IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. LESTER WAYNE VIRGIL, Defendant and Appellant.	Supreme Court Case. No. S047867 Los Angeles County Superior Court Case No. YA016781

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

[DEATH PENALTY CASE]

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **LESTER WAYNE VIRGIL,** **Defendant and Appellant.**	**Supreme Court Case No. S047867** **[Los Angeles County Superior Court Case No. YA016781]**

INTRODUCTION

On July 8, 2005, LESTER WAYNE VIRGIL ["Mr. Virgil"] filed the Appellant's Opening Brief in his automatic appeal. The Attorney General filed its Respondent's Brief on February 22, 2006, and Mr. Virgil filed his Reply Brief on August 24, 2007. On October 25, 2010, Mr. Virgil filed an Application for Permission to File a Supplemental Opening Brief. On November 5, 2010, the Court granted the Application, and ordered the Supplemental Opening Brief be filed within 30 days of November 5.

In Argument I of his Opening Brief, Mr. Virgil claimed, inter alia, that the trial court violated his right under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the analogous provisions of the California Constitution to be personally present at critical stages of his trial by conducting portions of jury voir dire at the sidebar out of his hearing and therefore his presence, and that the court's error was prejudicial under the federal and state Constitutions. (Opening Brief at pp. 94-115.) Given the nature of the proceedings at issue, those proceedings also effectively excluded the public from the same critical

stages of Mr. Virgil's trial. As such, the trial court also violated Mr. Virgil's right to a public trial and a reliable penalty determination under the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution, and his statutory rights under Penal Code sections 977 and 1043 and Evidence Code section 754. (See *People v. Esquibel* (2008) 166 Cal.App.4th 539, citing *People v. Woodward* (1992) 4 Cal.4th 376, 381.)

I.

THE TRIAL COURT VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL AND STATUTORY RIGHTS TO A PUBLIC TRIAL DURING JURY VOIR DIRE

A. Jury Voir Dire Conducted Outside Of The Presence Of Mr. Virgil And The Public

1. Defense Counsel's Request That All Challenges For Cause Be Made Publically In Open Court, And The Trial Court's Denial Of The Request And Adoption Of Procedures That Allowed Only The Court, Counsel, And The Court Reporter Wearing A Headset To Hear The Proceedings At Issue

When the court and parties discussed jury selection procedures, defense counsel asked that Mr. Virgil's challenges for cause be made publicly in open court. (1 RT 22.) The trial court refused, and ruled that challenges for cause be made and adjudicated at the sidebar. (1 RT 22.) [1] Consistent with its ruling, the court conducted the proceedings on eight challenges for cause out of the "presence" of everyone in the courtroom

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[1] Despite that ruling, the court identified jurors that it wanted to examine in open court, but out of the presence of other prospective jurors. (3 RT 116-117.) During those examinations, which are not at issue in this brief, the prosecution made five challenges for cause, four of which were sustained, and the defense made four challenges for cause, all of which were sustained. (3 RT 118-121, 122-130, 130-134, 134-138, 138-141, 141-145, 145-148, 149-156, 157-162, 163-175.)

other than the court, counsel, and the court reporter, who was given a headset so she could hear and report the proceedings. (1 RT 22.) Utilizing that procedure, the court heard and ruled on eight challenges for cause. [2] (4 RT 372-373, 383-386, 473, 485-486; 5 RT 527-530, 542-547, 566-567, 567-571, 582-585) Mr. Virgil never waived his right or the public's right to be present at these proceedings. (1 RT 22-23.) The record reflects that defense counsel did not have an opportunity to consult with Mr. Virgil about the challenges for cause before they were made and discussed, except for one involving then prospective alternate juror Tracey S. (1 RT 22; 4 RT 370-373, 382-386, 473, 485; 5 RT 527-529, 542-547, 563-571, 585-585.) [3]

2. Jury Voir Dire Conducted At The Sidebar Out Of The Presence Of Mr. Virgil And The Public

During the trial court's questioning of prospective juror Feliberta J., the trial court asked her to come to the sidebar to be questioned about her juror questionnaire and whether she would always vote for the death penalty. (3 RT 273.) At the sidebar, she said she had made a "mistake" in her questionnaire by saying she would always vote for the death penalty. Instead, she said, she would base her decision on the evidence introduced in the case. (3 RT 274.) The prosecutor and defense counsel questioned Ms. J. about her "mistake" and her views on the death penalty, and she was eventually seated as a regular juror. (3 RT 275-277.)

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[2] Out of Mr. Virgil's [and inferentially the public's] "presence," the trial court granted two challenges for cause by the prosecution (3 RT 372, 373, 5 RT 566-567, 571) and three defense challenges for cause (4 RT 472, 485; 5 RT 527-529, 542-547), and denied three defense challenges for cause. (4 RT 383-386; 5 RT 567-571, 582-585.)

[3] The challenge for cause was denied, and Tracey S. became a regular juror during the guilt phase of Mr. Virgil's trial. (5 RT 583-585; 12 RT 1893.)

After prospective juror Nina M. was questioned during the public voir dire, the trial court called counsel to the sidebar and asked if both counsel were willing to stipulate to her being excused because she had said she did not think she could decide whether someone should live or die. (4 RT 369.) Ms. M. was excused after both counsel stipulated. (4 RT 370.)

During the questioning of prospective juror William M., the court asked him to approach the sidebar so he could be questioned about his prior conviction for driving under the influence. (4 RT 425.) During the sidebar conference, William M. explained his prior by saying that he had been a "drunk, obnoxious college student," that he was treated as such at the time by "everyone involved," and that he harbored no resentment because of the incident. (4 RT 425-426.) William M. was seated as a trial juror and was the foreperson of the jury during both the guilt and penalty phases of Mr. Virgil's trial. He was the subject of a claim of juror misconduct in Mr. Virgil's appeal. (Appellant's Opening Brief, pp. 375-389.)

After the court and counsel questioned prospective juror Sandra M., defense counsel indicated in open court that he wanted to challenge her for cause. (4 RT 473.) The court replied this needed to be discussed at the sidebar. (4 RT 473.) Before granting the defense's challenge to Ms. M. at the sidebar, the trial court ruled that both counsel were "officially out of time" and could no longer question jurors directly. (4 RT 485.)

While questioning prospective alternate juror John B., the court asked him to come to the sidebar. (4 RT 507.) There, the court discussed John B.'s disclosure in his questionnaire that he was abused as a child. Mr. B. stated he had told his parents about the abuse, but they did nothing to help him. (4 RT 507-508.) He said he was unhappy about how things were handled and that the perpetrator, an uncle, was now deceased. He did not believe an abusive childhood would extenuate the circumstances of a crime. (4 RT 508-509.)

At the sidebar, John B. also discussed his statement in his questionnaire that a person who kills during a robbery forfeits his right to live. Despite that statement, Mr. B. said he would not choose death automatically and would weigh the circumstances. John B. conceded his responses to these important and critical questions were contradictory, and attempted to clarify these contradictions by saying he would consider life without possibility of parole as a punishment, but would lean very strongly towards death if the killing was vicious. Finally, John B. took offense at defense counsel's questioning because he felt counsel was trying to lead him "down the garden path" [by suggesting he would automatically choose death]. (4 RT 508-514.) The court denied the defense's challenge to John B., and defense counsel later used a peremptory challenge to excuse him. (5 RT 572.)

During the questioning of prospective alternate juror Richard S., the trial court asked him to approach the side bar. (RT 522.) In his questionnaire, Mr. S. had written that he doubted whether he could be fair and impartial in Mr. Virgil's case because he believed his brother was "railroaded" by his Deputy Public Defender and Mr. Virgil was being represented by the Public Defender's Office. (RT 523-524.) During the sidebar, Mr. S. said he would not feel comfortable serving as a juror in a death penalty case, and he was excused upon the agreement of counsel. (RT 525-526.)

After the 12-person jury had been sworn and during the selection of alternate jurors, Roberto S., who had been seated as Juror No. 2 (3 RT 176), asked permission to address the court and was directed to come to the sidebar. (5 RT 530.) According to Roberto S., he had learned the previous day [February 7, 1995] that he was "very familiar with the location of the donut shop and the bowling alley [two of the crime scenes in Mr. Virgil's

case]. Due to a fact from my employment, I have been visiting that location several times." (5 RT 530.)

Roberto S. told the court that he had been to the donut shop twice and the bowling alley once, and his nephew got carjacked at the corner of Van Ness Ave. and El Segundo Blvd. [where the Donut King was located] about a year and a half before the trial. (5 RT 531.) When asked why he did not provide that important information earlier, Roberto S. explained he was "talking about it [the case] yesterday – last night" and learned from relatives, including some who owned businesses in the area, that the Donut King was in a high crime area where robberies were common. (5 RT 531-532.) The court directed Roberto S. to return to his seat in the jury box and addressed counsel about the juror's belated disclosures. (5 RT 532.)

The prosecutor spoke first and said Roberto S. withheld information during voir dire because the addresses of the Donut King and Southwest Bowl were disclosed in the juror questionnaire [Question 42(b) and (c)] and both locations had been mentioned during general voir dire. (5 RT 532-533.) Defense counsel added that both counsel were not only quite upset over Roberto S.'s revelations, but were also prepared to excused him by stipulation. According to defense counsel, the only question was how to replace him because the jury had been sworn. (4 RT 487; 5 RT 533.)

Defense counsel asked how the court wanted to proceed and whether the court would replace Roberto S. by "call[ing] the next alternate." (5 RT 533.) According to the court, the next alternate would be prospective alternate juror Patricia E. Defense counsel agreed to accept that juror, but the prosecutor indicated that he would exercise a peremptory challenge against her. (5 RT 533.) Defense counsel asked if the court would consider substituting Patricia E. and then giving each side a peremptory challenge. (5 RT 533.) The court ruled that because Roberto S. was not very candid during voir dire, it would remove him from the jury, and it

would give each party one additional peremptory challenge to select his replacement. (5 RT 533-534.) Defense counsel concluded by saying that if the court called the next juror in sequence, prospective alternate juror Harriet P., the defense would not exercise its one additional peremptory challenge against her. (5 RT 534.) [4]

All the proceedings involving the discharge of Roberto S., the procedure for replacing him, and the ultimate selection of Harriet P. as a regular juror were done at the sidebar and out of Mr. Virgil's and the public's presence. (5 RT 530-534.)

When the selection of alternate jurors resumed, the court called prospective alternate juror Gladys F. to the sidebar. (RT 535-536.) The court asked about her pending vacation and Mrs. F. replied that she and her husband were planning a trip to New Orleans to care for her husband's 90-year old mother. (RT 536.) Both counsel stipulated to excuse the juror. (RT 536-538.)

During the questioning of prospective alternate juror Duvall G., the court asked him to approach the sidebar. [5] There, Duvall G. disclosed and discussed the abuse committed against him by his alcoholic father. (5 RT 551-552.) In addition, Duvall G. discussed his criminal history and prior convictions for driving under the influence and joyriding. (5 RT 553.) Defense counsel asked to question Duvall G. further after he indicated he could be fair to both sides, but the court refused by saying that both counsel were out of time. (5 RT 553.)

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[4] The 12-person jury was sworn after the prosecutor exercised his one allotted peremptory challenge against Patricia E. and defense counsel accepted the jury without exercising his allotted peremptory challenge against Harriet P. (RT 534-535.)

[5] Duvall G. was seated as an alternate juror and later became one of the 12 jurors during the guilt phase. (5 RT 572, 593-594; 22 RT 3410.)

While still at the sidebar, the prosecutor exercised a challenge for cause against prospective alternate juror Janice S. because of her views about the death penalty. (5 RT 566-567.) Defense counsel asked for an opportunity to question Janice S. and rehabilitate her, but the court refused and granted the prosecution's challenge. (5 RT 567-571.)

During the trial court's questioning of prospective alternate juror Tracey S., defense counsel asked to approach the sidebar. (5 RT 582.) [6] Defense counsel explained Mr. Virgil knew Tracey S. because she was a nurse at the Main Jail where he was housed during trial and she treated him several times, once when he was sick and once when he was stabbed by another inmate while handcuffed. (5 RT 583.) Defense counsel believed Tracey S. might not recognize Mr. Virgil because she treats many prisoners, but it would be uncomfortable for Mr. Virgil to have her serve as a juror, especially because of her close association with deputies at the jail. (5 RT 583.) Defense counsel added Tracey S.'s service as a juror might be very problematic because "we're trying to pretend he's not in custody" and she might see him in custody at the jail. (5 RT 583.) Accordingly, defense counsel challenged Tracey S. for cause "out of an abundance of caution." (5 RT 583.)

The prosecutor opposed the challenge and the trial court agreed to question her in open court about whether she recognized anyone sitting at the defense table. (5 RT 583-584.) After Tracey S. replied she did not, the court had counsel approach the sidebar again and ruled it would be "awfully difficult for me to say that she couldn't be an objective juror based on the concerns you [defense counsel] have." (5 RT 584.) On that basis and because the court expected that Tracey S. would not work during her

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[6] As noted above, Tracey S. became a regular juror during the guilt phase of Mr. Virgil's trial. (12 RT 1893.)

jury service and that negated defense counsel's stated concerns, the court denied the defense challenge for cause against her and she was seated as an alternate juror. (5 RT 584-585.)

Prospective alternate juror Marguerite W. was called to the sidebar where she discussed the disclosure in her juror questionnaire that she had been abused during her childhood and her mother was an alcoholic. (RT 589-590.) After she was questioned further about her past, her feelings about the death penalty, and defense counsel's concern about the fact that she had been robbed by a black man, the proceedings resumed in open court. (5 RT 590-593.) [7] There were no more challenges and the four alternate jurors were sworn. (5 RT 594.)

B. Analysis

1. A Defendant in a Criminal Case Has Federal And State Constitutional And Statutory Rights To Be Present At Proceedings That Are Substantially Related To The Fairness Of The Procedure Or The Fullness Of The Opportunity To Defend Against The Charges

A criminal defendant has a right under the Sixth and Fourteenth Amendments to the United States Constitution, under section 15, article I of the California Constitution and California Penal Code sections 977 and 1043 to be personally present during his trial. (*People v. Cole* (2004) 33 Cal.3d 1158, 1230; *People v. Waidla* (2002) 22 Cal.4th 690, 741; *People v. Weaver* (2001) 26 Cal.4th 876, 976; *Clark v. Stinson* (2d Cir. 2000) 214

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[7] Defense counsel had exhausted his peremptory challenges so he could not challenge Duvall G., Tracey S., or Marguerite W, and all of them were seated as alternate jurors. Duvall G. and Tracey S. eventually served on appellant's jury, replacing jurors who were excused.

F.3d 315 [the right to be present is grounded in the due process and confrontation clauses of the United States Constitution].) The United States Supreme Court and this Court have recognized that the right to be present is violated when the accused is absent from proceedings that are substantially related to the fairness of the procedure or the fullness of the opportunity to defend against the charges. (*Faretta v. California* (1975) 422 U.S. 806, 819, fn. 15; *People v. Ochoa* (2001) 26 Cal.4th 398, 433-435, abrogated on other grounds as stated in *People v. Coombs* (2004) 34 Cal.4th 821, 860; *People v. Cole, supra*, 33 Cal.4th at pp. 1231-1232.) According to this Court, it applies an independent or de novo review to a trial court's exclusion in whole or in part of a criminal defendant from pretrial and trial proceedings. (*People v. Cole, supra*, 33 Cal.4th at p. 1230; *People v. Waidla, supra*, 22 Cal.4th at p. 741.)

Individually and collectively, the many proceedings described above were proceedings substantially related to the fairness of Mr. Virgil's trial and his opportunity to defend against the serious charges against him. The procedure used by the court violated Mr. Virgil's rights under the Fifth, Sixth, and Fourteenth Amendments to be personally present at his trial and his right to consult with and receive the effective assistance of counsel in his defense. Further, the procedure used by the trial court affected the reliability of the proceedings in violation of Mr. Virgil's rights under the Eighth Amendment, as applied to the states by the Fourteenth Amendment, by conducting proceedings effectively in secret and out of his hearing. (See *Woodson v. North Carolina* (1976) 428 U.S. 280; *Tuilaepa v. California* (1994) 512 U.S. 967; *Gardner v. Florida* (1977) 430 U.S. 349; *Caldwell v. Mississippi* (1985) 472 U.S. 320.)

Jury voir dire is a critical stage concerning the right to be present, like any other stage of the trial where the accused's absence might frustrate the fairness of the trial. (*Faretta v. California, supra*, 422 U.S. 806, 819,

fn. 15; *People v. Ervin* (2000) 22 Cal.4th 48, 73, citing *Gomez v. United States* (1989) 490 U.S. 858, 873, quoting *Lewis v. United States* (1892) 146 U.S. 370, 374, and authorities cited therein, establishing the critical necessity and importance of voir dire to the overall fairness of a trial and the defendant's right to a fair and impartial jury). For that reason, the many sidebar conferences held outside Mr. Virgil's hearing [presence] violated his right to be present during voir dire, especially when challenges for cause were made at the sidebar out of his presence and information was elicited concerning the overall suitability of prospective jurors to serve on his jury where the punishment sought was death.

2. The Federal Constitutional Right To A Public Trial

In *In re Oliver* (1948) 333 U.S. 257, ("*Oliver*"), the United States Supreme Court discussed the evolution of the right to a public trial from its roots in English common law, though the ratification of the Federal Constitution's Sixth Amendment in 1791. According to the Court, an accused's right to a speedy and public trial under the Sixth Amendment is a fundamental right, and extends to the States under the Fourteenth Amendment to the United States Constitution. (*Id.,* at p. 273.)

In *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty.* (1984) 464 U.S. 501 ("*Press-Enterprise I*"), the high court considered the right of the public to be present during jury voir dire under the First Amendment to the United States Constitution. In *Press-Enterprise I*, the defendant was charged with the rape and murder of a teenage girl, and the government sought the death penalty against him. Before jury selection began, petitioner [the Press-Enterprise newspaper] requested that voir dire be open to the public. The government opposed the request by arguing the presence of the press might cause prospective jurors to withhold relevant, candid information that might otherwise be disclosed to the court and parties. The trial court agreed with the government, and excluded the

public and press from the major portion of jury voir dire – individual voir dire regarding death qualification and other areas where counsel believed the prospective jurors' responses should be kept private. After the jury was empanelled, petitioner again requested the trial court make public a complete transcript of the voir dire proceedings. Counsel for the defense and the government opposed disclosure on the grounds that it would violate the jurors' right of privacy and their expectation of confidentiality. The trial court agreed with counsel's argument and refused disclosure by finding that the defendant's right to a fair trial and the jurors' right to privacy should prevail over the right to a public trial. Petitioner's Petition for Writ of Mandate and Petition for Review from the California Court of Appeal and California Supreme Court, respectively, were denied and petitioner sought certiorari in the United States Supreme Court concerning whether the guarantees of open public proceedings in criminal trials apply to the voir dire examination of potential jurors.

The Supreme Court began its analysis by recognizing that the right of the public to attend trials has been an integral part of the right to trial by jury since the inception of that right in English common law, and that the process of jury selection is critically important not only to the adversaries but also to the criminal justice system itself. (*Press-Enterprise I, supra,* 464 U.S. at pp. 505-508.) According to the high court, an accused's right to a fair trial is the most sacred and important of all rights and that right is inextricably intertwined with "the right of everyone in the community to attend the *voir dire* which promotes fairness." (*Id.,* at p. 508.) Although the high court held the press and public may on occasion be excluded from criminal trials, "the State's justification in denying access must be a weighty one. Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the

denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." (Citation.)" (*Id.*, at pp. 509-510.)

The Supreme Court agreed the trial court was correct that a defendant's right to a fair trial and the jurors' right to privacy are important interests, but held the trial court erred by failing to make "findings showing that an open proceeding in fact threatened those interests. (Fn. omitted.)" (*Press-Enterprise I, supra*, 464 U.S. at pp. 510-511.) Because the trial court failed to consider alternatives to closure, the high court reversed the judgment and remanded the matter for further proceedings consistent with its opinion.

Later in the same term, the Supreme Court considered whether the right to a public trial under the Sixth Amendment extended to proceedings beyond the presentation of evidence against the accused. In *Waller v. Georgia* (1984) 467 U.S. 39 ("*Waller*"), the defense made a pretrial motion to suppress evidence gathered through the government's extensive wiretaps and searches at the defendants' homes and other locations. Because the government gathered so much evidence during its investigation, including personal information from individuals other than the defendants, it requested the suppression hearing be closed to the public to protect the privacy interests of these individuals. The trial court agreed with the government, and ordered the hearing closed.

After conviction, the defendants sought review in the Georgia Supreme Court on the grounds that closing the suppression hearing to the public violated their Sixth Amendment right to a public trial. The Georgia Supreme Court affirmed the judgment by finding the trial court properly balanced the interests at hand, and found the privacy interests of the individuals at issue outweighed the defendants' Sixth Amendment right to a public trial. The United States Supreme Court granted certiorari to consider whether the Sixth Amendment right to a public trial extends to suppression

hearings, and whether the trial court gave proper effect to the defendants' Sixth Amendment right to a public trial.

The *Waller* court began its analysis of both questions by noting "[t]he central aim of a criminal proceeding must be to try the accused fairly, and '[o]ur cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant.'" (*Waller, supra,* 467 U.S. at p. 46.) After identifying the importance and personal nature of the right to a public trial, the Court recognized public trials ensure that judges and prosecutors carry out their duties responsibly, and "a public trial encourages witnesses to come forward and discourages perjury." (*Ibid.*) Based on the importance of these "aims and interests," the *Waller* court concluded the Sixth Amendment right to a public trial extends to suppression hearings because such hearings are often as important as the trial itself. (*Ibid.*)

Despite the extreme importance of the right to a public trial, the *Waller* court noted the right is not absolute and occasionally must give way to other rights or interests. (*Id.,* at p. 45.) According to the Court, "'[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.' (Citation.)" (*Ibid.*) Given its holding that the State trial judge erred by closing the suppression hearing, the Supreme Court considered the appropriate remedy. The Supreme Court held the violation of a defendant's right to a public trial is not subject to a harmless error analysis because prejudice is so intangible and hard to show for the violation of this fundamental right. (*Id.,* at pp. 49-50, fn. 9.) Regardless, the Court held that remedies must be appropriate to

the violation, and the proper remedy for the closure in *Waller* was a remand for a new suppression hearing. [8]

Recently, the Supreme Court addressed for the first time whether a defendant's Sixth Amendment right to a public trial extends to the voir dire of prospective jurors. In *Presley v. Georgia* (2010) ___ U.S. ___ [130 S.Ct. 721] ("*Presley*"), the trial court noted a lone courtroom observer before jury selection began. The court explained to the parties and the observer [the defendant's uncle] that prospective jurors were about to enter the courtroom, and the observer had to leave the courtroom and the entire floor of the courthouse where the courtroom was located. After defense counsel objected to the public's exclusion, the court explained there were limited seats in the courtroom and it would not allow the observer to sit and intermingle with members of the jury panel. After the defendant was convicted, he filed a motion for a new trial based on the exclusion of the public from jury voir dire. The trial court denied the motion, and the defendant appealed his conviction to the Georgia Supreme Court.

The Georgia high court agreed with the defendant that the Sixth Amendment extended to the voir dire of prospective jurors, but rejected the defendant's argument that the trial court was required sua sponte to consider alternatives before ordering closure. Because the defense offered no such alternatives, the Georgia Supreme Court held the trial court did not abuse its discretion by ordering closure without advancing its own alternatives to excluding the public. The United States Supreme Court granted certiorari to consider two related questions: whether an accused's right to a public trial under the Sixth Amendment to the United States Constitution extends

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[8] The Court's remedy was based on the procedural nature of the proceedings in *Waller*, which did not involve the presentation of evidence or jury selection, so basic and fundamental to the fairness of the entire trial. (See *Waller, supra*, 467 U.S. at pp. 46, 50.)

to the entire process of jury selection and whether trial courts, absent a request, must consider lesser alternatives before ordering closure.

After considering its decisions in *Oliver* and *Press-Enterprise I,* the *Presley* court agreed that the Georgia Supreme Court correctly assumed the Sixth Amendment's right to a public trial applied to jury selection. (*Presley, supra*, 130 S.Ct. at pp. 723-724.) As it did in *Press-Enterprise I*, the high court recognized the right to a public trial is not absolute and there are "rare" circumstances where that right must give way to the defendant's right to a fair trial or the government's interest in limiting the disclosure of sensitive information. (*Id.,* at p. 724.) According to the high court, its decision in *Waller* provides standards for courts to apply before excluding the public from any stage of a criminal trial. Specifically,

> "'[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.' (Citation.)"

(*Presley, supra*, 130 S.Ct. at p. 724.)

Finally, the *Presley* court held trial courts must consider alternatives to closure even when not offered by the parties, and "[t]he public has a right to be present whether or not any party has asserted the right." (*Id.,* at pp. 724-725.) Consistent with its holding, the Supreme Court agreed the trial court erred by failing to identify any overriding interests before ordering closure, and merely advancing broad concerns about potentially tainting the jury [or disclosing jurors' potentially sensitive information] are insufficient because otherwise "a court could exclude the public from jury selection almost as a matter of course." (*Id.,* at p. 725.) Accordingly, where a judge concludes the need for closure is concrete enough to warrant closing voir dire, the judge must (1) identify the particular interest

warranting disclosure and how closure threatens that interest and (2) make specific findings to allow a reviewing court to determine whether closure was properly ordered. (*Ibid.*)

3. The Decision In Presley Applies Fully To Appellant's Case

In *People v. Cage* (2007) 40 Cal.4th 965 ("*Cage*"), the trial court found the statement of the defendant's son to a deputy was admissible because it had particularized indicia of reliability under *Idaho v. Wright* (1990) 497 U.S. 805, and *Ohio v. Roberts* (1980) 448 U.S. 56. While the defendant's appeal was pending, the United States Supreme Court decided *Crawford v. Washington* (2004) 541 U.S. 36 ("*Crawford*"), which overruled *Roberts* and announced a new standard for determining whether the admission of hearsay statements violate the confrontation clause. According to this Court, a new rule announced by the United States Supreme Court applies to all criminal cases pending on appeal. (*Cage, supra,* 40 Cal.4th at p. 974, fn. 4 citing *Schriro v. Summerlin* (2004) 542 U.S. 348, 351.) Because Mr. Virgil's case was pending on appeal when the high court decided *Presley, supra,* 130 S.Ct. 721, it is fully applicable to the instant case regardless of whether it is deemed "a 'watershed rul[e] that implicates 'the fundamental fairness and accuracy of the criminal proceeding,'" or merely an extension of the high court's reasoning in its prior cases in *Oliver* and *Waller.* (See *Saffle v. Parks* (1990) 494 U.S. 484, 488.)

4. The Exclusion Of Mr. Virgil And The Public From Critical Stages Of Mr. Virgil's Trial

Before jury selection began, the trial court and counsel discussed procedures for selecting the jury – the court would question jurors about their questionnaire and then counsel would have one hour to direct questions to focus on areas that counsel felt were necessary. (1 RT 20.) Defense counsel asked to clarify whether challenges for cause and

peremptory challenges would be done for each six-pack of jurors called for questioning. (1 RT 21.) The trial court said the court and parties would question all the jurors first, and make challenges for cause during death qualification questioning. After that, the original panel of 18 jurors would be reseated [less those removed for cause], and counsel would begin exercising their peremptory challenges. (1 RT 21-22.)

After it was established that all prospective jurors would be present in the courtroom during the death qualification voir dire (1 RT 21-22), defense counsel said

> "I would prefer to do the challenges for cause in open court; I would prefer the other jurors hear my basis for challenges for cause and not at side bar, unless for some reason it could be personal to the jurors such as something they would not want to reveal to other jurors. [¶] Does the court have any strong feelings about that?"

(1 RT 22.)

The court answered

> "As far as I am concerned, challenges for cause, be it for whatever reason, should be handled at side bar and that's what I intend to do. We have a little microphone here; the court reporter puts on her headset and we can discuss that here at side bar out of the presence of the jury."

(1 RT 22.)

After defense counsel clarified that this procedure would be followed at the side bar for "auto-deathers" and "auto-lifers," the prosecutor asked whether the challenges would be made after the court and counsel had an opportunity to talk to the entire jury panel in the courtroom. (1 RT 22.) The court answered

> "As far as the challenges for cause are concerned, those can be handled while you have the original 18 here because then, if the challenge is well taken, they won't have to sit through the process."

(1 RT 22.) Defense counsel answered "[t]hat will be fine." (1 RT 22.) Defense counsel's response was merely his agreement to make challenges for cause while the original 18 jurors were in the jury box, and has no effect on his earlier request to make challenges for cause in open court within the hearing and presence of Mr. Virgil and the public.

The threshold question presented by the instant claim [and the related portion of Argument I of appellant's Opening Brief at pp. 95-114] is whether the procedures adopted by the trial court permitting only the court, counsel, and the court reporter (who had to wear a headset) to hear the proceedings at issue excluded Mr. Virgil and the public from these proceedings because it rendered them functionally and effectively deaf and therefore not present. As established below, the trial court's procedure excluded Mr. Virgil and the public from critical portions of his trial in violation of his rights under the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, the analogous provisions of the California Constitution, and Mr. Virgil's statutory rights to be present under Penal Code sections 977 and 1043 and to hearing assistance under Evidence Code section 754.

In *People v. Lang* (1975) 325 N.E.2d 305, 308, 309, the Illinois Appellate Court, relying on *Pate v. Robinson* (1966) 383 U.S. 375, held that it violated a deaf mute defendant's federal constitutional right to a fair trial to try him without special procedures intended to remedy his inability to hear the proceedings and assist in his defense. Much earlier, in *Terry v. State* (1925) 105 So. 386, 387-388, the Alabama Court of Appeals held that a deaf indigent defendant was entitled to a court-appointed interpreter under the Alabama state constitution because

> "The constitutional right [to confront witnesses] would be meaningless and a vain and useless provision unless the testimony of the witnesses against him could be understood

> by the accused. Mere confrontation of the witnesses would be useless, bordering upon the farcical, if the accused could not hear or understand their testimony . . . . In the absence of an interpreter it would be a physical impossibility for the accused, a deaf-mute, to know or to understand the nature and cause of the accusation against him, and, as here, he could only stand by helplessly, take his medicine, or whatever may be coming to him, without knowing or understanding, and all this in the teeth of the mandatory constitutional rights which apply to an unfortunate afflicted deaf-mute, just as it does to every person accused of a violation of the criminal law."

In *People v. Freeman* (1994) 8 Cal.4th 450, 473 ("*Freeman*"), the defendant claimed he was "'functionally deaf,' and that this 'impairment compromised his right to participate in his defense and to hear and be personally present at all stages of the proceedings.'" In analyzing the defendant's claim, this Court considered the decision in *People v. Guillory* (1960) 178 Cal.App.2d 854, where the Court of Appeal held that due process requires trial courts to afford defendants who are handicapped by deafness or a similar affliction reasonable accommodation to allow them to hear the proceedings and thereby confront the witnesses against them and assist with their defense. Because the defendants in *Freeman* and *Guillory* were afforded reasonable accommodations by the respective trial courts and there was nothing in either record to suggest their claimed hearing loss rendered them unable to meaningfully participate in the proceedings and/or assist counsel in their defense, both courts rejected their constitutional challenges.

In *People v. Jenkins* (2000) 22 Cal.4th 900, 1005, the defendant claimed, *inter alia*, that the trial court violated his right to be present by conducting proceedings in his voluntary absence and while he was not "mentally present." Citing *Freeman*, the Court rejected these claims because the defendant was not a person with a physical disability, like "deafness," that imposed a duty on the trial court

> "to make reasonable provisions to aid the defendant so as to ensure that his or her presence at trial is meaningful. (Citation.) As we have observed, '[e]ven total physical absence from a hearing is not reversible unless the defendant's presence bears a reasonably substantial relation to the fullness of the defendant's opportunity to defend against the charges.' (Citations.)"

In Mr. Virgil's case, the trial court adopted a procedure that it intended and knew would prevent anyone other than the court, counsel and the headset-wearing court reporter to hear the challenges for cause and other jury selection proceedings conducted at the sidebar. (1 RT 22.) As established above, the proceedings conducted at the sidebar effectively and completely excluded Mr. Virgil and the public from proceedings substantially related to the fairness of his entire trial and the fullness of his opportunity to defend against the charges and the penalty of death.

Further, the record reflects not only that Mr. Virgil and the public were excluded from this critical portion of the trial, but also that the trial court violated the high court's standard from *Waller* by failing to make findings identifying an overriding interest that was likely to be prejudiced by an open proceeding and failing to consider reasonable alternatives to closure. (See *Presley, supra*, 130 S.Ct. at p. 724.) As such, the trial court violated Mr. Virgil's right to a public trial and to be present at critical stages of the proceedings, under the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the analogous provisions of the California Constitution, and his statutory rights to be present and to reasonable accommodations to address a complete hearing impairment caused by the trial court.

C. Prejudice

In *Arizona v. Fulminante* (1991) 499 U.S. 279, 307-309, the United States Supreme Court explained that not all federal constitutional errors are equal, and discussed the difference between errors that are mere "trial

error" and subject to harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24, and those errors where prejudice need not be determined because their violation is so basic and fundamental to the fairness of the proceedings that they may never be treated as harmless error.

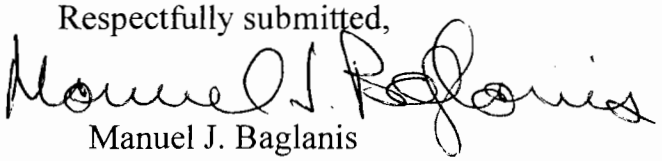
The violation of the right to a public trial under *Waller, supra*, 467 U.S. 39, is a structural error that requires the reversal of the judgment regardless of its actual impact on the accused's trial. (*Waller v. Georgia, supra*, 467 U.S. at p. 49, fn. 9; see also *United States v. Marcus* (2010) ___ U.S. ___ [130 S.Ct. 2159, 2164-2165; *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 149, citing *Waller* as holding that the denial of the right to a public trial is a structural error not subject to harmless-error analysis because it affects the framework within which the trial proceeds].)

CONCLUSION

For the above reason, Mr. Virgil respectfully requests that the entire judgment be reversed.

Dated: December 2, 2010

Respectfully submitted,



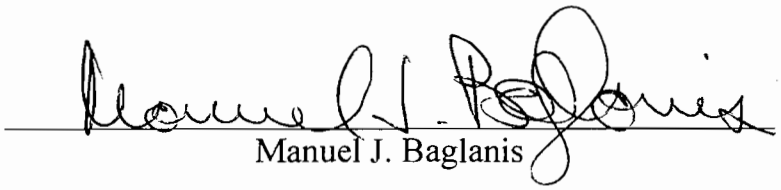
Manuel J. Baglanis
Attorney for Appellant
LESTER WAYNE VIRGIL

CERTIFICATE OF COMPLIANCE

CALIFORNIA RULES OF COURT

I, Manuel J. Baglanis, hereby declare that appellant's Supplemental Opening Brief associated with this Certificate of Compliance contains 6,505 words.

Dated: December 2, 2010



Manuel J. Baglanis

DECLARATION OF SERVICE

I, Manuel J. Baglanis, declare that I am over 18 years of age, and not a party to the within cause; my business mailing address is P.O. Box 700035 San Jose, CA 95170-0035. A true copy of the attached:

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

was served on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

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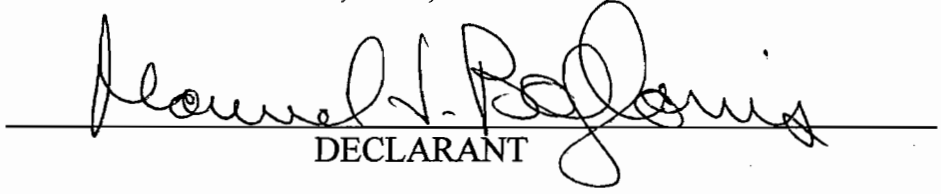
Each said envelope was then, on December 3, 2010, sealed and deposited in the United States Mail at San Francisco, California, with the postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 3, 2010, at San Jose, California.



DECLARANT