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Filed 12/11/08
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12-11-08 MJ Rodriguez

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN JOAQUIN

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. WILLIAM JENNINGS CHOYCE, Defendant.	Case No.: SF098079A MOTION FOR MODIFICATION OF THE RECOMMENDED DEATH VERDICT (Penal Code § 190.4 (e)) DATE: December 15, 2008 DEPARTMENT: 33

MOTION TO MODIFY THE DEATH VERDICT

NOTICE OF MOTION

Notice is hereby given that at the date, time and department set forth above, defendant, WILLIAM JENNINGS CHOYCE shall move this court for an order modifying the death penalty findings returned September 18, 2008 after a de novo determination of the mitigation and aggravation pursuant to Penal Code § 190.4.

This motion is made on the grounds set forth herein, the papers, pleadings and documents filed herewith, upon the court file and upon such other and further evidence and documentation as may be submitted by the defense.

Penal Code § 190.4 (e) provides:

> In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

In other words, the statute requires the court to make an independent determination concerning the propriety of the death penalty, and to independently reweigh the evidence in aggravation and mitigation and determine whether, in the court's own judgment, the weight of the evidence supports the jury verdict. (*People v. Burgener* (2003) 29 Cal.4th 833, 891.)

Although the statute does not so state, the court has interpreted this subdivision to require the judge to make an *independent* determination whether imposition of the death penalty upon the defendant is proper in light of the relevant evidence and applicable law. (*People v. Rodriguez*, (1986) 42 Cal.3d 730, 793.) The Court may not simply defer to the jury's verdict. The trial court must consider the entire record to include those matters in mitigation advance by the defense. (People v. DePriest, 42 Cal.4th 1.)

Dated: December 11, 2008

WILLIAM G. FATTARSI
Deputy Public Defender

Filed 12/11/08
ROSA JUNQUEIRO, CLERK
By Gail Land DEPUTY

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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SAN JOAQUIN

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The People of the State of California, Plaintiff, v. WILLIAM JENNINGS CHOYCE, Defendant.	No. SF098079A ~~SF074536A~~ NOTICE OF MOTION AND MOTION FOR A NEW TRIAL Date: December 15, 2008 Time: 9:00 AM Dept: 33

PLEASE TAKE NOTICE that on December 15, 2008 at 9:00 a.m., or as soon thereafter as the matter may be heard in Department 33 of the above-entitled court, defendant WILLIAM JENNINGS CHOYCE will, and hereby does, move the court for an order granting a new trial in this action.

This motion is made on the grounds that the jury's verdicts were contrary to law and evidence, that the court misdirected the jury in matters of law, that the court erred in decisions of law arising during the course of the trial, that jury was guilty of prejudicial misconduct having considered inappropriate matters during deliberations.

The motion is based on this notice, the records on file herein, on such other and further evidence as the court may deem appropriate to consider at the hearing hereof, and on the following memorandum of Points and Authorities:

THE TRIAL COURT IMPROPERLY ALLOWED EVIDENCE OFFERED BY THE STATE

INTRODUCTION

The People have offered hearsay evidence against the defendant, WILLIAM JENNINGS CHOYCE, under the past recollection recorded exception. (Evidence Code section 1237.) Defendant asserts that an inadequate foundation has been laid, and in the alternative, that the introduction of these statements violates the California Constitution, as well as the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment to the United States Constitutions.

POINTS AND AUTHORITIES

NO FOUNDATION FOR THE PAST RECOLLECTION RECORDED EXCEPTION HAS BEEN ESTABLISHED.

Evidence Code section 1237, past recollection recorded, requires that the following foundation be laid:

1. The statement must be admissible if made by the witness while testifying;

2. The witness lacks the present recollection necessary for full and accurate testimony;

3. The statement is contained in a writing that:

   a. Was made at a time when the fact was fresh in the witness's memory;

   b. Was made by the witness or under the witness's direction;

c. The witness testifies that the hearsay statement is true;

d. The writing is authenticated as an accurate record of the statement.

(Evidence Code section 1237.)

The purpose behind past recollection recorded is to allow the introduction of previously recorded statements when the trustworthiness and accuracy of those statements can be verified by the declarant, who is subject to cross-examination while under oath. (*People v. Simmons* (1981) 123 Cal. App. 3d 677, 682.) This is "only a narrow exception to the hearsay rule consistent with trustworthiness." (Id.)

Since the declarant's current testimony is the only guarantee of the statement's reliability, there must be some basis for the declarant actually asserting the statement is true. As such, the declarant must be able to testify that he is presently aware that the facts in his report are true. (*Sherrel v. Kelso* (1981) 116 Cal. App. Supp. 22, 33.) It is not enough to say that the facts in his report are true to the best of his knowledge, or that he had no motive to lie. (*Simmons*, supra, 123 Cal. App. 3d. at 682, 683.) As the Court of Appeal noted in *Simmons*, "[o]ne who has no knowledge as to the truth or falsity of a representation may honestly say that it is either true or false to the best of his knowledge with neither having any evidentiary value." (Id. at 683.)

In *Simmons*, defendant made admissions and other incriminating statements to a jailhouse

witness. The witness then discussed these statements with the police. The police transcribed witness's statement and had witness sign the transcription. Before he was able to testify in court however, the witness suffered a serious head injury causing amnesia. The witness was unable to verify that his prior statements were true, or that he even made statements to the police. The witness testified that he had no reason to lie to the police and was also able to identify his signature on the transcript of his original statement to police. The witness however, was unable to verify that his prior statements were true.

The trial court admitted the statements. The superior court reversed and excluded the statements. The Court of Appeal then affirmed the superior court, noting that the foundational requirements for past recollection recorded were not met because the witness had no knowledge of the events in his statement or any of the circumstances surrounding the statement's preparation. (*Simmons*, 123 Cal. App. 3d at 682.) The instant situation is similar to that in *Simmons*. In the instant case, the officers have no knowledge or recollection of any fact contained within their report, nor do they independently recall any of the information within their reports. As such, they cannot verify the accuracy of those statements, and can only offer generalized reassurances that they had no reason to lie. Even assuming the court finds that adequate foundation is laid, the past recollection recorded exception only allows the introduction

of portions of the officer's reports that would be independently admissible. (Evidence Code section 1237.) Therefore, the police officers would not be able to introduce statements made by other witnesses, as this would constitute a second level of hearsay. Past recollection recorded cannot be used as a vehicle for the admission of otherwise inadmissible evidence, in this case, the double hearsay statements within an officer's report. In addition, admission of double hearsay within the officer's report violates the Confrontation Clause under *Crawford v. Washington* (2004) 541 U.S. 36., since there is no opportunity to cross-examine the declarants, nor any showing of unavailability.

ALLOWING THE POLICE OFFICERS TO READ FROM THEIR REPORTS WHEN THEY CANNOT BE CROSS-EXAMINED ON FACTS NOT CONTAINED WITHIN THEIR REPORT VIOLATES THE CONFRONTATION CLAUSE.

Under the current state of the law, there is no Confrontation issue when a hearsay statement is admitted into evidence and the declarant is available at trial for cross-examination. (*United States v. Owens* (1988) 484 U.S. 554, 559.) A witness is still considered 'available' for cross-examination even when they have no memory of the circumstances surrounding the making of the hearsay statement. (*People v. Gunder* (2007) 151 Cal. App. 4th 412, 419.) The rationale is that the defendant is able to cross-examine the declarant on their lack of memory and,

hopefully, undermine or discredit the impact of the hearsay testimony. (*Owens*, supra, 484 U.S. at 559-560.)

But the constitutional guarantee of the opportunity for effective cross-examination is a legal fiction in situations involving the use of past recollection recorded. The police officers are able to read their reports to the jury, which is highly damaging to the defendant, and then are able to avoid any cross-examination by claiming, "I don't know." Because police officers are smart enough to write internally-consistent reports, the past recollection recorded exception allows the prosecutor to introduce inculpatory evidence without the defendant being able to respond. This leaves the jury with only half of the picture – that which is reflected in the officer's report. Such a policy encourages verdicts premised upon questionable evidence, which is antithetical to a justice system where the People bear the burden of proof.

IMPROPER INSTRUCTIONS TO THE JURY REQUIRE A NEW TRIAL

Penal Code section 1181 sets forth the reasons for which a trial court must grant a new trial. Those grounds include:

> 5. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial, and when

the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury; and

6. When the verdict or finding is contrary to law or evidence . . .

The jury immediately questioned the meaning of "life without possibility of parole." Members of the jury did not accept the clear and unambiguous meaning of the sentencing option (Declaration of Robert Buechler, *post.*) The jury sought guidance from the court and a clear statement regarding the nature of a sentence of life without parole.

The court should have responded to the specific question rather than merely repeating the "assume" language which gave rise to the question.

In this case defendant's future dangerousness was at issue. When "a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the defendant "to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel"; (*Ramdass v. Angelone* (2000) 530 U.S. 156, 165.) Defendant was allowed to argue the meaning of "life without the possibility of parole," however, the jury needed assurance from the court. the court failed to offer those assurances, leaving the jury with the belief that Mr. Choyce would be paroled. In *Shafer v. South Carolina* (2001) 532 U.S. 36, the United States Supreme Court concluded that the instruction that " 'life imprisonment means until the death of the defendant'

" did not satisfy *Simmons* (*Simmons v. South Carolina* (1994) 512 U.S.) because the instruction did not clearly eliminate the possibility of parole and because many jurors may not know " 'whether a life sentence carries with it the possibility of parole.' " (Shafer, at p. 52.) The court also found the instruction ambiguous because the judge also instructed the jury that " '[p]arole eligibility or ineligibility is not for your consideration.' " (Id. at p. 53.) The latter instruction "did nothing to ensure that the jury was not misled and may well have been taken to mean 'that parole was available but that the jury, for some unstated reason, should be blind to this fact.' " (Ibid., quoting Simmons, supra, 512 U.S. at p. 170.) The court in this matter did nothing to ensure that the jury was not confused and misled concerning the meaning of life without the possibility of parole. Aware of a misunderstanding concerning the nature of the penalty, the court reread the "assume" language that created the misunderstanding. The court thereby misled the jury as to the meaning of the sentence.

The sentencing alternative is described in *People v. Prieto* (2003) 30 Cal.4th 226 as "clear and unambiguous." The jury asked if Mr. Choyce would ever be released on parole. They did not have a clear unambiguous understanding. The court should have responded to the question.

JURY MISCONDUCT

Evidence Code section 1150 provides:

(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character

as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

(b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict.

This jury considered inappropriate matters, attempting to understand the meaning of life without possibility of parole. They considered the military meaning of the sentence, they considered the fact that Charles Manson has parole hearings (Declaration of Robert Buechler, *post*.) These considerations are of a character likely to have influenced the verdict improperly.

It is juror misconduct to consider such extraneous material and amounts to a presumption of prejudice subject to rebuttal by a showing that no prejudice actually occurred. (*People v. Mincey* (1992) 2 Cal.4th 408.) Prejudice is apparent in light of the courts failure to adequately instruct and the resulting verdict of death.

CONCLUSION.

For the above reasons, Defendant WILLIAM JENNINGS CHOYCE respectfully requests the Court to grant his motion for new trial.

December 11, 2008

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Declaration of Robert Buechler

1. I am a private investigator, licensed by the State of California since 1983. I am currently the Managing Owner of Buechler & Associates Investigative Services and a member of the California Association of Licensed Investigators. I began training and working as an investigator in 1980, and began attending training conferences regarding death penalty defense presented by the California Attorneys for Criminal Justice and the California Public Defenders Association, in Asilomar, California, in the early 1980's. I have attended those conferences for many years.

2. Over the past twenty years, I have read, reviewed and studied numerous manuals, articles, books, cases and other written materials regarding death penalty case standards and procedures. I am familiar with the standards established by the United States Supreme Court, the California Supreme Court, and the American Bar Association for the investigation of mitigating evidence in capital cases. I have also been retained by the California Appellate Project and the Habeas Corpus Resource Center to assist in the preparation of post-conviction filing.

3. I have worked as an investigator on hundreds of criminal cases in state and federal courts, including over twenty-five capital cases, some at trial and some in post-conviction. I have been retained by the California Supreme Court as a mitigation expert on a post-conviction Death Penalty case and by California Counties as a mitigation specialist on a trial level death penalty cases.

4. I was retained by the San Joaquin County Public Defender's Office as a mitigation specialist on the capital case of William Jennings Choyce.

5. In September 2008, Mr. Choyce's penalty phase trial ended with a verdict of death. After the verdict I was instructed by one of Mr. Choyce's attorney's, Public Defender William Fattarsi, to interview some of the jurors. I was specifically requested to interview juror Deborah Williams.

6. Although Deborah Williams was removed from the jury a few hours prior to the verdict, she was a sitting juror during all of the guilt phase testimony, through all of the penalty phase testimony and for the few days of jury deliberation prior to the death verdict. Ms. Williams was a sitting juror during the part of the deliberation when the jury asked the Court for clarification regarding the instruction of Life Without Parole.

7. On October 10th, 2008, I spoke with Deborah Williams by telephone. During that conversation I asked Ms. Williams about the jury question to the court regarding the definition of Life Without the Possibility of Parole [LWOP]. In response, Ms. Williams stated that "someone should have told us about LWOP... is it really LWOP." Ms. Williams said that after the Court read the jury instructions and they began deliberations, at least one member of the jury had questions about whether LWOP actually meant that the defendant would never be paroled. Ms. Williams called the Court's follow-up instruction to "assume" Life Without Parole meant Life Without Parole, "absurd." She said "the court didn't answer our question." She added, "why assume... why didn't they {sic} have a clearer answer." Asked if some members of the jury were considering the sentence of LWOP, Ms. Williams responded, "obviously."

8. Ms. Williams also told me that "there have been cases where people [convicted of death] have been paroled. They find some loophole to get out." She also mentioned that "Charles Manson goes for parole hearings." She also said that "in the military court system" some inmates sentenced to LWOP are paroled.

9. Ms Williams refused to tell me whether the jury discussed these scenarios during deliberation.

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

Robert Buechler

12/10/2008

Via Email