SUPREME COURT NO. S104665 **DEATH PENALTY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	
v.	)	Riverside County Superior Court No. INF033308
CHRISTOPHER POORE,	)	
Defendant and Appellant.	)	

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

HONORABLE RANDALL D. WHITE, JUDGE

REPLY BRIEF FOR APPELLANT CHRISTOPHER POORE

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ARGUMENT I

THE TRIAL COURT ERRED BY PAINFULLY SHACKLING APPELLANT TO AN UNDERSIZED CHAIR DURING TRIAL AS A PROPHYLACTIC MEASURE RATHER THAN AS A MEASURE OF LAST RESORT TO CONTROL DISRUPTIVE BEHAVIOR.

A. *Summary of Appellant's Argument*

In his opening brief, appellant Christopher Poore argued that the trial court prejudicially erred in ordering him to wear a REACT belt and to be shackled to a chair positioned too low for his comfort for the entirety of the trial. Specifically, he argued the trial court's order for restraints, as a threshold, was issued without sufficient evidence of manifest need as a last resort and was factually unjustified. He further argued the restraints put in place, in particular the special chair he was ordered to be seated in which was positioned at its lowest level and bolted to the floor, caused him pain, and resulted in appellant's absenting himself from a part of the trial. He argued there were less restrictive alternatives available and that the shackling should have been used only as a last resort. Appellant argued he was prejudiced by the inappropriate restraints in numerous aspects: by the resulting pain, the impairment of his right and ability to fully

participate in his trial, and by the violation of the dignity and decorum of the courtroom where it is possible the jurors were able to observe that appellant was restrained. In sum, appellant argued the cumulative effects of the unnecessary physical restraints rendered his convictions violative of due process and that reversal was required. (Appellant's Opening Brief (AOB) 75-145.)

B. *Summary of Respondent's Argument*

Respondent disagrees with appellant's arguments. Respondent urges the trial court properly exercised its discretion in finding there was a manifest need for restraining appellant. Respondent further urges that appellant cannot demonstrate prejudice in the use or nature of the restraints. Specifically, respondent contends the trial court properly found a manifest need for physical restraints based on courtroom security concerns relating particularly to appellant, that appellant's references to the pain he suffered and the impairment to his attendance and participation of his trial are not supported by the record, and there was no indication the jurors were aware of or could have been influenced by the use of the restraints. (Respondent's Brief (RB) 48-80.) Respondent's arguments should be rejected.

C. *Errors in Respondent's Argument*

1. The use of restraints was unjustified under the facts of this case and the trial court did not have sufficient evidence of a "manifest need" as a "last resort" for restraints at the time of its ruling.

Respondent urges the prosecutor submitted "evidence" to the trial court demonstrating a manifest need for restraining appellant, through the prosecutor's oral claims regarding appellant, bolstered by the submission of the Motion to Restrain and the Notice of Intention to Introduce Evidence in Aggravation. (RB 49-52 and fn. 3, 61-67; See 1 CT 283-286 [Pen. Code, § 190.3 Notice of Intention]; 2 CT 328-331 [Motion to Restrain].) Appellant disagrees that the prosecutor's oral and written claims demonstrated a "manifest need" as a "last resort" for restraining appellant in any manner.

As noted in both Appellant's Opening Brief (AOB 76-81) and Respondent's Brief (49-52), the trial court relied *entirely* on the prosecutor's oral claims and unsubstantiated pleadings to find there was "good cause, based on the totality of the facts and circumstances, that there be restraints." (1 RT 202.) The trial court read, nearly verbatim, from the Motion to Restrain, and the Notice of Intention to Introduce Evidence in Aggravation, before making its determination. (1 RT 192-194; 2 CT 328-329 [Motion to Restrain]; 1 RT 195-196; 1 CT 284-285 [Notice of Intention].) The court quoted the prosecutor's opinion, as stated in the Motion to Restrain, that given appellant's noted prior conduct, he was a

"prime candidate to 'go off' on somebody while in court." (1 RT 194; 2 CT 330.) Although the hearing on the issue of restraints was held on September 17, 2001 (1 RT 155), none of the prosecutor's alleged acts of misconduct purportedly committed by appellant had occurred after March 27, 2000. And, significantly, no substantiating documentation or law enforcement reports were submitted to support the accuracy of the alleged misconduct. The moving papers of the prosecutor, without attached documentation, did not comprise the "record" of misconduct required to find a "manifest need."

As the Court stated in *People v. Duran* (1976) 16 Cal.3d 282, "'manifest need' arises only upon a showing of planned nonviolent unruliness, an announced intention to escape, or '[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained... .'" (*Id.* at 292, fn. 11.) As well, "[t]he showing of nonconforming behavior ... must appear as a matter of record ... . The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion." (*Id.* at p. 291.) The trial judge erred in this case in finding a "manifest need" to restrain appellant because there was simply no evidence as a matter of record before the court upon which the court could base such a finding other than the prosecutor's oral claim that it should do so.

Even if mere allegations stated in a prosecutor's moving papers and oral claims could be deemed sufficient on their face as

a "record" upon which to base a finding of "manifest need" in some circumstances, which appellant disputes, the allegations made in this case did not provide "a showing of unruliness, an announced intention to escape, or 'evidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained.'" (*People v. Duran, supra*, 16 Cal.3d at p. 292, fn. 11.)

First, in the prosecution's Motion to Restrain, the prosecutor made much of appellant's purported membership in the Aryan Brotherhood and his alleged statement while still in prison that he was going to "make his bones," which the prosecutor said an expert "would testify" generally meant he would kill someone. (2 CT 328.) This did not support a "manifest need" because appellant was indeed facing trial for killing Mr. Kulikov after his release from prison. This purported fact, even if it was admissible at the guilt phase of the trial, did not support the restraint of appellant during the trial. Nowhere in the prosecutor's moving papers was it alleged there was any plan that appellant planned to kill anyone later, or commit violence in the courtroom during his trial. Moreover, appellant's misconduct here amounted to only "words," not violent conduct. The court erred in finding this relevant to its decision to restrain appellant because there was no stated reason to find this kind of disruption to the judicial process would occur if appellant was not restrained. (1 RT 192-193.)

Next, the prosecution's motion alleged that while appellant was in custody at some unnamed time, he solicited help from

others to have a witness against him killed. (2 CT 328.) This was not a threat by appellant himself to kill the witnesses while he or she appeared in the courtroom; this was clearly a purported solicitation to have other people assist appellant in potentially eliminating the possibility that a witness would make an appearance at all. An allegation of solicitation did not support a "manifest need" to restrain appellant due to a threat of violence in the courtroom. Based on the prosecutor's moving papers, this was not a threat by appellant to retaliate in the courtroom against any of the prosecutor's witnesses. The trial court erred in relying on this allegation to find a "manifest need" to restrain appellant. (1 RT 193.)

The Motion to Restrain continued to allege that jail deputies had found nitroglycerin and a syringe on appellant's person which could be combined to create a lethal "hot shot." (2 CT 328-329.) According to the prosecutor's Notice of Intention to Introduce Aggravating Evidence, this incident dated back to March of 2000 (1 CT 284), 18 months prior to the instant hearing. There was no allegation that appellant threatened to use nitroglycerin and a syringe as a "hot shot" in the courtroom as a way to disrupt the trial proceedings. Indeed, it did not appear appellant used any such means to threaten or kill another inmate while he was in custody either before or subsequent to March of 2000. The trial court erred in relying on this allegation to find a manifest need to restrain appellant. (1 RT 193.)

The Motion to Restrain alleged appellant told witnesses "immediately after" the instant crimes that they should "watch

themselves" because he had "brothers" getting out of prison all the time. (2 CT 329.) Threatening witnesses in 1999 that "brothers" might come after them is not misconduct which supported a manifest need for appellant to be restrained in the courtroom. Indeed, the sole suggestion offered in this instance was that experts would testify the Aryan Brotherhood ruled by intimidation and fear and would use force to perpetrate its objectives. (2 CT 329.) A threat by the Aryan Brotherhood, if the threat could even rise to that level, certainly was not a threat to disrupt the trial proceedings. And it certainly was not a threat that appellant himself would do so. The trial court erred in relying on this allegation to order appellant to be restrained during his trial. (1 RT 193-194.)

Finally, the Motion to Restrain stated that appellant was paroled from the Secured Housing Unit at Pelican State prison[1] in 1999, that his subsequent confinements were in administrative segregation units, and that appellant was handled "specially" by the local sheriff in transporting him to and from court. The motion did not state the reasons for the housing and transportation arrangements. The motion did not elaborate on how appellant's general past custodial circumstances, or his current "special" status and transports demonstrated a "manifest need" for courtroom restraints as a "last resort." (*Illinois v. Allen* (1970) 397 U.S. 337, 344 [restraining a defendant is a measure

[1] According to the motion, an expert would testify that only the most dangerous inmates are housed at the Pelican Bay facility.

that may be employed only "as a last resort" in an extraordinary case].) The trial court erred in relying on this alleged circumstance in finding a "manifest need" for restraints. (1 RT 194.)

Finally, during the hearing on the motion for restraints, the prosecutor pointed to the People's moving papers, "Notice of Intention to Introduce Evidence in Aggravation During the Penalty Phase of Trial," as additional support for restraints. (1 RT 194-195.) In the Notice of Intention, the prosecutor listed 11 incidents of past confinements where appellant had participated in fights with other inmates, and two instances where razor blades were found in his cell. The incidents were not dated, although "log" entries were noted after each entry. (1 CT 284-285.) None were listed as having occurred at Pelican Bay State Prison, which as noted above, was appellant's final location of incarceration before his parole in 1999. (See 2 CT 329 [Motion to Restrain].) At the instant hearing the trial court read the entries, one by one. (1 RT 195-196.) After additional input by defense counsel and the prosecutor, the trial court, without any elaboration, stated its finding there was good cause, based on the totality of the circumstances, that there be restraints. (1 RT 202.)

The allegations in the People's moving papers were not sufficient for the finding of good cause for restraints. The record does not reflect any documentation or testimony was presented to support the prosecutor's motion for restraints. In *People v. Hawkins* (1995) 10 Cal.4th 920, cited by respondent (RB 60) the sheriff's department requested the defendant be shackled during

the trial. (*Id.* at p. 943.) The court security advisor *testified* about the defendant's recent custodial incidents and history of criminal violence, and recommended to the court that the defendant be restrained. The trial court found the evidence sufficient and ordered restraints (*Ibid.*)

In *People v. Simon* (2016) 1 Cal.5th 98, also cited by respondent (RB 60), at the time of jury selection in September of 1999, the trial court granted the defense motion requesting the defendant be unshackled, but refused to order the removal of the Remote Electronically Activated Control Technology (REACT) stun belt he was also wearing. The court relied upon the bailiff's recitation of incidents, with specific dates, which had occurred while the defendant had been in jail custody during the past three years, which included a fight with another inmate, three shanks found in his cell, as well as the recovery of a container of feces and cleaning products in his cell, which according to the bailiff and another deputy, could be used to make explosives. (*Id.* at pp. 112-113, 117.) It is noteworthy that the court did not find verbal aggressiveness, threats in a letter, and the nature of the charges against the defendant and their potential punishment to justify the use of the stun belt. (*Id.* at p. 114.)

In *People v. Bryant, Smith, and Wheeler* (2014) 60 Cal.4th 335, cited by respondent (RB 60-61), before the trial began the trial court itself initiated an order for heightened security measures, including restraining the defendants by either shackles or a stun belt and enlisting multiple measures for ensuring juror safety. (*Id.* at pp. 388-389.) In finding no abuse of

discretion, this Court noted that there, the court "was clearly aware of its obligation to make its own determination on the need for restraints, and not simply defer to the wishes of the prosecutor or courtroom security personnel. There is no indication that the idea to use restraints came from anyone other than the judge himself. The court also clearly based its decision on the particular facts of this case, not a generalized policy that any defendant charged with a violent crime must be restrained." (*Id.* at p. 391.) Moreover, the Court noted that "although the court did not conduct a formal hearing with the presentation of evidence, the matter was discussed over the course of two pretrial proceedings, and the court summarized the case-specific information upon which it based its decision." (*Ibid*.)

This case is distinguishable from the above cases relied upon by respondent. Here. the trial court relied *entirely* on the motion and request made by the prosecutor, and then cited the prosecutor's list of factors, without requiring more, in order to find restraints were proper in this case. The court made no independent analysis, and did not review any one of the items listed by the prosecutor on its own merit. Instead, the trial court simply read off the list, asked for further comment by defense counsel, and then summarily ruled on the motion. Further noteworthy was the trial court's observation that, "... apparently the sheriff's department is not concerned in this case, because I have not received any information from the sheriff's department, other than that they are specially escorting the defendant to court." (2 RT 209.) The issue of the need for restraints was purely

of the prosecutor's making. The prosecutor conceded this, stating, "And in light of the fact that the sheriff's department did not notify the court, I provided the necessary information, which I believe *Duran* allows me to do. I took the lead in this, because it is my back that will be turned to the defendant when I stand in the well; it is my back that will be approaching the witnesses, not the court's not the deputy's, but mine and Ms. Kelly's." (2 RT 209.)

As noted below and in Appellant's Opening brief, while it is true that testimony was subsequently taken in order for the court to ascertain the nature of the restraints to be applied, the initial finding that restraints were manifestly necessary was made on imprecise, outdated, and in some instances, improper bases. The Court here need go no further than the initial finding of "manifest need" to conclude the trial court erred in ordering appellant restrained during his trial.

Even if the trial court did not err in relying on the bare factors presented by the prosecutor in the moving papers, which appellant disputes, once the testimony was complete the court should have *reversed* its finding that restraints were necessary, rather than find appellant should be restrained in a REACT belt *and* to a chair bolted to the floor.

As appellant asserted in his Opening Brief (AOB 110-122), the subsequent testimony of numerous law enforcement personnel assisted appellant for its significant diminishment of the actual circumstances, and reflection of the custodial system requirements for classification, housing, and procedural

measures unrelated to appellant specifically behind many of the factors which the prosecutor insisted supported the use of restraints. Respondent does not address the points specifically addressed by appellant. Respondent simply refers to appellant's "violent custodial behavior" by merging decade-old behavior in confinements *prior to* his custody at Pelican Bay State Prison[2] (see Notice of Aggravation, 1 CT 284-285) with appellant's apparent possession of nitroglycerin pills and a syringe while in custody for the instant case. (RB 61-62.)

Respondent implicitly concedes that the use of restraints here was based only on conduct outside of the courtroom. (RB 62-65; see AOB 110-112 [noting appellant's courtroom behavior for 23 months prior to the ruling on restraints was "exemplary"].) In this circumstance, respondent notes, sufficient evidence of such conduct must be presented to the trial court for it to make its own determination of the seriousness of the out of courtroom conduct. (RB 62.) In this regard, citing *People v. Medina* (1995) 11 Cal.4th 694, 731, respondent states that the trial court may base its decision to restrain a defendant on "reliable facts" presented by counsel. (RB 62-63.) In *Medina*, the "reliable facts" presented by the prosecutor included, most notably, readily verifiable instances of violent and disruptive courtroom behavior by the defendant during his first trial, which was memorialized in a prior published opinion raising the issue of the defendant's shackling in

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[2] Corrections Office Jose Miramontes testified appellant had no history of disciplinary markers during his time at Pelican Bay State Prison. (2 RT 220.)

the original trial. (*Id.* at p. 730, citing *People v. Medina I* (1) 51 Cal.3d 870, 897-898.) The disruptive behavior by the defendant at his first trial was found by the court to justify the shackling at his second trial, rather than engaging the less-intrusive option of "strategically placed guards" in the courtroom as an alternative. (*Id*. at p. 731.)

In this case, the prosecutor could not cite to any verifiable courtroom behavior to justify the motion for restraints, but instead relied upon potential witness testimony about threats made by appellant at some point in time regarding the witnesses in this case, appellant's purported admitted membership in the Aryan Brotherhood (which is not a crime), and appellant's possession of nitroglycerin pills and a syringe while in custody, as evidence of appellant's recent disruptive behavior. (2 CT 328-329 [Motion for Restraints].) The sole verifiable conduct was the contraband possession in the jail which did not justify the restraints ordered, much less a REACT belt and placement in a chair bolted to the floor. Indeed, the testimony of Corrections Officer Miramontes gave no support to the prosecutor's claim that the danger posed by the contraband included the preparation of a lethal "hot shot" which could be used to kill a witness. (1 RT 194) Miramontes only cited the syringe's needle point rendered it useful as a weapon in prison, and the pills could be a health risk. (2 RT 228.) Further, corrections officials testified that in his time in local custody, appellant never assaulted any jail staff member and treated all staff with respect. (2 R.T. 228-229, see also 2 R.T. 253-254.)

In sum, the presentation of the correctional officer testimony amounted to nothing more than an expressed desire for maximum restraints as a prophylaxis for possible gang-related violence. It did not show a "manifest need" for restraints or that restraints were necessary as a "measure of last resort" in this case. Indeed, the state's unsubstantiated claims of the need for such measures served as the basis for virtually all the expert testimony presented by the prosecution on the shackling issue.

2. Less restrictive means were available

Respondent disputes appellant's argument that the presence of additional courtroom deputies would have been sufficient to handle any disruptive situation that arose, and urges the testimony of Officer Miramontes, Sheriff's Captain Patrick Terrell, and Special Agent Leo Duarte from the Law Enforcement Investigations Unit of the Department of Corrections presented testimony justifying the measures taken by the trial court to restrain appellant. (RB 65-67.) Respondent is incorrect.

Although it is true that each of the law enforcement officers who testified preferred shackles, as appellant noted in his Opening Brief none of the deputies believed that courtroom deputies could not handle appellant if they were stationed near him. Officer Miramontes acknowledged that he and three deputies were in the courtroom and were fully trained on how to subdue a prisoner, and that if there was a concern that appellant could pose any danger, they would likely be able to handle it. (2 RT 242-243.)

Officer Terrell testified that courtroom deputies would be

stationed behind the defendant either seated or standing. He was not asked, however, how long it would take for the deputies to subdue any disruption caused by appellant if needed. (2 RT 270-271.) When asked if three people could restrain appellant, Officer Terrell stated, "Could be in some circumstances. But every person I use puts them in danger too." (2 RT 269.) Officer Terrell was of the opinion that *any* member of any violent gang which came into a courtroom should be restrained in some manner. This of course is not the law. (2 RT 268-269.)

As appellant set forth in his Opening Brief, Officer Duarte testified that the Aryan Brotherhood is no more violent than any other prison gang. (2 RT 311.) Thus, appellant's purported association with that gang presented no proof supporting the call for harsh physical restraints. Moreover, although there were 25 incidents of misbehavior listed in appellant's record, the most recent took place about two years prior to the charged homicide and four years prior to trial. Officer Duarte acknowledged that the fighting incidents, including an alleged stabbing claim, occurred between 1993 and 1996, at least three years before the charged incident and five years before guilt phase trial testimony began. (2 RT 309-310.). As well, Officer Duarte conceded that the fights between appellant and other inmates occurred primarily at Corcoran and Calipatria State Prisons, where inmates are a little uptight and fights happen. (2 R.T. 316.) The gravamen of Officer Duarte's testimony was his assertion that because an informant would be testifying against appellant, if appellant were to assault the informant in the courtroom, the assault would enhance

appellant's status within the gang. (2 RT 312.) For these reasons, he concluded that appellant should be restrained in the courtroom. (2 RT 312-313.)

The foregoing testimony demonstrated that the presence and placement of deputies in the courtroom would be adequate to prevent any attempted assault by the defendant. Nevertheless, when ruling on the need for shackles, the trial court made no reference to any of the deputies' testimony. Nor did the court explain why the security provided by the deputies or a stun belt would be inadequate to prevent any attempted assault by a defendant. Given that there was no testimony or other evidence that measures less onerous than shackling appellant to a chair would fail to prevent an assault, the trial court clearly abused its discretion. As explained above, if the alternatives provided are less onerous yet no less beneficial than shackles, due process requires that the trial judge use the less restrictive alternative. (*Spain v. Rushen* (1989) 883 F.2d 712, 728 , see also *Illinois v. Allen* (1970) 397 U.S. 337, 344.)

3. Prejudice

Respondent urges that appellant has not shown that he was prejudiced by the restraints because there was no evidence that the restraints caused him physical pain and impaired his ability to communicate with counsel or participate in his defense. (RB 68-75.) Respondent is incorrect.

On the morning of October 24, 2001, defense counsel objected to the apparently sudden lowering of appellant's chair. (8 RT 1863.) The adjustment was made between the previous

afternoon's recess and the morning session of October 24th. Counsel pointed out that appellant was wearing a stun belt which was akin to a "backpack," and the lowering of the chair prior to the morning session caused appellant, who was a tall individual, to be very uncomfortable, particularly due to the elevation of his knees beneath the counsel table. (8 RT 1863.) Counsel asked that the chair be raised a couple of inches to about the height as counsel's chair. (8 RT 1863.) The court ignored the claim of discomfort, stating that the court had ordered "the highest security measures," that the courtroom security "issue is in the hands of the security officers of the court" and the court would not "interfere." (8 RT 1863-1864.)

On October 25, 2001 defense counsel filed a Motion for Reconsideration on Height of Chair for Defendant. (24 CT 7063-7065.) The motion requested the court to reconsider the previous day's ruling that the sheriff was fully responsible for security in the courtroom and to reconsider allowing the deputies to position the chair at the lowest possible level. The motion stated that the position of the chair aggravated appellant's back condition, rendering a full day of sitting in court to be "unbearable." Counsel noted that appellant was strapped to the chair and also wearing a stun belt, and that the additional aggravation of the chair positioned at its lowest point may cause such pain that appellant would absent himself from the trial, depriving him of the opportunity to assist in his defense. (24 CT 7063-7064.) A declaration signed by appellant under penalty of perjury was appended to the motion. (24 CT 7065.) In the declaration,

appellant explained he had suffered a disk-compression spinal injury from a fall on his tailbone while on a construction job. He noted his back condition was well-documented in the Indio jail due to his frequent inability to get out of bed. He explained that because of his height and the resulting position of his knees, the setting of the security chair at its lowest position aggravated his back pain. He noted he had not been disruptive in court and that other security measures were in place. He averred if he was forced to remain in the lowered chair, he would suffer undue pain, preventing his attendance or causing a delay of trial. (24 CT 7065.)

On October 25, 2001, the court conducted a hearing on the defense motion. (9 RT 1985-1989.) Counsel explained once again that suddenly appellant's chair had been lowered to a level causing appellant extreme discomfort. Counsel stated that with the stun pack preventing appellant from leaning back in his chair, the additional measure of the lowered chair caused appellant's knees to be raised beneath the counsel table into a position he could not maintain throughout the court day. (9 RT 1985-1986.) Counsel acknowledged the court's earlier statement that courtroom security was the province of the sheriff, but argued it was improper for the court to relegate its responsibility to personnel. Counsel argued that appellant had a right to be comfortable, and that raising the chair just a few inches was a reasonable request that would not impair courtroom security. (9 RT 1986.)

The court stated in response that the security chair should

never have been raised above the lowest point of position. The court stated that it was part of the court's earlier order that the chair should be at the lowest point possible for security purposes. The court indicated it would only modify its order if appellant's declaration of injury was substantiated, noting that jail records of appellant's difficulty in getting out of bed was not sufficient. (9 RT 1987-1988.)

Following the court's ruling, appellant requested to be voluntarily absent from the court proceedings until he was able to sit up. (9 RT 1988.) Appellant conveyed that the pain was "bad," that he was in discomfort, and additionally had experienced problems on the previous evening. (9 RT 1988-1989.) The court agreed that appellant could voluntarily absent himself from the courtroom at any time. (9 RT 1989.) The court then recessed for the evening. (9 RT 1989.)

On the following court day, October 29, 2001, the court noted for the record that appellant had "voluntarily absented himself from proceedings." (9 RT 1990.) The court also stated he had told appellant he was permitted to do so during the most recent appearance. (9 RT 1991.)

On the morning of October 30, 2001, defense counsel informed the court that jail personnel related that appellant had been taken out for x-rays, but would not tell counsel anything further. (9 RT 2036.)

It appears the following week, on November 7, 2001, appellant became ill. (13 RT 2895.) On November 8, 2001, the court confirmed with the jail that appellant was sick and a

doctor's evaluation was ordered to determine if proceedings could resume. (13 RT 2903-2904.)

As set forth in appellant's original briefing, the trial court's decision to shackle him produced numerous structural errors which defy harmless error analysis. First, the decision to shackle appellant stripped him of his presumption of innocence and undermined the legitimacy of the trial. Second, the shackling suggested that the trial court may have pre-judged the case and exhibited bias against appellant. Third, and perhaps most important, appellant was shackled apparently without any due consideration of the less restrictive and readily available alternatives, the pain from the unjustified shackling impaired his ability to consult with counsel, affected his demeanor at counsel table and on the witness stand, and ultimately drove him from the courtroom at further proceedings involving jury selection.

The consequences of the unnecessary and excessive shackling of appellant bear directly on the "framework within which the trial proceeds" and affected the entire trial. (See, *United States v. Gonzales-Lopez* (2006) 548 U.S. 140, 150, citing *Arizona v. Fulminante* (1221) 499 U.S. 279, 310.) Therefore, because of the extensive harm caused by the unconstitutional restraints, each of appellant's criminal convictions must be vacated, without any further showing of prejudice, because each conviction was obtained at a criminal trial which was fundamentally unfair, unreliable and structurally unsound.

Even if a prejudice analysis was called for, shackled defendants are not required to make a specific showing of

prejudice. Rather, the presumption is that there was prejudice. The question then becomes whether the shackling was nevertheless justified under the circumstances. (See, e.g., *Kennedy v. Caldwell*, 487 F.2d 101, 107 (6th Cir. 1973), cert. den., 416 U.S. 959, 94 S. Ct. 1976, 40 L. Ed. 2d 310 (1974); *United States v. Samuel*, 431 F.2d 610, 615 (4th Cir. 1970), cert. den., 401 U.S. 946, 91 S. Ct. 964, 28 L. Ed. 2d 229 (1971); *Loux v. United States*, 389 F.2d 911, 919 (9th Cir.), cert. den., 393 U.S. 867, 89 S. Ct. 151, 21 L. Ed. 2d 135 (1968).) That is,"the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.'" (*Deck v. Missouri* (2005) 544 U.S. 622, 635, quoting *Chapman* v. *California* (1967) 386 U.S. 18, 24, [87 S. Ct. 824, 17 L. Ed. 2d 705].) Moreover, the amount of prejudice which may flow from a decision to impose physical restraints is not constant; instead, the degree of prejudice is a function of the extent of the shackles that are applied and their effect on the defendant. (*Spain v. Rushen, supra,* 883 F.2d at p. 722.)

Further, although the court characterized appellant's absence from the courtroom as a voluntary relinquishment of his right to be present, the pain from being shackled to the chair belies the court's characterization. As a preliminary matter, the United States Supreme Court has repeatedly emphasized that there is a high standard of proof which is required to demonstrate that the defendant waived one of his fundamental constitutional

rights. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464.) Waiver is "an intentional relinquishment or abandonment of a known right or privilege." (Id. at p. 464.) To preserve the fairness of the trial process the United States Supreme Court has established "an appropriately heavy burden on the Government before waiver can be found." (*Schneckloth v. Bustamante* (1973) 412 U.S. 218, 236.)

The State bears the burden of showing a valid waiver of constitutional rights in a criminal case. (*Adams v. United States ex rel. McCann* (1942) 317 U.S. 269, 275- 280.) The existence of a valid waiver depends on "the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused." (*Ibid.*) A defendant's waiver of a fundamental constitutional right is not valid unless the waiver is truly "voluntary." *(Whitmore v. Arkansas* (1990) 495 U.S. 149, 165.)

A waiver is voluntary if, under the totality of the circumstances, it is the product of a free and deliberate choice rather than coercion or improper inducement. (*People v. Howard* (1992) I Cal.4th 1132, 1178; *United States v. Doe* (9th Cir. 1998) 155 F.3d 1070, 1074. Conversely, a waiver is involuntary if it stems from coercion-either mental or physical. (See, e.g., *Brady v. United States* (1970) 397 U.S. 742, 752.)

In certain cases a decision to waive the right to pursue legal remedies in a criminal case may be involuntary if it results from coercion or duress: a procedure may be inherently coercive if it imposes an impermissible burden upon the assertion of a

constitutional right. (*United States v. Jackson* (1968) 390 U.S. 570, 582-583.) In particular, a decision to waive the right to pursue legal remedies may be involuntarily induced by the defendant's onerous conditions of pre-trial confinement. (*Smith v. Armantrout* (8th Cir. 1987) 812 F.2d 1050, 1058-1059 [reviewing decision of the district court on whether petitioner's conditions of confinement rendered his decision to waive appeals invalid]; *Groseclose ex rel. Harries v. Dutton* (M.D. Tenn. 1984) 594 F.Supp. 949, 961.) The United States Supreme Court has recognized the crippling effect of oppressive conditions of pre-trial confinement in involuntarily inducing waivers of fundamental constitutional rights and has held that any waiver of a fundamental constitutional right is not "effective unless there are both particular and systemic assurances that the coercive pressures of custody were not the inducing cause [of the waiver]." (*Minnick v. Mississippi* (1990) 498 U.S. 146, 155.)

Though constitutional rights may be waived, the government may not procure a waiver of an accused's rights through unconstitutional conditions. (*United States v. Scott* (9th Cir. 2006) 450 F.3d 863, 866.) An unconstitutional condition exists where the government uses overwhelming leverage to coerce a person into accepting a waiver of his or her constitutional rights. See, *Kathleen M. Sullivan, "Unconstitutional Conditions,"* 102 Harv.L.Rev. 1413, 1428 (1989). Giving the government free rein to exact such coercive waivers of a defendant's constitutional rights ""creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals, and

gradually eroding constitutional protections." *(United States v. Scott, supra*, 450 F.3d at 866.) Here, the waiver was coerced by the trial court because appellant's shackles caused undue pain and suffering with no legitimate cause. Thus, the error in permitting him to waive his personal presence at trial as the only alternative to avoid continued shackling was both grievous and not harmless beyond a reasonable doubt.

Even if it could be argued persuasively [which it cannot] that the defendant's initial absence was voluntary, his absence from trial for the second time was certainly not voluntary. Law enforcement simply removed him from jail (thereby excluding him from trial) and took him away for x-rays. Law enforcement wouldn't even tell defense counsel where it took him or the reason why he was taken to see a physician for x-rays. (9 RT 2036.) There is nothing in the evidence that the prosecution can point to that would show that this absence was voluntary. Therefore, absent some evidence of a knowing and voluntary relinquishment of the right to be present at a critical stage of trial, the error is prejudicial.

In order to prevail on a claim that the error here was harmless, the prosecution has the burden to show that not only was the shackling decision proper, but it did not cause undue pain; it did not affect appellant's participation in this trial, and that it did not detract from the dignity and decorum of the trial. Respondent cannot make such claims.

If the cumulative effect of the unnecessary physical restraints adversely impaired the defendant's ability to

participate in the trial proceedings or consult with his attorney, then the resulting conviction is a violation of due process. *(Spain v. Rushen, supra*, 883 F.2d at p. 728.) That is certainly the case here.

For these reasons, both the initial shackling decision and the level of pain caused by the unduly restrictive shackling were grossly improper. Therefore, appellant's judgment of conviction must be reversed.

ARGUMENT II

DISMISSAL OF PROSPECTIVE JURORS WHO WOULD LISTEN TO THE EVIDENCE AND CONSIDER VOTING FOR EITHER DEATH OR LIFE IMPRISONMENT CANNOT BE EXCUSED ON GROUNDS THAT THEY COULD NOT BE ABSOLUTELY SURE THAT THEY COULD IMPOSE THE DEATH PENALTY. THEIR DISMISSAL WAS IMPROPER AND VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AS WELL AS THE CALIFORNIA CONSTITUTION.

A. *Summary of Appellant's Argument*

In his opening brief, appellant argued the trial court improperly dismissed Prospective Juror Siebert and Prospective Juror Walker for cause because they expressed uncertainty as to whether they could vote for the death penalty. Appellant pointed out that the trial court did not find that either juror's view would preclude or substantially impair her ability to follow her oath and abide by the court's instructions.

Appellant further established that the United States Constitution, Amendments 5, 6, 8, and 14, as construed by decisions of the United States Supreme Court, preclude the removal of a prospective juror from a capital jury solely because the juror does not know if she could impose the death penalty, where as in California, imposing the death penalty is not required by law based on any particularized set of facts. Appellant pointed out that neither the California Legislature nor the electorate has ever enacted a statute authorizing exclusion of prospective jurors who will not or cannot impose the death penalty. Appellant argued that here, the dismissal of two jurors who favored the death penalty but stated they were *not sure* whether they could sentence a person to death was error. As appellant argued, where the trial court granted selective prosecutorial challenges for cause of two qualified jurors, the court committed error requiring reversal of the death judgment. *(Uttecht v. Brown* (2007) 551 U.S. 1.) (Appellant's Opening Brief [AOB] 145-187.)

B. *Summary of Respondent's Argument*

Respondent disagrees. Respondent urges substantial evidence supported the trial court's determination that Prospective Juror Seibert's and Prospective Juror Walker's views on the death penalty would prevent or substantially impair their ability to serve as jurors. Respondent asserts that the jurors both expressed they would be unable to follow the court's instructions and vote for death if the aggravating circumstances substantially outweighed the mitigating factors. Finally, respondent points out that deference must be accorded to the trial court's determination

because it is in a position to assess the demeanor of the venire and may be left with the "definite impression" that a person cannot "impartially apply the law."

Respondent's arguments are not supported by the record or the law and must be rejected. (Respondent's Brief [RB] 80-88.)

C. *Errors in Respondent's Argument*

The record does not support respondent's assertions that either Prospective Juror Siebert or Prospective Juror Walker expressed they would be unable to follow the court's instructions or unable to vote for death if the aggravating circumstances substantially outweighed the mitigating factors. (RB 86.) As demonstrated below, the jurors' written responses in their questionnaires belie this assertion as a threshold, and the jurors' responses during the voir dire questioning did not demonstrate substantial impairment based on their views of the death penalty. In fact, neither juror was directly questioned about her particular view of the death penalty by the court or by counsel for the parties.

Moreover, despite respondent's claim, the trial court did not rely on the demeanor of the two prospective jurors, or otherwise make a finding that the jurors' views on the death penalty would substantially impair their ability to abide by their oath or follow the court's instructions. (RB 86.) In fact, when the challenge for cause was made by the prosecutor, the court completely failed to address the jurors' qualifications **individually**. After asking the prosecutor to remind the court as to what Prospective Juror Siebert had said to support the challenge for cause, the court then

recalled only that both of the jurors said, "I don't know if I could vote for the death penalty." (7RT 1606.) In its ruling, the court stated without elaboration or explanation only that it was granting the prosecutor's challenges. (7RT 1607.) Defense counsel objected as to the dismissal of both jurors on the ground each had simply said they "didn't know," if they could impose the death penalty. The court noted the objections for the record, dismissed the jurors, and moved on. (7RT 1607.) The trial court erred. The rulings were not supported by substantial evidence.

As this Court recently made abundantly clear in *People v. Armstrong* (2019) 6 Cal.5th 735, under applicable law, "'even a juror who "might find it very difficult to vote to impose the death penalty" is not necessarily substantially impaired unless he or she was unwilling or unable to follow the court's instructions in determining the appropriate penalty.'" (*Id.* at p. 764, quoting *People v. Merriman* (2014) 60 Cal.4th 1, 53.) The law does not entitle the People to a jury composed only of people who would impose the death penalty in every factual scenario, but instead to a jury that can follow the court's instructions and determine the appropriate penalty based on proven aggravating and mitigating factors. (*Id.* at p. 765.)

Prospective Jurors Siebert's and Walker's views would not have prevented or substantially impaired the performance of their duties as a jurors, and they were therefore not subject to excusal for cause. Although each stated it would be difficult to impose the penalty of death, neither juror was questioned about this hesitancy, and neither the court nor the prosecutor

established that either juror was unwilling or unable to follow the court's instructions and determine the appropriate penalty based on the those instructions as well as the proven aggravating and mitigating factors. Excusal of both Prospective Juror Siebert and Prospective Juror Walker was expressly prohibited by *Armstrong*. Accordingly, dismissal of the prospective jurors violated appellant's right to be tried by a fair and impartial jury and his right to due process of law under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution. Because "the erroneous excusal of even one prospective juror for cause requires automatic reversal of the death sentence," reversal of appellant's sentence is required. (*People v. Armstrong, supra*, 6 Cal.5th at p. 764; *Witherspoon v. Illinois* (1968) 391 U.S. 510, 516-518; *Wainwright v. Witt* (1985) 469 U.S. 412, 424; *Gray v. Mississippi* (1987) 481 U.S. 648, 658; *People v. Mickey* (1991) 54 Cal.3d 612, 679-680; *People v. Holloway* (1990) 50 Cal.3d 1098, 1112; *People v. Wheeler* (1978) 22 Cal.3d 258, 265-266.)

1. Prospective Juror Siebert

Prospective Juror Siebert was a Canadian-born, 64-year-old retired nurse anesthetist who had previously served on a jury in a civil case that ultimately settled.[3] (15CT 4177-4178, 4180 [Questions 1(b), 2(a4), 3(a)].) She was indifferent about jury service generally. (15CT 4181 [Question 9(h)].) She would follow

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[3] Prospective Juror Siebert's questionnaire can be found at 15 CT 4177-4198.

the law and the instructions as provided by the judge, even if any instruction differed from her own belief or opinions. (15CT 4189 [Question 37].) Prospective Juror Siebert could be a fair and impartial juror because she wants to hear everything and weigh the pros and cons. (15CT 1490 [Question 47].)

With regard to her general feelings about the death penalty, Prospective Juror Siebert responded that she was "for it," and that it helped compensate the family of the victim. (15CT 4191 [Question 53], 4195 [Question 67].) When asked a series of questions about the variable circumstances under which the state should impose the death penalty, with the options of "always," "usually," "sometimes," or "never," she responded to each with either "usually" or "sometimes." (15CT 4193 [Question 59].) When asked to measure her views about the death penalty on a scale of 1 to 5, she selection option number 3: "I have no position for or against the death penalty; however, could consider the imposition of the death penalty in some cases." (15CT 4193 [Question 60].) Prospective Juror Siebert had no religious affiliations or beliefs which would have an impact on her penalty decision in this case. (15CT [Questions 64 and 65].) Prospective Juror Siebert expressed a single concern about the death penalty involving wrongful convictions. She had heard of cases where innocent persons had been imprisoned and later exonerated through DNA technology. (15CT 4193 [Question 61].)

As set forth in Appellant's Opening brief, during voir dire Prospective Juror Siebert was questioned first by the court and then by the attorneys for both parties. The court's questions

about the death penalty were brief. First the court confirmed Prospective Juror Siebert's answers to Questions 53 and 60 reflected her views on the death penalty, that she was "for it" [Question 53] and that she could impose the death penalty "in some cases" [Question 60]. (7RT 1535.) Prospective Juror Siebert affirmed her answers were accurate, noting that she was "for the death penalty," "under certain circumstances," and if "the case was right." (7RT 1535.) She explained her concern about innocent persons being wrongly imprisoned before being exonerated by DNA testing [Question 61] arose from news reports and talk shows where she had seen interviews with men who had been released under such circumstances. (7RT 1536.)

Defense counsel [Mr. Hemmer] conducted voir dire first. Counsel asked Prospective Juror Siebert only three questions, all of which concerned her birthplace and her United States citizenship. (7RT 1577-1578.) Defense counsel did not ask Prospective Juror Siebert any questions about the death penalty.

The prosecutor [Mr. McNulty] then questioned Prospective Juror Siebert about general trial matters. He did not ask Prospective Juror Siebert any questions about the death penalty. (7RT 1591-1598.)

At some point, the prosecutor addressed another juror who was generally opposed to the death penalty and asked: "Do you think, knowing you as you do, and given the fact that you're generally opposed to the death penalty, that you can still openly and conscientiously weigh aggravating factors with mitigating factors, and assuming the aggravating is so grossly outweighing

mitigating, you could impose death? (7RT 1599-1560.) After the juror responded affirmatively, the prosecutor apparently asked the venire:

> [Prosecutor]: "Anybody here that generally opposed it or feels weakly against that, other than you, sir? I think I know your feeling."

(7RT 1600.) At that point, Prospective Juror Siebert spoke and the prosecutor asked, "Yes, ma'am?" Prospective Juror Siebert then said:

> [Prospective Juror Siebert]: "I'm for the death penalty, but I would have to be honest and say if it got down to the point that I had to say "kill him," I really can't honestly say. I don't know if I could do it or not."

(7RT 1600.) The prosecutor responded:

> [Prosecutor]: All right. Thank you for offering that. I appreciate that."

(7RT 1600.)

The prosecutor then addressed other jurors on other matters and subsequently returned to Prospective Juror Siebert to ask about her questionnaire response indicating she was "indifferent" about jury service. When Prospective Juror Siebert responded that she meant she will sit if she is "needed or wanted," the prosecutor asked:

> [Prosecutor]: "Would it be fair to say that this is a case that you really don't want to sit on?"

(7RT 1601.) Prospective Juror Siebert answered:

> [Prospective Juror Siebert]: "Well, because of -- of the death penalty thing, I really -- I -- I would -- might be doing an injustice, because even though he was found 100 percent guilty in every respect, I don't know if I could live with myself after saying I am putting someone to death. I don't know if I could live with myself.
>
> ***
>
> So, as I said, I might be able to do it, but I don't know."

(7RT 1601.)

Neither the prosecutor nor the trial court inquired further of Prospective Juror Siebert about the death penalty or any other subject.

A few minutes later, out of the presence of the jury, the court inquired of counsel as to stipulations or challenges for cause. (7RT 1605-1606.) The prosecutor challenged Prospective Juror Siebert for cause, "on the *Witt* standard."[4] (7RT 1606.)

The court responded, "Miss Siebert. What did she say?" The prosecutor responded, "[S]he said she can't be sure she could give death." (7RT 1606.)

Then the court asked, "[I]s she the one who said, 'I don't know if I could vote for the death penalty?" (7RT 1606.) The prosecutor responded, "[Y]es." (7RT 1606.)

The court subsequently said it was excusing Prospective

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[4] *Wainwright v. Witt, supra,* 469 U.S. 412.

Juror Siebert for cause.[5] (7RT 1607.) Defense counsel objected, observing that Prospective Juror Siebert [and Prospective Juror Walker] "just said they didn't know. I think most of the jurors don't know. I would object to that, for the record." (7RT 1607.) The court responded, "All right. The record will so reflect." (7RT 1608.)

2. Prospective Juror Walker

Prospective Juror Walker was a 74-year-old homemaker. (15CT 4292 [Question 1b], 4293 [Question 3a].)[6] She believed jury service was "necessary for the justice system." (15CT 4296 [Question 9(h)].) She would follow the law and the instructions as provided by the judge, even if any instruction differed from her own belief or opinions. (15CT 4304 [Question 37].) Prospective Juror Walker could be a fair and impartial juror because she "could listen to both lawyers and the evidence as presented for and against." (15CT 4305 [Question 47].)

With regard to her general feelings about the death penalty and why she felt as she did about the death penalty, Prospective Juror Walker responded that she if she "felt the defendant was guilty beyond a reasonable doubt, [she] would be for the death penalty - but would rather vote for life" because "crimes must be punished." (15CT 4306 [Question 53 and 53a].) When asked a

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[5] The court also indicated another prospective juror, Prospective Juror Walker, discussed below, would also be excused for cause. (7RT 1607.)

[6] Prospective Juror Walker's questionnaire can be found at 15 CT 4292-4313.

series of questions about the variable circumstances under which the state should impose the death penalty, with the options of "always," "usually," "sometimes," or "never," she responded to all but one circumstance with either "usually" or "sometimes," reserving the response of "never" in the event of the killing of a relative. (15CT 4307-4308 [Question 59].) When asked to measure her views about the death penalty on a scale of 1 to 5, Prospective Juror Walker selected option number 4: "I am in favor of the death penalty but will not always vote for death in every case of murder with special circumstances. I can and will weigh and consider the aggravating and mitigating circumstances." (15CT 4308 [Question 60].) Prospective Juror Walker had no religious affiliations that took a stance on the death penalty, but she did feel her religious beliefs might "somewhat" have an impact on her decision in this case. (15CT 4309 [Questions 64 and 65].) Prospective Juror Walker did not express any concerns or note any changes in her opinion about the use of the death penalty over time. (15CT 4308 [Question 61].) She believed the death penalty accomplished the taking of "sick people out of society and protecting others." (15CT 4310 [Question 67].)

Again, as set forth in Appellant's Opening brief, during voir dire Prospective Juror Walker was questioned first by the court and then by the attorneys for both parties. The court's questioning about the death penalty as to Prospective Juror Walker was brief. The sole questions the court asked confirmed with Prospective Juror Walker that her answers to Questions 53 (she was for the death penalty but preferred life) and 60 (she was

for the death penalty and would not impose it in every case without weighting aggravating/mitigating factors) reflected her true feelings. (7RT 1565.)

Defense counsel did not ask Prospective Juror Walker any questions about the death penalty. (7RT 1581-1582.)

The prosecutor also did not Prospective Juror Walker any questions about the death penalty. (7RT 1593-1594, 1596-1598.)

As noted above, the prosecutor addressed another juror who was generally opposed to the death penalty and asked: "Do you think, knowing you as you do, and given the fact that you're generally opposed to the death penalty, that you can still openly and conscientiously weigh aggravating factors with mitigating factors, and assuming the aggravating is so grossly outweighing mitigating, you could impose death? (7RT 1599-1560.) After the juror responded affirmatively, the prosecutor asked:

> [Prosecutor]: "Anybody here that generally opposed it or feels weakly against that, other than you, sir? I think I know your feeling."

(7RT 1600.) As also noted above, at that point, Prospective Juror Siebert spoke:

> [Prospective Juror Siebert]: "I'm for the death penalty, but I would have to be honest and say if it got down to the point that I had to say "kill him," I really can't honestly say. I don't know if I could do it or not."

(7RT 1600.)

At that time Prospective Juror Walker also spoke:

[Prospective Juror Walker]: "Sir, I feel the same was as she does."

(7RT 1600.) The conversation briefly continued.

[Prosecutor]: "All right. So when it comes down to it, you're not sure?"

(7RT 1600.)

[Prospective Juror Walker]: "I am not sure if when it comes down to the nitty-gritty, whether I could do that, vote to kill him."

[Prosecutor]: "All right. Thank you."

(7RT 1600-1601.]

Neither the prosecutor nor the trial court inquired further of Prospective Juror Walker.

As noted above, the prosecutor challenged Prospective Juror Siebert for cause, "on the *Witt* standard." (7RT 1606.)

When the court asked, "[I]s she the one who said, 'I don't know if I could vote for the death penalty?" (7RT 1606.) The prosecutor responded, "[Y]es," the court then added, "And Miss Walker said that too." (7RT 1606.)

The prosecutor stated, "Yes, I haven't gotten to her, but she would be the next challenge for cause as well." (7RT 1606.)

The court subsequently said it was excusing both Prospective Juror Siebert and Prospective Juror Walker for cause. (7RT 1607.) As noted above, defense counsel objected to both dismissals, stating that the two prospective jurors "just said they didn't know." (7RT 1607.) The court noted the objections for the record and did not elaborate. (7RT 1607.)

3. Both Prospective Juror Siebert and Prospective Juror Walker were improperly discharged for cause

Respondent first asserts the record reflects that both Prospective Jurors Siebert and Walker "expressed they would be unable to follow the court's instructions and vote for death if the aggravating factors substantially outweighed the mitigating factors." (RB 86.) Respondent urges the prosecutor "demonstrated thorough questioning that potential jurors [Siebert] and [Walker] lacked impartiality" in that their views would substantially impair their ability to follow the court's instructions and vote for death in appropriate circumstances. (RB 87.) Respondent relies on the trial court's "position" to assess the demeanor of both Prospective Juror Siebert and Prospective Juror Walker and asserts the court's assessment here of the jurors' state of mind was binding. (RB 87.) As demonstrated above, respondent's points are not supported by the record. The dismissal of the jurors was error as a matter of law.

Both Prospective Jurors Siebert's and Walker's jury questionnaires made very clear that neither juror was opposed to the death penalty as a matter of principle. Prospective Juror Seibert expressed a concern in her questionnaire about the risks of imprisoning innocent persons. (15CT 4193, [Prospective Juror Siebert (Question 61).) Prospective Juror Walker did not express any concerns about capital punishment at all. Both prospective jurors stated in their questionnaires that they would follow the law and instructions as provided by the judge, even if any

instruction differed from her own belief or opinion, and return a verdict for the death penalty in the appropriate case. (15CT 4189, 4193 [Prospective Juror Siebert (Questions 37 and 60); 15CT 4305, 4308 [Prospective Juror Walker (Questions 37 and 60)].) Prospective Juror Siebert reiterated during voir dire that her questionnaire answers reflected her true feelings, and added that she was for the death penalty under certain circumstances if the case was right. (7RT 1535.) Prospective Juror Walker also confirmed her questionnaire answers reflected her true feelings. (7RT 1565.) As noted above, neither counsel asked Prospective Juror Siebert or Prospective Juror Walker any questions about the death penalty. It was not until the prosecutor was questioning another juror that he turned to the venire and asked a somewhat incoherent question, "Anybody here that generally opposed it or feels weakly against that.... ?" (7RT 1600.) At that time, both jurors expressed they might have difficulty imposing the death penalty. (7RT 1600-1601.) And, as noted above, neither the court nor the prosecutor inquired specifically as to the individual jurors' abilities to follow the court's instructions, the law, weigh the aggravating and mitigating factors, and follow their oath as jurors.

The trial court erred in ruling that Prospective Juror Siebert and Prospective Juror Walker should be excused. Their answers both in the questionnaires and the voir dire – even their responses to the baffling question offered by the prosecutor – indicated only that they were thoughtful, deliberative jurors who would have difficulty voting for death, but would follow the law at

all times.

This Court recently revisited the question of the appropriate standard for excusing jurors for cause based on their views of the death penalty in *People v. Armstrong, supra,* 6 Cal.5th 735. In that case, the Court reviewed the removal for cause of several jurors who held ambiguous opinions or would not impose the death penalty in certain hypothetical situations and held that the trial court "improperly excused at least four candidates. In doing so, it committed two kinds of errors: (1) it applied an erroneous standard to the question of qualification; and (2) it relied on factual bases not supported by the record. As a result, the death verdict must be reversed." (Id. at p. 751.)

That Prospective Jurors Siebert and Walker were erroneously excused in this case is well-illustrated by the circumstances and analysis in *Armstrong*. For example, in *Armstrong*, Prospective Juror S.R. stated in his questionnaire that he supported the death penalty as a deterrent to murder, and that it was the appropriate punishment for horrendous crimes. (*People v. Armstrong, supra,* 6 Cal.5th at p. 751.) He described himself as a person who always listened to both sides of an argument, and considered his "duty as a juror to be fair and un-biased." (*Ibid.*) He could keep an open mind, would consider whatever factors the court instructed were relevant, and could vote for death if the aggravating circumstances substantially outweighed those in mitigation, and for life if they were equal. (*Ibid.*)

During voir dire, the prosecutor focused S.R.'s questioning on three fact-based hypotheticals with limited information and no legal context, and asked S.R. if he could impose the death penalty in each of the three scenarios. (*People v. Armstrong, supra,* 6 Cal.5th. at pp. 751-754.) The prosecutor asserted this was a "true test of the juror's state of mind" with regard to liability of different participants in a joint crime, unimpeded by the guidance of jury instructions on the relevant law. (*Id.* at p. 753.) Based on S.R.'s responses indicating the hypothetical defendants could have varying degrees of guilt which would factor into his decision on punishment, the prosecutor moved to excuse S.R. for cause. (*Id.* at pp. 752-753.) The trial court agreed and excused the juror. (*Id.* at p. 754.)

The Court found that excusing S.R. for cause was error. The Court held the trial court applied a test for ineligibility that was erroneous as a matter of law. The Court stated that under *Witherspoon* and *Witt*, "the state is permitted to cull from the jury pool only those who would be unable to set aside their personal views and follow the law and the court's instructions." (*People v. Armstrong, supra*, 6 Cal.5th at p. 755.) "A juror who indicates he could vote for death, but is unwilling to guarantee he would do so, is not subject to excusal for cause." (*Id.* at p. 756.)

In the present case, based on the responses given, Prospective Jurors Siebert and Walker made clear that they were in favor of the death penalty and could return a verdict of death in the right case. (7RT 1535 [Prospective Juror Siebert], 1565

[Prospective Juror Walker].) While it is true both jurors also suggested they were not sure they could vote for death, neither juror stated she could never do so. Rather than questioning both prospective jurors as to whether, despite their uncertainty about voting for death in the instant case, they would follow the court's instructions to conscientiously consider the death penalty, the court simply defaulted to the jurors' brief and unclarified answers to the offhand question by the prosecutor in excusing both jurors. Further, the court did not make a proper determination of whether the jurors' stated uncertainty would "prevent or substantially impair" the performance of their duties "as defined by the court's instructions and [their] oath."

In excusing the jurors for cause, the trial court relied only on their single answer to the prosecutor's indirect question. This circumstance does not constitute substantial evidence of substantial impairment rendering the prospective jurors unable to follow the court's instructions on the law or their oaths. Contrary to respondent's suggestion, the court did not rely on the demeanor or attitude of the jurors. (RB 87-88.) During the discussion regarding excusing the jurors, the prosecutor did not reference any body language or other intangible behavior or characteristic regarding the jurors which suggested either juror was impaired. The court, as well, did not cite any behavioral conduct as leaving it with the "definite impression that the person cannot impartially apply the law" as grounds for excusal for cause for either juror. (See RB 88.) Instead, the court excused both jurors without explanation or elaboration. Indeed, while a

trial court's decision to remove a juror for cause where there is a "definite impression" of substantial impairment will be upheld on appeal if there is substantial evidence to support it (*People v. Armstrong, supra,* 6 Cal.5th at p. 751), no deference is owed to a such a circumstance if it did not happen.

The trial court's focus on whether the jurors could or would vote for the death penalty was understandable. Many decisions of this Court have approved a trial court's removal of a prospective juror who says she cannot impose, or will not impose, a death penalty. (See, e.g., *People v. Thomas* (2011) 52 Cal.4th 336, 357-358 [juror answered yes when asked whether her moral, religious, or philosophical beliefs in opposition to the death penalty were so strong that she would be unable to impose the death penalty regardless of the facts]; *People v. Ramos* (2004) 34 Cal.4th 494, 517 [juror indicated "she could never vote to impose the penalty, regardless of the evidence, and repeated similar sentiments when the court's questioning continued"]; *People v. Haley* (2004) 34 Cal.4th 283, 306-307 [juror stated that "man shouldn't take a life"]; *People v. Bolden* (2002) 29 Cal.4th 515,536-537 [responses of "I would not impose the death penalty" and "I don't think I could find the death penalty ever appropriate" indicate unequivocally that their death penalty views would have prevented or substantially impaired their performance of the duties of a juror in a capital case as defined by the court's instructions and the juror's oath]; *People v. Rodrigues* (1994) 8Cal.4th 1060, 1147, fn. 51 [juror said "I don't think so" when asked if she could vote for death if she thought it was justified],

fn. 52 [juror said "moral views and sleeping at night" would impair her ability to return death verdict she believed to be appropriate]; *People v. Millwee* (1998) 18 Cal.4th 96, 146-147 [Juror C said he thought imposing death sentence might haunt him, etc.; Juror L did not believe the state had the right to take life; Juror G said he would not impose death because life imprisonment is worse punishment].)

As noted in Appellant's Opening Brief, more recently in *People v. Capistrano* (2014) 59 Cal.4th 830, a five-Justice majority of this Court flatly declared: "If a prospective juror states unequivocally that he or she would be unable to impose the death penalty regardless of the evidence, the prospective juror is, by definition, someone whose views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' (*Witt, supra*, 469 U.S. at p. 424.)" (*Id.* at p. 859.)

The equation is quite different when a juror states unequivocally that she can impose death after hearing the evidence and argument, and pursuant to jury instructions, but feels it would be very difficult to do so. This Court has emphasized that setting a higher bar to vote for a death verdict is the juror's prerogative and is not a proper ground for exclusion when the juror expresses the ability to follow the court's instructions in doing so: *People v. Kaurish* (1990) 52 Cal.3d 648, recognizes that a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold

before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror ever to impose the death penalty.

Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will "substantially impair the performance of his [or her] duties as a juror" under *Witt, supra,* 469 U.S. 412. In other words, the prosecutor's offhand and confusing question, as phrased, did not directly address the pertinent constitutional issue. A juror might find it very difficult to vote to impose *the death penalty,* and yet such a juror's performance still would not be substantially impaired under *Witt,* unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law. (*People v. Stewart* (2007) 33 Cal.4th 425, 447.)

In this case, neither Prospective Juror Siebert or Prospective Juror Walker said -- in the juror questionnaire or during voir dire -- that she would be unable to impose the death penalty regardless of the evidence. Instead, both jurors said they were not sure they could or would impose the death penalty in

this case. There was nothing disqualifying about these responses.

In *People v. Fields* (1983) 35 Cal.3d 329, this Court held that a juror's willingness to consider the death penalty in other cases does not preclude excusal for cause if that juror would refuse to impose the death penalty in the case before him without regard to evidence that might be developed. (*Id.* at pp. 357-358.) However, the Court noted an important exception to that rule: When the court excludes a juror on this ground, however, it must take care to avoid violation of *Witherspoon's* command that a juror can be dismissed for cause only if he would vote against capital punishment "without regard to any evidence that might be developed at the trial of the case ...." (391 U.S. at p. 522, fn. 21.) If a prospective juror has been informed of the evidence to be presented, his asserted automatic vote may be based upon this information, in which case exclusion of the juror because of his views on the death penalty would violate *Witherspoon*. For example, a juror who announces that he would automatically vote against death in the case before him because he has been told (whether true or not) that the prosecution case rests entirely on circumstantial evidence is not casting a vote without regard to the evidence, and cannot be excluded under the *Witherspoon* formula. (*Id.* at p. 358, fn. 13.) "'[T]he *Witherspoon-Witt* ... voir dire seeks to determine only the views of the prospective jurors about capital punishment in the abstract. ... The inquiry is directed to whether, without knowing the specifics of the case, the juror has an "open mind" on the penalty determination.'" (*People*

v. Zambrano (2007) 41 Cal.4th 1082, 1120, quoting *People v. Clark* (1990) 50 Cal.3d 583, 597.) "The law does not entitle the People to a jury composed only of those who would impose death in every factual scenario, but instead to a jury that can follow the court's instructions and conscientiously consider the appropriate penalty based on the proven aggravating and mitigating circumstances." (*Id.* at p. 763, citing *People v. Stewart*, *supra*, 33 Cal.4th at p. 447.)

Prospective Juror Siebert's and Prospective Juror's Walker's answers gave no indication of unfitness to serve. While both set a high bar for a vote for death, each stated she would be able to follow the trial judge's instructions and could impose the death penalty in the right case or under the appropriate circumstances. (15 CT 4189, 4193; 7RT 1535 [Prospective Juror Siebert]; 15CT 4304, 4308; 7RT 1565 [Prospective Juror Walker].)[7] Stating that she was "not sure" she could do something, as each prospective juror did here, is a far cry from saying it could not be done. While either juror might have been predisposed to assign greater than average weight to mitigating factors in the weighing process of deciding penalty, each clearly stated she could engage in the weighing process required of jurors

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[7] It is noteworthy that there was no written question inquiring specifically whether the jurors would be able to vote for the death penalty if the juror believed, after hearing all of the evidence and the court's instructions on the law, and after weighing the aggravating and mitigating factors, that it was the appropriate sentence.

and further that she could return a death verdict. The trial court's implied finding that the jurors' views on imposition of the death penalty would prevent or substantially impair their performances as jurors was not supported by substantial evidence.(*People v. Pearson* (2012) 53 Cal.4th 306, 331-333; *People v. Stewart*, *supra*, 33 Cal.4th at p. 447.)

The for-cause exclusions of Prospective Juror Siebert and Prospective Juror Walker violated both the Sixth and Eighth Amendments as argued *post*. The United States Supreme Court only permits the discharge of a prospective juror for cause based on her views of capital punishment when the state carries its burden of showing that the juror's "views would prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." (*Adams v. Texas* (1980) 448 U.S. 38, 45.) That did not occur at trial and that burden was not met here. The discharge of Prospective Juror Siebert and Prospective Juror Walker was error.

ARGUMENT III

EXCLUSION OF PROSPECTIVE JURORS BECAUSE OF UNWILLINGNESS OR INABILITY TO IMPOSE A DEATH SENTENCE VIOLATES THE FEDERAL CONSTITUTION AS IT WAS UNDERSTOOD BY THE FRAMERS AND REQUIRES REVERSAL OF THE GUILT AND PENALTY JUDGMENTS IN THIS CASE.

A. *Summary of Appellant's Argument*

In his opening brief, appellant asserted that Sixth

Amendment jurisprudence concerning the right of a capital defendant to an impartial jury and due process of law should be revisited in the context of how those rights were understood by the Framers of the Bill of Rights. As he explained, the solemn duty of a jury, as understood by the Framers, was to reach a verdict which reflected the jury's conscience. He set forth numerous recent cases decided by the United States Supreme Court in which the Court focused on historical interpretations of the Sixth Amendment in the context of jury trials to reverse previous precedent which sought instead to only balance competing interests. He argued that due process of law and the right to an impartial jury, as seen by the Framers, does not permit judges to exclude citizens from juries based on their scruples against capital punishment. He asserted that when the Framers contemplated due process in capital cases, they envisioned the guarantee of trial by jury to include a jury's freedom to use its verdict to reject an application of a law which it deemed unjust. He urged that the Sixth Amendment right to an impartial jury applies to guilt as well as penalty juries, and the system which presently allows a death qualification procedure serves to substantially increase the risk that a defendant will be convicted of capital murder. He argued that reversal of guilt as well as the penalty judgment, which he established was required in Argument II, *supra*, is necessary in this case. (AOB 188-203.)

B. *Summary of Respondent's Argument*

Respondent disagrees. Respondent first urges appellant waived the argument for failure to raise it below. Then

respondent urges that death qualification voir dire is constitutional, citing several past holdings of this Court. (RB 88-90.) Appellant disagrees.

C. *Errors in Respondent's arguments*

1. The argument is not forfeited

An objection is not necessary to preserve a claim that a defendant's substantial rights have been violated. Appellant's failure to object at trial to the use of death qualification procedures at his trial does not forfeit the issue on appeal because the lack of objection does not forfeit the right to appeal the deprivation of "fundamental constitutional rights." (*People v. Vera* (1993) 5 Cal.4th 580, 592, 589 fn. 5.) Appellant's argument concerns his fundamental Sixth Amendment right to due process of law and his right to an impartial jury. Accordingly, respondent's claim of forfeiture is wrong as a matter of law.

2. The High-Court's death qualification cases should be re-examined in the context of the Framers' original understanding of the Bill of Rights.

Appellant acknowledges the previous holdings of this Court, as cited by respondent, finding the death qualification procedure does not violate a defendant's right to a representative jury which is a cross-section of the community (*People v. Taylor* (2010) 48 Cal.4th 574, 602-603); that it does not result in juries biased against the defense (*People v. Howard* (51 Cal.4th 15, 26-27); and that it does not violate the Fourteenth Amendment right

to a fair trial (*People v. Cummings* (1993) 4 Cal.4th 1233, 1279). Respondent's reliance on these cases sidesteps appellant's argument that the Sixth Amendment, as intended by the Framers, contemplated the right to due process as the guarantee of a trial by jury wherein a jury may reject an application of a law that it deems unjust. As appellant set forth, the expectation that jurors would follow their conscience and render a verdict against such a law was at the heart of an "impartial jury" as understood by the Framers. Respondent does not address these points.

Appellant pointed out numerous cases where the High Court has reexamined and even overruled previous holdings in favor of the context of the Framers' understanding of the Sixth Amendment. (See AOB 188-193, discussing *Alleyne v. United States* (2013) _ U.S. _, 133 S.Ct. 2151, overruling *Harris v. United States* (2002) 536 U.S. 545; *Ring v. Arizona* (2002) 536 U.S. 584, overruling *Walton v. Arizona* (1990) 497 U.S. 639; *Crawford v. Washington* (2004) 541 U.S. 36, overruling *Ohio v. Roberts* (1980) 448 U.S. 56; *Jones v. United States* (1999) 526 U.S. 227.) Appellant asked this Court to be guided by the re-evaluation of the Sixth Amendment in those cases, as set forth in his argument, and to hold that the Sixth Amendment prohibits the state from excluding prospective jurors based on an unwillingness or inability to impose the death penalty. The death qualification, as applied at appellant's trial where two prospective jurors who were removed for expressing scruples against the death penalty, but never stated they could not follow the law, substantially increased the risk that appellant would be convicted of capital

murder. For this reason, the judgment should be reversed in its entirety.

PENALTY PHASE ERROR

ARGUMENT IV

THE TRIAL COURT ERRED IN ALLOWING THE DEFENSE TO FOREGO THE PRESENTATION OF EVIDENCE IN THE PENALTY PHASE AFTER TRIAL DEFENSE COUNSEL INFORMED THE COURT THAT THERE WAS MITIGATING EVIDENCE AVAILABLE.

A. *Summary of Appellant's Argument*

In his opening brief, appellant argued that a death sentence imposed in the total absence of mitigating evidence is constitutionally unreliable and is violative of a defendant's Eighth and Fourteenth Amendment right to have a jury consider all evidence relevant to a penalty determination. Further, he argued that when it is the defendant who limits or chooses to waive his own case in mitigation at the penalty phase despite the existence of such evidence, a verdict of death becomes a near certainty, thereby reducing the penalty phase to a "suicide by jury" or "state assisted suicide," both inconsistent with the legal doctrines of our justice system. He pointed out that a death determination is a normative decision based on reason and community values, and thus cannot be properly reached by a jury based upon a wholly unbalanced presentation of evidence. When there is no mitigating evidence, the aggravating evidence cannot

logically be outweighed, rendering the only possible verdict that of death. He argued that here, notwithstanding defense counsel's accedence to appellant's desire to waive his right to present evidence in mitigation, the trial court committed structural and prejudicial error in violation of appellant's Eighth and Fourteenth Amendment rights to a reliable death sentence in allowing the penalty phase and deliberations on the question of death to proceed with only the prosecution presenting its case, where there was a complete void of defense mitigation evidence, cross-examination and argument. He argued that accordingly, the death sentence must be reversed. (AOB 203-224.)

B. *Summary of Respondent's Argument*

Respondent disagrees. Respondent urges that this Court has long-established the right of a defendant to refuse to allow defense counsel to present evidence in mitigation during the penalty phase of a capital trial, and that acceding to the defendant's wishes in this regard does not deny the defendant his right to a reliable penalty determination. Respondent urges that here, the inquiry by the trial court as to the circumstances underlying appellant's decision and the extent to which the court engaged with appellant about his reasoning sufficiently ensured appellant understood the consequences of the decision, that the decision was knowing and voluntary, and that the trial court "satisfied the state's interest in assuring the fairness and accuracy of the death judgment." (RB 90-101.) Respondent's argument should be rejected.

C. *Errors in Respondent's Argument*

Respondent relies primarily on the recent decision of *People v. Amezcua and Flores* (2019) 6 Cal.5th 886 (*Amezcua and Flores)* to urge that the trial court's determination that appellant controlled the decision whether to present a defense during the penalty phase was proper and that the absence of mitigating evidence did not violate appellant's constitutional right to a reliable penalty verdict. (RB 97-102.) While it is true that this Court has found that generally, a defendant may waive the presentation of all evidence and argument in mitigation, the instant case presents circumstances under which the general rule should not apply. As appellant will demonstrate, respondent's analysis should be rejected because *Amezcua and Flores* is readily distinguishable from the instant case.

In *Amezcua and Flores*, both defendants and their counsel together met with the trial court on the day before the guilt phase arguments were scheduled to begin to discuss the penalty phase. Both counsel informed the court that each of their clients had consistently and emphatically told respective counsel throughout the trial he did not want any defense presented should there be a penalty phase. (*Amezcua and Flores, supra,* 6 Cal.5th 886, 920-921.) Counsel for Amezcua explained that his client had been adamant that counsel not present testimony by family members, but had agreed to allow counsel to otherwise prepare a penalty phase defense. Later, Amezcua told his lawyer that he did not want to present *any* defense in mitigation. Counsel had

explained the nature of the penalty presentation he had prepared and told Amezcua that if it was not presented to the jury, Amezcua's chance of receiving a life sentence would be significantly diminished. Amezcua told counsel that he understood but still did not want to present a defense. (*Ibid.*) Flores' counsel reported that his client's intentions were similar to those of Amezcua, that he had reviewed with Flores the penalty phase evidence he had prepared, as well as explained that he had a much better chance of avoiding the death penalty if the defense presented the evidence. (*Id.* at p. 921.)

The court inquired of counsel as to the nature of the penalty phase evidence which each had prepared for their client. Counsel for *Flores* reported he had three family members and three experts prepared to set out nine points of mitigation in the case. (*Amezcua and Flores, supra*, 6 Cal. 5th at p. 921.) Counsel for *Amezcua* reported that he had seven to ten family members available to testify, along with a psychologist and a social historian. He would further offer a three-hour tape recording of the hostage negotiations which would reveal a different and "much softer side" of his client. (*Ibid.*)

The court then addressed both defendants directly. (*Amezcua and Flores, supra*, 6 Cal.5th at pp. 921-922.) The court explained it needed to clearly establish what each defendant wanted and that the decision reached was "knowing and voluntarily made." (*Id.* at p. 921.) The court also explained that the decision not to present mitigating evidence could result in a

verdict of death and would not be a basis for reversal of that verdict. (*Ibid.*)

Flores stated he understood the jury could decide that a death sentence was too harsh for him, but he "refused to allow [his] attorneys to attempt to sway their opinion." (*Amezcua and Flores, supra*, 6 Cal.5th at p. 922.) Flores acknowledged his attorneys had done a "great job" in assembling the case in mitigation. (*Ibid.*) Still, Flores explained he had made the decision at the time of his arrest that he did not want his attorneys to present his family's and friends' testimony in an effort to try to blame them for anything he had done, stating, "I did it without them. In my mind I stand alone. ..." (*Ibid.*)

Amezcua likewise explained that he did not want anybody "up there crying on my behalf when I didn't think about them when I was out there. ... I care about them but that's my own personal thing." (*Amezcua and Flores, supra*, 6 Cal.5th at p. 922.) Amezcua also stated that his attorneys had done "a great job" defending him, acknowledging that he sometimes was a hindrance to their efforts. (*Ibid.*) Amezcua told the court he understood his counsel had put together a lot of information for the penalty phase and said there had been no lack of effort on the part of his attorneys. He stated, "It's been my choice from way before, I mean, I ever got arrested. I understood my actions would get me to this point in life way before I ever got arrested." (*Ibid.*)

Amezcua denied the court's suggestion that he was trying to engage in "suicide by cop." (*Amezcua and Flores, supra*, 6

Cal.5th at p. 922.) First, Amezcua told the court that based on the numbers of defendants on death row, he was more likely to die of natural causes or old age. (*Ibid.*) He also explained that he had made a choice not to take his own life on the day of his arrest because it would have been cowardly. (*Id.* at pp. 922-923.) He said he wanted to give his family the opportunity to say goodbye, and to help them understand that they should not continue to blame themselves for his actions. (*Id.* at p. 923.)

Flores responded to the suggestion of "suicide by cop" by stating that if he wanted to die, he would kill himself. (*Amezcua and Flores, supra*, 6 Cal.5th at p. 923.) Flores also pointed out that if he is sent to death row he was "going to get a way better appeal action." (*Ibid.*) He added, "... if I go to death row, I believe there's some technicalities in my case that maybe one day with [a lawyer's] assistance with little words or something, that they will get me back out, and I may be old, but I believe I will be back in a level four one." (*Ibid.*)

Both defendants denied their decision was based on fear for their safety in prison. (*Amezcua and Flores, supra*, 6 Cal.5th at p. 923.) As for understanding that their decision to refuse to present any defense during the penalty phase could not be a ground for reversal of a death verdict, Flores stated they were giving up "that piece only" and all other grounds for appeal remained open. (*Ibid.*)

The court reminded each defendant of his right to testify at the penalty phase. (*Amezcua and Flores, supra*, 6 Cal.5th at p.

923.) The court then stated, "The main thing is to say this: You are in control of the evidence that is offered at a penalty phase; okay? [¶] You seem to know that already, but that is the law. And even though [defense counsel] have prepared and want to put on the mitigating evidence and they want to argue to the jury that you should not get the death penalty, you are the controlling person and you can say 'no, I don't want you to put that evidence on.'" (*Ibid.*)

The court met with each defendant separately, explaining that even if they were incarcerated for life, there were still worthwhile things to do in prison, and that a death verdict would be more limiting. (*Amezcua and Flores, supra*, 6 Cal.5th at pp. 923-924.)

The trial court then met with the defendants and their counsel on the following day. (*Amezcua and Flores, supra*, 6 Cal.5th at p. 924.) Each reiterated they wanted no mitigating evidence presented, no prosecution witnesses cross-examined, and no arguments made on their behalf. Their counsel confirmed the decisions reflected their client's sincere belief. (*Amezcua and Flores, supra*, 6 Cal.5th at p. 924.)

As respondent notes (RB 97-101), on appeal this Court found no error in the trial court's or defense counsel's accedence to the wishes of both defendants and it upheld the death sentences for both Amezcua and Flores. The Court observed it has consistently held that "among the core of fundamental questions over which a represented defendant retains control is the decision whether or not to present a defense at the penalty phase of a

capital trial, and the choice not to do so is not a denial of the right to counsel or a reliable penalty determination." (*Amezcua and Flores, supra*, 6 Cal.5th at p. 925.) As does respondent (RB 100), the Court invoked the holding of *McCoy v. Louisiana* (2018) 584 U.S. _ [200 L.Ed.2d 821, 138 S.Ct 1500] (*McCoy*), which stated while trial management involving certain evidentiary matters and argument are controlled by counsel, the "[c]hoice of the defense objective is the client's prerogative. (*Id.* at p. 926, quoting *McCoy, supra,* 584 U.S. _ [138 S.Ct. at p. 1508].) Based on the allocation of responsibilities between counsel and client as recognized by the Court in *McCoy*, this Court held that the decision to present certain mitigating evidence is not controlled by counsel, but rather is a right to be exercised by the defendant. (*Ibid.*)

It is clear that defendants Amezcua and Flores had each decided early in their trial, or even at the time of arrest, that they would refuse to present evidence in mitigation during a penalty phase if there was one. Neither equivocated about his decision or advocated for an alternative direction in which to take the defense penalty phase. Each defendant's expressed reasoning for refusing the presentation of a case in mitigation showed insight (i.e., better appellate options for death row inmates or not wishing for family to take blame) and were unrelated to the case itself. In other words, the proceedings in *Amezcua and Flores* reflected clear and resolute decision-making on the part of the defendants, each undeterred by the extent to which his attorney

had prepared for the penalty phase, and with all possible avenues of persuasion, encouragement, and thoughtful inquiry engaged by the trial judge.

The underlying circumstances in the instant case are readily distinguishable from those in *Amezcua and Flores*. In this case, on Wednesday, January 2, 2002 immediately following the reading of the guilt-phase verdicts, the trial court inquired of counsel as to the time required for each party to present its penalty phase evidence. (27 RT 5812-5821 [verdicts read], 5823-5824 [court query].) The prosecutor, who had another trial trailing, indicated the parties had originally agreed to start the penalty phase on January 8, 2002. The court reminded the proscecutor that the court would not be in session on January 9th or 10th, and the prosecutor then noted he had not scheduled witnesses for January 11, 2002. The prosecutor estimated that both parties' penalty evidence could be presented by the week of January 22nd at the latest. (27 RT 5799, 5822-5824.) Defense counsel agreed to waive time until January 14th, but said the defense could be ready on January 8, 2002 if needed. (27 RT 5822.)

Subsequently, out of the jurors' presence, defense counsel informed the court that appellant intended to represent himself at the penalty phase and was requesting the court to hear his *Faretta* motion the following morning.[8] Counsel stated he did not know what evidence, if any, appellant would present, but that if

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[8] *Faretta v. California* (1975) 422 U.S. 806.

the court denied the *Faretta* motion, the time estimate for the defense penalty phase "would probably be zero." (27 RT 5824-5825.)

At the hearing on the following day, the court commenced appellant's *Faretta* motion by stating that the defendant did not have a constitutional right to represent himself "midtrial." (27 RT 5829.) Defense counsel advised the court that if he remained retained on the case, appellant had instructed him to not present any mitigating evidence. Counsel said he told appellant that there "is mitigation, possibly," and there were witnesses the defense could call. (27 RT 5830.) If, however, appellant did not want counsel to present any mitigation evidence, which request counsel found "offensive" because his first thought was to persuade the jury not to impose the death penalty, then he was obligated to follow appellant's directive. (27 RT 5830.)

The prosecutor commented that his first concern was with "delay of the trial" and agreed with the court that it had the authority to deny the *Faretta* request as untimely and in balancing "the interest of the trial against the defendant's right to represent himself." (27 RT 5830.) The prosecutor also expressed security concerns including whether appellant would remain strapped to his chair or be allowed to roam the courtroom freely. (27 RT 5831.)

The court again noted the motion was a "midtrial request for self-representation" and asked appellant why he was making the request. (27 RT 5831.) Appellant responded:

"I feel that I can - - I know the issues a little better

> than my attorney does. I feel that the questions I can pose to these witnesses that are against me, I have more insight into. And basically my beliefs contradict with my lawyer's. He would take the case in a different direction. I don't wish to go that way."

(27 RT 5831.) After a brief discussion as to whether the penalty phase was a separate trial or part of a unitary trial with the same jury, the court again inquired about why appellant wanted to represent himself.

> [The Court] So you are saying, Mr. Poore, that you want to take the defense in a different direction in the penalty phase of the trial and that you disagree with or that your beliefs conflict with your lawyer's beliefs?
>
> [Appellant] What he would attempt to do would be to show mitigating factors that I don't approve of. My direction would be that at this point the only - - the only thing I choose to defend is the gang allegations, which weren't found true but I believe will be brought up as per my validation for, you know obviously institutional reasons. Other than that, I don't plan on putting on any mitigating evidence at all. And that contradicts with Mr. Hemmer [defense counsel]."
>
> I don't believe I will need any extra time for any legal studies. I don't plan on postponing the case or causing the jurors extra days or this court extra time. The only thing I may need is maybe the use of my investigator for a couple of days to serve transportation orders possibly for the two gentlemen that we pulled down previously, to deal with my gang issues.[9] And I don't see that causing the court any

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[9] Appellant was referring to inmates Richard Terflinger and Joseph Hayes who testified at Evidence Code

delay at all.

(27 RT 5832-5833.)

Appellant further stated that if the sheriff's office was served with a transportation order on this date, the two witnesses could be in court by the start-date of January 14th, as previously discussed. (27 RT 5833.) The court responded:

> [The Court] Well, that is not the plan because Mr. McNulty [the prosecutor] indicated he had another murder case which was trailing this case and the defendant in that case failed or refused to waive time, so we are not going to delay this case.

(27 RT 5833.) Then citing two cases,[10] the court said that appellant could "insist that mitigating evidence not be presented in the penalty phase" and told appellant he "would be estopped from later asserting ineffective assistance of counsel." (27 RT 5833.) The court also opined appellant's request for self-representation was untimely. (27 RT 5834.)

Defense counsel questioned whether he had a conflict with appellant, based on counsel's opposition to the death penalty and his obligation to try to ensure the jury did not reach a verdict of death, if appellant asked that counsel not present a case in mitigation. (27 RT 5834-5835.) Counsel then directly inquired of appellant as to whether, if counsel remained on the case,

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section 402 hearings but were not called at trial. (27 RT 5833; See 24 RT 5188-5235.)

[10] *People v. Bradford* (1997) 15 Cal.4th 1229; *People v. Lang* (1989) 49 Cal.3d 991.

appellant would request that counsel not present any mitigating evidence. Appellant responded, "Yes." (27 RT 5835.)

The prosecutor argued against appellant's self-representation, stating that appellant's likely reason for wishing to call the two inmate witnesses was to elicit "inappropriate" opinions as to whether appellant was a member of the Aryan Brotherhood. (27 RT 5836.) The prosecutor also argued that appellant was potentially engaged in:

> "a ruse to try to obviate the security that has been implemented by this court if he's granted pro per status, such that he be allowed to stand and cross-examine witnesses, such that he be allowed to use the podium in closing argument. That's at least the take that I am currently getting. And I believe for that reason the court has within its discretion to find, pursuant to cases that the court cited, that this is an untimely motion and it should be denied."

(27 RT 5837.)

The court then noted that the gang allegations had been found untrue by the jury and questioned the relevance of that evidence. (27 RT 5837.) Appellant responded:

> "Yes. I believe it was misunderstood. As far as the -- I know that the gang allegations were denied by the jury. I don't believe that Mr. McNulty will be presenting that, but I believe he will be presenting the fact that I'm validated in CDC and use that as future violent tendencies in his case. I would be calling these two gentlemen down because they know me, more character witnesses, along with them knowing me as a character witness, knowing that I'm not in that -- so inclined. And that would be my purpose for calling them.

> If it is necessary for me to go ahead and agree that - - to be strapped in the chair and not to use the podium or walk the floor, I would be more than happy to agree to that. I would just ask that the district attorney be also limited to that also. I have no problem with sitting here addressing my case. I don't think that getting up and using my arms or the use of the floor is necessary. On either side. The evidence should speak for itself."

(27 RT 5837.)

After further discussion, during which the court expressed defense counsel's representation as having been "excellent," the court issued its ruling denying appellant's request to represent himself in the penalty phase. (27 RT 5840.) The court first noted the trial was in the "late stage" of proceedings. It then cited several cases which it had reviewed and considered, and then stated:

> "Pursuant to those cases and the court's general knowledge of the factors and background of the defendant, the quality of counsel's representation of the defendant, and other factors which have been indicated, the court will deny the request [for self-representation] at this time."

(27 RT 5840.)

Defense counsel spoke:

> "Your Honor, since I'm still on the case, and the trial tactics are mine, my trial tactics will not include Mr. Terflinger or Mr. Hayes. So I will not be calling any witnesses. And pursuant to my client's request, I will not be presenting any mitigating evidence."

(27 RT 5840-5841.)

The court indicated it would need more information to rule

on the "remaining issues" in the case, and asked defense counsel if it was the defense's intention to not present mitigating evidence or otherwise fight against the death penalty. (27 RT 5841.) Counsel responded in the affirmative. (27 RT 5841.)

As appellant noted in his opening brief, the court then said, "So Mr. Poore is asking the jury essentially to put him to death." Appellant interposed, "No," and defense counsel responded that although he was not sure appellant wanted death, appellant did not want defense counsel to present any other mitigation. (27 RT 5841.) The court added, "Effectively, if the defendant does not present any mitigating evidence and chooses not to argue against the death penalty, he's asking the jury to put him to death." (27 RT 5841.) The court then asked counsel to read several cases, and noted that in order to be sure that appellant made an intelligent waiver of the right to present mitigating evidence, the court would have to make a further inquiry of the defendant. The matter was continued to the next court day. (27 RT 5842.)

At the next session, defense counsel noted that he had read the cases and advised that if appellant told him not to present mitigating evidence, he would comply although he did not like it. (27 RT 5844.) He stated, "Mr. Poore has made it clear to me that he does not want me to present a mitigating case in mitigation, let's put it that way. And, of course, if he wants me not to do that, I will not do that, and I will sit her and say no questions, no objections and no final argument, I suppose." (27 RT 5845.)

As set forth in appellant's initial briefing (AOB 206-207), the trial court engaged in a brief colloquy with appellant

confirming that: he heard what his lawyer said and agreed with it, that he understood there "may be some argument" his attorney could make which may persuade the jurors that life without parole would be the appropriate verdict, that appellant did not want his attorney to make that argument or present mitigating evidence, and that he knew the jury may order the death penalty but he was choosing not to "resist." (27 RT 5845-5846.) The court then opined that appellant's answers to the eight questions were "sufficient." (27 RT 5846.)

Commencing on January 8, 2002 the penalty phase was thereafter presented by the prosecution without argument, objection, or cross-examination on behalf of the defense. (27 RT 5880-5897 [prosecution opening argument], 5898-6079; 28 RT 6108-6261 [witnesses and exhibits].) The parties both rested on Monday January 14th, and the jury was excused until January 16, 2002. (28 RT 6262.) The court and counsel met on January 15, 2002 to review the exhibits and finalize the jury instructions. (28 RT 6265-6282.) At the close of the informal session, the court gave counsel two additional cases to review, and indicated it wanted to make sure it had ascertained from the defendant what his wishes are with respect to the presentation of mitigating evidence on the following morning. (28 RT 6283.)

The following morning, defense counsel advised the court that he spoke with appellant one more time about his right to present mitigating evidence, and about the witnesses counsel would call on his behalf, and that appellant's position had not changed. (28 RT 6285.) The court then directly questioned

appellant again about his right to present mitigating evidence, confirming that appellant had not been improperly influenced, coerced, promised, or threatened to not present evidence, that he had discussed mitigating evidence with counsel on more than one occasion, that he understood the decision could result in a verdict of death, and that such could not be a basis for appeal. (28 RT 6286-6287.)

Trial counsel affirmed that other than appellant's wishes, there was no reason, tactical or otherwise, not to present mitigating evidence. (28 RT 6288.) The sole exception was counsel's belief that the two witnesses which appellant wished to present in mitigation would not help his case. (28 RT 6289.)

As can be seen, this case is not like *Amezcua and Flores*. Here, unlike the two defendants in *Amezcua and Flores*, appellant in fact *wanted* to present a case in mitigation. He explained at the *Faretta* hearing that he wanted to represent himself during the penalty phase so that he could present the defense he believed would best represent his case, including calling two witnesses and self-directing the cross-examination of the prosecution witnesses. It was clear that defense counsel did not agree with the evidence appellant wanted to present and had *refused* to offer it in the penalty phase of the trial.

It is undisputable that *only* after appellant was denied on *all fronts* to present the witnesses he wanted the jury to hear and to conduct his own cross-examination of the prosecutor's witnesses, did he decline to present *any* evidence in mitigation,

including cross-examination of witnesses or argument to the jury. In other words, unlike the defendants in *Amezcua and Flores*, appellant made the determination that he did not want to present mitigating evidence because neither the trial court or his defense counsel would accede to either allow him to present, on his own or through his lawyer, the witnesses and the cross-examination he wanted and felt was important in his penalty defense.

As this Court explained, the High Court in *McCoy* held that the "[c]hoice of the *defense objective* is the client's prerogative. (*Amezcua and Flores, supra*, 6 Cal.5th at p. 926, quoting *McCoy, supra,* 584 U.S. _ [138 S.Ct. at p. 1508]; emphasis added.) This Court concluded that based on the allocation of responsibilities between counsel and client as recognized by the Court in *McCoy*, the decision to present certain mitigating evidence is not controlled by counsel, but rather is a right to be exercised by the defendant. (*Ibid.*)

Here, appellant *wanted* to present mitigating evidence. He explained what the evidence was and why he felt it would help his case. (27 RT 5837-5838.) His efforts were belittled by a defense lawyer who apparently believed that allowing the prosecution's case to proceed without any mitigating evidence in response was more advantageous than assisting appellant in presenting the case in mitigation case he preferred (27 RT 5840-5841), a trial court more concerned about how any time delay would inconvenience the prosecutor rather than giving appellant the extra few days to transfer his inmate witnesses back to court

(27 RT 5830, 5833) and a prosecutor who suggested that appellant, in moving for self-representation to present his own case in mitigation, was motivated by nefarious intentions to circumvent the courtroom security that was in place. (27 RT 5831, 5837, 5840.)

Moreover as noted above, prior to the commencement of the penalty phase, to establish that appellant's decision was knowing and voluntary, the trial court here addressed to him a mere eight perfunctory "yes/no" and "is that correct?" questions to which appellant only answered "yes" or "[T]hat's correct" as follows:

> [The Court]: Mr. Poore, you've heard what your attorney has just said; correct?
>
> [Appellant]: Yes.
>
> [The Court]: Is that what you wish him to do?
>
> [Appellant]: Yes.
>
> [The Court]: You understand that there may be some evidence which is mitigating evidence?
>
> [Appellant]: Yes.
>
> [The Court]: And you understand that there may be some argument that your attorney can make which may convince the jurors that life without possibility of parole would be the appropriate penalty rather than death?
>
> [Appellant]: Yes.

> [The Court]: But you don't wish him to make that argument; is that correct?
>
> [Appellant]: That's correct.
>
> [The Court]: So it is your position that you are ordering your attorney not to present any mitigating evidence; correct?
>
> [Appellant]: Correct.
>
> [The Court]: And you are ordering your attorney not to argue against the death penalty; correct?
>
> [Appellant]: Correct.
>
> [The Court]: Knowing that the jury may order the death penalty, you do not wish to resist that; is that correct?
>
> [Appellant]: Correct.

(27 R.T. 5845-5846.)

Based on these brief questions and answers, the trial judge found the inquiry sufficient and began the penalty phase of trial. (27 R.T. 5846.)

It is beyond dispute that this colloquy bears no resemblance to the probing, detailed, organized, and thoughtful questioning conducted by the trial court and lauded by this Court in *Amezcua and Flores*. As the Court described the discussion in that case:

> "The record clearly demonstrates defendants' objective in this case. The court engaged in extensive and careful colloquy with defendants and their counsel to ensure that each defendant understood the stakes involved in pursuing his choice. It ensured each defendant had the benefit of the court's own

> counsel, as well as that of his lawyers. It confirmed that both defense teams had prepared a case in mitigation and were ready to present it. It gave each defendant several opportunities to ask questions and to explain his choice in his own words. It expressed its own concerns for each defendant as an individual and for the preservation of each man's procedural safeguards. The court interacted with each defendant directly and with courtesy. It took the same kind of care that is required when ensuring that the waiver of any substantial right is personally and properly made. It explicitly found that each defendant had made his own choice knowingly and voluntarily. The procedure employed here satisfied the state's interest in assuring the fairness and accuracy of the death judgments consistently with *McCoy*."

(*Amezcua and Flores, supra,* at p. 926.)

It is true that, as noted above, the trial court addressed some additional "yes/no" questions to appellant *after* the penalty phase had been completed, the parties had rested, the exhibits admitted and the jury instructions selected. (See 28 RT 6285-6288.) This time the court addressed 16 yes/no questions to appellant. It begs the question, however, whether the court, concerned about a trial delay, had consistently and genuinely accorded appellant with the appropriate concern and recognition of his rights that the penalty phase of a capital trial requires. In other words, the belated questioning was undisputably too little and far too late. At this point, the jury had heard the prosecution's case, the parties had rested, and the jury was next expecting to be instructed and to deliberate.

As appellant argued in his opening brief (AOB 209-210),

there is a consistent line of cases which maintain it is unconstitutional to sentence a defendant to death without permitting the sentencer to hear all relevant mitigating evidence. (See *Skipper v. South Carolina* (1986) 476 U.S. 1, 8 [holding that a death sentence was unconstitutional when the judge ruled that some of the defendant's mitigating evidence was inadmissible]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 113 [finding that a death sentence was unconstitutional when the judge decided as a matter of law that mitigating evidence could not be considered]; *Beck v. Alabama* (1980) 447 U.S. 625, 627 [holding that it was unconstitutional to sentence defendant to death without permitting the jury to consider a conviction for a lesser included offense that was supported by the evidence]; *Lockett v. Ohio* (1978) 438 ·U.S. 586, 608 [striking down a state statute that limited the categories of evidence that could be considered in mitigation; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 (*Woodson*) [holding that mitigating evidence is a "constitutionally indispensable part" of any capital sentencing scheme]; *Roberts v. Louisana* (1976) 428 U.S. 325, 333-334 [(striking down a state statute that did not allow consideration of mitigating circumstances in the imposition of the death penalty].

In this case, there was a clear conflict between appellant and his defense counsel. While both were apparently prepared for - and wanted to present - a case in mitigation, their lack of agreement as to the nature of the case resulted in a wholly unbalanced presentation of penalty phase evidence which fatally

undermined the reliability of the penalty phase and verdict in violation of appellant's constitutional rights. As appellant argued in his opening brief, mitigating evidence is central to any constitutional capital sentencing proceeding. That is, "[t]he system is designed to consider both aggravating and mitigating circumstance ... in *every* case." (*Roper v. Simmons* (2005) 543 U.S. 551, 572; emphasis added.)

Consideration of mitigating circumstances has long been established as essential to ensuring the heightened reliability the constitution demands of any death verdict. (*Woodson, supra,* 428 U.S. at 305 [explaining that the requirement of individualized sentencing "rests squarely" on the need for reliability in the meting out of a punishment of such finality]; *Mills v. Maryland* (1988) 486 U.S. 367, 376 [requiring "even greater certainty" that there are proper grounds to justify a capital sentence]. Mitigating evidence is then, essentially, our system's bulwark against "capricious or arbitrary" decisions to condemn a fellow human being to die. (*Gregg v. Georgia* (1976) 428 U.S. 153, 189 [explaining that without such consideration, "the system cannot function in a consistent and rational manner"].)

In his opening brief, appellant also argued that the primary means of safeguarding against the risk that death might be imposed "in spite of factors which may call for a less severe penalty" is the presentation and consideration of mitigating evidence. (*Lockett v. Ohio, supra*, 438 U.S. at p. 605; see also *McKoy v. North Carolina* (1990) 494 U.S. 433, 443 ["[I]ndeed, it is precisely because the punishment should be directly related to

the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's *character* or record or the circumstances of the offense"]; emphasis added.) So unacceptable is the risk of over-sentencing that, in each and every circumstance in which the Supreme Court has encountered a bar to the jury's consideration of mitigating evidence, it has struck it down. Thus, neither statute, judge, evidentiary ruling, nor "a single juror's holdout vote" has been tolerated in the High Court's cases. (*Mills v. Maryland, supra,* 486 U.S. at p. 375.) Respondent addresses none of these points.

Appellant finally argued in his opening brief that the trial court's accedence to the defense's failure to present a mitigating case was prejudicial structural error. (AOB 222-223.) As set forth in appellant's initial briefing, errors not subject to quantitative measurement are structural. (*United States v. Gonzalez-Lopez*, *supra*, 548 U.S. 140, 149 [structural errors are those which are "necessarily unquantifiable and indeterminate"].) Appellant argued that because the imposition of the death penalty is a normative decision, imposing such a penalty requires a jury to engage in a *qualitative* balancing of the reasons for and against the imposition of the death penalty. This balancing enables the jury to "express the conscience of the community on the ultimate question of life or death," (*Witherspoon*, 391 U.S. at p. 519), and to make a "reasoned moral response to the defendant's background, character, and crime." (*California v. Brown*, 479 U.S. 538, 545

(O'Connor, J., concurring).) Moreover, because this normative decision expresses the conscience of the community, "predict[ing] the reaction of a sentencer to a proceeding untainted by constitutional error on the basis of a cold record is a dangerously speculative enterprise." (*Satterwhite v. Texas* (1988) 486 U.S. 249, 262 (Marshall, J., dissenting).) As appellant stated, it is therefore inappropriate here to conclude that the jury's inability to hear the available mitigating evidence undermined the credibility of the verdict, but nevertheless find the error was harmless. Respondent also does not address this argument.

The trial court erred in allowing the penalty phase to go forward without a scintilla of evidence, instruction, or argument on behalf of the defense. The prejudice to appellant is manifestly demonstrated by the speed at which the death penalty was imposed. After the defense waived any argument in the penalty phase, the jury retired for deliberations at 11:35 a.m. on January 16, 2002, and after 73-minute lunch recess commencing at noon, returned the verdict of death at 2:30 p.m. that afternoon. That is, the jury deliberated for less than two hours. Appellant was not afforded the dignity of presenting the mitigating case he requested. The trial court did not concern itself with appellant's desired case in mitigation at any time: in addressing trial defense counsel, in questioning appellant about his decision to waive mitigation both before and after the penalty phase, or in ruling that the court found the circumstances "sufficient" to allow the penalty phase to proceed without a defense case. The penalty verdict was unconstitutional. Sentence reversal is required.

ARGUMENT V

THE DEATH PENALTY AS ADMINISTERED IN CALIFORNIA IS CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AMENDMENT; CALIFORNIA'S FAILURE TO TIMELY PROVIDE CONDEMNED DEFENDANTS WITH HABEAS COUNSEL OFFENDS THE DUE PROCESS AND EQUAL PROTECTION GUARANTEES OF THE UNITED STATES AND CALI FORNIA CONSTITUTIONS AND REQUIRES REVERSAL OF APPELLANT'S CAPITAL CONVICTION AND SENTENCE; CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Appellant explained in his opening brief that:

- the death penalty as administer in California is cruel and unusual punishment within the meaning of the Eighth Amendment (AOB, Arg. V, pp. 224-240);
- California's failure to timely provide condemned defendants with habeas counsel offends the due process and equal protection guarantees of the United States and California constitutions and requires reversal of appellant's capital conviction and sentence (AOB, Arg. VI, pp. 240-242.)
- California's death penalty statute, as interpreted by this Court and applied at appellant's trial, violates the United States Constitution (AOB Arg. VII, pp. 242-278.)

In *People v. Schmeck* (2005) 37 Cal.4th 240, a capital appellant presented a number of often-raised constitutional attacks on the California capital sentencing scheme that had been

rejected in prior cases. As this court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id*. at p. 303.) This Court acknowledged that in dealing with these attacks in prior cases, it had given conflicting signals on the detail needed in order for an appellant to preserve these attacks for subsequent review. (*Id*. at p. 303, fn. 22.) In order to avoid detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (*Id*. at p. 304.)

Accordingly, pursuant to *Schmeck* and in accordance with this Court's own practice in decisions filed since then, appellant has, in Arguments VI through VII of the opening brief, identified the systemic and previously rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requests the Court to reconsider its decisions rejecting them. These arguments are squarely framed and sufficiently addressed in the opening brief, and therefore appellant makes no reply to respondent's argument at pages 101-109.

ARGUMENT VI

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS.

Appellant explained in his opening brief that numerous errors occurred at every stage of his trial from guilt phase through penalty phase. (AOB 75-278.) The multiple errors mandate an analysis of prejudice that takes into account the cumulative and synergistic impact of the errors. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.) Respondent states that "whether considered individually or cumulatively, [appellant's] claimed errors do not warrant reversal." (RB 109.)

There is a substantial record of serious errors that individually and cumulatively, or in any combination, violated appellant's due process rights under *Chambers v. Mississippi, supra*, 410 U.S. 284 and require reversal of the death judgment. The substantial errors in the guilt phase of the trial, as set forth in Arguments I through III, inclusive, and including the cumulative effect of the error in the penalty phase of trial (Argument IV), deprived appellant of a fair and reliable penalty determination. (AOB 82-184.) In the penalty phase, the jury was not permitted to hear and consider evidence in mitigation, which rendered the sentence unconstitutional by reason of its complete lack of balance with the aggravation scale in the weighing process. A trial is an integrated whole. The court's duty to review for cumulative error is heightened in a capital case, where the jury is charged with making a moral, normative judgment, and the jurors are free to assign whatever

moral or sympathetic value they deem appropriate to each item of mitigating and aggravating evidence.

The errors in this case are overwhelmingly prejudicial, both individually and cumulatively. More important, individually and cumulatively, these errors undermined the reliability of the death verdict. Our system of justice relies on process. If the trial process is just and fair, then the result will be reliable. (*California v. Ramos* (1983) 463 U.S. 992, 998-999.) If the process is fundamentally flawed, however, it cannot be redeemed by resort to harmless error analysis. As appellant has explained in both his opening and reply briefs, the death penalty process in California is fatally flawed in statute and it was flawed in its application to this case. Therefore, appellant's conviction and his death judgment must be set aside.

CONCLUSION

For the foregoing reasons, and the reasons set forth in his Opening Brief, appellant respectfully requests this Court to reverse his conviction in full. Alternatively, appellant requests the judgment of death be reversed.

Respectfully submitted,

s/ Patricia Ann Scott

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CERTIFICATE OF COMPLIANCE

I am the attorney for appellant Christopher Eric Poore. Based upon the word-count calculation of the Word Perfect X7 program, I hereby certify the length of the foregoing brief, including footnotes but not including tables, this certificate or the proof of service, is 19,945 words. (California Rules of Court, rule 8.630 (b)(1)(A).)

I declare under penalty of perjury of the laws of the State of California that the foregoing is true.

Date: September 21, 2021

s/ Patricia Ann Scott

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Attorney for Appellant and
Defendant
CHRISTOPHER POORE

DECLARATION OF SERVICE
BY MAIL AND ELECTRONIC SERVICE BY TRUEFILING

Case Name: *Christopher Poore* *S*uperior Court No. INF033308
Cal. Supreme Ct. No. S104665

I, the undersigned, declare: I am employed in the County of Yavapai, Arizona. I am over 18 years of age and not a party to the within entitled cause; my business address is Post Office Box 11056, Prescott, Arizona, 86304. My electronic service address is Scott165184@gmail.com.

On September 21, 2021, I served the attached,

REPLY BRIEF FOR APPELLANT CHRISTOPHER POORE

of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope addressed as follows:

Christopher Eric Poore
CDC #E06437
San Quentin State Prison
San Quentin, CA 94974

John K. Hemmer, Esq.
Post Office Box 766
Rancho Mirage, CA 92270
(Trial Counsel for Appellant)

The envelopes were sealed and the postage thereon fully prepaid and deposited with the United States Postal Service on September 21, 2021 in Prescott, Arizona, on the same day in the ordinary course of business.

On September 21, 2021, I also transmitted a PDF version of this document by Truefiling to each of the following as indicated:

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Anthony DaSilva, D.A.G.

Riverside County Superior Court
Hon. Randall D. White, Judge

California Appellate Project
Aundre Herron, Esq.

Office of the District Attorney
Ulrich McNulty, D.D.A.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Prescott, Arizona, on September 21, 2021.

s/ Patricia Ann Scott

Patricia Ann Scott

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

Case Name: **PEOPLE v. POORE (CHRISTOPHER ERIC)**
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9/21/2021
Date

/s/Patricia Scott

Signature

Scott, Patricia (165184)

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Attorney at Law

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