In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

RANDALL CLARK WALL,

Defendant and Appellant.

CAPITAL CASE

Case No. S044693

Superior Court of the State of California,
County of San Diego, Case No. CR133745
The Honorable Bernard E. Revak, Judge

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INTRODUCTION

In March of 1992, Randall Wall and John Rosenquist broke into John and Katherine Orens' home in the middle of the night. One or both of them entered 84-year-old John Oren's room, bludgeoned him with an iron bar, and cut his throat from ear to ear with a knife. Wall also stomped on Mr. Oren's ribs, crushing several of them.

Katherine Oren, who was 73-years old, nearly blind, and needed a walker to get around, heard the sounds of her husband being murdered. She came out of her separate room to see what was happening. Wall beat Katherine with the iron bar. One of the two cohorts also cut her throat and cracked several of her ribs. Rosenquist, who had AIDS, entered the bedroom belonging to the Orens' ten-year-old great grandson, Josh Dooty, and sexually molested him. Wall and Rosenquist ransacked the house and took the Orens' car, money, and credit cards. Wall had lived with the Orens for a short time a few years earlier. However, Katherine threw him out because she believed he was freeloading and stealing from her.

Wall and Rosenquist were tried jointly, but before separate juries. Prior to opening statements, Wall pled guilty to the special circumstance murders of Katherine and John Oren, residential robbery, residential burglary, conspiracy to commit residential burglary, and conspiracy to commit residential robbery. Following a penalty phase trial, a jury found him deserving of the death penalty.

STATEMENT OF THE CASE

On August 24, 1994, Wall pled guilty to the first degree murders of Katherine and John Oren (counts 1 and 2; Pen. Code, § 187, subd. (a)); residential robbery (count 3; Pen. Code, §§ 211/212.5, subd. (a)); residential burglary (count 4; Pen. Code, §§ 459/460); conspiracy to commit residential burglary (count 8; Pen. Code, § 182, subd. (a)(1)), and

conspiracy to commit residential robbery (count 9; Pen. Code, § 182, subd. (a)(1)). He further admitted four special circumstances: multiple murder; murder in the commission of a first degree burglary; murder in the commission of a residential robbery; and murder committed by means of lying in wait. (Pen. Code, §§ 190.2, subd. (a)(3) (15), (17).) (17 RT 4317-4362; 26 RT 6365; 13 CT 2747-2751; 16 CT 3413-3414, 3513.)

Wall pled not guilty to two counts of committing a lewd act upon a child under the age of 14 years (counts 5 and 6; Pen. Code, § 288, subd. (a)), and rape by a foreign object (count 7; Pen. Code, § 289, subd. (a)). He also denied allegations that he personally used a deadly or dangerous weapon in the commission of the murders of John and Katherine Oren (counts 1 & 2), the robbery (count 3) and the burglary (count 4). (Pen. Code, § 12022, subd. (b); 26 RT 6365).

Wall and Rosenquist were tried jointly, but before separate juries. Jury selection began on July 22, 1994, and the jury was sworn on August 12, 1994. (16 CT 3477, 3507.) At the close of the prosecution's case, the trial court granted Wall's Penal Code section 1118.1 motion with respect to the child molest and rape counts (5, 6 & 7). (26 RT 6292-6301.)

On September 23, 1994, Wall's jury found that he personally used a metal stake with respect to count 2 (the murder of Katherine Oren), and personally used a metal stake and/or a knife with respect to count 3 (robbery) and count 4 (burglary). The jury found that Wall did not use a metal stake with respect to count 1 (the murder of John Oren). (28 RT 6797-6798; 13 CT 2896-2899; 16 CT 3413-3414, 3569-3570.)

On the same date, Rosenquist's jury found him guilty of the first degree murders of John and Katherine Oren (counts 1 and 2; Pen. Code, § 187, subd. (a)); residential robbery (count 3; Pen. Code, §§ 211/212.5, subd. (a)); residential burglary (count 4; Pen. Code, §§ 459/460); two counts of committing a lewd and lascivious act upon a child (counts 5 & 6;

Pen. Code, § 288, subd. (a)); rape by a foreign object (count 7; Pen. Code, § 289, subd. (a)); conspiracy to commit residential burglary (count 8; Pen. Code, § 182, subd. (a)(1)); and conspiracy to commit residential robbery (count 9; Pen. Code, § 182, subd. (a)(1)). The jury also found true three special circumstances: multiple murder; murder in the commission of a first degree burglary; and murder in the commission of a residential robbery. (Pen. Code, §§ 190.2, subd. (a)(3) (15), (17).) (28 RT 6807-6812; 16 CT 3571-3573.) On November 23, 1994, Rosenquist's jury found that he was sane at the time he committed the crimes. (5 RT 733-736; 31 RT 9882.) Rosenquist stipulated to a sentence of life without parole and waived his rights to appeal. (35 RT 11006-11007.)

Wall's penalty phase trial began on December 6, 1994. Deliberations began on December 13, 1994, and on December 20, 1994, the jurors recommended that Wall's penalty for the murders of Katherine and John Oren be death. (34 RT 10974-10975; 15 CT 3360-3361; 16 CT 3591, 3602, 3605.) On January 30, 1995, the trial court denied Wall's automatic motion for modification of the verdict and his motion for a new trial. (35 RT 11050-11051, 10053; 15 CT 3365-3375; 16 CT 3607.) On January 31, 1995, the trial court filed a Commitment and Judgment of Death. (16 CT 3415.)

On February 22, 1995, Wall filed a notice of appeal. (36 CT 7722.)

STATEMENT OF THE FACTS

I. GUILT PHASE EVIDENCE

A. Wall Meets The Victims In March of 1990

In March of 1990, Tammy Miller met Randall Wall at a bus station in Butte, Montana. (21 RT 5497-98.) The two took a bus to Wall's parents' house just outside Salt Lake City, Utah, where they stayed for about a week. After that, they travelled to San Diego together. For about

two weeks, they lived on Deerpark Drive in San Diego with Miller's grandparents, John and Katherine Oren, in a makeshift tent in their backyard. (21 RT 5498, 5500.) Katherine and John Oren slept in separate rooms in the house and their great grandson, Josh Dooty, had his own room. (21 RT 5502, 5509.)

While Wall was living with the Orens, he would play catch with Josh and have meals with the family. (21 RT 5500-5501.) At some point, Katherine Oren accused Wall of taking money from her and kicked him out of the house. (21 RT 5502-5503.) One time, when Miller was taking a shower, she overheard Katherine and Wall arguing. Katherine told Wall that if he did not quit stealing from her and get a job, she was going to slash his throat. (21 RT 5503.)

B. Josh Dooty Is Molested And The Orens Are Murdered

In March of 1992, 10-year-old Josh Dooty and his great grandparents, John and Katherine Oren, still lived on Deerpark Drive. (22 RT 5569.) Sometime after Josh went to bed on March 1st, he heard a metal on metal sound, kind of like a "kerchang." Then, he heard what sounded like skin smacking skin or thumps or thuds coming from his grandfather's room. (22 RT 5570-5571, 5599.) According to Josh, two men were in his house. One of the men was wearing a bandana covering his face. (22 RT 5572-5573, 5612-5613.)

The parties stipulated that John Rosenquist (who was not the man wearing the bandana) entered Josh's bedroom. He took off his own clothes and then forcibly removed Josh's clothes. Rosenquist pinned Josh down on the bed and placed a pillow over his face until Josh said he could not breathe. Rosenquist removed the pillow. Rosenquist claimed that he inserted his finger into Josh's anus. According to Josh, Rosenquist penetrated his anus with some object, but Josh was uncertain as to whether

it was a finger or a penis. The act caused Josh pain and he asked Rosenquist to stop. At some point, Rosenquist did stop. He then pulled Josh on top of him, placed his penis between Josh's legs, and then moved Josh up and down. Rosenquist committed these acts to gratify his own sexual lusts and desires. Rosenquist achieved orgasm. Rosenquist stated that he ejaculated on Josh. (20 RT 5227-5228.)

While Josh was being molested, he heard screams coming from his grandmother's room.[1] (22 RT 5573-74.) Sometime after the screaming stopped, Rosenquist left the room, returned, and then left again. After that, Josh heard Rosenquist leave the house. (22 RT 5574.) Josh went back to sleep. (22 RT 5610-5611.)

In the morning, Josh went to see what happened to his grandparents. When he opened his grandfather's bedroom door, all he could see was his grandfather's head covered up. Josh then went to his grandmother's room, but could not get the door open. (22 RT 5575-5576.) He went across the street to a neighbor's house to report that something was wrong. When Josh walked outside, he noticed that his grandparents' Mercury Monarch was gone. Josh's neighbor came back to the house with Josh and the police were called. (22 RT 5576-5577, 5607.)

San Diego Police Officer Troy Owens responded to the Orens' home at around 8:00 or 8:30 a.m. on March 2, 1992. (17 RT 4486.) He found eighty-four-year-old John Oren's body on the floor in one of the bedrooms. His upper torso and head were covered with papers. (17 RT 4488-4489,

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[1] Initially, when Josh told people what happened, he made things up because it was too hard for him to talk about what really happened. (22 RT 5594-96, 5611-5613.) Josh admitted he had a problem with making things up and had a vivid imagination. (22 RT 5613.) At the preliminary hearing on August 31, 1992, he testified that he heard screams by both his grandmother and grandfather after his pajamas were taken off and while the molester was in the room with him. (22 RT 5620.)

4514; 18 RT 4695, 4724, 4969.) Mr. Oren died as a result of blunt force injuries to his head, chest, and abdomen, with cut and stab wounds to his neck and arms as contributing factors. (17 RT 4514-4515.)

There were seven blows to John Oren's head, which were consistent with having been inflicted with a metal stake or bar. (17 RT 4518-4519, 4545, 4548, 4550, 4568.) One blow to the left side of his head over his eye was three and one-half inches long. It split his skull open and exposed his brain matter. (17 RT 4522-4523, 4544-4545, 4577-4578.) He had a four-inch long and two-inch deep wound to the right side of his neck, and a four-inch long and two-and-a half-inch deep cut on the left side of his neck. Essentially, his neck was cut from ear to ear. (17 RT 4516-4517, 4552.) Mr. Oren also suffered multiple factures of his ribs on both sides, which were caused by some kind of compression to his chest, consistent with someone jumping or stomping on him. (17 RT 4524-4525, 4553.) Both his liver and right kidney were lacerated. (17 RT 4555-4557.)

Seventy-three-year-old Katherine Oren's body was found on the floor in another bedroom. Her feet were blocking the door to her room, and she was wedged between her bed and her portable toilet. Her body was covered by a couple blankets. Only her lower legs and a small portion of her head were visible. (17 RT 4488; 18 RT 4691.)

Katherine Oren died as a result of a four-and-three-fourths-inch cut wound to her neck. Its depth ranged from two to four inches. There were marks along the side of the cut, indicating there had been a back and forth sawing-type motion. Her jugular veins on both sides and her carotid artery on her left side were cut, as was part of her windpipe. She also had a couple of stab wounds on her neck below her ear and on her right lower arm near her wrist. A blow to her head caused a long thin laceration of the ear and an abrasion on the left side of her face in the cheek area. She also had bruising below her right eye. She had a bruise on the top part of her

right shoulder, which was four-and-a-fourth inches long and three-fourths inches wide. Her blunt force injuries were consistent with having been caused by a metal bar. (17 RT 4514, 4528-4532, 4535, 4563-4566.) Mrs. Oren also had multiple rib fractures along her left side, consistent with blunt force trauma caused by the pressure of stomping. (17 RT 4534, 4566.)

C. Wall and Rosenquist Travel To San Francisco After Committing The Murders

A car resembling John Oren's 1978 Mercury Monarch (which was light yellow and had a distinctive green door) was seen driving north on the Interstate 5 between La Jolla Village Drive and Genesee in San Diego at a high rate of speed on March 2, 1992, around 3:45 a.m. (17 RT 4471-4473, 4475, 4480-4482, 4484.)

Around 5:45 a.m., John Oren's credit card was used to purchase $76.35 worth of items, including two cartons of cigarettes, some groceries, and gas from a Shell gas station on Roscoe Boulevard in Sun Valley, California. (19 RT 4870-4874.)

Later that same day, David Kessler, who was working for the Bureau of Land Management in the Carrizo Plains, found Wall and Rosenquist standing at the entrance to Washburn Ranch, which was Kessler's home base. (18 RT 4641-4644.) They looked cold and wet and were not dressed for the conditions. (18 RT 4646.) When Kessler asked what they were doing there, they said their car had broken down and been towed. Kessler asked why they had not gotten a ride with the tow truck, but they acted like they did not hear him. Kessler found this unusual because the area where they were located was desolate for miles and miles. (18 RT 4645-4646.)

Wall and Rosenquist had a nylon or canvas bag or briefcase with them, which they passed back and forth. (18 RT 4647, 4651, 4671.) Kessler heard what sounded like change inside. (18 RT 4651.) The men

told Kessler that their names were Danny (Wall) and Vincent (Rosenquist) Reynolds. (18 RT 4651-4652.) Vincent Reynolds (Rosenquist) was wearing all black. Danny Reynolds (Wall) was wearing a Levi's jacket with wool lining, Levi's pants, and white sneakers. (18 RT 4652; 19 RT 4801, 4819-4820.) Rosenquist did most of the talking. (18 RT 4655.) He said they had traveled down to Mexico and were on their way back to San Francisco. (18 RT 4656.)

Kessler invited them into the ranch and gave them something to eat and drink. He then drove them to California Valley and dropped them off at the California Valley Motel. (18 RT 4646-4648, 4669; 19 RT 4762.) Thereafter, Kessler called the San Luis Obispo Sheriff's Department because something did not feel right to him. (18 RT 4650-4651.)

Patrick and Virginia Thomas, who owned the California Valley Motel, testified that Wall and Rosenquist arrived at their hotel on March 2, 1992, around 7:00 p.m. (19 RT 4760-4762, 4818-4819, 4824.) They said their names were Vincent and Danny Reynolds and claimed that their car had broken down. They were cold, wet, and wanted a room, but they did not have enough money to pay for one. (19 RT 4762-4763, 4822.) Rosenquist shook a satchel which sounded like it had only coins inside. Patrick Thomas felt sorry for them and said they could send him a check to cover their room whenever they got where they were going. (19 RT 4762-4763, 4773, 4776, 4810, RT 4836.)

Wall was very quiet and evaded conversation. (19 RT 4768, 4826.) He would open doors with his elbow or a towel, as though he did not want to leave fingerprints. (19 RT 4770.) Rosenquist wore black gloves during their entire stay. (19 RT 4810-4811, 4814, 4826.) When Rosenquist and Wall left the next day (March 3, 1992), they walked in the direction of San Luis Obispo. (19 RT 4806.)

Around 10:15 a.m., San Luis Obispo Deputy Sheriff Doran Christian contacted Wall and Rosenquist on Route 58, near California Valley, and asked for their identifications. (19 RT 4880-4882, 4888.) Rosenquist produced his social security card. Wall claimed he did not have any identification with him. They both said they did not have driver's licenses. (19 RT 4882.) Wall told Deputy Christian that his name was Vincent Reynolds. However, Deputy Christian heard Rosenquist refer to him as "Randy." When Deputy Christian asked Wall about the name Randy, Wall claimed that his first name was Vincent, but his middle name was Randy. (19 RT 4883, 4903, 4905-4906.)

Deputy Christian searched their duffle bag and found between 200 and 400 pennies and a Utah driver's license in the name Randall Clark Wall. (19 RT 4884.) He patted both men down for weapons. They each had a medium-size folding pocket knife with about a two-and-a-half-to-three-inch blade. (19 RT 4885, 4927.) They also had about $50. Deputy Christian eventually let them go on their way. (19 RT 4886.)

On March 4, 1992, the Orens' burnt Mercury, Monarch was found in a gully or ditch in Carrizo Plains, about eight miles from Washburn Ranch. (18 RT 4618, 4621-4622, 4631, 4633, 4649-4650.) John Oren's wallet and identification were found near the car. (18 RT 4720, 4722-4725.)

D. Wall Gives A Statement To Police And He And Rosenquist Are Arrested

On Tuesday, March 17, 1992, San Francisco Police Inspectors Lou Ramlan and Jim Bergstrom contacted Wall at a welfare office in San Francisco and brought him to the San Francisco Hall of Justice. (20 RT 5152-5153.) San Diego Police Detectives Terry Lange and Carl Smith interviewed Wall there. The interview was tape recorded and the beginning portion of it was played for the jury. (22 RT 5688, 5679; 14 CT 3044; Peo. Ex. 103-A-W).

The detectives told Wall that they were investigating a crime in San Diego. They were not sure of his involvement, and that was why he had not been arrested. (14 CT 3045.) Wall waived his *Miranda*[2] rights and stated that he had hitchhiked to San Francisco from Salt Lake City by himself in February of that year. He was staying on Third Street with Bill Crandall, whom he had only known for two or three weeks. (14 CT 3046-3049.)

The detectives told Wall that they had information he had been in Bakersfield, that a forest ranger had given him a ride, that he had stayed in a hotel, and was later stopped by the police. They said they had found a car out there in the "sticks" and were interested in how Wall came into contact with that car. Wall denied that he had stayed at the hotel or been stopped by the police there. The detectives then clarified that they were investigating a murder in San Diego, the car they had found belonged to a murder victim, and they knew Wall and another man were in the vicinity of that car. They asked Wall if he could tell them how he got the victim's car. They then showed him a picture of Rosenquist and asked if Wall knew him. Wall said he did not. (14 CT 3052-3053.)

One of the detectives asked Wall again where they had gotten the car. Wall responded, "I don't know where he got the car." To clarify who "he" was, the detective asked, "This guy here," referring to Rosenquist. Wall said, "Yeah." (14 CT 3053.) Wall said that Rosenquist picked Wall up in the car. One of the detectives then suggested that they start over fresh. (14 CT 3053.)

Wall explained that he had met Rosenquist in Salt Lake City through friends. (14 CT 3054-3055.) The two travelled to San Francisco together

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S. Ct. 1602, 16 L. Ed. 2d 694].

in February of that year. (14 CT 3054-3055.) Wall explained that Rosenquist had AIDS. On February 28, 1992, Rosenquist got his SSI or disability check and they used the money to go to Ensenada, Mexico. They stayed there a couple nights and then returned to the United States sometime between March 2nd and 4th. (14 CT 3055.)

They took a trolley from the border into downtown San Diego and then walked on the side of the freeway or on frontage roads for four or five hours. (14 CT 3059.) Wall claimed that Rosenquist left him near Interstate 5 for about 45 minutes to an hour and then returned with the car at around 9:00 or 10:00 at night. Rosenquist never explained where he got the car. (14 CT 3056-3058, 3066-3067, 3075.) Wall claimed he tried asking Rosenquist questions about it, but Rosenquist got upset. (14 CT 3065.) Wall figured the car belonged to one of Rosenquist's friends. (14 CT 3067, 8070.)

At one point, the two men stopped for gas. Wall claimed that Rosenquist paid for it with cash, and Wall put gas in the car. (14 CT 3060.) Rosenquist then drove through a stretch of desert, where the car got stuck. Rosenquist lit the car on fire and they went walking through the hills for about 12 hours. Eventually, they came across a ranch and went to see if anyone was around to help them. A forest ranger gave them a ride into town. Rosenquist registered at a motel as Vincent Reynolds. The guy at the motel provided them a room for the night, gave them something to eat, and washed their clothes. (14 CT 3056-3060, 3077, 3079.) The guy said they could pay him back when they got to San Francisco. (14 CT 3078.)

One of the detectives told Wall that officers had found a wallet containing some identification around the car. Wall said he thought Rosenquist had thrown a wallet into the car at one point. Wall went on to explain that Rosenquist had some change with him in a black bag,

including a "shit load of pennies," ten or fifteen dollars in quarters, and about ten dollars in dimes and nickels. (14 CT 3063.)

After spending the night in the motel, Rosenquist and Wall headed back to San Francisco. Wall gave the officer that stopped them a fake name. Wall claimed that the last time he had seen Rosenquist was about a week and a half prior to the interview with the detective. (14 CT 3057, 3079.)

On March 18, 1992, officers executed a search warrant at Bill Crandall's residence on Third Street in San Francisco. (20 RT 5155, 5157; 23 RT 5722.) Rosenquist was at home in a fold-out bed when the police entered. (23 RT 5722-23.) Officers discovered a knife with the blade locked open on a coffee table two feet away from Rosenquist. (23 RT 5724, 5764.) Officers seized several items including the knife, some black leather gloves, a black baseball cap, Rosenquist's black high top shoes, and a black bag. (20 RT 5155-5156; 23 RT 5723-5727, 5761-5762; 24 RT 5992.) Inside the black bag were a social security card in the name of John Rosenquist and a pad of paper on which there was a partnership agreement which provided:

> Contract of Partnership. I, Randy Wall, agree to partnership with John Richard Rosenquist. All business dealings are to be agreed on by both parties. All deals are to be split and business costs and rent 50/50. I, Randy Clark Wall, agree to a 30-percent partnership for one year. After one year of good standing in the business, then I, Randy Clark Wall, will receive 50 percent of the partnership. But, if I, Randy Clark Wall, fail in any way I lose all standing, including all money I have made in that one year. I, John Richard Rosenquist, agree to partnership with Randy Clark Wall. All business dealings are to be agreed on by both parties. All deals are to be split, business and rent 50/50. I, John Richard Rosenquist, agree to a 70-percent partnership for one year. After one year, if Randy C. Wall has done what he is supposed to do,

then the business will then be split 50/50. This contract of partnership is final on this fifth day of March, 1992.

(24 RT 5994.)

The agreement was signed by Randy C. Wall and John Richard Rosenquist and dated March 5, 1992, three or four days after the murder. (24 RT 5994-5995.)

E. Evidence From The Crime Scene Connecting Wall and Rosenquist To The Offenses And Corroborating Some Of Wall's Statements to Police

Back at the crime scene, officers found John Oren's body with papers and other items dumped on top of him. It was difficult to see his head until those items were removed. (20 RT 5042.) There was blood on the northwestern corner of John's bed by his pillow, which penetrated the sheet and the mattress, and went onto the floor beneath the bed. (20 RT 5127.) There was also blood spatter on his bedroom walls, ceiling, and headboard. It appeared as though John was initially attacked on the bed with his head toward the headboard and was later moved onto the floor. His room had been ransacked and his drawers had been emptied onto his bed. The ransacking occurred after the blows causing the blood spatters. (20 RT 5038-5039, 5044, 5127; 21 RT 5392.)

There was a bloody footprint on the top band area of John's blue pajama pants. (18 RT 4710; 21 RT 5268; Ex. 48.) It appeared that John was initially attacked on the bed and then pulled off the bed by someone with bloody hands, causing blood to be transferred to his ankles and causing his pajama bottoms to bunch up at the knees. (18 RT 4695; 20 RT 5038-5039, 5042, 5115; 21 RT 5401-5402, 5441-5442.)

On John's bed was an old Sears jacket with the pockets turned inside out. On a push sweeper there was a pair of pants with the pockets turned

inside out. It appeared that someone was looking for something. (18 RT 4696; 20 RT 5038-5039.)

Katherine Oren's body blocked her bedroom door, which swung into the room. (21 RT 5400.) Officers removed the door in order to get to her. (21 RT 5399.) Her body was covered with blankets and bedding. (20 RT 5114.) There was some blood under Katherine's head and blood spatter on the top of a toilet seat in the room. (21 RT 5401.)

It appeared that the perpetrators' point of entry was the back door to the house, leading from the back patio into the den. The door jamb and the chain hasp on the inside of the door were broken as though the door had been forced open. (18 RT 4688; 21 RT 5248, 5439-5440.)

Officers found three metal bars during the course of their investigation. One was leaning against a wall between the bathroom and John Oren's bedroom. Another was found down the block across the street from the Orens' house in some ivy. A third was found leaning against a metal shed in the backyard. (18 RT 4677, 4717-4718, 4769; 20 RT 5095, 5131-5135; 21 RT 5353-5354.) It appeared that the metal bars came from the Orens' backyard. (18 RT 4706; 21 RT 5355.) The metal bar found near John's bedroom had blood and hair on it. (18 RT 4681; 20 RT 5064-5066, 5122-5123; 21 RT 5255, 5281, 5320.) There were also 19 drops of blood on the wall near the bar. (18 RT 4681.)

In the Orens' den was a small table. On top of the table were a telephone and a black and white scarf, which looked as though it had been wrapped around someone's hand. (18 RT 4707; 20 RT 5068, 5071.) The telephone's cord had been cut and pulled out of the wall. (18 RT 4708-4709; 20 RT 5045, 5036-5037, 5069.)

Officers found a white envelope with two partial bloody shoe prints on it in the hallway near the entrance to the house. (18 RT 4711-4712, 4716-4717; 21 RT 5268, 5375, 5381.) Wall's white Nike shoes made the

prints. (19 RT 4820-4822; 21 RT 5375-5376, 5378-5379, 5382-5386.) The pattern, shape, design, and size of Wall's shoe were also consistent with the pattern of the bloody shoe print found on the waistband of John Oren's pajama pants. (21 RT 5378-5390.)

Officers also discovered what looked like a bloody shoeprint on the carpeting in the hallway near John Oren's bedroom. However, it could not be determined whose shoes made the print. (18 RT 4717; 20 RT 5046-5047; 21 RT 5252-5253, 5455.)

Additionally, officers found an empty Big Idaho Potato can sitting on the floor next to the metal bar in the hallway. (18 RT 4677, 4717-4718, 4769; 21 RT 5253.) John Oren generally kept a Big Idaho Potato can filled with change in his bedroom, tucked under his bed. (21 RT 5504-5505; 22 RT 5606.)

Officers located two shoeprints on the kitchen floor. (18 RT 4731; 20 RT 5046; Ex. 63.) They were made by the black shoes seized from Rosenquist. (19 RT 4820-4822; 21 RT 5163-5374; Peo. Exhs. 65, 88-90.)

The only bathroom in the house was between Josh's and John Oren's bedroom. (20 RT 5098.) There was blood on the edge of the bathroom sink. (20 RT 5100, 5115.)

F. Additional Evidence Connecting Wall To The Offenses

On March 5, 1992, San Diego Police Investigator Albert Vitela, Jr., obtained information from a fraud investigator for Shell Oil that John Oren's credit card had been used in Sun Valley to make a purchase. (20 RT 4998.) Investigator Vitela contacted the manager at the Shell Gas Station and obtained the original credit card receipt from the transaction. (19 RT 4879; 20 RT 4997-4999; Peo. Ex. 49 & 69.) Analysis of the handwriting revealed that the signature on the receipt in the name of John Oren matched Wall's handwriting. (20 RT 5000, 5016-5017, 5022; 22 RT 5678.)

G. Three Inmates Testify Regarding Inculpatory Statements Wall Made In Jail

1. Raynard Davis

In March 1992, Raynard Davis was housed in the San Francisco County Jail with Wall. (20 RT 5162.) At one point, Davis overheard Wall tell other inmates that he was from San Diego and was fighting a murder case. He said something to the effect of, "Man, I'm, like, homicide, man, chopping up peoples." (20 RT 5163, 5166.) Wall made a chopping motion as he was talking. (20 RT 5166.) Wall also said he had on gloves during the offense. (20 RT 5169.)

Davis later said to Wall, "I heard that you got a couple of murders on you, man." Wall replied, "Nahh, man. I got a double." (20 RT 5167.) He also said, "I ain't worried. Can't prove shit. You know. No evidence. Can't prove nothing." (20 RT 5167.) Wall explained that he had socks over his hands. (20 RT 5168.) Davis assumed at first that Wall had used an axe to chop up the victims. Later, when they were playing chess, Wall said he had used a stick or a metal pipe. (20 RT 5171.) Wall said he committed the murders three years earlier. (20 RT 5175-5176.)

2. John Fitzgerald

In 1992, John Fitzgerald was in the same tank in Vista County Jail with Wall for about six months. (24 RT 5901-5902.) Fitzgerald saw Wall have confrontations with other inmates. (24 RT 5902.) During one such confrontation, Fitzgerald overheard Wall say he had already killed a couple people and did not mind killing again. (24 RT 5903.)

At one point, Fitzgerald and Wall were returning to jail from court on a bus. Wall said that a Black man he had been in jail with in San Francisco (Raynard Davis) had testified against him at his preliminary hearing. Wall explained that the man was in custody for selling 50 rocks of cocaine and was trying to make a deal to get out of jail by informing about

Wall. Wall said he had friends in San Francisco and the inmate was not going to last long anyway. Fitzgerald understood that to mean Wall was going to have the inmate taken care of. (20 RT 5171; 24 RT 5903-5904, 5980.)

On July 12, 1992, Fitzgerald filed an "Inmate Request Grievance Form." (24 RT 5985-86.) On the form he wrote that "Mr. Wall openly voices that he's in there for a double murder and that he doesn't give a fuck about killing one more." (24 RT 5986.) Fitzgerald wrote the grievance in an attempt to get Wall out of his module. (24 RT 5988.)

3. Shawn Taylor

Shawn Taylor was in custody at the Vista Jail with Wall for about six months and 20 days in 1992, and the two became friends. Wall told Taylor that he and his partner, Rosenquist, had killed an old couple and ransacked their house. (25 RT 6041-6044.) About a month later, Wall told Taylor a few more details. (25 RT 6044-6045.) Wall said he had hitchhiked from where he was living with Rosenquist to California. Wall had met a girl and was living with her in the back of a house belonging to an old couple for a couple of months. The old couple got tired of them living there and wanted them out. That is when Wall and Rosenquist devised a plan to kill the old couple by beating them to death. (25 RT 6046.) Wall said they entered the house through the back door. The old man was in the kitchen. Rosenquist beat the old man to death. The old lady started screaming. She would not be quiet, so Wall beat her to death. (25 RT 6047, 6050.)

Wall told Taylor that the old lady deserved it. He also said that the only evidence the police had against him was a shoeprint found at the scene. (25 RT 6051.) Wall explained that he was going to shift the blame to Rosenquist because Rosenquist had AIDS, which was his own personal death penalty. (25 RT 6055-6056.)

Prior to trial, Taylor told a similar story. (25 RT 6057, 6064-6065.) He claimed Wall told him that Rosenquist came over "pissed off" and confronted the old man in the kitchen. (25 RT 6065.) Rosenquist had a knife and stabbed the man. Then, Wall stated, the old lady came in and Wall beat her up. (25 RT 6067.) Taylor initially said that Wall told him Rosenquist killed both the old man and the old lady. Later in the interview, Taylor said that Wall admitted beating the old lady to death with his fists. (25 RT 6068.) After they killed the couple, they ransacked the house to see what they could get. Wall said that they had taken jewelry and the couple's wallets. They jumped into the car and headed south.[3] (25 RT 6069-6070.)

II. PENALTY PHASE EVIDENCE

A. The Prosecutor's Case In Aggravation

1. Wall's Entire Statement To Police Is Played For The Jury

As set forth above, Detectives Lange and Smith interviewed Wall on March 17, 1992. (34 RT 10571.) Only a portion of that interview was played for the jury during the guilt phase. That portion is set forth above. (22 RT 5688, 5679; 14 CT 3044; Peo. Ex. 103-A-W). After that interview, Rosenquist was arrested and interviewed twice. Detective Lange then re-interviewed Wall on March 18, 1992. (34 RT 10571.) Both of Wall's interviews were played for the jury during the penalty phase. (34 RT 10574; Peo. Ex. 126(w).) The following recitation of facts begins where the portion of the first interview introduced at the guilt phase ended.

One of the detectives told Wall that he did not think Wall was telling the whole truth and that something probably happen with Rosenquist that Wall did not expect. Wall responded, "Yeah, he kind of pressured me into it and . . ." (15 RT 3214-3215.) Wall then explained that "him and I both

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[3] The defense did not put on any evidence during the guilt phase. (See 26 RT 6301-6311, 6317.)

killed the grandma and grandpa of that household." (15 CT 3217.) Wall stated that he had dated the victims' granddaughter, Tammy Decker, back in 1988 or 1989, and had stayed with her at that house for a while – maybe two or three months—in a tent in the backyard. (15 CT 3217-3219.) There was a child staying there also. Someone took money out of the grandmother's purse or grandfather's wallet. Wall and Tammy Decker were blamed and left. (15 CT 3219.)

On the day of the murders, Wall and Rosenquist rode a bus back from Ensenada to Tijuana and took a taxi from the bus station to the border. They walked across the border and hopped onto a trolley, which took them into downtown San Diego around the Greyhound bus station. (15 CT 3220.) As they were walking up the road, Rosenquist started talking about getting a car and some money. Wall had previously told Rosenquist about the Orens. While they were walking, Rosenquist brought up the subject of the Orens again and asked if they had a car or money. (15 CT 3221.)

Wall claimed Rosenquist planned it out and told Wall, "we're going to do this and this and this . . . ." (15 CT 3222.) Specifically, Wall explained Rosenquist said, "'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 then ah, get in and do these people in and take their car and money and . . . and take off.'" (15 CT 3222.) When Wall told Rosenquist that he did not want to do it, Rosenquist started calling him a chicken and threatening to kill him if he refused. Rosenquist had Wall's buck knife at the time. (15 CT 3222-3223.) Wall explained, "Ah I couldn't get any help from nobody so we went over and got in the house and killed 'em." (15 CT 3223.)

Wall explained that he and Rosenquist walked to the house, went in the backyard. and waited for all the lights to go out and for the people inside to go to sleep. The back door had a chain on it, but was not locked. Wall rammed the door and broke the chain. (15 CT 3223-3224.)

Wall and Rosenquist went into John Oren's bedroom. Wall explained, "we beat the guy up and beat the girl up." (15 CT 3225-3226.) The detective asked Wall to back up a little and he started again. He said he opened John Oren's bedroom door and went in, with Rosenquist behind him. They both had metal stakes that they had found in the backyard. Rosenquist also had Wall's knife. (15 CT 3226-3227.) Rosenquist beat John Oren, who was asleep on his bed. Mr. Oren fell to the ground and gasped for air. (15 CT 3228-3229.) Rosenquist ran out of the room. When Wall came around the corner, it looked like the elderly woman was coming out of her room to see what was going on. She was heavy set and blind and was screaming or hollering, "What's going on?" Rosenquist clobbered her in the head with the metal bar. She fell back into her room, where Rosenquist hit her two or three more times. (15 CT 3229, 3232, 3234.) The little boy came out screaming "after the lady was down." Wall claimed he took the boy back into his room, shut the door, and kept him quiet. (15 CT 3230, 3232.)

After about 10 minutes, Rosenquist came into the little boy's room and wanted to have sex with the boy. Wall thought that was "quite sick," so he "left the room," and went into the kitchen. (15 CT 3230.) Later, Wall told the detectives, "Well he told me before we went in that he was gonna have sex with this little kid." Specifically, Rosenquist said, "I want to fuck this little boy." Wall told him that was really sick. Rosenquist told Wall that if he did not like it, Rosenquist would kill Wall. Rosenquist asked Wall if he wanted to have sex with the boy too, and Wall said no. (15 CT 3236.) When Rosenquist came out of the little boy's room, he said he felt a lot better. (15 CT 3237.)

Rosenquist gave Wall three sets of keys and told him to figure out which one would start the car in the driveway. Wall started the car. (15 CT

3238.) When Rosenquist came out of the house, he had quarters, dimes, nickels, and pennies in his black bag. (15 CT 3245.)

Rosenquist told Wall to get into the passenger's seat and they drove away. Wall claimed he was not in the house when Rosenquist found the Orens' money and the wallet. He was already in the car. (15 CT 3238.) He claimed that he also did not know the Orens had been stabbed when he was in the house. He thought Rosenquist still had the knife in his pants. (15 CT 3235.)

They drove to Interstate 5 and headed north. Wall was wearing the same shoes, pants, shirt and jacket during the interview that he wore on the night at issue. Rosenquist was wearing black pants, black shoes, a black shirt, a black jacket, a black hat and black gloves. (15 CT 3239.)

Rosenquist left one of the metal bars at the house and the other one got thrown on the side of the freeway as they were entering Interstate 5. Only the one that was left in the house had blood on it. (15 CT 3244.)

They stopped for gas on the way up north. Wall paid for it and signed John Oren's name for the transaction. (15 CT 3240.) At the gas station, they also bought a six pack of Coke, two sandwiches each, and two cartons of cigarettes (Marlboro Reds and Kool Finger Kings). They drove again on Interstate 5 over the pass and took the Bakersfield exit. (15 CT 3241.)

Wall claimed he never hit John Oren over the head and was not the one who slit his throat—Rosenquist was. Wall explained, "I didn't have my knife." (15 CT 3230.) Wall explained that before Rosenquist gave the knife back to him, Rosenquist washed it off. The next day, there was still blood in the crevices, so he boiled it in hot water and put some rubbing alcohol on it too. (15 CT 3231.)

On March 18, 1992, the detectives interviewed Wall a second time. (15 CT 3250.) This time, Wall said that he personally clobbered the old

lady with the bar, and Rosenquist went to the boy. Wall said he personally broke the chain on the door using the bar. He also said he used his knife to cut the telephone cord a little before they left the house. He claimed that Rosenquist gave him back the knife before they went out the door. (15 CT 3252-3253.)

2. Additional Evidence Regarding the Circumstances Of The Crimes

San Diego Police Detective John Flynn testified that on March 2, 1992, there was a blood smear on a wall near a light switch in John Oren's bedroom. (34 RT 10621; Ex. 122.) John's body was on the ground between the bed and the west wall, right under where the light switch was located. (34 RT 10622.) There was what appeared to be a fabric impression in the blood. (34 RT 10622-23, 10624.)

A criminalist for the San Diego Police Department's crime laboratory compared a photograph of the blood smear with an impression made by applying ink to two types of cotton socks and two other types of fabric. He concluded that the blood smear was made either by one of the sock fabrics (knit sock no. 1) or by a twill weave fabric (denim), but not by Rosenquist's leather gloves. (34 RT 10661, 10664-69.) The blood smear was curved and consistent with a palm area of a hand. (34 RT 10671.) However, it could have been made by a sleeve, a shoulder, an elbow or by an object thrown against the wall. (34 RT 10675, 10679-80.)

Josh Dooty testified that at the time he was being molested, he heard the other man (Wall) laughing in the hallway. (34 RT 10693.) Josh also testified that Katherine Oren had problems with her vision. She could not see at all out of one eye, and only a little out of the other eye. She had trouble recognizing people. (34 RT 19694.) Finally, Josh testified that he was hospitalized after the offenses and had to receive psychiatric help. (34 RT 10695.)

3. Unadjudicated Criminal Activity

In 1989, Daniel Heacox and his wife, Dagmar Marie Donnor, lived in West Jordan, Utah, with Wall and Wall's girlfriend, Michelle. (34 RT 10631-110632, 10640.) At some point, Wall was not paying rent and was breaking some of the house rules. (34 RT 10641-10662.)

Donnor told Wall's girlfriend, Michelle, that she wanted them to move out. Wall started to get "mouthy." At some point, Wall pushed Donnor. (34 RT 10642-10643.) Heacox heard some shouting and went downstairs to investigate. Wall and Donnor were facing each other and Wall had his right hand raised as if he was going to strike Donnor. (34 RT 10634-35, 10638.) Heacox got between them. (34 RT 10635-10636, 10643.)

Wall shoved Heacox and ripped his shirt. (34 RT 10636.) Heacox put both of his hands on Wall's shoulders, "jacked him" against the wall, and asked him to calm down. When Heacox turned around for a moment, Wall kicked Heacox in the chest with a side-kick. Heacox turned back around and beat up Wall. (34 RT 10637-10638, 10644-10665.)

4. Wall's Conviction In Indiana For Felony Possession Of Cocaine

The parties stipulated that on June 27, 1991, in the state of Indiana, Wall was convicted of felony possession of cocaine. That cocaine was in an amount consistent with residue, which is a very small amount. (34 RT 10713-14.)

B. WALL'S CASE IN MITIGATION

The sole witness called by the defense was San Diego Police Detective Terry Lange, one of the two detectives who interviewed Wall in March of 1992. Lange testified that he also interviewed Rosenquist, who said that after he was "through with the kid," he walked into the old man's

room. "I saw him. I was getting sick. I covered him up. I also covered the old lady up, almost like respect. I felt bad to see them like that. It was sickening." (34 RT 10775-10776.)

The parties stipulated that sometime after his arrest, Rosenquist spoke with Dr. Raymond Murphy regarding the circumstances of the offense. Rosenquist referred to a time after he finished molesting Josh and went into John and Katherine Orens' rooms. He explained, "it was unbelievable. I've never seen anything like that before he [Mr. Oren] was blowing bubbles." (34 RT 10779-80.)

The parties also stipulated that Sylvester Boyles was the neighbor who helped Josh the morning after the murders. Mr. Boyles saw John Oren's feet sticking out from the bed covering. John's upper torso was covered with blankets or a bedspread. (35 RT 10797.)

ARGUMENT

I. WALL PERSONALLY, KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVED HIS CONSTITUTIONAL RIGHT TO BE PRESENT DURING VOIR DIRE; HE SHOULD BE ESTOPPED FROM ARGUING THAT HE IS ENTITLED TO RELIEF SIMPLY BECAUSE HIS WAIVER WAS ORAL RATHER THAN IN WRITING AS REQUIRED BY PENAL CODE SECTIONS 977 AND 1043

Wall contends the trial court erred when it conducted part of jury selection in his absence without securing a personal, knowing, voluntary, and intelligent waiver of his constitutional and statutory right to be present. (AOB 22-54.) Wall waived his constitutional right to be present during voir dire and that waiver was personal, knowing, voluntary, and intelligent. He should be estopped from arguing that he is entitled to relief simply because his waiver was oral rather than in writing as required by Penal Code sections 977 and 1043. In any event, any error in failing to memorialize the waiver in writing was harmless.

A. Background

Voir dire in this case began on August 1, 1994. (10 RT 2979.) On Friday, August 5, 1994, Wall was attacked by another inmate during the noon recess. (14 RT 3948, 3989; 16 CT 3496-3497.) One of Wall's attorneys, Mr. Ainbinder, stated that he had discussed the matter with Wall, who was willing to waive his presence for that afternoon's questioning of the remaining six jurors. Mr. Ainbinder turned to Wall and asked, for the record, if he was willing to waive his presence for the balance of the afternoon's proceedings "understanding that you have a right to be here to be an active participant." (14 RT 3948.) Wall responded, "Yes, I do, your Honor. I'm sorry about this." (14 RT 3948-3949.) Voir dire continued in Wall's absence, but in the presence of both of his attorneys. (14 RT 3949-3984; 17 RT 4331.)

Court was not in session on Monday, August 8, 1994. (16 CT 3501.)

On Tuesday, August 9, 1994, the trial court stated for the record in Wall's presence that Wall had waived his presence the previous Friday afternoon so they could continue with jury selection in his absence. The court said it wanted to make sure that Wall understood then, and still understood, that he had an absolute right to be present, but had decided to waive his presence so he could get medical attention. The court asked whether Wall had any problems understanding his right to be present the previous Friday. Despite the fact that his jaw was wired shut, Wall agreed that he had been told he had an absolute right to be present and had chosen not to be present for that afternoon's session. Wall's attorney, Mr. Ainbinder, stated that he and Wall had discussed the matter, he had recommended to Wall that he waive his presence, and he believed Wall had made a knowing, intelligent, waiver. (14 RT 3985-3986.)

Mr. Ainbinder went on to explain that on Friday, August 9th, the date of the attack, Wall was taken to Harbor View Hospital, where he remained until Sunday. He had a complete break of his right mandible. Medical professionals inserted a titanium steel plate, put braces on his top and bottom front teeth, and wired his jaw shut. (14 RT 3987-3988.) Other than penicillin, Wall was not on any other medications. Mr. Ainbinder expressed two concerns. First, he believed there was a possibility Wall had a concussion, which was affecting his current mental condition. (14 RT 3988.) Second, he feared that if the jurors saw Wall in that condition, they would think he did something to deserve his injuries. Therefore, counsel suggested that they continue voir dire until August 22nd rather than until August 15th[4] as they had planned. (14 RT 3990-3992.)

The trial court was reluctant to postpone voir dire unless Wall's mental condition was such that it would prevent him from meaningfully participating. The court suggested that they wait until Thursday to decide what to do. If Wall's mental condition permitted, then they could resume voir dire. However, to prevent the jury from seeing Wall's injuries, the court suggested that they could put him in the jury room next door with a speaker system so he could hear what was going on in the courtroom. They could take breaks so his attorneys could confer with him, and they could even make it possible for him to see the jury through a window. (14 RT 3993.)

Mr. Ainbinder acknowledged that there were 61 to 66 people returning to court that Thursday for voir dire and there was no way to get in touch with all of them to reschedule. However, he was concerned that if Wall were not present during voir dire, it would suggest a lack of concern

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[4] It appears he meant Thursday, August 11th rather than August 15th.

on his part. Mr. Ainbinder requested that they have the jurors come in, tell them that something came up, and then have them come back on a later date. (14 RT 3993-3995.) Mr. Ainbinder was "open," however, to waiving Wall's presence, having the judge inform the jury that Wall had a medical emergency, and going forward without him. (14 RT 3995.)

The trial court did not want to take a waiver of Wall's presence at that time in light of the possibility that he had a concussion. Moreover, the court preferred to have Wall present in the jury room, rather than waiving his presence altogether. If he was mentally capable of proceeding, they would tell the jury that they were going to take frequent breaks so Wall could assist his attorneys. (14 RT 3995-3996.) Mr. Ainbinder replied, "I think that is workable, particularly if your Honor also informs them that Mr. Wall is not responsible for the inconvenience, but feels badly for it, is trying to do the best he can under the circumstances and given his condition." (14 RT 3996.) The court agreed to say something of that nature. (14 RT 3996.) The court then asked whether Wall was following along with their discussions and whether he understood everything they said. He responded, "Yeah," to both questions. (14 RT 3997.)

On Wednesday, August 10, 1994, Wall's second attorney, Mr. Thoma, represented that a neurologist had examined Wall and conducted a CAT scan. There was a bruise on the right side of his brain, an injury to his right inner ear, and an injury to his right sensory nerve, which ran along the right side of his face. According to Mr. Thoma, it looked like Wall was healing. However, he appeared "to be at least mildly disoriented. He's very slow on the uptake, and I guess we're just kind of a wait and see situation." (14 RT 4003-4005.)

The court then asked whether Wall would be able to participate in voir dire the next day. Mr. Thoma said that it was taking longer to discuss things with Wall than before. Nevertheless, he and Wall had discussed that

over the lunch hour. In Mr. Thoma's opinion, Wall understood he had a right to be present in the courtroom and was amenable to instead being in the jury room listening to the process, and talking with his attorneys during the breaks. Mr. Thoma also expressed a willingness to go forward with voir dire the next day. (14 RT 4007, 4012.)

On Thursday, August 11, 1994, Wall's attorneys represented that Wall was still mildly disoriented and was moving slowly, with some dullness. However, Mr. Ainbinder explained, he and Wall had discussed Wall's right to be present in the courtroom and Wall wanted to waive his presence. (14 RT 4046-4047.) Mr. Ainbinder represented that Wall had been in the jury room, had seen the speaker set up in there, and they had tested it. Wall could hear what was going on. Mr. Ainbinder informed the court, "[S]o he stands by the position that I have related to your honor, that he is willing to waive his right to be here in the courtroom to actively participate and to, instead, be in the jury room. He knows that, if need be, that Mr. Thoma and [I] can consult with him during the course of this process." Mr. Ainbinder then asked Wall if he was willing to waive his presence and sit in the jury room listening to proceedings in that fashion. Wall replied, "Yeah." (14 RT 4047.) Mr. Ainbinder then asked, "You understand that you have a right to be here, you're willing to waive that right and go forward anyway?" Wall replied, "Yes." (14 RT 4047.)

The court noted that one of the bailiffs would be in the room with Wall and would contact the court and counsel whenever Wall wanted to talk with his attorneys. (14 RT 4047.) The court asked Wall if he understood that. Wall replied, "Yeah," and confirmed that was agreeable. Voir dire was completed in his absence. (14 RT 4047-4048.)

On Friday, August 12, 1994, at 8:49 a.m., the court said, "Let the record show that yesterday Mr. Wall waived his personal presence here.

He is not here today. His counsel are here." (14 RT 4091.) The jury was thereafter sworn and sent home until August 24, 1994. (14 RT 4092-4094.)

B. Wall's Waiver Of His Right To Be Present Was Personal, Knowing, Intelligent, and Voluntary

Under the Sixth Amendment, defendants have the right to be personally present at any proceeding where their appearance is necessary to prevent interference with their opportunity for effective cross-examination. (*People v. Lynch* (2010) 50 Cal.4th 693, 745-746; *People v. Butler* (2009) 46 Cal.4th 847, 861; *Kentucky v. Stincer* (1987) 482 U.S. 730, 744-745, fn. 17 [107 S. Ct. 2658; 96 L.Ed.2d 631].) Defendants also have a due process right "to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." (*Kentucky v. Stincer, supra*, 482 U.S. at p. 745; *People v. Lynch, supra*, 50 Cal.4th at p. 746.) The state constitutional right to be present at trial is essentially coextensive with the federal due process right. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1235; *People v. Butler, supra,* 46 Cal.4th at p. 861.) This Court has observed with respect to California statutory law:

> "The standard under sections 977 and 1043 is similar. ' "[T]he accused is not entitled to be personally present during proceedings which bear no reasonable, substantial relation to his opportunity to defend the charges against him . . . . [Citation.]"

(*People v. Virgil, supra,* 51 Cal.4th at p. 1235; *People v. Lynch, supra*, 50 Cal.4th at p. 746.)

In *Gomez v. United States* (1989) 490 U.S. 858, 873 [109 S.Ct. 2237, 104 L.Ed.2d 923], the United States Supreme Court stated that voir dire is a critical stage of criminal proceedings, during which the defendant has a constitutional right to be present. (*Ibid.*) However, a defendant can waive his constitutional right to be present, provided the waiver is knowing,

intelligent, and voluntary. (*People v. Rundle* (2008) 43 Cal.4th 76, 133-134, *disapproved on other ground in People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Jackson* (1996) 13 Cal.4th 1164, 1210.)

Wall contends that such a waiver must be made by the defendant personally rather than through counsel. (AOB 35.) As explained in *People v. Davis* (2009) 46 Cal.4th 539, a trial court must obtain a personal waiver of the defendant's appearance under Penal Code section 977, "but the court's failure to obtain such a waiver is statutory error, reversible only if there is a reasonable probability that the result would have been more favorable to defendant without the error." (*Id.* at p. 611.)

On appeal, reviewing courts apply an independent or de novo standard of review to a trial court's exclusion of a criminal defendant, in whole or in part, from pretrial and trial proceedings. (*People v. Virgil, supra,* 51 Cal.4th at p. 1235; *People v. Cole* (2004) 33 Cal.4th 1158, 1231.)

1. August 5th Proceedings

The record shows that Wall made a personal, knowing, voluntary, and intelligent waiver of his right to be present on Friday, August 5, 1994, the day of the assault. As set forth above, Wall's attorney, Mr. Ainbinder, stated that he had talked with Wall, who was willing to waive his presence for that afternoon's voir dire. Mr. Ainbinder then turned to Wall and asked if he was willing to waive his presence for the balance of the afternoon's proceedings "understanding that you have a right to be here to be an active participant." (14 RT 3948.) Wall responded, "Yes, I do, your Honor. I'm sorry about this." (14 RT 3948-3949.)

Then, on Tuesday, August 9, 1994, at 10:14 a.m., the trial court stated for the record in Wall's presence that it wanted to make sure Wall understood the previous Friday, and still understood, that he had an absolute right to be present, but had decided to waive his presence so he could get medical attention. The court asked whether Wall had any

problems understanding his right to be present the previous Friday. Wall affirmed that he understood his rights and had chosen not to be present for that afternoon's session. Wall's attorney, Mr. Ainbinder, stated that he and Wall had discussed the matter, he had recommended to Wall that he waive his presence, and he believed Wall had made a knowing, intelligent, waiver. (14 RT 3986.)

Thus, the record shows that Wall personally waived his presence for the August 5th proceedings, and that the waiver was knowing, voluntary, and intelligent. Wall's own counsel, who was in the best position to observe and evaluate his behavior, believed that despite Wall's condition he was capable of making a knowing, intelligent and voluntary waiver. (*See United States v. Clark* (9th Cir. 1980) 617 F.2d 180, 186 [the fact that the defendant's attorney considered defendant competent was significant evidence that defendant was in fact competent]; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 718 [trial counsel in best position to evaluate client's comprehension of proceedings].)

Wall complains that his waiver was invalid because the trial court never made an *express* finding regarding Wall's competency to waive his right to be present. (AOB 40-41.) The fact that the court proceeded in Wall's absence shows the trial court, after observing Wall's behavior and discussing the matter with counsel, *implicitly* found him competent to waive that right. Wall has provided no authority for the proposition that a trial court's finding on the matter must be express rather than implied.

Wall next complains that his wavier was invalid because the trial court never *personally* advised him of his *constitutional and statutory* right to be present during jury selection, and never *personally* elicited from Wall a waiver of those rights. (AOB 38.) Again, Wall cites no authority for the proposition that a defendant must be specifically informed of the constitutional and statutory sources of his right to be present, or that the

court must personally elicit the waiver from the defendant, as opposed to having counsel elicit the waiver in the court's presence.

In *People v. Moon* (2005) 37 Cal.4th 1, the defendant argued that although he stated in open court that he did not wish to be present during a jury view, the record was silent as to whether his counsel had discussed with him "the meaning of the right involved or the potential consequences of waiving this right." Therefore, he argued, his waiver was invalid. (*Id.* at p. 20.) This Court rejected the claim explaining:

> [T]o the extent defendant now contends the trial court bore a special duty to conduct a more searching substantive inquiry regarding his understanding of his waiver, we reject the claim as both forfeited by a failure to object and because it is legally unsupported.

(*People v. Moon, supra,* 37 Cal.4th at p. 21; see also *People v. Weaver* (2001) 26 Cal.4th 876, 967 [the court rejected the defendant's claim that his waiver was invalid because he was not advised of the importance of his personal presence and because the court did not conduct an extensive inquiry into whether he understood the significance and consequences of his decision not to be present.])

Here, as in *Moon*, Wall forfeited his claim that the trial court had a duty to personally conduct a more searching inquiry into Wall's understanding of his waiver.

In any event, because the record shows Wall was represented by counsel who had discussed the matter with him and then specifically repeated in open court that Wall had "a right to be here to be an active participant" (14 RT 3948), the record shows that Wall's personal in-court waiver was knowing, voluntary and intelligent.

2. Proceedings on August 11 and 12, 1994

During the remainder of voir dire on August 11, 1994, Wall was in the jury room next door listening to the proceedings with the ability to

consult with his attorneys whenever he chose. On that date, Wall's attorneys represented that he was mildly disoriented and was moving slowly with some dullness. However, Mr. Ainbinder explained, he and Wall had discussed Wall's right to be physically present in the courtroom and Wall wanted to waive his presence. (14 RT 4046-4047.) Mr. Ainbinder represented that Wall had been in the jury room, had seen the speaker set up in there, and they had tested it. Mr. Ainbinder then asked Wall if he was willing to waive his presence and sit in the jury room listening to proceedings in that fashion. Wall replied, "Yeah." (14 RT 4047.) Mr. Ainbinder then asked, "You understand that you have a right to be here, you're willing to waive that right and go forward any way?" Wall replied, "Yes." (14 RT 4047.)

The court noted that one of the bailiffs would be in the room with Wall and would contact the court and counsel whenever Wall wanted to talk with his attorneys. (14 RT 4047.) The court asked Wall if he understood that. Wall replied, "Yeah," and confirmed that was agreeable. Voir dire was then completed without him in the jury room. (14 RT 4047-4048.)

The record shows that Wall was competent to give a knowing, voluntary, and intelligent waiver of his right to be present, i.e. he had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and ... a rational as well as factual understanding of the proceedings against him." (*See People v. Stewart* (2004) 33 Cal.4th 425, 513, internal quotations omitted.) "[A] concussion does not necessarily result in an impairment of mental competency." (*Crail v. United States* (10th Cir. 1970) 430 F.2d 459, 460-461; *Pait v. State* (1966) 188 So.2d 15, 16 [rejecting claim that the defendant was incompetent to plead guilty due to a prior concussion and skull fracture].) Moreover, Wall's attorneys, who were in the best position to observe his

behavior, clearly believed he was competent to make such a decision despite the fact that he was mildly disoriented and moving slowly. (*See United States v. Clark, supra,* 617 F.2d at p. 186; *Hernandez v. Ylst, supra,* 930 F.2d at p. 718.)

Moreover, the trial court, after observing Wall and discussing the matter, implicitly found Wall competent to make such a decision as evidenced by its decision to go forward. Accordingly, the record shows Wall personally, knowingly, voluntarily, and intelligently waived his right to physical presence in the courtroom on August 11, 1994.

On Friday, August 12, 1994, the court said, "Let the record show that yesterday Mr. Wall waived his personal presence here. He is not here today. His counsel are here." (14 RT 4089-4091.) The jury was thereafter sworn and sent home until August 24, 1994. (14 RT 4092-4094.) Clearly, Wall's personal waiver on August 11th carried over through August 12th. In any event, the swearing of the jury — the proceeding that took place in his absence that day — was not a proceeding where his presence bore a substantial relation to his opportunity to defend the charges against him, i.e. where he has a constitutional or statutory right to be present.

C. Wall Should Be Estopped From Arguing That He Is Entitled To Relief Under Penal Code Sections 977 and 1043 Because The Trial Court Obtained an Oral Waiver of his Right to be Present and His Counsel Acquiesced in Such a Procedure

California statutory law qualifies when a capital defendant can waive his presence at trial. Penal Code section 977, subdivision (b)(1), provides that in felony prosecutions "the accused shall be present" at certain proceedings which are not relevant here, and "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, as provided by paragraph (2)." Section 977, subdivision (b)(2) provides "[t]he accused may execute

a written waiver of his or her right to be personally present, approved by his or her counsel, and the waiver shall be filed with the court." Penal Code section 1043 provides that a felony defendant "shall be personally present at the trial" but the trial may continue in his absence if (1) he persists in disruptive behavior after being warned; (2) he is voluntarily absent in a noncapital case; or (3) he waives his right to be present under Penal Code section 977. (See also *People v. Davis* (2005) 36 Cal.4th 510, 531.) As this Court has observed,

> [W]hen read together, sections 977 and 1043 permit a capital defendant to be absent from the courtroom only on two occasions: (1) when he has been removed by the court for disruptive behavior under section 1043, subdivision (b)(1), and (2) when he voluntarily waives his rights pursuant to section 977, subdivision (b)(1).

(*People v. Davis, supra,* 36 Cal.4th at p. 531; *People v. Jackson, supra,* 13 Cal.4th at p. 1210.)

Because Wall did not personally execute a written waiver, his statutory right to be present under Penal Code section 977, subdivision (b)(1), was violated. (*People v. Romero* (2008) 44 Cal.4th 386, 418.) Nevertheless, public policy demands that Wall be estopped from arguing that he is entitled to relief where the court obtained an oral waiver of his right to be present and his counsel acquiesced in such a procedure. (*See People v. Howze* (2001) 85 Cal.App.4th 1380, 1396, citing *In re Griffin* (1967) 67 Cal.2d 343, 347 [where defendant consents to act in excess of jurisdiction, he is estopped from subsequently complaining the act exceeded jurisdiction].)

People v. Ervin (2000) 22 Cal.4th 48, is instructive. In that case, the trial court allowed the prosecutor and defense counsel to screen out, by stipulation, more than 600 prospective jurors whose questionnaires showed they were probably subject to challenge and excusal. On appeal, the defendant argued that the procedure took place outside his presence,

violating his statutory and constitutional right to be personally present at all "critical stages" of the proceedings unless he has executed a written waiver. (*Id.* at pp. 72-73.) This Court rejected his claim, explaining:

> As we stated in *Visciotti*, "counsel acquiesced in the [voir dire] procedure of which defendant now complains. . . . [P] . . . [P] . . . While the parties are not free to waive, and the court is not free to forego, compliance with the statutory procedures which are designed to further the policy of random selection, equally important policies mandate that criminal convictions not be overturned on the basis of irregularities in jury selection to which the defendant did not object or in which he has acquiesced. [Citations.]"

Wall orally waived his right to be present on August 5th, 11th and 12th and willingly permitted his counsel to act on his behalf. He should be estopped from arguing that he is entitled to a new trial based upon a failure to memorialize his oral waiver in writing, where he and his counsel acquiesced in that procedure. (*See People v. Ervin, supra,* 22 Cal.4th at p. 73.)

D. Any Violation of Wall's Constitutional or Statutory Right to be Present Was Harmless

Constitutional error relating to a defendant's absence during a critical stage of trial is evaluated under the harmless-beyond-a-reasonable-doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 23 [17 L.Ed.2d 705, 87 S.Ct. 824]. (*People v. Davis, supra,* 36 Cal.4th at p. 532.) It is generally the People's burden under *Chapman* to prove beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman, supra*, 386 U.S. at p. 24.) However, an otherwise valid conviction should not be set aside if the reviewing court can confidently say, based upon the record as a whole, that the constitutional error was harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 [106 S.Ct. 1431; 89 L.Ed.2d 674].)

Error under Penal Code sections 977 and 1043 is reversible only if it is reasonably probable the defendant would have received a more favorable outcome in the absence of the error. (*People v. Davis, supra,* 36 Cal.4th at p. 532; *People v. Watson* (1956) 46 Cal.2d 818, 836.) "The burden is on the defendant to demonstrate that his absence prejudiced his case or denied him a fair trial." (*People v. Garrison* (1989) 47 Cal.3d 746, 783 [no reversible error for failure to comply with section 977].)

In *People v. Virgil, supra,* 51 Cal.4th 1210, the trial court conducted all challenges for cause during voir dire at sidebar. (*Id.* at p. 1234.) There were 12 instances in which prospective jurors were questioned at sidebar in the defendant's absence. The defendant argued that this deprived him of his statutory and constitutional rights to be personally present during a critical stage of his trial. (*Id.* at p. 1233.) This Court rejected his claim finding that he had not shown his presence would have affected the outcome of the for-cause juror challenges argued at sidebar. (*People v. Virgil, supra,* 51 Cal.4th at p. 1236.) It explained:

> With few exceptions, defendant simply describes the proceedings and does not explain how his presence would have made a difference. In the examples he does discuss in detail, . . . , we perceive no reasonable or substantial relation between defendant's absence from the proceedings and his ability to present a defense.

(*Id.* at p. 1236; see also *People v. Lynch, supra,* 50 Cal.4th at pp. 475-476.)

Wall's absence during the questioning of six jurors on August 5th, the exercise of peremptory challenges on August 11th, and the swearing of the jury on August 12th did not affect the outcome of his trial or penalty phase. (See *People v. Lopez* (2013) 56 Cal.4th 1028, 1052; *People v. Weaver, supra,* 26 Cal.4th at p. 968 [The speculative nature of any possible harm defendant suffered by his absence also precludes a finding the error affected the penalty phase verdict in any way]; *see also People v. Davis,*

supra, 36 Cal.4th at pp. 532-533; *People v. Ruiz* (2001) 92 Cal.App.4th 162.)

Wall had two experienced attorneys present during voir dire protecting his interests. After the questioning of the six jurors on August 5th, Wall's trial counsel had plenty of time before the next hearing to consult with him about their impressions of each of those jurors. Moreover, Wall was able to listen to his counsel exercising peremptory challenges from the jury room on August 11th, and consult with his attorneys whenever he felt the need. (See 14 RT 4047.)

Wall contends that because he could not see what was going on, he "could not possibly have followed the proceedings in any meaningful way." (AOB 46.) The trial court told the defense team that it could make it possible for Wall to see the jury through a window. (14 RT 3993.) It is unclear from the record whether Wall took the court up on its offer. If he did, then he obviously could follow the proceedings in a meaningful way. If he chose not to, he can hardly complain that his own choice not to watch prevented him from meaningfully following the proceedings.

Wall next contends in footnote 21 on page 34 of his opening brief that there is nothing in the record to suggest the trial court took any steps to ensure he could hear the proceedings clearly. (AOB 46.) Not so. Wall's trial counsel specifically stated on the record that Wall had been in the jury room, they had tested the speaker system, and Wall could hear what was going on. (14 RT 4047.)

Finally, Wall suggests that when he was in the jury room, he realistically "could never actually have communicated with counsel in time, given the scenario inherent in the logistical constraints." (AOB 47.) There is nothing in the record supporting such a speculative contention. (*See People v. Dickey* (2005) 35 Cal.4th 884, 922-924.)

Accordingly, Wall's absence during the proceedings at issue was harmless under both the state and federal standards. (*People v. Lopez, supra,* 56 Cal.4th at p. 1050 [Defendant's absence from in-chambers voir dire questioning did not violate his constitutional or statutory rights to be present]; *People v. Beardslee* (1991) 53 Cal.3d 68, 103-104 [harmless error where defendant was not present during 20 minutes of jury selection proceedings where jurors were excluded for hardship]; *People v. Grant* (1988) 45 Cal.3d 829, 846 [harmless error where the defendant was absent during the first half-hour of jury selection, at which time jurors were excused for physical disability or financial hardship]; see also *People v. Mayfield* (1997) 14 Cal.4th 668, 738-739.)

II. SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S EXCUSAL OF PROSPECTIVE JUROR E.J. FOR CAUSE BASED ON ITS DETERMINATION THAT HER VIEWS ABOUT CAPITAL PUNISHMENT WOULD PREVENT OR SUBSTANTIALLY IMPAIR HER ABILITY TO PERFORM HER DUTIES AS A JUROR

Wall contends the trial court's exclusion of Prospective Juror E.J. for cause violated his 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. (AOB 55-75.) Not so. Substantial evidence supports the trial court's excusal of E.J. for cause based on its determination that her views about capital punishment would prevent or substantially impair her ability to perform her duties as a juror.

A. Prospective Juror E.J.'s Questionnaire and Voir Dire Responses

In her questionnaire, Prospective Juror E.J. stated that she "adhere[d] to Methodist teachings," and checked the "No" box in response to whether her religious organization had a stated position regarding the death penalty.

(28 CT 6090.) When asked on the questionnaire about her opinion of the death penalty, she responded,

> Some acts of crime are so inhuman that I [sic] 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 parole) have to be taken.

(28 CT 6111.)

She then responded "No" to the following two questions:

> 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 trial?
>
> 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?

(28 CT 6112.)

When asked on the questionnaire if there were any circumstances where a person convicted of murder should automatically receive the death penalty, she responded, "My opinion – mass murder for political or financial gain." (28 CT 6113.)

Finally, the questionnaire asked if E.J. felt she was "able and willing to completely put aside any thought or concern relating to the penalty issues while you deliberate guilt or innocence at the guilt phase trial on these charges." She responded, "I can only say I hope so. After hearing evidence I am not sure how I will react." (28 CT 6114.)

During voir dire on August 3, 1994, the trial court explained to E.J. that if there were a penalty phase, the prosecutor could present evidence in aggravation and argue that the appropriate penalty is death. The defense could present evidence in mitigation and argue that the appropriate penalty

is life without the possibility of parole. If selected as a juror, she had to assume that whichever penalty she decided on would be carried out. The court then asked E.J. if she had a problem with that. She responded, "I'm not sure about how I would feel having to make a determination about whether a man or woman receives the death penalty." (12 RT 3485-3486.) The following discussion ensued:

> 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?
>
> E.J.: 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.[5]
>
> THE COURT: Okay. If you thought that, after listening to all of the evidence in this case, if you felt that the death penalty was your decision or – first of all, let me back up. [¶] 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?
>
> E.J.: 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.
>
> THE COURT: Okay. Suppose that this is your frame of mind, you listen to all of the evidence and you thought in your own mind that the appropriate penalty was death in this case, you talked it over with your other jurors, you agree that the appropriate penalty is death, you had to come back into this courtroom, face everybody who is here, people in the

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[5] Wall contends that E.J. "never expressed opposition to the death penalty on philosophical or religious grounds. . . ." (AOB 67.) As set forth above, she specifically stated she had religious feelings on the matter and that a higher being should decide whether someone lives or dies. (12 RT 3486-3487.)

audience, perhaps, anybody, and announce the verdict, that you voted for the death penalty in this case. [¶] Could you do that?

E.J.: I don't know.

THE COURT: Are you telling me that both choices are difficult choices? I understand that you could find life without possibility of parole.

E.J.: I think that I would have an easier time doing that, yes.

. . . .

THE COURT: You don't now know whether or not you could impose the death penalty?

E.J.: I don't.

(12 RT 3486-3487.)

Wall's counsel, Mr. Thoma, then asked E.J. whether part of her problem in not being able to answer the question was that she had not seen the evidence. She responded, "No." (12 RT 3488.) The following discussion ensued:

MR. THOMA: Let me put it this way [E.J.] 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?

E.J.: No.

MR. THOMA: And just the same, with regard to our case, you're not saying that you're absolutely opposed to life without possibility of parole absolutely, either, are you?

E.J.: No.

. . . .

E.J.: What I'm trying to you say is [sic], 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.

MR. THOMA: If I understand your problem, and I think that I do, what you're saying it [sic] that 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 right?

E.J.: That's correct.

. . . .

E.J.: I'm not saying that I would never be able to [vote for the death penalty], but I'm saying that I would have a lot of difficulty doing that.

(12 RT 3490-3491.)

Mr. Thoma asked E.J. whether she was open to the possibility of voting for either life without parole or death, depending on the evidence. E.J. responded, "I think that I have kind of answered yes to that with some reservations." (12 RT 3494.)

The prosecutor then said he was going to just ask E.J. "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?" She responded, "That is correct." (12 RT 3496.) The prosecutor then clarified, "Irrespective of the evidence, as you sit here now, you don't know if you can do it." Again she responded, "That's correct." (12 RT 3496.)

The prosecutor moved to excuse E.J. for cause, the defense objected, and the court took the matter under submission. (12 RT 3499-3500.) On August 8, 1994, the trial court revisited the issue and granted the prosecutor's challenge for cause. (14 RT 4048-4049.)

B. The Trial Court's Excusal of Prospective Juror E.J. For Cause Did Not Constitute An Abuse Of Discretion or Violate the State or Federal Constitution

The law permits a prospective juror to be excused for cause if his views on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844; 83 L.Ed.2d 841], *internal quotations omitted; People v. Nunez and Satele* (2013) 57 Cal.4th 1, 23; *People v. Whalen* (2013) 56 Cal.4th 1, 25.) In other words, "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." (*People v. Lewis* (2008) 43 Cal.4th 415, 482.) As explained by this Court in *People v. Thomas* (2011) 51 Cal.4th 449, "a trial court in a capital case properly may excuse for cause a prospective juror who states she does not know whether she could vote for the death penalty." (*Id.* at p. 469.)

> ' " 'There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity. [Citations.] Rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror.' " ' [Citation.] '[T]he [trial court's] finding may be upheld even in the absence of clear statements from the juror that he or she is impaired because "many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." [Citation.] Thus, when there is ambiguity in the prospective juror's statements, "the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, [is] entitled to resolve it in favor of the State." ' [Citations.]

(*People v. Whalen, supra,* 56 Cal.4th at pp. 25-26; *Wainwright v. Witt, supra,* 469 U.S. at p. 412.)

Reviewing courts must uphold the trial court's ruling on the matter if it is fairly supported by the record, and must accept as binding the trial court's determination as to the prospective juror's true state of mind when he or she has made statements that are conflicting or ambiguous. (*People v. Thomas, supra,* 51 Cal.4th at p. 462; *People v. DePriest* (2007) 42 Cal.4th 1, 21; *People v. Lewis, supra*, 43 Cal.4th at p. 483; *People v. Lewis and Oliver* (2006) 39 Cal. 4th 970, 1006-1007; *People v. Whalen, supra*, 56 Cal.4th at p. 25-26; *People v. Nunez and Satele, supra,* 57 Cal.4th at p. 24.)

The erroneous excusal of a prospective juror for cause based on his or her views of the death penalty automatically compels reversal of the penalty phase without any inquiry into whether the error actually prejudiced the defendant's penalty determination. (*People v. Whalen, supra,* 56 Cal.4th at p. 26; *People v. Stewart, supra,* 33 Cal.4th at p. 454.) However, "such error does not require reversal of the judgment of guilt or the special circumstance findings." (*People v. Heard* (2003) 31 Cal.4th 946, 966.)

In *People v. Griffin* (2004) 33 Cal.4th 536, *disapproved on another ground in People v. Riccardi* (2012) 54 Cal.4th 758, this Court held that the trial court properly excused for cause a prospective juror (M.C.) who stated during voir dire "that she did not know whether she ever could vote to impose the death penalty, regardless of the state of the evidence," and another prospective juror (J.D.) who stated she supported the death penalty but "she did not know whether she actually could vote to impose the death penalty—even in a case in which she had concluded that the defendant deserved the death penalty." (*Id.* at pp. 559-560.) This Court explained,

> With respect to each of these prospective jurors, the trial court, having had the opportunity to observe the demeanor of each and to assess the degree of reluctance and apprehension expressed by each prospective juror in responding to questioning, reasonably could find that each prospective juror's views on the death penalty would substantially impair

her ability to perform the duties of a juror in accordance with the trial court's instructions.

(*People v. Griffin, supra*, 33 Cal.4th at p. 560.)

Similarly, in *People v. Thomas, supra,* 51 Cal.4th 449, this Court held that the trial court properly excused four prospective jurors for cause. One juror (no. 6-353) stated she was moderately against the death penalty, did not know whether she could vote for the death penalty, and thought it was unlikely she would do so, although it was a "theoretical possibility." (*Id.* at p. 463.) Another juror (no. 833) told defense counsel it was possible she could vote for the death penalty and could consider it. However, she also stated at various times that she was strongly against the death penalty, her religious beliefs would make it difficult for her to sentence someone to death, she did not know if she could vote for the death penalty, she did not think she could vote for the death penalty, and it would be difficult for her to vote for the death penalty. (*Id.* at pp. 470-471; *see also People v. Wash* (1993) 6 Cal.4th 215, 255 [Prospective Juror Rosu repeatedly said she did not know or "I can't tell you," in response to the question of whether she was capable of returning a verdict of death.])

In *People v. DePriest, supra,* 43 Cal.4th 1, Prospective Juror M.B. initially stated on voir dire that he could keep an open mind with respect to sentencing and did not oppose the death penalty. However, he admitted he did not want the responsibility of making such a difficult decision, was reluctant to pass judgment on a capital defendant, and doubted he could impose death even if the evidence indicated it was the appropriate sentence. He also stated that he might vote for life, regardless of the evidence, to avoid making a decision on death. (*Id.* at p. 21.)

Also in *DePriest*, Prospective Juror G.G. stated that he did not oppose the death penalty and would not automatically vote against it. However, most of his answers contradicted this view. He said he would be

bothered by having to make such a difficult decision and wanted someone else to do it. He would not say, "yes" when asked point blank if he could and would consider imposing the death penalty based on the evidence. "Instead, he continued to equivocate and said, `I would not want to put someone to death right now.'" (*People v. DePriest, supra*, 42 Cal.4th at p. 21.)

A third prospective juror in *DePriest,* B.T., disfavored the death penalty, but said he would try to suppress his feelings, and would not automatically reject death or ignore the evidence. However, he thought it was wrong for anybody, including himself as a juror, to take a life. Later, B.T. said his feelings had crystallized and he could not say the death penalty was morally appropriate in any case and would "almost always" vote against it. (*People v. DePriest, supra*, 42 Cal.4th at p. 21.)

This Court found the trial court's dismissal of these jurors for cause did not constitute an abuse of discretion. It explained:

> Though their responses were not uniform or absolute, all three of the foregoing jurors indicated they would have extreme difficulty imposing capital punishment, even in an appropriate case. "Those answers, in combination with the trial court's firsthand observations, could give rise to a definite impression that [their] views on the death penalty would substantially impair the performance of [their] duties." (*Lewis and Oliver, supra,* 39 Cal.4th 970, 1007.) We thus defer to the court's ruling sustaining the prosecution's challenges for cause.

(*People v. DePriest, supra,* 42 Cal.4th at p. 22.)

Here, as in *Griffin*, *Thomas*, and *DePriest*, the trial court's excusal of Prospective Juror E.J. did not constitute an abuse of discretion. In her questionnaire, E.J. stated that her religious organization did not have a stated position regarding the death penalty (28 CT 6090), that she would not "always vote against death," if Wall were found guilty of murder and a special circumstance were found true (28 CT 6112), and she believed that

mass murders who kill for political or financial gain should automatically receive the death penalty (28 CT 6113).

However, in court, E.J. indicated she would have extreme difficulty imposing capital punishment, even in an appropriate case. When the trial court asked if she had religious *feelings* about the death penalty, she responded, "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." (12 RT 3486.) She then repeatedly stated that, regardless of the evidence, she did not know if she was capable of voting for death. (12 RT 3485-3488, 3490-3491, 3496.)

The trial court had the opportunity to observe E.J.'s demeanor and to assess the degree of uncertainty and reluctance she possessed.[6] It resolved her equivocal and conflicting responses in a manner that caused the court to conclude E.J.'s views would substantially impair her ability to make a penalty determination in accordance with the court's instructions. There is no reason for this Court to second-guess that finding. Contrary to Wall's suggestion, the fact that at some point E.J. may have stated or implied that she could perform her duties as a juror did not prevent the trial court from finding, on the entire record, that she nevertheless held views that substantially impaired her ability to serve. (*See People v. Griffin, supra,* 33 Cal.4th at p. 561.)

Wall characterizes E.J.'s comments as meaning "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." (AOB 68.) He then cites to *People v. Pearson* (2012) 53

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[6] Wall argues that the trial court failed to take E.J.'s demeanor into account. (AOB 73-74.) The record does not support this assertion. Although the trial court did not expressly state it was doing so, it obviously did so by implication.

Cal.4th 306, in support of his position that excusal for cause of a juror who indicates he could impose the death penalty in an appropriate case is improper. (AOB 70-71.)

In *Pearson*, Prospective Juror C.O. stated that, *inter alia,* she had no general feelings about the death penalty, did not believe either death or life without parole should be mandatory in all murder cases, and she would have an "open mind" and no "pre-set feeling" as to which penalty to impose. (*People v. Pearson, supra*, 53 Cal.4th at pp. 328-329.)

On her questionnaire, she further said that she did not think the death penalty was cruel and unusual, but was uncertain whether she approved or disapproved of it. When asked what she meant by that, she explained, "I think with that answer, because I'm uncertain of how I really feel about the death penalty, unless I had everything presented in front of me, so I don't know what I really meant on that one." (*People v. Pearson, supra*, 53 Cal.4th at p. 329.)

Upon further questioning, C.O. stated 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. When asked if she was for or against the death penalty she responded, "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." (*People v. Pearson, supra*, 53 Cal.4th at p. 329.) Finally, when pressed by the prosecutor, she stated that she was positive she could vote for the death penalty (*Ibid.*)

This Court found the trial court improperly excused C.O. for cause. It explained:

> None of C.O.'s answers on the questionnaire or in voir dire suggested views that would substantially impair her ability to

> perform her duties by voting to impose the death penalty in an appropriate case. Her general views on the death penalty were vague and largely unformed, though she thought it sometimes served the purpose of deterrence and so should not be abolished. But on whether she could vote to impose it, her responses were definite and consistent. According to the questionnaire, she would not vote automatically for life in prison regardless of the evidence; she would not find it impossible to vote for death in every case; she could set aside whatever she had heard about the death penalty outside of court and decide defendant's punishment based only on the evidence at trial; and she was not a person who, while supporting the death penalty, could not vote to impose it. On voir dire, C.O. repeated several times that she could vote for death in an appropriate case. She never wavered on this point, and when the prosecutor expressed skepticism, C.O. reassured her, "I am positive that I could."

(*People v. Pearson, supra*, 53 Cal.4th at pp. 330-331.)

In this case, however, E.J. did not definitely and consistently say she could impose the death penalty in an appropriate case. When Mr. Thoma asked E.J. whether part of her problem in not being able to answer the question of whether she could impose the death penalty was that she had not seen the evidence, she responded, "No." (12 RT 3488.) The prosecutor then said he was going to just ask "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?" She responded, "That is correct." (12 RT 3496.) The prosecutor then clarified, "*Irrespective of the evidence*, as you sit here now, you don't know if you can do it." Again she responded, "That's correct." (12 RT 3496.) Accordingly, this case is not like *Pearson.*

As set forth above, E.J. expressed that she did not know if she could follow her oath to conscientiously consider the death penalty. Although she gave some inconsistent comments in her questionnaire, "[t]he trial court was in the best position to assess the juror's state of mind, based on her

conflicting responses, her demeanor, her vocal inflection and other nonverbal cues." (*People v. Wilson* (2008) 44 Cal.4th 758, 1055.) Accordingly, this Court must accept as binding the trial court's determination that E.J.'s views about capital punishment would prevent or substantially impair her ability to perform her duties as a juror.

III. WALL'S STATEMENTS TO THE POLICE WERE PROPERLY ADMITTED DURING HIS PENALTY PHASE

Wall contends his tape-recorded statements to police were improperly admitted during his penalty phase in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 7 and 15 of the California Constitution. He argues the statements were obtained through psychological coercion and improper inducement because he was told he could "go on with [his] life," and "be with [his] wife and child and start fresh," if he told the detectives what happened. (AOB 76-105.) Wall implicitly concedes that the trial court properly admitted the first two stories he told the police before the implied promise of leniency was made. The third and fourth stories were also properly admitted because, even assuming the detective implicitly promised leniency, any such promise was not a motivating factor in Wall's decision to keep talking. Indeed, even before the detective made the implied promise, Wall had already decided to tell a third story about being pressured into committing the crimes.

A. Wall's Statements to Law Enforcement Officers

1. The Two Stories Wall Told Before The Alleged Improper Promise Of Leniency

On March 17, 1992, at approximately 4:50 p.m., officers from the San Francisco Police Department contacted Wall as he was leaving the Department of Social Services office. They asked Wall if he would accompany them to the Hall of Justice for questioning by some officers

from another agency. (6 RT 1164-1165, 1193; 6 CT 1285.) He said, "Okay." (6 RT 1165; 15 CT 3179.) The officers told Wall that he was free to leave if he wished. He agreed to stay and was not restrained in any fashion during the five hours he waited for the San Diego detectives to arrive. (6 CT 1285-1286; 6 RT 1168, 1170, 1190-1191.) He was given food, beverages, and cigarettes, used the telephone twice, and went unescorted to the restroom at 6:30 p.m., 7:25 p.m., and 9:30 p.m. (6 CT 1286; 6 RT 1167-1170.)

Around 10:00 p.m., San Diego Police Detectives Terry Lange and Carl Smith arrived at the San Francisco Hall of Justice to interview Wall. (6 RT 1170-1171; 34 RT 10571; 15 CT 3174.) Wall acknowledged during the interview that he had come down to the station voluntarily. (15 CT 3174-3175.) The detectives told Wall that they were investigating some crimes which had occurred in San Diego. They explained that Wall was not under arrest because they were not sure what his involvement was in the offenses. (15 CT 3175.) The detectives read Wall his *Miranda* rights. He said he understood them and agreed to talk. (15 CT 3176.)

Initially, Wall denied knowing Rosenquist or being in Bakersfield where the Orens' car was found. (15 CT 3181-3183.) When it became clear the officers knew that Wall was connected to Rosenquist and the victims' car, Wall told a second story. He admitted knowing Rosenquist, but claimed that Rosenquist already had the car when he picked Wall up. Upon hearing that statement, one of the detectives suggested that they start over with a clean slate and Wall agreed. (15 CT 3183-3184.)

Wall explained that he and Rosenquist met in Salt Lake City, traveled together to San Francisco, went on a trip to Ensenada, and then returned to San Diego in early March. (15 CT 3184-3185.) In need of transportation and money, Rosenquist told Wall to wait by an on-ramp for the Interstate 5. Around 45 minutes to an hour later, Rosenquist came back

down the road in a tan colored Monarch and picked Wall up. Wall claimed he did not know the car was stolen. When he asked Rosenquist where it came from, Rosenquist said it was none of his business. The two drove up north and took a back road, where the car got stuck. Rosenquist lit the car on fire around 4:00 or 5:00 a.m. (15 CT 3186, 3188-3190, 3196-3197, 3200, 3207, 3210.)

Wall told the officers about walking through the mountains in the rain, coming across a forest ranger who gave them a ride to a motel, being allowed to stay at the motel without having to pay, and then returning to San Francisco the next morning. (15 CT 3186-3187, 3207-3208.) Wall claimed that Rosenquist had a wallet in the car and a lot of change in a black bag. (15 CT 3191, 3193.) Whenever Wall tried asking Rosenquist questions about the car, Rosenquist would get irate. (15 CT 3195.)

The detectives asked Wall why he had told them a "bullshit" story initially. He said that he did not want any problems, did not want to get arrested, and wanted to get back to his wife and child in Salt Lake City. (15 CT 3197, 3200-3201, 3212-3213.) The detectives then asked Wall what made him change his mind and decide to tell them what really happened. Wall replied, "Ah, 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." (15 CT 40.) *The detective suggested that they start clean again because he knew Wall was not telling the whole truth and that something probably happened with Rosenquist that Wall did not expect. Wall agreed, saying, "Yeah, he kind of pressured me into it and . . ."* (15 RT 3214-3215, emphasis added.)

2. The Alleged Implied Promise Of Leniency And Wall's Statements Thereafter

One of the detectives told Wall the following:

> 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?"

(15 CT 3215.)

Wall responded, "Okay. Can you promise me one thing?" Wall then explained, "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." (15 CT 3215-16.) The detective responded, "Well, here's how we take care of that. We take John [Rosenquist], we turn him over like that [presumably referring to his photograph] and then you don't have to worry about him any more. Okay?" (15 RT 3216.) The detective also told Wall not to worry about Rosenquist, that he sounded like a "bullshitter," and that the police would deal with him. (15 CT 3216.)

Wall continued on with his third story that Rosenquist pressured him and that "him and I both killed the grandma and grandpa of that household." (15 CT 3217.) Wall explained he had dated the Orens' granddaughter, Tammy Decker, in 1988 or 1989, and had stayed with her in a tent in the backyard of the Orens' house for two or three months. (15 CT 3217-3219.) Someone took money out of Mrs. Oren's purse or Mr. Oren's wallet. Wall and Tammy were accused of doing it and left. (15 CT 3219.)

On the day of the murders, Wall and Rosenquist rode the bus back from Ensenada to Tijuana and took a taxi from the bus station to the border.

They walked across the border and hopped onto a trolley, which took them into downtown around the Greyhound bus station. (15 CT 3220.) As they were walking up the road, Rosenquist started talking about getting a car and some money and really put pressure on Wall. Wall claimed he had previously told Rosenquist about the Orens on the way down to Mexico. Rosenquist asked if they had a car or money. (15 CT 3221.)

Wall claimed that Rosenquist planned it all out. He told Wall, "'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 then ah, get in and do these people in and take their car and money and . . . and take off.'" (15 CT 3222.) Wall told Rosenquist that he really did not want to do it, but Rosenquist started calling him a chicken and threatening to kill him if he did not do it. Rosenquist had Wall's buck knife. (15 CT 3222-2323.) Wall explained, "Ah I couldn't get any help from nobody so we went over and got in the house and killed 'em." (15 CT 3223.)

Wall described what happened as follows. They walked to the Orens' house, went into the backyard, and waited for them to go to sleep. (15 CT 3223, 3224.) Using two-by-fours from the backyard, they rammed the back door, breaking the chain. (15 CT 3224.)

The two of them went into John Oren's bedroom. Each of them had a metal stake, which they also had found in the backyard. Rosenquist had Wall's knife. Wall explained, "we beat the guy up and beat the girl up." (15 CT 3225-3227.) Wall claimed that John Oren was asleep on his bed, and Rosenquist beat him. During the assault, Mr. Oren fell to the ground and was having a hard time breathing. (15 CT 3228-3229.)

Rosenquist ran out of the room and towards Mrs. Oren's room. She was heavy set and blind, and was screaming, "What's going on?" Rosenquist clobbered her in the head with the stake. She fell back into the room, and Rosenquist hit her two or three more times. (15 CT 3229, 3232,

3234.) The little boy came out screaming "after the lady was down." Wall claimed that he took the boy into the room, shut the door, and kept him quiet. (15 CT 3230, 3232.) After about 10 minutes, Rosenquist came into the room and wanted to have sex with the boy. (15 CT 3230.) Rosenquist had previously told Wall he wanted to "fuck this little boy." When Wall told Rosenquist that was "really sick," Rosenquist threatened to kill Wall. Rosenquist asked Wall if he wanted to have sex with the boy too, but Wall said no. (15 CT 3236.) When Rosenquist came out of the little boy's room, he said he felt a lot better. (15 CT 3237.)

Rosenquist gave Wall three sets of keys, and Wall went out to start the car. (15 CT 3238.) Rosenquist told him to get into the passenger's side and they drove away. Wall claimed he was not in the house when Rosenquist found the money and the wallet. (15 CT 3238.) When Rosenquist came out of the house, he had quarters, dimes, nickels, and pennies in his black bag. (15 CT 3245.)

They stopped and got gas on the way up north. Wall paid for it and Rosenquist pumped it. Wall admitted that he signed John Oren's name for the transaction. (15 CT 3240.)

Wall claimed he never hit John Oren over the head and was not the one who slit his throat—Rosenquist was. Wall explained, "I didn't have my knife." (15 CT 3230.) Wall claimed that he did not know the Orens had been stabbed when he was in the house. (15 CT 3235.)

On March 18, 1992, at 7:29 a.m., the officers re-admonished Wall and interviewed him again. (15 CT 3250-3251.) This time, Wall told a fourth story. He said that he personally beat Mrs. Oren with the bar, and Rosenquist went to the boy. (15 CT 3252.) Wall said he was the one who broke the chain on the door and cut the telephone cord with his knife, which he now claimed Rosenquist had given him back before they went out the door. (15 CT 3252-3253.)

3. The Trial Court's Ruling on Wall's Motion to Suppress

The trial court ruled that Wall's statements were admissible because there was no causal connection between the detective's alleged promise and Wall's subsequent confession. (8 RT 1575-1577.)

B. The Detective's Promise of Leniency Was Not A Motivating Factor in Wall's Decision To Tell A Third And Fourth Story About His Involvement In The Offenses

The Fourteenth Amendment of the United States Constitution and article I, section 15 of the California Constitution require that a defendant's confession be voluntary before it can be admitted at trial. (*People v. Massie* (1998) 19 Cal.4th 550, 576; *People v. Neal* (2003) 31 Cal.4th 63, 79; *People v. Smith* (2007) 40 Cal.4th 483, 501.) Both state and federal courts apply a "totality of circumstances" test to determine voluntariness. (*People v. Massie, supra,* 19 Cal.4th at p. 576; *see also Withrow v. Williams* (1993) 507 U.S. 680, 688-689 [123 L.Ed.2d 407].) "In determining whether a confession was voluntary, '[t]he question is whether defendant's choice to confess was not 'essentially free' because his will was overborne.'" (*People v. Massie, supra,* 19 Cal.4th at p. 576, *quoting People v. Memro* (1995) 11 Cal.4th 786, 827.)

To make that determination, courts must look at the surrounding circumstances, including "the characteristics of the accused and the details of the interrogation." (*People v. Benson* (1990) 52 Cal.3d 754, 779; *People v. Vasila* (1995) 38 Cal.App.4th 865, 876 [noting characteristics of the accused include age, sophistication, emotional state, and prior experience with criminal justice system]; *see also People v. Williams* (1997) 16 Cal.4th 635, 660.) The details of the interrogation include its length, location, continuity, and any threats or direct or implied promises of leniency.

(*People v. Massie, supra,* 19 Cal.4th at p. 576; *People v. Williams, supra,* 16 Cal.4th at p. 660.)

A confession is involuntary when elicited by a promise of some benefit or leniency, whether express or implied, i.e. when the wrongful inducement and the defendant's statement are causally linked. (*People v. Holloway* (2004) 33 Cal.4th 96, 115; *People v. Maury* (2003) 30 Cal.4th 342, 404-405.) Thus, even if the police improperly convey a promise of leniency, that fact by itself does not necessarily render a confession involuntary. "[A]n improper promise of leniency does not render a statement involuntary unless, given all the circumstances, the promise was a motivating factor in the giving of the statement." (*People v. Vasila, supra,* 38 Cal.App.4th at p. 874; *People v. Linton* (2013) 56 Cal.4th 1146.)

When a challenge is mounted, the prosecution must prove the confession was voluntary by a preponderance of the evidence. (*e.g., Lego v. Twomey* (1972) 404 U.S. 477, 489 [92 S.Ct. 619, 30 L.Ed.2d 618]; *People v. Markham* (1989) 49 Cal.3d 63, 71). On appeal, the trial court's findings with respect to the circumstances surrounding the confession will be upheld if supported by substantial evidence. However, its finding with respect to the voluntariness of the confession is subject to independent review. (*People v. Massie, supra,* 19 Cal.4th at p. 576.)

Respondent will assume, for purposes of argument, that the detective's statements (that Wall could "go on with [his] life," and "be with [his] wife and child and start fresh," if he told the detectives what happened) constituted an improper promise of leniency. But even so assuming, this Court could only find Wall's subsequent confession involuntary if the implied promise was a motivating cause of Wall's decision to tell the third and fourth stories. The totality of the circumstances demonstrates that it was not.

Wall voluntarily waived his *Miranda* rights and agreed to speak with the officers *before* the detective made the implied promise of leniency. Wall initially denied knowing Rosenquist or ever traveling in the Orens' car. However, he changed his story when it became clear the detectives knew he was connected with the car and gave him an opportunity to start over. Wall admitted that he did in fact know Rosenquist. In this version of the story, Wall claimed Rosenquist just showed up with the car and Wall did not even know it was stolen.

The detectives asked Wall why he told them a "bullshit" story initially. He said that he did not want any problems, did not want to get arrested, and wanted to get back to his wife and child in Salt Lake City. (15 CT 3212-3213.) The detective asked what made Wall change his mind and decide to tell them what really happened. Wall replied, "Ah, 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." (15 CT 40.)

The detective suggested that they start clean again because they knew Wall was not telling the whole truth. The detective posited that something may have happened with Rosenquist that Wall did not expect. Wall responded, "Yeah, he kind of pressured me into it and . . ." (15 RT 3214-3215.) Thus, even before the detective made the implied promise of leniency, Wall had already decided to tell a third story about being pressured into committing the crimes. (See 8 RT 1568.) His change of story was in response to the detective's awareness of his involvement, and not any implied promise.

Moreover, the detective's implied promise of leniency registered virtually no reaction from Wall. In fact, Wall appeared not to have considered it at all. Wall immediately expressed concern, not about what legal consequences he would suffer if he kept talking, but about whether he

would be protected from Rosenquist. (15 CT 3215-16.) Wall did not try to make a deal in exchange for the truth or make any further reference to the detective's comments. (See *People v. Linton, supra,* 56 Cal.4th at p. 1177 [no evidence defendant relied on promise of leniency].)

At the end of the first 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?" Wall replied, "No." (15 CT 3247; 8 RT 1569.) Wall's response shows his state of mind, i.e. that he did not believe anyone made any promises about what would happen to him. (*People v. Jackson* (1980) 28 Cal.3d 264, 299, *disapproved on another ground in People v. Cromer* (2001) 24 Cal. 4th 889; *see also Haynes v. Washington* (1963) 373 U.S. 503, 512-513 [83 S.Ct. 1336; 10 L.Ed.2d 513].) Moreover, Wall did not express surprise that he was not allowed to go home to his wife and child at the end of the first or second interviews.

Contrary to Wall's contention, the detectives did not exploit Wall's claimed fear of Rosenquist. (AOB 76, 96.) (*See People v. Bradford* (1997) 14 Cal.4th 1005, 1041 [there must be governmental coercion that renders the confession involuntary].) They simply told Wall not to worry about Rosenquist, that they would take care of him, and that he sounded like a "bullshitter." (15 CT 3216.) It is a quite a stretch to suggest that amounted to exploitation.

Wall argues that his youth, inexperience with the criminal justice system, lack of education, mental state, and the length of the interrogation made him particularly vulnerable to the detective's deception. (AOB 90-98.) Not so. Wall was 23 years old at the time of the interview. (15 CT 3177.) He had prior experience with the criminal justice system, including

a prior conviction in Indiana for possession of cocaine and prior offenses involving driving under the influence.[7] He did not appear to be on drugs, have any psychological problems, nor was he particularly emotional. (15 CT 3175-3176; 34 RT 10713.) Thus, although his grades suggest he had a lack of interest in school, a problem testing, or a learning disability (8 RT 1539-1549), his personal characteristics weigh in favor of, rather than against, a finding of voluntariness. (*See People v. Linton, supra,* 56 Cal.4th 1178-1179 [despite defendant being 20 years old, still living with parents, not employed, having history of learning disabilities requiring special education, no experience with criminal justice system, Court found no indication law enforcement exploited his personal characteristics to procure confession]; *People v. Farnam* (2002) 28 Cal.4th 107, 182 [although the 18-year-old defendant "was emotional when interviewed" by police, there was "no indication he felt intimidated" during interview]; *People v. Higareda* (1994) 24 Cal.App.4th 1399, 1409 ["appellant 'appeared calm,' not frightened or scared" during police interview].)

The conditions of his interview also weigh in favor of a finding of voluntariness. Although Wall waited at the Hall of Justice for five hours for the detectives to arrive from San Diego, he was told he was free to leave, was given food, beverages, and cigarettes, and went unescorted to the restroom three times. (6 CT 1286; 6 RT 1167-1170.)

The first interview lasted only an hour and thirty-eight minutes (15 CT 3174, 3248) and the second was extremely brief, taking up only 4 ½ pages of transcript (15 CT 325-3254). This harldly reflects the kind of continuous, prolonged interrogation that has been found to render a

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[7] It appears Wall was also arrested numerous times for such crimes as burglary, thefts, assault, petty larceny, criminal mischief, and possession of drug paraphernalia. (11 CT 2364-2365.)

confession involuntary. (*See People v. Linton, supra,* 56 Cal.4th at p. 1178.) Moreover, during both interviews, the demeanor of the detectives was even-handed and conversational. (*See People v. Benson, supra,* 52 Cal.3d at p. 780.)

Thus, the record belies any suggestion that Wall's personal characteristics or the conditions of the interview made him so vulnerable to deception that he would believe he would walk out of the police station, if he just admitted killing the Orens. (8 RT 1569.) Accordingly, as the trial court found, regardless of the propriety of the detective's statements, they simply do not appear to have been a motivating cause behind Wall's subsequent confession. Because Wall's confession was "the product of a rational intellect and a free will," the trial court properly denied Wall's motion to suppress, and his statements were properly admitted during the penalty phase. (8 RT 1573-1577; 16 CT 3463.)

C. Any Error in Admitting Wall's Statements Was Harmless

As the trial court noted during sentencing, the circumstances of the crimes were the dominant factor that supported the death penalty. (See 35 RT 11049.) Even without Wall's statements in the challenged portion of the interview, the jury knew this was a particularly egregious case. The Orens, who were extremely vulnerable (due to their advanced age, Katherine's near blindness, and the fact that they were in their own home asleep), had their throats slashed, were beaten with a metal bar, and were stomped on until their ribs cracked.

The evidence showed Katherine Oren had accused Wall of stealing from her and had threatened to slash his throat. (21 RT 5503.) Thus, this was not just a senseless robbery and a burglary committed so Wall and Rosenquist could make their way back to San Francisco, it was also an act of vengeance by Wall against an innocent couple who had previously shown him kindness by allowing him to stay at their home.

Wall contends that "[t]he 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." (AOB 101.) He also argues that the evidence against him was weak. (AOB 105.) Wall fails to consider the record and procedural history of this case. Wall pled guilty and therefore admitted his participation in the first degree murders of Katherine and John Oren (counts 1 and 2; Pen. Code, § 187, subd. (a)); the residential robbery (count 3; Pen. Code, §§ 211/212.5, subd. (a)); the residential burglary (count 4; Pen. Code, §§ 459/460); the conspiracy to commit residential burglary (count 8; Pen. Code, § 182, subd. (a)(1)); and the conspiracy to commit residential robbery (count 9; Pen. Code, § 182, subd. (a)(1)). He also admitted four special circumstances --multiple murder, murder in the commission of a first degree burglary, murder in the commission of a residential robbery, and murder committed after lying in wait. (17 RT 4317-4362; 26 RT 6365; 13 CT 2747-2751; 16 CT 3413-3414, 3513.)

Even without the taped confession, the evidence showed Wall was the leader and instigator in the offenses. He was the one who stomped on Mr. Oren's ribs, as evidenced by bloody footprints on Mr. Oren's pajamas, which were consistent with Wall's shoes. (18 RT 4710; 21 RT 5268, 5378-5390.) Moreover, as the jury found without even hearing the challenged portion of the confession, Wall *personally* used a stake in the murder of Katherine Oren and personally used either a knife or a stake in the commission of the robbery and the burglary. (28 RT 6797-6798; 13 CT 2896-2899; 16 CT 3413-3414, 3569-3570.) Indeed, Josh specifically stated that Rosenquist was in the room molesting him when he heard his grandmother scream. (22 RT 5573-5574.)

Further, Wall was the one who had a motive to commit these crimes (to seek revenge for Katherine kicking him out of the house, accusing him

of stealing from her, and threatening to slash his throat) and who obviously chose these particular victims (Rosenquist had no independent knowledge of their existence). (21 RT 5503.) Wall was also the one who used Mr. Oren's credit card when they stopped for gas on the way back to San Francisco. (20 RT 5000, 5016-5017, 5022; 22 RT 5678.)

Moreover, Wall showed absolutely no remorse for his actions, as evidenced by the unchallenged portion of his statements to police and his statements to other inmates. (See e.g. 20 RT 5167; 24 RT 5903 [inmate Fitzgerald overheard Wall say he had already killed a couple people and did not mind killing again].)

In fact, the jury learned very little from the challenged portion of Wall's interview with police that it did not already know. The jury learned only that: (1) Wall had advance knowledge Rosenquist was going to molest Josh; (2) Wall was in possession of a knife before he left the Orens' house, which allowed him to cut the telephone cord; and (3) Wall was the person who broke the chain on the back door. (15 CT 3230, 3236, 3252-3253.)

Moreover, Wall's challenged statements benefitted his defense because they provided corroboration for his guilt phase theme that he was pressured by Rosenquist into committing the offenses. (See e.g. 15 CT 3222-2323.)

Thus, even if the challenged portion of Wall's interview had been excluded, the jury still would have imposed the death penalty. Therefore, any error in admitting the challenged statements was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 23; *People v. Neal, supra,* 31 Cal.4th at p. 86; *see also Arizona v. Fulminante* (1991) 499 U.S. 279, 296-297 [111 S.Ct. 1246; 113 L.Ed.2d 302].)

IV. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF WALL'S EARLY CONDITIONAL OFFER TO PLEAD GUILTY IN EXCHANGE FOR A SENTENCE OF LIFE WITHOUT PAROLE

Wall contends the trial court prejudicially erred by excluding evidence at the penalty phase of his early offer to plead guilty in exchange for a sentence of life without parole. He argues the exclusion of this proffered mitigation evidence to show early acceptance of responsibility and concern for Josh Dooty's welfare, violated the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution. (AOB 106-114.) The jury already knew Wall confessed to the police shortly after his arrest and that he pled guilty to most of the charges prior to trial. The defense was not precluded from relying upon that evidence in mitigation in an effort to show acceptance of responsibility, remorse, or concern for Josh's welfare. Wall's early *offer* to plead guilty, conditioned upon his receipt of a life without parole sentence, was cumulative and had little to no mitigating value because it tended to show an intent to avoid the death penalty rather than acceptance of responsibility, remorse, or a concern for Josh. Therefore, the trial court properly excluded the proffered evidence. (See 33 RT 10477-10500.)

The 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* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973].) Nothing in the high court's decision in *Lockett*, however, limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense. (*Id.* at p. 604, fn. 12.) Moreover, the United States Supreme

Court has never suggested that a state court is precluded from applying ordinary rules of evidence to determine whether such evidence is admissible. (*People v. Edwards* (2013) 57 Cal.4th 658, 759; *People v. Weaver, supra,* 26 Cal.4th at pp. 980-981.)

In excluding the proffered evidence in this case, the trial court applied Evidence Code section 352, which provides that a trial court may, in its discretion, exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*Ibid.*)

> While the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. [Citations.] Plainly referring to rules of this type, we have stated that the Constitution permits judges "to exclude evidence that is 'repetitive . . ., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" [Citations.]

(*Holmes v. South Carolina* (2006) 547 U.S. 319, 326-327 [26 S.Ct. 1727, 164 L.Ed.2d 503].)

It appears well settled under *Lockett*, that an *unconditional* offer to plead guilty prior to trial may be relevant to a defendant's character, because it tends to show acceptance of responsibility and remorse. However, the cases are mixed on whether an offer to plead guilty conditioned upon receipt of a life sentence (rather than death) is relevant mitigating evidence under *Lockett*. Several courts have found such conditional offers are not relevant because they tend to show an intent to avoid the death penalty rather than an acceptance of responsibility or

remorse. Other cases have found evidence of conditional offers relevant, but their exclusion harmless beyond a reasonable doubt.

In *People v. Alfaro* (2007) 41 Cal.4th 1277, the defendant, like Wall, argued the trial court committed prejudicial error by refusing to admit evidence of her early offer to plead guilty in exchange for a sentence of life without parole to show remorse and a willingness to take responsibility for her criminal behavior. The prosecutor argued that although an offer of an *unconditional* guilty plea would be relevant mitigating evidence, an offer conditioned upon receipt of life without parole would not be. (*Id.* at p. 1305.)

This Court found that Alfaro waived her claim on appeal by not seeking to present evidence of her earlier conditional plea offer at her penalty retrial. It also held that the claim failed on the merits because there was no reasonable possibility the outcome would have been different had the trial court admitted the evidence of the conditional offer to plead guilty. (*People v. Alfaro, supra,* 41 Cal.4th at p. 1306; see also *People v. Williams* (1998) 45 Cal.3d 1268, 1332, fn. 9 [this Court stated in dictum that an offer to plead guilty might be admissible as mitigating evidence in the penalty phase of a capital case *if* it tends to demonstrate remorse].)

In *Owens v. Guida* (6th Cir. 2008) 549 F.3d 399, the petitioner argued the Supreme Court of Tennessee unreasonably applied clearly established federal law (*Lockett*) when it excluded evidence that the state had offered, and Owens had initially accepted, an offer of a life sentence in exchange for a guilty plea. (*Id.* at pp. 418-422.) The Sixth Circuit disagreed, explaining that Owens' proffered evidence was not relevant to her character because it showed no acceptance of responsibility. She did not offer to plead guilty unconditionally. Instead, she agreed to enter a plea only if she received a life sentence in return.

> Offering an unconditional guilty plea . . . would not have been volunteering for death or accepting the *lex talionis*. It simply would have accepted responsibility, and her punishment then would have been in the hands of the jury, just as it ultimately was. Thus, she was less interested in accepting responsibility and more interested in avoiding the electric chair, a motivation that is much less persuasive as a mitigating factor.

(*Owens v. Guida, supra*, 549 F.3d at p. 420; *accord Wright v. Bell* (6th Cir. 2010) 619 F.3d 586, 598-600.)

In *Johnson* v. *United States* (N.D. Iowa 2012) 860 F.Supp.2d 663, the defendant alleged that her trial counsel rendered ineffective assistance by failing to introduce her offers to plead guilty in exchange for a life sentence as evidence in mitigation. (*Id.* at pp. 899-900.) The Ninth Circuit found that although trial counsel performed deficiently in failing to introduce the evidence, the defendant did not suffer prejudice because: (1) the prosecution would likely have argued the defendant only offered to plead guilty in exchange for a life sentence because she was faced with overwhelming evidence of guilt; (2) when the prosecution refused to accept her conditional offer, she could have pleaded unconditionally, but did not; (3) her earlier offers to plead guilty lacked sufficient detail to demonstrate a genuine attempt to take responsibility; (4) her last two offers were so close to trial that they looked like little more than an attempt to avoid a death sentence in the face of overwhelming evidence of guilt; (5) her offers did not suggest remorse and nothing else in the record did either; and (6) a mitigation phase defense based on the defendant's willingness to plead guilty in exchange for life imprisonment would have been so contrary to her defense on the merits as to risk a further inference that the offers to plead guilty were just ploys to avoid a death sentence, not genuine expressions of remorse or acceptance of responsibility. (*Id.* at pp. 904-905.)

Similarly here, Wall's early *conditional* offer to plead guilty (See e.g. 3 CT 361, 382; 8 CT 1665; 3 RT 17, 115) was not relevant to his character under *Lockett* because it showed only an acknowledgement that the evidence against him was overwhelming and a desire to avoid the death penalty, not an acceptance of responsibility or a concern for Josh's well being. If his concern for Josh were genuine and he truly desired to accept responsibility, he would have pled guilty unconditionally and let the jury decide whether to impose life imprisonment or death. Moreover, the record contains no evidence that his offer to plead guilty was in fact based on concern for Josh Dotty.

To the extent the early offer evidence had any relevance to show Wall's desire to accept responsibility, the trial court properly excluded it under Evidence Code section 352. As set forth above, its mitigating value, if any, was infinitesimally small. Moreover, the evidence had the potential for confusion, as the trial court noted, because it could cause the jury to spend their time second-guessing the prosecutor's motivation for not accepting the offer, instead of focusing on its assessment of the mitigating and aggravating factors. (See 33 RT 10492, 10496-10498.) Also, the conditional offer was cumulative to evidence already before the jury suggesting Wall took measures which arguably showed he had a desire to accept responsibility for his actions (he confessed to the police shortly after his arrest and pled guilty to most of the charges prior to trial). (35 RT 10891-1092, 10906, 10909, 10919, 10929-10930, 10933; 16 CT 3514.)

In any event, the alleged error in excluding the proffered evidence was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031-1032 ["error which results in the exclusion of potentially mitigating evidence is federal constitutional error"]; *see also People v. Brown* (2003) 31 Cal.4th 518, 576.) Again, the jury already knew Wall had confessed to police

shortly after his arrest and had pled guilty to most of the charges prior to trial. The defense argued that these were factors in mitigation the jury could consider. (35 RT 10891-1092, 10919, 10929-10930, 10933.) The evidence of his *early conditional offer* to enter a plea was cumulative.

Moreover, as in *Johnson*, if the evidence had been admitted, the prosecutor undoubtedly would have argued to the jury that Wall only offered to plead guilty in exchange for a life sentence because he was faced with overwhelming evidence of guilt and wanted to avoid the death penalty. Additionally, the prosecutor could have argued that when he rejected Wall's conditional offer to plead guilty, Wall could have entered an unconditional guilty plea, but did not. Therefore, the exclusion of the evidence was harmless beyond a reasonable doubt.

V. CALIFORNIA'S DEATH PENALTY SCHEME DOES NOT VIOLATE THE FEDERAL CONSTITUTION

Wall raises several routine challenges to California's capital-sentencing scheme, which he acknowledges this Court has repeatedly rejected. He raises the claims solely to preserve them for federal review. (AOB 115-131.) None of these claims has merit.

The list of special circumstances qualifying a first degree murder for capital sentencing under Penal Code section 190.2 is not impermissibly broad. (*People v. Pearson* (2013) 56 Cal.4th 393, 477; *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 333; *People v. Michaels* (2002) 28 Cal.4th 486, 541; *People v. Catlin* (2001) 26 Cal. 4th 81, 179; *People v. Jenkins* (2000) 22 Cal.4th 900, 1050 [rejecting Fifth, Sixth, Eighth, and Fourteenth Amendment claims].) (See AOB 115-116.)

Penal Code section 190.3, factor (a), permitting the jury to consider the "circumstances of the crime" as a factor in aggravation or mitigation of penalty, is not so broad that it makes imposition of a death sentence

arbitrary and capricious. (*People v. Souza* (2012) 54 Cal.4th 90, 142; *People v. Brasure* (2008) 42 Cal.4th 1037, 1066; AOB 116-118.)

The death penalty statute does not run afoul of *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435] and its progeny by failing to require the jury to make findings beyond a reasonable doubt: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; or (3) that death was the appropriate punishment. (*People v. Lightsey* (2012) 54 Cal.4th 668, 731; *People v. Blair* (2005) 36 Cal.4th 686, 753; *People v. Prieto* (2003) 30 Cal.4th 226, 263; AOB 118-120.)

Further, because the penalty decision "is inherently normative, not factual," the jury need not be instructed "regarding the existence or absence of a burden of proof regarding its determination of the appropriate sentence." (*People v. Lightsey, supra*, 54 Cal.4th at 731; *People v. Moore* (2011) 51 Cal.4th 386, 415; AOB 120-121.)

The jury was "not required to reach a unanimous verdict or issue a written verdict regarding the existence of aggravating factors." (*People v. Lightsey, supra*, 54 Cal.4th at 731; *People v. Prieto, supra*, 30 Cal.4th at p. 275; AOB 122-123.) Section 190.3, factor (b), which allows a capital sentencer to consider unadjudicated criminal activity as an aggravating factor, does not violate the Fifth, Sixth, Eighth, or Fourteenth Amendments. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585; *People v. Barnett* (1998) 17 Cal.4th 1044, 1178.) Moreover, the jury "may properly consider evidence of unadjudicated criminal activity involving force or violence under factor (b) of section 190.3 and need not make a unanimous finding on factor (b) evidence." (*People v. Ward* (2005) 36 Cal.4th 186, 221-222; AOB 123-124.)

Use of the phrase "so substantial" in CALJIC No. 8.88 (jurors "must be persuaded that the aggravating circumstances are so substantial in

comparison with the mitigating circumstances that it warrants death instead of life without parole") does not render the instruction impermissibly vague. (*People v. Abel* (2012) 53 Cal.4th 891, 943; *People v. Lomax* (2010) 49 Cal.4th 530, 595; AOB 124-125; 15 CT 3351.)

Because CALJIC No. 8.88 told the jury that death could be imposed only if it found that aggravation outweighed mitigation, it was unnecessary for the court to instruct the jury that life without parole had to be imposed if the mitigating circumstances outweighed the aggravating circumstances. As this Court has held,

> The instruction [given to the jury] clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating. There was no need to additionally advise the jury of the converse (i.e., that if mitigating circumstances outweighed aggravating, then life without parole was the appropriate penalty).

(*People v. Duncan* (1991) 53 Cal.3d 955, 978.) (See AOB 125-126.)

Wall was not entitled to an instruction on a "presumption of life." (*People v. Streeter* (2012) 54 Cal.4th 205, 268; *People v. McKinnon* (2011) 52 Cal.4th 610, 698.) (AOB 121, 126-127.)

Written findings disclosing the aggravating and/or mitigating factors relied upon by the jury and/or the reasons for the jury's penalty verdict are not constitutionally required. (*People v. Beames* (2007) 40 Cal.4th 907, 934; *People v. Cook* (2006) 39 Cal.4th 566, 619; *People v. Jurado* (2006) 38 Cal.4th 72, 144; *People v. Jones* (2003) 29 Cal.4th 1229, 1267.) (AOB 127-128.)

The use of adjectives such as "extreme" and "substantial" in the list of potential mitigating factors set forth in Penal Code section 190.3, subdivisions (d) and (g), do not act as barriers to the meaningful consideration of mitigation evidence in violation of the Fifth, Sixth, Eighth

and Fourteenth Amendments. (*People v. Eubanks* (2011) 53 Cal.4th 110, 153; *People v. Brasure, supra,* 42 Cal.4th at p. 1068.) (AOB 128.)

The trial court was not required to delete inapplicable sentencing factors from CALJIC No. 8.85. (*People v. Streeter, supra,* 54 Cal.4th at p. 268; *People v. Cook, supra,* 39 Cal.4th at p. 618.) (AOB 128-129.)

The trial court's failure to advise the jury that certain sentencing factors could only be considered mitigating did not violate state law or Wall's constitutional rights. (AOB 129-130.) This Court has repeatedly found no error in this regard:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider 'whether or not' certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. [Citations.] Indeed, "no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors."

(*People v. Morrison* (2004) 34 Cal.4th 698, 730; *see also People v. Jurado, supra,* 38 Cal.4th at p. 143; *People v. Moon, supra,* 37 Cal.4th at pp. 41-42.)

The failure to conduct intercase proportionality review does not violate the Fifth, Sixth, Eighth, our Fourteenth Amendments. (*People v. Streeter, supra,* 54 Cal.4th at p. 268; *People v. McKinnon, supra,* 52 Cal.4th at p. 698; *People v. Foster* (2101) 50 Cal.4th 1301, 1368; *see also Pulley v. Harris* (1984) 465 U.S. 37, 50–51 [104 S.Ct. 871, 79 L.Ed.2d 29].) (See AOB 130.)

Because capital defendants are not similarly situated to noncapital defendants, the Equal Protection Clause did not require that Wall receive the same procedural rights as noncapital defendants. (*People v. McKinnon, supra,* 52 Cal.4th at p. 698; *People v. Lee* (2011) 51 Cal.4th 620, 653;

People v. Redd (2010) 48 Cal.4th 691, 758; *People v. Martinez* (2010) 47 Cal.4th 911, 968.) (AOB 130-131.)

International law does not prohibit a sentence of death where, as here, it was rendered in accordance with state and federal constitutional and statutory requirements. (*People v. Blacksher* (2011) 52 Cal.4th 769, 849 [rejecting claim "again"]; *People v. McKinnon, supra,* 52 Cal.4th at p. 698; *People v. Gonzales and Soliz, supra,* 52 Cal.4th at p. 334.) (AOB 131.)

California does not impose the death penalty as a regular form of punishment as Wall contends. (AOB 31.)

> "The death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true; furthermore, administration of the penalty is governed by constitutional and statutory provisions different from those applying to 'regular punishment' for felonies. (E.g., Cal. Const., art. VI, § 11; §§ 190.1-190.9, 1239, subd. (b).)"

(*People v. Doolin* (2009) 45 Cal.4th 390, 456, *quoting People v. Demetrulias* (2006) 39 Cal.4th 1, 44.) (AOB 31.)

VI. WALL HAS NOT ESTABLISHED CUMULATIVE ERROR

Wall contends the cumulative effect of the trial court's errors undermines the integrity of his guilt and penalty phase proceedings and warrants reversal of his conviction and death sentence. (AOB 132-133.) Wall, however, has not established any errors. Even if error is assumed, he has shown no prejudice. Therefore, his contention necessarily fails. (*People v. Abilez* (2007) 41 Cal.4th 472, 523.)

VII. WALL FORFEITED HIS CHALLENGE TO THE TRIAL COURT'S ALLEGED FAILURE TO CONSIDER HIS INABILITY TO PAY A $10,000 RESTITUTION FINE; *APPRENDI* HAS NO APPLICATION TO THE INSTANT RESTITUTION FINE; WALL HAS PROVIDED NO AUTHORITY FOR THE PROPOSITION THAT HIS RESTITUTION FINE MUST BE STAYED PENDING FINALITY OF HIS APPEAL

Wall contends that under *People v. Vieira* (2005) 35 Cal.4th 264, this Court should remand the matter to the trial court for reconsideration of his $10,000 restitution fine because the trial court failed to consider his inability to pay that amount. Relying upon *Apprendi v. New Jersey, supra,* 530 U.S. at p. 490, he further contends that the trial court's imposition of a restitution fine greater than the statutory minimum violated his rights to a jury trial and to due process. Wall also argues that his restitution fine should be stayed pending finality of his appeal. (AOB 134-140.) Wall forfeited his challenge to the trial court's alleged failure to consider his inability to pay. *Apprendi* has no application to the instant restitution fine. Finally, Wall has provided no authority for the proposition that his restitution fine must be stayed pending finality of his appeal.

A. Wall Forfeited His Challenge To The Trial Court's Alleged Failure To Consider His Inability To Pay

A statutory amendment that makes the punishment for a crime more burdensome cannot be applied to a defendant whose offense was committed before the effective date of the amendment. However, where the amendment makes the punishment less burdensome, and there is no saving clause, the amendment will operate retroactively so that the lighter punishment can be imposed. (*People v. Vieira, supra,* 35 Cal.4th at pp. 305-306; *People v. Saelee* (1995) 35 Cal.App.4th 27, 30.)

On March 1, 1992, when Wall committed the instant offenses, Penal Code section 1202.4, subdivision (a), provided that a restitution fine "shall be ordered regardless of the defendant's present ability to pay," and former Government Code section 13967, subdivision (a), set the fine at a range from $ 100 to $ 10,000. (Gov. Code, § 13967, as amended by Stats. 1991, Ch. 657, § 1; Penal Code, § 1202.4, as amended by Stats. 1990, Ch. 45, § 4; *People v. Saelee, supra,* 35 Cal.App.4th at p. 30.) The current restitution statute, however, provides that when imposing a fine in an amount greater than the statutory minimum, the trial court may consider a defendant's "inability to pay." (Pen. Code, § 1202.4, subd. (c).)

"[T]he addition of ability to pay language is an ameliorative change which, instead of making more burdensome the punishment of the restitution fine, benefits the defendant." (*People v. Saelee, supra,* 35 Cal.App.4th at p. 30, *internal quotations omitted.*) "If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, . . . it, and not the old statute in effect when the prohibited act was committed, applies." (*People v. Vieira, supra,* 35 Cal. 4th at p. 305, *internal quotations omitted.*) In other words, a defendant is generally entitled to benefit from amendments, like the amendment in Penal Code section 1202.4, subdivision (c), that become effective while his case is on appeal. (*Ibid.*)

In *Vieira,* the defendant argued that his $5,000 restitution fine imposed under former Penal Code section 1202.4 and former Government Code section 13967, subdivision (a), should be reduced to the statutory minimum. He explained that although the statutes in effect at the time he was sentenced did not require the trial court to consider his ability to pay, there was an amendment to section 13967, subdivision (a), after he was sentenced (effective September 14, 1992), which added language stating that the imposition of the restitution fine was "subject to the defendant's

ability to pay." Vieira argued that he had no ability to pay any amount over the statutory minimum and was entitled to benefit from the amendment. (*People v. Vieira, supra,* 35 Cal.4th at p. 305 & fn. 14.)

This Court explained that Vieira was not entitled to benefit from the 1992 amendment because it was repealed in 1994. However, he was entitled to benefit from subsequent amendments that became effective while his case was on appeal. Therefore, his case was remanded to the trial court "for reconsideration of the question of a restitution fine under the currently applicable statute." (*People v. Vieira, supra,* 35 Cal.4th at pp. 305-306.)

Wall contends he also is entitled to remand for reconsideration of his restitution fine under the current version of Penal Code section 1202.4, subdivisions (c) and (d), which require consideration of his ability to pay. (AOB 134.) Wall forfeited this claim on appeal.

People v. Avila (2009) 46 Cal.4th 680, is instructive. In *Avila*, the trial court imposed a $10,000 restitution fine without considering the defendant's ability to pay any amount above the statutory minimum. At the time his crimes were committed, former section 1202.4, subdivision (a), did not require the trial court to consider his ability to pay. In 1999, however, when the defendant was sentenced, section 1202.4 did allow such consideration. Defendant Avila did not assert in the trial court that he should benefit from the ameliorative effect of this amendment. This Court found that defendant Avila forfeited the issue on appeal. (*People v. Avila, supra,* 46 Cal.4th at pp. 728-29.) It explained:

> Had defendant brought his argument to the court's attention, it could have exercised its discretion and considered defendant's ability to pay, along with other relevant factors, in ascertaining the fine amount.

(*People v. Avila, supra,* 46 Cal.4th at p. 729.)

When Wall was sentenced on January 31, 1995, Penal Code section 1202.4, subdivision (d), contained language requiring the trial court to consider a defendant's ability to pay. (Pen. Code, § 1202.4, as amended by Stats. 1994, Ch. 1106, § 3.35 ["In setting the amount of the fine pursuant to subdivision (b) in excess of the two hundred dollar ($ 200) or one hundred dollar ($ 100) minimum, the court shall consider any relevant factors including, but not limited to, the defendant's ability to pay, . . ."]; RT 11055.) Had Wall, like Avila, brought this argument to the trial court's attention, it could have exercised its discretion and considered his ability to pay in ascertaining the fine amount. Accordingly, Wall, like Avila, forfeited the instant claim on appeal. Therefore, he is not entitled to have his case remanded. (*People v. Avila, supra,* 46 Cal.4th at p. 729.)

B. *Apprendi* is Not Applicable To The Restitution Fine Imposed In This Case

Wall contends that under *Apprendi* and its progeny, the trial court's imposition of a restitution fine violated his rights to a jury trial and to due process. (AOB 138-139.) He is wrong.

> In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435] (*Apprendi*), the United States Supreme Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." As the United States Supreme Court explained in *Blakely v. Washington* (2004) 542 U.S. 296, 303 [159 L. Ed. 2d 403] . . . : "[T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (Some italics omitted.) Stated differently, '[T]he relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.' [Citation.] Therefore, in sentencing a defendant, a judgment may not

'inflict[] punishment that the jury's verdict alone does not allow.' [Citation.]

(*People v. Kramis* (2012) 209 Cal.App.4th 346, 349-352; *People v. Urbano* (2005) 128 Cal.App.4th 396, 405-406.)

Penal Code section 1202.4, subdivision (c), provides:

> 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.

In a somewhat confusing argument, Wall contends that a restitution fine increases the penalty for capital murder beyond death or life imprisonment without parole and that, in order to impose the fine, a jury must find there are no extraordinary and compelling circumstances for not doing so. (AOB 138.)

However, as explained in *People v. Kramis, supra,* 209 Cal.App.4th at pp. 349-352, and *People v. Urbano, supra,* 128 Cal.App.4th at pp. 405-406, *Apprendi* and its progeny do not apply where, as here, the conviction makes the defendant eligible for a restitution fine and the trial court exercises its discretion and imposes a fine within the range authorized by statute. (*Ibid.; see also Apprendi, supra,* 530 U.S. at p. 481.)

At the time of Wall's offense (March 1992), former Government Code section 13967, subdivision (a), set the fine at a range from $ 100 to $ 10,000. (*See People v. Vieira, supra,* 35 Cal.4th at p. 305 & Fn. 14.) Wall's $10,000 fine is within the range authorized by statute. Accordingly, *Apprendi* is inapplicable.

C. Wall Has Provided No Authority For The Proposition That His Restitution Fine Must Be Stayed Pending Finality Of His Appeal

Wall contends that his restitution fine should be stayed pending the finality of his appeal. (AOB 139-140.) Respondent disagrees.

The trial court ordered that payment of the restitution fine be implemented as provided by section 2085.5 (35 RT 11055), which permits the Secretary of the Department of Corrections and Rehabilitation to deduct a percentage of a prisoner's wages and trust account deposits to pay a restitution fine. Wall provides absolutely no authority for the proposition that restitution fines should, or even can be, stayed pending finality of appeal. Accordingly, his contention should be rejected.

CONCLUSION

For the foregoing reasons, respondent respectfully requests the judgment be affirmed in its entirety.

Dated: November 18, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 25,794 words.

Dated: November 18, 2013

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Randall Clark Wall**
No.: **S044693**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On November 19, 2013, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 19, 2013, at San Diego, California.

M. Torres-Lopez
Declarant

M. Torres-Lopez
Signature

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