No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TODD JESSE GARTON, *Petitioner,*

vs.

STATE OF CALIFORNIA, *Respondent*.

ON A PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

DEATH PENALTY CASE

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QUESTION PRESENTED

Whether refusing to permit an in-custody defendant charged with murdering his wife and unborn child to wear his wedding ring during trial violates his constitutional rights to wear civilian attire during trial, to a meaningful opportunity to present a complete defense, and to a reliable guilt and penalty determination.

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TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS 1

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 4

1. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER REFUSING TO PERMIT AN IN-CUSTODY DEFENDANT CHARGED WITH MURDERING HIS WIFE AND UNBORN CHILD TO WEAR HIS WEDDING RING DURING TRIAL VIOLATES HIS CONSTITUTIONAL RIGHTS TO WEAR CIVILIAN ATTIRE DURING TRIAL, TO A MEANINGFUL OPPORTUNITY TO PRESENT A COMPLETE DEFENSE, AND TO A RELIABLE GUILT AND PENALTY DETERMINATION 4

CONCLUSION 12

INDEX TO APPENDICES

APPENDIX A: Opinion in *People v. Garton*, 4 Cal.5th 485 [229 Cal.Rptr.3d 624, 412 P.3d 315] (2018)

APPENDIX B: Order denying Rehearing

* * *

TABLE OF AUTHORITIES

Pages

FEDERAL CASES

Carella v. California
491 U.S. 263 (1989) 12

Chapman v. California
(1967) 386 U.S. 18 13

Crane v. Kentucky
476 U.S. 683 (1986) 12

Estelle v. Williams
425 U.S. 501 (1976) 11

Estes v. Texas
381 U.S. 532 (1965) 11

Govt. of the Virgin Islands v. Aquino
378 F.2d 540 (3d Cir. 1967) 9

Griffin v. Illinois
351 U.S. 12 (1956)) 11

Holmes v. South Carolina
547 U.S. 319 (2006) 12

In re Murchison
349 U.S. 133 (1955) 11

In re Winship
397 U.S. 358 (1970) 11

Mattox v United States
156 U.S. 237 (1895) 9

Taylor v. Kentucky
436 U.S. 478 (1978) 12

United States v. Yida
498 F.3d 945 (9th Cir. 2007) 9

STATE CASES

Creamer v. Bivert
113 S.W. 1118 (Mo. 1908) 9

Eaddy v. People
115 Colo. 488, 492 [174 P.2d 717] (1946) 11

FEDERAL STATUTE

28 U.S.C. § 1257 2

OTHER AUTHORITIES

3 Blackstone, Commentaries 8-9

California Jury Instructions Criminal CALJIC No. 2.20 8

Cal. Evidence Code §780 8

Hale, The History and Analysis of the Common Law of England (1713) 9

Mary Fairchild, About.com Guide, Exchanging of the Rings, Tips for your Christian Wedding Ceremony, http://christianity.about.com/od/christianweddingelements/qt/2exchangerings.htm (as of March 20, 2018) 10

Dario Maestripieri, Ph.D., Psychology Today, The Wedding Ring and Human Behavior: Current Research and Future Directions. Why some married people don't wear a wedding ring. https://www.psychologytoday.com/us/blog/games-primates-play/201207/the-wedding-ring-and-human-behavior-current-research-and-future (as of March 20, 2018) . 10

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PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner Todd Jesse Garton respectfully prays that a Writ of Certiorari issue to review the decision of the Supreme Court of the State of California affirming his conviction and sentence of death.

* * *

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were petitioner, Todd Jesse Garton, and respondent, the People of the State of California.

* * *

OPINION BELOW

The California Supreme Court issued an opinion in this case on March 5,

2018, reported as *People v. Garton*, 4 Cal.5th 485 [229 Cal.Rptr.3d 624, 412 P.3d 315] (2018). A copy of the opinion is attached as Appendix A. Rehearing was denied on May 16, 2018. A copy of the order is attached as Appendix B.

* * *

JURISDICTION

The California Supreme Court entered its judgment by denying rehearing on May 16, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

* * *

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall be . . . . deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . . "

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws."

* * *

STATEMENT OF THE CASE

Petitioner was convicted by jury of first degree murder and conspiracy to murder his wife and her fetus, and conspiracy to murder a codefendant's husband. The jury found true special circumstance allegations (eligibility factors) that petitioner committed multiple murders, that he committed the murders for financial gain, and that a principal in each offense was armed with a firearm. The jury returned a verdict of death. App. A at 1.

At a pretrial hearing, petitioner requested that the trial court allow him to wear his wedding ring during trial. The prosecutor opposed the request for security reasons. The court found the request "problematic" and indicated it would discuss the request with the bailiff. App. A at 14.

The trial judge said at a subsequent hearing that he had spoken with his marshal and summarized the reasons the jail does not generally allow jewelry to be worn by inmates: jewelry can be made into a weapon or used for barter, even if the original wearer does not so intend. The court also noted that petitioner would be wearing a tie and belt at trial, and said "[t]here [are] roughly at least a hundred opportunities for the busy Marshal to inadvertently miss one of the now four items, two of which are small and not readily visible, to be missed and find their way back to the jail." App. A at 15.

Defense counsel argued, "[A]ny other defendant who is not in custody in this

court . . . would obviously come in wearing a wedding ring, if that's their normal course. And so what we're now saying is that he is being deprived of the rights that any other person would have to correctly appear or make a normal appearance before a jury because of the no-bail situation . . . . And the fact that he does not have a wedding ring could well be interpreted by jurors as abandonment of his wife, in some sense or another." The court was not persuaded and said: "[C]ounsel, there are a great many married men who never have worn wedding rings. It would really shock me to think that any juror would start making negative assumptions about a man whose wife died roughly two years ago because he isn't currently wearing a ring, never having any knowledge about whether he ever wore a ring." The court denied petitioner's request. App. A 15-16. Petitioner took the stand, without his wedding ring, and testified in his own behalf. App. A at 10-13.

* * *

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER REFUSING TO PERMIT AN IN-CUSTODY DEFENDANT CHARGED WITH MURDERING HIS WIFE AND UNBORN CHILD TO WEAR HIS WEDDING RING DURING TRIAL VIOLATES HIS CONSTITUTIONAL RIGHTS TO WEAR CIVILIAN ATTIRE DURING TRIAL, TO A MEANINGFUL OPPORTUNITY TO PRESENT A COMPLETE DEFENSE, AND TO A RELIABLE GUILT AND PENALTY DETERMINATION

Petitioner's love for his wife and unborn child was a critical disputed issue in this case. The prosecution introduced evidence that petitioner did not like children and did not want them around because he would not be free to do what he wanted.

While his wife wanted children, petitioner did not. 26 RT 7396-7397. Petitioner did not believe he was the baby's father. 22 RT RT 6340, 6467-6469. Petitioner was miserable with his wife. His appearance as a "happy, bubbling, father-to-be" was a front. He expressed no concern that his unborn child was going to die. 19 RT 5524-5525; 20 RT 5839. Based on this testimony, the prosecutor argued that petitioner did not love his wife and did not want a child, that he had her and her fetus killed so he could collect the proceeds of her life insurance policy, and that he attempted to kill codefendant Lynn Noyes' husband so they could be together. 35 RT 10209-10210.

In contrast, petitioner testified that he and his wife enjoyed music together. They spent time hunting, camping, fishing, and going to casinos. He was looking forward to the birth of his son. 28 RT 8076-8187; 29 RT 8196-8388; 30 RT 8611-8629, 8668-8688, 8724-8774; 31 RT 8775-8793. The defense introduced evidence that petitioner showed affection for his wife and they had a loving relationship. 28 RT 8046-8047. They were happy. Petitioner was "ecstatic" about the pregnancy 30 RT 8699-8700 and happy about the impending birth. 17 RT 5017-5019; 28 RT 8003-8004. Defense counsel argued that petitioner and his wife were happy, that he was good with children, and that he was looking forward to the birth of his son. His love for his wife was best demonstrated when he was left alone during an interview with Detectives and did not know he was being videotaped. He pulled out his watch and looked lovingly at a picture of her. Exhibit 263; 30 RT 8668, 8742; 36 RT 10331.

Given this dispute, petitioner sought to wear his wedding ring[1] in the jury's presence because "the lack of a wedding ring might be interpreted by certain people against him, because they know that he was married, they know his wife was murdered. And the fact that he does not have a wedding ring could well be interpreted by jurors as abandonment of his wife, in some sense or another." 3 RT 1079. He argued there would be no objection to the ring but for the fact that he was in custody, 3 RT 1017, and that denying the request would deprive him of the right to make a normal appearance before the jury and discriminate against him because of his custodial status. 3 RT 1079. The trial court acknowledged that its order discriminated against petitioner: "[I]f the Defendant wasn't in custody, I'm not sure there would be any way I could compel him to take off his wedding band." 3 RT 1018-1019. Nonetheless, it denied his request to wear the ring during trial.

The trial court was concerned that taking the ring, a belt, and a tie from petitioner at noon and at the end of each court day when he returned to jail would require too much time and present too many opportunities for its bailiff to overlook one of the items. 3 RT 1073-1074, 1078. The court did not articulate any duties with which securing the ring would interfere or explain why it believed the bailiff might forget to perform his sworn duty. As defense counsel noted, securing the few items of clothing petitioner sought to wear in the jury's presence in this case was, at least to the casual observer, "an extremely simple thing." 3 RT 1074.

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[1] The ring was a simple gold band with a design that could not be seen from more than two or three feet away. 3 RT 1015, 1070.

> [T]he Marshals -- they are intelligent men and women. . . . When they have a routine such as we would have in this case, providing two items, or four items, either one, it's very simple. . . . Handing the tie and the necklace at the very same time holding them together, is an extremely simple thing. And the very -- frankly, the belt and the ring could go on at the same time.

3 RT 1075.

Nonetheless, defense counsel offered to provide a checklist to ensure that one of the items was not overlooked: "I don't know of a single Marshal associated with this case that can't remember four items, as opposed to two items without a checklist. But we'll provide a checklist for them for every time, so that they can check it off." *Ibid*. With the aid of a checklist, even the busiest, most forgetful bailiff easily could have ensured that petitioner did not leave the courtroom with the ring. This simple step would have eliminated any risk that the ring would have found its way to the jail.

Defense counsel, though, went even further and offered, as an officer of the court, to assume personal responsibility for the ring and hand it to petitioner at the beginning of each court day and take it at the end of the day so that it would not pose a security problem. Thus, the bailiff did not "even have to take care of the ring." 3 RT 1015, 1075-1076. Moreover, in the unlikely event that both counsel and the bailiff overlooked the ring, it would have been discovered during a routine search by jail personnel each time petitioner returned from court. 3 RT 1074.

Without elaboration, it is difficult to envision any reason for the trial court's concern about its bailiff's ability to do his job. One would reasonably expect all but

the most incompetent bailiffs to routinely accomplish the fundamental task of securing an incarcerated defendant's civilian clothing during trial. That an officer employed by the court for the purpose of securing the courtroom cannot be relied upon to reliably and consistently perform that routine task is not a justification for denying a defendant his rights to be presumed innocent and to present crucial evidence in his defense.

The trial court erroneously believed jurors could not see whether petitioner wore a ring or not. 3 RT 1080. This belief was based on defense counsel's purported representation that the prosecutor was unable to see the ring from where he sat at counsels' table: "[M]oments ago you were suggesting that you didn't think Mr. Gaul could see it, and jurors are further away." 3 RT 1080. Defense counsel, though, had represented that the prosecutor could not see ***the design on the ring***, which was "really not visible from more than two or three feet away." 3 RT 1070. The prosecutor himself admitted that he (and thus the jury) could see the ring. (*Ibid*.)

The trial court also believed that no juror would make "negative assumptions" from the fact that petitioner was not wearing a wedding ring. 3 RT 1080. The jury was instructed that, in determining petitioner's credibility, it was to consider his demeanor while testifying, the manner in which he testified, and his attitude toward the action. California Jury Instructions Criminal (CALJIC) No. 2.20; California Evidence Code section 780, subdivisions (a) and (j); 29 CT 8394; 35 RT 10049-10050. Indeed, one of the juror's functions is to "observ[e] the quality, age, education, understanding, behaviour, and inclinations of the witness" 3

Blackstone, Commentaries at pp. 373-74, and to "judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v United States*, 156 U.S. 237, 242-243 (1895).

When a witness testifies before the jury:

> To [the trier of fact] appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson, or the itching overeagerness of the swift witness, as well as honest face of the truthful one, are alone seen by [the trier of fact].

Creamer v. Bivert, 113 S.W. 1118, 1120 (Mo. 1908) ; see also *United States v. Yida,* 498 F.3^{d} 945, 950 (9th Cir. 2007) [Live testimony gives the jury the opportunity to observe the demeanor of the witness while testifying.]; *Govt. of the Virgin Islands v. Aquino,* 378 F.2d 540, 548 (3^{d} Cir. 1967) [a witness's testimony may provide "innumerable telltale indications" that are more reliable indicators of falsity than the "literal meaning of his words"]; Hale, The History and Analysis of the Common Law of England 257-58 (1713) ["[T]he very Manner of a Witness's delivering his Testimony will give a probable indication whether he speaks truly or falsely."].

While the trial court might have been shocked that any juror would interpret the absence of a wedding ring as abandonment of one's wife, it severely underestimated the symbolism and solemnity attached to the wedding ring and its significance and importance in our society. The tradition of wearing a wedding ring is deeply ingrained in American culture. It is the outward expression of the inward

bond, as two hearts unite as one, promising to love each other with fidelity for all eternity. Mary Fairchild, About.com Guide, Exchanging of the Rings, Tips for your Christian Wedding Ceremony, http://christianity.about.com/od/christianweddingelements/qt/2exchangerings.htm (as of March 20, 2018), The subject of married men and wedding rings remains a topic of much discussion, debate, and concern, particularly among women. Dario Maestripieri, Ph.D., Psychology Today, The Wedding Ring and Human Behavior: Current Research and Future Directions. Why some married people don't wear a wedding ring. https://www.psychologytoday.com/us/blog/games-primates-play/201207/the-wedding-ring-and-human-behavior-current-research-and-future (as of March 20, 2018).

Some of the jurors might not have been offended by petitioner's failure to wear a wedding ring. But, as instructed, any juror who believed petitioner's failure to wear a wedding ring showed his abandonment of his wife was permitted to decide he did not love her, and to discount his entire testimony and find him guilty solely because he was not wearing a wedding ring. Despite the trial court's belief to the contrary, the ring could be seen by the jury. And some of the jurors - particularly some of the five female jurors 12 RT 3574-3575 - could have concluded that petitioner did not love his wife because he was not wearing it.

Petitioner's request to wear the ring invoked his right to be tried in civilian clothes, and the trial court clearly understood that he had done so. In fact, the trial court invited the request: "Let's talk about Mr. Garton's courtroom attire. Any

issues about that?" 3 RT 1014. The trial court's ruling violated petitioner's right to be tried in civilian attire:

> [C]ourts must be alert to factors that may undermine the fairness of the factfinding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). [¶] The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. *Estes v. Texas*, 381 U.S. 532 (1965); *In re Murchison*, 349 U.S. 133 (1955). Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience.

Estelle v. Williams, 425 U.S. 501, 504 (1976).

> The presumption of innocence requires the garb of innocence, and regardless of the ultimate outcome, or of the evidence awaiting presentation, every defendant is entitled to be brought before the court with the appearance, dignity, and self respect of a free and innocent man, except as the necessary safety and decorum of the court may otherwise require.

Eaddy v. People (1946) 115 Colo. 488, 492 [174 P.2^{d} 717].

Refusing to permit a criminal defendant to wear ordinary clothes during trial also impinges on tenets of equal protection because it operates usually against only those who cannot post bail prior to trial. Persons who can secure release are not subjected to this condition. To impose the condition on one category of defendants, over objection, would be repugnant to the concept of equal justice embodied in the Fourteenth Amendment. *Griffin v. Illinois*, 351 U.S. 12 (1956).

The ruling prohibited petitioner from presenting the best and strongest evidence of his love for his wife to the jury and from rebutting the prosecutor's

assertions that he did not love her, and resulted in the exclusion of evidence on a determinative issue. Excluding the evidence because the court believed no juror would hold petitioner's failure to wear a wedding ring against him improperly invaded the jury's province, *Carella v. California* (1989) 491 U.S. 263, 265, and prevented it from performing its functions. Evidentiary rules that infringe upon a "weighty interest of the accused" and are "arbitrary" and "disproportionate" to the purposes they are designed to serve violate a criminal defendant's right to have a meaningful opportunity to present a complete defense. *Holmes v. South Carolina* (2006) 547 U.S. 319, 324-325, 331, citations omitted; *Taylor v. Kentucky* (1978) 436 U.S. 478, 485;*Crane v. Kentucky* (1986) 476 U.S. 683, 689–691.

* * * * *

CONCLUSION

The trial court believed there was no reason to incur the security risk involved in permitting petitioner to wear his wedding ring at trial, but ignored two compelling reasons: petitioner's constitutional right to present evidence of his love for his wife and child and his right to wear civilian attire during trial. 3 RT 1079, 1081. Refusing to permit the presentation of evidence on a critical disputed fact improperly restricted petitioner's ability to establish his love for his wife and child and to rebut the prosecutor's argument that he did not want the child and had them killed so he could collect her life insurance proceeds. It also impaired the presumption of innocence and violated his constitutional rights to be tried in civilian clothes, to due process, and to equal protection. Granting the request would have

been a minimal accommodation of these rights which presented virtually no security risk, required little time, and imposed no additional duties on the court's staff.

As set forth above, petitioner's love for his wife and unborn child was vigorously contested. Petitioner testified that he had nothing to do with killing or conspiring to kill her and her fetus, or with conspiring to kill his codefendant's husband, thereby putting his credibility in issue. The case essentially hinged on whether the jury believed petitioner or the uncorroborated testimony of his alleged accomplices, one of whom admittedly shot and killed petitioner's wife and her fetus.

Conveying his love for his wife to the jury was crucial to petitioner's defense, particularly at the penalty trial. The absence of a wedding ring served as constant reminder throughout the trial that petitioner might have participated in the alleged plots to kill because, as the prosecutor argued, he did not love his wife. Refusing to permit him to show the jury his love by virtue of the fact that he still wore his wedding ring undermined the fairness of the fact-finding process and diluted the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.

On this record, one cannot say the jury would have rejected petitioner's defense if not for the prejudice aroused by his failure to wear a wedding ring. The error was therefore not harmless beyond a reasonable doubt. *Chapman v. California* 386 U.S. 18, 24 (1967). For all the foregoing reasons, the Petition for Writ of Certiorari to the Supreme Court of California should be granted and the judgment of the Supreme Court of California upholding Petitioner's death sentence should be

reversed.

Dated: August 14, 2018

Respectfully submitted,

Jeffrey J. Gale

Counsel of Record for Petitioner

APPENDIX A

APPENDIX B