No. S044693

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY BRIEF

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

HONORABLE BERNARD E. REVAK, JUDGE (RET.)

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INTRODUCTION

As explained in appellant's opening brief, appellant's trial was unusual in several respects that frame his claims on appeal. First, when appellant was assaulted in a courthouse holding cell, the court continued with jury selection in his absence, without ensuring that appellant had knowingly and intelligently waived his right to be present at this critical stage.

Second, recognizing the doubtful admissibility of appellant's confession, at the guilt phase the prosecutor played only the first portion of appellant's tape-recorded statement to the police, stopping short of his confession, then played the entire tape at the penalty phase, along with a second taped interview in which appellant further incriminated himself. Appellant's confession was in fact coerced by the promise that he could go

home to his wife and young daughter if he told them what happened.

Third, the trial court erroneously excluded evidence of appellant's early offer to plead guilty in exchange for a sentence of life imprisonment without possibility of parole, citing Evidence Code section 352, even though the conditional offer was relevant mitigating evidencing of appellant's acknowledgment of wrongdoing and willingness to accept responsibility, was not cumulative of his later actual guilty plea, and posed little or no risk of confusing the jury.

Finally, the court erroneously excused prospective juror Evelyn Johnson – whose statement that she was not sure she could impose the death penalty, read in the context of her other questionnaire and voir dire responses, including her unambiguous statements that she would consider both penalties – shows only that she would have difficulty voting for death and would need to hear the evidence before she could decide whether death was the appropriate penalty in this case.

The violation of appellant's constitutional and statutory right to be present during jury selection warrants reversal of the entire judgment. The erroneous admission of appellant's confession, exclusion of the evidence of his plea offer, and dismissal of prospective juror Johnson for cause, individually and cumulatively, warrant reversal of the death sentence.

In this brief, appellant demonstrates that respondent's counter arguments are unsupported by the record or unsupported by the law or both. Appellant addresses specific contentions made by respondent where necessary in order to present the issues fully to the Court. Appellant does not reply to those of respondent's contentions that are fully addressed in appellant's opening brief. Appellant's failure to reply to any specific contention or allegation made by respondent, or to reassert any particular

point made in appellant's opening brief, does not constitute a concession, abandonment or waiver of the point (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1064-1065), but rather reflects appellant's view that the issue has adequately been presented and is fully joined.

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ARGUMENT

I.

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

A. Introduction

Appellant was absent during key portions of jury selection – the sequestered *Hovey* voir dire of six prospective jurors, one of whom served on the jury, the exercise of peremptory challenges, and the swearing of the jury – because of the physical injuries and mental impairment he suffered when assaulted in a courthouse holding cell. He did not sign a written waiver of his right to be present, as required by statute, and did not orally make a valid waiver of his right to be present. By nonetheless proceeding in appellant's absence, the trial court violated his constitutional and statutory right to be present at a crucial stage of the proceedings. Because the error cannot be deemed harmless under any standard, the judgment must be reversed in its entirety.

Respondent opposes the claim on three grounds, arguing (1) that appellant validly waived his presence for the completion of *Hovey* voir dire on August 5, 1994, shortly after he was assaulted, for the peremptory challenge "shoot out" on August 11, 1994, notwithstanding his evident mental impairment and visible physical injuries, and for the swearing of the jury August 12, 1994 (RB at pp. 30-34); (2) that appellant should be estopped from seeking relief for the violation of the requirement of a written waiver under Penal Code sections 977 and 1043 (RB at pp. 34-36);

and (3) that any errors were harmless (RB at pp. 36-39). Respondent is wrong on all counts.

As a preliminary matter, appellant wishes to dispel any confusion about his claim. Respondent reads the appeal as asserting that appellant's waiver of his right to be present August 5th was invalid because the trial court did not make express findings that appellant was competent to make that decision (RB at p. 31), and because defense counsel, rather that the trial court, gave appellant the advisements and elicited his waiver (RB at pp. 31-32). Respondent also reads the appeal as contesting appellant's competence to waive his right to be present on August 11th. (RB at pp. 33-34.) This misapprehends appellant's argument. The crux of appellant's claim is that given the unique facts of this case – where appellant's absence at a critical stage of the proceedings was necessitated by a violent assault he suffered in the courthouse holding cell, requiring emergency medical treatment and leaving him with visible physical injuries and evident mental impairment – the record is insufficient to support the trial court's implicit finding that appellant's waivers were voluntary, knowing and intelligent, and that the statutory and constitutional error in proceeding in his absence was not harmless under any applicable state and federal standard.

It is not appellant's argument that the trial court must make express findings or engage in a particular colloquy in every case in which a defendant purports to waive his right to be present. In his opening brief appellant noted that the trial court expressed concerned about appellant's capacity to waive his right to be present, yet failed to make any findings on the issue or to advise or question appellant. (AOB at pp. 29, 40.) Appellant did so to show that, under the unusual circumstances of this case, the record fails to support a finding that appellant's waivers were voluntary, knowing

and intelligent. Moreover, appellant does not claim here, on direct appeal, that he was not legally competent after the assault to proceed with the trial or to waive his right to be present. Any such claim would be appropriately raised in a petition for writ of habeas corpus.

B. The Record Does Not Support a Finding That Appellant Validly Waived His Presence For *Hovey* Voir Dire On August 5th

It is undisputed that on August 5th, during the noon recess, appellant was severely beaten by another inmate in a courthouse holding cell. (14RT:3948, 3988-3990; RB at p. 25.) It was apparent that appellant required immediate medical treatment: the bailiff explained that the jail nurse had provided appellant with ice packs, and suggested the court order appellant be X-rayed at the jail on "short order." (14RT:3949.) The court directed that appellant "see [a] medical doctor as quickly as possible" and issued and order that reads: "THE COURT DIRECTS THAT THE DEFENDANT BE GIVEN IMMEDIATE MEDICAL ATTENTION! SPECIFICALLY – X-RAYS AND ICE-PACKS! (16CT:3496, capitalization and underlining in original.) When defense counsel asked appellant if he agreed to waive his presence for the balance of the day's proceedings, understanding he had the right to be there and participate, he said yes, and apologized for the disruption. (14RT:3948-3949.) He was then removed from the courtroom and taken to Harbor View Hospital. (14RT:3987.) Sequestered voir dire continued for the remainder of the afternoon in his absence. (14RT:3949-3984.)

These circumstances raise serious questions about whether appellant's agreement to absent himself for the remainder of voir dire can be said to have been voluntary, knowing or intelligent. The court made no

inquiry of appellant, or his counsel, to determine whether appellant had the capacity, given his evident injuries, to give a valid waiver of his right to be present, or whether, instead, his need for emergency medical treatment left him with no choice but to leave. In light of these unusual circumstances, the mere fact that the court accepted appellant's waiver at face value, with no discussion, analysis, findings or consideration of alternatives, is not sufficient to establish that appellant's waiver was in fact voluntary, knowing and intelligent. (Compare *People v. Brown* (2014) 59 Cal.4th 86, 118-119 [trial court not only offered defendant the opportunity to listen to proceedings in holding cell, but also "questioned defendant at length" about his decision, which he "he had considered for almost four years," to absent himself during penalty phase, and "made defendant aware of the consequences" of doing so].)

The record of what occurred August 9th likewise fails to show that appellant had validly waived his presence four days earlier. On August 9th, defense counsel expressed concern about appellant's "mental state," as well as his physical disfigurement:

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

(14RT:3988.) Counsel described appellant as "a little slow on the uptake," and asked that "the record should reflect that the right side of [appellant's] face is kind of a green; he's got a black eye under his right eye; [and] the whole face is swollen." (14RT:3990.) He explained that he did not want the jury to see appellant in that condition, noting that even the prosecutor

had mistakenly ventured that appellant had likely provoked the incident and was the one responsible for the fight. (14RT:3991.) Counsel was also worried about appellant's "ability to participate" and reiterated that he feared appellant had suffered a concussion. (14RT:3991-3992.) The court directed defense counsel to have appellant seen by a neurologist. (14RT:3997-3998.)

Although respondent suggests that on August 9th the court confirmed that appellant had validly waived his presence on August 5th (RB at p. 25), the record in fact demonstrates that the court's attempt to rehabilitate retrospectively the waiver appellant purportedly gave four days earlier was itself inadequate:

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

THE COURT: Again shaking his head "Yes."

(14RT:3985-3986.) Thus, appellant responded "Yes" when asked if he could talk, "Yes" when asked *if it had been explained* to him that he had the right to be present, and "Yes" when asked whether he had waived his presence – but nothing in the colloquy confirms that he had in fact *understood* the right he was waiving. That question was never answered. (*Ibid.*) As the court recognized, on August 5th appellant had "withdraw[n] to receive *medical attention*," and on August 9th his counsel were additionally concerned about his "*mental condition.*" (*Ibid.*, 16CT:3496; 14RT:3988, italics added.) Under these circumstances, simply confirming what was said on August 5th cannot be said to have supplied an adequate record where there was none, or to have rehabilitated an invalid waiver.

Moreover, the court's suggestion on August 9th that appellant had given a valid waiver on August 5th is inconsistent with its reluctance *that same day*, August 9th, to take appellant's waiver of his presence going forward: "I'm not sure I want to take a waiver from him . . . at this time. I would rather get a doctor's report that he has not received a concussion, that, if anything, it's a severe discomfort and pain that he is undergoing, but that, as far as we are able to tell, his mind is all right and he could meaningfully assist [counsel] in selecting his jury. . . ." (14RT:3995.)[1] If the court had reservations about appellant's ability to execute a valid waiver on August 9th, several days following the assault, it should have had doubts

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[1] Similarly, when the court later suggested the possibility of continuing with the trial with appellant sitting in the jury room and listening to the proceedings, it did so on the express condition that "his mental condition is fine – that is to say if he has not suffered a concussion. . . ." (14RT:3992.)

about his ability to do so immediately after the assault on August 5th and should have investigated and answered those questions then, before accepting appellant's pro forma waiver and proceeding with voir dire in his absence. But it did not.

Respondent's contention that "[t]he fact that the court proceeded in Wall's absence [on August 5th] shows the trial court, after observing Wall's behavior and discussing the matter with counsel, *implicitly* found him competent to waive that right" is problematic. (RB at p. 31, italics in original.) On its face this is tantamount to saying the court could not have erred by proceeding in appellant's absence, because it did. That cannot be right. Moreover, as noted, appellant is not challenging, on appeal, his legal competence to proceed or to waive his right to be present.[2] Rather, the issue is whether, given the trial court's expressed concern on August 9th about appellant's physical injuries and possible mental impairments, the record demonstrates that the trial court actually and properly found that appellant knowingly, intelligently and voluntarily waived the right to be present. It does not.

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[2] Respondent cites *United States v. Clark* (9th Cir. 1980) 617 F.2d 180, *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714 and *People v. Stewart* (2004) 33 Cal.4th 425, 513, in support of the conclusion that appellant was legally competent to waive his right to be present. (RB at p. 33-34.) Because appellant is not contending he was legally incompetent, these cases are not relevant. However, appellant notes that in *People v. Stewart*, *supra*, 33 Cal.4th 425, this Court found the defendant had validly waived his right to counsel, where the record demonstrated that the trial court had satisfied itself – based an initial "lengthy examination" of the defendant, an additional "follow-up inquiry" and yet further discussion with the defendant – that his waiver was knowing and voluntary. (*Id.* at pp. 514-515.) Nothing comparable occurred here, notwithstanding the medical exigencies not present in *Clark*, *Hernandez* or *Stewart*.

Respondent's reliance on *People v. Moon* (2005) 37 Cal.4th 1, in which the defendant complained he did not validly waive his right to be present when the jury viewed the crime scene, is misplaced. (RB at p. 32.) As a threshold matter, and as this Court recognized, a criminal defendant does not have a federal constitutional right to be present when the jury views the crime scene. (*People v. Moon*, *supra*, 37 Cal.4th at p. 20, citing *Snyder v. Massachusetts* (1934) 291 U.S. 97, 117-118.) It is undisputed that appellant had the right to be present during jury selection. (RB at p. 29, citing *Gomez v. United States* (1989) 490 U.S. 858, 873.)

Moreover, the Court in *Moon* rejected the argument that, because the defendant was confused about the *scope* of his waiver, the trial court had "a special duty to conduct a more searching substantive inquiry regarding his understanding of his waiver . . . ." (*Id.* at p. 21; see also *id.* at p. 19.) The Court also rejected the defendant's contention that the trial court had a sua sponte duty to explain to him "the importance" of his personal presence at the crime scene, and that he was entitled to the application of a "heightened waiver standard" under the circumstances. (*Id.* at pp. 20-21, citing *People v. Weaver* (2001) 26 Cal.4th 876, 967.) Appellant does not contend that the court had a "special duty" to engage in a particular colloquy regarding jury selection, or to apply a "heightened waiver standard." His argument is that the record belies any finding that the trial court assured itself that appellant's purported waiver was in fact voluntary, knowing and intelligent.

People v. Weaver, *supra*, 26 Cal.4th 876, which respondent also cites (RB at p. 32), is also inapposite. In *Weaver* this Court rejected the defendant's arguments that the trial court had a duty to advise him as to the importance of his presence before the jury during the playing of a videotaped "Vietnam Era Stress Inventory" examination, and to conduct

"an extensive inquiry" to determine whether he "actually understood the significance and consequences" of his decision to waive his presence. (*Id.* at pp. 966-968.) The Court quoted the trial court's extensive colloquy with the defendant prior to its acceptance of his waiver, during which the defendant acknowledged that the court had previously discussed the issue with him, that it had explained to him "[his] right to be present at all phases of the case," and that he understood that he had the right to be present. (*Id.* at p. 967.)

Again, appellant does not contend the trial court had a special duty to advise him of the importance of his presence or to engage in a particular colloquy. Rather, appellant seeks application of the established standard: that, in order to accept a defendant's waiver of his right to be present, the trial court must first assure itself that the waiver is voluntary, knowing and intelligent. The record of proceedings on August 5th is insufficient to establish that the court actually satisfied itself that, despite his physical injuries and mental impairment, appellant could give a voluntary, knowing and intelligent waiver of his presence for the balance of voir dire.

The record of what occurred August 9th, far from rehabilitating appellant's invalid August 5th waiver, shows that the court again failed – even in the face of additional information regarding the nature and extent of appellant's mental impairment – to engage in any inquiry about appellant's past or present ability to validly waive his presence. Thus, unlike in *Moon* or in *Weaver*, the underlying issue here is whether the record supports the trial court's implicit determination in the first instance that appellant had the capacity to, and in fact did, knowingly and intelligently waive his presence, given his injuries. It does not.

Further, neither *Moon* nor *Weaver* involved a medical emergency, as

was the case here, necessitating the defendant's absence and raising questions about his ability to give a knowing, intelligent and voluntary waiver - questions the trial court failed to pursue. Appellant did not simply decide he would rather sit out voir dire in his jail cell – he needed emergency medical attention because he had been beaten. In this sense his absence itself was involuntary.

Finally, as respondent acknowledges, any waiver appellant gave on August 5th, would, if valid, have been only for "the afternoon session" that day, and would not have extended to the proceedings that took place on August 11th or 12th, when counsel exercised their peremptory challenges and the jury was sworn, respectively. (14RT:3948-3949; RB at p. 30.)

C. The Record Does Not Establish That Appellant Validly Waived His Presence On August 11th, For the Exercise Of Peremptory Challenges, Or On August 12th, When the Jury Was Sworn

As noted in appellant's opening brief, on August 10th defense counsel reported to the court, in appellant's absence, that the neurologist who had examined appellant and conducted a CAT scan had found appellant had suffered a "right cerebral contusion," as well as damage to the right inner ear and to the right sensory nerve running along the right side of appellant's head, causing numbness and loss of sensation. (AOB at p. 29; 14RT:4004-4005; 72CT:16190.01-16191.)[3] Defense counsel described appellant as still "at least mildly disoriented. He's very slow on the uptake." (14RT:4005.)

Defense counsel suggested the court "put everything off" for about a

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

week; he hoped to be able to secure an appointment for appellant on August 19th for further neurological assessment. (14RT:4008.) The court agreed to continue opening statements to August 24th, which again suggests the court was not per se averse to minor delays and recognized the importance of having appellant's mental status evaluated. (14RT:4013-4014.)[4]

Appellant was present when proceedings resumed on August 11th. (14RT:4046.) His counsel described him as still "mildly disoriented," "moving very slowly," with "definitely some dullness" in his interactions, as respondent acknowledges. (14RT:4046; RB at p. 33.) As noted in appellant's opening brief, appellant gave monosyllabic responses – "Huh?" then "Yeah" and finally "Yes" – when defense counsel asked appellant to acknowledge that he understood he had the right to be present but was still willing to sit in the jury room during counsel's exercise of their peremptory challenges, and the court felt the need to explain the logistics to him twice. (AOB at p. 32; 14RT:4047-4048.)

While the court had said on August 9th that it was reluctant to accept appellant's waiver of his right to be present without first finding that appellant had not suffered a concussion (14RT:3995), on August 11th it did just that: appellant was escorted into the jury deliberations room, and counsel exercised their peremptory challenges in his absence. (See also 14RT:3996 ["I don't want to take a waiver from him until you report to me that a doctor says that he's fine."].) Less than a week later appellant would be diagnosed as having suffered a concussion as a result of the August 5th

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[4] On August 19th the court and counsel examined the courtroom to be used for the joint trial. (16CT:3508.) Pretrial motions were heard August 22nd and 23rd. (16CT:3509-3512.)

assault. (72CT:16195-16196.)[5]

Respondent urges that appellant was competent on August 11th to waive his presence for further jury selection proceedings. (RB at p. 33.) Again, respondent misses the point. As discussed previously, the issue on appeal is not whether appellant's concussion or cerebral contusion rendered him legally incompetent to proceed, but whether his purported waiver for the jury proceedings conducted August 11th was voluntary, knowing and intelligent. The clear possibility that he had suffered brain damage should have factored into the court's inquiry. Yet the record shows that the court never engaged in the requisite assessment to determine whether – in light of appellant's manifest physical injuries and mental impairment – he in fact was capable of knowingly and intelligently waiving his right to be present for the exercise of peremptory challenges.

Respondent erroneously addresses certain of appellant's arguments regarding his exclusion from the courtroom (AOB at pp. 46-47) as though they bore on the issue of prejudice, rather than the question of error (RB at p. 38). Thus, respondent asserts that any error in excluding appellant from the proceedings on August 11th was harmless because appellant "was able to listen to his counsel exercising peremptory challenges from the jury room . . . and consult with his attorneys whenever he felt the need." (RB at p. 38, italics added.) As appellant has argued (AOB at pp. 45-48), the point here is that placing appellant in the jury deliberations room was not an acceptable substitute for having him present in court, at counsel table; he was still absent without having validly waived his presence.

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

Moreover, respondent glosses over the manifest ineffectiveness of the arrangement the court adopted. Respondent does not deny that the "shoot-out" occurred at the "dizzying" speed of what was characterized as a "ping pong" game. (14RT:4067; AOB at p. 47.) Respondent thus is simply wrong in asserting there was "nothing in the record" to support appellant's allegation that he could not have communicated with counsel in time. (RB at p. 38.)[6] The scenario, described in appellant's opening brief, is in fact improbable and unworkable on its face: appellant would have had to alert the bailiff; the bailiff would have had to secure him in the jury room, then go into the courtroom and tell the court that appellant wanted to consult with counsel; and the court would then have had to interrupt the "shoot-out" so that counsel could meet with appellant. (AOB at p. 47; 14RT:4047.) Thus, appellant plainly would not have been able to "consult with his attorneys whenever he felt the need" (RB at p. 38) or otherwise contribute to the definitive jury selection exercise, and there is no evidence that appellant understood that was so. Respondent also completely ignores appellant's argument that the confusion surrounding the second random draw of prospective jurors – resulting in the reshuffling of the list – further undermined appellant's ability to contribute effectively from outside the courtroom. (AOB at pp. 51-52.)

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[6] As noted in appellant's opening brief, the record includes the following, regarding the exercise of peremptory challenges:

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

(14RT:4067; AOB at p. 47.)

In addition, respondent erroneously suggests, in discussing harmless error, that appellant complains that he could not follow the exercise of peremptory challenges "because he could not see what was going on," and asserts appellant in fact could have watched the proceedings had he chosen to: "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.)" (RB at p. 38, italics added.) Not so. Appellant has never complained that the jury room arrangement precluded him from looking into the courtroom; rather, the error is that he was not *present* in the courtroom, and never validly waived his right to be there.

Moreover, respondent misstates the record with respect to the "window." The court in fact said:

> Now there *may* be a way we could even have him see *the jury that is seated in the box* by coming to this window, taking a look through there to see, you know, if he has any questions of you gentlemen *about who is juror number one or number ten or eleven* and then [I could] give you a break so that you could discuss it with him further before you settle on a jury.

(14RT:3993, italics added.) There is no other mention in the record of a window; thus any suggestion that the court contemplated appellant could look into the courtroom is purely speculative, and improbable on its face.[7] In any event, the court's isolated reference to a "window" suggests appellant would only have been able to see those prospective jurors who were actually "seated in the box" and confirms that appellant would not

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[7] One possibility is that there was a glass panel or "window" in a door leading from the courtroom to an internal hallway, and that the court was thinking appellant might, on request, be escorted from the jury room into the hallway to look into the courtroom. Again, however, there is no indication such an arrangement was ever agreed to or adopted.

have known who they were by name or juror identification number. (14RT:3993 [". . . if he has any questions . . . about who [any of them] is"].) Moreover, the same logistical constraints applicable to appellant's sitting in the jury room would have precluded his giving timely input into the rapid fire exercise of peremptory challenges.

Respondent fails even to address the argument that, given that appellant had been participating in jury selection prior to the assault (14RT:4006), there was every reason to expect he would have continued to give input, including with respect to the all-important exercise of peremptory challenges. (AOB at pp. 37, 53; see *United States v. Washington* (D.C. Cir. 1983) 705 F.2d 489, 497 [exercise of peremptory challenges "can require direct consultation with the defendant and something more than second hand descriptions of the prospective jurors' responses to questions during voir dire"].)

Finally, respondent errs in asserting that appellant's purported waiver of his presence on August 11th "carried over to August 12th," when appellant was absent for the swearing of the jury. (RB at p. 34.) As explained, the record fails to support a finding that his purported waiver on August 11th, whatever its ostensible prospective scope, was itself voluntary, knowing and intelligent. The fact that on August 12th the court stated that "yesterday Mr. Wall waived his personal presence here" does not render the waiver valid. (14RT:4091.)

D. Appellant Is Not "Estopped" From Obtaining Relief For the Conceded Violation Of His Statutory Right To Be Present

Respondent contends that, as a matter of "public policy," appellant should be "estopped from arguing that he is entitled to relief" for the

conceded violation of the statutory requirement of a written waiver because "the court obtained an oral waiver of his right to be present and his counsel acquiesced in such a procedure." (RB at p. 35.) This argument is flawed for several reasons. First, as explained above, the court did not obtain a *valid* oral waiver of appellant's right to be present. Second, appellant's state statutory right to a valid written waiver is independent of the federal constitutional requirements. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1210 [treating statutory error as "separate matter" from asserted constitutional violation].)

Third, and more importantly, respondent's estoppel argument is legally misguided, in that it improperly seeks to preempt review of the merits of appellant's claim, and thus ducks the question whether the admitted error is prejudicial. As explained in appellant's opening brief, and in subsection E, below, appellant's exclusion from key portions of jury selection in fact cannot be deemed harmless under any standard. (AOB at pp. 48-53.) Moreover, the notion of estoppel erroneously suggests appellant had the burden at trial to object that his own purported waivers of his presence were invalid under sections 977 and 1043, which is nonsensical on its face.

Fourth, the cases on which respondent relies are distinguishable. In *People v. Howze* (2001) 85 Cal.App.4th 1380, the Court of Appeal held that although the defendant had not waived his right to be present "in strict formal compliance with state law," the *violation* of Penal Code section 1043 was harmless because, among other things, the defendant had "affirmatively stat[ed] in open court that the court could do what it wanted to but he was not coming back for his trial" and had "admitted in court during the third day of trial that it was his choice not to come to court when trial

commenced." (*Id.* at pp. 1395-1396.) The Court of Appeal thus considered whether the error was prejudicial, not whether the defendant was estopped from asserting the error.

Moreover, the court in *Howze* applied the doctrine of estoppel not to the statutory waiver claim arising under Penal Code sections 977 and 1043, which, as noted, it reached on the merits, but to the "next question" before it – "whether a defendant, who is in custody, and who did not waive his appearance at the time of commencement of trial in strict formal compliance with state law, can later complain on jurisdictional or constitutional grounds when the trial commenced in his absence" under the circumstances described above. (*People v. Howze*, *supra*, 85 Cal.App.4th at pp. 1395-1396, italics added.) It was this jurisdictional claim the court rejected on estoppel grounds, because defense counsel failed to object to commencing the trial in the defendant's absence and the defendant deliberately chose to absent himself from trial with knowledge of the consequences of his decision and then clearly reaffirmed that he had deliberately chosen not to be present. (*Id.* at pp. 1388, 1396.)

Similarly, respondent misapplies *People v. Ervin* (2000) 22 Cal.4th 48, in which the trial court had adopted a screening process whereby counsel stipulated to the dismissal of prospective jurors based on their questionnaire responses in the defendant's absence. On appeal the defendant challenged this procedure on multiple grounds, including on the grounds that he was denied the right to be present. The Court rejected the claim on the grounds that defense counsel had stipulated to every aspect of the screening procedure and that the defendant, through counsel, had "agreed to excuse every prospective juror he now asserts was improperly excused." (*Id.* at p. 73.) The case has no application to the issue presented

here – whether the record supports the trial court's implicit finding that appellant validly waived his right to be present. Put differently, appellant is not challenging the jury selection procedures themselves, but maintains that he did not validly waive his presence and that listening to the exercise of peremptory challenges in the jury deliberations room was not an adequate or viable substitute.

In re Griffin (1967) 67 Cal.2d 343, is even farther from the mark. In *Griffin*, this Court held that a defendant who had sought and obtained a continuance of parole revocation proceedings to a time beyond the end of the probationary term could not later complain that the court had acted in excess of its jurisdiction in revoking his probation. (*Id.* at pp. 347-348.) The case thus has nothing to do with the validity of the waiver of a state statutory right to be present at trial. Moreover, as appellant has explained, at trial appellant never suggested that jury selection could proceed without the written waiver expressly required under Penal Code sections 977 and 1043.

E. Excluding Appellant From Crucial Portions Of Jury Selection Without a Valid Waiver Of His Right To Be Present Cannot Be Deemed Harmless Error Under State Or Federal Law and Requires Reversal

Respondent asserts categorically that "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" (RB at p. 38), yet argues that any harm caused by appellant's placement in the jury deliberations room during the exercise of peremptory challenges is speculative (RB at p. 37). Respondent ignores appellant's argument that it

is precisely the impossibility of knowing how the trial would have been different if appellant had not erroneously been excluded from key jury selection proceedings conducted in open court that makes harmless error analysis inappropriate. (AOB at pp. 50-51.)

With respect to the voir dire conducted the afternoon of August 5th, when appellant was absent altogether (getting emergency medical treatment), and not sequestered in the jury deliberations room, respondent argues that appellant was not prejudiced because "had two experienced present during voir dire protecting his interests." (RB at p. 38.) By this logic a criminal defendant represented by counsel could never establish that he was prejudicially excluded from trial proceedings. Again, this cannot be the law. (*United States v. Novaton* (11th Cir. 2001) 271 F.3d 968, 1000 ["The right to be present would be hollow indeed if it was dependent upon the lack of representation by counsel"]; AOB at pp. 52-53.)

And, unlike in *People v. Davis* (2005) 36 Cal.4th 510, 533 – where the defendant's invalid waiver of his presence at an in-chamber review of a flawed audio tape was deemed harmless in part because his counsel could have "brought to the court's attention at a later time any possible contributions or corrections the defendant might have made" – here the exercise of peremptory challenges could not have been revisited, and appellant's input would have come too late.

Respondent argues, as noted, that any error with respect to appellant's waiver of his presence for the exercise of peremptory challenges was harmless because appellant "was able to listen to his counsel exercising peremptory challenges from the jury room . . . and consult with his attorneys whenever he felt the need," and might have been able to observe the proceedings through "a window." (RB at p. 38.) As explained in

subsection C., above, the fact that appellant had to sit through the exercise of peremptory challenges in the jury deliberations room – i.e., was *absent* from the courtroom – without a valid waiver, is what gives rise to the *violation* of his constitutional and statutory right to be present, not what renders the error harmless.

Moreover, respondent here completely ignores the importance of demeanor – all the while insisting that demeanor properly must have informed the trial court's excusal of prospective juror Evelyn Johnson. (RB at pp. 48, 50-51; see Argument II, *post.*) As appellant has argued (AOB at pp. 50-51), he was prejudiced by his exclusion from jury selection proceedings because his attorneys were unable to assess the demeanor of the prospective jurors as they in turn observed appellant. As one court has explained, excluding the defendant from jury selection proceedings deprives him "of his due process right to exert a psychological influence upon the jury, completely aside from any assistance he might have provided to his counsel." (*Larson v. Tansy* (10th Cir. 1990) 911 F.2d 392, 396, citing *United States v. Fontanez* (2d Cir. 1989) 878 F.2d 33, 38 [excluding defendant during part of jury selection deprived him of the "'psychological function' of his presence on the jury"] and *Wade v. United States* (D.C. Cir. 1971) 441 F.2d 1046, 1050 [a "psychological influence" is implicated by "the right of confrontation of defendant and jury, aside from the usefulness the accused may be to his counsel"].) Here, as appellant has argued (AOB at pp. 49-50), his absence during an afternoon of voir dire, as well as for the exercise of peremptory challenges, denied him the right to exercise a psychological influence on jury selection – where the prospective jurors and the defendant are essentially taking in each other's demeanor in an intangible but crucial way – and deprived his counsel of the benefit of

observing that dynamic.

With respect to the violation of appellant's statutory right to be present, under Penal Code sections 977 and 1043, respondent again conflates the standards for error and prejudice. Thus, on the one hand respondent asserts that reversal is required if "it is reasonably probable the defendant would have received a more favorable outcome in the absence of the error[,]" citing, among other cases, *People v. Watson* (1956) 46 Cal.2d 818, 836, but on the other hand relies on *People v. Virgil* (2011) 51 Cal.4th 1210, 1236, in which the Court concluded the defendant's absence from bench conferences, including several related to jury selection, did not amount to a violation of his right to be present because he had not shown "that his presence would have affected the outcome of the for-cause juror challenges argued at sidebar." (*Ibid.*) *Virgil* thus is not relevant to a determination whether the *conceded* violation of appellant's statutory right to be present, or the violation of his constitutional right to be present, was harmless.

F. Conclusion

The record fails to support the trial court's implicit finding that appellant gave a voluntary, knowing and intelligent waiver of his right to be present during jury selection. The attack on appellant on August 5th, which left him visibly injured and mentally impaired, put the trial court on notice initially that something serious and unusual had occurred. Yet, the court made no inquiry as to the effect the assault had on appellant's ability to give a valid waiver of his presence for the completion of *Hovey* voir dire. Even in the face of defense counsel's subsequent descriptions of appellant's diminished mental functioning and expressed concern about brain damage, the court again simply accepted at face value appellant's perfunctory waiver

of his presence for the exercise of peremptory challenges on August 11th, without assessing whether appellant in fact understood what he was doing and without waiting for the neurological assessment it had acknowledged was all important, and then baselessly concluded the waiver extended to the swearing of the jury on August 12th.

As a result, appellant was denied his right to be present at a critical stage of his capital trial and to participate in the selection of the jury that would decide his sentence. He and his counsel, and the court, were denied the opportunity to observe and take into account the demeanor of the prospective jurors, as they observed appellant. Whether this error is deemed structural error or trial error, reversal is warranted.

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II.

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

A. Introduction

Prospective juror Evelyn Johnson would have had difficulty voting to impose the death penalty, but she would not automatically vote for life imprisonment without possibility of parole and agreed to keep an open mind and consider both penalties; she did not know whether she would be able to vote for death in this case, because she had not heard the evidence. This did not warrant excusing her for cause. There was no substantial evidence that Johnson's views about the death penalty would have prevented or substantially impaired her ability to follow the law, obey her oath as a juror, or impose a death sentence if appropriate. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424.) Reversal of appellant's death sentence is required.

B. The Record Does Not Support the Trial Court's Dismissal Of Johnson

As noted in appellant's opening brief (AOB at pp. 56-57), Johnson stated on her questionnaire that she would not automatically vote for life imprisonment without possibility of parole regardless of the evidence. (28CT:6112.) She expressed no strong opposition to the death penalty and identified certain crimes for which she thought it should automatically be imposed. (*Ibid.*) On voir dire she said would have difficulty imposing the death penalty (12RT:3491-3492); but she also said she "absolutely" would "keep an open mind and not make up [her] mind until [she had] seen the evidence" (12RT:3495), and reiterated that she would not automatically

vote for life without possibility of parole regardless of the evidence (12RT: 3490). Johnson consistently made clear that, without hearing the evidence – "not knowing what I'm going to hear" – she could not say whether she could impose the death penalty in this case. (12RT:3494, 3496.) She was cautious and deliberate in her responses, on voir dire as well as in her questionnaire.

Respondent maintains that Johnson was properly excused because, notwithstanding her acceptable questionnaire responses, on voir dire she "indicated she would have extreme difficulty imposing capital punishment, even in an appropriate case;" acknowledged she had "religious feelings" about the death penalty; and "repeatedly stated that, regardless of the evidence, she did not know if she was capable of voting for death." (RB at p. 48.) Respondent also asserts that the court "had the opportunity" to observe Johnson's demeanor and that it found her "equivocal and conflicting responses" rendered her substantially impaired within the meaning of *Witt*. (*Ibid.*) These arguments are misleading and unavailing.

First, as explained in appellant's opening brief (AOB at pp. 67-68), that Johnson would find it difficult to impose the death penalty is not disqualifying. (*People v. Avila* (2006) 38 Cal.4th 491, 530, citing *People v. Stewart*, *supra*, 33 Cal.4th at pp. 442-443.) Moreover, Johnson never actually said she would have difficulty imposing the death penalty "even in an appropriate case." (RB at p. 48.) Johnson simply could not say whether this was an appropriate case without hearing the evidence. And, as noted, both on her questionnaire and on voir dire she said, "No," she would not automatically vote for life imprisonment (28CT:6112; 12RT:3490), whereas someone who could never vote for death, even in an appropriate case, would have to have said, "Yes." (See *People v. Heard* (2003) 31 Cal.4th

946, 964 [that prospective juror would not "automatically" vote for life imprisonment or for death noted as among the factors establishing that prospective juror was erroneously excused].)

Second, respondent's reliance on Johnson's religion is misplaced. On her questionnaire she responded, "No," there was nothing about her religious or spiritual beliefs that would prevent her from "passing judgement in a criminal matter;" she checked the "No" box as to whether her religious organization (Methodist) had a stated position regarding the death penalty; and she wrote "N/A - None" when asked, "[i]f you have any spiritual and/or religious beliefs," to state any advisements, quotes or passages she felt pertained to capital sentencing. (28CT:6090, 6112; compare *People v. Duff* (2014) 58 Cal.4th 527, 542 [Catholic prospective juror asserted death penalty was "against the Catholic beliefs"].) Johnson acknowledged on voir dire that she had what the court termed "religious feelings," and said one reason she was unsure how she felt about the death penalty was that she did not "feel [she was] the one to make a judgment on that." (12RT:3486.) But ultimately she reiterated that she would not automatically vote against the death penalty, wanted to hear the evidence and was open to considering both penalties. (12RT:3490, 3495.)

Nothing Johnson said in the brief exchange on the issue of religion disqualified her to serve as a juror, and the trial court did not excuse her on that basis, or even mention her religion. (14RT:4048-4049.) Prospective jurors may not be excused for cause simply for having religious beliefs about capital punishment; they may be excused only if such beliefs would substantially impair the performance of their duties, which is not the case here. (Compare *People v. Duff*, *supra*, 58 Cal.4th at pp. 541-542 [Catholic prospective juror repeatedly stated she was unsure "whether she 'could

separate – completely separate those beliefs from me and my decision making because that's what has influenced all of my decisions all of my life'"]; compare *People v. Rountree* (2013) 56 Cal.4th 823, 847 [prospective juror who repeatedly expressed doubt whether he could judge someone and who would "have to ask God for forgiveness," "could hardly have been more equivocal about whether he could set aside his religious convictions and perform a juror's duties"].)

Third, respondent's assertion that Johnson "repeatedly stated that, regardless of the evidence, she did not know if she was *capable of voting for death*" (RB at p. 48, italics added) is misleading, in that it suggests Johnson did not know whether she could *ever* vote to impose the death penalty, in any case. The record shows that Johnson could consider both the death penalty and life imprisonment without possibility of parole, but could not say whether she would find *this case* to be an appropriate case for the death penalty without knowing the evidence. Thus, as noted in appellant's opening brief (AOB at p. 68), on her questionnaire she answered, "No," not "I don't know," when asked whether she would "always vote against death, *no matter what evidence might be presented* or argument made . . . ." (AOB at p. 68; 28CT:6112, italics added.) She confirmed on voir dire that she could not say whether, in this case, she would find death the appropriate penalty without first hearing the evidence:

> Q. [THE COURT]: . . . . [¶] Could you, *based on the evidence*, could you find in your own mind that the proper and appropriate penalty is death or could you never get to that point?
>
> A. [JOHNSON]: *Sitting here right now, this morning*, I would have to say that I don't really know. I really can't give you a yes answer. Maybe *hearing the testimony* would change my mind *so I want to be open to that*, but I – I do have

> a problem with dealing with that particular part of being a juror.

(12RT:3486-3487, italics added.) This colloquy was focused on this case, in which she did not know the evidence, and not on Johnson's theoretical ability to vote for the death penalty, as further evidenced by the court's prefatory reference to Johnson's having "listen[ed] to all the evidence *in this case* . . . ," and by its earlier explanation that at the penalty phase the prosecutor would argue that, based on the evidence in aggravation, death was the appropriate penalty, while defense counsel "are going to argue to you that based on everything *in this case*, the appropriate penalty is not death, but life without possibility of parole." (12RT:3486, 3485, italics added.) Johnson said she understood. (12RT:3485.)

Johnson responded, "[t]hat's correct," when the prosecutor asked her if it was true she did not know whether she could impose the death penalty "[i]rrespective of the evidence, as you sit here now." (12RT:3496.) Considered in the context of her entire voir dire, as it must be, this answer is not disqualifying. (*Darden v. Wainwright* (1986) 477 U.S. 168, 176 [Court examines context surrounding prospective juror's exclusion].) Given Johnson's repeated explanations that she could not say how she would vote until she had heard the evidence, logically she would have understood "irrespective" of the evidence to mean "without regard" to the evidence – i.e., without knowing the evidence, at that moment, it was true that she could not say how she would vote. Finally, although Johnson answered, "No" when defense counsel asked her initially whether "part of the problem" was not having seen the evidence, the record shows she was responding to a convoluted and confusing set of questions about whether she could "pronounce" death "if she felt that was [her] decision."

(12RT:3488.)[8] And, as noted, Johnson never said "her decision" could never be for death.

Fourth, respondent erroneously conflates ambivalence about capital punishment with ambiguity in answers to questions, and invokes the notion of deference to demeanor where it has no place. Respondent notes that the trial court "had the opportunity" to observe Johnson's demeanor, and to "assess the degree of *uncertainty and reluctance* she possessed" and consider her "vocal inflections and other nonverbal cues." (RB at p. 48, italics added.) From this respondent concludes that the court "resolved her *equivocal and conflicting* responses in a manner that caused [it] to conclude [Johnson's] views would substantially impair her ability to make a penalty determination in accordance with the court's instructions." (RB at p. 48, 52, quoting *People v. Wilson* (2008) 44 Cal.4th 758, 780, italics added.) As this Court has recognized, "[w]hen conflicting and equivocal answers are given, the trial court, through its observation of the juror's demeanor as well as through its evaluation of the juror's verbal responses, is best suited to reach a conclusion as to the juror's actual state of mind." (*People v.*

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[8] The colloquy reads in relevant part as follows:

> Q. [Mr. Thoma]: . . . . [¶] With regard to not knowing whether you could pronounce death if you felt that that was your decision, I want to ask you a couple of question about that. [¶] Is it hard to imagine, because you haven't seen what the evidence is, the circumstances under which you would vote for death? Is that part of your problem, is that you can't imagine it because you have not seen evidence to you that would warrant calling for somebody's death? Is that part of your problem?
>
> A. [JOHNSON]: No.

(12RT:3488.)

Merriman (2014) 60 Cal.4th 1, 33 [prospective juror "vacillated back and forth in her responses to leading questions from the parties"].)

But here Johnson's responses were neither equivocal nor conflicting. She consistently and unambiguously made clear that while she was ambivalent about the death penalty and would find it difficult to impose, she would not automatically vote for life imprisonment with possibility of parole (12RT:3490-3491, 3494-3495), would keep an open mind (12RT:3486-3487, 3494-3495) and needed to hear the evidence before making a decision (12RT:3486-3487, 3494-3495). (Compare *People v. Merriman, supra*, 60 Cal.4th at p. 35 [prospective juror "'swayed with the wind' depending on which of the parties was questioning her"].) She may have been "uncertain" about the death penalty and "reluctant" to impose it, but her responses were not "equivocal or conflicting." And "reluctance" to sentence someone to death is not a valid basis to excuse a prospective juror. (*People v. Avila, supra*, 38 Cal.4th at p. 530, citing *People v. Stewart, supra*, 33 Cal.4th at pp. 442-443 [difficulty imposing the death penalty of itself does not impair performance of juror's duties].) Nor is "uncertainty" about the death penalty disqualifying. (*People v. Pearson* (2012) 53 Cal.4th 306, 330-331 [erroneously excused prospective juror's views about the death penalty described as "vague and largely uninformed" and as "indefinite, complicated or subject to qualification"].)

Moreover, respondent's suggestion that the trial court in fact took Johnson's demeanor into account is contradicted by the record. As appellant noted in his opening brief (AOB at pp. 73-74), the record is devoid of any reference, implicit or explicit, to Johnson's demeanor, by counsel or the court; there is no suggestion Johnson was anxious, worried, troubled, evasive, hostile, emotional or confused in answering questions on

voir dire. Much less is there *any* mention of Johnson's purported "verbal inflection" or "nonverbal cues" to which respondent asks this Court to defer. (See RB at p. 51.)

Obliquely acknowledging as much, respondent maintains, in a footnote, that "[a]lthough the trial court did not expressly state it was doing so, *it obviously did so by implication.*" (RB at p. 48, fn. 6, italics added.) Without further explanation, or citation to the record or case authority, there is no merit in simply speculating that the court "must" have done anything; to the contrary, the court made clear it was relying largely on the written transcripts and said nothing about Johnson's demeanor. (14RT:4048.) On a silent record there is no basis in law or logic for any presumption about the trial court's assessment of or reliance on Johnson's demeanor which, as shown by the very absence of comments by the court or counsel, apparently was unremarkable.

The cases respondent relies on do not support Johnson's dismissal as a prospective juror. In *People v. Thomas* (2011) 51 Cal.4th 449, the Court upheld the exclusion of four prospective jurors based on their expressed views on the death penalty, two of whom respondent likens to Johnson. Johnson in fact is not comparable to either of them. As appellant noted in his opening brief (AOB at p. 68), Prospective Juror No. 6-353 responded, "I don't truly know," rather than "Yes" or "No," to the written question asking whether she would always vote for life imprisonment without parole "regardless of the facts and circumstances." (*People v. Thomas*, *supra*, 51 Cal.4th at p. 463.) In contrast, Johnson answered the same question "No." (28CT:6112.) Moreover, as this Court noted, "[d]uring voir dire, [Prospective Juror No. 6-353] stated she did not know whether she would be 'able to impose the death penalty in *any* case' and explained that while it

was theoretically possible that she could vote for the death penalty, it was '[p]robably not realistic[ ].'" (*Id.* at p. 464, italics added.) Here, Johnson identified on her questionnaire certain crimes for which she thought the death penalty should automatically be imposed (28CT:6113); explained on voir dire that she could not say how she would vote without having heard the evidence (12RT:3486-3487, 3490-3491) and reiterated that she would not automatically vote against the death penalty (12RT:3494-3495). She never said she did not know whether she could ever impose the death penalty "in any case," as did Prospective Juror No. 6-353 in *Thomas*.

Nor is Johnson comparable to *Thomas'* Prospective Juror No. 833, who, unlike Johnson, said on her questionnaire that she was "strongly against" the death and, also unlike Johnson, directly attributed these views to her Christianity. (*People v. Thomas, supra*, 51 Cal.4th at pp. 470-471.) Also, whereas Johnson wrote "No,"on her questionnaire, she would not automatically vote against the death penalty (28CT:6112) and confirmed this orally on voir dire (12RT:3494-3495), in response to the same question Prospective Juror No. 833 wrote, "*I'm not really sure* – my feeling is that I would find it very difficult to vote for the death penalty." (*People v. Thomas, supra*, 51 Cal.4th at p. 470, italics added.) When asked on voir dire whether she was capable of voting for the death penalty if she had decided it was the appropriate penalty, she answered squarely, "I really don't know," and then repeatedly said "I don't know, I don't know," when asked whether there was a reasonable possibility that she could vote for the death penalty. (*Ibid.*) Johnson, as explained above, never said categorically that she did not know whether she would ever be able to vote for the death in an appropriate case; to the contrary, she would keep an open mind and needed to hear the evidence. (12RT:3495.)

Respondent's reliance on *People v. Griffin* (2004) 33 Cal.4th 536, disapproved on another ground in *People v. Riccardi* (2012) 54 Cal.4th 758, is also misplaced. (RB at pp. 45-46.) As respondent points out (RB at p. 45) in *Griffin*, Prospective Juror M.C. had "stated and reiterated that she did not know whether she could *ever* vote to impose the death penalty, regardless of the state of the evidence in a case." (*Id.* at p. 559, italics added.) Indeed, the relevant portion of the voir dire colloquy with Prospective Juror M.C. highlights the contrast between M.C. and Johnson:

> Q. [Prosecutor]: And feeling that way as you've described in these last few answers in a real case, do you think that you could *ever* impose the death penalty on another human being?
>
> A. [Prospective Juror M.C.]: I guess. I really – I can't say definitely yes or no.
>
> Q. Please, if I'm not making myself clear, I'm not asking you how you would vote in this case because you couldn't know. You haven't heard the evidence.
>
> A. I know. It's if I could do anybody.
>
> Q. Exactly. And your best response is you don't know.
>
> A. I'm being honest.
>
> Q. And it's okay for you to feel that way. It's fine.
>
> A. Okay.

(*Ibid.*, fn. 9, italics added.) In contrast, Johnson did not say that she did not know whether she could *ever* impose the death penalty, but rather indicated that she could not say whether, not having heard the evidence, she could do so in this case.

The Court in *Griffin* also upheld the for cause challenge as to Prospective Juror J.D., who, as respondent acknowledges (RB at p. 45), stated 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." (*People v. Griffin*, *supra*, 33 Cal.4th at p. 560-561.) Again, the actual colloquy distinguishes Prospective Juror J.D. from Johnson:

> Q. [Prosecutor]: [L]et's *assume . . . [y]ou've heard the evidence* and it's just the kind of case you think [the death penalty is] deserved in. Because of your belief that hey, I can't be a person to make this decision, would you be able to? Would you be able to impose the death penalty?
>
> A. [Prospective Juror J.D.]: I don't know.
>
> Q. Even if it was a case that you thought deserves it you still might have a problem?
>
> A. Yes.
>
> Q. And that's the best you can tell us now[,] I don't know?
>
> A. I'm sorry.

(*Id.* at p. 560, fn. 10, italics added.) Johnson, on the other hand, never said she did not know whether she could impose the death penalty in appellant's case even if, *having heard the evidence*, she felt defendant deserved the death penalty.

People v. DePriest (2007) 42 Cal.4th 1, is also distinguishable. There, Prospective Juror M.B. initially said he could keep an open mind, but then admitted he did not want the responsibility of making the capital sentencing decision and "doubted he could impose death *even if the evidence indicated it was appropriate in the particular case*." (*Id.* at p. 21, italics added.) Johnson, on the other hand, explained that she could not say how she would vote *until* she had heard the evidence. Prospective Juror M.B. also "emphasized that he might vote for life 'regardless of the evidence' in order to avoid making a decision on death," and said "no"

when asked "whether he could conceive of a case in which death would be a viable option." (*Ibid.*) Again, this prospective juror is not like Johnson, who made clear she would not automatically vote against the death penalty and who identified cases where she felt the death penalty *should* be imposed. (12RT:3494-3495; 28CT:6112-6113.)

Prospective Juror G.G., also in *DePriest*, had initially said he would not automatically vote against the death penalty, but then "most of his answers seemed to contradict this view." (*People v. DePriest*, *supra*, 42 Cal.4th at p. 21.) Johnson, on the other hand, reiterated on voir dire that she would not automatically vote against the death penalty. (12RT:3494-3495.) Unlike Johnson, Prospective Juror G.G. would not say "yes" when asked whether he could or would even "*consider* imposing death based on the evidence." (*Ibid.*) Johnson clearly agreed she could and would consider both sentences. (12RT:3494-3495.)[9]

The third prospective juror in *DePriest* that respondent discusses, B.T., stated that once his feelings about the death penalty had "crystalized," he could not say the death penalty "was morally appropriate in any case[,]" and so would "'almost always'" vote against it. (*People v. DePriest*, *supra*, 42 Cal.4th at pp. 21-22; see RB at p. 47.) Johnson said nothing comparable.

Respondent's attempt to distinguish *People v. Pearson*, *supra*, 53 Cal.4th 306, which supports appellant's entitlement to relief, is not persuasive. (RB at pp. 48-50.) As appellant has explained, the responses

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[9] Prospective Juror G.G. gave other reasons for not wanting to sit on a capital jury, including that he was HIV-positive and had once spent several nights in jail. (*People v. DePriest*, *supra*, 42 Cal.4th at p. 21.) Johnson had no such reservations and thought she would want someone such as herself, "fair and impartial," on the jury if she were on trial. (28CT:6095.)

given by prospective juror C.O., who this Court held was erroneously excused, are like those Johnson gave in this case. (AOB at pp. 71-74.) Johnson, like C.O., said she was impartial and open-minded. (28CT:6105, 6109 [Johnson]; 53 Cal.4th at p. 328 [C.O.].) Although Johnson and C.O. were both uncertain how they felt about the death penalty (12RT:3486 [Johnson]; 53 Cal.4th at pp. 328-329 [C.O.]), neither would automatically vote against it (28CT:6112, 12RT:3490, 12RT:3494-3495 [Johnson]; 53 Cal.4th at p. 328 [C.O.]).

Most significantly, Johnson, like C.O., explained that she could not know how she would vote until she had heard the evidence. When the court asked her whether, "based on the evidence" she could find that death was the appropriate penalty Johnson responded: "*Sitting here right now, this morning*, I would have to say that I don't really know. I really can't give you a yes answer. Maybe *hearing testimony* would change my mind so *I want to be open for that*, but I – I do have a problem with dealing with that particular part of being a juror." (12RT:3486-3487, italics added.) When defense counsel asked whether she knew that, "*not knowing the evidence*," she would "absolutely vote for life without possibility of parole no matter what," she answered clearly, "Oh, no." (12RT:3494, italics added.) And, asked whether she would "promise to at least keep an open mind about it and not make up your mind yet *until you have seen the evidence*[,]" she replied, "Oh, *absolutely*." (12RT:3495, italics added.)

In *Pearson*, C.O. had put the same thought this way: ". . . *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, italics added.) C.O.,

pressed for a response to the question whether she could "actually" vote for the death penalty, or whether, "while supporting the death penalty in the abstract, [she] never could vote for it," said she could vote for the death penalty. (*Ibid.*) Johnson was never asked precisely this question, but did say, "*I'm not saying I would never be able to [vote for death]*, but I'm saying that I would have a lot of difficulty in doing that." (12RT:3491.) Like C.O., she conveyed that she would first need to hear the evidence, she could keep an open mind and she would not automatically vote for life imprisonment without possibility of parole. (28CT:6112; 12RT:3487, 3490-3491, 3494-3495.)

In *Pearson*, this Court concluded that "[C.O.'s] uncertainty related to the appropriateness of the penalty *in a given case*, which she could not decide *without hearing all the facts.*" (*People v. Pearson, supra*, 53 Cal.4th at p. 329, italics added.) That is precisely the case with respect to Johnson. She could not say whether she could vote for the death penalty *in this case* – "sitting here right now, this morning" – but would be "open" to "hearing the testimony" presented. (12RT:3487.) Respondent's assertion that, unlike C.O., Johnson "expressed that she did not know if she could follow her oath to conscientiously consider the death penalty" is thus not merely conclusory, but simply wrong. (RB at p. 50.) It is precisely because she could consider imposing either the death penalty or life without possibility of parole, on hearing the evidence, that she could have followed her oath as a juror, yet was erroneously excluded. As with C.O. in *Pearson*, Johnson's uncertainty about the death penalty did not substantially impair her ability to perform her duties as a juror.

C. Conclusion

The trial court's dismissal of prospective juror Evelyn Johnson is not supported by substantial evidence. Although she was ambivalent about the death penalty, and would have found it difficult to impose, her answers were unequivocal – she would need first to hear the evidence and then could vote for either death or life imprisonment without possibility of parole. There is no indication in the record that Johnson's demeanor conveyed impairment, or that her demeanor was telling or remarkable in any way. The trial court's decision to excuse her for cause is therefore due no deference from this Court and the record demonstrates that the judgment of death must be reversed without a showing of prejudice. (*Gray v. Mississippi* (1987) 481 U.S. 648, 661, fn. 10, 668.)

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III.

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

A. Introduction

The trial court erred in permitting the prosecutor to play appellant's tape-recorded confession at the penalty phase because appellant's confession was impermissibly induced by the promise that he could go home to his wife and daughter if he told them everything that had happened. Respondent implicitly concedes, or "assumes," that the detectives' promise constituted an "improper promise of leniency" (RB at p. 58, see also 51, 57), but maintains the promise was not "a motivating factor" in appellant's decision to confess his involvement in the homicides (RB at pp. 58-60). The record in fact demonstrates causation – that the promise that appellant could return to his family is what prompted him to confess.

A fair and logical review of the totality of the circumstances concerning appellant and the interrogations confirms that the state has not met its burden to establish appellant's confession was voluntary. The erroneous admission of appellant's confession at the penalty phase was not harmless beyond a reasonable doubt because the evidence of appellant's relative culpability was otherwise weak. Reversal of appellant's death sentence is therefore warranted.

B. Appellant's Confession Was Motivated By the Promise That He Could Return To His Wife and Child

Respondent maintains that Detective Smith's "implied promise of leniency" – that appellant could return to his wife and daughter if he told

them everything – was not a motivating factor in appellant's decision to confess his involvement in the homicides because appellant had "already decided" to tell "a third story" – i.e., to confess to participating in the homicides – when the promise was made; and that "his change of story was in response to the detective's awareness of his involvement . . . ." (RB at p. 59.)[10] A review of the March 17th interrogation confirms that appellant's confession was in fact induced by the detective's promise.

When the detectives first suggested they start the interrogation over "with a clean slate," after appellant had acknowledged knowing Rosenquist, appellant gave a partial account of the events surrounding the homicides, without implicating himself – for example, that Rosenquist had instructed him to wait by a freeway on-ramp and then showed up in a car; that they headed north until Rosenquist drove the car into a ditch; and that they then set out on foot, met up with a ranger who took them to a hotel, and left there on foot again the next day. (15CT:3183, 3185-3187.) Appellant also told

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[10] Respondent asserts appellant told "four stories:" During the March 17th interrogation, he first denied knowing Rosenquist (15CT:3183), then acknowledged he did know him and gave some information about their actions, without reference to the homicides (e.g., 15CT:3185-3197). (This much of the taped interview, only, was played for the jury at the guilt phase.) After appellant explained that he did not want to get arrested because he needed to get back to his wife and young daughter (15CT:3212-3213), the detectives promised appellant he could "go on with his life" and "be with [his] wife and [his] child and start fresh" if he told them everything (15CT:3213, 3215). Appellant then confessed that he did participate in the homicides, under duress from Rosenquist – what respondent calls "his third story." (15CT:3217, 3223; RB at p. 54.) Finally, during the March 18th interrogation appellant further implicated himself in the homicides. (15CT:3252.) In simpler terms, appellant was subjected to two interrogations, the first of which was punctuated by the promise of leniency, prompting appellant to confess his participation in the homicides.

the detectives about his family, explaining that if Rosenquist had not shown up soon he would have started hitchhiking back to Salt Lake City, where he had a wife and three-year-old daughter to care for. (15CT:3197). The detectives asked appellant about his family (15CT:3200-3201), and then questioned him further about his account of what occurred after Rosenquist picked him up (15CT:3210-3211).

The detectives then asked appellant why he had initially given "a bullshit story." (15CT:3212.) Appellant reiterated that he was afraid that if he were put in jail he would not be able to get back home to Salt Lake City to take care of his wife and child. (15CT:3212-3213.) Asked why, in that case, he had decided to tell them "what happened," appellant said, "when you guys says okay we'll just start with a clean slate, I figured well you guys know what's going on here and I'll just tell you and, and ah, to get it over with." (15CT:3213.) Then detectives then again suggested they start fresh, gave the "crossroads in your life" exhortation, and promised appellant he could return to his wife and daughter if he told them what happened. (15CT:3215.) When appellant said he was afraid Rosenquist might have one of his people "out there" retaliate against him, the detectives assured appellant they would protect him. Appellant then confessed to participating in the homicides. (15CT:3217.)

In support of the argument that the promise did not motivate appellant to confess, respondent argues, first, that two passages in the interrogation show that appellant had decided to confess before the detectives made the promise. (RB at p. 59.) Neither passage proves the point. Respondent relies on appellant's statement, "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." (RB at

p. 59; 15CT:3213.) Yet, the most logical interpretation of this statement is that appellant was explaining why he had decided to tell the detectives what he had "*just [told them]*" – that he did know Rosenquist, that Rosenquist had picked him up at the freeway on-ramp, that Rosenquist had gotten the car stuck in a ditch, and so on (what respondent refers to as the "second story"); not why he had decided to *go on* and admit his involvement in the homicides (the so-called "third story"). That is why Detective Smith then urged appellant to keep going and "get it *all* over with" and "start out clean *again*" with "the stuff that *you haven't told us*;" acknowledged that appellant wanted to return to his family; and promised he could do that if he told them "about *what [he had] left out.*" (15CT:3213-3215, italics added.)

Respondent also points to appellant's agreement with the detectives that, "Yeah, he kind of pressured me into it and . . . ," when the detectives asked whether something unexpected had come up with Rosenquist, as establishing that appellant had already decided to tell "a third story" before the promise of leniency. (15CT:3214-3215; RB at p. 59.) However, while the comment may have suggested appellant was willing to say more – perhaps, for example, that he felt pressured by Rosenquist to help break into the Oren residence – it does not indicate a readiness to go as far as to confess an active role in the homicides. Indeed, the detective questioning him at that point felt the need to press on:

> WALL: Yeah, he kind of pressured me into it and . . .
>
> DETECTIVE: Why don't you tell me about the part . . .
>
> WALL: Ah . . .
>
> DETECTIVE: Tell me about what you left out, okay? I know it's tough 'cause I can see that it's really bothering you a lot. But why don't you just tell us how it happened, what happened, and, and let's get this, let's put this behind us,

okay? Because we know what happened. . . . .

(15CT:3215.) The detective then moved on to noting that they had not flown up from San Diego on Saint Patrick's day just to "pick [appellant's] name out of a hat;" to giving the "crossroads in your life" exhortation; to promising appellant he could return to his wife and daughter, all without an intervening word from appellant. (*Ibid.*) If appellant had earlier demonstrated a willingness to tell the detectives "what [he] had left out," there would have been no need for any of these tactics, including the promise of leniency. Thus, fairly read, the interrogation transcript shows the detective did not think appellant was about to make further admissions without further prodding. And the next tool in the detective's interrogation kit was the promise that if appellant told them "what [he] had left out," he could go home to his wife and child.[11]

Second, respondent argues that the promise could not have motivated appellant's confession because it "registered virtually no reaction from Wall," and he "appeared not to have considered it." (RB at p. 59.) This argument ignores the obvious: that it is the promise that prompted appellant to tell the detectives what he had "left out;" i.e., that he had participated in the homicides with Rosenquist. That appellant did not try to "make a deal" (RB at p. 60) likewise overlooks the promise itself; appellant understood

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[11] The fact that at the guilt phase the prosecutor stopped the tape immediately after appellant said he decided to "just tell [them] and, and ah, to get it over with," before the detective suggested they "get it all over with" and "start out clean again," further demonstrates that appellant's words were not a prelude to the confession, but merely explained why he had admitted to as much as he had. (15CT:3213:10.) Put differently, the portion of the tape the prosecutor elected to play at the guilt phase was a discreet and free-standing statement.

that *was* the deal. And he accepted it by making a full confession.

Third, the fact that after appellant said "Okay," he would tell them what happened, he also asked to be protected from Rosenquist does not mean, as respondent maintains, that he was unaffected by the promise that he could return to his family. (RB at pp. 59-60.) His concern for his personal safety was fully consistent with his earlier descriptions of Rosenquist as "a little whacko," and with his statement that Rosenquist had threatened him personally and had "people all over San Francisco" he could call on to kill him if he yielded to police pressure to confess. (15CT:3190-3192, 3215-3216, 3243.)

Fourth, respondent's reliance on *People v. Linton* (2013) 56 Cal.4th 1146, the only case it cites on causation, is misplaced. In *Linton*, this Court agreed that telling the defendant he would "not get in trouble" for any prior sexual assault constituted a promise of leniency, but found the promise had not prompted the defendant to confess because he "did not immediately respond by admitting his sexual interest in or conduct with [the victim], which would have reflected his reliance on such promise." (*Id.* at p. 1177.) Instead, as the interrogation continued the defendant persisted in denying any sexual misconduct with the victim, did so as well when questioned by a psychologist, and did not finally admit to having attempted to rape the victim until after the detective had resumed questioning him, hours later. (*Ibid.*) Here, in sharp contrast, appellant admitted participating in the homicides almost immediately after the detective promised appellant he could go home to his wife and child if he confessed. (15CT:3215, 3217.) Temporal proximity is a factor demonstrating causation here. (See, e.g., *People v. Visali* (1995) 38 Cal.App.4th 865, 876 [promise that defendant would be released on his own recognizance was "the turning point" in the

interrogation that motivated defendant's statement]; *People v. Cahill* (1994) 22 Cal.App.4th 296, 315-316 [causation found where defendant repeatedly resisted implicating himself in homicide until told that by doing so he might avoid first degree murder charge]; compare *People v. Rundle* (2008) 43 Cal.4th 76, 119-120 [no representations made before defendant confessed to murder and confession was motivated "by his own preexisting personal belief" in cooperating with law enforcement], disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390.)[12]

The record thus demonstrates that appellant's confession to participating with Rosenquist in the homicides was coerced by the detectives' promise that he could return to his family if he told them what happened.

C. The Totality Of the Circumstances Regarding Appellant and the Interrogation Confirm That His Confession Was Involuntary

As appellant explained in his opening brief, the totality of the circumstances in this case – appellant's relative youth, limited education and minimal experience with the criminal justice system, as well as the interrogating detectives' coercive exploitation of his concern for his family – weigh in favor of a finding that his confession was not voluntary. (AOB at pp. 89-92.)

The Ninth Circuit has recently clarified the important and independent role a defendant's individual characteristics play in assessing the voluntariness of a confession. In *United States v. Preston* (9th Cir. 2014)

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[12] Respondent's argument that, at the end of the interview, appellant said "no" when 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?" (RB at p. 60; 15CT:3247) is addressed at page 97 of appellant's opening brief.

751 F.3d 1008 (en banc), the court emphasized that both the characteristics of the accused and the circumstances of the interrogation are to be considered, and held that the voluntariness inquiry is not limited to cases where the police conduct was "inherently coercive," but extends to cases where "the interrogation techniques were improper only because, in the particular circumstances of the case, the confession is unlikely to have been the product of a free and rational will." (*Id.* at p. 1016, citations omitted.) The court thus overruled *Derrick v. Peterson* (9th Cir. 1990) 924 F.2d 813, in which a panel had held "that the defendant's individual characteristics 'are relevant to our due process analysis *only* if we first conclude that the police's conduct was coercive.' (*Id.* at p. 818, emphasis added.)." (*United States v. Preston, supra*, 751 F.3d at p. 1019.) Appellant's individual characteristics thus must be given independent consideration in assessing whether his confession was voluntary.

In this regard, respondent ignores the evidence regarding appellant's demeanor and mental state – that he was "stressed" about his family and "scared" of Rosenquist, and that his tone of voice was subdued and depressed-sounding. (AOB at pp. 91-92; 15CT:3213-3215 [Ex. 127-W at 56:27, 56:38], 3216 [Ex. 127-W at 58:16], 3217 [Ex. 127-W at 58:26, 58:40-59:06].) Instead, respondent suggests appellant "did not appear to be on drugs" or to have "psychological problems." (RB at p. 61.) Yet these are not claims appellant has made, on which respondent simply speculates. (RB at p. 61.) The point is that appellant was not sophisticated, street-smart or well-educated – factors lending support to his claim that he was duped by the detectives' promise.

Respondent's discussion of appellant's experience with the criminal justice system is misleading. Respondent asserts, in a footnote, that "[i]t

appears appellant had been arrested numerous times for such crimes as burglary, thefts, assault, petty larceny, criminal mischief and possession of drug paraphernalia." (RB at p. 61, fn. 7, citing 11CT:2364-2365.) The record citation is to the transcript, not in evidence, of a hearing conducted in superior court in Indiana incident to appellant's felony conviction for possession of trace or residual cocaine. The referenced incidents were all minor,[13] and the evidence was not before the trial court when it ruled on appellant's motion to suppress his confession. (6CT:1153-1180; 7CT:1282-1300; 8RT:1538-1573.)

Respondent also sidesteps the key case law appellant cites for the proposition that "[p]reying on a suspect's emotional attachment to family has repeatedly been recognized as quintessentially coercive." (AOB at p. 94, citing, e.g., *Lynumn v. Illinois* (1963) 372 U.S. 528 and *United States v. Tingle* (9th Cir. 1981) 658 F.2d 1332.) Here the detectives improperly preyed on appellant's anxiety about his wife and daughter and exploited his expressed desire to return to them. (15CT:3213-3215; see *United States v. Cabrera*, 2012 WL 2238023 (S.D. Cal., June 15, 2012) [comments suggesting suspect would not see her children for a long time or be able to attend daughter's wedding impermissibly preyed on maternal instincts].)[14]

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[13] Appellant's "arrests" for burglary and theft were incident to his breaking into his parents' home to make himself a sandwich; the assault and criminal mischief charges arose when appellant retrieved some of his things from a friend's house; the petty larceny refers to shoplifting; and the drug paraphernalia arrest arose when appellant was found in possession of a "pipe" at a bar. (11CT:2364-2365.)

[14] Pursuant to rule 8.1115, subdivision (c), of the California Rules of Court, a copy of *United States v. Cabrera*, 2012 WL 2238023 (S.D. Cal., June 15, 2012) is attached in the Appendix to this brief.

The cases on which respondent relies are distinguishable. (See RB at p. 61.) In *People v. Linton, supra*, 56 Cal.4th 1146, this Court found there was "no indication of coercive tactics . . . including any evidence that [law enforcement] exploited any personal characteristics of defendant . . . ." (*Id.* at p. 1179.) Here the detectives did just that: they exploited appellant's expressed concern about his family – which one detective acknowledged was a source of "stress" (15CT:3214) – by promising him he could return to them if he told them everything.

In *People v. Farnam* (2002) 28 Cal.4th 107, the defendant had alleged that the police officers questioning him had engaged in impermissible deception, regarding alleged fingerprint evidence. Although the defendant was 18 years old and became emotional during the interview, and in that sense demonstrated vulnerability to coercive interrogation tactics, in fact there was no coercion. (*Id.* at p. 182.) There is no indication the officers exploited the suspect's personal characteristics, as the detectives did here, seizing on appellant's concern for his family.[15]

Finally, in *People v. Higareda* (1994) 24 Cal.App.4th 1399, the defendant "'appeared calm' and not frightened or scared" throughout the interview (*id.* at p. 1409); whereas here, as noted, the detectives

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[15] Moreover, the fact that in *Farnam* the misconduct at issue was police deception, rather than coercion, is a relevant distinction. The court held in *Farnham* that, "Where the deception is not of a type reasonably likely to procure an untrue statement, a finding of involuntariness is unwarranted." (*People v. Farnam, supra*, 28 Cal.4th at p. 182.) It is well established, however, that a coerced confession must be excluded regardless of whether the suspect told the truth when he confessed, "because the methods used to extract them offend an underlying principle in the enforcement of our criminal law." (*United States v. Preston, supra*, 751 F.3d at p. 1017, quoting *Rogers v. Richmond* (1961) 365 U.S. 534, 540-541.)

acknowledged appellant was "stressed" and "scared," his demeanor reveals him to have been depressed as well, and he is heard speaking in a flat, subdued tone. (AOB at pp. 81, 91-92; 15RT:3213-3214.) Moreover, in *Higareda*, the court found no promise of leniency had been made; merely an exhortation to tell the truth unaccompanied by a threat or promise. (*People v. Higareda, supra*, 24 Cal.App.4th at p. 1409.)

Here, the totality of the circumstances, regarding appellant and the interrogation, demonstrates that his confession was involuntary.

D. The State Has Not Established That the Erroneous Admission Of Appellant's Confession At the Penalty Phase Was Harmless Beyond a Reasonable Doubt

As respondent acknowledges, the state bears the burden of proving that admission of an involuntary confession is harmless beyond a reasonable doubt. (RB at p. 64, citing *Chapman v. California* (1967) 386 U.S. 18, 23.) Here the state cannot meet that heavy burden.

Respondent ignores the central role appellant's statements played at the penalty phase and fails even to address appellant's argument that the erroneous admission of the confession gave the prosecutor additional ammunition for his closing argument. As appellant has explained (AOB at p. 95), the prosecutor repeatedly referred to appellant's statements to the police, urging the jury that they showed appellant had lied about his relative involvement in the homicides (e.g., 35RT:10804-10809, 10813), was "the instigator" in killing *both* John and Katherine Oren (35RT:10828, 10835) and lacked remorse (35RT:10834-10835).

Respondent's suggestion that the "unchallenged portion" of the interrogation showed appellant lacked remorse (RB at p. 64) makes little sense, given he had not yet confessed. Relying on the testimony of

jailhouse informant William Fitzgerald for the same proposition ignores the unreliability of his testimony, as explained in appellant's opening brief. (RB at p. 64; AOB at pp. 101, 104.) Indeed, except for this passing reference to this informant, respondent does not dispute appellant's challenge to the reliability of any of the jailhouse informants' testimony (AOB at pp. 101-104), thereby tacitly acknowledging its problematic nature.

Respondent's argument that the admission of appellant's confession was harmless because appellant had already pled guilty and admitted the special circumstanced (RB at p. 63) misses the point. The question for the jury *at the penalty phase* was whether death or life imprisonment without possibility of parole was the appropriate penalty. Hearing appellant confess his direct participation in the homicides, in contradiction to the felony murder theory presented at the guilt phase, was highly prejudicial.

Respondent's contention that, even without the confession, "the evidence showed Wall was the leader and instigator in the offenses" (RB at p. 63) is not supported by the record. The portion of appellant's March 17th statement played at the guilt phase (i.e., without the confession) painted Rosenquist as being at all times in charge. The written "Partnership Agreement," found in Rosenquist's apartment and introduced into evidence by the prosecution, makes clear that Rosenquist was to be the leader in any "business dealings" between them. (24RT:5993-5995; People's Ex. 109-R.) Josh did not witness the homicides. Neither defendant testified at any phase of the trial. Apart from the demonstrably unreliable guilt phase testimony by jailhouse informants Shawn Taylor and Raynard Davis (see AOB at pp. 100-104), there was no evidence that appellant himself struck Katherine Oren, apart from the confession.

Respondent's suggestion that the evidence presented at the guilt phase had established that appellant "was the one who stomped on Mr. Oren's ribs, as evidence by the bloody footprints on Mr. Oren's pajamas, which were consistent with Wall's shoes" (RB at p. 63), is also misleading. Sandy Wiersema, the prosecution's criminalist, testified at least twice that she could not positively identify appellant's shoe as having made the print on John Oren's pajama pants. (21RT:5454-5455.)

Nor is there any basis for respondent's argument that it had been established at the guilt phase that appellant "had a motive" to commit "these crimes," presumably including the homicides. (RB at pp. 63-64.) While there was testimony that appellant was among those Katherine Oren had accused of stealing when she found some money was missing and had threatened him,[16] and that she and appellant had quarreled, there was no evidence that appellant had ever threatened her, much less that he harbored the intent to kill or even harm her. (21RT:5499-5504, 5508-5509.) When appellant and Rosenquist happened to be heading north after returning from Mexico, long after appellant had had any contact with the Orens, and Rosenquist said he wanted money and a car, appellant remembered the Orens from when he dated their granddaughter Tammy and would have known they had a car. There is no evidence appellant had ever planned to return to the Oren residence before going there with Rosenquist the night of the homicides.

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[16] Tammy Miller, the Orens' granddaughter, testified that when she and appellant arrived at the Oren residence her brother Chris, who was out of work, and his wife Diane, were already staying there, and that Katherine Oren accused her (Tammy) and Chris, as well as appellant, of having stolen the money. (21RT:5500, 5507-5509.)

Respondent observes that "the circumstances of the crime were the dominant facts that supported the death penalty" (RB at p. 62), thereby acknowledging that the other aggravating evidence was not significant, as appellant has argued (AOB at p. 100). Moreover, appellant's audio-taped confession – which the jurors asked to hear again during their deliberations (35RT:10959-10960) – set out "the circumstances of the crime" for the jury to hear in appellant's own voice, further rendering the admission of the confession prejudicial.

Finally, respondent's assertion that "all" that the jurors learned from the "challenged portion" of appellant's interview that they did not already know – that appellant knew Rosenquist was going to molest Josh, that appellant used a knife to cut the phone cord and that appellant was the one who broke the chain on the back door (RB at p. 64) – ignores the aggravating impact of the jury hearing the confession itself – that appellant stated, "Um, I didn't want to do it, but him and I both killed the grandma and the grandpa of that household," and, "Ah I couldn't get any help from nobody so we went over and got in the house and killed 'em." (15CT:3217, 3223.) The admission of this involuntary confession cannot be said to be harmless beyond a reasonable doubt.

E. Conclusion

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

IV.

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

A. Introduction

As noted in appellant's opening brief (AOB at pp. 106-107), on April 20, 1992, approximately a month after his arrest, appellant offered to plead guilty to all counts in exchange for a sentence of life imprisonment without possibility of parole. (2CT:162, 170; 3CT:382.) The offer was rejected. (3CT:382.) Citing Evidence Code section 352, the trial court rejected defense counsel's request to inform the jury of appellant's plea offer, repeatedly expressing its concern that the evidence would confuse the jury. (33RT:10495-10496, 10498-10500.) The court also concluded that the plea offer was not indicative of remorse. (33RT:10499.)

The trial court erred in excluding the evidence of appellant's plea offer. The evidence was relevant and inherently mitigating, in that it demonstrated appellant's early acceptance of responsibility and acknowledgment of wrongdoing, and reflected his concern for sparing Josh Dooty and others the ordeal of a trial. The court's concern with potential juror confusion was unfounded, and hence its invocation of Evidence Code section 352 was unwarranted.

Respondent maintains the evidence of appellant's plea offer was properly excluded because, as a conditional plea, it was not relevant mitigating evidence; because it was cumulative of his later guilty plea; and because, to the extent the evidence had any non-cumulative, mitigating value it was properly excluded under Evidence Code section 352. (RB at

pp. 65, 69.) Respondent also argues any error is harmless. (RB at pp. 69-70.) Respondent is wrong on all counts.

B. Evidence Of Appellant's Early Offer To Plead Guilty Was Relevant In Mitigation

Evidence of appellant's early offer to accept a sentence less than death in exchange for a guilty plea was relevant in mitigation. While it is true that *Lockett v. Ohio* (1978) 438 U.S. 586 does not limit the trial court's authority to exclude as irrelevant evidence "not bearing on the defendant's character, prior record, or the circumstances of his offense" (RB at p. 65), here, as appellant has argued (AOB at pp. 109-110), and as defense counsel explained (33RT:10480, 10487-10488, 10497; 2CT:170), appellant's early offer to plead guilty *did* bear on his character, in that it showed his willingness to accept responsibility and acknowledge wrongdoing, as well as his concern for sparing Josh Dooty and others the stress of a trial.

As defense counsel pointed out, rule 4.423(b)(3) of the California Rules of Court, governing non-capital sentencing, expressly provides that a defendant's voluntary acknowledgment of wrongdoing at an early stage of the proceedings constitutes a factor in mitigation. (AOB at p. 111; 33RT:10479-10480.) Although the trial court observed that the determinate sentencing rule had no application in capital cases (33RT:10500), respondent does not dispute appellant's contention that the rule for non-capital cases is pertinent in defining the scope of mitigating evidence in capital cases. It would be odd at best, if not irrational and unfair, for state law to deny a defendant in a capital case – where the federal Constitution demands heightened reliability and guarantees broad mitigation – the right to have his sentencer consider a factor in mitigation that is available to a defendant in a non-capital case.

Federal court decisions are divided on whether a conditional plea offer is admissible at sentencing in a capital case. Respondent cites the Sixth Circuit decision in *Owens v. Guida* (6th Cir. 2008) 549 F.3d 399, in which the prosecutor had offered a defendant charged with capital murder in Tennessee a life sentence in exchange for a guilty plea, contingent on her codefendant's acceptance of the same offer. (RB at pp. 67-68; *Owens v. Guida*, *supra*, 549 F.3d at pp. 419-420.) Although the defendant was prepared to accept the state's offer, her co-defendant declined, and the offer was withdrawn altogether. (*Id.* at p. 420.) The trial court denied the defendant's request to introduce evidence of the failed plea negotiations at the penalty phase of her trial.

On appeal from the denial of the defendant's habeas corpus petition, a divided panel concluded that the Tennessee Supreme Court had not unreasonably applied clearly established federal law. (*Owens v. Guida*, *supra*, 549 F.3d at p. 420.)[17] The majority found the defendant "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." (*Ibid.*) The court also noted that the defendant had urged the trial court to enter her guilty plea, over the state's objection, "because 'this case carries the ultimate [punishment,] death by electr[o]cution' and because [she] 'wants this matter done with and over with,' but not because she had accepted responsibility for her crime." (*Ibid.*)

Owens thus does not set out a broad ruling that a conditional plea

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[17] The court concluded that "[the defendant's] real complaint is that the Tennessee Supreme Court did not expand *Lockett*, but that is not the standard we are duty-bound to apply." (*Owens v. Guida*, *supra*, 549 F.3d at p. 422.)

offer can never be relevant mitigating evidence, but rather represents a narrow holding that the facts before the court did not show an unreasonable application of the *Lockett/Eddings* principle.

Owens is also distinguishable on its facts. Appellant extended his offer to plead guilty very early on and, as defense counsel explained, did so because he wished to accept responsibility and acknowledge wrongdoing, and to spare Josh and others the ordeal of a trial. (33RT:10487-10488, 10497; 2CT:170.)[18] Neither appellant nor his counsel ever expressed concern with avoiding the death penalty. Although the trial court speculated that appellant's offer to plead guilty could have reflected his recognition that "[his] goose [wa]s cooked" (33RT:10499), there is nothing in the record to suggest that appellant's acceptance of responsibility and concern for Josh were insincere.

Moreover, other federal courts have taken a different view. *Johnson v. United States* (N.D. Iowa 2012) 860 F.Supp.2d 663, which respondent cites (RB at pp. 68, 70), in fact further supports appellant's position that his offer to plead guilty was relevant and admissible in mitigation. Respondent overlooks that in *Johnson* the district court concluded that the fact of an offer to plead guilty in exchange for a sentence less than death was admissible as mitigating evidence supporting acceptance of responsibility, and that the defendant's counsel had rendered deficient performance in failing to seek to introduce the evidence.

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[18] Defense counsel noted that Josh's primary in-patient treating psychiatrist had indicated that "having Josh relive this case" would cause further psychological damage. (33RT:10487-10488.)

(860 F.Supp.2d at pp. 903-904.)[19]

In *United States v. Fell* (D. Vt. 2005) 372 F.Supp.2d 773, the court permitted the defendant to introduce a stipulation that he had offered to plead guilty in exchange for a sentence of life imprisonment without possibility of parole, agreeing that this evidence was "relevant to the mitigating factor of acceptance of responsibility." (*Id.* at p. 784.)[20] The court excluded the draft plea agreement itself, and the statements made during the failed negotiations, on the grounds that the prosecutor's belief as to the appropriate penalty were irrelevant: "It is Fell's *offer* to plead guilty that bears on his acceptance of responsibility. The Government's *response* to Fell's offer is not relevant." (*Ibid.*, italics in original.) Here appellant's offer to plead guilty was relevant in mitigation and should have been admitted.

C. Evidence Of Appellant's Plea Offer Was Erroneously Excluded Under Evidence Code Section 352

This Court has noted that "Section 352 directs 'the trial judge strike a careful balance between the probative value of the evidence and the danger of prejudice, confusion and undue time consumption. That section requires

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[19] The court found prejudice had not been established on the ineffectiveness of counsel claim, under *Strickland v. Washington* (1984) 466 U.S. 668. (*Johnson v. United States*, *supra*, 860 F.Supp.2d at p. 905.) As explained in Section C., *post*, the exclusion of appellant's plea offer under Evidence Code section 352 was prejudicial under *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

[20] Although the defendant in *Fell* was sentenced under the Federal Death Penalty Act, the relevant evidentiary standard for the admissibility of evidence in mitigation and aggravation is virtually identical to Evidence Code section 352. (*United States v. Fell*, *supra*, 372 F.Supp.2d at p. 782, quoting 18 U.S.C. § 3593(c).)

that the danger of these evils *substantially* outweigh the probative value of the evidence.'" (*People v. Babbitt* (1988) 45 Cal.3d 660, 688, citations omitted, italics added.) This balance "'is particularly delicate and critical where what is at stake is a criminal defendant's liberty.'" (*Ibid.*, citations omitted.) Further, "Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of *significant* probative value to his defense." (*Id.* at p. 684, quoting *People v. Reeder* (1978) 82 Cal.App.3d 543, 553, italics in original.)

Here, where all that was sought to be presented was the *fact* of appellant's early offer to plead guilty in exchange for a sentence of life imprisonment without possibility of parole, the trial court's concern with potential juror confusion was completely unfounded – much less was there any basis to conclude that the danger of juror confusion "substantially" outweighed the probative value of this mitigating evidence. The jury would simply have been told that, early on, appellant had offered to plead guilty in exchange for a sentence of life imprisonment without possibility of parole. There is nothing confusing about that.

Indeed, no court considering the admissibility of conditional pleas, including *Owens v. Guida*, *supra*, 549 F.3d 399, has cited potential juror confusion as a basis for excluding such evidence. In fact, in *Fell*, the court observed that information solely about the defendant's "offer to plead guilty is unlikely to confuse the jury." (*United States v. Fell*, *supra*, 372 F.Supp.2d at p. 774.)[21]

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[21] On appeal in *Fell*, the Second Circuit rejected the defendant's argument that the plea agreement itself, setting out the opinions of the

(continued...)

As appellant explained in his opening brief, the trial court's concern with possible jury confusion apparently resulted from its mistakenly conflating two points that are unrelated – appellant's possible reason for offering to plead guilty and the prosecutor's discretion to charge a case capitally. (AOB at pp. 112-113.) It is true enough that the district attorney had discretion whether to seek the death penalty in the first instance, and the discretion to accept or decline a defendant's offer to accept a sentence less than death. But there is no reason to think the jury would "second guess" one decision more than the other. (RB at p. 69.) Notably, respondent does not dispute appellant's analysis or otherwise defend the trial court's finding on this point.

Further, as noted in appellant's opening brief (AOB at pp. 112-113), the trial court's concern that the jury might "misinterpret" appellant's plea offer as evidencing remorse – "it shouldn't be used for that because it is not a sign of remorse whatsoever" (33RT:10499) – is highly problematic. As explained above, appellant's offer, in itself, was relevant in mitigation. (*United States v. Fell, supra*, 372 F.Supp.2d at p. 784.) Moreover, as noted in appellant's opening brief (AOB at p. 113), the extent to which the jury might have interpreted the plea offer as mitigating goes to the weight of the evidence, not its admissibility. (*People v. Lee* (2011) 51 Cal.4th 620, 651 [prior misdemeanor guilty plea]; *People v. Taylor* (2001) 26 Cal.4th 1155, 1173 [testimony regarding proposed criminal activity].) Thus, appellant

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[21] (...continued)
prosecutor, should also have been admitted, finding that "admission of the draft would authorize a confusing and unproductive inquiry into incomplete plea negotiations." (*United States v. Fell* (2d Cir. 2008) 531 F.3d 197, 219-220.) Here, as noted, there were no plea negotiations; just an offer that was not accepted. (33RT:10485.)

should have been allowed to argue the mitigating value of his early plea offer – whether as showing acceptance of responsibility and acknowledgment of wrongdoing, or as indicative of remorse – recognizing, as defense counsel in fact did (33RT:10493-10494) and as respondent points out (RB at pp. 69-70), that the prosecutor might well argue the offer was made to avoid the death penalty, or that appellant in fact lacked remorse. It was not for the trial court to weigh the evidence.

Although the trial court cited only the prospect of juror confusion as a basis for excluding the evidence of appellant's early plea offer (33RT: 10495-10500), respondent maintains the evidence was also properly excluded as cumulative of appellant's confession and eventual guilty plea. (RB at pp. 69-70.) Respondent's argument misses the point. As noted, appellant's counsel explained that appellant's offer, made very early on, reflected his desire to spare Josh, and his own family, the stress of a capital murder trial. (33RT:10487-10488; 2CT:162-163, 167, 170.) In other words, had the offer been accepted, there should have been no trial; Josh and appellant's family would have been spared the ordeal.

People v. Alfaro (2007) 41 Cal.4th 1277, on which respondent relies (RB at p. 67), is distinguishable. In *Alfaro* this Court found that, in light of the evidence of the defendant's remorse presented to the second penalty phase jury, including defendant's own testimony at the first penalty trial, "[t]he admission of defendant's offer to enter a conditional guilty plea to demonstrate her remorse and acceptance of responsibility for the crimes would have been cumulative of these accounts." (*Id.* at p. 1306, italics added.) Here, given appellant's election not to testify, and the prosecutor's argument that appellant *lacked* remorse (35RT:10835), evidence of his early offer to plead guilty, whether or not conditional, would not have been

cumulative of other evidence of remorse; it would have been relevant to show his early willingness to accept responsibility and acknowledge wrongdoing, and to spare others the stress associated with a capital murder trial. *People v. Edwards* (2013) 57 Cal.4th 658, which respondent also cites (RB at pp. 65-66), is inapposite for the same reason, as the Court there held that "[t]he mitigating value of the excluded testimony was cumulative to the ample evidence of defendant's remorse adduced through the testimony of defendant [and four other witnesses]." (*Id.* at p. 760.) No such evidence was presented in this case.

D. Exclusion Of the Evidence Of Appellant's Plea Offer Was Prejudicial and Warrants Reversal Of the Death Sentence

Respondent maintains the exclusion of the evidence of appellant's plea offer is harmless beyond a reasonable doubt, under *Chapman v. California*, *supra*, 386 U.S. at p. 24, because the jury learned that he had confessed and had then pled guilty to most of the charges before trial. (RB at pp. 69-70.) This reprises the argument that the evidence would have been cumulative, addressed above. The point is that appellant was denied that right to inform the jury that, long before trial, he was prepared to plead guilty on all counts and avoid a trial altogether because he wanted to spare Josh and his family additional anguish.

Respondent also speculates, citing *Johnson v. United States*, *supra*, 860 F.Supp.2d 663, that had the jury been informed of appellant's early plea offer, the prosecutor "undoubtedly would have argued" that appellant only made the offer to avoid the death penalty and, when the offer was rejected, failed to plead guilty unconditionally. (RB at p. 70.) As noted, however, defense counsel was prepared to explain that appellant's plea evidenced his

acceptance of responsibility and acknowledgment of wrongdoing – which would have been weighed in mitigation, and would have countered the prosecutor's argument that appellant lacked remorse. (33RT:10480, 10835.) And, the jurors reasonably would have understood that the trial was necessitated as much by the prosecutor's rejection of appellant's conditional offer as by appellant's election not to plead guilty unconditionally.

Moreover, in *Johnson* the federal district court found defense counsel's failure to present evidence of the defendant's plea offers amounted to deficient performance, under *Strickland v. Washington*, *supra*, 466 U.S. 668, but found prejudice had not been established because the defendant's early plea offers lacked sufficient detail and his later offers were made so close to trial as to appear more like efforts to avoid the death penalty than to accept responsibility. (*Johnson v. United States*, *supra*, 860 F.Supp.2d at p. 905.) At issue here is only appellant's early, detailed, unambiguous offer to plead guilty on all counts in exchange for a sentence of life imprisonment without possibility of parole. (2CT:162-163, 167, 170.)

Finally, a death sentence in this case was not a foregone conclusion. Certainly, the murders of John and Katherine Oren were highly aggravated. But that fact, by itself, does not assure a death sentence. (See *In re Lucas* (2004) 33 Cal.4th 682, 735 [where defendant killed two elderly, vulnerable neighbors in their home, and had a prior violent assault, Court reversed death judgment because defense counsel failed to adequately investigate defendant's background and presented no mitigating evidence]; *People v. Gay* (2008) 42 Cal.4th 1195, 1227 [death verdict was not a foregone conclusion despite aggravating evidence that defendant murdered peace officer in the performance of his duties and had committed prior violent crimes, which were "unusually – and unnecessarily – brutal and cruel," and

scant evidence in mitigation]; *People v. Sturm* (2006) 37 Cal.4th 1218, 1244 [although defendant's crime – murdering three friends after he had bound them and as they cried or begged for mercy – "was undeniably heinous," a death sentence "was by no means a foregone conclusion"].)

Moreover, the only evidence of prior criminal conduct – appellant's conviction in Indiana for possession of trace or residual cocaine, and the unadjudicated shoving and kicking incident involving Heacox and Donner – was not extreme. (34RT:10630-10634.) It is reasonably possible that the evidence of appellant's early plea offer would have given a juror who questioned whether death was the appropriate penalty some redeeming evidence of appellant's good character so that he or she "'would have struck a different balance'" (*In re Lucas*, *supra*, 33 Cal.4th at p. 690, quoting *Wiggins v. Smith* (2003) 539 U.S. 510, 123) and would not have voted to return a sentence of death. The exclusion of the proffered mitigation evidence cannot be said to be harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Appellant's death sentence therefore should be reversed.

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V.

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

A. Introduction

At the time of the homicides and at the time of appellant's conviction, the relevant restitution statutes did not permit or require the trial court to take into account the defendant's ability to pay in setting the amount of a restitution fine. As explained below, appellant therefore has not forfeited his claim that the trial court erred in not considering appellant's inability to pay any more than the statutory minimum. Whether a restitution fine should be set by the jury remains an open question with this Court.

B. Appellant Is Entitled To Application Of the Current Version Of Penal Code Section 1202.4, Which Requires Consideration Of the Defendant's Inability To Pay a Fine Greater Than the Statutory Minimum, and Has Not Forfeited This Claim

The homicides of which appellant was convicted occurred in March 1992. At that time, former Government Code section 13967, subdivision (a), did not require the sentencing court to considering the defendant's ability to pay in fixing the amount of a restitution fine and the version of Penal Code section 1202.4 in effect precluded the court from doing so. Appellant's conviction, based on his plea of guilty to murder with special circumstances, was entered August 24, 1994. (16CT:3394, 3513-3514.) The judgment of death was entered January 30, 1995. (16CT:3415-3420, 3607.)

Ten years later, in *People v. Vieira* (2005) 35 Cal.4th 264, this Court held that the defendant was entitled to application of "the current version of section 1202.4," and announced that "[t]he key date is the date of final

judgment. If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final, then, in our opinion, it, *and not the old statute in effect when the prohibited act was committed*, applies." (*Id.* at p. 305, citation omitted, italics added.) In *People v. Avila* (2009) 46 Cal.4th 680, decided four years after *Vieira*, the Court found the defendant had forfeited his challenge to a restitution because section 1202.4 had been amended, prior to entry of judgment, to provide for the consideration of the defendant's ability to pay, and defense counsel had failed to bring the amendment to the trial court's attention. (*Id.* at pp. 728-729.) Relying on *Avila*, respondent argues that because the version of section 1202.4 in effect at the time of entry of judgment – rather than at the time of the offense or conviction – provided for the consideration of the defendant's ability to pay, appellant has forfeited the restitution claim. (RB at pp. 77-78.)

The amendment to section 1202.4 that became effective September 29, 1994, provides that the trial court may consider the defendant's ability to pay in setting the amount of the restitution fine. (Pen. Code, § 1202.4, Ch. 1106, § 3, eff. Sept. 29, 1994.) Yet, before *Vieira* and *Avila*, appellant's counsel reasonably would have assumed that "the old statute in effect when the prohibited act was committed" applied, rather than any intervening amendment that might have been passed. (*People v. Vieira*, *supra*, 35 Cal.4th at p. 305.) Indeed, respondent relies on former Government Code section 13967, subdivision (a), *in effect at the time of the homicides* but since repealed, in support of the argument that the trial court properly exercised its discretion in setting the fine at the $10,000 maximum. (RB at p. 79.) Thus, appellant has not forfeited his claim that the trial court erred in failing to consider his inability to pay the $10,000 restitution fine.

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

As explained in appellant's opening brief (AOB at pp. 138-139), Penal Code section 1202.4 provides (and in the versions in effect at the time of appellant's trial provided) that the trial court shall impose of a "separate and additional" restitution fine unless it finds "compelling and extraordinary reasons" not to. (Pen. Code, § 1202.4, subds. (b) & (c); former Pen. Code, § 1202.4, subd. (c), Ch. 1106, § 3, eff. Sept. 29, 1994.) Because the statute gives the trial court, not the jury, the discretion to determine when there are reasons for not ordering restitution, it runs afoul of *Apprendi v. New Jersey* (2000) 530 U.S. 466, in which the Supreme Court held that any fact used to support an increase in sentence (other than a prior conviction) must be submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

Appellant acknowledged in his opening brief that two courts of appeal have concluded that *Apprendi* is not applicable to restitution fines. (AOB at pp. 138-139, citing *People v. Kramis* (2012) 209 Cal.App.4th 346, 348-352 and *People v. Urbano* (2005) 128 Cal.App.4th 396, 405-406.) Respondent relies on these cases in support of the argument that *Apprendi* is inapplicable, but fails even to address appellant's argument that neither decision addresses the argument, raised here, that the language of Penal Code section 1202.4, permitting the sentencing court to refrain from imposing any restitution fine if it finds "extraordinary and compelling reasons" renders the fine discretionary. (AOB at p. 139; RB at p. 79.) Appellant reiterates that these cases were wrongly decided.

D. Conclusion

For the foregoing reasons, and for the reasons set forth in his opening brief, appellant is entitled to remand for determination by a jury beyond a reasonable doubt whether he should pay a restitution fine, and if so whether, based on his inability to pay such a fine, among other factors, the fine should exceed the applicable statutory minimum. Pending redetermination of the amount of restitution, if any, appellant requests this Court stay further implementation of the restitution fine.

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CONCLUSION

For all of the reasons stated above, and for the reasons set forth in appellant's opening brief, the entire judgment – the conviction, the special circumstance findings, the weapons use allegations and the sentence of death – must be reversed.

DATED: November 20, 2014

Respectfully Submitted,

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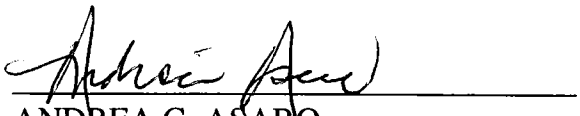
CERTIFICATE OF COUNSEL
(Cal. Rules of Court, Rule 8.630(b)(2))

I, Andrea G. Asaro, am the Senior Deputy State Public Defender assigned to represent appellant Randall Clark Wall in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that the brief is 19,264 words in length.

DATED: November 20, 2014



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APPENDIX

2012 WL 2238023
Only the Westlaw citation is currently available.
United States District Court,
S.D. California.

UNITED STATES of America, Plaintiff,
v.
Catherine CABRERA, Defendant.

No. 11cr4518–IEG. | June 15, 2012.

Attorneys and Law Firms

U.S. Attorney Cr, U.S. Attorneys Office Southern District Of California, San Diego, CA, for Plaintiff.

Donald A. Nunn, Law Offices Of Donald A. Nunn, Poway, CA, for Defendant.

ORDER:

(1) GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO SUPPERSS

(2) GRANTING IN PART DENYING IN PART DEFENDANT'S MOTION IN LIMINE TO ADMIT EXCULPATORY STATEMENTS

IRMA E. GONZALEZ, District Judge.

*1 Presently before the Court is Defendant Catherine Cabrera's motion to suppress and her motion in limine to admit exculpatory statements. [Doc. Nos. 21, 23.] For the reasons below, the Court **GRANTS IN PART** and **DENIES IN PART** both motions.

BACKGROUND

I. Vehicle Inspection and Arrest [1]

1 The statement of facts underlying Defendant's arrest is taken from the parties' briefs on Defendant's motion to suppress. Because these facts are not disputed for purposes of this motion, neither party has provided the Court with underlying evidence establishing these facts.

On September 7, 2011 at approximately 10:55 a.m., Defendant attempted to enter the United States through the San Ysidro Port of Entry as the driver and sole occupant of a white, 2006 Honda Civic. Defendant informed the primary officer on duty that she was headed home to Whittier, California, had purchased the car a week earlier, and had nothing to declare. Upon query of the vehicle's VIN number, the primary officer received a computer generated referral on the vehicle and requested the assistance of a canine enforcement officer. The canine officer then ran his dog on the vehicle, and the dog alerted to the dashboard area of the car.

The officers referred the vehicle to secondary for further inspection. Once in secondary, an officer opened the hood of the car and observed some packages in the firewall area. The officers then drove the vehicle through an x-ray machine and saw anomalies in the firewall area. Thereafter, the officers removed 11 packages of a substance that field-tested positive for cocaine from the car. The packages had a total weight of approximately 9.5 kilograms or 20.9 pounds. At around 1:00 p.m., officers informed Defendant of their discovery and placed her under arrest.

II. Defendant's Interrogation

Defendant's interrogation began at approximately 5:00 p.m., and lasted approximately three hours and forty-five minutes. [*See generally* Doc. Nos. 21–2, 21–3, 21–4, 21–5.] [2] The interrogation was conducted primarily by Department of Homeland Security Agents Patrick MacKenzie and Javier Enriquez in English. [*Id.*] Defendant is fluent in English and states in her motion that the fact the interrogation was conducted in English is not at issue in her motion. [Doc. No. 21–1 at 2.]

2 When citing to the interrogation, the Court will refer to the transcripts of the interrogation DVDs attached to Defendant's motion to suppress. The Court has also viewed the actual DVDs of the interrogation that the Government provided along with its response in opposition to Defendant's motion. [Doc. No. 27.] However, there were no timestamps on the DVDs. Therefore, the Court is unable to cite to the DVDs themselves. Any citation to the transcripts should also be considered a citation to that section of the DVDs.

The agents began the interrogation by obtaining background information from Defendant. [Doc. No. 21–3 at 1–10.] Agent MacKenzie then informed Defendant of her *Miranda* rights one by one. [*Id.* at 10–11.] Defendant stated that she understood each right, and initialed that she understood the

rights on the waiver form. [*Id.*] Agent MacKenzie explained to Defendant that if she wished to speak with them, she would have to sign the waiver form acknowledging she understood her rights and that she waived them freely and voluntarily without threat or intimidation and without any promise of reward or immunity. [*Id.* at 11.]

Defendant began to tell the agents that she was not involved with the narcotics and did not know about them. [Doc. No. 21–2 at 11.] Agent MacKenzie explained to Defendant again that if she wanted to speak to them about what happened, she would have to sign the waiver, and that she could stop the interrogation at any time for the purpose of consulting with an attorney. [*Id.* at 12.] The agent also told Defendant that she would eventually be provided with an attorney even if she agreed to waive her *Miranda* rights. [*Id.* at 13.] Agent MacKenzie then explained to Defendant she was under arrest and charged with two federal felonies and that she would be taken to the federal jail whether or not she spoke with them. [*Id.*]

***2** Defendant again tried to explain her story to the agents. [Doc. No. 21–2 at 14.] Agent MacKenzie again told her that they could not talk to her about her background story and stated the following:

> Agent MacKenzie: So I don't mean to be rude or disrespectful. I mean you know we're kind of at that point where its either you gotta you gotta waive your rights. If you're uncomfortable with the way this is going ...
>
> Defendant: Um hum.
>
> Agent MacKenzie: And you don't want to do it anymore just say hey guys I think now is the time to call a time out and I don't want to do this anymore. And then its over you know, then we're done. Its your decision. And we don't want to you know have any influence over that.

[*Id.*] Defendant still stated that she was not sure. [*Id.* at 14–15.] The agents tried to explain the process to Defendant. They told her she would go to jail no matter what, and then she would be taken before a judge and given an attorney. [*Id.* at 15 .] The agents explained that they would make a report based on any statements Defendant made during the interview, and that the report would be provided to the U.S. Attorney and Defendant's attorney. [*Id.*] But if Defendant did not tell them anything, then they would not provide the attorneys with a report. [*Id.* at 15–16.] The agents also explained that Defendant might not get an attorney that day, but that she would be provided one before she appeared before a judge. [*Id.* at 16.]

Defendant stated that she was still not sure. [*Id.* at 17.] She said that she wanted to tell the agents her story, but she did not want to sign the waiver form and have it hurt her later. [*Id.*] The agents said that it was her decision, that she did not have to sign the waiver, and that they would respect her decision. [*Id.* at 17–18.] The agents then gave Defendant a more thorough explanation of her *Miranda* rights, and Defendant read through the waiver form again. [*Id.* at 18–20.] Defendant stated that she was worried about statements coming back to hurt her later, and the agents stated that they could not guarantee that her statements would not be used against her later. [*Id.* at 20.] The agents informed Defendant of her rights a third time. [*Id.* at 20–21.] Defendant read the waiver aloud, acknowledged that she understood her rights, and signed the waiver form. [*Id.* at 21.]

Defendant's interrogation was conducted in three phases. The first phase lasted about three hours including the portions where the agents obtained her background information and her *Miranda* waiver. During the first phase, Defendant began to tell the agents her story, but she made several inconsistent statements. Agents MacKenzie and Enriquez stated that they did not believe her story, and told her that the U.S. attorney would not believe her story, and that they would like her to be honest with them. [*See, e.g.*, Doc. No. 21–2 at 47; Doc. No. 21–3 at 51, 67–68.] In addition, Agent MacKenzie stated a couple times that although he could not make any promises, things generally go better for people that tell the truth and the agents would tell the U.S. Attorney if they thought she was being honest with them. [Doc. No. 21–3 at 55–56, 89.] Agent MacKenzie also told Defendant that he could not promise anything, but he assumed that because her story had so many holes in it, the U .S. Attorney would go "full tilt" and seek the maximum penalty for her. [Doc. No. 21–3 at 63.] Later in the interview, the agents looked through Defendant's cell phone, and the agents told Defendant:

> ***3** Agent Enriquez: You know from the brief look I had at those messages. I think you do know this guy. Not only do you know him, but you are involved with this guy. Okay? Once we get the time of those messages in better detail, we're going to get a better picture.
>
> Agent MacKenzie: But that means that might have to come out in court, you know, maybe he is somehow involved. Because we have to cover all the angles on this, you know, that's just the way it works, um. You might want to have

a little talk with your husband before I have to do that just in case.

[*Id.* at 90;*see also id.* at 87.]

Throughout this initial interview, Defendant told the officers that she was being honest but then changed some parts of her story. Her story continued to contain noticeable inconsistencies. However, even after changing her story, Defendant continued to maintain that she did not know there were drugs in her car. [*See, e.g.,* Doc. No. 21–3 at 56, 67, 73.] Eventually, the agents said that they were frustrated, and Agent MacKenzie stated a few times that he would end the interview because he thought he was being lied to, but Defendant appeared to want to continue the interrogation. [*See, e.g., id.* at 63–64, 100–01.] During this phase, the agents remained calm, were sitting at a table with Defendant, and never raised their voices at her.

After about three hours, agent Michael Bettencourt entered the room. Agent Bettencourt appeared to be agitated and began speaking to Defendant forcefully, yelling at times, interrupting her, and pacing around the room. Agent Bettencourt told Defendant that an innocent person would not be as calm as she was acting and would instead be freaking out. [Doc. No. 21–3 at 91.] He then said:

Agent Bettencourt: What's the mandatory ...

Agent MacKenzie: 10 years.

Agent Bettencourt: for mandatory minimum? How old are your children?

Defendant: 17 and 19.

Agent Bettencourt: So 27 and 29 think about that.

Defendant: I'm really, I don't know what else to do I ...

Agent Bettencourt: Tell the truth, that's what you can do.

...

Agent Bettencourt: You're very sharp and you are very manipulative. Extremely, you are very sharp, and you are intelligent, and you are very articulate, but you are extremely manipulative the way you turn your story and stay very calm and collected. Oh this is what, this is, oh, this is. And its sociopathic. Actually, its very interesting. I love psychology and you are ...

Defendant: No I ...

Agent Bettencourt: the cream of the crop.

[*Id.* at 91–92.] Shortly after, Agent MacKenzie again told Defendant that the mandatory minimum is ten years, and that he would tell the U.S. Attorney that he did not believe her story and he would prove to the attorney that her story is a lie. [*Id.* at 93 .] Agent Bettencourt then made several sarcastic comments to Defendant such as: "Oh yeah, cause $200,000 worth of coke.... The drug fairy's going to go pick it up and magically like secrete it from your vehicle without you knowing."[*Id.* at 95.] He also said: "Oh you're an alien smuggler ... and you worked yourself up to dope. That's it there you go."[*Id.* at 99.] Agent MacKenzie also at one point told Defendant: "We're either going to trial or your attorney's going to talk to you and he's going to say hey you know what, tell them the truth, there's more to the story."[*Id.* at 96.] Agent Bettencourt and Agent MacKenzie then continued to tell Defendant that her story had holes, they did not believe her story, and they would tell that to the U.S. Attorney. [*See id.* at 94–100.] Defendant did not change her story, and the agents then ended the interview. [*Id.* at 101.]

*4 The interrogation began again some time later with San Diego Police Officer Miguel Morales now interrogating Defendant. Officer Morales was seated and did not raise his voice, but he did speak assertively. He interrupted Defendant before she completed almost every sentence and would at times put words in her mouth. He told Defendant:

> Officer Morales: This is the only opportunity you have to help yourself. And that's the only reason I'm telling you. Cause you can either tell him the truth, the whole truth, or just stick to what you've got so far and what you have done right now. Instead of helping you, its going to hurt you because they're going to think of you as both a smuggler and a liar. Okay, as opposed to just a smuggler that's doing it because they're having a hard time making ends meet. Maybe because their house is foreclosed, because their kids need shoes, they need food, they need whatever they need. Okay. And what you did was because you're a good mother. That's why you did it,

> right? Because you're a good mother and you want to provide for your kids. That's admirable. Its just a bad decision.

[Doc. No. 21–4 at 2.] Officer Morales later said: "Do you understand not being there for your daughter's wedding. How do you think she's going to feel that day? How do you think she's going to feel? Think about it."[*Id.* at 3.] Defendant appeared to get upset shortly after Officer Morales made these statements. Officer Morales then repeatedly told Defendant to tell him the truth and stop lying. [*See, e.g., id.* at 4, 6.] Eventually, Defendant admitted to Officer Morales that she did know there were drugs in her car. [*Id.* at 6.] Officer Morales continued to interrogate Defendant about where she was going to take the drugs once she crossed the border and her compensation for transporting the drugs. At one point Officer Morales said:

> Officer Morales: Because if you, if you cooperate and give em the story. Once again, the judge is going to look at the paper and he's going to see one of two things. He's either going to say look at the story and read it and then he's going to first laugh and after he's done laughing he says okay, obviously she did not learn, she must be part of the group, she's involved. Uh, she's giving a false story because she is protecting someone, that she is a player.
>
> Defendant: I'm not protecting nobody.
>
> Officer Morales: You were protecting. Well, I'm just telling you what the judge is going to think, okay. Or because they'll look at it another way when you tell the truth finally tell the truth. Okay? Trust me if you have four guys telling you that its not true, its because it is that obvious.... Now if you're honest with us and you tell us exactly what happened and they look at that and the judge looks at that and the attorney looks at that and say, hey, you you know what, yeah, hard times, everybody, we're all going through hard times. She's going through a hard time, she had no other options, she made a bad decision.

***5** [*Id.* at 12–13.] Defendant then admitted that she would be compensated for transporting the drugs across the border. [*Id.* at 15–18.] This second interview took about 20 minutes.

The interrogation began for a third time with Agent MacKenzie back interrogating Defendant. Agent MacKenzie told Defendant that it sounded like she had started to tell the truth, and Defendant responded: "Well I think I'm admitting that I knew that they were going to put the drugs in the car."[Doc. No. 21–5 at 1.] Agent MacKenzie then began taking down her confession in more detail. At one point, Agent McKenzie asked Defendant:

> Agent MacKenzie: Now you have been sitting in here a long time and I want to make it pretty clear that we understand each other. Under no time have we you know ...
>
> Defendant: Pressured me to say anything?
>
> Agent MacKenzie: You agree with that statement?
>
> Defendant: Yes. Yes. I understand.
>
> Agent MacKenzie: Okay, um, you know because there's you know there's different ways to interview somebody and you know basically, you finally decided you were going to tell the truth. Isn't that correct.
>
> Defendant: Yes
>
> Agent MacKenzie: Okay. Um, so we didn't shut the door and give you a couple of punches or anything like that right. Your, you just basically decided it was time to tell the truth. Okay. Just wanted to make sure. Because I wasn't here the whole time, and I want to make sure you know that you know that.
>
> Defendant: Oh no, the other agent made me realize a lot of stuff.

[*Id.* at 2–3.] This third interview concluded after about 15 minutes.

DISCUSSION

I. Defendant's Motion to Suppress

Defendant moves to suppress the statements she made during her interrogation because her confession was not voluntary. [Doc. No. 21–1 at 7–9.] Defendant argues that her will was overborne by the psychological and emotional pressure placed on her by the agents. [*Id.*] In response, the Government argues that Defendant validly waived her *Miranda* rights, and the agents did not coerce Defendant's statements. [Doc. No. 27 at 5–13.]

A. Waiver of Miranda Rights

As an initial matter, the Government argues that Defendant validly waived her *Miranda* rights. [Doc. No. 27 at 5–10.] Defendant does not contest that she waived her *Miranda*

rights. Defendant appears to only argue that her statements were coerced. [Doc. No. 21–1 at 7–9.]

"For inculpatory statements made by a defendant during custodial interrogation to be admissible in evidence, the defendant's 'waiver of *Miranda* rights must be voluntary, knowing, and intelligent.' " *United States v. Garibay,* 143 F.3d 534, 536 (9th Cir.1998). A valid waiver of *Miranda* rights depends upon the " 'totality of the circumstances including the background, experience, and conduct of defendant.' " *Id.* (quoting *United States v. Bernard S.,* 795 F.2d 749, 751 (9th Cir.1986). After reviewing the totality of the circumstances, the Court finds Defendant validly waived her *Miranda* rights.

B. Voluntariness of Statements

***6** Defendant argues that even if she waived her *Miranda* rights, her statements should be suppressed because they were not voluntary and were coerced. [Doc. No. 21–1 at 7–9.] In response, the Government argues that the agents did not engage in any coercive conduct during the interrogation. [Doc. No. 27 at 10–12.] Specifically, the Government argues that the agents did not yell at or threaten Defendant and the agents never made her any promises in order to overcome her will. [*Id.* at 12.] In addition, the Government argues that even if some of the agents' statements went too far, these statements did not cause Plaintiff to confess.

"Involuntary or coerced confessions are inadmissible at trial because their admission is a violation of a defendant's right to due process under the Fourteenth Amendment."*Brown v. Horell,* 644 F.3d 969, 979 (9th Cir.2011) (citations omitted). A confession is involuntary if it is not " 'the product of a rational intellect and a free will.' " *Medeiros v. Shimoda,* 889 F.2d 819, 823 (9th Cir .1989) (quoting *Townsend v. Sain,* 372 U.S. 293, 307, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963)). "Whether a confession is involuntary must be analyzed within the 'totality of the circumstances.' " *Brown,* 644 F.3d at 979 (quoting *Withrow v. Williams,* 507 U.S. 680, 693, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993)). "The factors to be considered include the degree of police coercion; the length, location and continuity of the interrogation; and the defendant's maturity, education, physical condition, mental health, and age." *Id.; see also Pollard,* 290 F.3d at 1033. "The government must prove that a confession is voluntary by a preponderance of the evidence." *United States v. Tingle,* 658 F.2d 1332, 1335 (9th Cir.1981).

A "necessary predicate" to finding a confession involuntary is that it was produced through "coercive police activity." *Brown,* 644 F.3d at 979 (quoting *Colorado v. Connelly,* 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986)); *Pollard v. Galaza,* 290 F.3d 1030, 1033 (9th Cir.2002) (explaining that " 'coercive conduct by police must have caused [the defendant] to make the statements' "). Coercive police activity can be the result of either "physical intimidation or psychological pressure."*Townsend,* 372 U.S. at 307. In *United States v. Tingle,* the Ninth Circuit found the agent's conduct to be "patently coercive" when the agent warned that "a lengthy prison term could be imposed, that [defendant] had a lot at stake, that her cooperation would be communicated to the prosecutor, that her failure to cooperate would be similarly communicated, and that she might not see her two-year-old child for a while."658 F.2d at 1336 (footnotes omitted). Further, the Ninth Circuit has explained that threats and promises relating to one's children carry special force. *Brown,* 644 F.3d at 980. "The relationship between parent and child embodies a primordial and fundamental value of our society."*Tingle,* 658 F.2d at 1336. When interrogators "deliberately prey upon the maternal instinct and inculcate fear in a mother that she will not see her child in order to elicit 'cooperation,' they exert the 'improper influence' proscribed by [the Supreme Court in *Malloy v. Hogan,* 378 U.S. 1, 8, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964)]."*Id.*

***7** The Court first finds that the agents clearly engaged in coercive tactics. The agents told Defendant that a lengthy prison sentence would be imposed, a 10 year mandatory minimum sentence,[3] and at one point, Agent MacKenzie told Defendant that if she did not tell the truth, the U.S. Attorney would go "full tilt" and seek the maximum penalty. The agents said that if Defendant cooperated, her cooperation would be communicated to the prosecutor and the judge, and the agents implied that things would go better if she did cooperate.[4] The agents also repeatedly told Defendant that if she continued lying, that also would be communicated to the prosecutor. Also, Agent MacKenzie at one point told Defendant that her own attorney would instruct her to tell the truth.[5] The agents also told Defendant that she would not see her children for a long time. After telling Defendant that the mandatory minimum sentence was 10 years, Agent Bettencourt told Defendant that she would not see her children until that were 27 and 29 years old. Officer Morales also told Defendant to think about what it would be like to not be present at her daughter's wedding. These two comments were clearly meant to prey on Defendant's maternal instincts. *See, e.g., Brown,* 644 F.3d at 980; *Tingle,*

658 F.2d at 1336. The agents also implied that if the case went to trial, Defendant's husband might find out about her relationship with another man. These actions during the interrogation were exactly the type of conduct that the Ninth Circuit found to be "patently coercive" in *Tingle.See Tingle,* 658 F.2d at 1336.

3 The Court recognizes that the recitation of the potential sentence a defendant might receive does not by itself render a statement involuntary. *United States v. Bautista–Avila,* 6 F.3d 1360, 1365 (9th Cir.1993). However, warning that a lengthy prison sentence can be imposed is a factor the Court may consider in determining whether the confession was voluntary. *See, e.g., Tingle,* 658 F.2d at 1336.

4 The Court recognizes, as the Ninth Circuit did in *Tingle,* that in certain circumstances, it is proper for an interrogating officer to represent to a suspect that her cooperation will be made known to the prosecutor. 658 F.2d at 1336 n. 4. However, where the offer to inform the prosecutor of defendant's cooperation was one of a series of representations made to defendant, it is proper to consider the cumulative effect of those statements in determining whether the confession was voluntary. *Id.; see also Williams v. Woodford,* 384 F.3d 567, 595 (9th Cir.2002) ("[A] promise of leniency accompanied by threats or other coercive practices constitutes improper influence and makes a subsequent inculpatory statement involuntary.").

5 The Court notes that this statement was particularly misleading and deceptive.

The Government argues that the agents did not misrepresent the purpose of the interview and the tone of the interview was conversational. [Doc. No. 34 at 3.] Although the tone of the interview was conversational for the first three hours, once Agent Bettencourt entered the room, the tone changed. Agent Bettencourt appeared to be agitated, was speaking very loudly, yelling at times, and was pacing around the room. Also, after Agent Bettencourt left and Officer Morales began conducting the interrogation, Officer Morales spoke very affirmatively with Defendant, constantly interrupting her and trying to put words in her mouth. Therefore, the tone of the interrogation was aggressive and confrontational rather than conversational when Agent Bettencourt and Officer Morales were involved.

Next, the Government argues that no promises or threats were made during the interview. [Doc. No. 34 at 3.] Although the agents did not expressly promise anything to Defendant, the agents told Defendant if she continued to lie, they would communicate that to the prosecutor and warned that the prosecutor would seek the maximum penalty. The agents also warned Defendant that if the case went to trial, her husband might find out about her relationship with another man.

At the hearing, the Government argued that although the agents made a couple improper statements, that the totality of the interrogation was not coercive because it was only a couple of statements over the course of a four-hour long interview. However, the Court finds that the agents made numerous improper statements rather than just a couple. In addition, although the entirety of the interview lasted almost four hours, the majority of the coercive statements were made during a 35–minute period when Agent Bettencourt and Officer Morales were involved in the interrogation. Accordingly, the Court finds that the agents' conduct was patently coercive.

***8** However, the Court must not only find that the agents engaged in coercive conduct, the Court must also find that their coercive conduct caused Defendant to confess. *See Brown,* 644 F.3d at 979; *Pollard v. Galaza,* 290 F.3d 1030, 1033. The Government argues that the Defendant's will was not overborne by the agents' conduct because she remained calm throughout the interview and at the end of the interview, she told Agent MacKenzie that she did not feel pressured to say anything. [*Id.*] The Government argues that, therefore, the present case is distinguishable from *Tingle,* where the defendant was crying and shaking for several minutes when the agents obtained her confession. *See Tingle,* 658 F.3d at 1334.

The Court finds that after reviewing the totality of the circumstances surrounding the interrogation, the agents' coercive actions caused Defendant to confess. Although Defendant was willing to speak with the agents and changed her story several times, Defendant maintained throughout the interrogation that she did not know there were drugs in her car. It was not until the agents engaged in all of the above coercive activity that Defendant finally admitted to knowing about the drugs. Further, even after she confessed, Defendant did not appear to be confident in her confession. The Defendant told Agent MacKenzie: "I think I'm admitting that I knew that they were going to put the drugs in the car."[Doc. No. 21–5 at 1.] Although Defendant did not cry and shake like the defendant in *Tingle,* Defendant did become noticeably upset when Officer Morales began interrogating her and made comments about her children. This is important because it

was shortly after that when Defendant first admitted to having knowledge about the drugs.

In addition, the length of the interrogation weighs towards finding that Defendant's statements were involuntary. The Government argues that there is no case law that suggests a three-hour interrogation compels a finding of involuntariness. [Doc. No. 34 at 3–4.] In support of this argument, the Government cites a Ninth Circuit case affirming the denial of a habeas petition where the state court found that the defendant's statements were voluntary even though he was subjected to an eight hour interrogation. [*Id.* at 4 (citing *Clark,* 331 F.3d at 1072–73).] However, in *Tingle,* the Ninth Circuit found the interrogation to be coercive even though it only lasted for one hour. *See Tingle,* 658 F.3d at 1333. In addition, the Supreme Court and the Ninth Circuit have repeatedly stated that the length of the interview is a factor to be considered in determining whether the statements were voluntary. *See, e.g., Brown,* 644 F.3d at 979; *Withrow,* 507 U.S. at 693. Four hours is a long time for an interrogation. In addition, it is important that much of the coercive conduct occurred towards the end of the interrogation after it had continued for over three hours.

Finally, the Court recognizes that Defendant later told Agent MacKenzie that she did not feel pressured into talking to the agents. However, the Court gives this statement little weight. When asking Defendant if her statements were voluntary, Agent MacKenzie made references to physical coercion, and Defendant stated that she confessed because the other agent made her realize a lot of stuff. Based on the Court's review of the record, it appears that Officer Morales most likely made Defendant "realize a lot of stuff" by making coercive statements to her. Therefore, Defendant's statements to Agent MacKenzie actually support a finding that the agents' coercive actions caused Defendant's confession.

***9** In sum, the Court finds that the agents' patently coercive conduct caused Defendant to admit that she knew the drugs were in her car and that she would be compensated for transporting the drugs. Therefore, these statements were involuntary.[6] However, the Court also finds that Defendant's statements made prior to Agent Bettencourt entering the interrogation room and participating in the interrogation were voluntary and not caused by coercive conduct. Therefore, the Court only suppresses the statements made after Agent Bettencourt entered the interrogation room. Accordingly, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant's motion to suppress.

6 The Court recognizes that there were some factors that weigh towards finding that Defendant's statements were voluntary: (1) Defendant was 36 years old at the time of the interrogation; (2) there was no evidence Defendant had a diminished state of mine; (3) Defendant was not handcuffed during the interview; (4) the agents were dressed in plain clothes and did not have visible firearms; and (5) the interrogation took place in a basic 8 by 10 interrogation room rather than a holding cell. However, the Court finds that these factors are clearly outweighed by the numerous coercive statements made by the agents, the tone of the interrogation, the length of the interrogation, and Defendant's reaction to the agents' statements.

II. Defendant's Motion in Limine to Admit Exculpatory Statements

Defendant moves to admit the entirety of the statements she made during the interrogation. [Doc. No. 23–1 at 8–10.] Defendant argues that to the extent the Court does not suppress her statements, the Court should allow her to present the remainder of the statements made during the interrogation. [*Id.*] However, any such exculpatory statements constitute inadmissible hearsay. *See United States v. Ortega,* 203 F.3d 675, 682 (9th Cir.2000). Therefore, Defendant may not present these statements as part of her case-in-chief. Defendant may only use statements from the interrogation for impeachment purposes on cross-examination. *See United States v. Bao,* 189 F.3d 860, 866 (9th Cir.1999) ("because a declarant's prior inconsistent statement is not offered for its truth, it is not hearsay."). Accordingly, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant's motion in limine to admit exculpatory statements.

CONCLUSION

For the reasons explained herein, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant's motion to suppress and **GRANTS IN PART** and **DENIES IN PART** Defendant's motion in limine to admit exculpatory statements.

IT IS SO ORDERED.

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DECLARATION OF SERVICE

Re: *People v. Randall Clark Wall*

Cal. Supreme Ct. No. S044693
San Diego Co. Sup. Ct. No. CR133745

I, Marcus Thomas, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, Suite 1000, Oakland, California 94607. On this day, I served a copy of the following document(s):

APPELLANT'S REPLY BRIEF

by enclosing it in envelopes and

/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;

/ X / **placing** the envelopes for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed on **November 20, 2014**, as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Signed on **November 20, 2014**, at Oakland, California.

DECLARANT