S066939

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MICHAEL ALLEN AND CLEAMON JOHNSON

Defendants and Appellants.

APPELLANT'S SUPPLEMENAL BRIEF

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles

HONORABLE CHARLES E. HORAN, Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

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PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,* v. MICHAEL ALLEN AND CLEAMON JOHNSON *Defendants and Appellants.*	S066939 Los Angeles County Superior Court No. BA105846

APPELLANT'S SUPPLEMENTAL BRIEF

Appellant Cleamon Johnson hereby files this supplemental brief to address four recent decisions of this Court which substantially support his contention, as set forth in Claim I of Appellant's Opening Brief, that the trial court erroneously dismissed a deliberating juror. The reasoning in each of these cases, *People v. Barnwell* (2007) 41 Cal.4th 1038, *People v. (Andre) Wilson* (2008) 43 Cal.4th 1, *People v. Watson* (2008) 43 Cal.4th 652, and *People v. (Lester) Wilson* (2008) 44 Cal.4th 758, reinforces appellant's claim that the removal of a juror who expressed doubts about the strength of the prosecution's case was improper and requires reversal of his conviction and death sentence.

I.

THE REMOVAL OF A DELIBERATING JUROR MUST BE SUPPORTED BY A "DEMONSTRABLE REALITY"

In *Barnwell, supra,* 41 Cal.4th 1038, the trial court received two notes from the jury complaining that one juror was not deliberating. (*Id.* at p. 1048.) In response – unlike in appellant's case – the court reinstructed the jury on the duty to deliberate. After the juror in question denied he was refusing to deliberate and promised to follow the court's instructions, deliberations continued. (*Ibid.*) The jury sent out another note that the juror seemed to have a bias against police officers. The court then conducted a hearing in which testimony from all 12 jurors was taken. While the challenged juror contended that he disbelieved the officers in this case but was not biased against all law enforcement officers, nine of the eleven other jurors testified that he had expressed a general bias against law enforcement. The testimony of the other two jurors was inconclusive. (*Id.* at p. 1049.) The trial court dismissed the juror, finding he was failing to deliberate based on his bias against police officers. (*Id.* at p. 1050.)

In determining whether the juror in *Barnwell* was appropriately excused, this Court stressed that removal of a juror is a "serious matter," implicating the defendant's constitutional rights, and requires the trial court to exercise its discretion with "great care." (*Id.* at p. 1052.) The Court clarified that the applicable standard of review is the one stated in *People v. Cleveland* (2001) 25 Cal.4th 466, 474, "that a juror's disqualification must appear on the record as a "demonstrable reality." (*Ibid.*) As explained in *Barnwell*, this "heightened standard more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury." (*Ibid.*)

In contrast to the substantial evidence inquiry (i.e., whether a court's decision is supported by substantial evidence), the demonstrable reality test "entails a more comprehensive and less deferential review." (*Id.* at p. 1052.) As this Court explained, "[i]t requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion . . . ." (*Ibid*, original italics.) While the reviewing court does not reweigh the evidence under either test, "[u]nder the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (*Id.* at pp. 1052-1053.)

The trial court's finding in *Barnwell* that the juror was unable to fairly deliberate was supported by the statements of nine jurors. The views of the other two jurors was inconclusive. (*Id.* at p. 1051-1053.) Thus, with no jurors disputing the claim of bias, this Court found the "totality of the evidence" supported the trial court's conclusion that the juror judged the testimony of the witnesses by a different standard because they were police officers. (*Ibid.*)

In appellant's case, in stark contrast to *Barnwell*, only two jurors – jurors who had met privately during a recess – believed that Juror 11 was failing to perform his duties as a juror. Even those two jurors (Jurors Nos. 4 and 5) conceded that Juror 11 participated in deliberations and maintained that he was undecided after making a statement about the weakness of the prosecution's case.[1] (26 RT 5314, 5337, 5349.) No other juror singled out

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[1] Juror 5 testified that Juror 11 said, "when the prosecution rested, she didn't have a case." (26 RT 5314, 5317, 5334.) Juror 4 testified that what Juror 11 said was that "he was waiting for the prosecuting attorney to bring her case forward and it never happened." (26 RT 5353.)

Juror 11 as deliberating inappropriately.

Juror No. 3 denied that any juror began deliberations with a fixed view. (26 RT 5383.) Juror 12 also denied that anyone had entered deliberations with their mind completely made up. (26 RT 5424.)

Three jurors identified jurors other than Juror 11 as making a comment about the strength of the prosecution's case. Juror No. 1 testified that a different juror stated at the outset of deliberations that the prosecution had failed to prove its case. (26 RT 5362, 5364-5365.) So did Juror 2, who described this other juror as one who appeared to have a strong opinion about the case, which she described as a "semi-conviction about guilt or innocence." (26 RT 5373.) Juror No. 1 denied that anyone failed to meaningfully participate in deliberations (26 RT 5362) and Juror 2 claimed that none of jurors had fully made up their mind prior to deliberations. (26 RT 5374-5376.) Juror 8 stated that two other jurors – not Juror 11 – entered deliberations with "certain things already happening in their head," that they were leaning in a certain direction but wanted the opportunity to discuss the case in the jury room. (26 RT 5403-5406.) He stated that it was a juror other than Juror 11 who made a comment about having "just about made up his mind when he left the jury box about how he felt about this case." (26 RT 5408.)

The remaining four jurors included Juror 11 as one of several jurors having strong concerns, but not expressing a fixed position, about the prosecution's case. Juror No. 6 "sort of had the feeling" that two jurors, including Juror 11, had their minds made up when they began deliberations. (26 RT 5388.) This was based on a statement by one of them that "they didn't feel that anything was proved to them." (26 RT 5389.) Juror 6 further stated the jurors then voted and everyone was undecided, "so it was more of

a thing in passing" at the start of deliberations that "they felt a little bit as though nothing has been proved beyond a reasonable doubt." (26 RT 5389.) According to Juror 7, at least five jurors, including Juror 11, appeared to go into deliberations with their minds made up. (26 RT 5395, 5400.) Juror 9 agreed that Juror 11, among others, was "less open minded" (26 RT 5411) than some of the other jurors and "some of them had a rough idea of which direction they might go, but I don't think it was something that was set permanently that they wouldn't hear the others." (26 RT 5410.) Juror 10 also stated that Juror 11 appeared to begin deliberations with his mind made up "but he recanted" and "was willing to be open minded," and stated he "will talk about it and deliberate." (26 RT 5415-5417.)

Finally, Juror 11 admitted that he made a comment that "when the prosecution rested, they had not convinced me." (26 RT 5421.) He claimed, however, not to have entered deliberations already having decided the case, and he told the foreperson he had not yet made up his mind. (26 RT 5419.)

Despite the lack of evidence in the record establishing Juror 11's refusal to deliberate, the trial court found "that the consensus is . . . that the juror made it relatively clear to a majority of the jurors here that he decided the case; that he had his mind made up at the time – at a time before the matter had been submitted to the jury." (26 RT 5448.) This Court cannot be "confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (*People v. Barnwell, supra,* 41 Cal.4th at pp. 1052-1053.) The record here simply does not show to a demonstrable reality that Juror 11 failed to deliberate.

II.

A JUROR WHO DOES NOT REACH A FIXED DECISION PREMATURELY AND WHO DISCUSSES THE CASE WITH OTHER JURORS MAY NOT BE REMOVED FOR FAILING TO DELIBERATE

In *People v. Wilson*, *supra,* 43 Cal.4th 1, the court received a note during penalty phase deliberations from the foreperson that a juror had decided the case prior to deliberations. The court then questioned the foreperson, who reported that Juror No. 1 said she had made up her mind before deliberations began, refused to participate in discussions with other jurors and stated that she was not going to change her mind. (*Id.* at pp. 23-24.) Juror No. 1 was questioned, and admitted that she had "more or less" made up her mind when the jury began deliberations and was not going to be swayed by further discussion. (*Id.* at p. 24.) She also told the court that she would go along with the other 11 jurors if she were the lone holdout. (*Ibid.*) The trial court removed the juror because she was not deliberating. (*Id.* at p. 25.)

This Court found no abuse of discretion because "the juror's refusal to deliberate appears in the record as a demonstrable reality." (*Id.* at p. 26.) As relevant here, the Court found support for the trial court's ruling that "Juror No. 1 repeatedly told other jurors she had already made up her mind and did not participate in any of the discussions," which was essentially confirmed by the juror herself when she explicitly stated after the jury's first vote that she had reached a conclusion about the case at the beginning of deliberations. (*Id.* at pp. 26-27.)

In *People v. Watson*, *supra,* 43 Cal.4th 652, on the second day of penalty phase deliberations, the foreperson sent a note to the court regarding a juror who reportedly did not believe in the death penalty under any

circumstances. (*Id.* at p. 693.) In response to questioning from the court, the juror stated he had spoken with his minister the previous evening and decided he could not "bring himself to take another human life." The juror agreed that he could not vote for the death penalty under any circumstances regardless of the evidence. (*Id.* at pp. 694-695.) He was then excused from the jury. (*Id.* at 695.)

This Court held that the trial court did not err in excusing the juror for failing to deliberate. By announcing after only one afternoon of deliberations "that he could not vote for the death penalty under any circumstances " (*id.* at pp. 696-697), the juror "express[ed] a fixed conclusion at the beginning of deliberations and refus[ed] to consider other points of view." (*Id.* at p. 697, quoting *People v. Cleveland, supra,* 25 Cal.4th at p. 485.)

The juror excused in appellant's case – unlike the jurors in *Wilson* and *Watson* – was deliberating when he was removed from the jury. On the second day of deliberations, Juror 11 said, according to the foreperson, that he believed after the prosecution rested that it had not proven its case. (26 RT 5314.) He insisted, however, that he had not yet made up his mind, and by all accounts continued to discuss the case with the other jurors. He never claimed to have prematurely reached a decision on a verdict, as in *Wilson*, or maintained that he could not vote a particular way under any circumstance, as in *Watson*. In fact, as even the two jurors who complained about him conceded, he continued to discuss the case with other jurors and had stated "undecided," when the first vote was taken. (26 RT 5314, 5334-5335.) The other jurors who identified Juror 11 as having strong views about the case agreed that he did not firmly maintain a fixed position and participated in discussions with the other jurors. (See, e.g., 26 RT 5389, 5410-5411, 5415-

5417.)

Thus, contrary to *Wilson* and *Watson*, this *is* a "situation where the juror had doubts about the sufficiency of the prosecution's evidence [or] viewed the evidence differently from the way [some] other jurors viewed it . . ." (*People v. Wilson, supra,* 43 Cal.4th at p. 27.) Removal of a juror in such a situation is error.

III.

A JUROR WHO HAS DOUBTS ABOUT THE STRENGTH OF THE PROSECUTION'S CASE DURING TRIAL BUT PARTICIPATES IN DISCUSSIONS DURING DELIBERATIONS AND VOTES "UNDECIDED" HAS NOT PREJUDGED THE CASE

This Court reversed the death judgment in *People v. Wilson*, 44 Cal.4th 758, finding that the trial court abused its discretion in removing a deliberating juror during penalty phase deliberations. One of the unsupported bases of the trial court's ruling that Juror No. 5 was unable to perform his duties was that he had prejudged the case by allegedly making comments about the question of penalty during the guilt phase. (*Id.* at p. 836.) The evidence came from another juror who informed the court that during a break in the guilt phase, Juror No. 5 said to him that the defendant's problems with authority stem from the lack of a positive authority figure when he was growing up. (*Id.* at pp. 837-838.)

As this Court noted, the juror's fleeting comment to a fellow juror was a technical violation of the court's admonition not to discuss the case but a trivial one. (*Id.* at pp. 839-840.) More significantly, the remark did not establish that the juror had prejudged the question of penalty. This Court pointed out that "while jurors are told not to discuss the case until all the evidence has been presented and instructions given, they are not precluded from thinking about the case, nor would that be humanly possible." (*Id.* at p.

840.)

In appellant's case, Juror 11's alleged comments – made during deliberations – were not evidence of prejudging, but merely reflected his thoughts about the case when the prosecution rested. They were made in the course of explaining to other jurors his opinion that the prosecution's case was not strong. (See e.g., 26 RT 5350 [one juror described the remark as being made when the jurors went around the table to express how each of them was leaning]; RT 5372 [one juror said that these kinds of remarks were made during the course of a discussion where each juror tried to express how they arrived at their initial vote]; RT 5389 [another juror said the remark was made "in passing" to describe the juror's feeling that "nothing had been proved beyond a reasonable doubt].)

The juror in *Wilson* had initially joined other jurors in a tentative vote to impose death and only later changed his mind. This demonstrated, as this Court pointed out, that when the juror "uttered the challenged comments during a break in the guilt phase proceedings [he] had not firmly prejudged the case, that the issue was fluid in his mind, and that he was open to imposing the death penalty on defendant." (*People v. Wilson*, *supra,* 44 Cal.4th at p. 840.) Here, after making the comment about the prosecution's case during deliberations, Juror 11 maintained that he had not yet made up his mind and, in fact, along with other jurors had stated that he was undecided. (26 RT 5314.) Other jurors agreed that Juror 11's views were not fixed. (See, e.g., 26 RT 5389 [Juror 11 appeared to have his mind made up but it was "more of a thing in passing"]; RT 5410 [Juror 11 had a "rough idea" of which direction he might go but it was not "set permanently"]; RT 5415-5417 [Juror 11 appeared to begin deliberations with his mind made up "but he recanted"].) At most, "[i]t merely appears that . . . [the juror] was

entertaining various concerns about the case in his mind" (*People v. Wilson, supra*, 44 Cal.4th at pp. 840-841), when the prosecution rested its case. As in *Wilson,* "[c]ontrary to the trial court's ruling, such thoughts did not show [Juror No. 11] had prejudged the case . . . ." (*Id.* at p. 841.)

IV.

CONCLUSION

It may be appropriate to disqualify a juror when the record firmly establishes that the juror has stubbornly maintained a fixed position from the start of deliberations and has refused to talk about his or her views with other jurors. Where, however, as in appellant's case, the juror is actively participating in discussions with other jurors, in the course of which he voices strong concerns about the prosecution's case, that juror is deliberating and it is improper to order the juror's removal. Indeed, to find otherwise would have the dangerous consequence of chilling "frank and open discussion of the issues among jurors." (*People v. Wilson*, *supra*, 44 Cal.4th at p. 829.) The trial court's removal of Juror 11 requires reversal because the record does not establish to a demonstrable reality that the juror failed to carry out his duties during deliberations.

DATED: September 15, 2008

Respectfully submitted,

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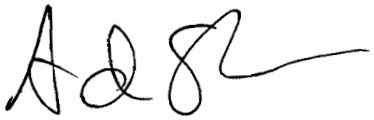

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CERTIFICATE OF COUNSEL

(Cal. Rules of Court, Rule 8.630(b)(2))

I, Andrew S. Love, am the Assistant State Public Defender assigned to represent appellant Cleamon Johnson in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that the brief is 2800 words in length.

Dated: September 15, 2008

ANDREW S. LOVE
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DECLARATION OF SERVICE BY MAIL

Re: People v. Allen and Johnson

No. BA105846-02
(Cal. Supreme Ct. No. S066939)

I, GLENICE D. FULLER, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. A true copy of the attached:

APPELLANT'S SUPPLEMENTAL BRIEF

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