremptory challenges as to each. (8 RT 1276, 1277.) When counsel used up all 20 of his peremptory challenges, he sought additional challenges, both in writing and orally. (8 RT 1273-1281; 4 CT 931.)

In seeking additional challenges, counsel specifically argued the trial court's refusal to strike T.T. and L.M. for cause was incorrect. (4 CT 937-938.) As counsel explained, prospective juror T.T. had admitted "'I believe blacks and Mexicans are more likely to be violent.'" (4 CT 937-938.) And counsel noted that prospective juror L.M. wrote in her questionnaire that "she believes Hispanic and African Americans involved in gangs are more violent . . . ." (4 CT 938.) The trial court denied counsel's motion. (8 RT 1281.)

In Argument I of his opening brief, Mr. Rices argued that a new penalty phase was required. There were two distinct components of this argument. First, citing *Adams v. Texas* (1980) 448 U.S. 38 and California Code of Civil Procedure 225, subdivision

(b)(1)(C), Mr. Rices contended the trial court erred in refusing to strike jurors T.T. and L.M. for cause. (Appellant's Opening Brief ("AOB") 19-28.) Second, citing a long series of this court's cases, Mr. Rices contended that the trial court's error was preserved for review because counsel did all that existing law at the time of trial required him to do to preserve this error for review -- he used peremptory challenges on T.T. and L.M., exhausted his peremptory challenges and requested more. (AOB 29-33.)[1]

The state does not dispute that Mr. Rices is black. (Respondent's Brief ("RB") 11-19.) The state does not dispute that because he pled guilty, the only decision for the jury was whether he should live or die. (RB 11-19.) The state does not dispute that in her jury questionnaire prospective juror T.T. explained that she "believe[d] black and mexican[s] are more likely to be violent" and that defense counsel would have an "uphill battle" to convince her to impose life without parole rather than death. (RB 13.) Finally, the state does not dispute that in her jury questionnaire prospective juror L.M. explained her view that "certain races were more violent," specifying that races it was "Hispanic[s] [and] African-Americans" that were more violent. (RB 12.)

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[1] *See People v. Whalen* (2013) 56 Cal.4th 1, *People v. Jones* (2012) 54 Cal.4th 1, 45, *People v. Mills* (2010) 48 Cal.4th 158, *People v. Bonilla* (2007) 41 Cal.4th 313, *People v. Cunningham* (2001) 25 Cal.4th 926, *People v. Ochoa* (1998) 19 Cal.4th 353, *People v. Morris* (1991) 53 Cal.3d 152, and *People v. Bittaker* (1989) 48 Cal.3d 1046.

Nevertheless, for three reasons the state argues that the trial court's refusal to discharge T.T. and L.M. does not require a new penalty phase. First, the state argues the issue is not properly preserved for review because trial counsel did not express dissatisfaction with the jury as seated. (RB 15-16.) Alternatively, the state argues the trial court properly refused to discharge either T.T. or L.M. from sitting in judgment on this case. (RB 16-18.) Finally, relying primarily on a case decided five years *after* trial, the state argues that a new penalty phase is not required because defense counsel did not challenge for cause any of the jurors who actually sat on the case. (RB 18-19.)

Mr. Rices will address each of the state's arguments in turn. Because none have merit, a new penalty phase is required.

B. Trial Counsel Did All That The Law Required Him To Do At The Time Of Trial To Preserve This Issue.

The parties agree on the applicable legal principle. When a trial court denies a for-cause challenge to a prospective juror made by the defense, in order to challenge that ruling on appeal defense counsel must (1) use a peremptory challenge to remove the juror, (2) exhaust his peremptory challenges and (3) express dissatisfaction with the seated jury. (*People v. Whalen*, *supra*, 56 Cal.4th 1, 42; *People v. Jones*, *supra*, 54 Cal.4th 1, 45; *People v. Mills*, *supra*, 48 Cal.4th 158, 186; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 339;

People v. Cunningham, supra, 25 Cal.4th 926, 976; *People v. Ochoa, supra*, 19 Cal.4th 353, 444; *People v. Morris, supra*, 53 Cal.3d 152, 184; *People v. Bittaker, supra*, 48 Cal.3d 1046, 1087-1088.)

The state concedes that "appellant used peremptory challenges to remove the jurors in question." (RB 15.) The state concedes that defense counsel "exhausted all his peremptory challenges." (RB 15.) The state argues, however, that defense counsel "did not express dissatisfaction with the jury ultimately selected." (RB 15.)

The state recognizes that after the court's rulings defense counsel filed a written motion asking for additional peremptory challenges. (4 CT 931.) The state correctly notes, however, that defense counsel made this motion for additional peremptory challenges *before* the jury was actually constituted. (RB 15.) The legal argument at least implicit in this factual observation is that defense counsel could not really have been expressing dissatisfaction with the actual jury selected since that jury had not even been selected yet.

This argument makes some sense. And had defense counsel not renewed the motion later, the state might have a point. (*Compare People v. Bonin* (1988) 46 Cal.3d 659, 679 [denial of defense motion for additional peremptory challenges not preserved for

appeal where "defendant made his motion for additional peremptory challenges before he had exhausted the 26 peremptory challenges allotted to the defense" and defendant "never renewed the motion" afterwards].)

But whatever interesting legal issue this might present in another case, it presents no such issue here. The fact of the matter is that defense counsel explicitly renewed this very same motion *after* the jury was actually selected. (8 RT 1281.) Indeed, the record could not be much clearer on this point. Immediately after the jury was selected, the following exchange occurred between defense counsel Chambers and the trial judge:

> MR. CHAMBERS: . . . Your honor, I would renew my request for additional peremptory challenges based on the motion I filed this morning. I know the court has already ruled on the motion, but I am renewing it at this time.
>
> THE COURT: Thank you Mr. Chambers. And I have considered the arguments raised in the moving papers, the arguments that were presented, and that motion is again denied. (8 RT 1281.)

Without explanation the state suggests that defense counsel's decision to renew the motion for additional challenges after the jury was selected "did not express dissatisfaction with the jury as constituted because it referenced a motion that, again, was filed before a single juror had been seated for final selection." (RB 15.) With all due respect, this is simply a non-sequitur.

If defense counsel had genuinely been satisfied "with the jury as constituted" after the jury was selected, there would have been no reason at all to renew the motion for additional peremptory challenges. In the real world setting of trial, the only reason a lawyer moves for additional peremptory challenges after a jury has been seated is because the lawyer is dissatisfied with the jury and wants additional challenges to challenge some of the seated jurors.

Although it is not entirely clear, the state may be suggesting that the act of seeking additional peremptory challenges after the jury is seated is not sufficient to express dissatisfaction with the jury. If this is the state's suggestion, it is worth noting that the state does not cite a single case that has ever advanced such a thesis.

In fact, the law has long been to the contrary. (*See, e.g., People v. Caldwell* (1980) 102 Cal.App.3d 461, 473 [trial court denies three challenges for cause, defendant uses peremptory challenges to dismiss jurors, defense exhausts challenges and "moved for additional peremptory challenges;" held, issue properly preserved for review]; *Darcy v. Moore* (1942) 49 CalApp.2d 694, 701 [trial court denies challenges for cause, defendant uses peremptory challenges to dismiss jurors, defense exhausts challenges; held, "[s]ince petitioner requested and was denied additional peremptory challenges, he is entitled to urge on appeal the point of the alleged erroneous disallowance of his challenge for

cause."]; *compare People v. Terry* (1994) 30 Cal.App.4th 97, 104 ["failure to seek an additional peremptory challenge . . . will be deemed waiver of a claim of prejudice from the erroneous denial of a challenge for cause."]; *People v. Shambatuyev* (1996) 50 Cal.App.4th 267, 272 [defendant arguing that his trial lawyer properly preserved an objection to the trial court's denial of a for-cause challenge was not entitled to augment the record on appeal to include a transcript of voir dire where the defendant did "not indicate that the voir dire transcript he seeks will demonstrate . . . a motion for an additional peremptory challenge."].) In light of this case law, counsel's decision to seek additional peremptory challenges properly preserved this issue for review.[2]

C. The Trial Court Erred In Refusing To Discharge Prospective Jurors T.T. And L.M.

Alternatively the state argues that the trial court properly refused to discharge T.T. and L.M. for cause. The argument need not long detain the Court.

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[2] It is worth noting that this Court has repeatedly noted the *absence* of a motion for additional peremptory challenges in finding that trial counsel had *not* preserved the issue for appeal. (*See People v. Whalen, supra*, 56 Cal.4th 1, 42; *People v. Ramirez* (2006) 39 Cal.4th 398, 448 [trial court denied for-cause challenge to alternate juror, defendant exhausted peremptory challenges to remove this juror but "defendant did not request additional peremptory challenges" as to the alternates; held, claim not preserved since defendant "fail[ed] to express dissatisfaction with the jury."].)

The state concedes the trial court was required to discharge for cause any juror whose views would "prevent or substantially impair" the performance of his duties as a juror. (RB 16.) Here, defendant was black, the only question the jury would be asked to decide was whether he should live or die, and prospective juror L.M. opined that "Hispanic [and] African-Americans" were more violent than other people. (19 CT 4479.) The state concedes L.M. was not asked even a single question about her views as to black people at during jury voir dire, but nevertheless argues that the trial court's decision not to strike her is entitled to deference. (RB 16-17.) The state notes that in her questionnaire L.M. said she "had a lot of social contact with people of other races and ethnicities . . . nor had she ever had a bad experience with an African-American individual." (RB 17.) The state cites this as reassuring evidence that L.M. "did not harbor any bias." (RB 17.)

The state makes a similar argument as to prospective juror T.T. Thus, the state concedes T.T. admitted her view that "black & mexican [sic] are more likely to be violent." (RB 17.) As it did with L.M., the state argues she "was unbiased," pointing out that she too "never had a negative experience with an African-American person." (RB 17.)

In arguing that the Court should find that the for-cause challenges were properly denied, the state urges the Court to defer to the trial court's decision because the trial

judge saw and heard these jurors. (RB 16.) The state notes that deference is generally appropriate when a juror has made conflicting statements or given equivocal statements. (RB 16.)

But the question of whether deference should be provided in this case is not quite so neat. As to L.M., for example, the state concedes that during voir dire "she was not questioned about" her belief that black people are more violent. (RB 17.) In fact, L.M. was asked only one question during the voir dire:

> BY MR. CHAMBERS:
>
> Q: Juror No. 37, I looked at the last page of the questionnaire. Do you want to read it? "I'm very in favor of the death penalty if charged guilty in murder." Is there a reasonable possibility that you could vote for life in prison?
>
> A: Yeah. It depends on the circumstance but I think I'd lean more towards the death penalty. I'd lean more towards the death penalty.

That was it. There was not a single question about her view that blacks were more violent. No inquiry was made in this area at all. So there were no conflicting statements, or equivocal answers, which the trial court could evaluate by "seeing and hearing" this juror testify. Applying deference in this situation -- when the entire reason for the rule of deference does not apply -- makes little sense. Because the trial judge's ruling was not

made on the basis of the one-question voir dire -- which he saw and heard -- but was instead based entirely on his evaluation of the jury questionnaire, deference is simply inappropriate here. (*Compare People v. Riccardi* (2012) 54 Cal.4th 758, 779 ["In reviewing dismissals for cause based upon only written answers, we apply a de novo standard of review."].)

The same is true with respect to T.T. During voir dire, T.T. said she was leaning toward the death penalty, "at this point I would say the death penalty," but it was "not definite" and she would look at the evidence and listen to both sides. (7 RT 1172.) Later she repeated that she would consider both sides. (7 RT 1212.) As with L.M., however, no inquiry at all was made about T.T.'s view that blacks were more violent. Here too there were no conflicting statements, or equivocal answers, which the trial court could evaluate by "seeing and hearing" this juror testify.

Fortunately, there is no need to dwell on the question of whether a full measure of deference is appropriate given the actual record in this case. This is because, as this Court has noted time and again, "although appellate courts should generally defer to trial courts in factual or discretionary matters, deference is not abdication." (*People v. Johnson* (1989) 47 Cal.3d 1194, 1291. *Accord People v. Lucas* (2014) 60 Cal.4th 153, 277; *People v. Batts* (2003) 30 Cal.4th 660, 703; *In re Jones* (1996) 13 Cal.4th 552, 561.)

Here, even deferring to the trial court, the decisions as to L.M. and T.T. cannot be upheld. The state was seeking to sentence Mr. Rices, a black man, to death. One of the state's arguments for seeking death was that Mr. Rices would be dangerous in the future. (19 RT 2752-2753.) The trial court refused to discharge two jurors who admitted their views that blacks were more violent than whites. At no point during the voir dire was either juror questioned about these views, at no point did either juror agree to put aside this view in deciding the case and at no point did the trial court ever find that these jurors would indeed set aside this view.

As noted, the state offers the reassuring observation that both prospective jurors had experiences and contact with people of other races, and neither juror had ever had a bad experience with an African American. (RB 17.) But this does little to advance the state's cause. If anything, it suggests an even more ingrained bias. After all, if neither T.T. nor L.M. had ever personally had an adverse experience with a black person, their belief that blacks are more violent is necessarily attributable to an ingrained prejudice rather than a life experience. That certainly does not suggest that either juror should have been permitted to sit in judgment, deciding whether Mr. Rices should live or die.

The state cites *People v. Jackson* (1996) 13 Cal.4th 1164 and suggests that it is "instructive." (RB 18.) Mr. Rices agrees, but not in the way the state argues.

During the voir dire in *Jackson* one juror said he had been "raised with racial prejudice" but had "grown out of it." (13 Cal.4th at 1199.) He expressed his belief -- based on media accounts -- "that Blacks were more likely to have committed a crime than Whites" but he then agreed he would "judge each case individually." (*Ibid.*) The trial court denied defense counsel's for cause challenge to this juror. Given that there had been voir dire on the actual question of the juror's racial views, the prospective juror had given equivocal answers, and had promised to set aside any improper views, this Court deferred to the trial court and ruled there had been no abuse of discretion in denying the challenge.

Jackson is distinguishable in every respect. Here, as noted above, neither juror T.T. nor L.M. were asked about their view as to whether blacks were more violent than whites. Thus, neither of them gave any equivocal answers on the subject -- the only information in the record on this subject are their unequivocal answers on the jury questionnaire that blacks are indeed more violent than whites. Nor was either juror asked whether they could set aside their views that blacks were more violent and decide this case individually. The fact that both L.M. and T.T. agreed to hear both sides of the case says nothing at all about whether they would set aside their ingrained view that blacks

were more violent. *Jackson* does not justify the trial court's ruling here.[3]

D. In Light Of The Law Which Existed At The Time Of Trial, A New Penalty Phase Is Required.

The state's final argument is that even if the trial court erred, and even if that error was preserved for review, reversal of the penalty phase is not required because the trial record is insufficient to show prejudice. (RB 18-19.) The state argues that to show prejudice the trial record must show (1) defense counsel made an unsuccessful "motion in the trial court" to challenge a sitting juror for cause and (2) "a juror who should have been removed for cause sat on the jury that ultimately decides the case." (RB 19.) The state correctly notes that in *People v. Black* (2014) 58 Cal.4th 912 this Court held that these two requirements were indeed necessary to establish prejudice.

The state's position requires this Court to answer two questions. The first is a

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[3] It is also worth noting that the juror's particular bias in *Jackson* -- "that Blacks were more likely to have committed a crime than Whites" -- had little to do with the state or defense theories presented in *Jackson* at either the guilt or penalty phase. The defense there conceded Jackson was involved in a crime, contending only that he had withdrawn from participation before the murder was committed. (13 Cal.4th at p. 1192.) In contrast, because Mr. Rices pled guilty in this case the only question was whether he should live or die, and the prosecutor urged death in part based on future dangerousness. In this situation there is a far greater likelihood that the bias expressed by prospective jurors T.T. and L.M. -- a belief that blacks were more *dangerous* -- rendered them "substantially impair[ed]" in their ability to resolve the only question that would be presented to them.

question the Court has never actually addressed: can the standard set forth in *Black* in 2014 -- requiring trial counsel to have made a "motion in the trial court" challenging a sitting juror for cause -- be fairly and constitutionally applied to a case tried in 2009? If the answer is no, the Court must then decide whether prejudice has been shown under the standard that existed when the case was actually tried in 2009.

As more fully discussed below, *Black* cannot fairly be applied to this case. At the time of trial the law was quite clear as to what defense counsel had to do to set the record for a showing of prejudice in this situation. The law did *not* require counsel to file a "motion in the trial court" to challenge a sitting juror for cause, nor did it require the record to show "a juror who should have been removed for cause sat on the jury that ultimately decides the case." Applying these subsequently-created requirements to this case, requirements of which trial counsel here had no notice, would violate due process and the right to effective counsel. And as also discussed below, application of the rule in effect at the time of trial -- of which counsel was aware -- requires a new penalty phase.

1. Because trial counsel established a sufficient record for a showing of prejudice under the law as it existed in 2009, it would be unfair to retroactively apply a higher standard of prejudice created five years after trial.

As noted, trial in this case was in 2009. At the time the law was clear about the