SUPREME COURT COPY

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S044693

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

RANDALL CLARK WALL,

Defendant and Appellant.

San Diego County
Superior Court
No. CR133745

SUPREME COURT
FILED

APR 22 2013

Frank A. McGuire Clerk

Deputy

APPELLANT'S OPENING BRIEF

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of San Diego

HONORABLE BERNARD E. REVAK, JUDGE (RET.)

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DEATH PENALTY

S044693

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. RANDALL CLARK WALL, Defendant and Appellant.	S044693 San Diego County Superior Court No. CR133745

APPELLANT'S OPENING BRIEF

INTRODUCTION

Appellant and his codefendant John Rosenquist were prosecuted together for the homicides of John and Katherine Oren, an elderly couple appellant knew, and the sexual assault on Joshua (Josh) Dooty, the couple's then 10-year-old great-grandson, who was living with them at the time. Appellant was charged with two counts of murder with special circumstance and weapons use allegations, one count each of robbery and burglary, three counts of child molestation, and conspiracy. The prosecution's theory was that appellant committed the murders while Rosenquist was molesting the boy. Appellant maintained he was guilty only of felony murder because while he had broken into the Orens' home with the intent to take property, Rosenquist alone molested Josh and killed

both John and Katherine Oren. Key to a fair analysis of appellant's claims on appeal is an understanding of the unusual procedural posture in which this case was tried.

First, after denying appellant's motion to sever defendants the court empaneled dual juries, to hear the case simultaneously at the guilt phase, and separately at any penalty phase.

Second, during jury selection appellant was assaulted in a holding cell during a noon recess and as a result suffered severe disfiguring physical injury and a concussion. Without taking a personal, voluntary, knowing and intelligent waiver from appellant of his right to be present, the court concluded jury selection proceedings in appellant's absence. The afternoon of the assault, while appellant was receiving emergency medical treatment, the court concluded individual sequestered voir dire. Several days later, when it was time for counsel to exercise their peremptory challenges, the court placed appellant, still recovering from his injuries, in the jury deliberations room and arranged for a speaker to pipe sound in from the courtroom. The next day, in appellant's absence, the court swore the jurors, including one who had been voir dired in appellant's absence.

Third, on the eve of guilt phase opening statements appellant pleaded guilty to the murder, burglary and robbery counts and admitted all the special circumstance allegations. He denied the weapons use allegations, consistent with the defense theory of felony murder, and maintained his innocence of the molestation counts. At the close of the prosecution's case the trial court granted appellant's motion for judgment of acquittal on the molestation counts, in view of Rosenquist's admission that he and he alone had molested Josh and the absence of any evidence that appellant had aided or abetted in any way. Thus, the only issues submitted to the jury at the

guilt phase were the weapons use allegations. Appellant was found to have used a dangerous or deadly weapon in connection with the murder of Katherine Oren, but not John Oren, and in the commission of robbery and burglary.

Fourth, while at the guilt phase the prosecutor had elected to play only a portion of the tape recording of appellant's initial interrogation by police detectives, at the penalty phase the prosecutor played the entire recording, including the portion in which appellant – in response to impermissible coercive promises – confessed his participation in the homicides, and played the tape recording of a second, equally incriminating, police interrogation. Apart from appellant's involuntary confession, the case in aggravation was extremely weak. And defense counsel introduced virtually no mitigation in support of their plea for a sentence of life imprisonment without possibility of parole.

This unusual capital trial resulted in reversible error. The violation of appellant's right to be present during jury selection warrants reversal of the entire judgment. The erroneous exclusion of a prospective juror who had stated she would have difficulty imposing the death penalty, would first have to hear the evidence, but then could impose either penalty requires reversal of the death sentence. So, too, does the erroneous admission of appellant's involuntary confession at the penalty phase, alone or in conjunction with the erroneous exclusion of mitigating evidence that appellant had offered early in the proceedings to plead guilty in exchange for a sentence of life imprisonment without possibility of parole, in recognition of his responsibility and to spare Josh Dooty the trauma of testifying. Finally, the trial court erroneously imposed a restitution fine which should be vacated.

STATEMENT OF APPEALABILITY

This appeal from a final judgment imposing a verdict of death is automatic under Penal Code section 1239, subdivision (b).[1]

STATEMENT OF THE CASE

Appellant Randall (Randy) Wall and codefendant John Rosenquist were arraigned on September 21, 1992, on a nine-count information: count one, the murder of John Oren (Pen. Code, § 187); count two, the murder of his wife Katherine Oren (Pen. Code, § 187); count three, robbery (Pen. Code, §§ 211, 212); count four, burglary (Pen. Code, §§ 459, 460); count five, lewd and lascivious act (digital/anal contact) upon a child, Josh Dooty, the Orens' then 10-year-old great-grandson (Pen. Code, § 288, subd. (a)); count six, lewd and lascivious act (masturbation) upon a child, Josh Dooty (Pen. Code, § 288, subd. (a)); count seven, rape of Josh Dooty by a foreign object (Pen. Code, § 289, subd. (a)); count eight, conspiracy to commit burglary (Pen. Code, § 182, subd. (a)(1)); and count nine, conspiracy to commit robbery (Pen. Code, § 182, subd. (a)(1)). (2CT:219-224.) All of the crimes were alleged to have occurred on the night of March 1-2, 1992, at the Oren residence. It was further alleged that appellant personally used of a deadly or dangerous weapon, described as a "metal stake," in the commission of the murders, robbery and burglary. (Pen. Code, § 12022, subd. (b).) (2CT:219-222.)

The information charged the following special circumstances: murder during the commission of burglary (Pen. Code, § 190.2, subd. (a)(17)) on each murder count; murder during the commission of robbery

[1] Unless stated otherwise, all statutory references are to the Penal Code. "CT" refers to the Clerk's Transcript, "RT" to the Reporter's Transcript.

(Pen. Code, § 190.2, subd. (a)(17)) on each murder count; and multiple murder (Pen. Code, § 190.2, subd. (a)(3)). (2CT:219-224.)

Appellant initially pleaded not guilty and denied all allegations. (16CT:3423.)

On November 13, 1992, appellant filed motions to dismiss counts five, six and seven, pursuant to section 995 (3CT:244-253); a motion to sever those counts (3CT:260-271); and a motion to sever defendants (3CT:272-285).

On June 18, 1993, an amended information was filed, adding a lying in wait special circumstance allegation as to each of the murder counts, as to appellant and Rosenquist (Pen. Code, § 190.2, subd. (a)(15)). (6CT:1057-1062.) The amended information also alleged, as to the robbery and burglary counts, that appellant personally used a deadly or dangerous weapon, this time described as "a knife and/or metal stake." The weapon alleged to have been used by appellant in the commission of the murders was again described simply as "a metal stake." (6CT:1059-1060.) Appellant again pleaded not guilty and denied all allegations. (16CT:3435.) A second amended information was filed later, clarifying that the alleged burglary was of an inhabited dwelling. (16CT:3509.)

On March 14, 1994, Rosenquist entered an additional plea of not guilty by reason of insanity. (16CT:3441; 5RT:733-736.)

On June 13, 1994, the court heard and denied appellant's motion challenging the voluntariness of his confession and his motion to dismiss counts five, six and seven, pursuant to section 995. (16CT:3463.)

On June 15, 1994, the court denied appellant's motion to sever defendants, but ordered that dual juries be empaneled to hear the case, simultaneously at the guilt phase, and sequentially at the penalty phase, if

necessary, and denied appellant's motion to sever counts five, six and seven. (16CT:3469; 8RT:1773-1775.)

Jury selection for appellant's jury began July 22, 1994. (16CT:3447.)

On August 5, 1994, during the noon recess, appellant was assaulted by another inmate in a holding cell. Because of the severity of his injuries and resulting disfigurement and mental impairment, appellant was not present in the courtroom for the balance of voir dire, during counsel's exercise of peremptory challenges, or when the jury was sworn. For some but not all of these proceedings he was held in the jury room, where a speaker had been installed. (16CT:3496, 3499, 3505-3506, 3507.)

On August 24, 1994, appellant pleaded guilty to counts one and two of the amended information, the murders of John and Katherine Oren; count three, robbery; count four, burglary; and counts eight and nine, conspiracy. He admitted all the special circumstance allegations as to the murder counts (robbery murder, burglary murder, lying in wait and multiple murder) and admitted the inhabited dwelling allegations as to the robbery and burglary counts. He admitted the following three alleged overt acts to the conspiracy: (1) walking to the Oren residence for the purpose of stealing property from the Orens; (2) entering the Oren residence by forcing open a back door; and (3) taking money belonging to John Oren. (16CT:3513-3514.)

Appellant maintained his plea of not guilty to counts five, six and seven (the molestation counts) and denied the weapons use allegations. (16CT:3514.) Appellant's guilty plea was predicated on a felony murder theory. (17RT:4335-4336.) He maintained Rosenquist was the actual killer. (17RT:4355-4356.)

On August 24, 1994, counsel gave opening statements. (16CT:3514.) The prosecution called its first witness on August 25, 1994 and rested its case on September 13, 1994. (16CT:3516, 3554.)

On September 14, 1994, the court granted appellant's section 1118.1 motion for entry of judgment of acquittal on counts five, six and seven, involving the molestation of Josh Dooty. (16CT:3555.) The same day the defense rested without calling any witnesses or presenting any evidence. (16CT:3555.)

Closing arguments began September 19, 1994 and continued on September 20, 1994. (16CT:3559-3561.) The court instructed the jury on September 20, 1994. (16CT:3562.) Given appellant's guilty plea (6CT:3513-3514) and the dismissal of the molestation counts (16CT:3555), the only matters before the jury were the section 12022, subdivision (b), weapons use allegations.

The jurors returned verdicts September 21, 1994, finding that appellant did not use a metal stake in connection with the murder of John Oren (Count 1); did use a metal stake in connection with the murder of Katherine Oren (Count 2); did use a knife and/or metal stake in the commission of the robbery (Count 3); and did use a knife and/or metal stake in the commission of the burglary (Count 4). (13 CT:2896; 16CT:3562.)

On September 21, 1994, the prosecutor dismissed the lying in wait special circumstance as to Rosenquist. (16CT:3565, 3572-3573.) On September 23, 1994, Rosenquist was found guilty on all counts, with findings of true on the felony murder and multiple murder special circumstances. (16CT:3571-3573.)

Rosenquist's sanity phase trial began October 11, 1994. (See 16CT:3573.) On November 23, 1994, the Rosenquist jury reached a

verdict, finding him sane on all counts. (16CT:3580; 42CT:9245.)

On December 6-7, 1994, the prosecutor presented his penalty phase case in aggravation as to appellant. (16CT:3591-3594.)

On December 8, 1994, the defense presented its case in mitigation. (16CT:3597-3598.)

The prosecutor gave his closing argument December 12, 1994. (16CT:3600), and defense counsel gave closing arguments December 12 and 13, 1994. (16CT:3600-3602.) The court instructed the jury on December 13, 1994 (16CT:3602). The jurors began deliberating the same day (*ibid.*), deliberated again on December 14, 1994 (16CT:2604), and returned their verdict of death on December 20, 1994 (16CT:3605).

On January 30, 1995, the court denied appellant's automatic motion for modification of the verdict, pursuant to section 190.4, subdivision (e), and his motion for a new trial. (15CT:3365-3375; 16CT:3607.) Appellant addressed the court and expressed remorse. (35RT:11052-11053.) That same day, the court sentenced appellant to death on counts one and two (murder). (16CT:3607.)

As to count three (robbery), count four (burglary), count eight (conspiracy to commit burglary) and count nine (conspiracy to commit robbery), the court imposed a total sentence of 26 years. (16CT:3419.) The court also imposed a restitution fine, pursuant to former Government Code section 13967, in the amount of $10,000, to be paid pursuant to section 2085.5. (16CT:3607.)

The judgment of death was entered January 31, 1995. (16CT:3415-3420, 3607.)

STATEMENT OF FACTS

I. Guilt Phase Evidence

At the guilt phase the prosecutor called law enforcement personnel who described the crime scene and the recovery of evidence; forensics experts who described the victims' wounds, opined as to the cause of death and further described the crime scene; percipient witnesses who relayed their encounters with appellant and Rosenquist before and after the homicides; Josh Dooty, who testified regarding what he had heard and seen at the Oren residence the night of the homicides; and three jailhouse informants who attributed various incriminating statements to appellant. The prosecutor also played a portion of appellant's March 17, 1992 statement to the police. From this evidence the jury learned the following.

A. The Oren Household

At the time of the homicides John Oren, age 84, and his wife Katherine, age 73, were living on Deerpark Drive, in suburban San Diego. Their 10-year-old great-grandson, Josh Dooty, was living with them, and had since infancy. John Oren, Katherine Oren and Josh each had separate bedrooms. Appellant had met all of them several years earlier when he and Tammy Decker, the Orens' granddaughter, had spent part of the summer together in a makeshift tent in the Orens' backyard. Tammy's brother Chris and his girlfriend were also staying with the Orens at that time. Appellant and Katherine Oren had not gotten along; he was among those she accused of stealing, when some of her money was discovered missing. (21RT:5499-5504.)

B. Josh Dooty Is Molested By Rosenquist and Later Finds His Great-Grandparents Dead

The night of March 1, 1992, Josh was asleep in his room. He testified, on the one hand, that he was awakened by a sound he described as "kerchang," that he then heard a sound "like skin-smacking-skin" coming from John Oren's room, and that someone then came into his room. (22RT:5570-5571.)[2] On the other hand, when asked whether he had previously told both the prosecutor and defense counsel that he had been asleep up until the moment the man who molested him put a pillow over his face, Josh answered, "Yes." (22RT:5608-5609; 22RT:5603 [preliminary hearing testimony read into the record].) According to Josh, there were two men in the house; one had a bandana over his face, but the man who molested him did not. (22RT:5612-5613.) Josh testified that he heard screams from Katherine Oren's room while he was being molested, and that the screams stopped while the man molesting him was still in his room; he also testified that he heard both John and Katherine Oren scream while the man molesting him was in his room. (22RT:5573-5574, 5621.) The man who molested him left the room and then returned, and then left the house for good. (22RT:5573-5574.)

It was stipulated that Rosenquist molested Josh – that he placed a pillow on Josh's head until Josh said he could not breathe, forcibly removed Josh's clothes, digitally penetrated him, penetrated him with a foreign object, and ejaculated on him. (20RT:5227-5228.) The prosecutor had informed the jury in his opening statement that Rosenquist had molested Josh. (20RT:5227; 17RT:4377.) Josh was reluctant to testify about the

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[2] Josh acknowledged having previously described the sounds as more like thuds or thumps. (22RT:5570-5571.)

molestation, but in response to the court's question whether it hurt, he responded, "Yes." (22RT:5610.) He also testified he saw a therapist regarding the incident. (22RT:5589-5590.)[3]

After being molested, Josh went back to sleep and did not leave his room until the next morning. (22RT:5611.) When he awoke, he went to John Oren's open bedroom door and saw him on the floor with his head covered; Katherine Oren's bedroom door was closed, and he could not open it. (22RT:5575-5576.) Josh went across the street to neighbors Sylvester and Moselle Boyles. (22RT:5611-5612.) Sylvester Boyles entered the Oren residence, saw John Oren's body, and called the police. Police officers and homicide detectives began arriving at the scene shortly thereafter. (17RT:4485.)

C. Forensic Evidence

John Oren's body was found on the floor of his bedroom between the bed and the wall. He died of blunt force injuries, with cut and stab wounds as contributing factors. (17RT:4514-4515.) Katherine Oren's body was

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[3] Josh's testimony was garbled, contradictory and confusing. He repeatedly stated that he did not remember, did not know, or did not want to say, in response to questions by counsel and the court. (See, e.g., 22RT:5577, 5580-5581, 5588-5589, 5604, 5611, 5612, 5623-5624, 5629, 5630-5631, 5631-5632.) He acknowledged that in talking with many of the people who interviewed him he had made things up, that he had made things up before, that his teacher and school counselor had been working with him on this, and that he did not always know when he was making things up and when he was not. (22RT:5594-5596, 5613.) He also testified that at the time of the homicides he was taking Ritalin for hyperactivity and another medication for enuresis (bed-wetting), because the Ritalin made him sleep so soundly that he would not wake when he needed to go to the bathroom (22RT:5608).

found in her bedroom, wedged against the door from inside. (6RT:1129.)[4] She died from a large cut wound to her neck. (17RT:4528; 4568.) A thin metal bar was recovered inside the house, leaning against the doorjamb of John Oren's bedroom. (Ex. 28-W.)[5] It was dusted for fingerprints but yielded nothing of value. (23RT:5711-5712.) The entire house was dusted with graphite and sprayed with ninhydrine in an attempt to locate useable fingerprints. (20RT:5059-5061.) No fingerprints matching appellant or Rosenquist were found. (21RT:5289-5290.) The cord from the one telephone in the house had been cut and pulled from the wall. (18RT:4708-4709.) A bandana, folded and rolled in a manner that made it seem it had been used to cover someone's hand, was found on a table near the couch and next to the phone. (*Ibid*; 20RT:5071.) Blood spatters were noted on the walls, headboard and ceiling in John Oren's bedroom. (20RT:5044; 21RT:5256-5257.) Two sets of shoe prints were identified inside the house: one, a bloody athletic shoe print, was eventually identified as matching the Nike shoes recovered from appellant. (21RT:5385-5386; Exs. 92-W, 93-W.) The second shoe print was matched to shoes worn by Rosenquist. (21RT:5372.) A pocket knife was later recovered from the apartment where Rosenquist had been staying, on a table near his bed.

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[4] Katherine Oren weighed close to 225 pounds. (20RT:5073-5074.) It took two firefighters and a police officer to force open the door to her room. (17RT:4488.)

[5] Exhibit 28-W is variously described as a "3/8ths to a half-inch wide metal stick, basically like a yardstick, sharp at one end for driving into the ground" (17RT:4379 [prosecutor]); a "metal rod" (17RT:4550-4551; 18RT:4679), a "steel rod" (18RT:4677); a "thin metal stick" (18RT:4679); an "iron bar" (*ibid.*) and a "metal pipe" (RT:5170-5171 [jailhouse informant]); as well as as a "metal stake."

(21RT:5723-5724.)

D. Appellant Travels With Rosenquist To San Francisco Where He Is Arrested

On March 2, 1992, David Kessler of the U.S. Bureau of Land Management came upon Rosenquist and appellant, on foot, near the Washburn Ranch fire station in the Carrizo Plains area of San Luis Obispo County. (18RT:4643.) They looked cold and wet. (18RT:4646.) They told him their car had broken down and had been towed; when he asked why they had not gone with the tow truck, they said nothing. (18RT:4645.) Kessler took them to the California Valley Motel (18RT:4647-4649), where proprietors Patrick and Virginia Thomas gave them a room and a meal and laundered their clothes (19RT:4763-4764). Rosenquist and appellant identified themselves as Danny and Vincent Reynolds. (19RT:4822.) Rosenquist had a satchel that appeared to contain coins, which Patrick Thomas heard jingling. (19RT:1763.) Rosenquist was the more assertive and talkative of the two and was perceived to be the leader in the relationship, but neither appeared to be afraid of the other. (RT:4655, 4664; 19RT:4891-4892, 4942, 4783-4784.)

Kessler found the circumstances of his encounter with Rosenquist and appellant suspicious, largely because they could not satisfactorily answer his questions about what had happened to their car and why – if it had in fact been towed – they had not gone with the tow truck. (18RT:4645, 4656.) He reported this information to the San Luis Obispo County Sheriff's Office. (18RT:4650-4651.) According to Kessler and the Thomases, Rosenquist did most of the talking. (18RT:4664; 19RT:4892; 19RT:4833.) It also appeared to Patrick Thomas that Rosenquist and appellant were trying to avoid leaving their fingerprints anywhere.

(19RT:4769-4770.) Rosenquist wore black gloves. (19RT:4814.)

Rosenquist and appellant left the motel the following morning, March 3, 1992, and set out on foot, hitchhiking. (19RT:4806-4808.) They were soon stopped by San Luis Obispo Sheriff's Deputy Doran Christian. (19RT:4880-4881.) Deputy Christian detained and questioned them. (19RT:4921-4924, 4883-4884.) Rosenquist gave his true name; appellant gave his name as Vincent Reynolds. (19RT:4883, 4900.) Deputy Christian patted both men down and found each had a small folding pocket knife. (19RT:4884-4886, 4901, 4921-4923.) He searched their black bag, where he found appellant's Utah driver's license, with his true identification. (19RT:4884, 4903-4904.) Ultimately Deputy Christian released them, and they made their way to San Francisco, where, on March 17, 1992, appellant was detained and arrested. (19RT:4886; 6RT:1164.)

E. Jailhouse Informant Testimony

Three jailhouse informants testified to various statements appellant allegedly had made while in jail. Raynard Davis, first, testified that he met appellant when he (Davis) was in custody at San Francisco County Jail on charges of selling rock cocaine. (20RT:5162-5163.) When the two began "conversating" about their cases, appellant told him that he was facing two murder charges, and that he had "chopped" his victims, had used a "stick" or "metal pipe," and had worn socks on his hands. (20RT:5167-5171.) William Fitzgerald, next, testified that he met appellant in jail in San Diego when the two were in the same "tank." (24RT:5900-5901.) Appellant was generally confrontational and threatened to kill someone who had testified against him at his preliminary hearing – a man who was facing charges of selling rock cocaine. (24RT:5903-5904.) Shawn Claude Taylor, finally, gave confusing and conflicting testimony as to what appellant had told him

when they were in jail together in San Diego. In essence he conveyed that appellant said Rosenquist had stabbed an old man and that he (appellant) had beaten an old woman to death because she would not stop screaming. (25RT:6043-6051.) Taylor also testified that appellant said he was not worried because the only evidence against him was a shoe print (25RT:6051), and that he wanted to shift the blame to Rosenquist because Rosenquist was dying of AIDS anyway (25RT:6056).

F. Appellant's Statements To the Police

The prosecutor played a portion, only, of appellant's March 17, 1992 tape-recorded statement to the police. (15CT:3173-3248, 3173-3213:10.) Appellant denied any knowledge of the homicides and initially denied even knowing Rosenquist. (15CT:3182-3183.) He then acknowledged he had met Rosenquist in Salt Lake City and had traveled with him to San Francisco and then Mexico. (15CT:3184-3185.) Appellant and Rosenquist left Mexico and traveled to San Diego on a trolley, then walked for several hours until Rosenquist decided to go off to in search of a car, leaving appellant to wait for him at a freeway on-ramp. (15CT:3186-3189, 3196.) Rosenquist eventually returned driving a tan colored Mercury Monarch. (15CT:3186-3189, 3210.) He had a black satchel containing lots of coins. (15CT:3193-3194.) He was wearing black gloves, as he always did. (15CT:3211.) The two drove north and then took back roads, until their car got stuck in the mud. (15CT:3186, 3202.) Rosenquist set the car on fire. (15CT:3189-3190.) They set off on foot, eventually encountering a ranger (Kessler) who took them to a motel where the proprietors (the Thomases) gave them a room and a meal and washed their clothes. (15CT:3186, 3207-3208.) Appellant said Rosenquist had AIDS and described him as "wacko." (15CT:3190, 3186-3189.) Rosenquist talked about working for the

government and "doing hits" on people, and frequently "flew off the handle" and threatened appellant. (15CT:3186, 3191, 3211.) Appellant denied killing anyone. (15CT:3212.)

II. Penalty Phase Evidence

A. The Prosecutor's Case In Aggravation

The prosecutor presented as aggravating evidence the balance of appellant's March 17, 1992 tape-recorded interview, in which he confessed to participating in the homicides; the entire tape recording of appellant's March 18, 1992 interview, in which he further incriminated himself; evidence of appellant's involvement in an unadjudicated physical altercation; evidence of appellant's Indiana felony conviction for possession of residual cocaine; and additional crime scene evidence.

1. Appellant's Complete Statements To the Police

At the penalty phase the prosecutor played appellant's entire March 17, 1992 tape-recorded statement to the police, in which appellant ultimately admitted participating in the homicides, and the entire tape of the March 18, 1992 interview, in which he further implicated himself. (15CT:3173-3248, 3250-3254; 34RT:10575, 10580-10583.) From these the jury learned the following additional information about the crimes to which appellant had pled guilty.[6]

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[6] Because at the guilt phase the prosecutor had withheld the incriminating portions of appellant's statement, the court agreed to certain redactions, to account for the fact that the jury had found that appellant had not used the metal stake in connection with the murder of John Oren. (33RT:10331-10340; see fn. 31, below.) People's Exhibit 126-W, which was provided to the jury, is a clean, retyped version of the transcript that incorporates the redactions. This version is included at pages 3173 to 3248 (continued...)

When appellant and Rosenquist returned from Mexico, on foot and out of money, Rosenquist formulated a plan that would result in the death of John and Katherine Oren. (15CT:3221-3222.) Appellant had told him that he and a girlfriend had stayed at the Oren residence several years earlier. (15CT:3217-3219, 3221-3222.) Rosenquist decided he and appellant would make their way there, wait in the backyard until the Orens were asleep, then break into the house, take some money, and leave in the Orens' car. (15CT:3221-3223.)

Appellant did not want to go along with the plan, but Rosenquist threatened to kill him if he did not participate. (15CT:3222-3223.) Given Rosenquist's violent and erratic nature, which appellant had witnessed, it was clear this was no idle threat. (15CT:3190-3191.) Appellant gave in to Rosenquist's demands, and gave him his folding buck knife. (15CT:3222-3223.)

The two found the Orens' house late that night and waited in the backyard to be sure the household members were asleep. (15CT:3223-3224.) Appellant had no plan to harm anyone inside the house. (15CT:3217, 3222-3223.) Rosenquist, however, did. He was a pedophile with a predilection for little boys. (19RT:4937-4938.) On learning that then 10-year-old Josh Dooty was living with the Orens, Rosenquist announced that he "wanted to f--- this little boy." (15CT:3236.) Appellant told him that was "really sick," and Rosenquist again threatened to kill him. (*Ibid.*)

At about midnight, appellant used a thin metal bar he had found in the backyard to break open the back door, and the two entered the Oren

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[6](...continued)
of volume 15 of the Clerk's Transcript.

residence. (15CT:3224-3233.) Appellant's accounts of what then happened to the Orens are inconsistent in certain respects. During the March 17, 1992 interrogation he stated, "Um, I didn't want to do it, but him and I both killed the grandma and the grandpa of that household[,]" "Ah, I couldn't get any help from nobody so we went over and got in the house and killed 'em[,]" and, "Um, we beat the guy up and beat the girl up." (15CT:3217, 3223, 3225.) But he then described how Rosenquist had beaten John Oren, knocked him out and killed him, said it was Rosenquist who "clobbered" Katherine Oren, and denied striking either of them. (15CT:3228-3232, 3233-3234.) In his March 18, 1992 statement, appellant stated "I clobbered the old lady and he [Rosenquist] went to the boy." (15CT:3252.)

Contrary to Josh's testimony that only one man – the one who molested him (stipulated to be Rosenquist) – was ever in his room that night, appellant stated that he went into the boy's room first, to calm him down when he started to cry. (15CT:3235-3236.) Rosenquist then entered the room and told appellant he wanted to have sex with the boy. (15CT:3286.) When appellant protested Rosenquist again threatened him, and appellant left Josh's room. (*Ibid.*) When Rosenquist came out, he told appellant he "felt a lot better." (15CT:3237-3238.)

Appellant consistently denied stabbing or "cut[ting]" either John or Katherine Oren. (15CT:3252, 3254.) In his March 17, 1992 statement, appellant stated that he assumed Rosenquist had done so, because he found blood on his knife when Rosenquist gave it back to him the next day, even though Rosenquist had washed the knife at the Oren residence. (15CT:3230-3223.) However, in his March 18, 1992 statement, appellant stated that he had used his own knife, which Rosenquist had returned to

him, to cut the phone line. (15CT:3253.)

2. Additional Evidence Regarding the Facts and Circumstances Of the Crimes

In addition to playing appellant's tape recorded statements, the prosecutor called his investigating officer, who testified regarding a bloody fabric "print" or "impression" found on a wall near a light switch in John Oren's bedroom. (34RT:10623-10624.) A criminalist testified that he had compared a photo of the blood smear with impressions he had made by applying ink to two types of cotton socks and two other types of fabric, and on that basis had concluded that the blood smear was made either by one of the sock fabrics or by a "twill weave" fabric, but not by a leather glove. (34RT:10665-10669.) He agreed that the blood smear could have been made by a sleeve, a shoulder, an elbow or an object thrown against the wall, as well as by a hand. (34RT:10679-10680.)

The prosecutor also called Josh Dooty to testify again. This time he stated that before he was molested he heard the metallic "kerchang" sound at the backdoor, then "thumping and whacking" sounds from his great-grandfather's room, then someone using the bathroom ("peeing") and the sound of water in the bathroom sink, and that after being molested he again heard someone in the bathroom. (34RT:10995, 10696-10697, 110711-110712.) He also testified, for the first time and over objection, that while he was being molested he could hear "the other man" laughing in the hallway. (34RT:10693.) He acknowledged that he was familiar with the sound of appellant's laughter, from when his aunt and appellant had stayed with the Orens, and stated he did not recall hearing appellant's voice the

night of the homicides.[7] He testified that the man who molested him spoke to him in a calm voice, and when asked whether the man "was like savage, vicious with you, or did he use like persuasion, friendliness," Josh responded, "friendliness and persuasion." (34RT:10693.) With prompting by the court, the prosecutor elicited from Josh that his great-grandmother had no vision in one eye and limited vision in the other.[8] (34RT:10694.) Finally, Josh testified that he was hospitalized for 30 days after the incident, for psychiatric care, and that he was still receiving psychiatric treatment. (34RT:10694-10695.)

3. Unadjudicated Physical Altercation

In 1989 appellant and his girlfriend were living in Utah with Daniel Heacox and Heacox's then wife Dagmar Marie Donner. (34RT:10630-10634.) Appellant and his girlfriend were asked to move out, and an argument ensued. (34RT10634-10637.) When appellant pushed Donner and raised his hand to hit her, Heacox intervened. (34RT:10635.) Appellant shoved Heacox, ripping his T-shirt. (34RT:10636.) Heacox pushed

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[7] Defense counsel asked Josh, "And you did not hear Randy Wall's voice in your house that night, did you?" Josh responded, "No." When counsel then asked, "And you didn't hear the sound of laughter which made you think, God, that's Randy Wall's laugh? Do you understand what I'm saying?" Josh responded, "I don't remember." (34RT:10699.)

[8] The court expressly reminded the prosecutor to ask Josh about Katherine Oren's eyesight:

MR. PRZTULSKI: Judge, I don't have anything further.

THE COURT: Did you want to go into the eyesight at all?

MR. PRZTULSKI: Oh, yes, thank you very much.

(34RT:10694.)

appellant against the wall and told him to "calm down." (34RT:10637.) Wall pushed Heacox away. (34RT:10636-10637.) The altercation between the two men continued: Wall kicked Heacox in the chest, and Heacox beat up Wall. (34RT:10637.)

4. Appellant's Conviction In Indiana For Possession Of Trace Cocaine

The court read the following stipulation to the jury: "That on June 27th of 1991, in the State of Indiana, the defendant was convicted of felony possession of cocaine. That cocaine was in an amount consistent with residue. That is a very, very small amount." (34RT:10713.)

B. Appellant's Case In Mitigation

Defense counsel called only one witness, San Diego Police Detective Terry Lange, one of the two officers who had interviewed appellant and Rosenquist in March 1992. Detective Lange testified that Rosenquist told him that after molesting Josh he went into John Oren's bedroom, saw "blood everywhere" and covered him with a blanket; and that he then went into Katherine Oren's bedroom and covered her body with a blanket as well. (34RT:10775-10776.) Detective Lange also testified that Rosenquist told him, in connection with the statement that he covered John Oren, that he did not stab him. (34RT:10778-10779.)

The defense also read a stipulation to the jury, to the effect that Rosenquist had told psychologist Raymond Murphy that when he went into John Oren's bedroom he saw that the man was "blowing bubbles" (i.e., that air was coming from the wound in his neck, suggesting he was still alive) and that he "covered the bodies with their bedspreads." (34RT:10779-10780.)

ARGUMENT

I.

THE TRIAL COURT ERRED IN CONDUCTING JURY SELECTION PROCEEDINGS IN APPELLANT'S ABSENCE WITHOUT SECURING A PERSONAL, VOLUNTARY, KNOWING AND INTELLIGENT WAIVER FROM HIM OF HIS CONSTITUTIONAL AND STATUTORY RIGHT TO BE PRESENT

A. Introduction

When appellant was assaulted in a holding cell and suffered visible physical injury and evident mental impairment, the trial court proceeded to conduct key portions of jury selection – including the sequestered *Hovey* voir dire of six prospective jurors, one of whom then served as a sworn juror, the exercise of counsel's respective peremptory challenges, and the swearing of the jury – while appellant was absent from the courtroom. This occurred notwithstanding the clear inapplicability of the only waiver appellant had executed, 18 months earlier, which was expressly limited to specified in-chambers proceedings. By excluding appellant from jury selection proceedings without obtaining a personal, voluntary, knowing and intelligent waiver of his right to be present for these proceedings, the trial court violated appellant's rights to an impartial jury, a fair capital sentencing hearing, and due process of law under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution and violated sections 977 and 1043. As a result, the judgment must be reversed.

B. Factual and Procedural Background

1. Appellant Provides a Written Waiver Of His Presence Expressly Limited To In-Chambers Discussions of Specified Procedural Issues

On January 11, 1993, over 18 months before the commencement of jury selection, appellant executed a written waiver which, by its terms, was limited to specified in-chambers proceedings. In its entirety appellant's waiver states:

> I, RANDALL WALL, after discussing the matter fully with counsel, and understanding my right to be present at each and every court proceeding including chambers conferences, do hereby knowingly, intelligently, and voluntarily waive and give up my right to be present at *chambers conferences* in which my attorneys, the attorneys for the District Attorney, and the judge are discussing: *scheduling* issues (including continuances motions and trial dates); *departmental assignment* issues (i.e., which judge or judges are being considered to hear my case); and *case settlement/case resolution* issues (i.e., discussions aimed at settling this case pursuant to a plea agreement).

(3CT:308-309, italics added.) Appellant executed no other waiver of his right to be present.[9]

2. Appellant Is Assaulted In Custody and Suffers Disfiguring Physical Injury and Evident Mental Impairment

A panel of prospective jurors was sworn on July 22, 1994. (9RT:2506.) The trial court explained the nature and likely duration of the case, introduced counsel and appellant, gave preliminary instructions

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[9] On January 13, 1993, the court conducted a status conference and secured appellant's oral confirmation that he had executed the waiver described above. (3RT:10-11.)

regarding reasonable doubt and burden of proof, and distributed hardship questionnaires. (9RT:2506-2512.) Those not excused for hardship filled out juror questionnaires, and the court began individual sequestered voir dire on August 1, 1994. (10CT:2979.)

On Friday, August 5, 1994, during the noon recess, appellant was severely beaten by another inmate, in a holding cell.[10] (14RT:3948.) When proceedings resumed in court that afternoon, appellant orally agreed to absent himself for the rest of the day, so that he could seek emergency medical attention. The entire colloquy regarding appellant's absence was as follows:

> THE COURT: Counsel, it has been brought to my attention, now that Mr. Wall is here, it is clear and obvious to me, that somebody has attacked your client, apparently during the noon recess. He certainly was not like that this morning. . . . You [counsel] have indicated briefly to the Court, after viewing your client, that you were willing to waive his presence for this afternoon's questioning of the remaining jurors; is that correct [?]
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> MR. AINBINDER: That is correct, Your Honor . . . . I saw Mr. Wall in the third floor holding tank and discussed with him the immediate court needs and the question of waving [*sic*] of his presence for [voir dire of] the balance of the jurors, only a half-dozen left. [¶] Randy, do you agree to waive your presence for the balance of this afternoon's proceedings, understanding that you have a right to be here to be an active participant?
>
> THE DEFENDANT: Yes, I do, Your Honor. I'm sorry about this.
>
> THE COURT: That's all right. Not your fault, as I

[10] As the court acknowledged and as later became clear, appellant was not at fault in the assault. (14RT:3949, 3988-3990.)

> understand it. [¶] Put in there that he ought to see [a] medical doctor as quickly as possible please.
>
> THE BAILIFF: Your Honor, I might note for the record, as soon as this happened down there, [the] jail nurse quickly took a look at him and ice packs [were] brought. When I [brought] him back up, the ice packs were warm. When I saw him about twenty after one, almost a half hour ago, more ice packs were be [*sic*] brought. It may be a short order to have the – request the jail to have him X-rayed [*sic*].
>
> THE COURT: I think that you better do it[.] [Get him] down there as quickly as possible.
>
> THE COURT: We will proceed without Mr. Wall then this afternoon.

(14RT:3948-3949.) Appellant was then escorted out of the courtroom.

Sequestered voir dire then continued, in appellant's absence, and was concluded that day. The court gave the prospective jurors no explanation why appellant was absent, nor any admonishment regarding how to interpret his absence. (14RT:3949-3950.) Among those questioned was one person who ultimately was seated as a juror (D. H.) (14RT:3959-3968) and two who would later be excused on defense peremptory challenges (Richard Lyons and Christine Focosi) (14RT:3951-3959, 3970-3981).

Proceedings resumed Tuesday, August 9, 1994, outside the presence of the prospective jurors. (14RT:3985.) By then appellant had undergone medical treatment, including surgery, for his injuries. His jaw, broken in the assault, was wired shut, and he had braces on his teeth. His face remained swollen, his cheek was discolored, and he had a black eye. (14RT:3986-3990.) Regarding what had occurred on August 5, 1994, the court stated, "at that time we took a waiver from you of your presence for the remainder of the afternoon insofar as continuing jury selection."

(14RT:3985.) The court then inquired whether appellant had understood the implications of his absence:

> THE COURT: I want to make sure that you understood – understand at this point and understood Friday afternoon that you had an absolute right to be present, but because of the nature of your injuries, we allowed you to withdraw and receive medical attention. Did you have any problems understanding Friday, when we had you up here about 11:30, that you had a right to be here and that you chose not to be here because of your obvious discomfort, pain and your appearance? [¶] Is he able to talk?
>
> DEFENDANT WALL: Yes. My jaw's wired shut, but –
>
> THE COURT: But was it explained to you that you had the absolute right to be present [¶] You can nod if you want to.
>
> DEFENDANT WALL: Yes.
>
> THE COURT: You're saying, "Yes." [¶] And you agree that we did take a waiver from you, and you did not want to be present for the afternoon session; is that correct?
>
> DEFENDANT WALL: Yes.
>
> THE COURT: Again shaking his head "Yes."

(14RT:3985-3986.)

Defense counsel indicated that "when the situation presented itself . . . it seemed the only thing to do at the time" and he had therefore recommended it, adding: "I was concerned as to what kind of shape he was in, but believed he was able to make a knowing, intelligent waiver at the time, despite the fact that he was pretty shaken up." (14RT:3986.) Defense counsel then described the treatment appellant had undergone and expressed concern about his mental impairment and possible brain damage:

> MR. AINBINDER: . . . . I'm concerned that he has a concussion and other injuries not related just to simple fractures, but I'm concerned about his mental condition. At this point in time he's moving very slowly. He's not responding even with head movements in a way that – I've been with him since March of 1992 and know this man pretty well. I'm concerned that he has some damage above and beyond what happened to his jaw.

(14RT:3988.) Counsel described appellant as "a little slow on the uptake," and asked that "the record should reflect that the right side of [appellant's] face is kind of a green; he's got a black eye under his right eye; [and] the whole face is swollen." (14RT:3990.)

The court and counsel then discussed scheduling. Defense counsel observed:

> I know if it was any of the lawyer participants, if we had our jaw broken and our head rattled the way I think [appellant's] head's been rattled, the way his jaw's been broken, if we had surgery and a two-and-a-half-inch metal plate inserted into our jaw, there would be no question but that we would put this off a little bit.

(14RT:3990.) He suggested they postpone jury selection and again stressed it would be unacceptable for the jury to see appellant visibly injured:

> My initial thinking is we ought to – ought to think about telling this jury to comeback on the 22nd [of August] instead of the 15th. I know Your Honor has a panel coming back on the 15th for Mr. Rosenquist's case, and maybe rescheduling opening statements in that case is too difficult and opening statements can go forward there and put Wall off for about a week, but I cannot have a jury see Randy in this condition.

(14RT:3990-3991.) Summarizing, defense counsel stated he was concerned "on two levels:" First, he was concerned about appellant's "ability to meaningfully participate" in the proceedings because he (counsel) believed

appellant had suffered a concussion; second, he feared that if the jurors saw appellant visibly injured they might mistakenly think he was "a troublemaker," and that the prosecutor himself might treat the incident as an aggravating circumstance. (14RT:3991-3992.)

The court did not expressly rule on defense counsel's request to postpone the proceedings but proposed instead that they proceed as follows: "If his mental condition is fine – that is to say if he has not suffered a concussion – why couldn't Mr. Wall be present in the jury room next-door this Thursday when the panel comes in, and you gentlemen communicate with him?" Further, they could "jerry rig some type of a speaker system so he c[ould] hear what's going on in the courtroom." (14RT:3992-3993.) The court expressed its concern about inconveniencing the prospective jurors and its reluctance to continue the proceedings:

> My problem is that it is virtually impossible to get ahold of all of these people, the sixty-one or so that are scheduled to come in Thursday, and rescheduling them for another date. I wouldn't mind putting the trial off if need be, but I – I'm a little reluctant to put the jury selection off unless Mr. Wall's mental condition is such that he could not meaningfully participate in the selection of his jury.

(14RT:3993.)

Defense counsel acknowledged he had considered having appellant waive his presence for jury selection, but also observed, twice, that jury selection experts had informed him that "it was a bad idea to go forward even with the shoot-out with [appellant] not present[,] because in post verdict interviews with jurors their feeling was that that indicates a lack of concern on the defendant's part, that he's not physically present." (14RT:3993-3995.) On the other hand, counsel noted "the problem of all these [prospective jurors] coming in." (14RT:3995.) On balance, counsel

was "open to the idea of waiving presence and perhaps informing [the prospective jurors] of a medical emergency." (14RT:3995.)

The court expressed its concern about appellant's capacity to waive his presence:

> . . . . [M]y concern, quite frankly, is that if he has a concussion or there's something wrong other than what we see and which you reported on, I'm not sure I want to take a waiver from him at that time – at this time. I would rather get a doctor's report that he has not received a concussion, that, if anything, it's a severe discomfort and pain that he is undergoing, but that, as far as we are able to tell, his mind is all right and he could meaningfully assist [counsel] in selecting his jury. . . . I wouldn't want him to be held in jail while you two select a jury that's going to try his case . . . .

(14RT:3995, 3996.) The court reiterated to defense counsel, "I don't want to take a waiver from him until you report to me that a doctor says that he's fine." (14RT:3996.) The court ordered appellant transferred to the Perlman Ambulatory Care Center, at the University of California, San Diego, for neurological assessment and, if necessary, a CAT Scan and MRI. (72CT:16190.01-16091.)[11]

When proceedings resumed the next day, Wednesday, August 10, 1994, outside the presence of the prospective jurors, appellant again was absent. (14RT:4003; 16CT:3503.) The court stated appellant and Rosenquist had "each waived their personal presence this afternoon to talk about scheduling." (*Ibid.*) The court then immediately took up the subject of appellant's mental status and competence to proceed, rather than scheduling, and asked defense counsel to report on the results of appellant's

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[11] By Order filed March 20, 2013, this Court granted appellant's motion to unseal this document.

neurological examination. Defense counsel reported that the neurological examination had revealed "a right cerebral contusion;" "injury to the right inner ear," possibly causing the "loss of balance, dizziness and general disorientation that [appellant's] feeling;" and "damage and injury to a sensory nerve running long the right side of [appellant's] face," resulting in "numbness and loss of sensation." (14RT:4004-4005.) Counsel noted that appellant's physical appearance was improving, but that he still appeared to be "at least mildly disoriented. He's very slow on the uptake . . . . [¶] . . . It just takes longer to discuss things with him because he's just moving slower now . . . ." (*Ibid.*) Appellant also was suffering at least a 30-percent hearing loss in his right ear. (14RT:4008.) According to defense counsel, appellant was nonetheless "amenable" to listening to the jury selection proceedings in the jury room, talking to counsel during breaks and did not want to "inconvenience" the prospective jurors. (14RT:4006.)[12]

Although appellant had been following the jury selection process prior to his injury and had been giving counsel his input (14RT:4006), defense counsel now "s[aw] a Randy Wall that is mentally impaired . . . ." (14RT:4007). Counsel noted that his "lay suspicion that there was

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[12] The relevant trial minutes for this date state, in pertinent part:

". . . . Both Randall Wall and John Rosenquist are not present. . . . . Larry Ainbinder advises the Court regarding Randall Wall. The defendant's present mental and physical condition is discussed. The Court inquires whether the defendant (Randall Wall) is competent to assist counsel in the challenge process scheduled for 8-11-94 at 9:00 a.m. Discussion by parties ensues. Court and Counsel agree that the defendant (Randall Wall) will be seated in the adjoining jury room with a speaker enabling him to hear the proceedings. Defense counsel for Mr. Wall will communicate with him during breaks." (16CT:3503.)

something wrong with [appellant] was confirmed yesterday with just the preliminary neurological exam." (14RT:4007-4008.) He requested a continuance: "I think what we ought to do is put everything off about one week and see where we're at in one week." (14RT:4008.) Defense counsel also informed the court that appellant was scheduled to see the neurologist for a follow-up examination in approximately a week. (14RT:4011.) Appellant had yet to see an ear, nose and throat specialist, though the neurologist had recommended he do so. (14RT:4005, 4011.) It was then agreed that opening statements would be postponed to August 24th, with evidence to begin the following day, on the assumption appellant by then would be able to appear. (14RT:4012-4015.)

The court and counsel also discussed, in appellant's absence, how the prospective jurors' names would be drawn for the exercise of peremptory challenges. Defense counsel (Mr. Ainbinder) stated he had understood there would be a single "random draw," with the jurors assigned a number that would then be placed on their questionnaires. He explained that, in reliance on this arrangement, he and his cocounsel (Mr. Thoma) had spent less time questioning prospective jurors who were nearer the bottom of the list on their attitude toward the death penalty. (14RT:4025-4028, 4031-4033.) The clerk in fact had conducted a second random draw, and the prospective jurors had all been assigned new numbers for purposes of filling in the box for the exercise of peremptory challenges. (14RT:4034.)

Finally, while appellant was absent, the court addressed the hotly contested issue of how the joint guilt phase before two juries would proceed – when each jury would be present, what each jury would hear, whether the defendants' defenses were antagonistic, and so on. (See, e.g., 14RT:4017-4023.)

3. Appellant Is Placed In the Jury Deliberations Room For the Completion Of Jury Selection

On Thursday, August 11, 1994, appellant was present in court, outside the presence of the prospective jurors. Defense counsel described appellant's condition as unchanged – he was "mildly disoriented; moving very slowly, and in terms of interaction, there is definitely some dullness." (14RT:4046.) Counsel represented that appellant was nonetheless still willing to be placed in the jury room and understood he could consult with counsel during the exercise of the peremptory challenges. (14RT:4046-4047.) When counsel then asked appellant whether this was true, appellant responded, "Huh?" Counsel then twice asked appellant whether he understood he could be present but was waiving that right, eliciting first a "Yeah," then finally a "Yes." (14RT:4047.) The court, similarly, needed to explain twice how the set-up would work: "Let me repeat it for you. While you're listening in there, you hear the challenges, if at any time you want to talk to your attorneys about what is going on in here or your feelings about any of the prospective jurors, tell the bailiff and he will come in here and notify us and I'll let your lawyer go back and talk to you." (14RT:4047, 4048.)

Appellant was then removed from the courtroom and approximately 65 prospective jurors were escorted in. (14RT:4006, 4057.) The court explained that appellant wanted to be there but was absent because of a "medical emergency," assured the jury that appellant's absence "will not slow us down at all," and announced they would "proceed selecting a jury as quickly as we can." (14RT:4057.) Counsel exercised their respective 20 peremptory challenges, using what defense counsel had referred to as the "shoot-out" method: 12 prospective jurors were seated in the jury box; the

prosecutor then "thanked and excused" one, and another was immediately called to fill the vacancy; defense counsel took their turn, and that vacancy was then filled; and so on, back and forth, until counsel had exercised all of their respective peremptory challenges. (14RT:4061-4078 [the jury]; 4083-4084 [the alternates].)

When proceedings resumed the next day, Friday, August 12, 1994, appellant again was absent. (14RT:4091.) Outside the presence of the jury the court stated appellant had "waived his personal presence." (14RT:4089-4090.) The court then summoned and swore the jury and the alternates, giving no explanation for appellant's absence. (14RT:4092-4094.)

On August 17, 1994, pursuant to court order, appellant was again examined at the University of California, San Diego. (72CT:16195-16196.)[13] Dr. W. C. Wiederholt, a neurologist, gave the following diagnosis: "Head trauma with brain concussion, hearing loss on right, hypesthesia [loss of sensation] in branch of right mandibular division of 5th nerve, and subjective complaints of dizziness and numbness in the right face, left-hand and left-foot." (*Id.* at p. 16196.)

Proceedings resumed August 22, 1994, when the court took up pretrial matters, out of the presence of the jury, but with appellant present. (15RT:4096.) The court made no inquiry or reference as to appellant's injuries or to his physical appearance, mental condition, or demeanor, and defense counsel were silent on these issues. (See 15RT:4096-4234.)[14] Further pretrial matters were taken up the next day, August 23, 1994, in

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[13] By Order filed March 20, 2013, this Court granted appellant's motion to unseal this document.

[14] The court minutes for August 22, 1994, are also silent on these issues. (16CT:3509-3510.)

appellant's presence, again without reference to his appearance or condition. (16RT:4235.)[15] When proceedings resumed August 24, 1994, out of the presence of the jury, the court immediately turned to appellant's guilty plea. (17RT:4317.) The jury was then brought in and informed of appellant's plea, with appellant present. (17RT:4366, 4368-4373.)

C. The Trial Court Failed To Obtain a Valid Waiver Of Appellant's Fundamental, Constitutional and Statutory Right To Be Present During Jury Selection

The United States Supreme Court has long regarded a criminal defendant's right to be present in the courtroom at every stage of his trial as one of the most basic of the federal constitutional rights. As early as 1892 the high court referred to the "peculiar sacredness of this high constitutional right." (*Lewis v. United States* (1892) 146 U.S. 370, 375.) A century ago it announced that the right to be present extends "to every stage of the trial, inclusive of the empaneling of the jury and the reception of the verdict and . . . [is] scarcely less important to the accused than the right to trial itself." (*Diaz v. United States* (1912) 223 U.S. 442, 455.) As this Court has recognized, "[a] criminal defendant's right to be personally present at trial is guaranteed by the Sixth and Fourteenth Amendments of the federal Constitution, as well as by article I, section 15 of the California Constitution and by sections 977 and 1043 of the California Penal Code." (*People v. Hines* (1997) 15 Cal.4th 997, 1038-1039, citations omitted.) Thus, "even in situations where the defendant is not confronting witnesses or evidence against him, he has a due process right 'to be present in his own person whenever his presence has a relation, reasonable and substantial, to the

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[15] The court minutes for August 23, 1994, are also silent on these issues. (16CT:3511-3512.)

fulness of his opportunity to defend the charge[,]' . . . [but] "not when the presence would be useless, or the benefit but a shadow.'" (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745, quoting *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-106; accord, *People v. Hines*, *supra*, 15 Cal.4th at p. 1039.) "The state constitutional right to be present at trial is generally coextensive with the federal due process right." (*People v. Butler* (2009) 46 Cal.4th 847, 861, citations omitted.)

A defendant may waive his constitutional right to be present at a critical stage of the proceedings, but only "provided such waiver is voluntary, knowing and intelligent." (*Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662, 671-672, citing *Johnson v. Zerbst* (1938) 304 U.S. 458, 464 [waiver of constitutional right defined as "the intentional relinquishment or abandonment of a known right"].) This Court has recognized that to be valid, a defendant's waiver of a constitutional right must be knowing and intelligent, "that is, made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it, as well as voluntary . . . . " (*People v. Weaver* (2012) 53 Cal.4th 1056, 1071-1072 [right to a jury]; *People v. Collins* (2001) 26 Cal.4th 297, 307-309.)

The right to be present at trial requires the defendant's personal waiver and cannot be waived by counsel. (*Taylor v. Illinois* (1988) 484 U.S. 400, 417-418 & fn. 24 [listing the right to be present during trial among the "basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client"]; *United States v. Felix-Rodriguez* (9th Cir. 1994) 22 F.3d 964, 967 [waiver of right to be present during play-back of taped conversation must be given by defendant personally]; *People v. Davis* (2009) 46 Cal.4th 539, 610-611 [defendant

must personally waive right to be present when jury views crime scene; error harmless].)

Under California law a defendant's right to waive his presence at trial is further qualified by the statutory limitations of sections 977 and 1043, which, read together, provide that a capital defendant may be absent during trial *only* if (a) he is removed because he is disruptive (*People v. Price* (1992) 1 Cal.4th 324, 405-406), or (b) he voluntarily executes a written waiver of his presence, in open court, and then only if the proceeding is not one at which evidence is taken (*People v. Romero* (2008) 44 Cal.4th 386, 418-419).[16]

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[16] Section 977, subdivision (b)(1)provides, in pertinent part:

> In all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present . . . .

Section 1043 provides, in pertinent part:

> (a) Except as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial.
>
> (b) The absence of the defendant in a felony case after the trial has commenced in his presence shall not prevent continuing the trial to, and including, the return of the verdict in any of the following cases:
>
> (1) Any case in which the defendant, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, nevertheless insists on conducting

(continued...)

Here appellant was absent during a critical stage of his capital trial – the selection of the jury that would decide whether or not to sentence him to death.[17] (*Lewis v. United States*, *supra*, 146 U.S. at p. 394; *Gomez v. United States* (1989) 490 U.S. 858, 873 [voir dire is a "critical stage of the criminal proceedings, during which the defendant has a constitutional right to be present[,]" citations omitted].) Given the sanctity of the right to be present at trial, the high court has recognized that the right can only be waived by the defendant himself, and not by his counsel. (*Taylor v. Illinois*, *supra*, 484 U.S. at p. 418 & fn. 24.)

Moreover, given the importance of jury selection in a capital case, it is reasonable to expect that the defendant will have strong views and wish to consult with counsel as the process actually unfolds. Indeed, here, as defense counsel indicated, appellant had had "significant input" in jury selection until his concussion and thus had demonstrated he was interested, willing and capable of participating in strategic decisions regarding the

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[16](...continued)
himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom.

(2) Any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent.

. . .

(d) Subdivisions (a) and (b) shall not limit the right of a defendant to waive his right to be present in accordance with Section 977.

[17] Given the procedural posture of the case – that appellant had pled guilty to everything but the weapons use allegations and had admitted the special circumstances – a penalty phase was a foregone conclusion at the outset.

selection of the jury that would decide whether or not to sentence him to death. (14RT:4006.)

Yet, the trial court never advised appellant of his constitutional and statutory right to be present during jury selection, never confirmed with appellant that he understood those rights, never elicited from appellant himself an oral waiver of those rights, and never obtained a written waiver of those rights from appellant in open court.[18]

On August 5, 1992, the day appellant was assaulted, it was defense counsel, not the court, who elicited from appellant his perfunctory and uninformed agreement to waive his presence for "the balance of this afternoon's proceedings." (14RT:3948.) The court's assertion on August 9th – when appellant appeared in court with his jaw wired shut and was barely able to answer the court's questions (14RT:3985-3986) – that on

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[18] The court in fact conducted other proceedings, not covered by appellant's limited written waiver, in appellant's absence without obtaining appellant's waiver of his right to be present. For example, on March 2, 1993, appellant was absent when the court and counsel discussed whether the fact that the public defender's office, which employed appellant's counsel, had also represented one of the testifying jailhouse informants presented a conflict of interest. (3RT:63-68.) On May19, 1993, the court discussed at length with counsel, in appellant's absence, appellant's Indiana prior conviction for possession of residual cocaine. (4RT:611-635) and the prosecutor's request to conduct a conditional examination of prospective penalty phase witness John Ells (4:RT:640-643). And, as noted, appellant was absent August 10, 1994, when the court and counsel discussed appellant's mental status and competence to proceed with jury selection, as well as the confusion surrounding the "random draw" procedures and the issue of how the dual-jury system would work. (14RT:4002-4023.) While not subject to individual claims of statutory or constitutional error here, these instances are relevant in that they evidence the trial court's failure to appreciate and respect appellant's right to be present absent a constitutional and statutorily compliant waiver.

August 5th it had taken appellant's waiver – that "*we* did take a waiver from you, and you did not want to be present for the afternoon session" (14RT:3986, italics added) – is thus contradicted by the record of the August 5th proceedings. Moreover, even as reconstructed by the trial court, any waiver elicited on August 5th would expressly have been limited to "the afternoon session" that day (*ibid.*) and thus could not have extended to the proceedings on August 11th, when counsel exercised their peremptory challenges, or to the swearing of the jury on August 12th.

The court's suggestion on August 9th that on August 5th it had "explained to [appellant] that [he] had the absolute right to be present" is also contradicted by the record. At no time during the proceedings on August 5th did the court or anyone else inform appellant that he had constitutional and statutory rights to be present during jury selection, much less elicit an acknowledgment from appellant that he understood that he had such rights and was voluntarily giving them up, as required for a constitutionally valid waiver. (*Johnson v. Zerbst*, *supra*, 304 U.S. at p. 464; *People v. Weaver*, *supra*, 53 Cal.4th at pp. 1071-1072.)

The proceedings conducted August 5th prior to appellant's departure from the courtroom span one-and-a-half pages of transcript. (14RT:3948-3949) Apart from taking appearances, the court made only two statements: the first, spanning a paragraph, was expressly address to "counsel" and includes: "You have indicated briefly to the court, after viewing your client, that *you* were willing to waive his presence for this afternoon's questioning of the remaining jurors; is that correct?" Defense counsel agreed that was correct. (14RT:3948, italics added.) The court's second statement is addressed to appellant: "That's all right. Not your fault, as I understand it." (14RT:3949.) Thus the court never engaged in any

colloquy with appellant on August 5th, must less one that could be construed as eliciting the waiver of a constitutional and statutory right.

Nor did the court make any inquiry or findings on August 5th, or on August 9th, regarding appellant's capacity to waive his presence. The fact that on August 9th defense counsel (Mr. Ainbinder) stated that *he* "believed appellant was able to make a knowing, intelligent waiver . . . [on August 5th], despite the fact that he was pretty shaken up[,]" (14RT:3986) does not satisfy the requirement of a personal, voluntary, knowing and intelligent waiver. First, counsel's lay opinion about appellant's mental capacity to comprehend the nature of his constitutional and statutory rights and to knowingly and intentionally waive them – immediately following an assault to the head sufficiently severe to require emergency medical attention – was itself uninformed, if not facially dubious. Indeed, on August 9th counsel stated he "st[oo]d by" his assessment, all the while informing the court, as noted, that he was concerned about appellant's mental condition: "*I'm concerned that he has a concussion* and other injuries not related just to simple fractures, but I'm concerned about his mental condition." (14RT:3986, 3988, italics added.) Moreover, the court itself took no steps to assess appellant's mental capacity to give a constitutionally valid waiver, either on August 5th or on August 9th, nor did it make any findings on the subject.

Although appellant was present in court the morning of August 11th, prior to being escorted into the jury deliberations room, the court again failed to elicit from him a retrospective waiver of his presence the afternoon of August 5th, when six prospective jurors were voir dired, or a waiver of his presence for any other jury selection proceedings. Again, it was counsel, not the court, who stated that appellant was willing to waive his

presence and who engaged in a colloquy with appellant regarding his willingness to sit in the jury room. (14RT:4046-4048.) Yet it was also counsel who described appellant as "pretty much in the same shape" as the day before: "mildly disoriented; moving very slowly, and in terms of interaction, there is definitely some dullness." (14RT:4046.) The trial court merely described the logistics, which it felt it had to do twice:

> *Let me repeat it for you.* While you're listening in there, you hear the challenges, if at any time you want to talk to your attorneys about what is going on in here or your feelings about any of the prospective jurors, tell the bailiff and he will come in here and notify us and I'll let your lawyer go back and talk to you.

(14RT:4048, italics added.) Asked by the court if this was "agreeable" to him, appellant said "Yes." (*Ibid.*) Again, however, the court failed to explain to appellant that he had the *right* to be present or to elicit his knowing and intelligent waiver of that right. The court also failed, again, to make findings regarding appellant's capacity to voluntarily waive a constitutional right, even in the face of counsel's candid representation regarding appellant's persistent mental impairment. (*Ibid.*)

Finally, on August 22, 1992, when appellant was next present in court, following the swearing of the jury on August 12th, the court made no mention of appellant's having been absent during jury selection, much less elicit from appellant a retrospective waiver of his presence. (15RT:4096-4234; compare *People v. Weaver, supra*, 53 Cal.4th at p. 1075 [doubt regarding whether waiver extended to special circumstances removed by defendant's post-verdict reiteration that he had waived a jury as to special circumstances].) The court and counsel merely took up routine pretrial matters, including jury instructions and discovery, and the structure of the

dual-jury trial. (*Ibid.*; 16CT:3509-3510.)

The trial court also failed to comply with the requirements of sections 977 and 1043, which provide that a non-disruptive capital defendant may only waive his presence at trial in writing in open court. As noted, the only written waiver appellant executed was signed 18 months before jury selection began and by its terms was limited to in-chambers discussions of three specific procedural matters. (3CT:308-309.) (Compare *Campbell v. Wood*, *supra*, 18 F.3d at pp. 670-671 [trial court obtained written and oral waiver from defendant of presence at empaneling of jury]; *People v. Edwards* (1991) 54 Cal.3d 787, 809 [defendant waived presence during jury selection orally and in writing].) That waiver cannot be deemed to encompass jury selection. (*United States v. Berger* (2007) 473 F.3d 1080, 1095 ["We narrowly construe Berger's waiver and only read it to include whatever Berger explicitly waived."].)

It was particularly important here for the court to obtain appellant's personal waiver of his presence, rather than rely on counsel's representation that appellant had agreed that jury selection could continue without him. As the court was aware, appellant had suffered a concussion as a result of the assault he endured, and counsel repeatedly had informed the court that appellant's mental functioning was impaired. (See, e.g., 14RT:3986, 3988.) Under these circumstances it was incumbent on the court to be certain that appellant himself understood what rights he enjoyed and that he was knowingly and intelligently waiving them.

The extent and nature of the proceedings appellant missed distinguish this case from others in which this Court has found no violation of the right to be present. Unlike in *People v. Holt* (1997) 15 Cal.4th 619, in which the defendant was absent during proceedings ancillary to jury

selection, such as an in-chambers discussion regarding jury selection procedures or an in-chambers examination of one or a few jurors, here appellant was absent from the courtroom for a half day of individual sequestered voir dire, for the exercise of *all* peremptory challenges by both parties and for the swearing of the jury, as well as when his physical and neurological condition and capacity to proceed were discussed outside the presence of the prospective jurors. (Compare *People v. Castaneda* (2011) 51 Cal.4th 1292, 1316-1317 [defendant absent during hallway conferences at which rulings were made regarding voir dire and at which court indicated it would monitor prospective juror who expressed concern about being video-taped]; *People v. Wallace* (2008) 44 Cal.4th 1032, 1051-1053 [defendant absent during court's ex parte discussion with juror, later excused, who was distraught over marital difficulties]; *People v. Panah* (2006) 35 Cal.4th 395, 443 [defendant excluded from conference during which counsel passed for cause and each exercised only three peremptory challenges]; *People v. Ervin* (2000) 22 Cal.4th 48, 72-74 [defendant absent during preliminary prescreening of prospective jurors based on questionnaires]; *People v. Grant* (1988) 45 Cal.3d 829, 846 [defendant absent for discovery motion and filing of section 190.3 notice and, following execution of written waiver, from discussion of jury selection procedures and from hardship voir dire]; *People v. Hines*, *supra*, 15 Cal.4th at pp. 1038-1040 [defendant absent during questioning of a juror regarding phone call she received from defendant]; *People v. Beardslee* (1968) 53 Cal.3d 68, 103-104 [defendant possibly absent during 20 minutes of hardship voir dire].)

Nor is this a case in which sensitive, personal matters pertaining to individual jurors were being discussed, at sidebar, out of the presence of the

other jurors, as well as the defendant. (Compare *People v. Virgil* (2011) 51 Cal.4th 1210, 1233-1238 [defendant and counsel had opportunity to discuss prospective jurors' disclosure at sidebar that they had been abused as children]; *People v. Blacksher* (2011) 52 Cal.4th 769, 800 [court repeats in-chambers ruling on *Batson* motion; defendant not present when deliberating juror replaced, but was present when parties agreed juror would be excused if proceedings not concluded in time].)

Nor was appellant's absence brief. As noted, he was absent, while the prospective jurors were present, for the voir dire of six prospective jurors, for counsel's exercise of all of their peremptory challenges, and for the swearing of the jury – i.e., when his jury was ultimately selected.[19] (Compare *People v. Hines*, *supra*, 15 Cal.4th at pp. 1038-1040 [defendant absent for "a matter of seconds" during counsel's discussion of scheduling, "briefly" while jury silently reviewed two photographs as defendant was being escorted out]; *People v. Wallace*, *supra*, 44 Cal.4th at pp. 1051-1053 [defendant absent briefly during preliminary discussion regarding whether prosecution witness would be present during trial, and during court's ex parte discussion with juror later excused].)

Moreover, the record establishes that appellant was absent not for being disruptive, but because he had been brutally assaulted while in custody, to the point of visible physical injury and documented, evident mental impairment. (Compare *People v. Hines*, *supra*, 15 Cal.4th at pp. 1039-1040 [defendant with " history of faking illness]; *People v. Price*,

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[19] As noted, he was also absent, outside the presence of the prospective jurors, on August 10, 1994, while the court and counsel discussed his competence to proceed with jury selection, among other things.

supra, 1 Cal.4th at pp. 405-406 [disruptive defendant].) Yet, neither is this case comparable to *People v. Lewis* (2006) 39 Cal.4th 970, in which the Court proceeded with the reading of the verdict in defendant's absence because the defendant had been hospitalized as a result of being assaulted, was in a coma, and would be unavailable potentially indefinitely, thus risking the loss of jurors. (*Id.* at p. 1040).

Here it was clear that appellant simply needed a bit more time to recover sufficiently from his physical injuries and to return to his prior level of mental functioning, so that he could appear and participate as he had been. This is what appellant's counsel had requested on August 10th when he suggested that "what we ought to do is put everything off about one week and see where we're at in one week." (14RT:4008.) At the next court appearance, on August 22, 1994, the subject of his injuries and appearance never came up. (15RT:4096-4234.) The court made no inquiry or reference as to appellant's appearance or condition and counsel were silent on the subject. (*Ibid.*) The court easily could have used the time appellant spent recuperating to attend to the extensive pretrial matters not taken up until then. For example, the "construction" of the dual-jury courtroom, which apparently also took some time, could also have been done while appellant was recuperating. That the court allowed over a week to elapse between July 22, 1994, when the first panel was sworn, and August 1, 1994, when voir dire resumed, suggests the court was not per se averse to such interruptions. And although the court expressed concern about inconveniencing the prospective jurors (14RT:3993), it took no steps to inquire whether they would in fact have been inconvenienced by a brief delay.

Having appellant sit in the jury room during counsel's exercise of

their peremptory challenges with the proceedings piped in by speaker was not a viable alternative to his presence in the courtroom, for several reasons. As a practical matter, listening from the jury room appellant could not possibly have followed the proceedings in any meaningful way. For one thing, the 12 prospective jurors who initially filled in the box – of the 62 remaining from the panel at that point – were not all identified out loud by name.[20] (14RT:4061-4062.) Thus appellant, sitting in another room, could not, as a practical matter, have voiced an opinion about who to excuse if he did not know who was "in the box" to start with – even if he had memorized what he had learned about each of the 60-plus prospective jurors, and even if he were not "mildly disoriented," "moving very slowly," exhibiting "some dullness" and suffering hearing loss.[21] Indeed, it is difficult to imagine how anyone not observing the proceedings could possibly have kept track of the rapid-fire "thank and excuse" exercise of peremptory challenges – one juror excused, another called to fill in, another

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[20] With respect to the identity of prospective jurors initially seated in the box, appellant would have heard only the following:

> THE COURT: We will deal only with the 12 in the box. That would be through Miss Williams and Miss Dwyer. You've been selected at random. You in the audience, you don't know where you fit in the scheme. These folks, actually sixteen now, we are down to 15 because we lost Miss Garcia, they were the first ones drawn strictly at random.

(14RT:4062.)

[21] Although the court was aware that appellant had suffered hearing loss as a result of the assault (17RT:4321-4322; see also 14RT:4047-4048), there is nothing in the record to suggest the court ever took any steps to ensure that the "jerry rig[ged]" speaker system was effective in allowing appellant to hear the proceedings clearly.

juror excused, and so on – without knowing who the initial 12 were and seeing who remained in the courtroom. Moreover, as the Florida Supreme Court has recognized, "The exercise of peremptory challenges by defendant . . . may involve the formulation of on-the-spot strategic decision which may be influenced by the actions of the state at the time." (*Florida v. Walker* (1983) 438 So.2d 969 [reversible error to exclude defendant].)

And, realistically, appellant could never actually have communicated with counsel in time, given the scenario inherent in the logistical constraints: appellant alerts the bailiff; the bailiff goes into the courtroom and interrupts the proceedings; the bailiff takes the time to "secure" appellant in the jury room; the court recesses the proceedings, so that appellant's counsel can meet with their client in the jury room, leaving the prospective jurors to speculate about the sudden disruption of the proceedings. There simply was no time for appellant to give input; nor would there have been enough time for appellant's input to have been taken into account. Even to those participating in the courtroom, the back-and-forth process moved at a "dizzying" pace:

> MR. AINBINDER: I was getting that dizzy feeling like watching a ping-pong [ball] go back and forth.
>
> THE COURT: How do you think that I feel?
>
> (LAUGHTER)

(14RT:4067.)

This case is thus distinguishable from cases such as *People v. Dickey* (2005) 35 Cal.4th 884, in which the defendant was permitted to watch the testimony of a single witness on a television monitor, with the option to return to the courtroom on a moment's notice, and hence retained a

meaningful and realistic opportunity to participate in the proceedings. (*Id.* at p. 924.) Moreover, in *Dickey* the defendant had made clear that he wanted "no sympathy or pity from th[e] jury that convicted [him]," such that his hostile demeanor might have been detrimental to his defense. (*Ibid.*) Here appellant had every reason to want to appear before the prospective jurors; yet he could not, because of the disfiguring physical injuries he had suffered through no fault of his own while in custody.[22]

Finally, it bears noting that appellant was only placed in the jury deliberations room on August 11th, when counsel were exercising their peremptory challenges. The court made no alternative arrangements whatsoever for the jury selection proceedings that took place the afternoon of August 5th, when six prospective jurors were voir dired, one of whom was later sworn, or on August 12th, when the jury was sworn. Appellant was simply absent altogether on those occasions.

D. The Exclusion Of Appellant From Crucial Portions Of Jury Selection Without a Personal, Voluntary, Knowing and Intelligent Waiver Of His Right To Be Present Cannot Be Deemed Harmless Error Under State Or Federal Law and Requires Reversal

This Court, like the United States Supreme Court, generally views federal constitutional violations as either structural error or trial court error. (*People v. Lightsey* (2012) 54 Cal.4th 668, 699-700, citing *Arizona v. Fulminante* (1991) 499 U.S. 279.) An error is structural, and reversal is automatic, if the error permeates "[t]he entire conduct of the trial from beginning to end" or "affect[s] the framework within which the trial

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[22] In *Dickey* the Court found it was error to have permitted the defendant to be absent during the taking of evidence, under sections 977 and 1043, but found the error harmless under the circumstances described above.

proceeds." (*Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 309-310.) "[T]the kinds of errors that, regardless of the evidence, may result in a 'miscarriage of justice' because they operate to deny a criminal defendant the constitutionally required 'orderly legal procedure' (or, in other words, a fair trial) . . . all involve fundamental 'structural defects' in the judicial proceedings . . . ." (*People v. Cahill* (1993) 5 Cal.4th 478, 501-502, citing *Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 309-310 .) On the other hand, trial court error is error that "occur[s] during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." (*Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 307-308; *People v. Zapien* (2009) 4 Cal.4th 929, 980-981 [erroneous admission of evidence]; *People v. Hart* (1999) 20 Cal.4th 546, 656 [erroneous commutation instruction].)

Appellant recognizes that this Court and the Ninth Circuit have applied harmless error analysis in cases in which a defendant has challenged his absence from trial proceedings (e.g., *People v. Panah*, *supra*, 35 Cal.4th at p. 443; *People v. Bradford* (1997) 15 Cal.4th 1229, 1358; *Rice v. Wood* (9th Cir. 1996) 77 F.3d 1138, 1141 (en banc)), but urges that, in this case, appellant's absence during jury selection be treated as structural error. Appellant was absent not during brief or isolated jury selection proceedings, but rather during the voir dire of six prospective jurors, one of whom was seated, and during counsel's exercise of all of their respective peremptory challenges – i.e., during the ultimate determination of the composition of the jury, which affects the entire framework from which the trial proceeds and thus implicates appellant's right to "the constitutionally required 'orderly legal procedure.'" (*People v. Cahill*, *supra*, 5 Cal.4th at pp.

501–502, quoting *Arizona v. Fulminante, supra*, 499 U.S. at pp. 309-310; compare *People v. Panah, supra*, 35 Cal.4th at p. 443 [in camera pass of for cause challenges and exercise of only three peremptory challenges].)

Appellant's presence was essential during jury selection so that appellant, his counsel and the court could observe and take into account the demeanor of the prospective jurors, as they in turn observed appellant, at the all-important moment of selecting the 12 men and women who would decide whether to sentence appellant to death. (See *United States v. Washington* (9th 1983) 705 F.2d 489, 497 [right to be present at bench-conducted voir dire because right of defense to exercise peremptory challenges "can require direct consultation with the defendant and something more than second hand descriptions of the prospective jurors' responses to questions during voir dire"]; *Florida v. Lane* (Fla. 1984) 459 So.2d 1145, 1146 ["It is well settled that the challenging of jurors is one of the essential stages of a criminal trial where a defendant's presence is required"]; *People v. Sloan* (N.Y. 1992) 592 N.E.2d 784, 786-787 [defendant had fundamental state law right to be present during voir dire at bench because his assessment of demeanor and responses "could have been critical in making proper determinations in the important and sensitive matters relating to challenges for cause and peremptories"]; compare *Rice v. Wood, supra*, 77 F.3d at p. 1141[defendant's absence at return of verdict was harmless error because he could not have pleaded with the jury or spoken with the judge].)

This Court has recognized the importance of demeanor in the jury selection process and has noted, for example, that the trial judge's function in court-conducted voir dire "is not unlike that of the jurors later on in trial. Both must reach conclusions as to the impartiality and credibility by relying

on their own evaluation of demeanor evidence and responses to questions." (*People v. Carter* (2005) 36 Cal.4th 1215, 1250, citing *People v. Holt*, *supra*, 15 Cal.4th at p. 661, quoting *Mu'Min v. Virginia* (1991) 500 U.S. 415, 424.)

Appellant's absence during counsel's exercise of all of their respective peremptory challenges by its very nature precludes harmless error analysis. Indeed, if appellant's absence from these proceedings is not treated as structural error, he will effectively be left with a right without a remedy, because it would be impossible for him ever to show how his presence and input would have affected the outcome of his trial. For example, appellant could never show that, had he been present during the exercise of peremptory challenges, his counsel (perhaps at appellant's urging) would have excused a prospective juror (perhaps one who in fact later served as a juror), based on the person's demeanor in appellant's presence; or that the prosecutor would not in turn have excused the person who replaced that prospective juror; or, ultimately, that the composition of the jury would have been different – much less that *that* jury would have reached a more favorable verdict. Thus, it is no answer to say, as the trial court did, that counsel already knew who they wanted. (14RT:4034 ["And I think you pretty well know who you want or who you don't; at least you know who you don't want on this jury."].)

Moreover, in this case there was confusion about the order in which the prospective jurors would be seated. Defense counsel understood there would be only one random draw, at which point each prospective juror would be assigned a number, which would appear on their questionnaire. (14RT:4026-4028.) In fact, at the court's instruction the clerk conducted a second random draw, which led to the reordering of the prospective jurors

who had not been excused for hardship or for cause. (14RT:4024.) Defense counsel explained that, based on their understanding that there would be just the one random draw, they had questioned the jurors near the bottom of the list less rigorously on their views on the death penalty, and so felt disadvantaged. (14RT:4026-4028.) Therefore, while appellant had previously been able to convey his thoughts to counsel regarding the prospective jurors (14RT:4006, 4007), the reshuffling of the prospective jurors made his continued personal input all the more crucial. Put differently, the second random draw effectively undermined whatever input appellant previously had contributed.

Even if reversal is not automatic under these circumstances, the burden is on the state to show that the trial court's error was "harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Wright* (1990) 52 Cal.3d 367, 403; disapproved on other grounds in *People v. (David) Williams* (2010) 49 Cal.4th 405, 458-459 [applying *Chapman* to a violation of a defendant's right to be present at critical stages of his trial].) This "burden of proving harmless error is a heavy one." (*Bustamante v. Eyman* (9th Cir. 1972) 456 F.2d 269, 271.) "The standard by which to determine whether reversible error occurred . . . is not whether the accused was actually prejudiced, but whether there is 'any reasonable possibility of prejudice.'" (*Wade v. United States* (D.C. Cir. 1971) 441 F.2d 1046, 1050.) That burden cannot be met here, for precisely the same reasons, explained above, why reversal per se is required.

Nor, in any event, do any of the circumstances of appellant's trial support a finding of harmless error. The fact that appellant's counsel was present and conducted jury selection on appellant's behalf does not render

appellant's absence harmless. The presence of counsel does not cure the violation:

> Although the presence of counsel is certainly a relevant factor to be considered in determining whether a defendant's absence was harmless, the right to be present at trial – grounded in the Confrontation Clause and the Due Process Clause – is not a gossamer right inevitably swept away simply because a defendant is represented, in his absence, by counsel. The right to be present is distinct from the right to be represented by counsel. The right to be present would be hollow indeed if it was dependent upon the lack of representation by counsel. Furthermore, such a rule would ignore the fact that a client's active assistance at trial may be key to an attorney's effective representation of his interests.

(*United States v. Novaton* (11th Cir. 2001) 271 F.3d 968, 1000.) The right to be present at trial thus stems in part from the fact that only by his physical presence can the defendant hear and see the proceedings, be seen by the jury, and participate in the presentation of his rights. (*Bustamante v. Eyman*, *supra*, 456 F.2d at p. 274 [right to be personally present in the courtroom during rereading of jury instructions].) Appellant had been giving input, and thus could be expected to have continued to do so. Moreover, as explained above, here appellant's counsel were denied the benefit of seeing the prospective jurors as they observed appellant. The violation of appellant's right to be present thus cannot be shown to be harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; see *United States v. Gordon* (D.C. Cir. 1987) 829 F.2d 119, 124-129.)

The trial court's violation of sections 977 and 1043, which permit a capital defendant's absence from trial only if he is removed because he is disruptive or voluntarily executes a written waiver of his presence for

proceedings at which evidence is not taken (see pages 35-36, above), is judged under the *Watson* (*People v. Watson* (1956) 46 Cal.2d 818, 836) standard. (*People v. Dickey*, *supra*, 35 Cal.4th at p. 946.) For the reasons stated above with regard the federal *Chapman* standard, appellant's absence during jury selection also was prejudicial under *Watson*.

E. Conclusion

Through no fault of his own, and without a personal, voluntary, knowing and intelligent waiver, appellant was excluded from the courtroom during half a day of voir dire, during the exercise of all peremptory challenges and for the swearing of the jury. As a result, appellant, his counsel and the court were unable to observe and take into account the demeanor of the prospective jurors, as they observed appellant, at the critical stage of selecting the jury charged with determining whether appellant would be sentenced to death. Whether this error is deemed structural error or trial error, reversal is warranted.

II.

THE TRIAL COURT'S ERRONEOUS EXCLUSION FOR CAUSE OF PROSPECTIVE JUROR EVELYN JOHNSON BASED ON HER VIEWS ON THE DEATH PENALTY REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE

A. Introduction

Over appellant's objection, the trial court excused prospective juror Evelyn Johnson for cause, notwithstanding her statements, on voir dire and in her questionnaire, that while she "had a problem" with the death penalty and would have "difficulty" imposing it, she would not automatically vote against the death penalty, would need to hear the evidence to decide, and would keep an open mind. (14RT:4048-4049; 12RT:3490-3491, 3494, 3495.) The trial court's excusal of Johnson, based on statements she made on voir dire suggesting she was uncertain whether she could impose the death penalty in appellant's case, was not supported by substantial evidence that Johnson's views about the death penalty would prevent or substantially impair her ability to follow the law, obey her oath as a juror, and impose a death sentence if appropriate. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424.) Because the trial court's error violated appellant's rights to an impartial jury, a fair capital sentencing hearing, and due process of law under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution, reversal of appellant's death sentence is required. (*Gray v. Mississippi* (1987) 481 U.S. 648, 658, 668.)

B. Factual and Procedural Background

1. Johnson's Questionnaire

In her sworn juror questionnaire Johnson described herself as a married, 51-year-old Black woman (28CT:6089, 6108); an x-ray technician employed by the California Department of Corrections (28CT:6091); a Navy veteran who served in the hospital corp in the 1960's (28CT:6092); a member of the Black Tennis Club, the Urban League and the NAACP, among other organizations (28CT:6093); and a "leader" with "organizational skills" (*Ibid.*). Asked about her "religious or spiritual preference," she responded that she "adhere[d] to Methodist teachings," but said, "No," there was nothing about her religious or spiritual beliefs that would prevent her from "passing judgement in a criminal matter," and checked the "No" box as to whether her religious organization had a stated position regarding the death penalty. (28CT:6090.) The questionnaire asked the prospective juror to "explain any feelings or thoughts you may have at the prospect of being called upon to judge the conduct of another." Johnson responded: "It is a great responsibility, and if I were on trial, I would want someone who would be fair and impartial as I think I would be." (28CT:6095.)

Asked "whether [her] attitudes on our criminal justice system [were] such that [she] would be leaning towards the prosecution or the defense stance before hearing both sides[,]" she responded: "My attitude is towards neither." (28CT:6105.) In response to the question, "What is it about yourself that makes you feel you can be an impartial juror on this case?" Johnson wrote: "I think I am open minded and will make a determination only after hearing the evidence." (28CT:6109.) The only reason she gave why she might not be impartial was the child molestation charge, stating, "I

can't justify that kind of behavior in any way." (*Ibid.*)

The questionnaire concluded with a series of questions designed to elicit the prospective juror's views on the death penalty and the penalty of life imprisonment without possibility of parole. (28CT:6110-6114.) In response to "What is your opinion regarding the death penalty?" Johnson wrote: "Some acts of crime are so inhuman that I['m] not sure the one who commits these types of crimes could ever be rehabilitated and if not then they would be a threat to society and therefore whatever means to protect society (even if incarcerated with [*sic*][23] parole) have to be taken." (28CT:6111.) In response to a similar question about life imprisonment without possibility of parole, she responded: "It is a bad way to spend ones life, but sometimes it's a necessary way in order to protect society at large." (28CT:6112.) Johnson answered "No" to each of the following questions:

> No matter what evidence is presented, would you refuse to vote "guilty" as to murder or refuse to find the special circumstances true, in order to keep the case from proceeding to the penalty trial, where the task would be to decide between death and life in prison without the possibility of parole?
> Yes ___ No _X_
>
> No matter what evidence is presented, would you always vote "guilty" as to murder or true as to the special circumstances in order to assure that the case proceeds to the penalty trial, where the task would be to decide between death and life in prison without the possibility of parole?
> Yes ___ No _X_

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[23] Given the context of the question and answer – the prospective juror's attitudes toward the penalties of death and life imprisonment *without* possibility of parole – the only logical interpretation of Johnson's parenthetical is that she meant to write "without" but mistakenly wrote "with.")

> If you and the eleven other jurors found Mr. Wall guilty of murder and found a special circumstance to be true, would you always vote against death, no matter what evidence might be presented or argument made during a penalty phase?
> Yes ___ No _X_
>
> If you and eleven other jurors found Mr. Wall guilty of murder and found a special circumstance to be true, would you always vote for death, no matter what evidence might be presented or argument made during a penalty trial?
> Yes ___ No _X_

(28CT:6112.) In response to the question asking whether a person convicted of murder should ever "*automatically*" receive the death penalty, Johnson responded: "My opinion – mass murder for *political* or financial gain." (28CT:6113, all italics in original.)

Finally, the questionnaire asked whether the prospective juror could "put aside any thoughts or concerns relating to the penalty issues while you deliberate guilt or innocence . . . ." Johnson responded: "I can only say I hope so. After hearing evidence I am not sure how I will react." (28CT:6114.)

2. Johnson's Voir Dire

During individual, sequestered *Hovey* voir dire the trial court asked prospective juror Johnson about the statement on her questionnaire regarding the child molestation allegation. (See 28CT:6109.) Johnson responded that she now understood the presumption of innocence and the prosecutor's burden of proof, and agreed she was open to listening to the testimony. (12RT:3484.) She later acknowledged that she was troubled by the molestation charge and was not sure whether she could be "totally objective with regard to a molestation case . . . ." (12RT:3493.)

The court then addressed the subject of penalty, explaining that if

there were a penalty phase, the prosecutor could present evidence in aggravation and the defense could present evidence in mitigation, and that whichever penalty the jury decided on, death or life without possibility of parole, would be carried out. (12RT:3485.) Asked whether she had "a problem with that," Johnson replied, "I'm not sure about how I would feel about having to make a determination about whether a man or woman receives the death penalty." (12RT:3486.) This colloquy continued as follows:

> Q. [THE COURT]: Okay. Let's talk about that. Do you have some religious feelings about it or what feelings? What opinions do you have about it?
>
> A. [JOHNSON]: I don't have – when you say religious feelings, I feel that I'm not the one to make a judgment on something like that. It is a higher being so if you mean – if you mean by religious feelings, yes, I have that feeling.
>
> Q. [THE COURT]: .... Could you, based on the evidence, could you find in your own mind that the proper and appropriate penalty is death or could you never get to that point?
>
> A. [JOHNSON]: Sitting here right now, this morning, I would have to say that I don't really know. I really can't give you a yes answer. Maybe hearing testimony would change my mind so I want to be open for that, but I – I do have a problem with dealing with that particular part of being a juror.

(12RT:3486-3487.) Asked whether, having listened to the evidence and agreed with the other jurors that death was the appropriate penalty, she could "come back into this courtroom, face everybody who is here, people in the audience, perhaps, anybody, and announce the verdict, that [she] had voted for the death penalty in this case[,]" Johnson responded, "I don't know." (12RT:3487.) Then follows a somewhat confusing exchange

between the court and Johnson:

> Q. [THE COURT]: Are you telling me that both choices are difficult choices? I understand that you could find life without possibility of parole.
>
> A. [JOHNSON]: I think that I would have an easier time doing that, yes.
>
> Q. [THE COURT]: But you could do that?
>
> A. [JOHNSON]: Yes – I don't think so.
>
> Q. [THE COURT]: You don't now know whether or not you could impose the death penalty?
>
> A. [JOHNSON]: I don't.

(*Ibid.*)

Defense counsel then questioned Johnson, and the following exchanged occurred:

> Q. [THOMA]: . . . . You're not telling us right now, as you sit, that you're automatically against the death penalty, automatically in all circumstances whatsoever, are you? You're not saying that?
>
> A. [JOHNSON]: No.
>
> . . . .
>
> Q. [THOMA]: . . . . [W]hen you come to that part of the case involving penalty, it would just depend on what evidence was introduced in it, and listening to argument, for you to determine in a individual case whether it would warrant the death penalty or not; isn't that correct?
>
> A. [JOHNSON]: What I'm trying to say is, I don't have a problem with life imprisonment. I do have a problem with personally being part of a group that says that this man has to die or not. I have a problem with that. It may be that I will

hear evidence that will change my mind, but right now, this morning, I have a problem saying that I would be able to do that.

Q. [THOMA]: If I understand your problem, and I think that I do, what you're saying is that [it] would be much more difficult for you to make a decision to vote for death in a case than it would be to vote for life without possibility of parole in a case. That is part of it; is that correct?

A. [JOHNSON]: That's correct.

Q. [THOMA]: And that's fine. There are all kinds of people that come in here, different jurors with different thinking here. There are those that it would be just the other way, that it would be – it is easier for them to do – to vote for death than life without possibility of parole. There are all kinds of people, but what we're trying to find out is: if you would ever be able to do it or not, and as you sit here now, you're not saying that you would never be able to vote for death. Are you?

A. [JOHNSON]: I'm not saying that I would never be able to, but I'm saying that I would have a lot of difficulty in doing that.

(12RT:3490-3491.)

Defense counsel further questioned Johnson, as follows:

Q. [THOMA]: . . . . Realizing that is going to be a difficult decision for you anyway, okay, and not knowing the evidence, and it is hard because we can't really talk about the evidence ahead of time, but you don't know right now, without seeing anything, that you would absolutely vote for life without possibility of parole no matter what, right?

A. [JOHNSON]: Oh, no.

. . . .

Q. [THOMA]: And would you promise to at least keep an

open mind about it and not make up your mind until you have seen the evidence with regard to that?

A. [JOHNSON]: Oh, absolutely.

(12RT:3494-3495.)

The prosecutor then questioned Johnson as follows:

Q. [PRZYTULSKI]: .... I'm going to ask you straight out, okay, is what you're saying now, as you sit here now, you don't know if you are capable of imposing the death penalty. Is that a fair statement?

A. [JOHNSON]: That is correct.

(12RT:3496.)

Referring to Johnson's response to Question 16 of the questionnaire – that if she were on trial she would like "fair and impartial" jurors like herself – the prosecutor probed whether she was in the prosecution or defense "frame of mind:"

Q. [PRZYTULSKI]: [¶] In essence, is what you said, would you always, if you were concerned with the opinion I have, be satisfied with a juror in your frame of mind, in other words, I will be up here plugging for conviction; plugging for what we feel is the appropriate sentence. [¶] Are you in that frame of mind as well, or equally, other people come in, they sit there, they are to protect the defendant, they are also there to be objective on both sides. How do you feel?

A. [JOHNSON]: I understand. I have a somewhat understanding of both sides. I would try, again, just be objective. I don't know this man. I don't have any vested interest in him.

Q. [PRZYTULSKI]: I know.

A. [JOHNSON]: Or the person that you're defending, whatever, only thing that I can say, I would just try to be

objective, keep an open mind about it.

(12RT:3495-3496.)

3. The Challenge For Cause and the Trial Court's Ruling

On August 3, 1994, the prosecutor challenged Johnson for cause, on the grounds that "*Witt* and *Witherspoon* . . . hold that the juror must indicate that she has the capacity to uphold the death penalty. 'I don't know' is not sufficient under *Witt* and *Witherspoon*." (12RT:3499.) Defense counsel (Mr. Thoma) acknowledged that Johnson had difficulty with the death penalty, but countered that she was open to both penalties and would have to see the evidence before deciding; noted she had filled out her questionnaire thoroughly and had indicated she believed the death penalty should be automatic for certain crimes; and offered that her "problem" is simply that she has to "think things through very carefully" before making important decisions. (12RT:3499-3500.) Defense counsel (Mr. Ainbinder) acknowledged Johnson was hesitant, but offered that "[s]he knows that this is an extraordinarily difficult decision but she is willing to consider it and return a death verdict if the evidence warrants it." (12RT:3500.) The court took the matter under submission, characterizing it as a "close question," and observed:

> In addition to her answers, I just want the record to note this is not only a female, she is a black female. On the other hand, she works for the Department of Corrections so all of those things ought to be stated for the record. I know that they are in the questionnaire. If there is a review of this, we ought to indicate those factual matters as well.

(12RT:3500-3501.) The court made no further observations about Johnson's appearance or background, and made none about her demeanor.

On August 4, 1994, by the end of the day six prospective jurors remained under submission on for cause challenges, including Virginia Garcia, who the defense had challenged as biased in favor of the death penalty, and Johnson. (13RT:3852) Garcia had strong views on the issue of penalty. She repeatedly stated she favored the death penalty for anyone convicted of murder and answered "Yes," she would automatically vote for death if appellant were found guilty of murdering two elderly people in their home, guilty of robbery and burglary, and guilty of molesting a child. (13RT:3834-3835.) But she also stated that while she "d[id]n't know" then how she would vote, she was open to either penalty and would have to first hear the evidence. (See, e.g., 13RT:3848-3849.)

The trial court suggested Garcia and Johnson were comparably "extreme" in their views, stating, "if I'm going to let fringe people in, I'm going to let fringe people in on both sides. I'm not going to allow anybody who is at either extreme or cannot give me an answer." (13RT:3856.) Put differently, the court observed, "[s]eems to me what's good for the goose ought to be good for the sauce [*sic*]." (13RT:3853.)

A week later, on August 11th, the Court ruled on the outstanding for cause challenges as follows:

> My attitude quite frankly, in looking at them, is that two people ought to go. One is Virginia Garcia, one is Evelyn Johnson. I think that the rest of [those under submission] are okay and let me tell you [what] my reasoning is. [¶] That a lot of people expressed some confusion about that questionnaire, those questions, and these folks were not the only ones on the questionnaire that got confused by the phrase – couple of those questions about capital punishment and life without possibility of parole. And in going through these transcripts, I noticed a lot of people said statements like, I think that I can but I don't, this that. That, in and of itself, is not grounds for cause. It is where somebody says, 'I don't know' or 'I can't

> make a decision one way or the other,' and I think in Virginia Garcia's case, a cause challenge on behalf of the defense, I think that Miss Johnson, Evelyn Johnson, is a cause challenge on the behalf of the People.

(14RT:4048-4049.) The court gave no further explanation or elaboration of its reasons for excusing Johnson, or Garcia, or for denying the challenges as to the other prospective jurors then under submission.

C. The Record Does Not Support the Trial Court's Excusal Of Johnson

Under the federal constitution, "[a] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 421, quoting *Adams v. Texas* (1980) 448 U.S. 38, 45.) The Supreme Court has held that: "*Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the state's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out." (*Adams v. Texas*, *supra*, 448 U.S. at p. 48, citation omitted.) Thus, all the state may demand is "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Id.* at p. 45.) The same standard is applicable under the California Constitution. (*People v. Pearson* (2012) 53 Cal.4th 306, 327-328; *People v. Gray* (2005) 37 Cal.4th 168, 192.) The focus of any inquiry is properly on the juror's ability to honor his or her oath as a juror. "'A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where

appropriate.' [Citation]." (*People v. Pearson*, *supra*, 53 Cal.4th at p. 327, quoting *People v. Cunningham* (2001) 25 Cal.4th 926, 975.)

The prosecution, as the moving party, bears the burden of proof in demonstrating that a juror's views would "prevent or substantially impair" the performance of his or her duties. (*People v. Stewart* (2004) 33 Cal.4th 425, 445.) The exclusion of even a single prospective juror in violation of *Witherspoon* and *Witt* requires automatic reversal of a death sentence. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 669; *Davis v. Georgia* (1976) 429 U.S. 122, 123; *People v. Stewart*, *supra*, 33 Cal.4th at p. 445.)

In this case the trial court's excusal of prospective juror Johnson is not supported by the record. The court granted the prosecution's challenge without identifying any responses Johnson gave on her questionnaire or on voir dire that if felt demonstrated that her views on the death penalty would "prevent or substantially impair" her performance of her duties as a juror; without pointing to any response indicating she could not consider the evidence and follow the court's instructions and her oath as a juror; and without reference to her demeanor.

As a preliminary matter, the court noted that the questions on the juror questionnaire regarding the death penalty and life without possibility of parole were confusing and that many prospective were in fact confused, but identified nothing from Johnson's questionnaire as a basis for its decision to exclude her. (14RT:4048.)[24] The court also observed that it had reviewed transcripts of the juror voir dire and had found that many people

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[24] The court noted that many of the questions on the questionnaire were confusing: "I found that some of the questions, these people just do not understand what you are asking them. . . . I just don't like questionnaires." (13RT:3857-3858; see also 14RT:4048-4049.)

expressed uncertainty about the death penalty. (*Ibid.* ["[G]oing through these transcripts, I noticed a lot of people said statements like, I think that I can but I don't, this that."].) The court thus recognized that giving ambivalent responses was not a sufficient basis for excluding a juror for cause, but concluded that "[i]t is where somebody says, 'I don't know' or 'I can't make a decision one way or the other,' and I think in Virginia Garcia's case, a cause challenge on behalf of the defense, I think that Miss Johnson, Evelyn Johnson, is a cause challenge on the behalf of the People." (14RT:4049.)

The record does not demonstrate that Johnson's ability to serve as a juror was substantially impaired under *Witherspoon-Witt.* First, contrary to the court's characterization of the type of prospective juror it would excuse for cause, Johnson's views on the death penalty were not on the "fringe" or "extreme." (13RT:3856.) She never expressed opposition to the death penalty on philosophical or religious grounds, much less categorical opposition – either in her questionnaire responses or on voir dire. (28CT:6090; compare, e.g., *People v. Martinez* (2009) 47 Cal.4th 399, 427-428 [one prospective juror stated she was "strongly against the death penalty," that it "serves no useful purpose [and] makes killers out of us;" another expressed philosophical opposition to the death penalty]; *People v. Avila* (2006) 38 Cal.4th 491, 531 [prospective juror had "indicated she strongly opposed the death penalty and would in every case automatically vote for life without possibility of parole, regardless of the evidence that might be produced at trial"].) Indeed, Johnson affirmatively favored the death penalty in certain circumstances. (28CT:6111.)

Nor did Johnson ever state she could *only* consider the death penalty in certain extreme or limited circumstances not applicable in appellant's

case. (Compare, e.g., *People v. McKinzie* (2012) 54 Cal.4th 1302, 1331-1332, 1337-1338, 1335 [only for serial killers or where the murderer molests a child (prospective juror E.S.T.); or only for "animals" like Jeffrey Dahmer (prospective juror R.H); or only for someone who commits the "premeditated" "mass" killing of school children (prospective juror D.K.)].) Rather, Johnson merely said generally she would find it difficult to impose the death penalty – "*I'm not saying that I would never be able to [vote for death],* but I'm saying I would have a lot of difficulty doing that." (12RT:3491, italics added.) As this Court has held, difficulty in imposing the death penalty does not of itself prevent or substantially impair the performance of a juror's duties. (*People v. Avila*, *supra*, 38 Cal.4th at p. 530, citing *People v. Stewart*, *supra*, 33 Cal.4th at pp. 442-443.)

Second, Johnson consistently made clear she would consider the evidence presented in this case and then on that basis decide whether to vote to impose the death penalty or life without possibility of parole, as appropriate. In this regard, her questionnaire responses fully support her qualification under *Witherspoon-Witt* to serve as a juror. For example, she answered "No," not "I don't know," to the question asking whether, regardless of the evidence, she would automatically refuse to vote guilty or to find the special circumstances true, to keep the case from proceeding to a penalty phase, and "No," not "I don't know," to the question asking whether she would automatically vote against the death penalty, no matter what evidence might be presented. (28CT:6112; compare *People v. Thomas* (2011) 51 Cal.4th 449, 463 [prospective juror answered "I don't truthfully know," rather than "Yes" or "No," on questionnaire in response to question whether she would "always vote for life in prison without parole regardless of the facts and circumstances"].) Similarly, on voir dire Johnson said,

"no," she was not "automatically against the death penalty, automatically in all circumstances whatsoever." (12RT:3490.)

Considered in context, as they must be, Johnson's responses demonstrate caution and circumspection; she emerges as a careful, thoughtful person who seeks to make informed decisions. For example, she described herself as follows: "I think I am open minded and will make a determination *only after hearing the evidence*." (28CT:6109, italics added.) Meaning, she does not prejudge. In responses to questions on the topic of criminal justice, Johnson indicated she "agreed with the concept" that everyone is entitled to a jury trial and opined that the jury system is "as fair as it can be, *without having absolute personal knowledge of [the] crime*." (28CT:6103, italics added.) Asked if she felt appellant was guilty solely by virtue of being charged with a crime, she checked "No," and added: "*Don't have enough information* to make a judgment." (28CT:6100, italics added.) Again, this is a woman who believes that just decisions must be based on the facts.

Johnson was cautious and deliberate in her responses on other subjects as well. As to whether she had heard of the case of *People vs. Randall Clark Wall*, she checked "No," but added, "that I can remember." (28CT:6099.) Asked her view of the "moral character of people involved in using 'crank' or 'speed,'" she wrote: "Don't have a blanket impression of anyone[']s character *without knowing some other factors about the person*." (28CT:6106, italics added.) Asked whether she would tend to trust or distrust psychiatric or psychological testimony she wrote: "Would do neither. I would judge that testimony by *what was said regarding the case*." (28CT:6107, italics added.) In the same vein, asked whether she was "prone to giving little or no weight, or great weight[,] to the testimony

of psychiatrists or psychologists," she responded: "Neither. Each of these resources may have some good or bad information *that would not be known until presented.*" (28CT:6108, italics added.) Even with respect to what newspapers she read, she identified two by name and added "and any newspaper in a city that I may be visiting." (28CT:6094.) Finally, asked whether she could put aside her views on penalty while deliberating appellant's guilt or innocence, she responded: "I can only say I hope so. *After hearing evidence* I am not sure how I will react." (28CT:6114, italics added.) Although this last response suggests she may have misunderstood the question, it is consistent with her approach – Johnson would make her decision based on the evidence presented to her.

Johnson was thus attempting to make clear on that although she was not able to predict, *in the moment*, knowing nothing about the facts of the case, whether she would be able to vote to sentence appellant to death, she was open to hearing the evidence and, *considering the evidence presented*, was open to imposing either penalty. Thus, when the court asked her on voir dire whether, "based on the evidence could you find it in your own mind that the proper and appropriate penalty is death[,]" Johnson responded: "*Sitting here right now, this morning*, I would have to say that I don't really know. I really can't give you a yes answer. Maybe *hearing testimony* would change my mind so *I want to be open for that*, but I – I do have a problem with dealing with that particular part of being a juror." (12RT:3486-3487, italics added.) When defense counsel asked whether, "*not knowing the evidence*, and it is hard because *we can't really talk about the evidence* ahead of time," she knew that she would "absolutely vote for life without possibility of parole no matter what," she answered clearly, "Oh, no." (12RT:3494, italics added.) And, asked whether she would

"promise to at least keep an open mind about it and not make up your mind yet *until you have seen the evidence*[,]" she replied, "Oh, *absolutely*." (12RT:3495, italics added.) Thus, when the prosecutor asked if it was true that, "*as you sit here now*, you don't know if you are capable of imposing the death penalty," and she said that was "correct," it is clear in context that she was again merely attempting to explain that she would need to know the facts before she would be able to decide on the appropriate penalty. (12RT:3496, italics added.) This seems more than reasonable for a juror in a capital case.[25]

In this regard Johnson's responses are like those of prospective juror "C.O." in *People v. Pearson, supra*, 53 Cal.4th at pp. 327-333, who this Court found had erroneously been excluded for cause. Like Johnson, C.O.

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[25] The only indication in the record to the contrary is the following exchange between defense counsel and Johnson:

> Q. [THOMA]: Is it hard to imagine, because you haven't seen what the evidence is, the circumstances under which you would vote for death? Is that part of your problem, is that you can't imagine because you have not seen evidence to you that would warrant calling for somebody's death? Is that part of your problem?
>
> A. [JOHNSON]: No.

(12RT:3488.) Given counsel's somewhat garbled questions and double negative, and read in the context of her numerous other responses, Johnson's "No" here is susceptible of two meanings – no, not having "seen the evidence" is not "part of the problem," or difficulty, she would have in deciding between life without possibility of parole and death; and no, I haven't seen the evidence. Given how many times she made clear that she would need to hear the evidence before making a sentencing decision, the latter interpretation is the logical one.

had stated in her questionnaire that she thought she could be impartial and would not automatically vote for either penalty. (*Id.* at p. 328.) In response to this question – "Some people say they support the death penalty; yet could not personally vote to impose it. Do you feel the same way?" – C. O. checked "No" and wrote: "*I'm not sure where I stand* but *if* I strongly felt strong about something, I would stand behind it." (*Ibid.*, italics added.) In response to another question C. O. wrote: "I don't think the death penalty is cruel and unusual punishment. *But I'm uncertain if I approve or disapprove w/ death sentence.*" (*Id.* at p. 329, italics added.) Asked on voir dire what she meant by that, she said: "I think with that answer, because I'm uncertain of how I really feel about the death penalty, *unless I have everything presented in front of me,* so I don't know what I really meant on that one." (*Ibid.*, italics added.) As this Court noted, "On further questioning by defense counsel, she reiterated that she could vote for death in an appropriate case and agreed her uncertainty related to the appropriateness of the penalty in a given case, *which she could not decide without hearing all the facts.*" (*Ibid.*, italics added.) Finally, in response to further questioning by the prosecutor, who admonished that it would be unfair to both sides to seat her "if you truly, *at this point in time*, don't know what you will do," O.C. stated: "I think with that, *I'd have to be an actual juror to see what's presented for me*. I'm not saying that I can't vote for it or that I wouldn't vote for it, but I think that *I have to have all of the evidence before I can say anything concerning this case itself.*" (*Ibid.*, italics added.)

This Court held the trial court erred in excusing C.O. for cause. The Court noted that while C.O.'s views on the death penalty were "vague and largely uninformed," her answers were neither conflicting nor equivocal, in

that she consistently stated she could vote for the death penalty in an appropriate case. The Court observed that a prospective juror is not "substantially impaired for jury service in a capital case because his or her ideas about the death penalty are indefinite, complicated or subject to qualification . . . ." (*People v. Pearson*, *supra*, 53 Cal.4th at pp. 330-331.)

Prospective juror Johnson's views were like C.O.'s, who would "have to have all of the evidence before [she could] say anything concerning this case itself." (*Id.* at p. 329.) Like prospective juror C.O., Johnson was simply trying to make clear that she could not tell *then* what she would do if she were an "actual juror;" she would need to hear the evidence before making a decision in appellant's case. She confirmed that "not knowing the evidence" she would not automatically vote for life without parole, and promised, "absolutely," to keep an open mind. (12RT:3494-3495.)

Finally, this is not a case in which deference can or should be accorded to a trial court's assessment of a prospective juror's demeanor or emotional state. While such deference may be due when a prospective juror gives conflicting or equivocal answers (*People v. Martinez*, *supra*, 47 Cal.App.4th at pp. 426-427, quoting *People v. Boyette* (2002) 29 Cal.4th 381, 416), Johnson did not do so. She may have been ambivalent about the death penalty, candidly acknowledging this penalty might be difficult to impose, but her answers were unambiguous. She consistently conveyed that no, she could not say, then and there, without having heard the evidence, whether she could impose the death penalty in this case; that yes, she would listen to the evidence presented; and that yes, she was open to imposing either penalty. That is all that is required of a juror in a capital case.

Moreover, the record confirms that the court did not take Johnson's

demeanor into account. As noted, the court made clear it was relying largely on the written voir dire transcripts (14RT:4048) and made no observations about Johnson herself other than to note she was African American and worked for the Department of Corrections (12RT:3500-3501). (Compare *People v. McKinzie*, *supra*, 54 Cal.4th at pp. 1333-1334 ["the trial court was 'impressed by [prospective juror F.R.'s] body language and the tears even just talking about it' . . . ."]; *People v. Thomas*, *supra*, 51 Cal.4th at p. 540 [trial court noted and relied on the "body language" of two prospective jurors; defense counsel described one as "very, very nervous, her lips were smacking . . . almost like she was a deer in the headlights"]; *People v. Lynch* (2010) 50 Cal.4th 693, 729, disapproved on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 637 [trial court noted one prospective juror "sounded like a different person" when she answered defense counsel's questions than when she answered the prosecutor's, and stated with respect to another prospective juror: "I have been observing this prospective juror, her demeanor and listening to her responses . . ."].)

Nor, in any event, is there any indication that Johnson in fact was upset, anxious or emotional. (Compare, e.g., *People v. McKenzie, supra*, 54 Cal.4th at pp. 1333-1334 [prospective juror crying]; *People v. Clark* (2011) 52 Cal.4th 856, 897 [prospective juror appeared "visibly upset and nervous" and looked like he "might lose emotional control over himself"]; *People v. Cowan* (2010) 50 Cal.4th 401, 440 [prospective juror "breaking down," "shaking head from side to side" and "crying"during voir dire].)

D. Conclusion

The trial court's excusal of prospective juror Evelyn Johnson is not supported by substantial evidence. The record does not establish that she was substantially impaired in her ability to comply with the court's

instructions or to fulfill her oath as a juror as required for exclusion under *Witherspoon-Witt.* Johnson's questionnaire responses and voir dire questioning consistently revealed her to be a careful and deliberate person who makes informed decisions. She was ambivalent about the death penalty, and would have found it difficult to impose, but her answers were clear and unambiguous – she would need first to hear the evidence and then could impose either death or life imprisonment without possibility of parole. There is no indication in the record that Johnson's demeanor conveyed impairment, or that her demeanor was telling or remarkable in any way. The trial court's decision to excuse her for cause is therefore due no deference from this Court and the record demonstrates that the judgment of death must be reversed without a showing of prejudice. (*Gray v. Mississippi, supra*, 481 U.S. at p. 661, fn. 10, 668.)

III.

APPELLANT'S COERCED AND INVOLUNTARY CONFESSION WAS ADMITTED INTO EVIDENCE AT THE PENALTY PHASE IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS

A. Introduction

The trial court erred in permitting the prosecutor to play appellant's tape-recorded confession at the penalty phase, because appellant's statements to law enforcement were obtained through psychological coercion and improper inducement and hence were not freely and voluntarily given.[26] Specifically, the detectives who interrogated appellant promised him he could "go on with [his] life" and "be with [his] wife and child and start fresh" if he confessed, and exploited his expressed fear of codefendant Rosenquist. Appellant's involuntary confession was admitted into evidence in violation of appellant's rights under the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 7 and 15 of the California Constitution. Because the confession was the centerpiece of the prosecution's case for death the error is not harmless beyond a reasonable doubt and reversal of the death sentence is mandated.

B. Factual and Procedural Background

1. The Interrogations

On March 17, 1992, shortly before 5:00 p.m., San Francisco homicide detectives James Bergstrom and Edward Erdlatz apprehended

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[26] As noted, at the guilt phase the prosecutor played only a portion of appellant's March 17, 1992 statement, stopping the tape before appellant confessed his involvement in the homicides, and played none of appellant's March 18, 1992 statement.

appellant as he emerged from a social services office. (6RT:1164-1165, 1167.) They did so at the request of San Diego Sheriff's Deputies, who in turn had received information about appellant from San Luis Obispo County Sheriff's Deputies and from David Kessler of the Bureau of Land Management. (6RT:1161-63.) No warrant had been sought or obtained. (6RT:1181-1182; 6RT:1165-1171.)

Appellant was patted down and then taken to the San Francisco Hall of Justice, where he was placed in an interview room and detained for five hours pending the arrival of two San Diego homicide detectives. (6RT:1164-1166, 1193.) He was given food, cigarettes and allowed to use the restroom unescorted. (6RT:1167-1170.) He was kept under observation by Inspector Erdlatz, Lieutenant Bruce Lorin and Inspector James Bergstrom. (6RT:1190.) The report Inspector Bergstrom prepared, after speaking with the prosecutor's investigator, stated that appellant's movements were "monitored, but not restricted . . . ." (*Ibid.*)

When San Diego homicide detectives Terry Lange and Carl Smith arrived, appellant was moved to an interrogation room equipped to surreptitiously tape record their interview. (6RT:1171; 15CT:3174.) The first interrogation began at 10:00 p.m. (15CT:3174.) Detectives Lange and Smith[27] questioned appellant for some time before advising him of his *Miranda* rights. They promised they were "gonna explain everything to [him] from the beginning to the very end," and that he was "gonna know exactly what's going on." (*Ibid.*) However, they gave him no indication

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[27] Although Detectives Terry Lange and Carl Smith both participated in the interview, the transcript simply reads "Detective," when either is speaking. Only occasionally, in context, is it clear whether the speaker is Terry Lange or Carl Smith. (E.g., 15CT:3216, line 9 ["When Terry and I sat down . . ." indicates that Carl Smith is the speaker].)

that he was free to leave or to go to the restroom unescorted, as had been the case before their interrogation began, while the detectives were en route. They elicited appellant's agreement that he had come to the police station voluntarily. (*Ibid.*)

The detectives told appellant that they were investigating "a fairly serious crime" in San Diego, that they were not sure about his involvement in the crime, and that he was therefore not under arrest. (15CT:3175.) They told appellant they had hoped to talk with him "maybe even out on the street," but had to proceed differently because the San Francisco police officers had picked him up and taken him to the police station. (*Ibid.*) When the detectives indicated they did not know his arrest record appellant said he had been arrested in Utah "for like drunken tickets and underage, that I didn't pay and a couple of speeding tickets that I didn't pay[,]" which the detectives downplayed as "[j]ust real minor shit." (15CT:3175-3176.) They said they thought appellant "may be a witness in this case or may be able to provide some information about it." (15CT:3176.) Then they read appellant his *Miranda* rights and appellant agreed to talk to them. (*Ibid.*)

After eliciting background information from appellant, including his date of birth, the detectives told him they were concerned about a car found near Bakersfield. (15CT:3181-3182.) They said they were told a forest ranger had given appellant and someone with him a ride to a hotel, and that two officers had then stopped them, gotten their names, and then released them. (15CT:3181.) The detectives told appellant they were not interested in whether the car was stolen or not, but instead in "how you guys may have come upon that car. That's basically what's going on." (15CT:3181-3182.)

When appellant denied any contact with the police the detectives finally disclosed the true reason for the interrogation: "We're homicide

detectives and we're investigating a murder. I'm gonna be up front with you, okay? We're investigating a murder that happened in San Diego." (15CT:3182.) The detectives then showed appellant a photograph of Rosenquist. (15CT:3183.) Appellant initially denied knowing him, but then said he did not know where Rosenquist had gotten the car. (*Ibid.*)

At this point one of the detectives suggested, "Why don't we start over with a clean slate, okay? . . . Yeah let's do it like this never happened and we're just coming right in and starting over again. Okay?" (15CT:3183.) Appellant agreed. (*Ibid.*) He explained that he had met Rosenquist in Salt Lake City, where appellant was from, and that the two had hitchhiked to San Francisco, then gone to Mexico, then back to San Diego on a trolley. (15CT:3185-3186.) Appellant gave the following account of what occurred next. After they had walked for a time Rosenquist said he wanted to find transportation and some money. He was broke and did not want to hitchhike. He instructed appellant to wait for him at a freeway on-ramp and then returned to pick him up in a car. The two drove north, with Rosenquist at the wheel, until the car got stuck. (15CT:3186.) They left the car and set off on foot, got lost, and walked a day and a half in the rain; a forest ranger picked them up and took them to a motel, where the proprietors gave them something to eat and laundered their clothes; they left the next day and returned to San Francisco. (15CT:3186-3187.) Appellant gave additional details, including that they stopped for gas, cigarettes and snacks; that Rosenquist had set the car on fire; and that when Rosenquist picked appellant up with the car there were lots of coins in the black bag they had been traveling with. (15CT:3189-3190, 3193.)

Asked again how they got the car, appellant repeated that he waited, as instructed by Rosenquist, by the freeway; he thought Rosenquist might

have gone off to get cigarettes, by shoplifting. (15CT:3196.) Appellant added that he did not want anything to do with shoplifting because he did not want to get into trouble. (15CT:3196-3197.)

At this point appellant told the detectives about his family: "[I]f Rosenquist didn't show up within like five or ten more minutes, then I was just gonna walk off and start hitchhiking down the freeway and to get back to Salt Lake, where I'm originally from. I got a wife and kid back there I'd like to get back to and take care of, but I'm trying to get some money together so I can get a bus ticket back there to do this." (15CT:3197.) Returning to the subject of the car, appellant said he understood Rosenquist had gotten the car from a friend. (15CT:3197-3198.)

The detectives then focused on appellant's family:

DETECTIVE: Um, you're, you're married and got some kids back in Salt Lake. . .

WALL: I'm divorced right now.

DETECTIVE: Oh divorced.

WALL: Um she, we both want to get married again.

DETECTIVE: Does she know where you're at right now?

WALL: No.

DETECTIVE: When's the last time you saw her?

WALL: Last time I saw her was February 13th or 14th.

DETECTIVE: And what made you want to come to California?

WALL: I was gonna ah, go to a different state and see if I like it, the atmosphere and if I could get a good job and, and move into a place and get some income, then I was gonna send back for her and have her and my daughter come down, and you know move them out of Salt Lake . . . .

DETECTIVE: How long have you been, you guys have been

married?

WALL: We was married for three and a half years.

DETECTIVE: And how old's your daughter?

WALL: She's three years old now.

(15CT:3200-3201.)

The detectives returned again to the subject of the car (with appellant again stating that Rosenquist did all the driving and that the car had gotten stuck); then asked appellant about subsequent events, including their encounter with the forest ranger, their stay at the motel and their interaction with the officer who stopped them the next day; and then again asked about the car. (15CT:3210-3211.)

Finally, the detectives got to the subject of the homicides, asking appellant: "You ever killed anybody before?" Appellant said no. (15CT:3212.) When asked why he had initially given "a bullshit story," appellant again explained that he wanted to reunite with his family: "Because I really don't want any problems and ah I don't, I don't need and I don't want to get arrested and thrown in jail. I would like to get back to Salt Lake and take care of my wife and kid." (15CT:3212-3213.) Asked why, in that case, he "didn't just tell [them] what happened as opposed to making up a story," appellant responded, "'Cause I'm scared." Asked why, if he was scared, he changed his mind and decided to tell them "what really happened," appellant responded, "[a]h, when you guys says okay we'll just start with a clean slate, I figured well you guys know what's going on here and I'll just tell you and, and ah, to get it over with." (15CT:3213.)[28]

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[28] This concludes the portion of the tape the prosecutor elected to play for the jury at the guilt phase.

The detectives then suggested appellant again start over "with a clean slate." Detective Smith acknowledged that appellant was afraid and that his separation from his wife was stressful:

> . . . . I can tell that you're scared. I understand that. I know that you've got something that's bothering you up here that's never happened to you before and you really don't know how to tell two cops from the police department about what happened. . . . The problem is telling only part of the whole truth is not good enough. . . . Um, you seem like a real intelligent young man, and um, I give you credit for that, and I understand you want to get back with your wife and I can tell you kind of got some pressure, some stress from your wife, this separation, something's going on there that you really don't like. Isn't it?

(15CT:3213-3214.)

Detective Smith then told appellant that if he told them what happened he could return to his wife and daughter:

> But why don't you just tell me how it happened, what happened, and, and let's get this, let's put this behind us, okay? Because we know what happened . . . . Because you're at a crossroad in your life and you've got two directions to go; you could go this way or you could go this way. And if you go this way, you're gonna stay stuck all your life. If you go this way, tell us what happened, let's get it out in the open, let's put it behind you, then you can go on with your life. You can be with your wife and your child and start fresh. And that's what we want to do is let's start fresh, okay?

(15CT:3215.)

When appellant said he was afraid that Rosenquist, who was "a little whacko," would kill him if he learned that appellant had said anything to law enforcement about the homicides, the detectives reassured appellant they would protect him:

> WALL: He's told me that ah, something like this might

happen and I'd get pressured into it, and the pressure would come down and he'd find out then, and ah, that he had connections all over the place, and he will have me killed.

DETECTIVE: Well, here's how we take care of that. We take John, we turn him over like that and then you don't have to worry about him any more. Okay?[29]

. . . .

WALL: He's probably got people out there right now.

DETECTIVE: . . . . Now we're giving you the opportunity, don't worry about him. We'll deal with him, okay? Well he, he sounds like a bullshitter to me and that's pretty much I think what he is. So what I want you to do for me and for Terry is don't worry about him. We just turn him over, blank him out, worry about this guy right here, okay? That's the guy that matters; not anybody else, not him just you. Okay?

WALL: Okay.

(15CT:3215-3216.)

Appellant then confessed his involvement in the homicides: "[Rosenquist] sort of ah, he pressured me into this. Um, I didn't want to do it, but him and I both killed the grandma and the grandpa of that household." (15CT:3217.) Appellant explained that he knew the house because he had once dated the Orens' granddaughter. (15CT:3218-3222.) He quoted Rosenquist as saying, "we're gonna wait until ah like midnight and then go over and wait in the backyard for like maybe an hour or so and

[29] "Turn him over" suggests Detective Smith was turning over the photograph of Rosenquist, shown to appellant earlier in the interview. (15CT:3183.) At this juncture on the audio tape itself there is a smacking sound, further suggesting the detective was turning over Rosenquist's photo and slapping it face down on the table. (Ex. 127W [audio tape of interview] at 57:07.)

then ah, get in and do these people in then take their car and some money and . . . take off." (15CT:3222.) Rosenquist had threatened to "do" appellant, too if he did not participate. (15CT:3223.) Appellant said, "Ah I couldn't get any help from nobody so we went over and got in the house and killed 'em." (*Ibid.*)

Initially appellant said "we" – he and Rosenquist – "beat the guy up and beat the girl up" (15CT:3225), but he then described how Rosenquist had beaten John Oren, knocked him out and killed him, and said Rosenquist also "clobbered" Katherine Oren. (15CT:3229.) Asked how many times he himself "hit the old man," appellant responded, "I didn't hit him at all." (15CT:3230.) Asked, "Are you sure?" appellant responded, "I'm positive." (*Ibid.*; see also 15CT:3233-3234 [No, appellant "never hit the old man and the old lady;" yes, Rosenquist "did all that."].) Appellant said he and Rosenquist each had a metal bar – which he described as three feet long, three-quarters of an inch wide and one inch thick – but said he only used his to break into the house. (15CT:3233; see also Ex.28-W [photo of metal bar].) Appellant also admitted he was aware, before he and Rosenquist entered the Oren residence, that Rosenquist intended to molest Josh. (15CT:3236.)

At the conclusion of the interview the detectives asked: "Have we promised you anything for us talking to you today? Have we made any promise to you about what would happen to you or anything like that?" (15CT:3247.) Appellant answered no. (*Ibid.*) They asked, "Have we made any threats to you?" Appellant again answered no. (*Ibid.*) When asked whether he had any questions for the detectives, appellant repeatedly asked that they protect him from Rosenquist "and his friends," which the detectives assured him they would do:

> WALL: Am I gonna be safe from this guy?
>
> DETECTIVES: We'll do everything we can do to protect you. (Unintelligible.) We won't put you toget[her], you know, we're not gonna put you together if that's what you're saying.
>
> WALL: Okay but I want him kept away from me.
>
> DETECTIVES: We will.
>
> WALL: And I want him ah, I don't want his friends coming after me either.
>
> DETECTIVES: We'll take care of it. We'll speak to the jail and make sure you're put in a separate spot. Okay?

(15CT:3247.)

Appellant was interviewed again the next day, March 18th, at 7:30 a.m., by the same detectives. (15CT:3250.) At the outset, the detectives said something to appellant about being fingerprinted (the transcript at this point indicates some words were "unintelligible"), and informed him that Rosenquist was in custody "based on some information that you told us about." (*Ibid.*) They then told appellant they wanted him to tell them only what he had done: "I don't want you to mention anybody else that may or may not have been with you. I don't want you to say what anybody else may or may not have did [*sic*]. I just want to know what your participation was if you can think of it." (*Ibid.*) Then appellant was re-advised of his *Miranda* rights. (15CT:3251.)

This time appellant stated that he "clobbered" both John and Katherine Oren with the metal bar, while Rosenquist went to molest Josh. (15CT:3252.) He denied stabbing or "cut[ting]" either of them. (15CT:3252, 3254; see also 15CT:3230.) He also denied taking any money

or John Oren's wallet. (15CT:3253.) He admitted cutting the phone line, as they were leaving, with his knife, which Rosenquist had returned to him. (*Ibid.*)

2. The Motion To Suppress, the Trial Court's Ruling and the Playing Of the Tapes At the Penalty Phase

Appellant's counsel moved to suppress appellant's statements on multiple grounds, including that his confession was involuntary and therefore inadmissible under the federal constitution and California law. (6CT:1153-1180.) Defense counsel argued that the detectives had used deception in coercing appellant's confession, and stressed that the time between the promise that appellant could return to his wife and daughter if he told them what happened, and appellant's confession, was short. (8RT:1554-15558.) Counsel cited appellant's educational records to show appellant was vulnerable to deception (8RT:1539-1540; Court Ex. 2), and cited relevant case authority. (8RT:1560-1561).

The prosecutor argued, among other things, that appellant was free to leave during the five hours he spent at the police station before the San Diego detectives arrived; that appellant had "spilled the beans" before the detective made reference to his wife and daughter; that appellant's school records were irrelevant; and that "the causation element hasn't been met" because appellant had said the detectives had not promised him anything (8RT:1568-1572.) The prosecutor would later acknowledge, however, that he had harbored doubts as to the admissibility of appellant's tapes; i.e., that he recognized that introducing the confession was not legally without risk. (30RT:9762.)

The trial court noted it was taking into consideration appellant's school records and "the entire situation and all the circumstances," but

focused on the quoted exchange in which the detectives promised appellant that he could go home to his wife and daughter and "start fresh" if he told them what had happened. (8RT:1574.) The court at least twice characterized the detectives' reference to appellant's wife and daughter as "unfortunate." (8RT:1574, 1576.) The court stated its concern was with causation. (8RT:1575.) On the one hand, the court stated, "I don't think this was a promise of any kind." (8RT:1576.) On the other, however, the court found the "unfortunate" statement was "not a promise, express or implied, that caused Wall to eventually make an admission" – i.e., it was a promise, but not one that had cause appellant to confess. (*Ibid.*) The court denied the suppression motion, stating: "I don't think the burden has been met." (8RT:1577.)

Although appellant's March 17, 1992 and March 18, 1992 statements had been ruled admissible in their entirety, at the guilt phase the prosecutor had chosen to play only a portion of the March 17th interview, stopping the tape just before the detectives began giving appellant the assurances that led him to confess his participation in the homicides (15CT:3213, line 10), and played none of the March 18th interview (15CT:3250-3254).

At the commencement of the penalty phase the prosecutor announced he intended to play the entire March 17th statement, as well as the entire March 18th statement, as evidence of the "circumstances of the crime," under section 190.3, factor (a).[30] Defense counsel objected,

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[30] The prosecutor first gave notice of his intent to introduce appellant's entire tape-recorded statements to law enforcement at the penalty phase in his "Third Supplement To Penal Code Section 190.3 Notice of Aggravation," filed October 17, 1994 (while the Rosenquist (continued...)

accusing the prosecutor of deliberately withholding the evidence at the guilt phase in order to "sandbag" the defense at the penalty phase. (30RT:9758-9762.) The prosecutor claimed, in essence, that he had not wanted to take the chance, at the guilt phase, that an appellate court might disagree with the trial court's ruling that appellant's taped confessions were admissible: "[W]e just don't know how the Ninth Circuit is going to look at this and [when] we don't really need it, we don't take that risk . . ." (30RT:9762.) The March 17th and March 18th interrogations, with certain redactions, were played for the jury in their entirety at the penalty phase.[31]

C. The Trial Court Erred In Admitting Appellant's Involuntary Confessions At the Penalty Phase

An involuntary confession is inadmissible under the due process clause of the Fourteenth Amendment and under article I, sections 7 and 15 of the California Constitution. (*Jackson v. Denno* (1964) 378 U.S. 368,

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[30](...continued)
sanity phase was underway). (14CT:2954-2955.) On November 22, 1994, shortly before giving his penalty phase opening statement, he confirmed that he would be introducing both statements. (30RT:9738-9739.)

[31] To reconcile the taped confession and the jury's verdicts on the weapons use allegations (i.e., that appellant had used a metal stake in connection with the murder of Katherine Oren, but not John Oren), the tapes were edited so that appellant was heard stating he struck Katherine Oren, only. (30RT:9833-9835.) The March 17th tape was redacted to delete a statement by appellant that he "clobbered" *them* with a metal bar. (Compare 2CT:0054 and 15CT:3224, italics added). The March 18th tape was redacted to change "I clobbered the old man and the old lady . . . ." to "I clobbered the old lady . . . ." (Compare 2CT:0122 and15CT:3252). The statements, "him and I both killed the grandma and the grandpa of that household," and "we went over and got in the house and killed 'em," from the March 17th interview, were not redacted. (15CT:3217, 3223.)

385-386; *People v. Benson* (1990) 52 Cal.3d 754, 778.) A confession is involuntary, under federal and state law, when it is "extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence . . . ." (*People v. Benson*, *supra*, 53 Cal.3d at p. 778, citations omitted.) A confession is involuntary if the threat or promise is "a" motivating factor in the defendant's decision to confess. (*People v. Vasila* (1995) 38 Cal.App.4th 865, 874; *People v. Flores* (1983) 144 Cal.App.3d 459, 470.) To determine whether a confession is voluntary the reviewing court examines the entire record below (*Davis v. North Carolina* (1966) 384 U.S. 737, 741) and considers the totality of the circumstances (*Withrow v. Williams* (1993) 507 U.S. 680, 693-694; *People v. (Darren) Williams* (1997) 16 Cal.4th 635, 660). "[T]he trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review." (*People v. Massie* (1998) 19 Cal.4th 550, 576, citations omitted.) The right against self-incrimination also applies at the penalty phase of a capital trial. (*Mitchell v. United States* (1999) 526 U.S. 314, 326-328; *Estelle v. Smith* (1981) 451 U.S. 454, 463.)

The prosecutor has the burden to establish by a preponderance of the evidence that a confession is voluntary. (*People v. (Darren) Williams, supra,* 16 Cal.4th at p. 659, citation omitted.)[32] In light of the totality of the circumstances – concerning appellant and the interrogation – the state cannot be said to have met its burden to establish appellant's confession

[32] Here, the trial court erroneously imposed that burden on appellant. In denying appellant's motion to suppress his confession the court stated, "I don't think the burden has been met." (8RT:1577.)

was voluntary.

1. The Location and Duration Of the Interrogation

San Francisco police officers apprehended appellant on the street at about 5:00 p.m., patted him down, took him to the San Francisco Police Department and placed him in an interrogation room. They told him law enforcement officers from another jurisdiction wanted to talk to him. Five hours later, Detectives Lange and Smith arrived from San Diego; appellant was then moved to another interrogation room, equipped to surreptitiously tape record the interrogation. The two San Diego detectives questioned appellant for nearly two hours, beginning at 10:00 p.m. (15CT:3174.) They then interviewed him again briefly the next morning, at 7:29 a.m. (15CT:3250.) Thus, appellant had been in custody five hours when the interrogation began, was in custody during the interrogation, remained in custody overnight, and was interrogated in custody again the next morning.[33]

2. Appellant's Relative Youth, Limited Education and Lack Of Experience With the Criminal Justice System

Appellant was 23 years old at the time, which the detectives knew, having confirmed his date of birth. (15CT:3177.) He did not graduate high school and his educational background was poor, as evidenced by the school records and test scores presented in support of appellant's motion to

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[33] Even if appellant may not have been "in custody" during the five hours he sat in the first interview room, before Detectives Lange and Smith arrived, he unquestionably was in custody during the subsequent interrogation by Detectives Lange and Smith, when he was moved to the interview room equipped to record conversations and advised of his *Miranda* rights.

suppress. (8RT:1539-1550, 1560-1561; 16CT:3462; compare *People v. Sapp* (2003) 31 Cal.4th 240, 268 ["Defendant was over 30 [and] obviously intelligent . . . ."].) At the hearing on the motion to suppress appellant's confession defense counsel informed the court of appellant's limited education and noted that when the detectives told appellant he could go home to his wife and daughter if he told the truth, he believed them, and still did. In defense counsel's words: "he bites, believes it, in fact sitting here today still thinks this is a rip-off in some way because they told [him he] could be with [his] wife and child . . . ." (8RT:1550.)

Appellant had little experience with the criminal justice system, which the detectives knew, given their characterization of his prior DUI-type offenses and traffic violations as "just real minor shit." (15CT:3175-3176.)[34] (Compare *People v. (David) Williams*, *supra*, 49 Cal.4th at pp. 442-443 ["Defendant had experience with the criminal justice system, having been convicted of rape and burglary and having served a prison term in consequence"]; *People v. Sapp*, *supra*, 31 Cal.4th at p. 268 [defendant was "well-acquainted" with the criminal justice system].)

3. Appellant's Demeanor and Mental State

Appellant appeared "stressed," about getting back to his wife and daughter, and "scared," of Rosenquist, as the detectives acknowledged. (15CT:3214, 3213, 3215, 3213.) Appellant repeatedly told his interrogators that he and his former wife planned to remarry and that he wanted to return to her and their three-year-old daughter. He also repeated that he feared Rosenquist, who consistently had played the role of leader, would kill him or have him killed. His tone of voice was subdued and depressed, and

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[34] Appellant also had pled guilty to a felony conviction, in Indiana, for possession of residual cocaine. (34RT:10713.)

neither cocky nor bantering; he sighed frequently before answering. (See, e.g., 15CT:3215 [Ex. 127-W at 56:27, 56:38], 15CT:3216 [Ex. 127-W at 58:16], 15CT:3217 [Ex. 127-W at 58:26, 58:40-59:06])[35] (Compare *People v. (Darren) Williams, supra,* 16 Cal.4th at p. 659 [trial court relies on observations of defendant in court, listens to tapes, and describes defendant as "'a street kid, street man,' in 'his early twenties, big, strong, bright, not intimidated by anybody, in robust good health' and displaying 'no emotionalism . . . [or signs of] mental weakness' in the course of the interview"].) The prosecutor, who had the burden to establish appellant's confession was voluntary, offered no evidence on the issue of appellant's demeanor or mental state, and the trial court made no findings on the issue.

4. The Timing Of the Detectives' Promises and Appellant's Confession

The timing of the detectives' promise that, if he told them what happened, appellant could return to his wife and daughter, confirms the involuntariness of appellant's confession. Almost immediately after one of the detectives said, "If you go this way, tell us what happened, let's get it out in the open, let's put it behind you, then you can go on with your life. *You can be with your wife and your child and start fresh,*" appellant said, "Um, I didn't want to do it, but him and I both killed the grandma and the grandpa of that household." (15CT:3215, 3217, italics added; compare *People v. (David) Williams*, *supra*, 49 Cal.4th at pp. 444-445 [defendant continued to deny responsibility in the face of challenged assertions; *People v. Carrington* (2009) 47 Cal.4th 145, 170 [defendant did not confess until one hour after the challenged assertions were made].) The prosecutor's

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[35] Ex. 127-W is the audio tape of the March 17, 1992 interrogation. The citations are to minutes and seconds.

assertion, in opposition to appellant's motion to suppress the confession, that appellant had started to "spill the beans" before the detectives made any mention of appellant's being able to return to his wife and child, is thus flatly contradicted by the record. (8RT:1568.) To the contrary, the record shows the detectives' promise to have been a motivating factor in appellant's decision to confess. (*People v. Vasila*, *supra*, 38 Cal.App.4th at pp. 876-877 [promise to release defendant on his own recognizance].) Before the detectives' coercive promises appellant had simply acknowledged his relationship with Rosenquist and described their travels following the homicides. (15CT:3185-3187, 3196-3197, 3210-3211.) The trial court's determination that the detectives "unfortunate" promise did not cause appellant to make his incriminating admissions is thus not supported by the evidence.

5. Considering the Totality Of the Circumstances, the Record Does Not Establish That Appellant's Confession Was Voluntary

As shown above, appellant's age, inexperience, demeanor and mental state, the location and length of the interrogation, and the timing of the promise of a benefit and appellant's incriminating statements all point to the involuntariness of his confession. Detectives Lange and Smith were well aware of and repeatedly exploited appellant's vulnerabilities. In particular, they seized on his expressed desire to return to his family: "I understand you want to get back with your wife and I can tell you kind of got *some pressure*, *some stress* from your wife, this separation, something's going on there that you really don't like. Isn't it?" (15CT:3214, italics added.) Appellant agreed. (*Ibid.*) They promised appellant that if he confessed, he could return to his wife and child. (15CT:3215.) They used

psychological coercion, implicitly promising him the truth would set him free – if he told them what happened, he could go home to Utah to his wife and daughter and "start fresh" and "go on with your life" – but if he did not, he would be "stuck" where he was, in custody in California. (15CT:3215.)

Preying on a suspect's emotional attachment to family has repeatedly been recognized as quintessentially coercive. In *Lynum v. Illinois* (1963) 372 U.S. 528, 534, the United States Supreme Court held a confession obtained by threats that the defendant's financial aid for herself and her children would be cut off and that her children would be taken from her was coerced. (See also *Haynes v. State of Washington* (1963) 373 U.S. 503, 512-514 [confession involuntary and inadmissible where defendant, in custody, was told he could not communicate with his wife until he had signed a written confession].)

In *United States v. Tingle* (9th Cir. 1981) 658 F.2d 1332, cited by appellant at trial in support of his motion to suppress, the Ninth Circuit held that a confession obtained by threatening the defendant that she would not see her child for a long time, warning her about the possible length of her incarceration, and reminding her that "she had a lot to lose," was coerced. (*Id.* at p. 1336.) As the Court noted, *Malloy v. Hogan* (1964) 378 U.S. 1, 8, held that "a confession 'must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.'" (*Tingle*, *supra*, 658 F.2d at p. 1335, quoting *Malloy*, *supra*, 378 U.S. at p. 7.) The Court in *Tingle* acknowledged that the coercive tactics at issue were not as express or extreme as those that rendered the confession involuntary in *Lynum*, but found the "coercive purpose and objective of the interrogation was to cause Tingle to fear that, if she failed to cooperate, she would not see her young

child for a long time." (*Id.* at p. 1336.) So too here, Detectives Lange and Smith used appellant's repeatedly expressed desire to return to his family as a means to extract a confession.

The Ninth Circuit has reaffirmed the principle articulated in *Tingle*. In *Brown v. Horell* (9th Cir. 2011) 644 F.3d 969, a case arising on a petition for writ of habeas corpus, the Court analyzed the voluntariness of the confession of a defendant who had expressed, to both the interrogating detective and the polygraph examiner, his desire to be with his girlfriend when she gave birth to their child. When the defendant said he wanted to kiss his girlfriend's stomach and talk to his unborn baby, the detective said:

> Well, you know, you're probably not gonna get to actually touch your girl – it's gonna be a while. . . . We'd be lying if we told you something different. I don't think you're gonna get any kind of contact visit until this whole thing is settled and you're either out or – or transferred and locked up where you're gonna be locked up for, you know, more time. I don't think you're gonna get it at the jail you're goin' to here.

(*Id.* at pp. 976-977, internal quotations omitted.) In response to similar comments by the defendant about wanting to see his pregnant girlfriend and be with her and their baby, the polygraph examiner said, "I want to see you be able to be with that child and have a life, but only the truth is going to take you to that place." And, "I want you to be there for your baby, and what's gonna take you there is the truth. The truth is what's gonna let you be there for your baby. . . ." (*Id.* at p. 980.)

The court concluded that the polygraph examiner had conditioned the defendant's ability to be with his child on his cooperating with her examination of him, and had deliberately preyed upon his desire to witness the birth of his child. (*Brown v. Horell*, *supra*, 644 F.3d at p. 981.) Considering the defendant's limited education in not completing high

school, his relatively young age of 21 years, and length of the custodial interrogations, which occurred on three separate days, the Ninth Circuit ruled that the defendant's admissions were involuntary. (*Ibid.*) Nevertheless, the Court was constrained by the deferential review required under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") to affirm the judgment.[36]

Here the detectives preyed not only on appellant's expressed desire to return to his family, but also on his stated fear of Rosenquist, promising to protect him from the man appellant knew as crazed, impulsive and violent: "We'll deal with him, okay? Well he, he sounds like a bullshitter to me and that's pretty much I think what he is. So what I want you to do for me and for Terry is don't worry about him. We just turn him over, blank him out." (15CT:3216.)

It also bears noting that the detectives repeatedly assured appellant they were telling him the truth:

> When Terry [Lange] and I sat down, the first thing he said and I remember him telling you, is that he said "we're gonna tell you everything we know. We're gonna tell you up front, *we're gonna be honest with you*, and this is the way it's gonna be." That's the way him and I do business. We don't

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[36] The situation in this case is different from that before the Court in *Ortiz v. Uribe* (9th Cir. 2011) 671 F.3d 863, in which a polygrapher simply appealed to the defendant's conscience by urging him to "do the right thing by [his] mom, . . . daughters and [his] lady" by telling the truth. (*Id.* at p. 866; see also *Rupe v. Wood* (9th Cir. 1996) 93 F.3d 1434, 1444 [state court factual finding that challenged statements in context were not threats or promises but "psychological appeals to defendant's conscience," was presumptively reasonable under deferential 28 U.S.C. § 2254(d) standard of review].) Here the detectives did not simply invoke appellant's family in an appeal to get him to confess, but they promised he could return to his wife and daughter.

bullshit, *we don't lie*, we don't do anything like that.

(15CT:3216, italics added; see also 15CT:3174 ["Um, and I'm gonna explain everything to you from the beginning to the very end and you're gonna know exactly what's going on."].) Appellant was unsophisticated and had little experience with law enforcement or the criminal justice system, as the detectives knew, and so would have little reason for skepticism.

The fact that at the conclusion of the March 17th interrogation appellant answered "no" when the detectives asked whether they had made any promises – "Have we promised you anything for us talking to you today? Have we made any promise to you about what would happen to you or anything like that?" – does not render appellant's confession voluntary. (15CT:3247.) The second of the detectives' questions, coming with no intervening response from appellant, appears simply to have clarified that by "promise" the detective meant a promise of leniency at the hands of criminal justice personnel. More importantly, in *Haynes v. Washington*, *supra*, 373 U.S. at p. 513, the Supreme Court rejected just such an argument in a case in which the defendant had acknowledged in a written confession that his interrogators had not threatened him or made any promises other than that he could call his wife once he was booked:

> It would be anomalous, indeed, if such a statement, contained in the very document asserted to have been obtained by use of impermissible coercive pressures, was itself enough to create an evidentiary conflict precluding this Court's effective review of the constitutional issue. Common sense dictates the conclusion that if the authorities were successful in compelling the totally incriminating confession of guilt, the very issue for determination, they would have little, if any, trouble securing the self-contained concession of voluntariness.

(*Ibid.*)

An examination of the totality of the circumstances of appellant's interrogation, including the prosecutor's candid expression of concern as to its admissibility (30RT:9762), demonstrates that appellant's confession was not voluntary.

D. The Erroneous Admission Of Appellant's Confession At the Penalty Phase Was Prejudicial

"A confession is like no other evidence. Indeed, the defendant's own confession is probably the most provocative and damaging evidence that can be admitted against him." (*Arizona v. Fulminate*, *supra*, 499 U.S. at p. 296.) This Court has recognized that an improperly admitted confession "is much more likely to affect the outcome of the trial than are other categories of evidence, and thus is much more likely to be prejudicial . . . ." (*People v. Cahill*, *supra*, 5 Cal.4th at p. 503.) The state has the burden to prove the erroneous admission of a confession is harmless beyond a reasonable doubt, under *Chapman v. California*, *supra*, 386 U.S. at p. 24. (*Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 295-296; *Satterwhite v. Texas* (1988) 486 U.S. 249, 256.)

Here, at the guilt phase the jury had heard appellant tell the detectives he waited by the freeway and did not go into the Oren residence. The jury knew that was contradicted by appellant's felony murder guilty plea. Now, in deciding whether to sentence appellant to life without possibility of parole or death, they would hear appellant confess to participating in the killing of an elderly couple, at Rosenquist's behest; admit to knowing that Rosenquist intended to molest the 10-year-old boy who would be with them; and acknowledge he had lied about his knife. (34RT:10562-10566.)

Moreover, in his penalty phase closing argument the prosecutor relied on the March 17th interrogation to argue that appellant had killed *both* John and Katherine Oren: "He was a leader, he was the instigator and, folks, he was involved up into his ears in the actual killing of John and Katherine Oren." (35RT:10828.) The prosecutor also argued that the tape showed appellant lacked remorse: "[L]isten to that interview. Listen to it. No remorse. Cold." (35RT:10835.) Perceived lack of remorse has been shown to be a highly aggravating factor. (Garvey, *Aggravation and Mitigation In Capital Cases: What Do Jurors Think?* (1998) 98 Col. L.Rev. 1538, 1560-1561.) The prosecutor also repeatedly invited the jury to have the tape re-played. (See 35RT:10805, 10808.) The trial court confirmed that they could request to hear the tape if they wished. The day they commenced deliberations the jury did ask to hear the tape, which was played the following morning. (35RT:10959-10960; 15CT:1358, 16:CT3603, 3604.)[37] The jury announced their verdict the next morning. (16CT:3605.) The taped confession was the centerpiece of the prosecution's case for death and the jury obviously paid attention to it. The erroneous admission of appellant's involuntary confessions was thus unquestionably prejudicial. (*Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 295-296; *Satterwhite v. Texas*, *supra*, 486 U.S. at p. 256.)

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[37] The jury's note requests "the taped interview with Det. Lange and Det. Carl Smith in S.F.," without specifying which of the two interviews they wanted to hear. (15CT:3358.) The Reporter's Transcript likewise does not specify which tape was played. (16RT:3603, 3604.) However, it is clear the March 17th tape is the one re-played because that is the lengthy, principal interview, spanning 75 pages of transcript, and the Clerk's Transcript shows it took approximately two and a half hours to play back. (16CT:3604.) The March 18th interview was very short, spanning fewer than five pages of transcript. (15CT:3250-3254.)

Recognizing the limited circumstances under which the erroneous admission of a defendant's confession "might" be found harmless, this Court set out three examples: "(1) when the defendant was apprehended by the police in the course of committing the crime, (2) when there are numerous, disinterested reliable eyewitnesses to the crime whose testimony is confirmed by a wealth of uncontroverted physical evidence, or (3) in a case in which the prosecution introduced, in addition to the confession, a videotape of the commission of the crime." (*People v. Cahill*, *supra*, 5 Cal.4th at p. 505, citing *Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 312-314 (conc. opn. of Kennedy, J.).)

Here none of these circumstances obtains, nor is there anything comparable. There is no videotape of the commission of the crime. Appellant was not apprehended "in the course of committing the crime." There are no "eyewitnesses to the crime" of which appellant was convicted, i.e., the murders. Josh Dooty testified obliquely regarding the molestation, which it was stipulated Rosenquist had committed, and of which appellant had been acquitted by the trial court. Moreover, Josh was only able to give conflicting, confusing testimony regarding what he heard in the house the night of the homicides. (See pages 9-11, above.) He did not identify appellant as having been there, much less as having participated in any homicide.

In fact, the prosecutor's case in aggravation, apart from appellant's audio-taped statements, was weak. The only other criminal conduct presented to the jury consisted of an unadjudicated incident, admitted under section 190.3, factor (b), in which appellant got into a fight with someone he and his girlfriend had been staying with, and an Indiana felony conviction, admitted under section 190.3, factor (c), for possession of

cocaine residue. Moreover, the jury was properly instructed that they could impose a sentence of life without possibility of parole, even in the absence of mitigating evidence, if they found the aggravating evidence were not substantial enough to warrant a sentence of death. (15CT:3344.)

The only evidence, apart from the taped confession, suggesting appellant was not merely at the Oren residence, but actually participated in the homicides, was the testimony, given at the guilt phase, of three jailhouse informants – hardly "disinterested reliable eyewitnesses to the crime whose testimony is confirmed by a wealth of uncontroverted physical evidence." (*People v. Cahill, supra*, 5 Cal.4th at p. 505; see *United States v. Bernal-Obeso* (9th Cir. 1993) ["By definition criminal informants are cut from untrustworthy cloth . . . ."]).

Shawn Taylor, for one, was in jail awaiting sentencing on a drug charge when he testified. (25RT:6059-6060.) His testimony regarding what appellant allegedly said about the homicides is largely inconsistent both with the prosecution's theory of the case and with what appellant said in his tape-recorded statements. Taylor testified, on direct examination, that appellant had said that Rosenquist had beaten John Oren to death, in the kitchen, and that he (appellant) had beaten Katherine, with his fists, when she came into the kitchen, to keep her quiet. (25RT:6046-6049.) Taylor also testified that appellant had said the only evidence against him was a shoe print. (25RT:6051.) He said appellant had not mentioned a child being present (*ibid.*) nor anything about anyone using a knife for any purpose (25RT:6047, 6057).

On cross-examination Taylor admitted that he had read about appellant's case in the newspapers, during the preliminary hearing, and that he had originally told the prosecution investigator that appellant had said it

was Rosenquist who had killed both John and Katherine Oren. (25RT:6066-6067.) Taylor also acknowledged having said that appellant told him he and Rosenquist stole jewelry, including rings from Katherine Oren's fingers, and both Katherine and John Oren's wallets (25RT:6069), when in fact there was no evidence to support any of this alleged conduct. Taylor also admitted an extensive criminal record, and an ongoing problem with abusing drugs, including methamphetamine. (25RT:6079.)

Raynard Davis, who was in jail in San Francisco on charges of possession of rock cocaine,[38] testified at the guilt phase that he heard appellant and others "conversating" about their cases. Appellant allegedly said he was "fighting some murders." According to Davis, appellant said, "Like, I got a double murder, man. I ain't worried. Can't prove shit. You know. No evidence. Can't prove nothing." (20RT:5166, 5167.) Davis repeatedly testified that appellant had said he was in custody for "chopping up peoples," which he understood meant with an axe. He later testified appellant had said he used something variously described as "[l]ike a pipe . . . a stick, pipe stick," and a "stick, metal pipe." (20RT:5166, 5169, 5171.)

When Davis was asked whether appellant had said anything about wearing gloves or socks on his hands during the homicides, the following colloquy took place, reminiscent of Abbott and Costello's "who's on first, what's on second" exchange:

> Q. [PRZYTULSKI]: Did he tell you why there wasn't no evidence?
>
> A. [DAVIS]: Why there wasn't no evidence, okay. Now we are going to switch back to the first conversation when I was

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[38] By stipulation, the jury was instructed not to infer that anyone from the prosecutor's office or the San Diego Police Department had anything to do with the dismissal of the charges pending against Davis in San Francisco for possession of rock cocaine. (20RT:5197.)

laying –

Q. [PRZYTULSKI]: Okay?

A. [DAVIS]: The conversation when I was laying. They was conversating about the murders. He said that he had on gloves. He mentioned gloves. I heard this glove. Okay. When the second conversation – we was playing chest [*sic*]. He said that he had on something long over his hands. No evidence.

Q. [PRZYTULSKI]: Did he tell you what that was?

A. [DAVIS]: Well, not exactly. He – when he said something long, I just – long, I mean, gloves ain't long, you know, so from my understanding, something long (indication) goes down to here. That is either a sock –

Q. [PRZYTULSKI]: You thought it was sock in your own mind?

A. [DAVIS]: Sock, correct. Right. He corrected.

Q. [PRZYTULSKI]: "He." You mean Mr. Wall corrected it?

A. [DAVIS]: Yeah. Socks.

Q. [PRZYTULSKI]: He said it was socks?

A. [DAVIS]: Socks.

Q. [PRZYTULSKI]: When he said something long?

A. [DAVIS]: Yeah. When he said it was something long, long – it ain't no gloves. Only thing that can come down here is socks.

Q. [PRZYTULSKI]: Did Mr. Wall use the word, "socks" then?

A. [DAVIS]: He used, "sock."

Q. [PRZYTULSKI]: He said that he had socks on his hand?

A. [DAVIS]: He said, "socks."

(20RT:5167-5168.)

Davis acknowledged on cross-examination that he had previously

reported that appellant had said he committed the murders three years earlier, with an axe. (20RT:5182, 5189-5190.) He also admitted a long history of felony drug convictions, so numerous he could not track defense counsel's attempt to inventory them all. (20RT:5186-5187.)

A third informant, John Fitzgerald, testified at the guilt phase not about the Oren homicides but that he had overheard appellant say he had been in jail in San Francisco with a black man charged with selling crack cocaine, and that "the guy wasn't going to last long" because appellant was going to have him "taken care of." (24RT:5903-5904.) Like Davis and Taylor, Fitzgerald was impeached with his extensive felony record (24RT:5915-5921), and with his history of being an informant in exchange for favorable treatment on his own criminal cases (24RT:59210-5931).

The only evidence introduced at the penalty phase regarding gloves or socks was the testimony of criminalist Kevin Kong that a blood smear near a light switch on a wall in John Oren's room could have been made by a type of sock fabric or by a "twill weave" fabric, but not by a leather glove. (34RT:10665-10669.) Relying on this and Davis' guilt phase testimony, the prosecutor argued that appellant must have killed John Oren, wearing socks on his hands, and then left the blood smear mark on the wall. (35RT:10811-10813.) However, defense counsel countered that Kong had acknowledged that the smear could alternatively have been made by a sleeve, a shoulder, an elbow or an object thrown up against the wall. (34RT:10680.)[39]

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[39] The only guilt phase evidence, apart from Davis' testimony, that could have any bearing on whether anyone wore socks or gloves was the testimony by a prosecution criminalist that white cotton fibers, which, unlike man-made fibers, break off, are so ubiquitous as to have no forensic (continued...)

Although the defense was thus able somewhat to temper the guilt phase testimony about gloves and socks and the penalty phase testimony about the blood smear, they could do nothing to ameliorate the much more aggravating impact of appellant's March 17th statement, in which he admitted that he and Rosenquist had "both killed the grandma and the grandpa of that household" (15CT:3217), or of his March 18th statement, in which appellant further incriminated himself and admitted that he did have his knife with him (15CT:322-3253). The erroneous admission of appellant's coerced confession was thus highly prejudicial.

E. Conclusion

Considered in light of the totality of the circumstances pertaining to appellant and the interrogation, appellant's confession was involuntary and its admission at the penalty phase was erroneous. In view of the weakness of the prosecution's case absent the confession, the state cannot carry its burden of proving the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Appellant's death sentence must be reversed.

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[39](...continued)
significance at a crime scene, and that the metal bar found at the Oren residence was not tested for fibers. (21RT:5458-5459, 22RT:5095-5097; see also 21RT:5436-5437.) Defense counsel argued that the absence of fiber evidence was consistent with Rosenquist having wielded the bar, wearing his leather gloves. (26RT:6415.)

IV.

THE TRIAL COURT ERRED PREJUDICIALLY BY EXCLUDING EVIDENCE AT THE PENALTY PHASE OF APPELLANT'S EARLY OFFER TO PLEAD GUILTY IN EXCHANGE FOR A SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE

A. Introduction

The trial court erred at the penalty phase by excluding evidence of appellant's offer, early in the proceedings, to plead guilty in exchange for a sentence of life imprisonment without possibility of parole. Such evidence was inherently mitigating, because it demonstrated appellant's early acknowledgment of responsibility and, in particular, reflected appellant's concern for Josh Dooty's welfare. Its exclusion was erroneous under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112-114; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031-1032.) Because the error cannot be shown to be harmless beyond a reasonable doubt, reversal of appellant's death sentence is required. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

B. Factual and Procedural Background

On April 20, 1992, barely a month after his arrest, appellant, through counsel, offered to plead guilty to all counts and to admit all special circumstances and other allegations, and to waive his appeal rights, in exchange for a sentence of life imprisonment without possibility of parole.[40]

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[40] This offer was made prior to the amendment of the information that added the lying in wait special circumstance.

(2CT:162, 170; 3CT:382.) The offer was rejected. (3CT:382.) Appellant's counsel informed the court on several occasions of appellant's offer. (8RT:1735-1736; 15RT:4222-4223; 30RT:9708; 33RT:10478.)

At the penalty phase defense counsel sought to inform the jury of appellant's early plea offer as evidence in mitigation. (33RT:10479.) Counsel cited, by analogy, rule 4.423, subdivision (b)(3), of the California Rules of Court, which provides that the defendant's voluntary acknowledgment of wrongdoing before arrest or at an early stage of the proceedings constitutes a factor in mitigation. (Cal. Rules of Court, rule 4.423(b)(3); 33RT:10479-10480.) Counsel explained that appellant was motivated in part by the desire to spare Josh Dooty from having to testify and relive the trauma he had endured and to assuage his own family's fear that he might be sentenced to death. (33RT:10487-10488; see also 2CT:170 [May 15, 1992 letter from defense counsel to prosecutor].) The prosecutor responded that while appellant's subsequent plea itself was mitigating, the early plea negotiations and appellant's offer to waive his appeal were not; he argued that if appellant introduced evidence of his early offer to plead guilty, then he could counter that appellant had also challenged the voluntariness of his confession. (33RT:10483-10485.) Defense counsel replied that there had been no plea negotiations – appellant had categorically offered to plead guilty in exchange for a sentence of life imprisonment without possibility of parole. (33RT:10485.) Counsel urged that the jury should be permitted to consider the offer, including the prospect of finality, as mitigating. (33RT:10489.)

The court expressed concern that the jury might be confused if appellant's request were granted. (33RT:10495-10496.) The court noted that the jurors had been instructed on voir dire to assume whatever sentence

they imposed would be carried out, and made the following observations:

> Now all of a sudden before we get to the penalty phase, now you want to bring in the fact that way back when, two and a half, almost three years ago, now Mr. Wall was willing to plead to everything. The problem with that is the argument could be made that the reason he's doing this is he wants only to avoid the death penalty, and that's a decision that the district attorney has to make of whether or not to file it and to seek the death penalty. So I think that the issue is very confusing.

(33RT:10496.) The court denied the request under Evidence Code section 352, again expressing its concern with juror confusion: "I think it confuses the issue for this jury, that is what is the appropriate penalty in this case considering all the factors, anything in aggravation, all the factors in mitigation that I'm going to allow the defense to put in, and I think this is a confusing area and confusing offer." (*Ibid.*) The court stated that rules governing sentencing in noncapital cases had no application in capital cases, and reiterated that the decision whether to seek the death penalty is left to the district attorney:

> Once they seek the death penalty, I think it's confusing to the jury because it allows the jury to second guess the working of the district attorney in seeking the death penalty. . . . [T]hat's the part that I think is confusing[,] saying, gee whiz, Mr. Przytulski, Mr. Wall was willing to plead guilty way back then, accept life without parole, and here we are in the penalty phase. But that's the function of the district attorney whether or not to seek the death penalty.

(33RT:10497-10498, 10499.) The court also expressed concern that the jury might regard appellant's offer to plead guilty as a sign of remorse, "because it's not a sign of remorse whatsoever," but instead could simply be a recognition by appellant that "my goose is cooked." (33RT:10499.)

C. Evidence Of Appellant's Early Offer To Plead Guilty Was Admissible As Mitigating Evidence

At the penalty phase of a capital trial, the defendant is entitled to have his sentencer consider any and all character and background evidence in mitigation of his sentence: "[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 604, original italics; see also *Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112, citations omitted.) A defendant need not demonstrate a nexus between the mitigating circumstances and the crime. (*Tennard v. Dretke* (2004) 542 U.S. 274, 289; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5.) Moreover, the "threshold of relevance" for admitting mitigation is low. (*Tennard*, *supra*, 542 U. S. at p. 285.) Thus, a state cannot bar "'the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence less than death.'" (*Ibid.*, quoting *McKoy v. North Carolina* (1990) 494 U.S. 433, 441; see also *People v. Gonzales* (2012) 54 Cal.4th 1234, 1287.) Accordingly, appellant's's jury was instructed, pursuant to section 190.3, factor (k), to consider: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (15CT:3341.)

The fact that appellant had offered, early in the proceedings, to plead guilty in exchange for a sentence of life imprisonment without possibility of parole constitutes mitigating evidence regarding appellant's character in

that it reflects his willingness to acknowledge and accept responsibility for his actions. Here, in addition, appellant's plea offer also reflected his desire to spare young Josh Dooty the emotional trauma of testifying regarding the sexual assault he had personally endured and the murder of his great-grandparents. (33RT:10487-10488; 2CT:170.)

The trial court erred in concluding that no legal authority supported the admission of an early offer to plead guilty as mitigation. In *People v. (Michael) Williams* (1988) 45 Cal.3d 1268, 1332, this Court rejected an Eighth Amendment challenge to the death penalty predicated on the purported *inadmissibility* of such an offer as mitigation, implicitly acknowledging such evidence *is* admissible:

> Defendant contends the death law violates the Eighth Amendment by preventing the introduction of a defendant's expressed willingness to plead guilty as evidence in mitigation. He argues that such evidence is relevant to show, for example, remorse or a willingness to take responsibility for one's criminal behavior. The point must be rejected. *Nothing in the death penalty law even purports to bar such evidence.*

(*Id.* at p. 1332, italics added; see *People v. Ledesma* (2006) 39 Cal.4th 641, 732 [not improper for prosecutor to question defense witnesses regarding possible motive for defendant's offer to plead guilty, evidence of which defendant had offered in mitigation as demonstrating remorse]; compare *People v. Cook* (2007) 40 Cal.4th 1334, 1362 [no abuse of discretion to exclude evidence of *prosecutor's* pretrial offer to accept guilty plea in exchange for sentence of life without possibility of parole, noting motivation may have been to save time, effort and resources].)

The admissibility at the penalty phase of a capital case of evidence of a defendant's early offer to plead guilty is also fully consistent with the

language of the catch-all mitigation provision, section 190.3, factor (k), which, tracking *Lockett*, instructed the jury to consider "any sympathetic or other aspect of the defendant's character or record" in support of a sentence less than death. (Pen. Code, § 190.3, subd. (a); 15CT:3341.) Appellant's early willingness to acknowledge or accept responsibility is a sympathetic or otherwise positive aspect of his character. Moreover, other jurisdictions have held that a capital defendant's offer to plead guilty is admissible in mitigation. (See, e.g., *Johnson v. United States* (N.D. Iowa 2012) 860 F.Supp.2d 663, 903-904; *Mobley v. State* (Ga. 1993) 426 S.E.2d 150, 152-153.)

The admissibility of an early offer to plead guilty as mitigation in a capital case is also consistent with the state sentencing guidelines for noncapital cases, which, as trial counsel noted, mandate favorable consideration of the defendant's early voluntarily acknowledged wrongdoing. (Cal. Rules of Court, rule 4.423(b)(3); 33RT:10479-10480.) Similarly, federal courts, relying on federal sentencing guidelines, have recognized that early acceptance of responsibility for criminal wrongdoing is a mitigating circumstance to be considered in the sentencing determination. (*United States v. Johnson* (9th Cir. 2009) 581 F.3d 994, 1000, citing 18 U.S.C.A. § 3E1.1(a)[41] and *United States v. Espinoza-Cano* (9th Cir. 2006) 456 F.3d 1126, 1133-1134.) It would surely be anomalous for evidence of an early plea offer to be admissible by statute in noncapital cases, yet inadmissible in capital cases. The only reasonable interpretation

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[41] 18 U.S.C.A. § 3E1.1, subdivision (a) provides: "If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels."

of the language of factor (k), quoted above, is that it must encompass such evidence.

Here the trial court's expressed concern about juror confusion was baseless, and may have reflected the court's own confusion or conflation of counsel's request to introduce evidence of the *fact* that appellant had early on offered to plead guilty, with counsel's request to inform the jury that *if* they sentenced appellant to life without possibility of parole he would waive his appeal.[42] For example, the court's observation, during the colloquy regarding the admissibility of appellant's plea offer, that the jurors had been told on voir dire to assume that whatever penalty they imposed would be carried out (33RT:10495) may be relevant to the waiver of appeal issue, but has no bearing on the admissibility of the fact that appellant had offered to plead guilty. Whatever the merits of the former, the latter is straightforward evidence of something mitigating that appellant had offered to do. There is nothing confusing about that. Moreover, the court failed even to address the possibility of giving the jury an admonishment to avert or clarify whatever confusion it feared might result from the introduction of evidence of appellant's plea offer. Where, as here, any legitimate concern about possible juror confusion could have been addressed, Evidence Code section 352 cannot be permitted to trump appellant's constitutional right to present mitigating evidence.

The trial court's reference to remorse – that appellant's offer to plead guilty was "not a sign of remorse whatsoever" – is problematic in at least

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[42] Appellant is not challenging the denial of defense counsel's request that they be permitted to inform the jury that if they voted to sentence appellant to life imprisonment without possibility of parole he would waive his appeal rights.

three respects. First, there is no evidence to suggest that appellant lacked remorse; there is only the prosecutor's contention in closing argument that appellant's tone of voice during the police interrogation did not show remorse. (35RT:10835.) Second, remorse is not the only reason why a defendant might elect to plead guilty. Indeed, here defense counsel explained that appellant's offer reflected his acknowledgment of wrongdoing, his concern to spare Josh further trauma and his desire to assuage his own family's fear that he might be sentenced to death. (33RT:10480, 10487-10488.) Finally, whether the jury might accept the defense interpretation of appellant's offer to plead guilty or the view voiced by trial court goes to the weight of the evidence of the plea offer, not its admissibility. (*People v. Lee* (2011) 51 Cal.4th 620, 651; *People v. Taylor* (2001) 26 Cal.4th 1155, 1173.)

D. The Erroneous Exclusion Of Appellant's Early Offer To Plead Guilty Was Prejudicial

This Court has held that the erroneous exclusion of potentially mitigating evidence is federal constitutional error. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1031-1032, citing *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604 and *Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 110.) Thus, reversal of the penalty is required unless the state establishes that the error was harmless beyond a reasonable doubt under *Chapman v. California*, *supra*, 386 U.S. at p. 24.

Here the erroneous exclusion of the proffered evidence of appellant's early offer to plead guilty cannot be said to be harmless beyond a reasonable doubt. Particularly given the prosecutor's contention during penalty phase closing argument that appellant lacked remorse, and his reference to the evidence suggesting appellant was heard laughing in the

hall while Josh was being molested (35RT:10815), it was all the more important, and relevant, for the jury to have heard that appellant had in fact acknowledged wrongdoing and was concerned about Josh's welfare.[43] Nor, as noted, was there any reason to fear the jury might have been confused by such evidence – the fact that appellant had offered to plead guilty in exchange for a sentence of life without possibility of parole is something readily understood at face value – i.e., as evidence of acknowledgment and acceptance of responsibility.

E. Conclusion

The evidence of appellant's early offer to plead guilty in exchange for a sentence of life without possibility of parole was admissible as relevant mitigation. The erroneous exclusion of this mitigating evidence cannot be said to be harmless beyond a reasonable doubt under *Chapman v. California*, *supra*, 386 U.S. at p. 24, and thus requires that appellant's death sentence be reversed.

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[43] The prosecutor argued: "Did he have any remorse that day? Ask Josh Dooty when he's laughing while he's being molested, ask him about his remorse on the day in question. And it doesn't make any difference if he's laughing about Josh Dooty being molested or if he's laughing about killing Katherine Oren. There is something very tragic, something very *aggravating* about a man that enjoys his work in that fashion." (35RT:10814- 10815, italics added.)

V.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital sentencing scheme violate the United States Constitution. However, this Court has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, disapproved on another ground in *People v. McKinnon, supra*, 52 Cal.4th at p. 637, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges to California's sentencing scheme in order to urge reconsideration and to preserve these claims for federal review. Should the Court decide to reconsider any of these claims, appellant requests leave to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

To pass constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few murder cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) Meeting this criterion requires a state to genuinely narrow, by rational and objective criteria, the class of

murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, section 190.2 listed 19 special circumstances which in total made 29 factually distinct murders eligible for the death penalty.

Given this large number of special circumstances, California's statutory scheme failed to identify the few cases in which the death penalty might have been appropriate, and instead made almost everyone convicted of first degree murder eligible for the death penalty. This Court has routinely rejected this challenges to the statute's lack of meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down section 190.2 and the current statutory scheme because it is so over-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application Of Section 190.3(a) Violated Appellant's Constitutional Rights

Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 15CT:3340.) In capital cases throughout California prosecutors have urged juries to weigh in aggravation almost every conceivable circumstance of a crime, even those that, from case to case, are starkly opposite circumstances. In addition, prosecutors use factor (a) to embrace the entire spectrum of factual circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing. Here,

for example, the prosecutor urged the jury to consider the fact that the Orens were elderly, vulnerable and asleep (35RT:10800-10803); that Katherine Oren used a walker and was visually impaired (35RT:10803); the manner in which the Orens were killed (35RT:10806, 10814); the evidence that appellant knew the Orens and that Katherine Oren had accused him of stealing (35RT:10801, 10803); and the fact that appellant knew a child was living there, knew Rosenquist was a pedophile and knew Rosenquist had AIDS (15CT:10820).

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factor" has been applied in such a wanton and freakish manner that almost every feature of every murder can be and has been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that this Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 at the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641, disapproved on another ground in *People v. (David)*

Williams, *supra*, 49 Cal.4th at p. 459; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Appellant urges the Court to reconsider this holding.

C. California's Death Penalty Statute and the Accompanying Jury Instructions Fail To Set Forth the Appropriate Burden Of Proof

1. Appellant's Death Sentence Is Unconstitutional Because It Is Not Premised On Findings Made Beyond a Reasonable Doubt

California law does not require, and at the time of the offense charged against appellant did not require, that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.86, 8.87; 15CT:3348-3349.) (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, the trial court denied appellant's counsel's request that the jury be instructed that: "Before you may consider any of the factors which I have listed for you as aggravating, you must find that the factor has been established by the evidence beyond a reasonable doubt. You may not consider any factor as a basis for imposing the punishment of death unless you are first convinced beyond a reasonable doubt that it is true." (15CT:3314, citing *People v. Boyd* (1985) 38 Cal.3d 762) and the Eighth and Fourteenth Amendments.) The jury was thus not told that it had to find beyond a reasonable doubt either the existence of any aggravating factors, other than appellant's Indiana conviction for possession of residual cocaine or the shoving incident involving Heacox and Donner, or that the aggravating circumstances outweighed the mitigating factors, before determining whether or not to impose a death sentence.

(15CT:3348-3349, 3350-3351 [CALJIC No. 8.88].) The prosecutor specifically so argued. (35RT:10832 ["But those two (the Heacox/Donner incident and the Indiana prior) are the only factors that you [*sic*] have to prove beyond a reasonable doubt. Everything else doesn't have that requirement. Okay, you're free to weigh then evidence how you see fit."].)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604 and *Cunningham v. California* (2007) 549 U.S. 270, now require that any fact that is used to support an increased sentence (other than a prior conviction) be submitted to the jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (15CT:3350-3351 [CALJIC No. 8.88].) Because these additional findings were required before the jury could impose the death sentence, *Apprendi, Blakely*, *Ring,* and *Cunningham* require that each of these facts be found, by the jury, to have been established beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on another ground by *People v. Breverman* (1998) 19 Cal.4th 142, 149; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson*, *supra*, 25 Cal.4th at p. 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33

Cal.4th 536, 595, disapproved on another ground in *People v. Riccardi* (2012) 54 Cal.4th 758, 819-821). The Court has rejected the argument that *Apprendi* and *Ring* impose a reasonable doubt standard on California's penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant also contends that the sentencer in a capital case is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected the claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that to return a death sentence it must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Appellant requests that the Court reconsider this holding.

2. Some Burden Of Proof Should Have Been Required, Or the Jury Should Have Been Instructed That There Was No Burden Of Proof

Evidence Code section 520, which provides that the prosecution always bears the burden of proof in a criminal case, creates a legitimate expectation as to the way a criminal prosecution will be decided under state law, and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks*

v. Oklahoma (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed, but was not, that the state had the burden of persuasion regarding the existence of any and all factors in aggravation, the determination whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given in this case (15CT:3340-3341, 3350-3351), failed to provide the jury with the guidance legally necessary for the imposition of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal constitution and thus urges the Court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible for there to be no burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. (Keith) Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror voted for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict Was Not Premised On Unanimous Jury Findings

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jurors, ever found a single set of aggravating circumstances that rendered death the appropriate penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 290, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*, 536 U.S. 584. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.) The jury in this case was so instructed. (15CT:3343 [no unanimity requirement for aggravating or mitigating factors].)

Appellant asserts that *Prieto* was incorrectly decided and that application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina*, *supra*, 494 U.S. at p. 452 (conc. opn. of Kennedy, J.).)

The failure to require appellant's jury to unanimously find any and all aggravating factors were established also violated the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth

of such allegations. (See, e.g., Pen. Code, § 1158a.) Because capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than to a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), by its inequity violates the equal protection clause of the federal constitution and by its irrationality violates both the due process and cruel and unusual punishment clauses of the federal constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal constitution.

b. Unadjudicated Criminal Activity

Appellant's jury was not instructed that alleged prior criminality had to be found true unanimously; nor is such an instruction generally provided for under California's sentencing scheme. In fact, appellant's jury was instructed that unanimity was not required for aggravating factors, specifically including the unadjudicated incident involving Heacox and Donner, to which the prosecutor twice alluded in closing argument (15CT:3343, 3349; 35RT:10821-10822, 10824-10825.)

In fact, any use of unadjudicated criminal activity by a member of

the jury as an aggravating factor, as outlined in section 190.3, factor (b), would violate due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering appellant's death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) Appellant recognizes that this Court has routinely rejected this claim. (*People v. Anderson*, *supra*, 25 Cal.4th at pp. 584-585.)

The United States Supreme Court's decisions in *Apprendi*, *Blakely*, *Ring*, and *Cunningham* confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The Instructions Caused the Penalty Determination To Turn On An Impermissibly Vague and Ambiguous Standard

The question whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances [were] so substantial in comparison with the mitigating circumstances that it warrant[ed] death instead of life without parole." (15CT:3351.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing.

Consequently, this instruction violated the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright*, *supra*, 486 U.S. at p. 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The Instructions Failed To Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return a Sentence Of Life Without the Possibility Of Parole

Section 190.3 directs a jury to impose a sentence of life imprisonment without possibility parole if the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Here the trial court denied appellant's counsel's request that the jury be instructed that it must return a life without possibility of parole verdict if they found the mitigating factors were equal to or outweighed the aggravating factors. The court instead gave CALJIC No. 8.88, which does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. (15CT:3308, 3350-3351.) Because it fails to conform to the mandate of section 190.3, the giving of the instruction violated appellant's right to due process of law. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that because CALJIC No. 8.88 tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan*

(1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be appropriate, but failing to explain when a life without possibility of parole verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

6. The Penalty Phase Jury Should Have Been Instructed On the Presumption Of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life without the possibility of parole is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption that life without possibility of parole is the appropriate sentence. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.) Appellant's counsel nonetheless requested that the court instruct the jury that if they "had a doubt as to which penalty to impose, death or life without the possibility of parole," they should "give the defendant the

benefit of the doubt and return a verdict fixing the penalty at life in prison without the possibility of parole." (15CT:3313.) The trial court refused to give this instruction. (*Ibid.*)

The trial court's failure to instruct the jury that the law favors life and presumes the sentence of life imprisonment without possibility of parole to be the appropriate sentence violated appellant's right to due process of law, his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner, and his right to the equal protection of the laws, guaranteed by the Eighth and Fourteenth Amendments.

In *People v. Arias, supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is fundamentally deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing To Require That the Jury Make Written Findings Violated Appellant's Right To Meaningful Appellant Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings at the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not

capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the Court to reconsider its decisions on the necessity of written findings.

E. The Instructions To the Jury On Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights

1. The Use Of Restrictive Adjectives In the List Of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; Pen. Code, § 190.3, factor (g); 15CT:3341) impeded the consideration of mitigation, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367, 384; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila*, *supra*, 38 Cal.4th at p. 614), but urges reconsideration.

2. The Failure To Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case because no evidence was presented to support them – specifically, factor (d) ("Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance"), factor (e) ("Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act"), factor (f) ("Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct"), factor (h) ("Whether or not at

the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication") and factor (i) ("The age of the defendant"). (15CT:3340-3341.) The trial court failed to omit those factors from the jury instructions (*ibid.*), likely confusing the jury and preventing the jurors from making a reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Failure To Instruct That Statutory Mitigating Factors Were Relevant Solely As Potential Mitigators

In accordance with customary state court practice, nothing in the instructions given in appellant's case advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (15CT:3340-3341) This Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigating circumstances. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). Appellant's jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors,

precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, appellant asks the Court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

F. The Prohibition Against Intercase Proportionality Review Guarantees Arbitrary and Disproportionate Imposition Of the Death Penalty

California's capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., intercase proportionality review. (*People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct intercase proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the Court to reconsider its failure to require inter-case proportionality review in capital cases.

G. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes, in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and

mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rules 4.421 and 423.) At the penalty phase of a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that the Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider.

H. California's Use Of the Death Penalty As a Regular Form Of Punishment Falls Short Of International Norms

This court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook*, *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the Court to reconsider its previous decisions.

VI.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINE THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Even if this Court were to conclude that none of the errors in this case was sufficiently prejudicial, by itself, to require reversal of appellant's conviction or death sentence, the cumulative effect of the errors that occurred below nevertheless requires reversal of appellant's conviction and sentence. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may "so infect[] the trial with unfairness" as to violate due process and require reversal. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303; *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927-928 [principle that cumulative errors may violate due process is "clearly established" by Supreme Court precedent]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error]; *People v. Hill* (1998) 17 Cal.4th 800, 844-845 [reversing guilt and penalty judgments in capital case for cumulative prosecutorial misconduct].)

The death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1243-1244 [cumulative effect of penalty phase errors prejudicial under state or federal constitutional standards]; *People v. Brown* (1988) 46 Cal.3d 432, 463 [applying reasonable possibility standard for reversal based on cumulative error].)

In this case, as set out in Argument I., above, appellant's conviction must be reversed because he was erroneously excluded from key jury selection proceedings. This error, which affected who sat on the jury that would deliberate appellant's fate, also must be considered in assessing the prejudice of the penalty phase errors, the cumulative effect of which undermined the reliability of the death judgment. The erroneous excusal for cause of prospective juror Evelyn Johnson (Argument II.), which requires per se reversal, also affected the composition of the jury that condemned appellant to death. The penalty-phase evidence was unfairly weighted toward death by the erroneous admission of appellant's coerced confession (Argument III.) and the erroneous exclusion of the mitigating evidence that appellant had offered to plead guilty early in the proceedings (Argument IV.). Those errors were exacerbated by other defects in California's capital sentencing scheme (Argument V.).

In this way, the errors at the guilt phase and the penalty phase – even if individually not found to be prejudicial – precluded the possibility that the jury reached an appropriate verdict in accordance with the state death penalty statute or the federal constitutional requirements of a fundamentally fair, reliable, non-arbitrary and individualized sentencing determination. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina*, *supra,* 476 U.S. at p. 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

Accordingly, the cumulative effect of all of the errors set out herein requires a reversal of appellant's conviction and sentence.

VII.

APPELLANT IS ENTITLED TO REMAND FOR RECONSIDERATION OF THE $10,000 RESTITUTION FINE, BY A JURY, IN LIGHT OF HIS INABILITY TO PAY OR, IN THE ALTERNATIVE, FOR A STAY AND REFUND OF SUMS PAID

A. Introduction

When the trial court sentenced appellant to death, on January 31, 1995, it also imposed a $10,000 restitution fine, citing former Government Code section 13967, subdivision (a), to be deducted from appellant's inmate trust account by the California Department of Corrections, in accordance with section 2085.5. (35RT:11055.) The trial court did not consider appellant's inability to pay such a fine, presumably because the version of the statute in effect March 1, 1992, when the Oren homicides occurred, did not require the trial court to take into account the defendant's inability to pay a restitution fine, and the version of section 1202.4 then in effect did not permit the court to do so.

The $10,000 restitution fine is invalid and must be stricken. Because the imposition of a restitution fine is not mandatory, it should have been submitted for the jury to decide, based on relevant evidence. In any event, appellant is entitled to application of the current version of section 1202.4, which mandates consideration of the defendant's inability to pay. (*People v. Vieira* (2005) 35 Cal.4th 264, 304-305.) Appellant is prepared to demonstrate on remand that because he is effectively not permitted to work while under a death sentence, and because he has been and remains indigent, he is unable to pay a restitution fine greater than the current $280

minimum for felony convictions.[44]

Minimally, because the restitution fine is part of the judgment, which is stayed pending appellant's automatic appeal to this Court, enforcement of the restitution fine should have been stayed, and now should be stayed, pending final disposition of the appeal.[45]

B. Appellant Is Entitled To Application Of the Current Version Of Section 1202.4, Which Requires Consideration Of the Defendant's Inability To Pay a Fine Greater Than $280

In *People v. Vieira*, *supra*, 35 Cal.4th at p. 264, an indigent defendant convicted in March 1992 of capital murder committed in May 1990 challenged the trial court's imposition of a $5,000 restitution fine, on the grounds that he was entitled to the application of the version of section 1202.4 in effect when he was sentenced in September 1992, which required consideration of a defendant's inability to pay. This Court found the defendant was not entitled to the benefit of the 1992 version of the statute, because it had been repealed in 1994, but held he was entitled to application

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[44] A condemned prisoner in fact has virtually no post-incarceration earning potential, much less any realistic expectation of earning any sum approaching $10,000. (See *In re Barnes* (1985) 176 Cal.App.3d 235, 239 [discussing the Department of Corrections and Rehabilitation's prioritization, with condemned prisoners and prisoners in security housing units at the lowest priority for work assignments]; Pen. Code, § 2933, subd. (b) [a prisoner's "reasonable opportunity to participate" in work programs "must be consistent with institutional security and available resources"]; see also Pen. Code, § 2933.2 ["any person convicted of murder, as defined in section 187, shall not accrue any [worktime] credit"].)

[45] On August 23, 2011, appellant, in pro per, filed a petition for writ of habeas corpus in this Court challenging the restitution fine. That petition was stricken by order filed September 7, 2011.

of "the current version of section 1202.4, which provides detailed guidance to the trial court in setting a restitution fine, including consideration of a defendant's ability to pay." (*Id.* at p. 305, citing *In re Estrada* (1965) 63 Cal.2d 740, 744 ["The key date is the date of final judgment. If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final, then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies."].) The Court noted that, "for purposes of determining retroactive application of an amendment to a criminal case, a judgment is not final until the time for petitioning for a petition for writ of certiorari in the United States Supreme Court has passed." (*Ibid.*, quoting *In re Pedro T.* (1994) 8 Cal.4th 1041, 1045; further citations omitted.) This Court remanded the cause for redetermination of the restitution award. (*Id.* at p. 306.)

As in *Vieira*, here the versions of section 1202.4 and former Government Code section 13967, subdivision (a), in effect at the time of the offense (March 1992) did not permit or require, respectively, consideration of the defendant's inability to pay.[46] Because the trial court was not authorized to consider appellant's inability to pay, appellant's claim cannot be barred for want of an objection below, as it would have been futile. (See *People v. Hill, supra*, 17 Cal.4th at p. 820; *People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5; *People v. (Darren) Williams* (1976) 16 Cal.3d 663, 667, fn. 4.)

The current version of section 1202.4, effective July 1, 2011, states

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[46] Effective September 29, 1994, an amendment to former Government Code section 13967 deleted a provision that had mandated consideration of the defendant's ability to pay. (See *People v. Vieira, supra*, 35 Cal.4th at p. 305.)

in pertinent part:

> (b) In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.
>
> (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense. If the person is convicted of a felony the fine shall be not less than . . . two hundred eighty dollars ($280), starting January 1, 2013, . . . and not less than ten thousand dollars ($10,000). . . .
>
> (c) The court shall impose the restitution fine unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine. *Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the minimum pursuant to paragraph (1) of subdivision (b). . . .*
>
> (d) In setting the amount of the fine pursuant subdivision (b) in excess of the minimum fine pursuant to paragraph (1) of subdivision (b), the court *shall* consider any relevant factors, *including, but not limited to, the defendant's inability to pay . . . . Consideration of a defendant's inability to pay may include his or her future earning capacity.* A defendant shall bear the burden of demonstrating his or her inability to pay.

(Pen. Code, § 1202.4, italics added.)[47] Under *Vieira*, appellant is entitled to the application of this version of section 1202.4, as his conviction is not yet final. Accordingly, as it did in *Vieira*, the Court should remand this case "for reconsideration of the question of a restitution fine under the currently

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[47] Government Code section 13967 was repealed in its entirety in 2003, leaving section 1202.4 as the controlling statute with respect to the restitution fines. (Stats. 2003, ch. 230, § 2.)

applicable statute[,]" which will require consideration of appellant's inability to pay. (*Id.* at p. 306.)

C. A Restitution Fine May Only Be Imposed By a Jury, Based On Relevant Evidence

In *Apprendi v. New Jersey, supra,* 530 U.S. 466, the United States Supreme Court held that " [i]t is unconstitutional for a legislature to remove from the jury the assessment of facts, other than the fact of a prior conviction, that increase the proscribed range of penalties to which the criminal defendant is exposed, and such facts must be established by proof beyond a reasonable doubt." (*Id.* at p. 490, quoting *Jones v. United States* (1999) 526 U.S. 227, 252-253.)

Section 1202.4 currently provides that, beginning January 1, 2013, the court shall impose a "separate and additional" restitution fine of at least $280 but not more than $10,000, "*unless it finds compelling and extraordinary reasons for not doing so . . . .*" (Pen. Code, § 1202.4, subds. (b) & (c), italics added.) In other words, a restitution fine increases the penalty for capital murder beyond death or life imprisonment without possibility of parole and is not mandatory.[48] The existence *vel non* of "extraordinary and compelling circumstances" is a fact question that potentially increases the penalty a capital defendant faces, and so, under *Apprendi*, is for the jury to decide and must be decided under the beyond-a-reasonable-doubt standard. Because the statute instead vests the

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[48] By comparison, the version of former Government Code section 13967 in effect at the time of the offense in this case provided that, "under no circumstances shall the court fail to impose the separate and additional restitution fine required by this section." (Former Gov. Code, § 13967, subd. (a) (1990).) Thus, the trial court properly treated the restitution fine as "mandatory." (35RT:11055.)

determination whether a capital defendant shall suffer a restitution fine, in any amount, with the trial judge, it violates *Apprendi.*

Appellant is aware that two courts of appeal have concluded that *Apprendi* is not applicable to restitution fines. (*People v. Kramis* (2012) 209 Cal.App.4th 346, 348-352; *People v. Urbano* (2005) 128 Cal.App.4th 396, 405-406.) Appellant respectfully submits that these cases were wrongly decided. Moreover, neither decision addresses the argument, raised here, that the language of section 1202.4 permitting the sentencing court to refrain from imposing any restitution fine if it finds "extraordinary and compelling reasons" renders the fine discretionary.

On remand the determination whether a restitution fine should be imposed in this case should be tried to a jury and, pursuant to section 1202.4, subdivision (c), appellant's inability to pay must be considered in assessing whether the fine should be increased beyond the current $280 minimum for a felony conviction.

D. Minimally, the Restitution Fine Should Be Stayed Pending the Finality Of Appellant's Automatic Appeal

The trial court erred in ordering payment of the restitution fine to be implemented as provided by section 2085.5. Subdivision (a) of this statute provides, in pertinent part:

> In any case in which a prisoner owes a restitution fine imposed pursuant to . . . subdivision (b) of Section 1202.4, the Secretary of the Department of Corrections and Rehabilitation shall deduct a minimum of 20 percent or the balance owing on the fine amount, whichever is less, up to a maximum of 50 percent from the wages and trust account deposits of a prisoner . . . and shall transfer that amount to the California Victim Compensation and Government Claims Board for deposit in the Restitution Fund in the State Treasury. Any amount so deducted shall be credited against the amount

owing on the fine.

(Pen. Code, § 2085.5, subd. (a).)

As a condemned prisoner, appellant's conviction and sentence automatically were appealed and are not final. (Cal. Const., art. VI, § 11, subd. (a); Pen. Code, § 1239, subd. (b).) It is therefore premature to transfer funds in payment of appellant's restitution fine pending finality. Doing so interferes with appellant's right to an automatic appeal. The trial court erred in failing to stay the restitution order and payment of the restitution fine.

E. Conclusion

Appellant is entitled to remand for determination by a jury beyond a reasonable doubt whether he should pay a restitution fine and, if so, whether, based on his inability to pay such a fine, among other factors, the fine should exceed the applicable statutory minimum of $280. Pending remand, appellant requests this Court stay further implementation of the restitution fine and order that any sums exceeding $280 previously deducted from appellant's inmate trust account pursuant to section 2085.5 be restored to the account.

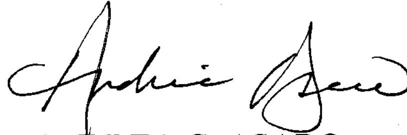
CONCLUSION

For all of the reasons stated above, the entire judgment – the conviction, the special circumstance findings, the weapons use allegations and the sentence of death – must be reversed.

Dated: April 18, 2013

Respectfully Submitted,

MICHAEL J. HERSEK
State Public Defender



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CERTIFICATE OF COUNSEL

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

I, Andrea G. Asaro, am the Senior Deputy State Public Defender assigned to represent appellant Randall Clark Wall 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 39,444 words in length.

Dated: April 18, 2013

ANDREA G. ASARO
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Randall Clark Wall*

Case No. CR133745
Supreme Court No. S044693

I, Randy Pagaduan, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, Suite 1000. Oakland, CA 94607. On this day, I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

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Each said envelope was then, on April 19, 2013, sealed and deposited in the United States mail at Alameda, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Signed on April 19, 2013, at Oakland, California.

DECLARANT