

SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff & Respondent,

v.

SCOTT THOMAS ERSKINE,

Defendant & Appellant.

CAPITAL CASE

Case No. S127621

San Diego County Superior Court Case No. SCD161640
The Honorable KENNETH KAI-YOUNG SO, Judge

**SUPREME COURT
FILED**

RESPONDENT'S BRIEF

DEC 16 2015

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DEATH PENALTY

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STATEMENT OF THE CASE

On August 29, 2003, the San Diego County District Attorney filed an amended information charging appellant Scott Thomas Erskine with the murders of 13-year-old Charlie Keever and 9-year-old Jonathan Sellers on or about March 27, 1993. As to both victims, the information alleged special circumstances that the murder was intentional and involved the infliction of torture (Pen. Code, § 190.2, subd. (a)(18)), and that Erskine committed the murder while engaged in the commission or attempted commission of performing a lewd act on a child under the age of 14 (Pen. Code, § 190.2, subd. (a)(17)(v)). As to Charlie, the information additionally alleged a special circumstance, accusing Erskine of committing the murder while engaged in the commission or attempted commission of oral copulation. (Pen. Code, § 190.2, subd. (a)(17)(vi).) The information further alleged, as to both victims, that Erskine personally used a deadly and dangerous weapon—a rope—in the commission of the crimes. (Pen. Code, § 12022, subd. (b).) Finally, the information alleged the special circumstance that Erskine had been convicted of multiple murders within the meaning of Penal Code section 190.2, subdivision (a)(3). (11 CT 2588-2590.)

The same day, Erskine entered a “not guilty” plea and denied the allegations in the information, and jury selection commenced. (17 CT 3941.) The jury was sworn on September 18, 2003. (17 CT 3959.) Guilt phase jury deliberations began on September 30, 2003. (17 CT 3976.)

On October 1, 2003, the jury returned a verdict, finding Erskine guilty of all charges and finding true all enhancements and special-circumstance allegations. (17 CT 3978-3986.)

The penalty phase commenced on October 14, 2003. (17 CT 3995.) Penalty phase deliberations began on December 9, 2003. (18 CT 4039.)

On December 15, 2003, the jury advised the trial court that it was deadlocked, and the court declared a mistrial. (18 CT 4045.)

On March 26, 2004, jury selection for the penalty phase re-trial commenced. (18 CT 4064.) The jury was sworn on April 15, 2004. (18 CT 4080.) Penalty phase re-trial deliberations began on June 2, 2004. (18 CT 4131.) The same day, the jury determined the appropriate penalty for both offenses was death. (18 CT 4132-4134.)

On September 1, 2004, the trial court sentenced Erskine to death for the special circumstance murders of Charlie Kever and Jonathan Sellers. (18 CT 4154.)

STATEMENT OF FACTS

A. Guilt Phase

1. The People's Evidence

a. The Murders of Jonathan Sellers and Charlie Kever

Alton Williams was Jonathan Sellers's brother and the oldest of Milena Sellers's six children. Jonathan was Alton's best friend; they shared a room where they slept in bunk beds. Alton was also very close friends with Charlie Kever. (23 RT 3278.) On March 27, 1993, a Saturday, Alton and Charlie planned to go to Rally's Hamburgers in San Diego. (23 RT 3278-3279.) The boys would make this trip routinely with a big group of friends and not tell any parents where they were going. (23 RT 3280-3281.) The excursion also involved going down to the Otay River "riverbed area." (23 RT 3282; 24 RT 3303-3304, 3307, 3310.) When Charlie arrived at his house that Saturday, Alton was not there at the time. Their mother later informed him that his brother went with Charlie on the bike ride instead. (23 RT 3285-3286.)

Shawn Williamson worked at Fun Farm Go-Carts, an arcade and pet adoption center, on March 27, 1993. (23 RT 3240.) He saw Jonathan and Charlie that day. They asked if they could see the animals for adoption and left their bikes outside while they did so. (23 RT 3242-3243.) They played with the animals for a few minutes and then rode their bikes to the arcade where they played video games. (23 RT 3245.)

Cashier Linda Dassow was working at Rally's Hamburger on March 27, 1993, and saw Jonathan and Charlie that day. (23 RT 3249.) They were regular customers who always arrived on their bikes. (23 RT 3250.) She took the boys' order and saw them eat their food at a table outside. (23 RT 3250-3252.) The boys were at Rally's sometime between 11:30 a.m. and 1:00 p.m. (23 RT 3257, 3260.)

Carol Carr rode her bike on March 27, 1993, by the river bottom area in Otay Mesa. (23 RT 3265.) She saw a blue car driving where it should not have been, across a field, and then stop, blocking her path. Carr waited because she was scared. (23 RT 3270.) The driver of the car backed up, stepped out, and waved her on. She chose to leave the area instead, and when she did so, she saw the two boys. Arthur Blitz was also riding his bike in the Otay riverbed area on March 27, 1993, and saw Charlie and Jonathan as well. (23 RT 3275.) Jonathan said "hi" to him and asked about his helmet while Charlie stood with his bike about 25 feet away. (23 RT 3275-3276.)

Later that evening, Alton realized that Jonathan had not come home. He called Charlie's house and learned that the boys were not there either. (23 RT 3288.) Melina Sellers told her children—including Alton—to get in the car, and she proceeded to drive them around to Jonathan's friends' houses. The boys were still nowhere to be found. (23 RT 3288-3289.) Milena Sellers returned home with her other children at 7:00 p.m. and called the police. Realizing the seriousness of the situation now that his

mother had called the police, Alton divulged that the boys may have ridden their bikes to Rally's and on the riverbed trail. (23 RT 3289.) He also knew about a "fort" in the river bottom area. (23 RT 3283-3284.) Alton was scared his brother may have drowned. (23 RT 3289.) His mother directed him to take her to the trail. Alton complied, but only took her as far as a washed-out bridge; he did not take her all the way to the fort. (23 RT 3289-3290.)

San Diego Police Sergeant Sue Payne helped direct the search for the two boys, beginning on March 27, 1993. (24 RT 3313.) An air and ground search spanned from Saturday night through Sunday. (24 RT 3315, 3317.) It rained that Saturday night and the following day. (23 RT 3292; 24 RT 3303.) That Monday, March 29, 1993, Peter Winslow embarked on his usual bike ride from his apartment in Chula Vista through the Otay River area. (24 RT 3303-3304.) Part of his exercise regimen included dropping his bike and running for a stretch. (24 RT 3306.) As he ran that day, Winslow peered over some bushes and noticed a "camp-like thing." He looked inside and saw a little boy, hanging, and another boy laying on the ground. (24 RT 3307, 3310.) Winslow touched nothing and ran for help. He retrieved his bike and rode to the nearby Home Depot where he called the police who arrived a few minutes later. (24 RT 3310-3311.)

Sergeant Payne met Winslow at the Home Depot, and he escorted her to the location of the two boys' bodies—an area with bushes, tumbleweeds, and a hollowed-out area like a fort children would construct. (24 RT 3319-3320.) The "fort" had been constructed out of castor bean plants—tall growing trees with very thick branches or trunks. (24 RT 3346.) It was about 10 feet by 12 feet; the ground was hard, made out of trampled-down tumbleweeds. One could not see into the fort until he or she got very close to it. It had a two-foot entrance that opened into a 12-foot entryway,

resembling an igloo. (24 RT 3360-3361.) Sergeant Payne did not enter the crime scene as it was obvious the boys were dead. (24 RT 3322.)

Inside the fort, nine-year-old Jonathan was hanging from a tree branch. (24 RT 3321, 3371.) He was wearing a sweatshirt and socks, the bottom of which were dirty, but was otherwise unclothed from the waist down. He was suspended from a branch three and a half feet above the ground by a yellow rope around his neck. (24 RT 3368, 3371.) His body was partially blocking the entrance to the structure. (24 RT 3348.)

Jonathan was on his knees, but the rope held him upright; his knees and knuckles touched the ground. (24 RT 3369; 25 RT 3544.) Jonathan's ankles were bound with rope as well. (24 RT 3372.) He also had a "gag" around his chin; it had been fashioned out of a terry cloth towel or pad and secured to his face with white surgical tape and black electrical tape.

Jonathan had adhesive marks on his cheeks, revealing where the gag had once been attached. (24 RT 3372-3373; 25 RT 3511-3512; 3549-3550.)

There was an area where the skin had been pulled off, consistent with the tape being violently torn from Jonathan's face. (25 RT 3524.) He also had a piece of white cord on his left wrist, thinner than the yellow rope around his neck, that was not attached to anything. (24 RT 3377; 25 RT 3545.)

Thirteen-year-old Charlie was off to Jonathan's side. (24 RT 3321.) He was lying face down, slightly on his right side, on top of a pile of clothes. (24 RT 3379, 3380-3381.) The pile of clothes contained both boys' shirts, pants, and shoes. They were not thrown on the ground, but rather neatly stacked. (24 RT 3389.) Charlie was wearing a hooded sweatshirt and socks, but, like Jonathan, he was unclothed from the waist down. (24 RT 3369-3370.) Charlie also had a yellow rope and white cord around his neck. His rope was tight, whereas Jonathan's was loose.

Charlie's skin had swelled up between the two ropes. (24 RT 3383.)

Charlie¹ also had adhesive marks and an outline evidencing that something had been across his face. (24 RT 3385-3386.) He had tape marks from his mouth, between his chin and lower lip, to the back of his ear. There was a quarter-sized area by Charlie's left ear where his skin was missing. (24 RT 3386.)

Charlie and Jonathan lived a few blocks from each other. Their homes were less than five miles from the crime scene; Rally's was only about a mile away. (24 RT 3350.)

Among other items, law enforcement personnel collected from the crime scene a pair of jeans with red stains (24 RT 3396), a green shirt with red stains (24 RT 3399), a multicolored t-shirt with red stains (24 RT 3402-3403), and cigarette butts on the pathway leading to the crime scene (24 RT 3418-3419). They also found two bikes lying on their sides, 30 feet away from the structure. The bikes were locked together and well hidden underneath tumbleweeds. (24 RT 3414.) Sexual assault swabs were collected from the boys at the crime scene. (24 RT 3421-3422.)

Dr. John Eisele, who was employed by the San Diego County Medical Examiner's Office at the time, conducted autopsies on both boys. (25 RT 3517.) The skin between the two ropes on Charlie's neck was folded, bruised, reddened, and "hemorrhagic," meaning that there was blood under the skin and indicating that Charlie was alive when the ligatures were tied tightly around his neck. (25 RT 3521, 3529-3520.) There was a small amount of blood coming from Charlie's left ear—an occasional consequence of strangulation. He also had many pinpoint hemorrhages in the skin of his eyelids—a common consequence of strangulation. (25 RT

¹ In testifying to this fact, the San Diego police detective referred to Charlie as "Jonathan." It appears he did so out of inadvertence as the context surrounding the statement makes plain that he was referring to Charlie.

3526.) Charlie had small holes in his lip, likely caused by his lip being pushed in against his braces. (25 RT 3528.) He had an area of hemorrhaging on the muscle that runs down the side of the neck, on the base of his tongue, and pinpoint hemorrhaging in the lining of the voice box. (25 RT 3536.) Charlie had bruises on his penis and small holes or tears in the skin along the bruised area; he also had a piece of skin that was torn away on his scrotum. (25 RT 3530-3531.) These injuries occurred before Charlie's death and were not caused by dragging or insect or animal activity. (25 RT 3531-3532.) The injuries were to a very sensitive area and would have been painful. (25 RT 3541-3542.) Charlie's wrists were bruised, which was consistent with a ligature being tied around them before death. (25 RT 3533.) Charlie's anus was damaged on the inside with hemorrhaging to multiple areas. (25 RT 3538.) The damage would have occurred while Charlie was alive. Dr. Eisele could not form an opinion as to the specific cause of this damage other than to say it would have required a fair amount of force and could have been caused by a penis, finger, or some other foreign object. (25 RT 3538-3539.) Dr. Eisele opined that Charlie's cause of death was likely asphyxia by ligature strangulation and that it would have taken two to five minutes to strangle him to death. (25 RT 3540-3541.)

During Jonathan's autopsy, Dr. Eisele discovered pinpoint hemorrhages in his eyelids and over the whites of his eyes—symptoms of strangulation. He had ligature marks on his neck which indicated that the ligature had been pulled tight to strangle him and then, when he was dead or at least unconscious, the rope suspended him from the tree. (25 RT 3551-3552.) Like Charlie, the cause of Jonathan's death was asphyxia resulting from strangulation. (25 RT 3555.)

With his background in forensic odontology (the study of the mouth and teeth as it relates to the law), Dr. Norman Sperber examined

photographs of the bite marks on Charlie Keever's penis. (24 RT 3476, 3481-3482.) He noticed that the marks on Charlie's penis did not look like typical bite marks, but could have been caused by the sharp edges or corners of human teeth. (24 RT 3482.) Charlie also had an oval-shaped injury on his scrotum, laceration of the tissue, and bruising in the area, all of which are features of a human bite mark. (24 RT 3482-3483.) Dr. Sperber explained that the injury would have been a very painful one. (24 RT 3484-3485.)

Shortly after the crimes occurred, samples collected from the boys and Erskine were subjected to DNA analysis. A criminalist at the San Diego Police Department crime laboratory analyzed a swab taken from Charlie's scrotum after the sperm cells were separated from the non-sperm cells. She located one sperm cell. (25 RT 3590.) DNA analysis revealed genetic material consistent with the victims and no foreign DNA or sperm cells. (25 RT 3591-3592.) The analyst recognized that further testing of swabs of the victims might have revealed clues as to their murderer, but further testing would have consumed the samples. Accordingly, the analyst determined that no further testing should be done on the samples until DNA testing improved. (25 RT 3595.) She sealed the samples and put them away. (35 RT 3596.)

Between 1993 and 2001, DNA testing vastly improved, becoming significantly more powerful and discriminating. (25 RT 3596-3597, 3626-3627.) A reevaluation of the swabs in 2001 revealed an additional sperm cell on Charlie's scrotum swab (25 RT 3599-3600), sperm cells on an oral swab from Charlie (25 RT 3600-3601), and a single sperm cell on an Charlie's exterior anal swab (25 RT 3602-3603).² Again, the analyst

² A penile swab and oral swab from Jonathan revealed no sperm cells. (25 RT 3603-3604.) Jonathan's exterior anal swab revealed a low number of
(continued...)

extracted the sperm cells from the non-sperm cells and stored the extraction samples for analysis. (25 RT 3601-3602.)

The Department of Justice maintains a DNA databank called the Combined DNA Information System, or "CODIS." It is a repository of DNA profiles both from unsolved cases and particular individuals who qualified to be in the database because they had committed certain serious crimes. (25 RT 3620.) In March 2001, the San Diego Police Department submitted a profile from the Otay riverbed crime scene to the Department of Justice laboratory in Berkeley for comparison with the profiles in the CODIS database. (25 RT 3619, 3621.) Of the more than 72,000 profiles in CODIS, the profile from the crime scene matched one—that belonging to Erskine. (25 RT 3621-3623.)

The San Diego Police Department continued its reexamination of the swabs taken from Charlie in 2001 as well. The sperm fraction of the oral swabs taken from Charlie revealed mixtures of DNA from Charlie and an additional person with the likely explanation that the DNA foreign to Charlie came from the sperm portion. (25 RT 3632.) Most of the DNA in the sample was not Charlie's. (25 RT 3637.) A criminalist with the San Diego Police Department compared the sperm fraction with the Department of Justice database and discovered that Erskine was a match. (25 RT 3633.) The probability that a randomly selected person would be included as a possible contributor to the mixture was 1 in 1.9 trillion in the Caucasian population, 1 in 600 billion in the Black population, and 1 in 3.5 trillion in the Hispanic population. (25 RT 3638-3639.) The criminalist also tested two cigarette butts found at the murder scene and discovered that Erskine was in all probability the source of the DNA on those items,

(...continued)

sperm cells, but the number of sperm was so low that the sample did not qualify for further DNA testing. (25 RT 3604-3605.)

the likelihood being 1 in 10 quadrillion in the Caucasian population, 1 in 900 trillion in the Black population, and 1 in 29 quadrillion in the Hispanic population. (25 RT 3642-3643.)

A private DNA laboratory (25 RT 3560-3561) reached similar conclusions: that the sperm fraction of the separated sample revealed a mixture of DNA from two people (25 RT 3575-3576), and at every marker with respect to the sperm fraction, the sample was consistent with DNA from Erskine and Charlie (25 RT 3579-3580). With respect to the population frequencies, however, the private laboratory concluded that the odds an individual would have a DNA profile that would include him or her in this mixture at every marker were 1 in 1.6 million in the Caucasian population, 1 in 750,000 people in the Black population, and 1 in 5 million in the Hispanic population. (25 RT 3582-3583.)

After being informed of the match to Erskine in the CODIS database, Sergeant Williams Holmes obtained a search warrant, which permitted him to go to Wasco State Prison to obtain saliva and blood samples from Erskine. (25 RT 3649-3651.) Also, a criminalist examined additional items from the crime scene to determine whether there was any more evidence available for DNA testing. (25 RT 3606-3607.) The criminalist extracted cells you would find in one's mouth (epithelial cells) from a cigarette butt. A sample from cuttings of a pair of blue jeans from one of the boys revealed one sperm cell. (25 RT 3588, 3615.) A green shirt revealed one sperm cell, the boys sweatshirts each revealed a low number of sperm. (25 RT 3645-3647.)

Dr. Wendy Wright, a pediatrician at Children's Hospital, reviewed the autopsy photos and report in an effort to determine the stage of pubescent maturation of the boys. (26 RT 3667-3669.) She opined that neither boy was of the pubertal stage of development at which they could generate sperm. (26 RT 3670.)

Around the time of Charlie and Jonathan's murders, Lori Behrens was Erskine's roommate. She was in the United States Navy at that time. She had orders to be stationed on the naval sub base in San Diego around 1992 or 1993. (26 RT 3672.) At that same time, Behrens attended Southwest College in Chula Vista where she was enrolled in a business certificate program. She met Erskine there; he was taking business classes as well. (26 RT 3672-3673.) Behrens socialized with Erskine, had coffee with him, and talked with him about material discussed in their classes. (26 RT 3674.) She knew Erskine to carry a knife—a buck knife, perhaps, with a “pretty good blade”—four to five inches in length. He wore it on his hip in a dark black or navy blue case. He appeared to be skilled in using the knife as he was always “flipping it.” (26 RT 3676.) Behrens also knew Erskine to be a smoker. (26 RT 3677.) Erskine became Behrens's roommate at her Mission Hills home in March 1993. (26 RT 3677-3678.) She considered him a good roommate. (26 RT 3678.) He drove two cars, one of which was an older model Volvo. (26 RT 3679.) Erskine lived with her about three and a half months—from March 1993 until the beginning of the summer. (26 RT 3680.)

b. Other Crimes Evidence

(1) Erskine's Sexual Assault on Jennifer M.³

On October 22, 1993, Jennifer M. was waiting for a bus around 1:00 p.m. The bus drove by without stopping for her. She began talking to herself out loud about the bus not stopping, and Erskine, who had been standing across the street, responded. (26 RT 3686.) Jennifer M. could not

³ By the time of Erskine's trial, Jennifer M. was unavailable as a witness. A transcript of her prior testimony from February 28, 1994, was read to the jury. (26 RT 3683.)