SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MARTIN CARL JENNINGS,

Defendant and Appellant.

CAPITAL CASE
S081148

SUPREME COURT
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The Honorable Rufus L. Yent, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

HOLLY D. WILKENS
Deputy Attorney General

KRISTINE A. GUTIERREZ
Deputy Attorney General
State Bar No. 199209

110 West "A" Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2028
Fax: (619) 645-2191
Email: Kristine.Gutierrez@doj.ca.gov

Attorneys for Respondent

DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MARTIN CARL JENNINGS, Defendant and Appellant.	**CAPITAL CASE** S081148

ARGUMENT

I.

APPELLANT WAS NOT PREJUDICED BY THE OMISSION IN THE TORTURE MURDER SPECIAL CIRCUMSTANCE INSTRUCTION

Appellant contends the torture murder special circumstance finding must be reversed because the trial court erred by deleting certain language from CALJIC No. 8.81.18 [Special Circumstances——Murder Involving Infliction of Torture](Sixth Edition), which had the effect of omitting from the instruction any requirement that the jury find that an act of torture was inflicted upon the victim. (Supp. AOB 2-16.) While the modification of the instruction was agreed to by counsel, and recommended by the Use Note to the instructions, it nevertheless had the effect of eliminating an element of the special circumstance. The omission, however, did not prejudice appellant.

CALJIC No. 8.81.18, the instruction on the torture murder special circumstance, provides:

> To find that the special circumstance referred to in these instructions as murder involving infliction of torture is true, each of the following facts must be proved:

1. The murder was intentional; and

2. The defendant intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose; and

3. The defendant did in fact inflict extreme cruel physical pain and suffering upon a living human being no matter how long its duration.

Awareness of pain by the deceased is not a necessary element of torture.

(CALJIC No. 8.81.18)

In 1990, the electorate passed the Crime Victims Justice Reform Act, Proposition 115. Proposition 115 amended the torture murder special circumstance by deleting the last sentence of Penal Code section 190.2, subdivision (a)(18), which required the "infliction of extreme physical pain."[1] Thereafter, the special circumstance applied if ""[t]he murder was intentional and involved the infliction of torture." (*People v. Elliot* (2005) 37 Cal.4th 453, 477.) Proposition 115 did not provide "further explanation as to what constitutes 'the infliction of torture' for purposes of the special circumstance." (*Ibid.*)

In response to the amendment to Penal Code section 190.2, subdivision (a)(18), the following use note was added to CALJIC No. 8.81.18:

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1. Section 190.2, subdivision (a)(18) was amended as follows:

The murder was intentional and involved the infliction of torture. ~~For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration."~~

(*Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, 985-986, citing Ballot Pamp., Prop. 115, Primary Elec. (June 5, 1990) p. 66.)

Torture murders committed on or before June 5, 1990, will require proof and instruction on element number 3. However, for crimes committed after that date, delete element number 3.

(CALJIC No. 8.81.18.) Consistent with the use note, the court deleted number three from the instruction in this case without objection.[2] (12 RT 3015.)

A. Appellant Was Not Prejudiced By The Omission Of The Actus Reus From The Torture Murder Special Circumstance Because The Jury Made An Express Finding Of Infliction Of Torture

A defendant is not entitled to reversal if the omission of an element of a special circumstance was harmless beyond a reasonable doubt. (*Neder United States* (1999) 527 U.S. 1, 10, 15 [119 S.Ct. 1827, 144 L.Ed.2d 35]; *People v. Flood* (1998) 18 Cal.4th 470, 482, 502-503.) When an element is omitted from an instruction on a special circumstance, the error is harmless if the jury has made findings that show it considered the necessary elements notwithstanding the omission in the instruction. (*People v. Flood, supra,* 18 Cal.4th at p. 505.) Here, the language of the torture special circumstance finding itself reflects that the jury concluded from the totality of the instructions that the murder of Arthur Jennings "involved the infliction of torture."

The jury was instructed that the information alleged that the "murder was intentional *and involved the infliction of torture* within the meaning of Penal

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2. Michelle's counsel objected to all instructions on torture murder and the torture murder special circumstance, arguing that the prosecution had proven only child abuse, not torture. (12 RT 2997-3004, 3014-3015.) Appellant's attorney joined the general objection to CALJIC No. 8.81.18. (12 RT 3015.) However, neither party objected to the deletion of the third requirement. Inasmuch as the error involves the omission of an element of the special circumstance, however, the absence of objection or request for clarification is not a prerequisite to preserving the issue on appeal. (*People v. Caitlin* (2001) 26 Cal.4th 81, 149.)

Code Section 190.2 Subparagraph (a) Subparagraph (18)." (12 RT 3152-3153, emphasis added.) The jury was also instructed on the crime of torture:

> Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of persuasion, or for any sadistic purpose, inflicts great bodily injury on the person of another is guilty of the crime of torture, in violation of Section 206 of the Penal Code.
>
> Great bodily injury means a significant or substantial physical injury.

(2 CT 527; 12 RT 3158.) The trial court later instructed the jury on the murder by torture special circumstance as follows:

> If you find a defendant in this case guilty of murder of the first degree, you must then determine if one or more of the following circumstances are true or not true. And the special circumstances are, one, that the defendant intentionally killed the victim by the administration of poison, and then the other is the murder was intentional and *involved the infliction of torture*.
>
> The People have the burden of proving the truth of the special circumstances. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.
>
> . . . .
>
> To find that the special circumstance referred to in these instructions as murder *involving infliction of torture* is true, each of the following facts must be proved:
>
> 1. The murder was intentional; and,
>
> 2. The defendant intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of persuasion, or for any sadistic purpose.
>
> Awareness of pain by the deceased is not a necessary element of torture.

(2 CT 559-560, 562; 12 RT 3178, 3180-3182, CALJIC Nos. 8.80.1, 8.81.18, emphasis added.)

Finally, the jury was instructed:

> With respect to Special Circumstance Two as to defendant Martin Carl Jennings, if, and only if, you find the defendant Martin Carl Jennings guilty of murder in the first degree, then, and only then, may

> you make a finding as to Special Circumstance Two, and your verdict may be in one of the following forms:
>
> Special Circumstance Two
>
> We, the jury in the above-entitled action, find that said defendant Martin Carl Jennings intentionally murdered Arthur Jennings *and it involved the infliction of torture.*
>
> And there's a place for True and Not True and a place for you to place your X.

(12 RT 3188, emphasis added.)

The jury was also told that it would be given the instructions in written form. (12 RT 3192.) The written version of CALJIC No. 8.81.18 also included the caption "Special Circumstances——Murder Involving Infliction of Torture." (2 CT 562.)

When the instructions are viewed as a whole, it is manifest the jury understood the instructions to mean that to find the murder by torture special circumstance true, it had to find that the murder *involved the infliction of torture*, i.e. an act or acts of torture, <u>and</u> it had to find that appellant had the requisite intent, i.e., to kill Arthur and to inflict extreme cruel physical pain and suffering.[3] The actual written finding by the jury on the torture special circumstance reflected a finding that torture was inflicted.

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3. As the prosecutor explained during closing argument, "If you find a first degree murder, and only if you find a first degree murder, then you look to the two special circumstances, and that's that *the murder was intentional* and done with either poison or *involved torture. And I say involved torture. It doesn't imply torturous acts killed the child but they are a cause.* (12 RT 3063, emphasis added.) And, "To find a special circumstance true, *you have to find there was an intent to kill* coupled with the poison or *coupled with the torture.* That's the difference." (12 RT 3069, emphasis added.)

B. Any Instructional Error Was Also Harmless Because Evidence Of Torture Was Uncontroverted

Even if the torture special circumstance finding were not alone sufficient to demonstrate a lack of prejudice, appellant would not be entitled to reversal. Where the evidence of the omitted element is uncontrovered, there is no prejudice. (*Neder v. United States, supra,* 527 U.S. at p. 16-17; *People v. Flood, supra,* 18 Cal.4th at p. 504.) Appellant's counsel had earlier indicated that *he did not dispute Arthur was tortured.*[4] (12 RT 3003.) In fact, the evidence of torture was so overwhelming that appellant did not argue to the jury that Arthur was not tortured. Instead, he defended against the torture murder special circumstance by arguing that he did not intend to kill Arthur. (12 RT 3105.)

Moreover, even assuming that the evidence of torture was controverted, appellant would still not be entitled to a reversal of the torture special circumstance. The error was harmless beyond a reasonable doubt because there was overwhelming evidence for the jury to find the actus reus of torture and the jury would have returned the same true finding on the torture special circumstance even if the instruction had included as an element the infliction of torture. (*Neder v. United States, supra*, 527 U.S. at p. 16-18.)

The evidence in this case overwhelmingly established that the murder "involved the infliction of torture." Specifically, the evidence established that appellant tortured Arthur by starving and physically abusing him for a two-month period before he finally died.[5]

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4. Appellant argued language in the torture murder instruction which did not require an intent to kill was unconstitutional, although he recognized this position was contrary to California law. (1 RT 2999-3000, 3003-3004.)

5. Section 190.2, subdivision (a)(18) encompasses within the torture-murder special circumstance acts of torture that would not have caused death.

First, the evidence established that appellant tortured Arthur by deliberately starving him. The undisputed evidence showed that in the two and a half months appellant and Michelle had custody of Arthur, he lost nearly half his body weight, going from a healthy 64 pounds to an emaciated 35 pounds. (9 RT 2316; 10 RT 2471-2472, 2517; 11 RT 2661-2662.) Dr. Sheridan, who conducted the autopsy in this case, testified that there was no medical reason for Arthur's dramatic weight loss over a short period of time. (10 RT 2605.) Dr. Sheridan further testified that Arthur was extremely thin for his height (3'10"), had almost no fat under his skin, his muscles were wasting (meaning his body broke down his muscles for energy), and he had no food in his stomach at the time of his death. (10 RT 2571-2572, 2580, 2583, 2585, 2588-2590, 2606.) Finally, Dr. Sheridan testified that Arthur had acute pneumonia as a part of his overall failure to thrive and the breakdown in his immune system from emaciation. (10 RT 2604-2605.)

Evidence at trial also showed that prior to his death, Arthur appeared thin and undernourished, despite the fact that the Jennings had plenty of food in their home and that when given food or drink he gulped them down. (10 RT 2442, 2446-2447, 2453, 2464, 2473-2474, 2518-2519.) The jury was also able to see pictures of Arthur at the time he was returned to the Jennings' care in November 1995 and at the time of his death only 2 ½ months later, as well as an autopsy photograph showing that he had no fat under his skin. (9 RT 2320-2321, 10 RT 2588, 2598-2599; Ex. 6, 87-88.)

(*People v. Crittenden* (1994) 9 Cal.4th 83, 141-142.) Because Arthur was continuously abused over the two-month period leading to his death, and the injuries accumulated, weakening his body and causing subsequent abuse to be even more painful, all of appellant's acts of torture should be considered as a whole. (See 12 RT 3004-3005 [court indicating that it was the combination of the defendants acts which justified the giving of instructions on murder by torture and the torture murder special circumstance].)

Undisputed evidence also established appellant tortured Arthur by severely physically abusing him. By all accounts, Arthur was happy and healthy when he was returned to appellant's care in November 1995. (9 RT 2316-2318; 10 RT 2471-2472.) In the subsequent months before Arthur's death, appellant inflicted numerous painful injuries on his son. A month and a half before Arthur died, appellant severely burned Arthur's hand by holding it over the stove. (3 CT 738-739; 10 RT 2517, 2519-2520, 2580-2581, 2600, 2609.) In the month prior to Arthur's death, he sustained numerous injuries including a bruise which ran all the way down his face; bandages on his head; dried blood on his face; black, bloody eyes; and an eye that was seeping blood and was swollen shut. (10 RT 2463-2464, 2473, 2519.) Around this time, Arthur also received an injury to his scalp which appellant then sutured, apparently without anesthetic. (3 CT 708, 733; 10 RT 2576-2578, 2599-2600, 2609, 2577.) Appellant also "dragged" Arthur home, knocked him down with an elbow, kicked him in the mid-section, put a sock in his mouth, and duct taped his mouth. (3 CT 705-706, 708-715, 738-739, 762-763, 773.)

In the days before Arthur's death, appellant repeatedly, violently shook Arthur. (3 CT 710-711, 715.) As a result of the shaking, Arthur sustained injuries which included bleeding in the left side of his brain and hemorrhaging of the optic nerves around his eyes. (10 RT 2571-2572, 2601, 2608.)

On the day Arthur died, appellant hit him in the back of the head with a fireplace shovel, causing a large, gaping head wound. (3 CT 788-790, 796; 10 RT 2576-2578, 2591, 2599; 11 RT 2683-2684; Ex. 82.) On the same day, appellant also inflicted another injury on Arthur which caused extensive hemorrhaging to the deeper layers of his scalp across the front of his forehead. (10 RT 2591, 2599-2600.) Shortly before he died, appellant also "smothered" Arthur, causing a bruise and abrasion on the tip of Arthur's nose, bruising and a tear on the area between his nose and mouth, bruises on the inside of his lips

and gums, a tear in his frenulum and a slight bruise on the tip of his tongue. (3 CT 764-765; 10 RT 2573-2576, 2600, 2613-2614, 2627, 2637.)

Numerous other injuries were also found on Arthur's body during the autopsy. Arthur had abrasions in several places on his left arm, on his right elbow, and on his left buttock. (10 RT 2582-2584, 2586.) He had "rug burn" abrasions on his left back. (10 RT 2585-2588.) Arthur had bruises on his chest, both of his shoulders, right elbow, his left arm, and on his left buttock. (10 RT 2579-2584, 2586, 2596.) Finally, Arthur had a scar on the back of his lower right thigh. (10 RT 2585.) Dr. Sheridan testified that all of the physical injuries had been painful. (10 RT 2576, 2578, 2614.) Because the evidence overwhelmingly established that appellant committed acts of torture against Arthur, the jury's finding would have been the same if the jury was instructed as appellant now urges.

II.

THE TRIAL COURT PROPERLY RESPONDED TO THE JURY'S QUESTION WHETHER STARVATION COULD BE CONSTRUED AS "EXTREME PHYSICAL PAIN"

Appellant contends the court erred when it responded to the jury's question whether starvation could be construed as extreme physical pain under the legal definition of torture. (Supp. AOB 17-36.) Appellant has waived this claim and, contrary to his argument, the trial court correctly answered the jury's question.

During jury deliberations on April 19, 1999, the jury sent a question to the court which read, "Can starvation be construed as extreme physical pain under legal definition of torture?" (3 CT 606.) After conferring with counsel, the court sent the following answer to the jury:

> Only if the required mental state for the lesser offense of torture or the Special Circumstance-Murder Involving Infliction of Torture is proved. See California Jury Instructions 9.90 and 8.81.18. Then it is up to the jury and each of you to decide whether or not starvation may constitute extreme physical pain under the law.

(12 RT 3212.) About an hour later, the jury alerted the court that it was unable to agree on a verdict for the torture special circumstance with respect to Michelle. (12 RT 3213-3216.) The jury then returned its verdicts on the substantive crimes and special circumstance allegations, including a true finding on the torture murder special circumstance with respect to appellant. (12 RT 3216-3218.)

Appellant now contends the court's response to the jury's question was erroneous because starvation cannot constitute torture under section 190.2, subdivision (a)(18) as a matter of law and, even if it could, the court should have instructed the jury that the prosecution had to prove beyond a reasonable doubt that the acts of starvation were capable of causing extreme physical pain. (Supp. AOB 17-36.) "Where, as here, appellant consents to the trial court's responses to jury questions during deliberations, any claim of error with respect thereto is waived."[6] (*People v. Bohana* (2000) 84 Cal. App.4th 360, 373.)

In any event, appellant's assertion that starvation cannot constitute torture as a matter of law is incorrect. First, appellant argues that starvation cannot constitute torture because it involves the *withholding* of nourishment instead of the *affirmative infliction* of an injury.[7] (Supp. AOB 21-27.) This

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6. Moreover, if appellant genuinely believed that starvation could not legally form the basis of a guilty verdict for murder by torture or the crime of torture, or a true finding on the torture murder circumstance, one would have expected him to have expressed that view long before the jury posed its question.

7. Surely, no one would suggest that starving someone held as a prisoner is not an *act* of torture.

argument fails. Appellant had an affirmative duty as Arthur's parent to provide his five-year-old child with food. The evidence at trial established that appellant *intentionally withheld sufficient nourishment* from Arthur over a two-month period. (See *People v. Burden* (1977) 72 Cal.App.3d 603, 616 [the omission of a duty is in law the equivalent of an act]; see also 12 RT [defense counsel conceding during closing argument that appellant was withholding food as a form of punishment].) The evidence also established that appellant's act of withholding food from Arthur resulted in the *infliction of significant physical injury*. Dr. Sheridan testified that Arthur had almost no fat under his skin, that his body was breaking down his muscles for energy and that he had acute pneumonia as a part of his overall failure to thrive and the breakdown in his immune system from emaciation. (10 RT 2571-2572, 2580, 2583, 2585, 2588-2590, 2604-2606.) Accordingly, there was substantial evidence from which the jury could have determined that the murder involved the *infliction* of torture by means of starvation, if it determined that appellant had the requisite intent to inflict extreme physical pain when he withheld food from Arthur.

Second, appellant asserts that starvation cannot constitute torture as a matter of law because it is incapable of causing extreme physical pain. (Supp. AOB 27-31.) This too must be rejected. Appellant improperly supports his argument with studies and anecdotal evidence which is not part of the record and was never offered into evidence. (Supp. AOB 28-31.) The court and counsel properly determined that whether the starvation in this case could constitute extreme physical pain was not a legal determination to be made by the court but a question for the jury to decide. The jury was entitled to use its common sense and find that being deprived of sufficient food for two months could cause extreme physical pain, and that appellant so intended when he withheld food from Arthur. As the prosecutor explained during closing argument:

> Is this [Arthur's physical injuries a week before his death] painful? Extremely. Because what you've got to remember is these other injuries are not healed. They're adding. They're adding to the pain. And the pain is getting worse and worse.
>
> Is he gaining weight? No. Is food still being withheld? Yeah. Starvation. Is that painful? They did it in concentration camps.

(12 RT 3056.)

And, as the trial court explained with respect to this evidence when denying the automatic motion to modify the death verdict:

> On top of all of the other abuses and insults he suffered, he was being systematically starved by the defendant Martin Jennings. . . . ¶ The little boy was actually consuming his own body to stay alive. ¶ We can all imagine what it's like to miss one or two meals. Rarely, if ever, do we go the entire day without eating. It seems to the Court that the pain of hunger can drive you mad. It can cause you to steal or kill to find food.
>
> The defendant Martin Jennings ate well, the co-defendant Michelle Jennings ate well, the little boy's sister Pearl ate well. There was food in the family trailer. The little boy, five-year-old Arthur, was being starved to death as a form of punishment.
>
> None of us in this courtroom can understand and feel what it must have been like those last 90 days of the little boy's life in the hands of his father, the defendant Martin Jennings.

(13 RT 3559-3560.)

Furthermore, the jury in this case could find that when appellant withheld food from Arthur, he "intended to inflict extreme cruel physical pain and suffering upon [Arthur] for the purpose of persuasion, or for [a] sadistic purpose," regardless of whether the starvation actually caused Arthur to feel extreme physical pain. (*See People v. Chatman* (2006) 38 Cal.4th 344, 389 [victim's awareness of pain is not an element of the offense].) Accordingly, the trial court's response to the jury's question was both correct and appropriate.

Finally, contrary to appellant's contention, the trial court was not required to state in its answer that the prosecution had to prove beyond a reasonable doubt that the acts of starvation were capable of causing extreme physical pain. (Supp. AOB 21, 31-34.) The jury was properly instructed on the prosecution's burden of proof by CALJIC No. 2.90 [Presumption of Innocence-Reasonable Doubt-Burden of Proof][8] and CALJIC No. 8.80.1 [Special Circumstance-Introductory].[9] (2 CT 510, 559-560.) The trial court was not required to remind the jury of the prosecution's burden of proof in its answer, particularly absent such a request from counsel.

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8. The jury was instructed with CALJIC No. 2.90 as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his or her guilt is satisfactorily shown, he or she is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him or her guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(12 RT 3147-3148.)

9. The Court instructed the jury with CALJIC No. 8.80.1 in pertinent part as follows:

> The People have the burden of proving the truth of the special circumstances. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.

(12 RT 3178.)

Moreover, even assuming the trial court erred, there was no prejudice. (*See People v. Huggins* (2006) 38 Cal.4th 175, 209-213 [finding no prejudice from court's error in defining intent in response to jury question].) Appellant argues that by asking whether starvation can be construed as extreme physical pain under the legal definition of torture, the jury showed that it improperly relied on torture by starvation in finding the torture special circumstance true. (Supp AOB 34-35.) Appellant's assumption cannot be indulged. The far more reasonable inference is that the jury posed this question while it was deliberating the truth of the special circumstance allegation with respect to Michelle, and not appellant. There was only one incident of physical abuse directly linked to Michelle and shortly after it received the court's response to this question, the jury indicated it was unable to determine the truth of this special circumstance allegation for Michelle. As discussed in the previous argument, there was overwhelming evidence appellant tortured Arthur not only by starving him, but by burning, beating, shaking, and smothering him. Appellant's claim must be rejected.

III.

APPELLANT WAS NOT DEPRIVED OF DUE PROCESS OR HIS RIGHT TO BE PRESENT WHEN HIS ATTORNEY DISCUSSED THE APPROPRIATE RESPONSE TO A JURY QUESTION IN HIS ABSENCE

Appellant contends he was denied his constitutional and statutory rights to be present while the court and counsel discussed how to respond to a jury question. (Supp. AOB 37-41.) Because appellant had no right to be present during these proceedings, his constitutional and statutory rights were not violated. Moreover, because appellant cannot demonstrate that his absence from these proceedings prejudiced his case or denied him a fair trial, reversal is unwarranted.

After the jury adjourned to begin deliberations, the trial court explained to appellant:

> Let me indicate first of all with respect to any questions or requests for testimony that the jurors have, the Court will not respond to the question until it discusses the appropriate answer with all counsel.

(12 RT 3200.) Appellant did not request to be present during any such discussions. (12 RT 3200.) Counsel agreed to an informal procedure for readback of testimony in the jury room. (12 RT 3200-3201.)

The following relevant proceedings were subsequently held in open court with appellant present:

> THE COURT: The jurors submitted a question to the court and counsel, it's question No. 9, and I would like to read it for the record. (Reading:)
>
> "Can starvation be construed as extreme physical pain under legal definition of torture?"
>
> And the record should reflect that we, the court and counsel, has [sic] discussed informally in chambers off the record out of the presence of Mr. and Mrs. Jennings the appropriate response, and I believe that the following response has been agreed to by all counsel and the court, and I would like to read it into the record. (Reading:)
>
> "Only if the required mental state for the lesser offense of torture or the Special Circumstance - Murder Involving Infliction of Torture is proved, see California Jury Instruction 9.90 and 8.81.18, then it is up to the jury and each of you to decide whether or not starvation may constitute extreme physical pain under the law."
>
> Mr. Hess, is that response to jury question No. 9 acceptable to you?
>
> MR. HESS: Yes, sir.
>
> THE COURT: And Mr. Nacsin, is it also acceptable to you?
>
> MR. NACSIN: Yes, sir.
>
> THE COURT: And Mr. Katz?
>
> MR. KATZ: Yes.

THE COURT: Thank you very much.

And the court will have that response typed on the actual jury questionnaire.

(12 RT 3212-3213.)

Appellant now contends he was denied his constitutional and statutory right to be present while the court and counsel discussed how to respond to the jury question in chambers. (Supp. AOB 37-41.) Appellant had no right to be present during this informal discussion. Nor can appellant demonstrate that his absence from these proceedings prejudiced his case or denied him a fair trial.

> Broadly stated, a criminal defendant has a right to be personally present at certain pretrial proceedings and at trial under various provisions of law, including the confrontation clause of the Sixth Amendment to the United States Constitution, the due process clause of the Fourteenth Amendment to the United States Constitution, section 15 of article I of the California Constitution, and sections 977 and 1043.

(*People v. Cole* (2004) 33 Cal.4th 1158, 1230.)

"A criminal defendant's right to be personally present at trial is guaranteed by the Sixth and Fourteenth Amendments of the federal Constitution . . . ." (*People v. Lucero* (2000) 23 Cal.4th 692, 716, citing *People v. Jones* (1991) 53 Cal.3d 1115, 1141.) However, a defendant, "'does not have a right to be present at every hearing held in the course of a trial.'" (*People v. Lucero, supra,* 23 Cal.4th at p. 716, quoting *People v. Price* (1991) 1 Cal.4th 324, 407.) Under the Sixth Amendment, a criminal defendant does not have the right to be personally present unless his appearance is necessary to prevent interference with his opportunity for effective cross-examination. (*Kentucky v. Stincer* (1987) 482 U.S. 730, 740, 744, fn. 17 [107 S.Ct. 2658, 96 L.Ed.2d 631]; *People v. Waidla* (2000) 22 Cal.4th 690, 741.) Such right does not arise under the Fourteenth Amendment unless the defendant finds himself at a "stage . . . that is critical to [the] outcome" and "his presence would contribute to the fairness of the procedure." (*Kentucky v. Stincer, supra*, 482 U.S. at p. 745;

People v. Waidla, supra, 22 Cal.4th at p. 742; see also *United States v. Gagnon* (1985) 470 U.S. 522, 526 [84 L.Ed.2d 486, 490, 105 S.Ct. 1482] [noting that while a defendant's right to be present is rooted largely in the Confrontation Clause, such right may also arise under the Due Process Clause in situations where the defendant is not actually confronting the witnesses or the evidence against him].)

Similarly, under the California Constitution, a defendant has no right to be present at hearings that occur outside the jury's presence on questions of law or other matters that do not bear a reasonably substantial relation to the fullness of his opportunity to defend against the charges. (*People v. Cole, supra*, 33 Cal.4th at p. 1231.) In California, defendants also have a statutory right to be personally present during certain proceedings pursuant to sections 977 and 1043. Section 1043, subdivision (a) provides that "[e]xcept as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial." Section 977, subdivision (b)(1), provides in pertinent part:

> In all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present . . . .

However, there is no right to be present pursuant to section 977 and 1043, even in the absence of a written waiver, where the defendant has no such right under the California Constitution. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1357; *People v. Cole, supra*, 33 Cal.4th at p. 1231.)

Lastly, the burden is on the defendant to demonstrate that his absence prejudiced his case or denied him a fair trial. (*People v. Lucero, supra,* 23 Cal.4th at p. 716; *People v. Bradford, supra,* 15 Cal.4th at p. 1357.)

A. Appellant Had No Right To Be Personally Present During The Informal In-Chambers Discussion Between The Court And Counsel On A Point Of Law

Contrary to appellant's assertions, he had no constitutional or statutory right to be personally present during the in-chambers discussion regarding how to respond to the jury's question as to whether "starvation [can] be construed as extreme physical pain under [the] legal definition of torture." The appropriate response to this question was a legal matter which was discussed between the court and counsel outside the presence of the jury. (*People v. Waidla, supra,* 22 Cal.4th at p. 742 [a defendant does not have the right to be personally present during in chambers discussions, outside of the jury's presence, on questions of law].) Therefore, appellant had no right to be present during the in-chambers discussion concerning the appropriate response to the jury question.

Fisher v. Roe (9th Cir. 2001) 263 F.3d 906, cited by appellant in support of his argument, is inapposite. (AOB 39-40.) In *Fisher*, the Ninth Circuit Court of Appeal granted a federal habeas corpus petition because neither the defendant nor his counsel was present when the trial court responded to a jury request for readback of testimony. (also, cf. *Shields v. U.S.* (1927) 273 U.S. 583, 584-585, 588-589 [47 S.Ct. 478, 71 L.Ed. 787][defendant's right to be present violated when court responded to jury question ex parte without defendant or counsel present].) In contrast, in this case defense counsel participated in the in-chambers discussion and was fully able to represent appellant's interests. Additionally, this Court is not bound to follow the decisions of the lower federal courts. (*People v. Williams* (1997) 16 Cal.4th 153, 190.)

Moreover, while "[i]t may be that if personal presence truly bears a substantial relation to a defendant's opportunity to defend against the charges,

counsel's waiver would not forfeit the claim," the very fact that counsel did not think appellant's presence was necessary "strongly indicates that [his] presence did not, in fact, bear [] a substantial relation" to the fullness of his opportunity to defend. (*People v. Cleveland* (2004) 32 Cal.4th 704, 741.)

Finally, the question and proposed response were read to appellant before it was presented to the jury. (12 RT 3212-3213.) Thus, appellant had the opportunity to raise any issues or problems he observed, including "pointing out to counsel and the court that Arthur had never complained of hunger pains, and had never shown symptoms of pain related to hunger . . . ." (AOB 40; *see People v. Cole, supra,* 33 Cal.4th at p. 1232 ["when defendant arrived during the in-court hearing, the court summarized that it was currently hearing a defense continuance motion. Presumably defendant could have given the court or counsel any information he had at that time. But he did not . . . ."].) Appellant's constitutional or statutory right to be present was not violated.

B. Appellant Has Failed To Show That His Absence From The In-Chambers Discussion Resulted In Prejudice Or Deprived Him Of His Right To A Fair Trial

In any event, appellant has failed to show that his absence denied him a fair trial or that the result of the proceedings would have been different had he been present during the in-chambers discussion. First, appellant argues that if he had been present during the in-chambers discussion, he could have pointed out that Arthur never complained of hunger pains or showed any signs of hunger. But this ignores the fact that the evidence had already been presented and his attorney knew the state of the record in terms of whether there was any evidence Arthur complained of being hungry. There is no evidence in the record, and no evidence was offered at trial, that Arthur did not complain of being hungry or show signs of hunger. (*People v. Waidla, supra,* 22 Cal.4th at

p.742 ["The only possible basis for a conclusion favorable to [the defendant] in this regard would be speculation. Such a basis, however, is inadequate."]; see also, *People v. Horton* (1995) 11 Cal.4th 1068, 1121.) Quite to the contrary,the evidence established that Arthur did show signs of being very hungry. Specifically, Arthur quickly devoured food and milk on the apparently rare occasions when it was given to him. (See 10 RT 2518-2519, 2474.)

Second, the fact that appellant did not make any such statements when the court read him the question and proposed response belies appellant's argument that he would have raised this issue if only he had been present during the in-chambers discussion.

Third, as discussed in the previous argument, the trial court correctly responded to the jury question. Thus, "defendant's presence would not have contributed to the fairness of the procedures, and his absence during the jury's inquiry did not prejudice him or violate his right to a fair and impartial trial." (*People v. Lucero, supra,* 23 Cal.4th at p. 717.) Accordingly, appellant's claim must be rejected.

CONCLUSION

Based on the foregoing, respondent respectfully requests that the judgment be affirmed.

Dated: September 21, 2007

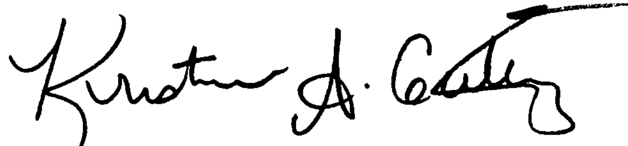
Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

HOLLY D. WILKENS
Deputy Attorney General



KRISTINE A. GUTIERREZ
Deputy Attorney General

Attorneys for Respondent

KAG:cjm

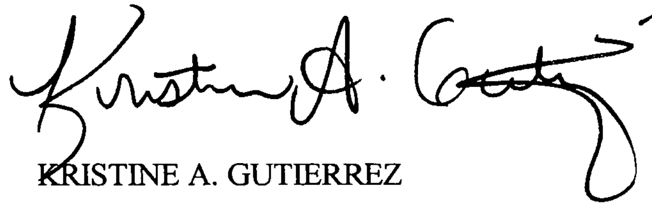
CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 6010 words.

Dated: September 21, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California



KRISTINE A. GUTIERREZ
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Martin Jennings** No.: S081148

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 collection and processing of correspondence for mailing with the United States Postal Service. 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 that same day in the ordinary course of business.

On September 21, 2007, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West "A" Street, Suite 1100, San Diego, California 92101, addressed as follows:

Gregory Marshall
Attorney at Law
P.O. Box 996
Palo Cedro, CA 96073
Attorney for Appellant

The Honorable Rufus L. Yent, Judge
San Bernardino County Superior Court
14455 Civic Drive
Victorville, CA 92392

California Court of Appeal
3389 Twelfth Street
Riverside, CA 92501

California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105-3647

The Honorable Eric M. Nakata, Judge
San Bernardino County Superior Court
Victorville District
14455 Civic Drive
Department V5
Victorville, CA 92392

The Honorable Michael A. Ramos
San Bernardino County District Attorney's Office
316 North Mountain View Avenue
San Bernardino, CA 92415-0004

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 September 21, 2007, at San Diego, California.

Carole McGraw
Declarant

Signature