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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>LAC VINH DU et al.,<br>Defendants and Appellants. | B110122<br>(Super. Ct. No. BA115846) |
| In re LAC VIN DU,<br>on Habeas Corpus. | B120896 |

APPEAL from a judgment of the Superior Court of Los Angeles County, Morris B. Jones, Judge. Reversed and ordered dismissed. Petition for writ of habeas corpus is denied as moot.

Eleanor M. Kraft; Berley & DeVito and Cara DeVito, under appointments by the Court of Appeal, for Defendants and Appellants.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Lance E. Winters, and Suzann E. Papagoda, Deputy Attorneys General, for Plaintiff and Respondent.

Following removal of a hold-out juror during deliberations, a jury consisting of 11 original jurors and an alternate convicted appellants Lac Vinh Du and Tuong Vinh Du of one count of second degree murder in violation of Penal Code section 187, subdivision (a) and three counts of attempted murder in violation of sections 664 and 187. The jury also found true various enhancements related to the use of firearms in the commission of the crimes. The trial court sentenced Lac to a total term of 16 years to life in state prison and Tuong to a total term of 33 years and 8 months to life in state prison.

Appellants appealed from the judgments of conviction, contending, inter alia, that the trial court abused its discretion when it dismissed the hold-out juror. We held that the trial court did not err in dismissing the juror, and affirmed the judgment.

Appellants petitioned our Supreme Court for review. The Supreme Court transferred review to this Court, with directions to vacate our earlier decision and to reconsider this cause in light of *People* v. *Cleveland* (2001) 25 Cal.4th 466. We now do so.

Facts

Appellants were convicted for their roles in a 1994 gang-related shooting at the Rose Room, a nightclub in Rosemead. Henry Chang, Adam Zachs and David Yang were shot as they left the club. Sam Chan was shot and killed. Appellants were arrested as they drove away from the scene of the shooting with four others.

Tuong admitted to police that he had fired a gun into the crowd outside the Rose Room, and said that he did so because he was afraid. Lac admitted to police that he knew there would be a problem at the Rose Room and that someone in his group was taking a gun there. He said that he intended to back up his fellow gang members with his fists.

## Discussion

In letter briefs filed after this matter was transferred to us from the Supreme Court, appellants contend that *People* v. *Cleveland*, *supra*, demonstrated that the trial court erred in dismissing Juror No. 5., a hold-out juror. We agree.

1. Facts.

At 3:00 p.m. on the second full day of deliberations, the trial court received a note from the jury foreperson which read as follows: "We have a juror who does not want to explain to us or deliberate why she has staunchly stood her ground on her decision (verdict) concerning this case. We, the majority of the jury, agree that this particular juror *has not* reasonably explained her stance with her decision, and further, she is not willing to further deliberate concerning her actions. We, as a jury, are very concerned about this predicament and want to know what the next step is we need to take."

The trial court then questioned each of the jurors with counsel present, and received the following responses.

The foreperson (Juror No. 8) explained that as the jury was going through the instructions at the beginning of the second day, Juror No. 5 stated she had reached a decision on the case, was staunchly maintaining it, and refused to explain her decision and further refused to discuss the case with the rest of the jury. According to the foreperson, Juror No. 5 was talking to the jurors, but repeatedly stated she had reasonable doubt, but would not explain the reasons for her position. Juror No. 5 also would not discuss the facts or evidence of the case.

Juror No. 1 said Juror No. 5 told the jury, "I made up my mind. I thought about it last night. I made up my mind, and it's made up. It's [*sic*] nothing you can say." Juror No. 5 refused to deliberate with the rest of the jury stating that "she feels that the defendant was intimidated." She would not enter into a "give and take" discussion of the evidence. Juror No. 1 did not think Juror No. 5 had a bias

or racial problem. Juror No. 5 would not "give any kind of reason, no kind of statement, anything as to why."

Juror No. 2 stated that Juror No. 5 said she had "overnight made up [her] mind." Juror No. 5 said she had reasonable doubt and refused to listen to further deliberations. She told the jury, "I made up my mind.” She refused to listen to further deliberations. I thought about it last night. I made up my mind, and it's made up. It's [*sic*] nothing you can say." . She refused to give specific reasons for her doubt and would not answer others' questions. Juror No. 2 believed Juror No. 5 was not cooperating with the rest of the jury. Juror No. 5 did not pay attention to the others' questions or the on-going discussions in the juror room. Juror No. 5 at one point said, "Well, if, if answering the question like that means to be agreeing with you, then I must be wrong." Juror No. 5 did not give specific reasons for what she called "reasonable doubt" because that was the excuse. Juror No. 5 "has like an attitude as being against the rest of the juror's decision or opinion . . ." and has an opposite answer to the answer of the other jurors.

Juror No. 3 stated that Juror No. 5 indicated the first thing in the morning of the second day that she had made up her mind. When Juror No. 5 stated that her mind was made up, the other jurors suggested reviewing the evidence, but Juror No. 5 said she "didn't need to," because she had already made up her mind. While Juror No. 5 participated in the day's discussions to an extent, "she didn't want to listen or consider the evidence again. She just didn't want to anymore. She felt like she had already made up her mind." When asked to explain her mental processes, "she wasn't very helpful in that regards."

According to Juror No. 4, Juror No. 5 refused to deliberate with the rest of the jury and, first thing in the morning, she advised the others she had "made [her] mind up." Juror No. 4 believed another day of deliberations might lead to further progress, as Juror No. 5 was "begrudgingly" discussing the facts of the case. However, Juror No. 5 also said "over and over again," "I've got my mind made up. I have reasonable doubt. I have reasonable doubt. I have reasonable doubt."

Juror No. 5 was not helpful in presenting her case or giving the jurors some evidence she relied on.

Juror No. 6 opined Juror No. 5 appeared to have trouble understanding or interpreting "the wording of the facts," and seemed to be close-minded. Juror No. 5 said she had made up her mind at home the previous evening. The other members of the jury started going over it again line by line to see where the misunderstanding was, but Juror No. 5 "seems kind of close-minded still."

Juror No. 7 stated Juror No. 5 refused to discuss the case with the rest of the jury. According to Juror No. 7, there had been agreement on certain issues the previous day, but in the morning, Juror No. 5 said, "I've gone home and thought about it, and I've made up my mind, and this is it." Juror No. 5 refused to explain how she had reached her conclusions. Juror No. 7 did not believe Juror No. 5's decision was based upon any bias or prejudice. Juror No. 5 "does not go off in a corner and put their hands over their head," but will not answer any questions or give reasons to help other jurors feel the way she does.

Juror No. 9 stated Juror No. 5 refused to deliberate any further. According to Juror No. 9, Juror No. 5 said she had not slept and had deliberated "last night amongst her own self in her mind and [was] through. She made up her mind at 9 a.m. this morning." Juror No. 5 refused to discuss her views and "repeatedly looked out the window" and said "I don't have to agree with you and just because you don't like what I say, doesn't mean that you're right."

Juror No. 10 opined Juror No. 5 was not agreeing with the others and was "failing to accept some of the evidence." Juror No. 5 said she had a reasonable doubt, but could not articulate where or explain the basis for her doubt. The other eleven jurors kept firing off different ideas trying to get Juror No. 5 to explain the problem in accepting a particular piece of evidence, but she always went back to "reasonable doubt." Juror No. 5 appeared to have "problems" in terms of "being receptive to ideas from the other jurors," but by the end of the first day of deliberations, "everyone pretty much agreed on things. Today [Juror No. 5] came

in and said, 'I, I have a reasonable doubt."' Juror No. 5 wanted to "submit that we're stuck." Juror No. 5 also said she had made up her mind and was not going to change her mind.

Juror No. 11 stated although the other jurors had not finished deliberating, Juror No. 5 said she was not willing to deliberate further as she had made up her mind. Juror No. 11 felt Juror No. 5 had not "really listened and tried to consider what the other people were saying," throughout the second day of deliberations. Juror No. 5 continually brought up one point that the others had considered, which was "an age issue." Specifically, Juror No. 11 said she believed No. 5 felt that "the age of one of the defendants was young . . . and feels that perhaps the piece of evidence being the tape -- on that tape --." The court interrupted and asked the juror not to go into the evidence.

Juror No. 12 stated Juror No. 5 refused to deliberate with the rest of the jury. Before the jury even started the second day's deliberations, Juror No. 5 informed the jury she had already made her decision. Juror No. 12 believed that while Juror No. 5 had no racial bias, she did not "want to deal" with the rest of the jury and would not respond to their questions in a "coherent" manner. Juror No. 12 expressed the view that "every juror in there has tried to come up with some way that would make her comfortable at giving us an explanation for things that she -- in other words she doesn't want to tell us why she feels, you know, the way she does."

Juror No. 5, when questioned by the trial court, said that she thought all jurors were deliberating and that the one juror who was not in accord with the other jurors was discussing the facts of the case. In response to the trial court's question as to whether a juror had made up her mind at home, reached a decision, and refused to further deliberate, Juror No. 5 responded, "That's not true, Your Honor, because all of the jurors have been deliberating today." When asked if she had anything to add about the deliberation process, Juror No. 5 stated, "Like I said before, I think certain jurors think they can, you know, make the decisions for

everybody, and I think we have to do it individually, at least those were your instructions."

After the trial court advised her that the jury was to deliberate as a group and try to reach an agreement on the case, Juror No. 5 stated, "And if there is no agreement on the case after the jurors have deliberated and if it's not unanimous, the juror -- I think that -- I think that he or she has done everything within [her] power, and I think that's what we're talking about."

After hearing argument, the trial court ruled as follows: "If a juror went home and made up their mind and says I've made up my mind, I'm not going to talk about it, something is wrong there. [¶] [T]he Court does have the discretion under Penal Code [section] 1089 to dismiss a juror prior to a verdict upon showing that the juror is unable to perform his or her duty by way of deliberations. [¶] And I think from what has been said by all -- well, all of the jurors basically have indicated that one juror is not deliberating except one of the jurors, and that one juror just gave two general statements. [¶] I'm going to bring the foreperson out and find out who that particular juror is at this time, and the court will excuse that juror from the panel."

Recognizing that counsel for both appellants did not agree with this action, the court stated: "That's an appellate issue if the court removes the juror and there's not demonstrated good cause. That's what happens in that situation."

The trial court excused Juror No. 5 and replaced her with an alternate juror.

2. Standard of review.

Section 1089 provides in relevant part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, . . . the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box. . . ." A juror who refuses to deliberate may be removed on the theory that such a juror is "unable to perform

his duty" within the meaning of section 1089. (*People* v. *Cleveland*, *supra*, 25 Cal.4th at p. 475.)

As our Supreme Court stated in *Cleveland*: "'We review for abuse of discretion the trial court's determination to discharge a juror and order an alternate to serve. [Citation.] If there is any substantial evidence supporting the trial court's ruling, however, we will uphold it. [Citation.] We also have stated, however, that a juror's inability to perform as a juror' "must appear in the record as a demonstrable reality" '[Citation.]'" (*People* v. *Marshall* (1996) 13 Cal.4th 799, 843, 55 Cal.Rptr.2d 347, 919 P.2d 1280.)" (*People* v. *Cleveland*, *supra*, 25 Cal.4th at p. 474.) Thus, "[t]he trial court may discharge the juror if it appears as a demonstrable reality that the juror is unable or unwilling to deliberate." (*Id*. at p. 484 [internal quotation marks omitted].) Thus, our job here is to determine from the record whether there is substantial evidence to establish as a demonstrable reality that Juror No. 5 failed to deliberate.

3. Guidelines to determine a refusal to deliberate.

Our Supreme Court has warned, "caution must be exercised in determining whether a juror has refused to deliberate. California courts have recognized the need to protect the sanctity of jury deliberations." (*People* v. *Cleveland*, *supra*, 25 Cal.4th at p. 475.) Indeed, "[t]he very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations." (*Id*. at p. 476.) Thus, "a trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations. *The inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations*." (*Id*. at p. 485 [emphasis added].)

"[P]roper grounds for removing a deliberating juror include refusal to deliberate. A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with

fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury. The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge. Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge. A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views. [Citation.]" (*People* v. *Cleveland*, *supra*, 25 Cal.4th at p. 485.)

4. Court's inquiry.

After questioning all of the jurors, the trial court removed Juror No. 5 because the court found that "all of the jurors basically have indicated that one juror is not deliberating." This, however, is an incomplete statement of what the trial court's inquiry had shown. All of the jurors agreed, and the trial court implicitly recognized, that Juror No. 5 had participated in the first day of deliberations to the satisfaction of all the other jurors.

In addition, when the trial court reminded Juror No. 5 that all jurors were to discuss and deliberate on the facts of the case, Juror No. 5 responded, "And if there is no agreement on the case after the jurors have deliberated and if it's not unanimous, the juror -- I think that -- I think that he or she has done everything within [her] power, and I think that's what we're talking about." Juror No. 5 correctly stated that a majority was not entitled to make the decisions for all the jurors, "and I think we have to do it individually, at least those were your

instructions" These comments indicated that Juror No. 5 understood and was attempting to comply with the court's instructions.[1]

These additional facts establish that Juror No. 5 should not have been discharged for failing to deliberate under the guidelines set forth in *Cleveland*, *supra.* As the Court in *Cleveland* made clear: "A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussions will not alter his or her views." (*People* v. *Cleveland*, *supra*, 25 Cal.4th at p. 485.)

We recognize that Juror No. 5's alleged refusal to deliberate arose after she had changed her views. However, such a change is not a relevant factor for consideration under *Cleveland*. As the Court in *Cleveland* instructs: "The inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations." (*People* v. *Cleveland*, *supra*, 25 Cal.4th at p. 485.)

The record is clear that Juror No. 5 deliberated for the first day. On the second day she announced that she had thoroughly reviewed the matter in her mind and was convinced that the People had failed to prove appellant guilty beyond a reasonable doubt. She had done "everything within [her] power to explain her position" and concluded further deliberations would be futile. Juror No. 5 should not have been discharged because she failed to deliberate further. A juror who has participated in deliberations for a reasonable period of time may not

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[1] The jury was instructed with CALJIC No. 17.40 as follows:

"The People and the defendant are entitled to the individual opinion of each juror.

"Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors.

"Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision.

"Do not decide any issue in this case by chance, such as the drawing of lots or by any other chance determination."

be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views. [Citation.]" (*People* v. *Cleveland*, *supra*, 25 Cal.4th at p. 485.)

Further, although the trial court found that Juror No.5 had not been deliberating, we believe that the jurors' responses to the court's inquiry fail to show as a demonstrable reality that Juror No. 5 refused to deliberate on the second day. Juror No. 5 herself stated that all the jurors were deliberating.

Two jurors expressly told the court that Juror No. 5 *had* continued to participate in discussions. Juror No. 3 stated that Juror No. 5 participated in the second day's discussion "to an extent." Juror No. 4 stated that Juror No.5 was "begrudgingly discussing the facts of the case.

The remainder of the jurors stated that Juror No. 5 would not deliberate; yet their comments showed that Juror No. 5 had participated substantively in deliberations. Juror No. 1 said that Juror No. 5 "feels that the defendant was intimidated." Juror No. 11 stated that Juror No. 5 continually brought up one point that the other jurors had considered, which was an "age issue," and that Juror No. 5 "feels that perhaps the evidence, the piece of evidence being the tape --." Clearly, the jurors could not have learned that Juror No. 5 felt this way unless she told them during deliberations.

Juror No. 2 stated that Juror No. 5 "has an opposite answer to the answer of the other jurors," and that Juror No. 5 had said "If answering the question like that means to be agreeing with you, then I must be wrong." Juror No. 9 stated that Juror No. 5 stated "Just because you don't like what I say, doesn't mean you're right." Juror No. 8, the foreperson, acknowledged that Juror No. 5 was talking to the other jurors. He also stated "we were going through questions. Sometimes she'll just say, well this, this is it. . . . And she does not answer those questions. These remarks show that Juror No. 5 was making substantive remarks, was indicating her disagreements with specific areas where the other jurors apparently all agreed, and was answering some questions.

Juror No. 6 stated that Juror No. 5 appeared to have trouble understanding or interpreting "the wording of the facts." Juror No. 10 stated that Juror No. 5 was "failing to accept some of the evidence." The remarks strongly suggest that Juror No. 5 was providing some kind of substantive feedback to the other jurors which made them think that she did not understand or agree with some specific facts.

Juror No. 7 told the court that she did not believe that Juror No. 5's decision was based on "ethnic or personal or racial" bias or prejudice. Similarly, Juror No. 12 told the court that Juror No. 5's decision did not have a racial basis. These remarks also suggest that Juror No. 5 had provided the other jurors with some reasons for her beliefs which were detailed enough for the jurors to feel comfortable that her beliefs were not based on bias or prejudice.

Thus, the jurors all sent mixed messages about Juror No. 5's conduct on the second day of deliberations. The only clear and uniform message that the jurors sent was that they were frustrated that they could not persuade Juror No. 5 to agree with them. As discussed above, a juror is required only to deliberate, not to agree with the majority.

The jurors' comments show that it is at least as likely that Juror No. 5 was unable to explain her views to the other jurors and that she engaged in the sort of faulty or disagreeable deliberating permitted by *Cleveland,* as it is that Juror No. 5 refused to deliberate at all.

For the reasons set forth above, we conclude that the record does not establish as a demonstrable reality that Juror No. 5 refused to deliberate. The trial court thus abused its discretion in dismissing Juror No. 5.

We find the erroneous dismissal to be prejudicial. The statements of the jurors indicate that Juror No. 5 was a hold-out juror for acquittal. Juror No. 5 herself indicated that she had reasonable doubt and that further deliberations would not change her mind. (*People* v. *Cleveland*, *supra*, 25 Cal.4th at p. 486.) The judgment must be reversed.

5. Double Jeopardy

The Court in *Cleveland* did not expressly discuss the issue of whether the defendant in that case could be retried. Subsequently, our colleagues in Division Four of this District Court of Appeal have considered the double jeopardy implications of an erroneous dismissal of a juror for refusing to deliberate, and have found that jeopardy bars a retrial. (*People* v. *Hernandez* (2002) 95 Cal.App.4th 1346.) In letter briefs filed after the publication of *Hernandez*, appellant contends that the doctrine of double jeopardy bars his retrial in this case. We agree.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense. (*U.S.* v. *Dinitz* (1976) 424 U.S. 600, 606.) Article I, section 15 of the California Constitution likewise guarantees that "[p]ersons may not twice be put in jeopardy for the same offense."

We agree with our colleagues that "[t]he determination of whether to preclude retrial in any given situation can be made only by focusing on all of the fundamental rights and policies upheld by the prohibition on double jeopardy, including the 'need to protect the interest of an accused in retaining a chosen jury' (*Crist* v. *Bretz*, *supra*, 437 U.S. at p. 35 [98 S.Ct. at p. 2161]), the right to a fair and impartial jury rather than one selected by the prosecution (*People* v. *Young*, *supra*, 100 Cal.App. at p. 23), and the importance of avoiding trials in which undue advantage has been placed in the hands of the prosecution (*Larios* v. *Superior Court*, *supra*, 24 Cal.3d at p. 329; *Downum* v. *United States*, *supra*, 372 U.S. at p. 736 [83 S.Ct. at p. 1034].)." (*People* v. *Hernandez*, *supra*, 95 Cal.App.4th at p.1370.)

The Court in *Hernandez* applied the above-stated policies to the case before them and concluded "that jeopardy bars retrial when, without legal necessity or good cause, the court alters the composition of the jury in the middle of trial in a

way that favors the prosecution." (*People* v. *Hernandez*, *supra*, 95 Cal.App.4th at p. 1371.)

We reach the same conclusion here. In the case before us, the removal of Juror No. 5 without legal necessity or good cause altered the composition of the jury in a way that favored the prosecution. We agree with our colleagues that "were we to conclude that retrial is permitted under these circumstances, the vital and fundamental right of every citizen to trial by a fair and impartial jury would be gravely undermined and the right to be free from double jeopardy would be rendered meaningless." (*People* v. *Hernandez*, *supra*, 95 Cal.App.4th at p. 1371.) "If the result of discharging a juror sympathetic to the defense without good cause was nothing more than a reversal of the conviction and remand for retrial minus the offending juror, we fear such discharges could become routine. This would do lasting harm to the fundamental rights protected by the right to trial by an impartial jury and the prohibition against double jeopardy." (*Ibid.* [footnote omitted].)

"As its ancient lineage attests, the double jeopardy clause is no mere 'technicality'; it is an integral part of 'the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial." (*United States v. Jorn* [(1971)] 400 U.S. [470] at p. 479 [27 L.Ed.2d at p. 553] (plur. opn.).) . . . [¶] . . ."The double jeopardy clause suffers no compromise; therein lies its strength and vitality. The extent of our inquiry ends with its proper application: 'Whether guilty or innocent of the offense with which he [is charged, the defendant is] entitled to have his case fairly tried according to the established rules of law. As was said by a learned judge, "Though unfair means may happen to result in doing justice to the prisoner in the particular case, yet justice so attained is unjust and dangerous to the whole community." (*Hurd v. State*, 25 Mich. 405.) The doctrine that respect for the law cannot be inspired by withholding the protection of the law from those accused of crime is one which recognizes no exceptions. To be watchful for the constitutional and individual rights of the citizen against any

encroachment thereon is one of the primary duties and obligations of the courts, and it is by unrelenting watchfulness and zeal in this regard that the conviction of the innocent will be averted.' (*People v. Mendoza* (1942) 55 Cal.App.2d 625, 633; cf. *People v. Superior Court (Harris)* (1990) 217 Cal.App.3d 1332 [defendant may not be retried for death penalty after sentence of life without possibility of parole reversed].)" (*People v. Superior Court (Marks)* 1 Cal.4th 56, 78-79.)

Disposition

The judgment of conviction is reversed and this matter is ordered dismissed. Petition for habeas corpus is denied as moot.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J.

I concur:

MOSK, J.

Turner, P.J.

I respectfully dissent from the reversal of the judgment and the dismissal of the amended information. In this regard, I believe that: the entire issue concerning excusing juror No. 5 has been waived by defendant, Lac Vinh Du[1]; all Sixth Amendment objections have been waived; the trial court would not have abused its discretion in concluding there was good cause within the meaning of Penal Code section 1089 as construed in *People v. Cleveland* (2001) 25 Cal.4th 466, 475-485 to discharge the juror; and the double jeopardy analysis in *People v. Hernandez* (2002) 95 Cal.App.4th 1346, 1354-1371 is incorrect.

First, Lac has waived the entire issue. Counsel for Lac never interposed an objection to the order excusing juror No. 5. Therefore, the entire issue has been waived. There are well established and consistently applied California Supreme Court holdings requiring prompt and timely objections in connection with a whole host of constitutional and statutory issues. (E.g. *People* v. *Frye* (1998) 18 Cal.4th 894, 969 [prosecutorial misconduct]; *People* v. *Alvarez* (1996) 14 Cal.4th 155, 186 [Sixth Amendment confrontation claim]; *People* v. *Jackson* (1996) 13 Cal.4th 1164, 1235 [admissibility of gun under § 190.3, subd. (b)]; *People* v. *Turner* (1994) 8 Cal.4th 137, 177 [Fourth Amendment claim]; *People* v. *McClellan* (1993) 6 Cal.4th 367, 376-377 [misadvisement by the judge as to the consequences of a guilty plea]; *People* v. *Clark* (1993) 5 Cal.4th 950, 994 [conflicted representation in violation of the Sixth Amendment]; *People* v. *Saunders* (1993) 5 Cal.4th 580, 589 [statutory violations of Pen. Code, §§ 1025 and 1164 by prematurely discharging the jury]; *People* v. *Welch* (1993) 5 Cal.4th 228, 234-235 [improper probation conditions]; *People* v. *Visciotti* (1992) 2 Cal.4th 1, 48 [improper voir dire questions]; *People* v. *Gallego* (1990) 52 Cal.3d 115, 179 [delay in objecting to destruction of evidence]; *People* v. *Wright* (1990) 52 Cal.3d

367, 411 [judicial misconduct]; *People* v. *Carrera* (1989) 49 Cal.3d 291, 317 [improper questioning of witnesses].) The reason for these rules has been articulated by the California Supreme Court as follows: "'An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been but was not presented to the lower court by some appropriate method . . . . The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver . . . . Often, however, the explanation is simply that it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial.'" (*Doers* v. *Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1, italics in *Doers*.) "'The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . .'" (*People* v. *Walker* (1991) 54 Cal.3d 1013, 1023.) "'No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." [Citation.]' (*United States* v. *Olano* (1993) [507 U.S. 725, 731].)" (*People* v. *Saunders, supra,* 5 Cal.4th at p. 590, fn. omitted.) The failure to ever object to excusing juror No. 5 constitutes waiver, forfeiture, and procedural default of all of Lac's constitutional and statutory claims.

Second, all of Tuong's Sixth Amendment objections have been waived. Tuong's counsel only objected to the order excusing juror No. 5 and never set forth any grounds. Presumably, Tuong's counsel was objecting under Penal Code section 1089, the provision of law the trial court was applying. Tuong has waived all constitutional issues and they are now the subject of procedural default. The

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**1** Because of the similarity their names, for purposes of clarity and not out of

California Supreme Court has repeatedly held that constitutional objections must be interposed in order to preserve such contentions on appeal. (*People* v. *Williams* (1997) 16 Cal.4th 153, 250 [objection raised for the first time on appeal that admission of gang paraphernalia violated defendant's associational rights under the First and Fourteenth Amendments waived when not presented in trial court]; *People* v. *Garceau* (1993) 6 Cal.4th 140, 173 [Sixth and Fourteenth Amendment claims to a fair trial and equal protection in connection with jury selection waived when not presented in trial court]; *People* v. *McPeters* (1992) 2 Cal.4th 1148, 1174 [Sixth Amendment discriminatory juror selection issue waived when not presented in trial court].)

Third, there would have been no abuse of discretion under the rule established in *Cleveland* in excusing juror No. 5. On October 16, 1996, after the conclusion of final jury instructions, the alternate was excused. The trial court been stated: "Counsel, there will be no deliberating tonight. They will return tomorrow at 9 a.m. Leave a number where we can reach you. And if anything comes up, we'll contact you expeditiously. . . . [¶] Good night. Thank you. [¶] . . . All three counsel may look at the forms. . . . make sure they are okay." After both defense attorneys acknowledged they had looked at the verdict forms, the court stated: "Okay. Then, we're in recess until tomorrow morning."

The clerk's minutes for October 17, 1996, indicate that the jury commenced deliberations at 9 a.m. The jurors deliberated between 9 and 10:30 a.m. At 10:30 a.m. the recess was taken and deliberations resumed at 10:50 a.m. At noon, deliberations ceased during the lunch recess. In the morning of October 17, the jurors only deliberated 160 minutes. The jury resumed deliberations at 1:30 p.m. At 1:55 p.m. the jury presented the court with a written inquiry. The jurors were not brought into the courtroom until 62 minutes later at 2:57 p.m. At 3:04 p.m., the jurors resumed deliberations and were excused at 4 p.m. It is difficult to assess

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any disrespect for either defendant, they will be referred to as Lac and Tuong.

how long deliberations transpired on the afternoon of October 17. If the deliberations ceased at 1:55 p.m. when the written inquiry was presented and discussions recommenced at 3:04 p.m., the total deliberations in the afternoon consumed only 81 minutes. Often, but not always, deliberations are put on hold when a written question is presented to the court. On the other hand, if the jurors deliberated from 1:30 p.m. except for the 7 minutes in the courtroom when their question was answered, then the jury deliberated only 2 hours, 21 minutes. When the record is viewed in a light most favorable to the judgment, total deliberations on October 17 consisted of only 4 hours, 41 minutes. If the record is viewed in the light least favorable to the judgment, then the total deliberations on October 17 consisted of only 5 hours, 6 minutes.

Juror No. 5, according to the other jurors, made up her mind at home after the conclusion of deliberations on October 17. Under the analysis in *Cleveland*, a juror who deliberately refuses to obey a court order to deliberate may not be excused if she or he has participated in "deliberations for a reasonable period . . . ." (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 485.) This issue is reviewed for an abuse of discretion. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1351; *People v. Osband* (1996) 13 Cal.4th 622, 674-675.) The trial court, without abusing its discretion, could have concluded there had not been deliberations for a "reasonable period" of time as that term is used in *Cleveland*. There had been only a single day of deliberations which consumed between 4 hours, 41 minutes and 5 hours, 6 minutes of deliberations. There were four counts charged against defendants plus a total of 22 separate special allegations. The jury instructions, which included complex analysis concerning lesser-included offenses and various mental states, consisted of 82 pages. The "reasonable period" of time language in *Cleveland* necessarily vests trial judges with the authority to consider the complexity the case along with the duration of deliberations. Because, without abusing discretion, the trial court could have concluded that deliberations had not occurred for a "reasonable period" of time, the willful refusal of juror No. 5 to

obey the order to deliberate constitutes "good cause" within the meaning of section 1089. (*People v. Cleveland*, *supra*, 25 Cal.4th at pp. 475-485.)

Of course, the problem in this case is the trial court never exercised its discretion under *Cleveland*. This is because *Cleveland* was not decided until nearly a half-decade after the trial in this case. The injustice resulting from California's outdated rule requiring retroactive application of judicial decisions is obvious. Two convicted murderers are being released, they will go free, because the trial judge did not exercise discretion under a specific rule not announced until nearly a half-decade later. Hopefully, the Legislature or the voters will take action to ban the retroactive application of appellate court decisions such as *Cleveland*. The families of victims of gang-related homicides deserve such from the Legislature and the voters.

Finally, there is no merit to the *People v. Hernandez*, *supra*, 95 Cal.App.4th at pages 1354-1371 double jeopardy analysis. If a conviction is reversed, under these circumstances, an accused is subject to retrial, double jeopardy protections notwithstanding. Two binding decisions, *United States v. DiFrancesco* (1980) 449 U.S. 117, 131 and *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 71-72, neither cited in *Hernandez*, compel such a result.

TURNER, P.J.