SUPREME COURT OF LOUISIANA

No. 94-KA-0756

STATE OF LOUISIANA

Versus

JAMES E. DIVERS

ON CAPITAL DIRECT APPEAL TO THE PARISH OF OUACHITA,
STATE OF LOUISIANA

BLEICH, Justice, dissenting.

The conviction in this case was legally supported by the record and the sound judgment of the trial court, particularly during the voir dire process. The majority opinion inappropriately emphasizes excerpts of the voir dire of two prospective jurors rather than the totality of their testimony. The majority does not give appropriate legal deference to the trial court's discretion. Therefore, I respectfully dissent.

The majority has held that in a capital case, a juror who would choose to recommend the death penalty rather than life imprisonment when no mitigating circumstances are presented must be disqualified. I do not believe that the prospective juror[1] Honea should have been excused for cause. A careful examination of the testimony of prospective juror Pritchard leads to the same conclusion.[2]

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1. It is noteworthy that neither of the two prospective jurors mentioned in this dissent actually served on the jury. Therefore, the jury that actually heard this case was fair and impartial. This writer would suggest that this point of the **jury that actually served and its impartiality** should be examined by this court in consideration of the rule set forth in Ross v. Oklahoma, 108 S.Ct. 2273 (1988), wherein the United Supreme Court stated: "**So long as the jury that sits is impartial**, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." (Emphasis supplied.) No "incompetent juror," as that term is defined in Ross, was forced upon this defendant. No substantial derogation of the defendant's rights would occur if the Ross rule is applied in this case.

2. Excerpts from the testimony of prospective juror Pritchard:
Q. . . . Are you going to be able to say, **"I will look at all the circumstances of the offense, any mitigating circumstances** if there are any, see if the State proves their aggravating circumstances, consider the character and propensities"? Will you look at all of that?
By Mr. Pritchard: **I think I can look at it, yeah.** I may not

A juror should be dismissed based on mind-set and beliefs, first, if he "is not impartial, whatever the cause of his partiality." La. C.Cr.P. Art. 797(2). Second, a juror should be dismissed if he "will not accept the law as given to him by the court." La. C.Cr.P. Art. 797(4). The law relevant to capital sentencing mandates that "[a] sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed." La. C.Cr.P. Art. 905.3. However, in the hypothetical questions posed to these jurors, there were no mitigating circumstances to be considered.[3] The jurors were not refusing to abide by the law.

The majority cite State v. Ross, 623 So.2d 643 (La. 1993), and State v. Robertson, 92-2660 (La. 1/14/94); 630 So.2d 1278, for the proposition that challenges to jurors who would automatically vote for the death penalty if the defendant was convicted should be sustained. In those cases, the jurors said that they would refuse to regard the statutory requirement to consider any mitigating circumstances presented by the defense in making their determination. The situation presented in those cases is critically different from that presented by prospective jurors

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agree with it, but I think I can look at it. R. 3385.
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Q. . . . And that you hoped you wouldn't go fishing for some reason to vote for first degree murder after you saw specific intent. Is that right?
By Mr. Pritchard: Yeah, that's right. Because one of the circumstances has to exist, the robbery or whatever that we was talking ... I mean it has to exist. Either it does or it doesn't. And I hope **I wouldn't go fishing to try to find something and to try to connect that to the first degree.** R. 3386.
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By Mr. Pritchard: I would do my best to follow the law...
Q. Do your best, but you're not certain that you would follow the law?
By Mr. Pritchard: No, as I've said, I can't guarantee anything.
. . .
By The Court: . . . Now, you may personally disagree with the law, but it will be one of your duties as a juror to apply that law, the law of Louisiana as it exist today, regardless of your personal feelings about the law. Do you understand that, sir?
By Mr. Pritchard: Yes I do, Your Honor.
By The Court: And can you do that?
By Mr. Pritchard: I think I can, but what I was trying to get at was that **I would not try to come up and .. with one of the circumstances that would had to also exist**, in the back of my mind say, "Well, maybe this over here really applies to this." R. 3387-3388.
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3. Voir dire of Mrs. Honea:
Q. What I'm asking you is, if you don't hear any reason from him why, or if you don't hear any kind of explanation, something to make it better, then you're going to impose the death penalty? Right?...
By Mrs. Honea: Yes. R. 3053-3054.

Honea and Pritchard. The jurors in the instant case would vote for the death penalty if mitigating factors were not presented by the defense. If mitigating factors were presented, they would garner these prospective jurors' due consideration.[4]

If there is at least one aggravating circumstance coupled with several mitigating factors, the death penalty is yet an option. Sawyer v. Whitley, 945 F.2d 812 (5th Cir. 1991), aff'd, 505 U.S. 333, 112 S.Ct. 2514, reh'g denied, 505 U.S. 1244, 113 S.Ct. 21 (1992). At the same time, the jury need not find mitigating circumstances to recommend a life sentence. State v. Martin, 550 So.2d 568 (La. 1989); State v. Watson, 449 So.2d 1321 (La. 1984). These cases give jurors permission to recommend a life sentence in their discretion; they do not mandate that the juror be disposed to this option. Beyond the statutory requirement that jurors find one aggravating circumstance before recommending death, and consider mitigating factors where presented, the penalty in a capital case is absolutely optional. The role of the jury is to recommend a penalty based on facts and impressions gained from hearing the trial of the case filtered through their personal dispositions and beliefs.

The trial court is accorded broad discretion in ruling on challenges for cause. State v. Hallal, 557 So.2d 1388, 1389 (La. 1990). A juror should be dismissed where "bias, prejudice or inability to render judgment according to law may be reasonably implied." Id. at 1390. This court does not give appropriate deference to the sound judgment of the trial court in making this determination. Assuming arguendo that some of the answers, viewed out of context, raise

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4. Voir dire of Mrs. Honea:
By Mrs. Honea: Well, like I say, if something happened that they was defending themselves or maybe... I don't know, maybe had a good excuse...
Q. What .. What I'm asking... Yes, ma'am.
By Mrs. Honea: I really don't believe in just taking a life for a life. I don't believe in that. R. 3052.

Voir dire of Mr. Pritchard
Q. All right. . . . The second phase is the sentencing, and you consider the circumstances, the character, that kind of thing, aggravating circumstances, mitigating circumstances. Do you think just because you voted guilty at the first phase that you would automatically recommend the death penalty or would you consider anything and everything?
By Mr. Pritchard: I would hope I would consider the circumstances involved in it.
Q. **And if you heard mitigating circumstances would you consider those?**
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By Mr. Pritchard: **Yes. I think I would.**
Q. Okay. **And is there any reason why you would automatically recommend death** just because you had voted guilty?
By Mr. Pritchard: **No. There again I'd have to look at the circumstances** involved in it. R. 3370-3371.

questions as to the validity of a challenge for cause, the trial judge was in the best position to hear and view the prospective jurors as their answers were given. One could debate the tenor of a written statement as it appears from a cold transcript, but the one who actually knows--who actually judges--the correct meaning and inference to be drawn from an answer is the trial judge. This experienced trial judge went to great lengths to preserve the integrity of the record and the right of the defendant to a fair trial and an orderly proceeding. The trial judge clearly answered any question that might have existed as to the viability of service of the prospective jurors.[5]

Stark answers from the record often present multiple potential interpretations. The sound judgment of the experienced trial judge here resulted in the correct conclusions. Our constitutional provision granting the defendant the right to a fair trial does not mean the State of Louisiana and its citizens are not likewise entitled to that same fair trial.

I respectfully dissent.

5. For example, before counsel ever raised an objection concerning the ruling on the challenge for cause of Pritchard, the trial judge dutifully noted a possible objection of the defendant for the record. R. 3407-3408. If the court's ruling had been so egregious or clearly wrong, surely counsel would have made such suggestion. This can only lead to the conclusion that the answers of Pritchard, when taken in context and in light of his demeanor as observed by the trial judge, show clearly that he would have followed the law and should not have been removed for cause.