

MAY 06 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>ALFREDERICK LOVE,</p> <p>Petitioner - Appellant,</p> <p>v.</p> <p>L.E. SCRIBNER, Warden,</p> <p>Respondent - Appellee.</p>

No. 07-55237

D.C. No. CV-06-00640-WQH

ORDER

Before: GRABER and BERZON, Circuit Judges, and WILKEN,* District Judge.

The memorandum disposition filed on March 19, 2008, is amended as follows:

1. Insert the following two paragraphs on Page 4, between the paragraph that ends with "1992.*)" and the paragraph that begins with "Even."

In Snyder v. Louisiana, 128 S. Ct. 1203 (2008), the Supreme Court reversed the petitioner's conviction, holding that the state trial court committed clear error in its ruling on a Batson objection. The Court noted that the "implausibility" of the prosecutor's explanation that he struck an African-American juror based on the juror's student-teaching obligations "is reinforced by the prosecutor's acceptance of

* The Honorable Claudia Wilken, United States District Judge for the Northern District of California, sitting by designation.

white jurors who disclosed conflicting obligations that appear to have been at least as serious as” those of the individual who was stricken. Id. at 1211. However, the Court “recognize[d] that a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial.” 128 S. Ct. at 1211.

The Snyder Court's cautions are not applicable to this case. Love attempted to raise the alleged similarities at trial by asking, “Did he indicate that he had removed all teachers and social workers?” The trial court did not require the prosecutor to answer Love’s question regarding the individuals connected with teaching who were left on the jury. Love tried to elicit the facts that would have allowed the trial court, the Court of Appeal and this court to evaluate the alleged similarities, but was not permitted to do so. We cannot fault him for the trial court’s decision.

2. Add “3.” before “Even” at the start of the next paragraph.

3. On Page 7, line 11, change “The trial court” to “As discussed above, the trial court.”

4. On Page 7, line 13, change “However, the court simply stated” to “Instead, the court stated.”

With these amendments, Judges Berzon and Wilken have voted to deny the petition for rehearing. Judge Graber has voted to grant it. Judge Berzon has voted to deny the petition for rehearing en banc, and Judge Wilken has so recommended. Judge Graber has voted to grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no

judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.

No further petitions for rehearing or petitions for rehearing en banc may be filed.