In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ALFRED FLORES, III,

Defendant and Appellant.

CAPITAL CASE

Case No. S116307

San Bernardino County Superior Court Case No. FVA015023
The Honorable Ingrid A. Uhler, Judge

RESPONDENT'S SECOND SUPPLEMENTAL BRIEF

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INTRODUCTION

On July 10, 2019, this Court granted an application by appellant Alfred Flores III to file a Second Supplemental Opening Brief, which raises four additional claims on appeal. Pursuant to this Court's order of the same date, respondent respectfully submits this Second Supplemental Respondent's Brief.

ARGUMENT

I. ALTHOUGH THE AMENDMENT TO PENAL CODE SECTION 12022.53 APPLIES RETROACTIVELY TO FLORES, REMAND FOR RESENTENCING IS UNWARRANTED HERE

In Claim I of his second supplemental opening brief, Flores asks this Court to remand the case so that the trial court may exercise its discretion to strike or dismiss the additional prison terms that it imposed under Penal Code section 12022.53, subdivision (d).[1] (2d Supp. AOB 11-16.) This Court should deny Flores's request because the trial court's comments clearly show that it would decline to reduce his sentence and any such remand would be futile.

A. The Revision of Section 12022.53 Applies Retroactively to the Present Case

Flores was sentenced to death for three first-degree murders. The trial court additionally imposed and stayed three consecutive terms of 25 years to life for the firearm-use enhancements attached to each count. (10 CT 2722-2729A.) At the time Flores was sentenced, section 12022.53 provided that a court "shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (§ 12022.53, former subd. (h); Stats. 1997, ch. 503, § 3.) But Senate Bill 620, which became effective January 1, 2018, removed the prohibition on

[1] All further statutory references are to the Penal Code unless stated otherwise.

striking the enhancements and added the following language in its place: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise imposed by this section." (Stats. 2017, ch. 682, § 2; *People v. McDaniels* (2018) 22 Cal.App.5th 420; *People v. Chavez* (2018) 22 Cal.App.5th 663.)

Because the judgment of conviction in Flores's case was not yet final when Senate Bill 620 took effect, the new statutory amendment applies retroactively to him. (*People v. Chavez*, *supra*, 22 Cal.App.5th 663, 712; *People v. Robbins* (2018) 19 Cal.App.5th 660, 679; see *People v. Brown* (2012) 54 Cal.4th 314, 323–324; *People v. Francis* (1969) 71 Cal.2d 66, 75–76; *In re Estrada* (1965) 63 Cal.2d 740.).

B. Remand is Not Appropriate Because the Trial Court Clearly Indicated Through its Comments That It Would Decline to Strike or Dismiss the Firearm Enhancements

Although the revision of section 12022.53 applies retroactively, it does not require a new hearing in every instance. Since the totality of the trial court's comments and other sentencing choices in the present case clearly indicate that it would decline to reduce Flores's sentence by dismissing the firearm enhancements, there is no need to remand the case for a new hearing.

This Court addressed a similar situation following the enactment of the Three Strikes law. Many trial courts initially believed that they did not have discretion under section 1385 to dismiss a prior-conviction allegation under the Three Strikes law unless the prosecution concurred. (See *People v. Fuhrman* (1997) 16 Cal.4th 930, 944-945.) This Court disabused the trial courts of such a belief in *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. But this Court noted that, even if a trial court had mistakenly believed that it lacked discretion, a new hearing would not be necessary on collateral review if "the record shows that the sentencing court clearly

indicated that it would not, in any event, have exercised its discretion to strike the allegations." (*Romero*, *supra*, at p. 530, fn. 13.) This Court subsequently observed that the same rule applies on direct appeal such that "remand is not required where the trial court's comments indicate that even if it had authority to strike a prior felony conviction allegation, it would decline to do so." (*Fuhrman*, *supra*, 16 Cal.4th at p. 944.)

Reviewing courts have considered a variety of circumstances in determining whether a sentencing court had clearly indicated that it would not dismiss a prior-conviction allegation under *Romero*. For example, in *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, the reviewing court considered the fact that the trial court's other sentencing choices had increased the defendant's aggregate prison term "beyond what it believed was required by the Three Strikes law." (*Id*. at p. 1896.) In *People v. Askey* (1996) 49 Cal.App.4th 381, the reviewing court considered the fact that, although the trial court had described the defendant's sentence as being "severe," it had also had described his prior convictions as having been for "overwhelmingly serious offenses" that had involved "different times, different places, [and] different victims." (*Id*. at pp. 385, 389.) And, in *People v. DeGuzman* (1996) 49 Cal.App.4th 1049, the review court considered the defendant's criminal history and the fact that there was "no hint in this record that the trial court ever entertained the slightest thought of leniency." (*Id.* at pp. 1054-1055.)

Consistent with the foregoing, the appellate court in *People v. McDaniels*, *supra*, 22 Cal.App.5th 420 recently observed that the retroactive revision of section 12022.53 would not warrant a new hearing if "the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*Id*. at p. 425.) Applying that standard, the appellate court found that there was not a clear indication as to how the trial

court would exercise its new discretion. For example, the trial court had "expressed no intent to impose the maximum sentence." (*Id*. at p. 428.) "To the contrary, it imposed the midterm for being a felon in possession of a firearm, and it ran that term concurrently to the term for the murder. It also struck '[i]n the interest of justice' four prior convictions it had found true." (*Ibid*.)

Similarly, in *People v. Chavez*, *supra*, 22 Cal.App.5th 663, the appellate court found that remand was necessary because "the record does not clearly indicate the trial court would have declined to strike or dismiss the section 12022.53, subdivision (h) [*sic*] firearm enhancement if it had the discretion to do so at the time of Gonzalez's sentencing." (*Id*. at p. 713.) Indeed, the trial court "did not impose on Gonzalez the maximum sentence possible and, in particular, imposed a lower two-year term for his count 2 conviction for assault with a deadly weapon." (*Id*. at p. 714.) And the trial court did not make "any other statement clearly indicating that it would not have exercised discretion to strike or dismiss the section 12022.53, subdivision (h) [*sic*] enhancement even if it had the discretion to do so at the time of Gonzalez's sentencing." (*Ibid*.; see also *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081-1082 [finding trial court did not clearly indicate that it would have declined to strike enhancements].)

In contrast, the Court of Appeal in *People v. McVey* (2018) 24 Cal.App.5th 405, rejected a remand request pursuant to Senate Bill 620 where the trial court in imposing the upper term for the firearm enhancement and identifying aggravating factors noted "the lack of significant provocation, appellant's disposition for violence, his lack of any remorse, and his 'callous reaction' after shooting an unarmed homeless man six or seven times," "that appellant 'did not hesitate to shoot this unarmed homeless guy' multiple times, and described appellant's attitude as 'pretty haunting.' " (*Id.* at p. 419.)

Here, like *McVey*, the trial court clearly indicated through the totality of its comments and other sentencing choices that it would decline to reduce appellant's sentence by dismissing the firearm enhancements. In denying Flores's motion for new trial, the trial court stated, "based on what I know about the defendant and based on what I know the defendant did, quite frankly, I think Mr. Flores does fall into the category of the worst of the worst offenders thereby deserving the ultimate sentence of death." (23 RT 5192.) The court thereafter denied Flores's automatic motion to modify the verdict, observing, in part, that Flores had shown "absolutely no remorse. It's as if he has no soul." (23 RT 5194.)

In light of the court's "pointed comments on the record" in denying Flores's new trial motion and automatic motion to modify the verdict, "remand in these circumstances would serve no purpose but to squander scarce judicial resources." (See *Mcvey, supra*, 24 Cal.App.5th at p. 419.) Accordingly, a new hearing is unwarranted here.[2]

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[2] In the event that this Court finds that the trial court did not clearly indicate how it would exercise its discretion, this Court could obviate the need to remand the case for a new hearing by modifying the judgment to reflect the dismissal of the additional punishments under section 12022.53. (See *People v. Boyce* (2014) 59 Cal.4th 672, 729-730; *People v. Banks* (2014) 59 Cal.4th 1113, 1154-1155, abrogated on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.) Indeed, the additional punishments serve no practical purpose so long as Flores remains sentenced to death. (See *Boyce, supra*, at p. 730; *People v. Cleveland* (2004) 32 Cal.4th 704, 770 (conc. opn. of Chin, J.).) Such a modification would be without prejudice to the trial court reconsidering its sentencing options and re-imposing the additional punishment in the unlikely event that Flores is relieved from the judgment of death. (See *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1256 ["trial courts are, and should be, afforded discretion by rule and statute to reconsider an entire sentencing structure in multi-count cases where a portion of the original verdict and resulting sentence has been vacated by a higher court"]; *People v. Hill* (1986) 185 Cal.App.3d 831, 834 [observing that "an aggregate prison term is not a

II. THE EIGHTH AMENDMENT DOES NOT PROHIBIT IMPOSING THE DEATH PENALTY ON "YOUTHFUL" ADULT MURDERERS

In Claim II of his second supplemental opening brief, Flores contends that his sentence violates the Eighth Amendment because he was 21 years old at the time of the offense. (2d Supp. AOB 17-26.) In Claim III, he makes a related argument that the Eighth and Fourteenth Amendments prohibit imposition of the death penalty on all "youthful offenders of 21 years or less" because their "inherent immaturity" undermines the reliability of the death sentence. (2d Supp. AOB 27-32 [boldface type omitted].) Neither the United States Supreme Court, this Court, nor any other state court of last resort has held that sentencing a 21-year-old defendant to death is cruel and unusual or renders a death sentence unreliable. There is no emerging national consensus against executing 18-to-21-year-old offenders.

In 2005, the United States Supreme Court ruled that the Eighth Amendment prohibits imposing the death penalty on juvenile offenders. (*Roper v. Simmons* (2005) 543 U.S. 551, 568 (*Roper*).) The High Court defined juveniles as people under the age of 18. (*Ibid.*) Five years later, this Court rejected an argument that "evolving standards of decency" rendered the execution of 18-year-old offenders unconstitutional. (*People v. Gamache* (2010) 48 Cal.4th 347, 405 (*Gamache*).) Most recently, this Court has reaffirmed that the Eighth Amendment does not prohibit executing 18-year-old offenders. (*People v. Powell* (2018) 6 Cal.5th 136, 192 ["*Roper* teaches that a death judgment against an adult is not unconstitutional merely because that person may share certain qualities with some juveniles."].)

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series of separate independent terms, but one term made up of interdependent components"].)

As in *Gamache* and *Powell*, Flores's attempt to extend *Roper* should again be rejected. At the time of *Roper*, 18 states excluded juveniles from death-penalty eligibility. (*Roper, supra*, 543 U.S. at 564.) Another 12 states had no death penalty at all. (*Ibid*.) And in the 20 remaining states, execution of juvenile offenders was rare – only three states had executed such offenders in the 10 years preceding *Roper*. (*Ibid*.) In finding a national consensus against executing juveniles, the Court noted that the situation before it was strikingly similar to the situation presented in *Atkins v. Virginia* (2002) 536 U.S. 304, which recognized a Constitutional prohibition on executing intellectually disabled offenders. In *Atkins*, just as in *Roper*, 30 states prohibited executing intellectually disabled inmates – 18 as an exception, 12 because of an absence of the death penalty. (*Ibid*.)

Currently, 29 states have the death penalty. (See http://www.ncsl.org /research/civil-and-criminal-justice/death-penalty.aspx [as of August 6, 2019].) Flores fails to identified any states that have "by express provision or judicial interpretation exclude[d] [offenders under 21] from its reach." (*Roper, supra*, 543 U.S. at p. 564.) In fact, as in *Gamache*, Flores has not identified a single state (or territory) with the death penalty that has a minimum age higher than 18; the states either permit the death penalty on offenders who are 18 or older or do not permit it at all. (See *Gamache, supra*, 48 Cal.4th at p. 405.) There is no evidence of an emerging national consensus against executing 18-to-21-year-old offenders within the meaning of *Roper*.

Flores's reliance upon a trial-court ruling from Kentucky is misplaced. (2d Supp. AOB 26.) First, the case does not establish Kentucky as a state that excludes 18-to-21-year-old offenders because the case is currently pending in the Kentucky Supreme Court. (*Com. v. Bredhold*, No. 2017-SC-000436.) Second, the reasoning is unpersuasive. The court cites to seven states as having a de facto prohibition on executing 18-to-21-year-

old offenders. (*Com. v. Bredhold* (Ky.Cir.Ct. Aug. 01, 2017), No. 14-CR-161, 2017 WL 8792559, at *2.) It includes those states, as well as four states with a governor-imposed moratorium, in its assertion that there are thirty states that would not execute an 18-to-21-year-old offender. (*Ibid.*) But *Roper* never mentioned de facto prohibitions or governor-imposed moratoria, only exceptions that were "by express provision or judicial interpretation." (*Roper, supra*, 543 U.S. at p. 564.)

To the extent *Roper* considered such states, it was as part of its observation that only three states had executed juvenile offenders in the immediate preceding 10-year period. (*Roper, supra*, 543 U.S. at 565.) Under the rubric of *Roper*, the facts before the court were that 31 states had the death penalty and none excluded 18-to-21-year-old offenders by express provision or judicial interpretation. And while the Kentucky court acknowledged that nine states executed 18-to-21-year-old offenders between the 2011 and 2016, the relevant time frame is 10 years, not 5. The Kentucky court's attempt to demonstrate a downward trend in individual executions of 18-to-21-year-old offenders by excluding Texas from its analysis similarly bears scant resemblance to the reasoning in *Roper*, which expressly considered Texas as one of the three states that had recently executed juvenile offenders.

Contrary to Flores's assertion, recent judicial and legislative activity does not support a finding that the Eighth Amendment prohibits executing 18-to-21-year-old offenders. In 2010, the United States Supreme Court ruled that a juvenile offender cannot be sentenced to life in prison without the possibility of parole (LWOP) for a nonhomicide offense. (*Graham v. Florida* (2010) 560 U.S. 48, 74.) Two years later, it ruled that a juvenile convicted of homicide cannot receive a mandatory LWOP, a court must consider the juvenile offenders' individual characteristics before imposing such a sentence. (*Miller v. Alabama* (2012) 567 U.S. 460.) Consequently,

the California legislature enacted Penal Code section 3051. Under the statute, juvenile offenders sentenced to LWOP shall nonetheless be eligible for parole "during his or her 25th year of incarceration…." (Pen. Code § 3051(b)(4).)

The fact that Penal Code section 3051 also provides parole hearings for those who were under 25 years old at the time of the offense and who are not serving LWOP does not support Flores's argument. (2d Supp. AOB 18-20; See Pen. Code §3051(b)(1)-(3).) As Flores notes, the legislature considered scientific arguments regarding human maturation in support of the bill that created Penal Code section 3051. And yet it chose not to include 18-to-21-year-olds in its statutory relief for juvenile offenders serving LWOP. This reflects an informed decision to draw the line of eligibility for the most serious punishment at 18. Similarly, the American Bar Association (ABA) resolution calling for the abolition of the death penalty for 18-to-21-year-olds has not been acted upon by the legislature. As such, neither Penal Code section 3051 nor the ABA resolution reflect an emerging state-wide consensus against executing 18-to-21-year-olds, much less a national one. (See *Roper, supra*, 543 U.S. at 564 ["The beginning point is a review of objective indicia of consensus, as express in particular by enactments of the legislatures that have addressed the question."].)

The United States Supreme Court recognized that any bright-line rule would be subject to objection. "The qualities that distinguish juveniles from adults do not disappear when an individual turn 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach." (*Roper, supra*, 543 U.S. at 574.) It decided, however, that the general consensus regarding the immaturity of juveniles rendered their execution cruel and unusual. "The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to

rest." (*Ibid*.) Flores has failed to establish that society at large considers 18-to-21-year-olds less accountable for their actions than other adults.

Similarly without merit is Flores's argument that the "inherent immaturity" of those aged 18 to 21 undermines the reliability of the death sentence. (2d Supp. AOB 27-32.) Although the United States Supreme Court has stated that the Eighth Amendment and evolving standards of decency impose a high requirement of reliability on the determination that a sentence of death is the appropriate penalty in a particular case (see, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 108; *Mills v. Maryland* (1988) 486 U.S. 367), the High Court has never held that the maturity level of 18-to-21-year-olds renders the death penalty unreliable. To the contrary, both the High Court and our state supreme court have concluded that the age of 18 is where society draws the line between childhood and adulthood. (*Roper, supra*, 543 U.S. at 574; *People v. Argeta* (2012) 210 Cal.App.4th 1478, 1482) Flores presents no compelling reason why this bright line should be redrawn at another age for the purposes of the death penalty.

III. NO LAW OR CONSTITUTIONAL RIGHT WAS VIOLATED WHEN THE TRIAL COURT EXCUSED PROSPECTIVE JURORS PURSUANT TO A STIPULATION BETWEEN THE PARTIES

In Claim IV of his second supplemental opening brief, Flores contends that the trial court violated Code of Civil Procedure sections 222 and 223 by permitting the prosecutor and defense counsel to stipulate to the excusal of potential jurors without voir dire. He further contends that the stipulations were barred by Civil Code section 3513. Flores argues this constitutes structural error requiring reversal. (2d Supp. AOB 32-55.)

Flores forfeited these contentions by stipulating to the procedure he now challenges on appeal. In any event, Flores's claims fail because the parties' stipulations to excuse potential jurors did not violate any statutes.

Since there was no statutory error or constitutional violation, the judgment should be affirmed.

A. Forfeiture

Before jury selection began, the parties agreed to the juror screening procedure at issue. Under this procedure, prospective jurors reporting for service would initially complete one of two questionnaires approved by the parties; either a hardship questionnaire based on the length of the trial or a case-specific questionnaire. (2 RT 171-172; 3 RT 339-340.) After reviewing the hardship questionnaires, the court would excuse those individuals the parties stipulated could be excused. (2 RT 171-172; 3 RT 339-340.) If the parties did not stipulate to excuse a prospective juror based on hardship, that individual would complete a case-specific questionnaire. (2 RT 171-172; 3 RT 339-340.) Thereafter, counsel would review the completed case-specific questionnaires outside of court, and the trial court would then excuse any juror the parties mutually agreed to excuse based on their review. (2 RT 182-183; 3 RT 580-581; 4 RT 598-599.) The remaining jurors would be subject to a "modified *Hovey*"[3] voir dire, and any remaining individuals thereafter would be subject to regular voir dire. (2 RT 182-183; 4 RT 602.) Flores's counsel agreed to this procedure. (2 RT 171-172, 182-183; 3 RT 339-340, 580-581; 4 RT 602.)

After the hardship questionnaires were completed by the jurors, the parties met with the court and they stipulated to the excusal of prospective jurors who they agreed qualified for a hardship excuse from service on Flores's trial. From the first panel of 212 prospective jurors, the prosecutor and defense counsel stipulated to the excusal of 117 individuals, and the trial court excused those prospective jurors. (3 RT 343-404; 3 CT 790.)

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[3] *Hovey v. Superior Court* (1980) 28 Cal.3d 1[providing procedure for sequestered voir dire of prospective jurors for death qualification].

From the second panel of 176 prospective jurors, the prosecutor and defense counsel stipulated to the excusal of 107 individuals, and those prospective jurors were excused by the court. (3 RT 408, 419-433, 438-465; 3 CT 792.) Defense counsel volunteered that the number of remaining prospective jurors after the first two groups of stipulated hardship excusals were "real good" and "pretty good." (3 RT 405, 481.)

From the third panel of 153 prospective jurors, the prosecutor and defense counsel stipulated to the excusal of 94 individuals based on their response to the hardship questionnaire, and those prospective jurors were excused by the court. (3 RT 484-495, 506-525; 3 CT 799.) The fourth panel consisted of 130 prospective jurors, from which 94 individuals were excused based on the stipulation of the prosecutor and defense counsel. (3 RT 537-546, 557-575; 3 CT 801a.)

The remaining prospective jurors completed case-specific questionnaires. (3 CT 789-793, 798-801a.) After the prosecutor and defense counsel reviewed the questionnaires outside of court, they stipulated to the excusal of an additional 98 prospective jurors for cause or hardship before the *Hovey* and regular voir dire. (4 RT 630-637; 5 RT 822-823; 3 CT 808-814.) Defense counsel agreed to this procedure. (4 RT 619.)

As demonstrated, Flores stipulated to the excusals he now claims were erroneous. "When prospective jurors are formally dismissed pursuant to a stipulation rather than cause, the trial court makes no findings, and we have nothing we can review." (*People v. Duff* (2014) 58 Cal.4th 527, 540.) "Consequently, a stipulation to the excusal of jurors forfeits any subsequent objection to their omission from the jury pool." (*Ibid*.; accord *People v. Romero and Self* (2015) 62 Cal.4th 1, 14.)

As Flores acknowledges, this Court has found forfeiture where the defendant failed to object to jury screening procedures. (2d Supp. AOB

35.) In *People v. Visciotti* (1992) 2 Cal.4th 1 (*Visciotti*), defense counsel and the prosecutor agreed to deviate from the statutory procedures for random selection of jurors, adopting the trial court's suggestion that each party submit a list of 20 prospective jurors from which the court would seat the initial panel. (*Id*. at pp. 38-39.) This Court held:

> While the parties are not free to waive, and the court is not free to forego, compliance with the statutory procedures which are designed to further the policy of random selection, equally important policies mandate that criminal convictions not be overturned on the basis of irregularities in jury selection to which the defendant did not object or in which he has acquiesced. [Citations.] The failure to object will therefore continue to constitute a waiver of a claim of error on appeal.

(*Id*. at pp. 37, 38.)

Likewise, a claimed violation of the right to a public trial is forfeited unless that right was asserted below for the trial court's consideration. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1292, fn. 27; *People v. Ledesma* (2006) 39 Cal.4th 641, 667.) " 'A defendant "may, by his own acts or acquiescence, waive his right [to a public trial] and thereby preclude any subsequent challenge by him of an order excluding the public." ' " (*People v. Virgil* (2011) 51 Cal.4th 1210, 1237, quoting *People v. Edwards* (1991) 54 Cal.3d 787, 813.) " ' "Unlike the jury trial right which requires an express personal waiver [citation], the constitutional guarantee of a public trial may be waived by acquiescence of the defendant in an order of exclusion." [Citations.]' " (*Ibid.*) Flores's complaints about the stipulated excusals of potential jurors should therefore be deemed forfeited.

B. There Were No Statutory or Constitutional Violations

Even if Flores's complaints were properly preserved, they are meritless. Flores claims the stipulations between his trial counsel and the prosecutor to excuse potential jurors violated sections 222 and 223 of the Code of Civil Procedure. (2d Supp. AOB 33-34.) However, these two

statutory provisions contain no prohibition on stipulating to the excusal of prospective jurors.

Code of Civil Procedure section 222 requires the selection of prospective jurors for voir dire, either at random from the jury panel or in the order of a random list of panel members provided by the jury commissioner. (Code. Civ. Proc., § 222, subds. (a) and (b).) Code of Civil Procedure section 223 provides for voir dire of prospective jurors by the court and counsel in criminal cases, matters for the court to consider in exercising its discretion regarding voir dire, the conducting of voir dire in the presence of all prospective jurors where practicable, examination of prospective jurors to aid in the exercise of challenges for cause, the use of written questionnaires, distribution of the panel lists at the earliest practical time, and restrictions on appeal based on voir dire. (Code. Civ. Proc., § 223, subds. (a)-(g).) Here, the parties' stipulations to excuse prospective jurors did not violate either statute.

Flores invokes Civil Code section 3513, arguing the procedures set forth in Code of Civil Procedure sections 222 and 223 cannot be waived because they concern matters of public policy. (2d Supp. AOB 35-50.) Civil Code section 3513 reads: "Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." (Civ. Code, § 3513.)

As previously stated, neither section 222 nor section 223 of the Code of Civil Procedure bars the excusal of prospective jurors by stipulation. In fact, the procedures for challenging prospective jurors are governed by Code of Civil Procedure sections 225 through 230, and those provisions contain no prohibition on excusing prospective jurors by stipulation. (See Code Civ. Proc., §§225-230.) Whether considered personal rights or laws

established for public reasons, no statutory provisions governing challenges to prospective jurors were contravened by the stipulations in this case.

Flores relies on *Visciotti, supra*, 2 Cal.4th 1, for his argument that the stipulations to excuse prospective jurors violated the statutory requirements for voir dire. (2d Supp. AOB 42-47.) Flores's reliance on *Visciotti* is misguided. *Visciotti* concerned a departure from statutory procedures for random selection of prospective jurors. Instead of random selection of the initial group of jurors seated for voir dire, the jurors in *Visciotti* were chosen based on lists submitted by the attorneys. (*Visciotti, supra*, 2 Cal.4th at pp. 37-39.) Here, in contrast, the challenged procedure concerns the manner in which the trial court conducted voir dire.

The conduct of voir dire is a matter largely within the discretion of the trial court. (*People v. Benavides* (2005) 35 Cal.4th 69, 88; accord *People v. Booker* (2011) 51 Cal.4th 141, 161, fn. 9.) Thus,"[a] court may allow counsel to prescreen juror questionnaires and stipulate to juror dismissals." (*People v. Duff, supra*, 58 Cal.4th at p. 540.) As explained in *People v. Benavides, supra*, 35 Cal.4th 69:

> Both defense counsel and the prosecutor recognized upon review of the questionnaires alone that they did not want to accept any of these prospective jurors, and neither felt it necessary to inquire further into the prospective jurors' views on the death penalty. Instead of pursuing additional questioning, they mutually agreed to reject these prospective jurors. Defendant fails to show how this procedure was unreasonable.

(*Id.* at pp. 88-89.)

The trial court did not abuse its discretion in adopting the juror screening procedure here. With respect to Flores's random selection argument under Code of Civil Procedure section 222 (2d Supp. AOB 43), only a "material departure" from the procedures set forth in the statute violates the random selection requirement. (See *Visciotti, supra*, 2 Cal.4th at p. 38.) As this court held, the challenged selection process did not

constitute a "complete abandonment of random selection," and "minor deviations" from the statutory procedure are not grounds for reversal of a judgment. (*Id*. at p. 38; see also *People v. Wright* (1990) 52 Cal.3d 367, 395, disapproved on other grounds by *People v. Williams* (2010) 49 Cal.4th 405 [no violation of section 222 where trial judge designated the first 21 jurors to enter the courtroom as the first group of jurors for voir dire].)

In this case, the screening procedure at issue did not violate Code of Civil Procedure section 222 because it did not constitute a material departure from statutory procedures on random selection. The challenged procedure addressed the composition of the jury panels assigned to Flores's trial, not the selection of jurors from those panels for voir dire. The procedure at issue merely allowed the trial court to excuse jurors from the assigned jury panels based on the parties' stipulations and did not address the order in which the court would then seat the remaining jurors for voir dire.

Indeed, Flores does not claim that the actual order in which jurors were seated for voir dire was non-random. Rather, he asserts that the challenged procedure violated the random selection requirement "[b]y allowing counsel to systematically remove potential jurors from the pool to be called for voir dire." (2d Supp. AOB 34.) There is no dispute that the screening procedure allowed counsel to "systematically remove" jurors from the jury pool—that was the point. For a violation of Code of Civil Procedure section 222, however, Flores must show that the procedure affected the order the jurors were then seated for voir dire. Because he has not done so, Flores's argument fails.

As for Flores's argument under Code of Civil Procedure section 223 (2d Supp. AOB 47), this Court's precedents foreclose this claim. Flores appears to argue that, because section 223 directs the trial court to conduct an "initial examination" of prospective jurors as part of voir dire, the

section also forbids counsel from stipulating to excuse jurors from the jury panels prior to this initial examination. (2d Supp. AOB 47-48.) But this Court has previously rejected variations of this argument on multiple occasions. (See *Booker, supra*, 51 Cal.4th at p. 161, fn. 9; *Benavides, supra*, 35 Cal.4th at pp. 88-89; *People v. Ervin* (2000) 22 Cal.4th 48, 73.) And for good reason—nothing in section 223 forbids stipulated excusals of jurors prior to voir dire. Although the section provides that the trial judge "shall conduct an initial examination of prospective jurors," this language cannot reasonably be read as precluding the judge from approving stipulated excusals of jurors prior to the court's examination. Indeed, as this Court has recognized, a trial court does not act unreasonably "in allowing counsel to prescreen prospective jurors whose questionnaires showed they were probably subject to challenge and excusal." (*Benavides, supra*, 35 Cal.4th at p. 88.) Flores's argument under section 223 therefore fails.

Neither section 222 nor section 223 of the Code of Civil Procedure or Civil Code section 3513 restrict the ability of the parties to stipulate to the excusal of prospective jurors. The joint stipulations to excuse prospective jurors did not violate any statutes.

Flores's remaining challenges to the juror screening procedure are also without merit. First, he argues that the procedure allowed the parties "to trade discriminatory removal of potential jurors" and thus undermined "the entire structure that *Batson [v. Kentucky* (1986) 476 U.S. 79] created to forestall racial discrimination in jury selection." (2d Supp. AOB 49.) However, Flores points to no evidence showing that the parties discriminated against potential jurors on the basis of race; and he further cites no authority holding that the mere possibility that such discrimination occurred constitutes sufficient grounds to find the screening procedure here unconstitutional. Second, Flores argues that the screening procedure

"frustrates the public policy requiring that voir dire be open to the public." (2d Supp. AOB 50.) However, voir dire in this case was open to the public, as were the proceedings during which counsel stated on the record which prospective jurors they stipulated to excusing. Finally, Flores argues that the screening procedure "recreates many of the problems inherent in peremptory challenges." (2d Supp. AOB 50.) But he cites no authority holding that any of these purported "problems" are legal error, let alone, reversible legal error.

C. The Alleged Error Was Harmless

Even if the trial court should not have adopted the juror screening procedure at issue, reversal of Flores's conviction on these grounds is unwarranted because he fails to show prejudice. Contrary to Flores's argument (2d Supp. AOB 51), the purported error is not reversible per se. When addressing similar claims of procedural irregularity in jury selection, this Court has routinely analyzed whether the irregularity actually caused harm to the defendant. (See, e.g., *Ervin, supra*, 22 Cal.4th at p. 73 [screening procedures did not warrant reversal because they "benefited all parties"]; *Visciotti, supra*, 2 Cal.4th at p. 41 [requiring "actual harm be shown" before reversing conviction based on violation of random selection requirement].)[4] Flores makes no showing here that the juror screening procedure at issue caused him harm. Indeed, such a showing would be difficult, if not impossible, to make because Flores's counsel expressly

[4] Flores incorrectly suggests that the purported errors at issue here involve the trial court's noncompliance with Civil Code section 3513. (2d Supp. AOB 51.) He contends that any error is structural, as a result, because non-compliance with this section prevented him from showing prejudice. (2d Supp. AOB 51.) But Flores expressly frames his arguments against the juror screening procedure as violations of Code of Civil Procedure sections 222 and 223 and rests the bulk of his substantive arguments on those two statutes.

stipulated to the juror excusals that would form the basis for any claim of prejudice. For this reason, even if the trial court erred, the error would not warrant reversal. The judgment should be affirmed.

CONCLUSION

For the foregoing reasons and those given in the respondent's brief and first supplemental respondent's brief, respondent respectfully requests that the judgment of the trial court be affirmed in its entirety.

Dated: August 9, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S SECOND SUPPLEMENTAL BRIEF** uses a 13 point Times New Roman font and contains 5, 919 words.

Dated: August 9, 2019

XAVIER BECERRA
Attorney General of California

/S/ HEATHER M. CLARK
HEATHER M. CLARK
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Flores, III**

No.: **S116307**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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San Bernardino County Superior Court
247 West Third Street

San Bernardino, CA 92415

San Bernardino County District Attorney's
Office Appellate Services Unit
303 West 3rd Street, 5th Floor
San Bernardino, CA 92415-0042

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 9, 2019, at San Diego, California.

N. Rodriguez
Declarant

N. Rodriguez
Signature

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

Case Name: **PEOPLE v. FLORES (ALFRED)**
Case Number: **S116307**
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/s/Natalie Rodriguez
Signature

Clark, Heather (222779)
Last Name, First Name (PNum)

Department of Justice, Office of the Attorney General-San Diego

Law Firm