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.	**CAPITAL CASE** Case No. S047867

Los Angeles County Superior Court Case No. YA016781
The Honorable Steven C. Suzukawa, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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I. APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO A PUBLIC TRIAL WERE NOT VIOLATED WHEN THE TRIAL COURT HELD LIMITED SIDEBAR PROCEEDINGS REGARDING CHALLENGES FOR CAUSE AND ADDITIONAL QUESTIONING OF SEVERAL PROSPECTIVE JURORS

Appellant contends the trial court violated his rights to a public trial and a reliable penalty determination under the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, article I, section 15 of the California Constitution, and his statutory rights under Penal Code sections 977 and 1043, and Evidence Code section 754 when he was not present during parts of the jury voir dire which were held by the trial court at sidebar conferences in the presence of the prosecutor, his trial counsel, and the court reporter via headset. (Supp. AOB.)[1] This claim is meritless.

Appellant cites several instances where he was not present during voir dire: eight challenges for cause against prospective jurors Charles P. (4RT 372-373), Angel R. (4RT 383-386), Sandra M. (4RT 473-485), Margarita B. (5RT 527-530), Albert C. (5RT 542-547), Janice S. (5RT 566-571), John B. (4RT 507-514) and Tracey S. (5RT 582-585) and the

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1. To the extent appellant is again raising the claim that his federal and state constitutional rights were violated because he was not personally present during the voir dire and questioning of the listed prospective jurors (see AOB 94-115), respondent incorporates by reference its response to this claim in the Respondent's Brief and will not repeat it here. (See RB 19-22.)

questioning of eight other prospective jurors: Feliberta J. (3RT 273-277), Nina M. (4RT 369-370), William M. (4RT 425-426), Richard S. (5RT 522-526), Roberto S. (5RT 530-534), Gladys F. (5RT 535-538), Duvall G. (5RT 551-553), and Marguerite W. (5RT 589-594). (Supp. AOB 2-9.)

Both the Sixth Amendment to the United States Constitution and Article I, section 15 of the California Constitution provide that a person charged with a criminal offense is entitled to a public trial. (*People v. Esquibel* (2008) 166 Cal.App.4th 539, 551; *People v. Prince* (2007) 40 Cal.4th 1179, 1278 ["A criminal defendant has a right to a public trial that is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by article 1, section 15 of the California Constitution. (Citations.)"].) In our system of jurisprudence, there is a deeply ingrained and traditional mistrust of secret trials, and the guarantee of a public trial has always been recognized as a safeguard against any attempt to employ our courts as elements of persecution. (*In re Oliver* (1948) 333 U.S. 257, 268-270 [68 S.Ct. 499, 92 L.Ed. 682]; see also *Presley v. Georgia* (2010) __ U.S. __ [130 S.Ct. 721, 723-724, __ L.Ed.2d __] [*Presley*].)

> """The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. . . ."""" [Citations.] [¶] In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.

(*Waller v. Georgia* (1984) 467 U.S. 39, 46, fn. omitted [104 S.Ct. 2210, 81 L.Ed.2d 31] [*Waller*].)

Although the right to a public trial is not absolute, there is "[t]he presumption of openness." (*Press-Enterprise Co. v. Superior Court* (1984) 464 U.S. 501, 509-510 [104 S.Ct. 819, 78 L.Ed.2d 629].) The right to an open trial may give way in certain cases to other rights or interests that are essential to the fair administration of justice. (*Waller*, *supra*, 467 U.S. at p. 45; *United States v. Sherlock* (9th Cir. 1989) 962 F.2d 1349, 1356.) "When such a 'higher value' is advanced, the trial court must balance the competing interests and allow a form of exclusion no broader than needed to protect those interests." (*People v. Woodward* (1992) 4 Cal.4th 376, 383.)

The Supreme Court has identified four factors that the trial court must consider before closing a courtroom: (1) "'the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced'"; (2) "'the closure must be no broader than necessary to protect that interest'"; (3) "'the trial court must consider reasonable alternatives to closing the proceeding'"; and (4) the trial court "'must make findings adequate to support the closure.'" (*Presley*, *supra*, 130 S.Ct. at p. 724, quoting *Waller*, *supra*, 467 U.S. at p. 48). It is clear that "the Sixth Amendment right to a public trial extends to the voir dire of prospective jurors." (*Presley*, *supra*, 130 S.Ct. at p. 724.)

In *Presley*, the Supreme Court held that the trial court violated Presley's right to a public trial when it excluded his uncle from the courtroom during voir dire due to space limitations and a concern that jurors might be exposed to "inherently prejudicial remarks from observers during voir dire." (*Presley*, *supra*, 130 S.Ct. at pp. 722-23.) The Supreme Court, in its summary per curiam opinion, disagreed with the Georgia Supreme Court's conclusions that the trial court had an overriding interest in ensuring that the potential jurors were not exposed to prejudicial remarks, and that the trial court was not required to consider alternatives to closure when Presley had not offered such alternatives. The *Presley* Court pointed to the "explicit" direction from *Waller* that "the trial court must consider reasonable alternatives to closing" the courtroom. (*Presley*, *supra*, 130 S.Ct. at p. 724, citing *Waller*, supra, 468 U.S. at p. 48). As will be discussed below, there was no error by the trial court here.

Initially, appellant has failed to demonstrate that the procedure utilized by the trial court impacts his federal or state constitutional right to a public trial as he alleges. (Supp. AOB 21.) Appellant appears to argue that the procedure violated these rights because neither he nor the public were privy to the proceedings at sidebar and thus "it rendered them functionally and effectively deaf and therefore not present." (Supp. AOB 19.)

However, the record demonstrates the trial court never ordered anyone excluded from the courtroom, nor does appellant allege that it did

so. (1RT 10-31; 2RT 101-102; 3RT 114-311; 4RT 312-515, 5RT 516-594.) In addition, none of the cases upon which appellant relies regarding deaf defendants and an inability to hear proceedings hold that the standard courtroom procedure of holding sidebar conferences constitutes a violation of the right to a public trial under the Sixth Amendment. (See Supp. AOB 19-21.) Therefore, appellant's underlying premise fails the outset because he has not demonstrated that the procedure used by the trial court impacted his state or federal right to a public trial.

Even assuming appellant could properly establish that the procedure utilized by the trial court affected his right to a public trial, his claim is meritless. As noted, in *Presley* the court excluded the public from the entirety of voir dire which did not occur in the instant case. Instead, in the instant case the overwhelming majority of the voir dire of the more than 60 prospective jurors, including the 16 prospective jurors appellant specifically complains about, occurred in open court without use of the objected-to procedure. (See 3RT 114-311; 4RT 312-515; 5RT 516-594.)

The sidebar conferences, moreover, were appropriate insofar as they dealt primarily with matters personal to the jurors. For example, as noted in the supplemental opening brief, the sidebars included discussions with several jurors regarding abuse they disclosed in their questionnaires (John B., Duvall G., Marguerite W.) prior convictions they suffered (William M. and Duvall G.), and a bias held against the Public Defender's Office

because of a brother's experience (Richard S.) (Supp. AOB 4-9.) Therefore, there was no violation of appellant's federal or state constitutional rights to a public trial.

Moreover, to the limited extent the trial court held sidebar conferences regarding challenges for cause or follow-up questioning of prospective jurors, it was a de minimis violation and there was no denial of the right to a public trial. (*People v. Esquibel*, *supra*, 166 Cal.App.4th 539. The *Esquibel* court explained:

> In general, there are two types of exclusions: a total closure where all spectators are directed to leave the courtroom and a partial closure where some, but not all, spectators are asked to leave. The total closure of the courtroom is almost always a per se violation of the constitutional rights of the accused. In the case of a partial closure, the Sixth Amendment public trial guarantee creates a "presumption of openness" that can be rebutted only by a showing that exclusion of the public was necessary to protect some "higher value" such as the defendant's right to a fair trial, or the government's interest in preserving the confidentiality of the proceedings. . . There is also a sub-category of the partial closure which includes the circumstances of this case where only certain identified spectators are excluded.

(*Id.* at pp. 552-553.)

> The *Esquibel* trial court excluded two members of the public
>
> at the request of the prosecutor based on the concern and urging of the mother of the witness. Her principal concern in this gang related case was that the spectators may be gang members and would recognize her child in the neighborhood, not that her child may recognize them. There was no evidence of intimidation or harassment.

(*People v. Esquibel*, *supra*, 166 Cal.App.4th at p. 554.) They were excluded only during that witness's testimony.

In finding no violation of the right to a public trial, the court reasoned:

> There was no order excluding the press or the public in general. Except for these two spectators, no one else connected with appellant was excluded from the courtroom and the exclusion was only for the testimony of the single witness. Members of appellant's family remained in the courtroom. There was no showing that the excluded individuals had any special relationship to appellant or were needed to provide him support during the trial.

(*People v. Esquibel*, *supra*, 166 Cal.App.4th at p. 554.) And,

> We conclude the partial closure of a trial by the temporary exclusion of select supporters of the accused does not create an automatic violation of the constitutional right to a public trial. Furthermore, on the facts of this case, we conclude there was no constitutional violation of appellant's rights. To hold otherwise would not serve the purposes of the public trial right. Here, the exclusion of the spectators was for a minimal amount of time and appellant's family supporters remained in the courtroom.

(*Id.* at p. 554.)

Similarly, as discussed above, the trial court here only utilized the sidebar conferences with a small number of selected prospective jurors, and these "exclusions," which were brief in the context of the entire voir dire, were not during testimony. In addition, it is significant that there was not, as in *Waller*, *supra*, 476 U.S. 39, total exclusion of the public during the voir dire process. Thus, under the facts here, no core value of the Sixth

Amendment's right to a public trial were impacted. The small number of sidebar conferences were brief so that the public's right to see that appellant was "fairly dealt with and not unjustly condemned" was not violated. (*In re Oliver*, *supra*, 333 U.S. at p. 270, fn. 25.) Moreover, since the brief "exclusions" of the public did not occur during the receipt of evidence, witnesses were not discouraged to come forward nor was perjury somehow encouraged. (*Waller*, *supra*, 467 U.S. at p. 46.)

Likewise, in the case of *People v. Bui* (2010) 183 Cal.App.4th 675, the Court of Appeal found an exclusion of three people for 40 minutes during voir dire was de minimis and did not violate defendant's constitutional right to a public trial because it was "for a very limited period, during only a small part of the voir dire of prospective jurors, and not during the evidentiary phase of the trial." (*Id.* at pp. 686-87, 689.) That court compared Bui's case with *Owens v. United States* (1st Cir. 2007) 483 F.3d 48, where *all* members of the public were excluded for an entire day of voir dire rather than "a mere fifteen or twenty-minute closure," in contrast to *Woodward*, where a one and one-half hour closure was deemed de minimis. (*People v. Bui*, *supra*, 183 Cal.App.4th at pp. 687-689; see also *Gibbons v. Savage*, 555 F.3d 112, 121 (2d Cir. 2009) [judge's exclusion of defendant's mother from courtroom during afternoon of first day of jury selection was too trivial to violate right to public trial]; *Braun v. Powell* (7th Cir. 2000) 227 F.3d 908, 919-920 [exclusion of one spectator

from entire trial "does not implicate the policy concerns that inform the Sixth Amendment's right to an open trial"]; *Peterson v. Williams*, 85 F.3d 39, 43 (2d Cir. 1996) [20 minute closure while defendant testified was "extremely short" and "too trivial" to constitute Sixth Amendment violation]; *United States v. Al-Smadi*, 15 F.3d 153, 154-55 (10th Cir. 1994) [rejecting public trial violation, in part, because 20 minute closure was "brief"].)

Presley did not consider or address, either expressly or implicitly, the de minimis rationale or triviality standard recognized by both the California Supreme Court and several federal courts and thus is not dispositive on this issue. (*Presley*, 130 S.Ct. at pp. 721-725.) Alternatively, to the extent *Presley*, applies to the instant case, it does not mandate a different result. As the record demonstrates, the trial court's use of the less restrictive alternative of limited sidebar conferences during voir dire rather than complete closure of voir dire to the public to accommodate discussions of personal matters related to prospective jurors is consistent with *Presley*. Therefore, the limited "exclusions" at issue did not violate appellant's state or federal constitutional rights to a public trial. Accordingly, this claim is meritless.

CONCLUSION

For the foregoing reasons, respondent respectfully asks that the judgment be affirmed.

Dated: February 22, 2011

Respectfully submitted,

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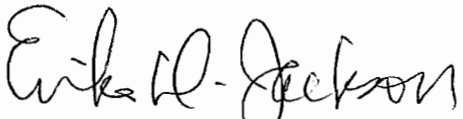

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CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 2,464 words.

Dated: February 22, 2011

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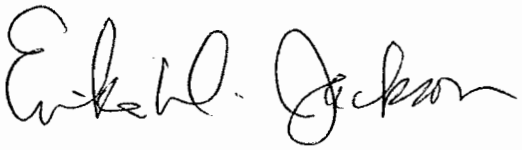

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SUPPLEMENTAL RESPONDENT'S BRIEF

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