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Supreme Court of California
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S116307

THE PEOPLE,
Plaintiff and Respondent,

v.

ALFRED FLORES,
Defendant and Appellant.

Superior Court of California
San Bernardino County
No. FVA-015023
Ingrid A. Uhler

Second Supplemental Brief
Automatic Appeal from a Judgment of Death

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SECOND SUPPLEMENTAL BRIEF

I. The Case Must Be Remanded to Afford the Sentencing Court an Opportunity to Exercise its Discretion to Strike or Dismiss the Firearm Enhancements in the Interests of Justice.

On May 19, 2003, the court sentenced Alfred Flores to death and to three consecutive life terms of 25 years to life for first degree murder, and consecutive terms of 25 years to life for the use of a firearm causing death under Penal Code section 12022.53, subdivision (d). (23 RT 5214.) The life terms were imposed and stayed under Penal Code section 654. (23 RT 5214.)

When the court pronounced judgment on Mr. Flores, the imposition of the section 12022.53 enhancement term was mandatory -- the term could not be suspended nor could the allegation be stricken. (Former section 12022.53, subds. (g) & (h).) However, under a new law that took effect January 1, 2018, the sentencing court now has discretion to strike firearm enhancements under Penal Code sections 12022.5 and 12022.53 in the interests of justice. (Stats. 2017, ch. 682, §§1–2 (S.B. 620).) Because the new law potentially lessens punishment, it applies retroactively to cases not yet final on appeal. (*In re Estrada* (1965) 63 Cal.2d 740, 745 *(Estrada)*.) This case is not yet final, and thus the new law applies to him. The matter must be remanded to give the court an opportunity to exercise its discretion.

A. The appeal is pending and the judgment is not final for retroactivity purposes.

On October 11, 2017, the Governor signed into law Senate Bill 620, to take effect January 11, 2018. (Stats. 2017, ch. 682, §§ 1–2 (S.B. 620).) Prior law required a court to impose a term for Penal Code section 12022.53 gun-use enhancement and allowed no discretion to strike the enhancement. The new law grants the court discretion to strike or dismiss the enhancement.

Senate Bill 620 amends section 12022.53, subdivision (h). As amended, that subdivision states:

> The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivisions applies to any resentencing that may occur pursuant to any other law.

(Stats. 2017, ch. 682, §§ 1–2 (S.B. 620).)[1]

A law applies retroactively to a judgment that is not yet final. A judgment is final for purposes of retroactivity analysis when all direct appeals have been exhausted and a petition for writ of certiorari in the United States Supreme Court has been denied or the time for filing such a petition has expired. (*People v. Vieira* (2005) 35 Cal.4th 264, 305–306.) Any case where the certiorari deadline is still pending as of January 1, 2018 (the date the amendment to section 12022.53 became law) is not yet final for retroactivity purposes. Here, the appeal is pending.

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[1] The new law also gives the court discretion to strike or dismiss an enhancement under section 12022.5. (§ 12022.5, subd. (c).)

B. The new law potentially lessens punishment and therefore applies retroactively to all cases not yet final on the date the new law takes effect.

There are two reasons why the amendment to section 12022.53 applies retroactively:

(1) The text of the amendment shows the Legislature intended it to apply retroactively.

(2) It is generally assumed that when the Legislature lessens punihsment for a crime, it intends the new law to apply retroactively. (*Estrada*, *supra*, 63 Cal.2d at p. 745.)

First, the text of the amendment states in part, "The authority provided by this subdivision applies to *any resentencing* that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2 (emphasis added; see § 12022.53, subd. (h)).) The express declaration that the amended statute applies to resentencing, and not merely sentencing, evinces an intent that the amendment applies retroactively.

Second, *Estrada* requires retroactive application of the amendment. *Estrada* carves out a categorical exception to the "ordinary presumption that statutes operate prospectively." (*People v. Brown* (2012) 54 Cal.4th 314, 323.) *Estrada* holds that a court must assume the Legislature intended that any new law that lessens punishment applies to all defendants whose judgments are not yet final on the statute's operative date unless a contrary legislative intent appears. (*Estrada*, *supra*, 63 Cal.2d at p. 742.) It is of "paramount importance" whether the

amendment lessens punishment. If it does, that leads to the "inevitable inference that the Legislature must have intended that the new statute" apply retroactively. (*Id.* at p. 745.)

Estrada also applies to a new law—such as Senate Bill 620—that allows for the possibility of lesser punishment but does not guarantee it. (See, e.g., *In re Griffin* (1965) 63 Cal.2d 757 [holding that a law which reduced the minimum time to be served before parole eligibility applied retroactively even though early release on parole was not guaranteed]; *People v. Francis* (1969) 71 Cal.2d 66, 76 [holding that *Estrada* required retroactive application of a law that provided a court more discretion to impose a lesser punishment].)

Here, as in *Griffin* and *Francis*, the amendment to section 12022.53 offers the possibility of reduced punishment. Under *Estrada*, this is enough to trigger retroactive application. Thus, in light of the statutory language that applies the new law to "resentencing," and pursuant to *Estrada* the cause remanded to the superior court for resentencing under section 12022.53, subdivision (h).

The Attorney General has conceded in other cases that the amended section 12022.53 applies retroactively. (See. e.g, *People v. Woods* (2018) 19 Cal.App.5th 1080, 1091 *(Woods)*.) And the Court of Appeal has consistently held that the amendments to section 12022.53 apply retroactively under *Estrada* to cases not yet final on appeal. (*People v. Arredondo* (2018) 21 Cal.App.5th 493; *People v. Robbins* (2018) 19 Cal.App.5th 660, 679; *Woods*, *supra*, at p. 1091.)

C. A remand is required because the court did not state on the record that it would not have exercised discretion in defendant's favor if it had discretion to exercise.

A remand for resentencing is necessary because the court did not know it had discretion to exercise, and made no statement as to how it would have exercised discretion if it had such authority. In such a case, a remand is required to allow the court an opportunity to exercise its discretion. (See *People v. Thompson* (1992) 7 Cal.App.4th 1966, 1974–1975 [holding remand for resentencing required where court failed to exercise discretion under section 654].)

The situation would be different if the record showed that the court indicated that it would not have exercised discretion to strike the enhancement even if it had the authority to do so. (See, e.g., *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [holding a remand for resentencing under *Romero* unnecessary where the trial court indicated that it would not have exercised its discretion to lessen the sentence even if it had discretion to do so].)

Thus, "a remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 *(McDaniels)*.) The court rejected the argument that harmless error analysis applies to this situation. The court affirmed that harmless error applies to the question whether a court abused its

discretion in making a particular sentence choice, but denied that harmless error applies when the court failed to exercise discretion in the first instance. The court reasoned:

> But when, as here, a trial court has made no discretionary choice because it was unaware it had authority to make one, an application of the "reasonable probability" standard requires the reviewing court to decide what choice the trial court is likely to make in the first instance, not whether the court is likely to repeat a choice it already made. While it is true that determining whether a trial court is likely to repeat a choice involves some degree of conjecture, determining what choice the trial court is likely to make in first instance is far more speculative, unless the record reveals a clear indication of how the court would have exercised its discretion.

(*McDaniels*, *supra*, 22 Cal.App.5th at p. 426.)

Other courts have reached the same conclusion. (See, e.g., *People v. Phung* (2018) 25 Cal.App.5th 741 [ordering remand for resentencing where the People conceded that the *Estrada* rule of retroactivity applies to SB 620]; *People v. Arredondo*, *supra*, 21 Cal.App.5th at p. 507.)

Accordingly, the case must be remanded to allow the trial court judge to decide whether to exercise her discretion and strike or dismiss one or more of the firearm use enhancements under sections 12022.53.

II. California's Death Penalty Statute as Applied to Those 21 Years of Age or Younger at the Time of the Offense Violates the Eighth Amendment; the Sentence of Death Must be Vacated.

A. Alfred Flores was 21 when the charged crimes occurred.

Appellant Alfred Flores was 21 years old when the capital offenses were committed. Appellant's date of birth is December 18, 1979; the charged offenses occurred on or about March 19–21, 2001, nine months before he turned 22. (Probation Officer's Report, dated May 19, 2003.) Mr. Flores's childhood was unstable and chaotic. Both his parents were deeply involved in street gangs, and the young Flores was bounced between social service programs and various different family members while growing up. (23 RT 5061.) He witnessed violence in his home and neighborhood from an early age. (23 RT 5062.)

On February 5, 2018, the American Bar Association House of Delegates "overwhelmingly" passed a resolution urging each jurisdiction that imposes capital punishment to prohibit the imposition of a death sentence on, or execution of, any individual who was 21 years old or younger at the time of the offense. (American Bar Association's House of Delegates Resolution (Feb. 5, 2018), Facts about the Death Penalty, Death Penalty Information Center (hereinafter, the "ABA Resolution".) Consistent with the ABA Resolution and evolving Eighth Amendment and Fourteenth Amendment jurisprudence, appellant urges this Court to extend the categorical bar on the

death penalty for juveniles under the age of 18 (*Roper v. Simmons* (2005) 543 U.S. 551) to those 21 years of age or younger.

B. California recognizes that individuals in late adolescence, in light of their ongoing neurological development, have a diminished culpability similar to juveniles, supporting appellant's request for a ruling by this court that the death penalty cannot be applied constitutionally to those 21 years of age or younger at the time of the offense.

In response to recent decisions relating to diminished culpability of individuals in late adolescence, in 2013 the California Legislature passed Senate Bill No. 260, which, among other things, became the current Penal Code section 3051. (*People v. Franklin* (2016) 63 Cal.4th 261, 276–277 ["the Legislature passed Senate Bill No. 260 explicitly to bring juvenile sentencing into conformity with *Graham, Miller,* and *Caballero*"].)[2] When first effective January 1, 2014, section 3051 provided for a "youth offender parole hearing" for any prisoner who was under 18 years of age at the time of the controlling offense. In 2015, section 3051 was modified, substituting 23 years of age for 18 years of age, wherever it appears in the section. (Stats.2015, ch. 471, § 1, effective Jan. 1, 2016.) In 2017, section 3051 was again modified substituting 25 years of age for 23 years of age. (Stats.2017, c. 675 (A.B.1308), § 1, eff. Jan. 1, 2018.)

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[2] *People v. Caballero* (2012) 55 Cal.4th 262; *Miller v. Alabama* (2012) 567 U.S. _ [132 S.Ct. 2455]; *Graham v. Florida* (2010) 560 U.S. 48.

Section 3051, subdivision (a)(I), currently provides that "any prisoner who was under 25 years of age . . . at the time of his or her controlling offense" shall be afforded a "youth offender parole hearing." Section 3051 thus recognizes the similarities of juveniles and those individuals in late adolescence under 25 years at the time of the offense. The Senate legislative analysis in connection with the 2015 modification of section 3051 increasing the age from 18 to under 23 years of age states, in part:

> Science, law, and common sense support the appropriateness of SB 260 youth offender parole hearings for young adults between the age of 18 and 23. Recent scientific evidence on adolescent and young adult development and neuroscience shows that certain areas of the brain - particularly those affecting judgment and decision-making - do not fully develop until the early-to-mid-20s. Various studies by researchers from Stanford University (2009), University of Alberta (2011), and the National Institute of Mental Health (2011) all confirm that the process of brain development continues well beyond age 18. This research has been relied on by judges and lawmakers. The US and California Supreme Courts have recognized in several recent opinions that adolescents are still developing in ways relevant to their culpability for criminal behavior and their special capacity to turn their lives around. California already recognizes the uniqueness of young adults in its Department of Juvenile Justice (DJJ). DJJ is mandated to detain and provide services and programming to some young adults until age 23. The state has recognized early adulthood as a vulnerable period in other arenas as well, for example, extending foster care support beyond age 18 to age 21 in AB 12 (Beall, 2010). As recently as 2013, the Legislature

> passed AB 1276 (Bloom), which provided special protections and opportunities for young adults through age 22 entering prison.

(Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 261 (2015–2016 Reg. Sess.), as amended June 1, 2015, pp. 3–4.)

The Assembly legislative analysis recognizes that individuals in late adolescence, in light of their ongoing neurological development, are similar to juveniles:

> Recent neurological research shows that cognitive brain development continues well beyond age 18 and into early adulthood. For boys and young men in particular, this process continues into the mid-20s. The parts of the brain that are still developing during this process affect judgment and decision-making, and are highly relevant to criminal behavior and culpability. Recent United States Supreme Court cases including *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama* recognize the neurological difference between youth and adults. The fact that youth are still developing makes them especially capable of personal development and growth.

(Assem. floor analysis of Sen. Bill No. 261 (2015–2016 Reg. Sess.), as amended June 1, 2015, pp. 2–3.)

California thus recognizes that individuals in late adolescence, in light of their ongoing neurological development, have diminished culpability similar to juveniles, thereby supporting appellant's request for a ruling by this Court that the rationale in *Roper* should be extended to those 21 years of age or younger at the time of the offense. (See *Moore v. Texas* (2017) _ U.S. _ [137

S.Ct.1039, 1048–1053] [addressing the significance of a scientific consensus to Eighth Amendment jurisprudence]; *Hall v. Florida* (2014) 572 U.S. _ [134 S.Ct. 1986]; *Roper v. Simmons*, *supra*, 543 U.S. 551 [highlighting that scientific consensus about pre-eighteen brain development informed the Court's Eighth Amendment decision].)

Since *Roper*, the science of brain development has progressed significantly. While previous studies focused on the effects of brain development on juveniles under eighteen, researchers increasingly examined what this process means for youths in their late teens and early twenties who also do not yet have fully developed adult brains. This research shows that people in this age group bear a strong resemblance to juveniles under eighteen when it comes to their decision-making and behavioral abilities.

Medical science now understands that the primary reason late adolescents resemble juveniles when it comes to decision-making and behavior is that the frontal lobes, "home to key components of the neural circuitry underlying 'executive functions' such as planning, working memory, and impulse control, are among the last areas of the brain to mature; they may not be fully developed until halfway through the third decade of life." (Sara Johnson, Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy, 45 J. Adolesc. Health 216, 216 (2009).) This continued development affects the behavior of late adolescents in the areas the court described in *Roper*.

Evolving Eighth Amendment jurisprudence, including that described in detail in the ABA Resolution, supports the fact that scientific research has proven that individuals in late adolescence

have ongoing neurological development similar to juveniles, thereby revealing diminished culpability similar to juveniles. (See *Miller v. Alabama, supra*, 132 S.Ct. at p. 2460] [holding that a juvenile who commits a homicide offense may not be automatically sentenced to an LWOP term]; *Graham v. Florida*, *supra*, 560 U.S. at p. 74 [holding that a juvenile who commits a nonhomicide offense may not be sentence to LWOP]; *Roper v. Simmons*, *supra*, 543 U.S. at p. 578 [holding that the death penalty may not be imposed on juvenile offenders]; *People v. Gutierrez* (2014) 58 Cal.4th 1354.)

In *Miller*, the United States Supreme Court held that a juvenile who commits a homicide offense may not be automatically sentenced to an LWOP term. (*Miller v. Alabama, supra*, 132 S.Ct. at p. 2460.) *Miller* held that the sentencing authority must have individualized discretion to impose a less severe sentence and, in exercising that discretion, must take into account the following youth-related mitigating factors. (*Id.* at pp. 2468–2469.) The Court stated: “Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features - among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” (*Miller v. Alabama, supra*, 132 S.Ct. at p. 2468.)

In *Montgomery v. Louisiana* (2016) 577 U.S. _ [136 S.Ct. 718], the court clarified that *Miller* announced a substantive rather than a procedural rule, and therefore operates retroactively. (*Id.* at p. 736].) *Montgomery* explained that: “*Miller*, then, did more than require a sentencer to consider a juvenile offender’s youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light

of "the distinctive attributes of youth." (*Montgomery v. Louisiana, supra*, 136 S.Ct. at p. 734, quoting *Miller v. Alabama, supra*, 132 S.Ct. at p. 2465).

In *People v. Gutierrez*, *supra*, 58 Cal.4th 1354, this Court held that a sentencing court has discretion to sentence a juvenile convicted of first-degree murder with special circumstances to LWOP or 25 years to life, with no presumption in favor of life without parole. (*Id.* at p. 1361.) This Court held that *Miller* requires the court, "in exercising its sentencing discretion, to consider the 'distinctive attributes of youth' and how those attributes 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders' before imposing life without parole on a juvenile offender." (*Ibid.*)

Miller and *Graham* discuss at length the developmental differences between children and adults and the reasons these differences are relevant to decisions whether to impose the most serious penalties on youthful offenders. For example, they discuss "a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking," "limited control over their own environment," and "a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity." (*Miller v. Alabama, supra*, 132 S.Ct. at p. 2464.) *Graham* noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds" — for example, in "parts of the brain involved in behavior control." (*Graham v. Florida*, *supra*, 560 U.S. at p. 2026.) For these reasons, "juveniles have diminished

culpability and greater prospects for reform, . . . they are less deserving of the most severe punishments." (*Miller v. Alabama, supra*, 132 S. Ct. at p. 2464.)

As noted above, according to scientific literature, these differences do not disappear at age 18. "The research has turned up some surprises, among them the discovery of striking changes taking place during the teen years. These findings have altered long-held assumptions about the timing of brain maturation. In key ways, the brain doesn't look like that of an adult until the early 20s." (https://infocenter.nimh.nih.gov/pubstatic/ NIH%2011–4929/NIH% 2011- 4929.pdf.) "Human and animal studies, Jensen and Urion note, have shown that the brain grows and changes continually in young people-and that it is only about 80 percent developed in adolescents. The largest part, the cortex, is divided into lobes that mature from back to front. The last section to connect is the frontal lobe, responsible for cognitive processes such as reasoning, planning, and judgment. Normally this mental merger is not completed until somewhere between ages 25 and 30 - much later than these two neurologists were taught in medical school." (http://harvardmagazine.com/2008/ 09Ithe-teen-brain.html.)

Studies of brain development from adolescence to adulthood show that the frontal lobe undergoes far more change during adolescence than at any other stage of life and is also the last part of the brain to develop. As a result, even as they become fully capable in other areas, adolescents cannot reason as well as adults. Maturation in the frontal lobes has been shown to

correlate with measures of cognitive functioning.[3] The frontal lobe is involved in behavioral facets germane to many aspects of criminal culpability.

"Perhaps most relevant is the involvement of these brain regions in the control of aggression and other impulses. .. . If the neural substrates of these behaviors have not reached maturity before adulthood, it is unreasonable to expect the behaviors themselves to reflect mature thought processes. [¶] The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable .... Indeed, age 21 or 22 would be closer to the 'biological' age of maturity."[4]

The results in *Graham* and *Miller* are driven by the incomplete mental development of persons of the age of the defendants in those cases, as a class, as documented in scientific literature. They are less deserving of the harshest sentences, even when they commit terrible crimes, due to "the distinctive attributes of youth." (*Miller v. Alabama, supra*, 132 S.Ct. at p. 2464; *Graham v. Florida, supra*, 130 S.Ct. at p. 2026.)

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[3] (See Adolescence, Brain Development and Legal Culpability, January 2004 Newsletter of ABA Juvenile Justice Center, https:llwww.americanbar.org/content/dam/aba/publishing/criminaljustice_section_newsletterl crimjustjuvjus_Adolescence.authcheckdam.pdf (Adolescence) and authorities there cited.)

[4] (Adolescence, Brain Development and Legal Culpability, January 2004 Newsletter of ABA Juvenile Justice Center, https:llwww.americanbar.org/ content/dam/aba/publishing/criminaljustice_section_newsletter/crim justj uvj us_Adolescence.authcheckdam. pdf.)

Indeed, in August of 2017, a circuit court judge in the Commonwealth of Kentucky, County of Fayette, declared the death penalty to be unconstitutional as applied to defendants who were under 21 years of age at the time of their crimes. After citing statistics demonstrating that 19 states plus the District of Columbia have abolished the death penalty, another four states have declared moratoria on all executions, and seven states, including Kentucky, have de facto prohibitions on the executions of offenders under the age of 21 years, the Circuit Court judge found that the death penalty is a disproportionate punishment for offenders under 21 years of age. The court announced a "bright line rule as promoted in *Roper*" in categorically barring the death penalty for offenders under 21 years old. (*Commonwealth v. Bredhold*, No. 14-CR-161 (Fayette Co. August 1, 2017, pp. 4–6, 12.)

C. Reversal of appellant's death sentence is required.

Evolving Eighth Amendment jurisprudence thus recognizes what scientific literature demonstrates: similar to juveniles under 18, late adolescents like the appellant here, 21-year-old Alfred Flores, show a lack of maturity and under-developed decision-making process, and increased susceptibility to negative influences, thereby warranting prohibition against capital punishment. (U.S. Const., Amends. VIII, XIV.)

III. Under the Eighth and Fourteenth Amendments, the Death Penalty Cannot Be Applied to Youthful Offenders of 21 Years or Less Because the Risk That Youth Presents to the Reliability of the Death Sentence.

A. The inherent immaturity of persons aged 18–21 renders the criminal proceedings that lead to the death penalty unreliable and unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

The Eighth and Fourteenth Amendments require heightened reliability in proceedings that lead to the imposition of the death penalty. (*Lockett v. Ohio* (1978) 438 U.S. 586, 605; *Penry v. Lynaugh* (1989) 492 U.S. 302, 328 [noting that only when the sentencer has given full effect to the evidence presented in mitigation can we be sure that the sentencer has treated the defendant as a "uniquely individual human being" and has made a reliable determination that the death is the appropriate sentence].)[5]

In recent years, the Supreme Court has found that the special problems presented by two categories of offenders – the intellectually disabled and juveniles – create an impermissible risk of unreliability in the imposition of the death penalty that makes such punishment unconstitutional for those people.

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[5] See Scott E. Sundby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling* (2014) 23 Wm. & Mary Bill Rts. J. 487, 495–496

With respect to the intellectually disabled, the Court found that "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution." (*Atkins v. Virginia* (2002) 536 U.S. 304, 320.) The Court explained as follows:

> The reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty. The risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty,' *Lockett v. Ohio*, 438 U.S. 586, 605 [citations], is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. As *Penry* demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.

(*Atkins v. Virginia*, *supra*, 536 U.S. at pp. 320–321.)

Similar issues arise with respect to juvenile offenders. In *Roper*, the Court noted that, as with intellectual disability, the offender's youth could be a two-edged sword:

> The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any

> particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant's youth may even be counted against him. In this very case, as we noted above, the prosecutor argued Simmons' youth was aggravating rather than mitigating.

(*Roper v. Simmons*, *supra*, 543 U.S. at pp. 572–573.)

Further, in the non-capital case of *Graham v. Florida*, *supra*, 560 U.S. 48, where the Court struck down life without parole sentences for juveniles who had committed nonhomicide crimes, the Court invoked the unreliability principle to reject the idea that the states could rely on a "case-by-case proportionality" approach to decide if a life without parole sentence violated the Eighth Amendment. Specifically, the Court brought the unreliability principle into play by turning to the *Atkins* theme that the very nature of the mitigation (intellectual disability in *Atkins* and youth in *Roper* and *Graham*) made a reliable assessment of the defendant's culpability more difficult:

> [T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one

> charged with a juvenile offense. These factors are likely to impair the quality of a juvenile defendant's representation.

(*Graham v. Florida*, *supra*, 560 U.S. at pp. 320–321.)

As noted in Argument II, *infra*, the hallmarks of youth, the very features that make the imposition of the death penalty unconstitutional when applied to offenders less than 18, apply with equal or greater force to those who are aged 18–21. California's recent enactment of legislation to grant a meaningful opportunity for parole to offenders who committed crimes before age 23 recognizes that individuals, especially males, do not magically become adults at age 18:

> Science, law, and common sense support the appropriateness of SB 260 youth offender parole hearings for young adults between the age of 18 and 23. Recent scientific evidence on adolescent and young adult development and neuroscience shows that certain areas of the brain - particularly those affecting judgment and decision-making - do not fully develop until the early-to-mid-20s. Various studies by researchers from Stanford University (2009), University of Alberta (2011), and the National Institute of Mental Health (2011) all confirm that the process of brain development continues well beyond age 18. This research has been relied on by judges and lawmakers. The U.S. and California Supreme Courts have recognized in several recent opinions that adolescents are still developing in ways relevant to their culpability for criminal behavior and their special capacity to turn their lives around. California already recognizes the uniqueness of young adults in its Department of Juvenile Justice (DJJ). DJJ is mandated to detain and provide services and programming to some young adults until age 23. The

> state has recognized early adulthood as a vulnerable period in other arenas as well, for example, extending foster care support beyond age 18 to age 21 in AB 12 (Beall, 2010). As recently as 2013, the Legislature passed AB 1276 (Bloom), which provided special protections and opportunities for young adults through age 22 entering prison.

(Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 261 (2015–2016 Reg. Sess.), as amended June 1, 2015, pp. 3–4.)

Not only do persons aged 18–21 suddenly become more culpable than those who are less than 18, the features identified in *Graham* that impair the quality of representation of a juvenile and therefore undermine the reliability of death penalty judgments in juvenile cases – mistrust of adults, inability work effectively with the lawyer to assist their defense, limited understanding of the criminal justice system, difficulty in weighing long-term consequences, impulsiveness, and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects – are just as much features of persons aged 18–21 as they are of those less than 18 years. (See *Graham v. Florida*, *supra*, 560 U.S. at pp. 320–321.)

B. Reversal of appellant's death sentence is required.

The scientific literature demonstrates that similar to juveniles under 18, late adolescents like the 21-year-old Alfred Flores possess a lack of maturity and under-developed decision-making process that undermine the reliability of the proceedings that

lead to death. Similarly, the very mitigating aspect of youth is a two-edged sword that makes the imposition of death more, rather than less, likely. This presents too great a risk that constitutionally protected mitigation cannot be reliably assessed, and this unreliability means that the death penalty cannot be constitutionally imposed. (U.S. Const., Amends. VIII, XIV.) The death penalty must be reversed.

IV. The Trial Court Improperly Permitted the Prosecutor and Defense Counsel to Remove Prospective Jurors from the Pool of Jurors to Be Selected for Voir Dire by Mutual Agreement, Violating the Statutory Procedures and Policies Established by the Legislature.

Before voir dire, the trial court permitted defense counsel and the prosecution to review the questionnaires completed by prospective jurors and then remove from the jury pool, by mutual agreement, any prospective jurors they wished. In doing so the court violated the procedures established by the Legislature in Code of Civil Procedure sections 222 and 223 and the legislative policy expressed in section 191. Moreover, because the procedures set forth in these provisions implicate public policy, and not simply the private rights of the parties, Civil Code section 3513 barred their waiver. Given the importance of the policies involved and the requirements of these statutes, the only way to ensure compliance with the Legislature's mandated procedures is to reverse appellant's conviction.

A. Factual background.

Jury selection began on October 15, 2002. (3 RT 339.) Before selection began, the parties stipulated that the jury commissioner could excuse jurors who demonstrated “obvious hardship.” (2 RT 169.) On that day, 212 potential jurors were called for jury service. Out of that pool, the parties stipulated to excuse 119 persons for hardship. (3 RT 344–359; 369–405.) The next day, a second pool of 177 persons were called for service, and 113 were excused by stipulation. (3 RT 408–433; 438–482.) On the third day, a pool of 153 jurors were called, and 89 were excused by stipulation. (3 RT 483–505; 506–534.) On the fourth day, 141 persons were called, and 93 were excused by stipulation. (3 RT 535–557; 557–581.) The remaining jurors then filled out case-specific questionnaires. (3 RT 339.) After reviewing the questionnaires, the attorneys stipulated to the removal of an additional 60 potential jurors for cause. (4 RT 602–609.) Thus, fully two-thirds of the potential jurors were excused from service before voir dire began.

B. Allowing counsel to remove potential jurors from the jury pool violated Code of Civil Procedure sections 222 and 223.

Civil Procedure Code sections 222 and 223 establish the procedures for conducting voir dire in criminal cases. Section 222 provides that potential jurors are to be randomly selected for voir dire. Section 223 provides, among other things, that: “In a criminal case, the court shall conduct an initial examination of

prospective jurors." (Code Civ. Proc., § 223.) By allowing counsel to remove potential jurors by agreement from the pool of potential jurors, the trial court violated both of these provisions.

The procedure used in appellant's trial upends the entire system crafted by the Legislature for ensuring that jurors are randomly selected. The system begins with the jury commissioner randomly selecting potential jurors for the venire from source lists that represent a cross section of the community. (Code Civ. Proc., § 197.) From these lists the jury commissioner, again using random selection, creates a master list to be used in summoning jurors. (Code Civ. Proc., § 198.) Once the court summons potential jurors the Legislature again requires the use of random selection in assigning those potential jurors to courtrooms for voir dire. (Code Civ. Proc., § 219.)

Finally, once in the courtroom, section 222 mandates that the court randomly select prospective jurors for voir dire. By allowing counsel to systematically remove potential jurors from the pool to be called for voir dire, the court evaded the requirement that jurors be randomly called for voir dire.

The procedure used at trial here also ignores the requirement in section 223 that the attorneys are not to be involved in jury selection until after the trial court conducts the initial questioning of the jurors. Only then may the attorneys question the potential jurors and seek to remove them. Moreover, potential jurors may be removed only for cause, with the judge determining whether the legal standard has been met, or through peremptory challenges, which are limited in number by statute. (Code Civ. Proc., § 231.)

Additionally, the removal of jurors is subject to the constitutional limits of *Batson v. Kentucky* (1986) 476 U.S. 79, *People v. Wheeler* (1978) 22 Cal.3d 258, and Code of Civil Procedure section 231.5.

C. This claim is cognizable on appeal because Civil Code section 3513 prohibits waiver of the requirements of sections 222 and 223.

This Court has previously ruled that violations of both section 222 and section 223 can be waived and are subject to forfeiture in the absence of an objection. (See, e.g., *People v. Visciotti* (1992) 2 Cal.4th 1, 38 *(Visciotti)* [Code Civ. Proc., § 222]; *People v. Benavides* (2005) 35 Cal.4th 69, 88 [Code Civ. Proc., § 223].) However, the court did not consider the effect of Civil Code section 3513 in those cases.

Section 3513 provides that "Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." Previous cases have not addressed whether section 3513 bars a defendant from waiving the procedures required by either section 222 or 223. For section 3513 to bar waiver the public benefit must be more than "incidental" as "[s]ome public benefit is ... inherent in most legislation. The pertinent inquiry, therefore, is not whether the law has any public benefit, but whether that benefit is merely incidental to the legislation's primary purpose." (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1049, abrogated on other grounds as noted in *DeBerard Props., Ltd. v. Lim* (1999) 20 Cal.4th 659, 668.)

1. Waiver in criminal cases is limited to rights that are solely for the defendant's benefit and do not implicate public policy concerns.

While the ability of criminal defendants to waive their rights is, in some respects, fairly broad, this Court has held that it is limited by public policy concerns. "An accused may waive any rights in which the public does not have an interest and if waiver of the right is not against public policy. [Citation.]" (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371 *(Cowan)*.) Courts have allowed the defendant to waive rights where explicitly permitted, or at a minimum not prohibited by statute. It also shows that many circumstances characterized as the waiver of rights are actually the result of the enforcement of certain constitutional or statutory rights.

In *Cowan,* the defendant was charged with murder and sought to waive the statute of limitations so that he could plead guilty to the lesser included offense of voluntary manslaughter, on which the statute of limitations had run. (*Cowan*, *supra*, 14 Cal.4th at p. 370.) This Court held that while the statute of limitations defense could not be forfeited, it could be waived under specific conditions: "(1) the waiver is knowing, intelligent, and voluntary; (2) it is made for the defendant's benefit and after consultation with counsel; and (3) the defendant's waiver does not handicap his defense or contravene any other public policy reasons motivating the enactment of the statutes. [Citation.]" (*Id.* at p. 372.)

Cowan listed several rights that can be waived. (*Cowan*, *supra*, 14 Cal.4th at p. 371, citing *People v. Robertson* (1989) 48 Cal.3d 18, 61.) These include the right to waive presence, a jury

trial, and the right to counsel, as well as the rights to plead guilty, to testify to a preference for a death sentence, and to decline to participate in the penalty phase. (*Robertson, supra*, 48 Cal.3d at p. 61.) However, all of these waivers are distinguishable from the waiver of the procedures required by sections 222 and 223.

Statutory provisions specifically allow the waiver of some of these rights, such as the right to a jury trial (see Cal. Const., art. I, § 16), or the right to be present (see Pen. Code, § 977). The right to plead guilty is also statutory, and is circumscribed by statute, in that counsel's consent is required in a capital case. Counsel's consent cannot be waived as "a guilty plea has more immediate and drastic consequences than even a judicial confession; second, and most importantly, the Legislature has spoken on the subject of guilty pleas." (*People v. Chadd* (1981) 28 Cal.3d 739, 750, fn.7.) Notably, then, statutory directives may limit the scope of rights that may be waived.

Other waivers mentioned in *Robertson* are not waivers at all. For example, what is often characterized as the "waiver" of the right to counsel is more properly viewed as "the right of self-representation." (*Faretta v. California* (1975) 422 U.S. 806, 817.) And courts have imposed stringent requirements for defendants choosing self-representation. "[I]n order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits. [Citations.] . . . [H]e should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' [Citation.]" (*Id.* at p. 835.) A court may also deny a defendant's request for self-representation if it

finds that the defendant, while mentally competent to stand trial if assisted by counsel, is not mentally competent to engage in self-representation. (In*diana v. Edwards* (2008) 554 U.S. 164, 167.) The right to decline to present a defense is also a component of the right to self-representation. (*People v. Teron* (1979) 23 Cal.3d 103, 113, disapproved of on other grounds by *People v. Chadd*, *supra*, 28 Cal.3d 739.)

Similarly, the right to testify to a preference of death is a component of the right to testify. (*People v. Guzman* (1988) 45 Cal.3d 915, 962, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046.) Thus, while it is often viewed broadly, some acts characterized as waivers are actually the implementation of constitutional rights and true waivers in criminal cases are regularly limited by policy concerns and legislative directives.

2. A court may not allow the waiver of duties and procedures explicitly imposed on it by the Legislature to serve a public purpose.

Sections 222 and 223 differ from the examples of permissible waivers discussed above in that they serve a public policy goal identified by the Legislature, which has imposed a duty on the court to follow their procedures, and include no provision permitting those procedures to be waived. This is significant because the courts have held that a defendant cannot waive requirements imposed by the Legislature on courts in criminal cases where those requirements serve a public purpose. In *People v. Stanworth* (1969) 71 Cal.2d 820, 833–834, this Court held that a capital defendant may not waive the statutorily required

automatic direct appeal. This is so because the statute not only manifested a concern for the defendant "but has also imposed a duty upon this court to make such review." (*Ibid.*) This Court held that it could not "avoid or abdicate this duty merely because defendant desires to waive the right provided for him." (*Ibid.*) "The law cannot suffer the state's interest and concern in the observance and enforcement of this policy to be thwarted through the guise of waiver of a personal right by an individual. 'Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.' (Civ. Code, § 3513.) [Citation.]" (*Id.* at p. 834.)

In *People v. Massie* (1998) 19 Cal.4th 550, 566,570–571, the court reaffirmed *Stanworth* and extended it, holding that a capital defendant has neither the right to self-representation nor to decide which issues should be raised on appeal, a position subsequently adopted with regard to all criminal appeals by the United States Supreme Court. (*Martinez v. Court of Appeal of California, Fourth Appellate Dist.* (2000) 528 U.S. 152, 163.)

Moreover, *Stanworth* cites with approval to *People v. Werwee* (1952) 112 Cal.App.2d 494, 499, superseded by statute as noted in *People v. Chain* (1971) 22 Cal.App.3d 493, 497, which barred a defendant from waiving a then existing statutory requirement that the jury not separate after deliberations had begun. "If it should be contended that a defendant under such circumstances waived his right to claim irregularity in the separation of the jury by consenting to it, our answer would be that he could not waive the right to have the statutory procedure observed." (*Id.* at p. 499.) The court explained: "Although a defendant may waive

rights which exist for his own benefit, be may not waive those which belong also to the public generally. If the prosecution and the defendant should be permitted to adopt their own procedure, wholly at variance with that prescribed by statute for the conduct of criminal cases, confusion and uncertainty would exist, and if it should become the custom to permit separation of jurors after submission of the cause, the tendency would be toward a lessened respect for and confidence in the independence of jurors and the justness of their verdicts. The law is mandatory. It does not give the parties the right to agree to a separation. If that exception is to be written into the law it must be by the Legislature, not the courts." (*Id.* at p. 500; see also *People v. Blakeman* (1959) 170 Cal.App.2d 596 [citing section 3513 and holding a defendant may not waive the invalidity of banishment from the county as a probation condition].)

In *People v. Chadd*, *supra*, 28 Cal.3d at pages 746–753, this Court held that a trial court may not waive the requirement in Penal Code section 1018 that counsel must consent before a capital defendant may plead guilty, and further held that, while a defendant has a right to self-representation, there is no concomitant right to waive counsel for a guilty plea. In *Chadd*, the defendant sought to overturn his guilty plea, which the trial court had allowed over defense counsel's objection. In overturning the plea, this Court noted that the statute required "that no guilty plea to a capital offense shall be received 'without the consent of the defendant's counsel.' It is settled that 'When statutory language is thus clear and unambiguous there is no need for construction, and courts should not indulge in it.' [Citation.]" (*People v. Chadd*, *supra*, at p. 746.) This Court also

held that the Attorney General's argument to the contrary "fails to recognize the larger public interest at stake in pleas of guilty to capital offenses. It is true that in our system of justice the decision as to how to plead to a criminal charge is personal to the defendant: because the life, liberty or property at stake is his, so also is the choice of plea. [Citation.] But it is no less true that the Legislature has the power to regulate, in the public interest, the manner in which that choice is exercised. Thus, it is the legislative prerogative to specify which pleas the defendant may elect to enter (Pen. Code, § 1016), when he may do so (*id.*, § 1003), where and how he must plead (*id.*, § 1017), and what the effects are of making or not making certain pleas." (*People v. Chadd*, *supra*, at pp. 747–748.)

Outside the context of statutory commands, this Court has also limited a defendant's ability to waive certain rights where policy concerns are implicated. Thus, courts may deny a defendant's waiver of a conflict of interest and remove defense counsel if it finds that such an action is necessary "in order to eliminate potential conflicts, ensure adequate representation, or prevent substantial impairment of court proceedings . . . . [Citation.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 995.) Courts also must instruct on lesser included offenses that the evidence supports, even over a defendant's express objection. (*People v. Breverman* (1998) 19 Cal.4th 142, 154–155.) "These policies reflect concern not only for the rights of the accused, but also for the overall administration of justice. [Citation.]" (*Id.* at p. 155.)

Taken together these cases stand for the proposition that both precedent and section 3513 bar the waiver of certain rights and

procedural protections, and in particular, requirements that the Legislature has specifically imposed on the courts that implicate a public purpose or benefit.

3. The jury selection procedures mandated by the Legislature serve the public interest and therefore cannot be waived under section 3513.

Like the cases discussed above, this case involves the purported waiver of procedures mandated by statute to further the Legislature's public policy goals. It thus runs afoul of the holdings of those cases, including the holding in *Stanworth* that a court cannot "avoid or abdicate [a] duty merely because defendant desires to waive the right provided for him." (*People v. Stanworth*, *supra*, 71 Cal.2d at p. 833.) The Legislature expressed its interest in and concern for jury selection policies in 1988, when it passed A.B. 2617, the "Trial Jury Selection and Management Act." (Code Civ. Proc., § 190; 1988 Cal. Legis. Serv. 1245 (West).) According to the Legislative Counsel's digest the bill enacted "an extensive revision of the law with respect to juries," which included changes to "the selection of jury panels, voir dire, and challenges to jurors." (1988 Cal. Legis. Serv. 1245 (West).) In this bill, the Legislature enacted and repealed numerous provisions, creating a comprehensive system for jury selection.

The importance of the jury selection process has not only been recognized by the Legislature in carefully constructing that process, but also by the Judicial Council. The Council has undertaken two major examinations of California's jury system in

the last twenty years, The Blue Ribbon Commission on Jury System Improvement[6] and the Task Force On Jury System Improvements.[7] These examinations have included recognition of the important public interest implicated in the process for selecting juries: "A properly conducted voir dire is critical to a fair trial and to promote respect by litigants and the public for the jury's decision." (Blue Ribbon Report at p. 51.)

The procedure used here violated the Legislature's carefully crafted scheme for selecting jurors. It violated the provisions of section 222, requiring random selection of jurors, and in doing so violated the policy set forth in Code of Civil Procedure section 191. It also violated the voir dire procedures required by section 223, and in doing so created a new avenue for removing potential jurors not contemplated in any statute.

a. By allowing attorneys to remove jurors from the pool of prospective jurors who could be selected for voir dire the trial court violated the statutory provisions and legislative policy mandating random selection of jurors.

In section 191 the Legislature "recognizes that trial by jury is a cherished constitutional right, and that jury service is an obligation of citizenship." That section states that "[i]t is the

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[6] See Final Report of the Blue Ribbon Commission on Jury System Improvement (1996) (Blue Ribbon Report) available at http://www.courts.ca.gov/documents/BlueRibbonFullReport.pdf.

[7] See Final Report of Task Force on Jury System Improvements (2004) (Task Force Report) available at http://www.courts.ca.gov/documents/tfjsLfinal.pdf.

policy of the State of California that all persons selected for jury service shall be selected at random from the population of the area served by the court; that all qualified persons have an equal opportunity, in accordance with this chapter, to be considered for jury service in the state and an obligation to serve as jurors when summoned for that purpose; . . . " (Code Civ. Proc., § 191, italics added.) Section 222 is part of the means by which the Legislature effectuates this goal. In that section the Legislature requires that either the clerk of the court or the jury commissioner ensure that jurors are seated for voir dire in random order. Such procedures are also called for by the American Bar Association (ABA) Principles for Juries and Jury Trials (2005), Principle 1O.B.2. ("Courts should use random selection procedures in . . . assigning jurors to panels [and] calling jurors for voir dire."). (See also ABA Stds. Relating to Juror Use and Management (1993) std.3(b)(iii).)

In *Visciotti*, this Court recognized that section 191 establishes a state policy in favor of random selection of juries. (*Visciotti*, *supra*, 2 Cal.4th at p. 38.) However, this Court also stated that "equally important policies mandate that criminal convictions not be overturned on the basis of irregularities in jury selection to which the defendant did not object or in which he has acquiesced." (*Ibid.*) It thus concluded that "[w]hile the parties are not free to waive, and the court is not free to forego, compliance with the statutory procedures which are designed to further the policy of random selection . . . failure to object will . . . continue to constitute a waiver of a claim of error on appeal." (*Ibid.*) This Court thus allowed the waiver of a provision it said could not be waived, and in doing so favored the policy of requiring an

objection over the policies set forth by the Legislature in section 191. This Court apparently reached this conclusion without considering section 3513.

The ruling in *Visciotti* is inconsistent with both the text and intent of section 3513. As this Court stated in *Visciotti*, section 191 contains a statement of the Legislature's public policy concerns. If policy concerns regarding preservation of error can override the requirements of section 3513, it would be rendered a nullity. By its nature section 3513 is most often relevant where there has been a waiver. If section 3513 cannot be enforced where the underlying error below has not been preserved due to the very waiver that section 3513 barred, it will almost never be enforceable.

Allowing counsel to review the questionnaires of the entire pool of potential jurors and agree on jurors to remove from consideration for jury service frustrates the state policy explicitly set forth in section 191 and effectuated by section 222. Rather than potential jurors being randomly selected for questioning, counsel can systematically remove potential jurors from the available pool in a secret, off the record, unsupervised proceeding. This upends the system of jury selection designed by the Legislature to effect its policy goals. The system crafted by the Legislature begins when the jury commissioner randomly selects potential jurors for the venire from source lists representing a cross section of the community. (Code Civ. Proc., § 197.) From these lists the jury commissioner, again using random selection, creates a master list to be used in summoning jurors. (Code Civ. Proc., § 198.) Once the court summons potential jurors the Legislature again requires the use of random selection in

assigning those potential jurors to courtrooms for voir dire. (Code Civ. Proc., § 219.) Finally, once in the courtroom, section 222 mandates that the court randomly select prospective jurors for voir dire. Even at this point the attorneys are not involved since, as discussed further below, section 223 directs that the court conduct the initial questioning of the jurors. If the potential jurors are systematically culled by counsel, potential jurors are no longer being randomly selected for voir dire.

The approach used in this case is especially pernicious because it not only prevents jurors from sitting on a particular case, it prevents them from sitting on any case. This is because, under Government Code section 68550 and California Rules of Court, rule 2.1002, jurors are limited to one trial or one day on call. Thus, once excused from this case, the potential jurors were removed from the jury pool for at least one year. (Cal. Rules of Court, rule 2.1 008(e).) This violates the "policy of the State of California that all persons selected for jury service shall be selected at random . . . [and] that all qualified persons have an equal opportunity . . . to be considered for jury service." (Code Civ. Proc., § 191.)

Allowing the wholesale removal of potential jurors from the available pool before they can be randomly selected for voir dire constitutes a material departure from the statutory procedures set forth by the Legislature. (See *People v. Johnson* (1894) 104 Cal. 418, 419 *(Johnson)* [allowing bailiff to select jurors to be called for voir dire "departed materially" from statutory procedures for selecting a jury.]) In *Visciotti*, this Court held that because the improper procedure only involved the first 12 jurors and those jurors had already been examined in an initial round of

voir dire and sequestered Hovey voir dire, it did not constitute a material departure. (*Visciotti*, *supra*, 2 Cal.4th at pp. 40–41.) In finding no material departure, *Visciotti* noted that it was "not faced here with a complete abandonment of random selection." (*Id*. at p. 40.) This is exactly what this Court faces here. In *People v. Wright* (1990) 52 Ca1.3d 367, 393, disapproved of on other grounds by *People v. Williams* (2010) 49 Ca1.4th 405, the trial judge designated the first twenty-one potential jurors who entered the court room as the first group for voir dire. This Court held that this was not a material departure because the rest of the potential jurors were called randomly and no individual controlled the order in which the potential jurors would enter. (*Id*. at p. 395.) This stands in stark contrast to the situation here where the improper method of selection affected the entire jury pool and most certainly involved intentional selection by counsel.

b. By allowing attorneys to remove jurors from the pool of prospective jurors available for voir dire the court violated the statutory requirement that the court conduct the preliminary examination of jurors.

In addition to frustrating the Legislature's policy requiring that jurors be fairly and randomly selected at every stage, removal of jurors by counsel also frustrates the Legislature's specific and carefully crafted system for examining and excusing jurors. Section 223 specifies that the process "shall" begin with an examination of prospective jurors conducted by the judge. Only after the judge has completed that initial examination do the

attorneys have the right to conduct voir dire. The statute also specifies that the only purpose of voir dire is to "aid in the exercise of challenges for cause." (Code Civ. Proc., § 222.) The Legislature has specified when and in what order counsel may make challenges. (Code Civ. Proc., §§ 226, 227.) It has also limited counsel to two methods of excusing potential jurors: challenges for cause and peremptory challenges. (Code Civ. Proc., § 225.) The basis for cause challenges are set forth in detail and the judge must rule on them. (Code Civ. Proc., §§ 229, 230.) Peremptory challenges are strictly limited in number and cannot be based on bias. (Code Civ. Proc., §§ 231, 231.5.)

The language in section 223 requiring a judge to conduct the preliminary examination is also in the ABA Principles for Juries and Jury Trials. (See ABA Principles for Juries and Jury Trials (2005) principle 11.B. [stating that "[t]he voir dire process should be held on the record" and that "[q]uestioning of the jurors should be conducted initially by the court"]; see also ABA Stds. for Crim. Justice, Trial by Jury Stds. (1996) std. 15–2.4 ["Questioning of jurors should be conducted initially by the court"]; ABA Stds. Relating to Juror Use and Management (1993) std. 7(b) ["The trial judge should conduct a preliminary voir dire examination. Counsel should then be permitted to question panel members for a reasonable period of time"].)

Batson, and cases following it, also demonstrate that the public, and not only the defendant, have an interest in a nondiscriminatory jury selection process. "Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try . . . by denying a person participation in jury service on account of his race, the State

unconstitutionally discriminate[s] against the excluded juror." (*Batson, supra,* 476 U.S. at p. 87.) Moreover, "harm from discriminatory jury selection extends beyond that inf1icted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. Discrimination within the judicial system is most pernicious because it is a stimulant to that race prejudice which is an impediment to securing to black citizens that equal justice which the law aims to secure to all others." (*Id*. at pp. 87–88; see also *Miller-El v. Dretke* (2005) 545 U.S. 231, 238 [finding that the harm of discrimination in jury selection is not "confined to minorities. When the government's choice of jurors is tainted with racial bias, that 'overt wrong . . . casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial. ... ' [Citation.] That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality,' [citation] and undermines public confidence in adjudication [Citation.]".) The procedure permitted here allows the parties to trade discriminatory removal of potential jurors and would thus undermine the entire structure that *Batson* created to forestall racial discrimination in jury selection. In the ordinary course of voir dire counsel has an incentive to challenge the exercise of discriminatory peremptory challenges. However, in the context of the sort of horse trading that secret stipulated removals allow, counsel may choose to overlook opposing counsel's discriminatory action in exchange for the removal of other prospective jurors.

The procedure also frustrates the public policy requiring that voir dire be open to the public. (*Press-Enter. Co. v. Superior Court of California, Riverside Cnty.* (1984) 464 U.S. 501.) "The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." (*Id.* at p. 505; see also ABA Principles for Juries and Jury Trials (2005) principle 7.A.l. ["Juror voir dire should be open and accessible for public view" unless there is "a finding by the court that there is a threat to the safety of the jurors or evidence of attempts to intimidate or influence the jury"]; *Waller v. Georgia* (1984) 467 U.S. 39, 50.)

This procedure also recreates many of the problems inherent in peremptory challenges, but in greatly magnified form. Commentators and courts have long expressed concern about peremptory challenges, and whether they should be limited or eliminated. As the Blue Ribbon report noted "many scholars [have] forecast or call[ed] for the outright abolition of [peremptory challenges]. See, e.g., Susan A. Winchurch, J.E.B. v. Alabama Ex Rel. T.E.: The Supreme Court Moves Closer to Elimination of the Peremptory Challenge, 54 Md. L. Rev. 261 (1995); Felice Banker, Eliminating a Safe Haven for Discrimination: Why New York Must Ban Peremptory Challenges From Jury Selection, 3 J.L. & Policy 605 (1995). See also *Batson v. Kentucky*, *supra*, 476 U.S. at p. 102 (Marshall, J., concurring) [calling for abolition of peremptory challenges].)

The problems inherent in peremptory challenges are magnified here by the removal of the process from public view and the lack of either judicial oversight or numerical limitations. The Blue Ribbon Report noted that peremptory challenges "can

defeat the attempt to create a trial jury that is a fair cross section of the community." (Blue Ribbon Report at p. 56.) This risk is more pronounced in the case of stipulated removals.

D. The trial court's error requires reversal of the conviction.

Where a trial court has violated section 3513 by improperly permitting a defendant to waive a right that cannot be waived, the record will often contain no showing of the prejudice resulting from the error. Although defense counsel's agreement to the procedure was improper, that agreement would naturally mean that counsel would make no effort to preserve evidence of prejudice. This is the kind of situation in which it will often, if not always, be impossible for a defendant to demonstrate prejudice, thus, it should be considered structural error.

As in other instances where structural error has been applied, the secret, unexplained, unsupervised removal of potential jurors has "consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 282 [holding that harmless error does not apply where the jury was not properly instructed on the reasonable doubt standard].) The guarantee of a trial by jury is "a basic protection whose precise effects are unmeasurable" and the consequences of its depravation "are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" (*Id.* at pp. 281–282; see also *Batson v. Kentucky*, *supra*, 476 U.S. at p. 100 [holding discrimination in selection of trial jurors requires reversal

without consideration of prejudice]; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 283 [same].) It is appropriate to find an error "structural" where "the difficulty of assessing the effect of the error" precludes harmless error analysis. (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 156, fn. 4 [denying indigent defendant counsel of choice is structural error].)

Similarly, in the case of judicial bias, a judge's "actual motivations are hidden from review," and the court must, therefore, "presume that the process was impaired." (*Vasquez v. Hillery, supra*, 474 U.S. at p. 263, citing *Tumey v. Ohio* (1927) 273 U.S. 510.) When the right to a public trial is denied "a requirement that prejudice be shown 'would in most cases deprive [the defendant] of the [public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury.' [Citation.] While the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real." (*Waller v. Georgia*, *supra*, 467 U.S. at p. 50, fn. 9.) Automatic reversal is also required where an indigent defendant has been denied a transcript of a first trial on retrial because "there is no way of knowing" how "adroit counsel assisted by the transcript to which the defendant was entitled might have been able to impeach or rebut any given item of evidence." (*People v. Hosner* (1975) 15 Cal.3d 60, 70.) A reviewing court could only "hypothesize what use at the latter trial could have been made of the transcript. [] To paraphrase Mr. Justice Cardozo's epitaph for the National Industrial Recovery Act, this would be speculation running riot." (*Ibid.*)

In *Werwee*, a case discussed above that involved the then improper separation of a deliberating jury, the court applied the established standard that in such a circumstance prejudice would be presumed, and that the burden was on the government to show otherwise. (*People v. Werwee*, *supra*, 112 Cal.App.2d at p. 496.) Such a rule was necessary "because it would be impossible in almost every case for the prisoner to establish the fact of any corrupt or improper communications between the juror and others." (*Id.* at p. 498, quoting *People v. Backus* (1855) 5 Cal. 275, 276.)

People of Territory of Guam v. Marquez (9th Cir. 1992) 963 F.2d 1311, is particularly instructive as it also involved a situation in which the trial court's error resulted in a record inadequate to allow harmless error analysis. In *Marquez*, the trial court submitted instructions on the elements of the offense in writing, rather than reading them to the jury. (*Id.* at p. 1314.) The court held that this made it impossible to show prejudice, since the record was silent as to whether the jurors had read the instructions. (*Id.* at pp. 1315–1316.) The court also noted that, as a matter of due process, an appellant is entitled to "a record of sufficient completeness so that he or she can demonstrate that prejudicial error occurred during the trial." (*Id.* at p. 1315, quoting *Mayer v. City of Chicago* (1971) 404 U.S. 189, 194.)

Also instructive are *Riley v. Deeds* (9th Cir. 1995) 56 F.3d 1117, and *United States v. Mortimer* (3d Cir. 1998) 161 F.3d 240. Both cases involved the judge's absence from court during a critical stage of the proceedings, a read back of testimony to the jury in Riley and defense closing arguments in Mortimer. In both cases, the courts found that the error was structural. (*Id.* at p.

1120; *United States v. Mortimer*, *supra*, at p. 242.) "A conviction obtained after a proceeding in which no judge presided and no judicial discretion was exercised is 'abhorrent to democratic conceptions of justice.' [Citation.] In these circumstances, there is a breakdown in the construct of the trial, a structural collapse so severe that its effect on the trial cannot be 'quantitatively assessed in the context of the other evidence presented.' In short, the error is structural and is not susceptible to harmless error analysis." (*Riley v. Deeds*, *supra*, at p. 1120.)

Similarly here, the judge abandoned her role, allowing counsel to meet in her absence to choose potential jurors to be removed and then removing them without question or explanation. Because the nature of the error here, allowing an improper waiver, is such that prejudice would almost never be visible in the record, requiring a showing of prejudice would make deterring the error impossible. The United States Supreme Court recognized this problem in rejecting the application of harmless error to racial discrimination in the selection of grand jurors. (*Vasquez v. Hillery, supra*, 474 U.S. at p. 261.) The court rejected the argument that any harm was cured by the defendant's conviction, in part because per se reversal was "the only effective remedy for this violation" and was necessary to deter future violations. (*Id*. at p. 263.) Just as racial discrimination in grand jury selection would continue if rendered harmless by a later conviction, improper waiver of California's jury selection procedures will continue if that waiver, the very wrongdoing at issue, renders itself unreviewable.

Because, by its very nature, the error here moved an entire critical portion of the trial out of view and off the record, it is

impossible to know what the motivations or rationales of counsel were for removing potential jurors. No explanation for the removals was requested by, or offered to, the trial court. Due to the trial court's error in allowing the waiver, it is thus impossible for appellant to show, or the court to determine, whether prejudice resulted from the error and this Court should, therefore, find the error reversible per se.

Conclusion

For the reasons stated above, and in the appellant's other briefs on file, the convictions and judgment should be reversed.

Respectfully submitted,

Dated: June 20, 2019 By: /s/ Robert Derham

Attorney for Defendant and
Appellant Alfred Flores III

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