In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ENRIQUE PARRA DUENAS,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S077033

Los Angeles County Superior Court Case No. BA109664
The Honorable Dewey Lawes Falcone, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

In the early morning hours on October 30, 1997, appellant shot and killed Los Angeles County Sheriff's Deputy Michael Hoenig with a loaded Colt .45 handgun that he had stolen from his uncle. Several witnesses, including a witness who knew appellant personally, saw the shooting and later identified appellant as the shooter. Shortly after the shooting, law enforcement personnel found appellant hiding behind the garage of a home near the crime scene. Following his arrest, appellant led detectives to the location where he had thrown the murder weapon, which had appellant's fingerprints on it. Appellant then confessed to the crime on at least three different occasions.

STATEMENT OF THE CASE

By indictment filed on March 11, 1998, a Los Angeles County Grand Jury accused appellant of one count of murder (Pen. Code[1], § 187, subd. (a)). The indictment alleged that appellant committed the murder for the purpose of avoiding and preventing a lawful arrest (§ 190.2, subd. (a)(5)). It was also alleged that the victim, Los Angeles County Sheriff's Deputy Michael Hoenig, was a peace officer who was intentionally killed while engaged in the performance of his duties, and that appellant knew and reasonably should have known that Deputy Hoenig was a peace officer engaged in the performance of his duties (§ 190.2, subd. (a)(7)). It was further alleged that appellant personally used a .45 caliber semiautomatic pistol during the commission of the offense (§§ 1203.06, subd. (a)(1); 12022.5, subd. (a)(1)), and a principal was armed with a .45 caliber semiautomatic pistol (§ 12022, subd. (a)(1)). (1CT 181-182.)

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[1] All statutory references are to the Penal Code unless otherwise indicated.

Trial was by jury. On December 2, 1998, the jury convicted appellant of first degree murder and found the special allegations to be true. (5CT 918, 924-925.)

At the penalty phase, the same jury returned a verdict of death. (5CT 945, 950.) After denying appellant's motion to reduce the penalty to life imprisonment without the possibility of parole, the trial court sentenced appellant to death, and imposed a consecutive term of ten years (upper term) for the firearm-use finding. Appellant received a total of 518 days custody credit, consisting of 450 actual days and 68 days good time/work time. (5CT 983, 986-987.)

The appeal is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

GUILTY PHASE

A. Prosecution Evidence

Nada Watson Witnesses Deputy Michael Hoenig's Murder

At approximately 1:00 a.m. on October 30, 1997, Nada Watson, a prostitute, was standing at the corner of Long Beach Boulevard and Seminole Avenue in South Gate waiting for her "date" or "trick" when she encountered Los Angeles County Sheriff's Deputy Michael Hoenig. Deputy Hoenig got out of his patrol car to speak to Watson. Watson knew Deputy Hoenig because he had arrested her on a cocaine-related charge in the past. Despite the arrest, Watson was on good terms with Deputy Hoenig. (5RT 1184-1186, 1196, 1282.)

While Watson spoke to Deputy Hoenig, appellant rode his bicycle past them going south on Long Beach Boulevard. (5RT 1191, 1196.) Watson knew appellant from a "dope house" in the area. In fact, she had last seen appellant at the dope house a few hours earlier that evening, at which time appellant told Watson he had a gun in his waistband. Watson

thought appellant was "jiving" because he appeared nervous. Watson would have warned Deputy Hoenig about the gun had she believed appellant. (5RT 1192-1193, 1225.)

When Deputy Hoenig saw appellant, he ordered appellant to stop because appellant was riding his bike without lights, a traffic violation, and because Deputy Hoenig had information that individuals on bicycles were involved in burglaries in the area. (5RT 1193; 1313-1315, 1366.) Appellant extended his middle finger in an obscene manner and said, "Fuck you, cop." Appellant then rode away quickly going west on Seminole Avenue. (5RT 1194-1195.) Deputy Hoenig got back into his car, made a U-turn on Long Beach Boulevard, and followed appellant on Seminole Avenue. (5RT 1195-1196.)

Watson got into her date's car, and they drove south on Long Beach Boulevard to Martin Luther King Boulevard. They continued west on Martin Luther King Boulevard and turned north onto Pescadero Avenue. At the corner of Pescadero and Seminole Avenues, Watson could see that Deputy Hoenig had pulled his car over to the curb. (5RT 1197-1199.) Deputy Hoenig's headlights, break lights, and light bar were on. Watson heard a gunshot, but she did not know who fired that shot.[2] (5RT 1197, 1200, 1202.) Watson's date kicked her out of the car and drove away. (5RT 1201-1202.) As Watson stood on the corner of Pescadero and Seminole Avenues, she saw appellant fire two more shots at Deputy Hoenig, who was sitting in the driver's seat with half of his body outside the car and the driver door opened. Appellant was standing near the left

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[2] Watson later testified that she saw appellant shoot Deputy Hoenig from the back window while the deputy was sitting in his car reaching for a "walkie-talkie" on his radio. (5RT 1205-1206.) According to the prosecution's theory, the first shot was fired through the rear window of Deputy Hoenig's patrol car. (4RT 1136.)

rear tire of Deputy Hoenig's patrol car holding a black handgun, possibly a ".38" or "9MM," with both hands directly in front of his chest. Watson could see appellant's arms bend from the gun's recoil each time he fired a shot. (RT 1202-1208,1212.) Watson testified that she saw appellant fire two shots, but she heard a total of five or six shots. (5RT 1205, 1207, 1223.)

After the shooting, appellant ran around the patrol car and got back on his bike that he had left by a tree. Appellant tried to ride away, but fell off his bike when it hit a fence. He eventually left the bike on the ground and fled on foot. (5RT 1208-1209, 1221.) Watson watched appellant run around a corner, and thought he hid in some bushes, but she later realized that she was mistaken. (5RT 1210-1212, 1214-1216.) As Watson ran east on Seminole Avenue, she heard gunshots behind her. (5RT 1212, 1222-1224.) Watson saw police cars going to the crime scene, so she flagged down a sheriff's deputy to report the shooting and because she heard Deputy Hoenig calling for help. Watson also took the deputy to the bushes where she thought appellant hid. (5RT 1213-1216, 1228.) Watson later identified appellant as the shooter at an in-field show-up. Appellant, however, was not wearing the blue/black hooded sweatshirt or the blue/black baseball cap he had on during the shooting. (5RT 1216-1219.) Watson also identified appellant in court. (5RT 1196.)

Watson admitted that she had consumed about 20 ounces of beer and "smoked some rocks" several hours before witnessing the shooting. However, Watson said that her alcohol and drug use did not interfere with her ability to hear or understand what was being said to her, or her ability to recognize appellant. (5RT 1226-1228.)

South Gate Police Officers Respond to the Crime Scene

South Gate Police Sergeant Tim Lee Williams, a shift supervisor, was the first officer to arrive at the crime scene in response to a "shots fired"

call. At the time, he did not know that an officer had been shot. (5RT 1254-1256.) When Sergeant Williams saw Deputy Hoenig's patrol car, he actually thought Deputy Hoenig was there responding to the call. (5RT 1256.) As Sergeant Williams parked behind Deputy Hoenig's car, he saw Deputy Hoenig lying on the ground. Sergeant Williams moved his car to a location east of Deputy Hoenig, and illuminated the location with the lights on his car so he could see the shooter in case the shooter was still in the area. (5RT 1257.)

South Gate Police Officer Frank Mena, a Canine Unit officer, was driving on Abbott Road at San Miguel Avenue in South Gate when he received a "shots fired" call or "hot call." (4RT 1150, 1152-1153.) Officer Mena drove to the crime scene and saw Deputy Hoenig lying on the ground. (4RT 1153, 1157.) Deputy Hoenig was dressed in his Sheriff's Department uniform. (4RT 1159, 1163.) The driver's door of his patrol car was opened. (4RT 1158.)

Officer Mena spoke to Sergeant Williams about what to do. At that point, Officer Mena and Sergeant Williams only knew that there was a sheriff's deputy down. Neither man knew where the shooter was located, whether the shooter was watching, or if the shooter was within gunshot range. (4RT 1159-1160; 5RT 1257.) Sergeant Williams and Officer Mena decided that Sergeant Williams would cover Officer Mena with a shotgun while Officer Mena went to render aid to Deputy Hoenig. (4RT 1161; 5RT 1258.)

Officer Mena positioned himself just south of Deputy Hoenig's patrol car. (4RT 1160.) Officer Mena found Deputy Hoenig lying on the ground with his nose and forehead resting on the pavement. Deputy Hoenig's left arm was resting underneath his body. He had a bullet wound to his right hand and blood on his throat. Deputy Hoenig was holding his gun, a Beretta 9-millimeter firearm, in his right hand, with his index finger on the

trigger guard. (4RT 1161-1162; 5RT 1170.) The "hammer" on Deputy Hoenig's gun was down, the magazine was at full capacity, and there was a bullet in gun's chamber, indicating that the gun had not been fired. (5RT 1170-1171; 6RT 1446-1447, 1450.) Deputy Hoenig's back-up magazines were still in his magazine pouch on his belt, and they were at full capacity. (6RT 1449.) His back-up revolver also had not been fired. (6RT 1451-1452.) Officer Mena removed Deputy Hoenig's gun from his hand, rolled him over, and administered CPR. (4RT 1162, 1170.) Office Mena noticed that he was kneeling on a .45 caliber shell casing as he was administering CPR to Deputy Hoenig. (5RT 1171.)

South Gate Police Officer Carlos Fernandez came to help Officer Mena. They checked for Deputy Hoenig's pulse, but did not feel a pulse or hear him breathing. The officers removed Deputy Hoenig's bullet-proof vest and administer CPR. Officer Mena never received any response from Deputy Hoenig. South Gate Police Officer Rodney Bishop eventually joined the rescue efforts. He immediately noticed a bicycle on the sidewalk and the broken rear passenger side window on Deputy Hognig's patrol car. The paramedics arrived shortly thereafter to relieve the officers. (4RT 1162-1164; 5RT 1266, 1268-1270, 1272-1273.)

After the paramedics took Deputy Hoenig away, Officer Mena saw a bicycle near Deputy Hoenig's patrol car. (5RT 1176.) He also saw that the passenger window of Deputy Hoenig's patrol car was broken. (5RT 1177-1178.)

Residents Living Above the Crime Scene Witness the Murder

After other law enforcement units began arriving at the scene, Sergeant Williams spoke to Sandra Carranza and Luis Gomez who both lived in a building just northwest of the crime scene. (5RT 1258-1259, 1295-1296.) Sandra Carranza lived at 3041 Seminole Avenue with her husband. She was sleeping at 1:15 a.m. when she was awakened by the

sounds of gunshots. Carranza looked out the window and saw a man stumbling around on her driveway. He was dressed in dark clothing -- "really over sized pants and sweater" and a black baseball cap. Carranza said the area was "very lit" by several different lights, including the lights from Deputy Hoenig's patrol car. (5RT 1281-1283, 1285, 1301.) Carranza heard gunshots and saw flashes near the man's upper body. The man moved in a southeasterly direction as he fired. After the shooting, the man ran westbound on Seminole Avenue. (5RT 1284-1285.)

Carranza called 9-1-1 and reported the shooting to the Southgate Police Department. (5RT 1291.) Later that morning, Carranza identified appellant as the shooter at an in-field show-up. Carranza said appellant's clothes were "mangled" or "shredded" by that time, and he was not wearing his baseball cap. (5RT 1296-1297, 1300.) Carranza again identified appellant in court. (5RT 1299-1300.)

Like Carranza, Luis Gomez was awakened by the sounds of gunshots. Gomez likewise saw appellant stumbling around on his driveway, then running away. Appellant was dressed in brown pants, a dark sweatshirt, and a white tank top or t-shirt. He also wore a black cap. Other than the initial gunshots, Gomez did not hear any additional shots. (5RT 1300-1301.) Gomez later identified appellant as the shooter at an in-field show-up. However, appellant was not wearing the dark sweatshirt or cap at the time of the identification. Gomez also noticed that appellant's pants were "torn up." Gomez also identified appellant in court. (15RT 1303-1304.)

Reyes Estrella Quintero lived on the corner of Capistrano Avenue and Seminole Avenue. (5RT 1406.) He was asleep at 1:15 a.m. when he heard gunshots from a large caliber weapon and someone yelling, "Fucking police." (5RT 1406-1407.) Quintero looked out the window and saw a policeman lying on the ground next to a gun. (5RT 1408.) He called 9-1-1 and said "somebody killed the police." (5RT 1409.) The next day,

Quintero discovered that his brother-in-law's van and his sister-in-law's car sustained some gunshot damage. (5RT 1410.)

Appellant is Found Hiding in the Backyard of a House Near the Crime Scene

Sergeant Williams received information that the police dispatcher had received a call regarding suspicious noises at a house on Montara Avenue. Sheriff's deputies and police officers immediately set up a perimeter around the house, as a well as a larger perimeter around the entire neighborhood, to find the shooter. (5RT 1260, 1262-1263, 1274-1275, 1413-1414.) Sergeant Williams believed the shooter was at the house on Montara Avenue because it was located in the direction in which the witnesses had seen the shooter run. (5RT 1261.)

Los Angeles County Sheriff's Deputy Steven Wilkinson and his canine partner, "Ronnie," participated in the search for the shooter. Based on information from the police dispatcher, the search efforts focused on a property at 10448 Montara Avenue. (5RT 1320-1322.) Ronnie and the search team cleared the driveway and front of the garage. (5RT 1324, 1328-1330.) As Ronnie searched the side of the garage by a cement block wall, Deputy Wilkinson heard appellant say, "I'm here. You got me." Appellant was lying flat on his back, and his hands were not visible to Deputy Wilkinson. (5RT 1331-1333.) Ronnie bit appellant, and Deputy Wilkinson ordered appellant to show Deputy Wilkinson his hands, but appellant refused to comply with Deputy Wilkinson's orders. (5RT 1334-1335.) Upon Deputy Wilkinson's command, Ronnie pulled appellant out of his hiding place, and Deputy Wilkinson could see that he did not have anything in his hands. Officers took appellant into custody. (5RT 1335-1336.) The paramedics treated appellant's injuries from Ronnie's bite. (5RT 1337-1338.)

Sheriff's Detective Eugene Fines found a black leather cap in the back of the garage at 10448 Montara Avenue. (6RT 1418, 1421) In the backyard of 10451 Pescadero Avenue, a residence directly behind 10448 Montara Avenue, Detective Fines found a ladder propped up against a cement block wall. (6RT 1420.)

Recovery of the Murder Weapon and Collection of Ballistic Evidence

Los Angeles County Sheriff's Deputy Philip Geisler, a S.W.A.T. team member, recovered a chrome stainless steel Colt .45 caliber semiautomatic pistol at 10432 Montara Avenue, a few house north of appellant's hiding place. (5RT 1347-1348; 6RT 1432.) The gun was lying next to a planter. The gun's slide was "locked back indicating that the weapon was possibly empty." (5RT 1347-1349.) Test fires conducted by Los Angeles County Sheriff's Deputy Patricia Fant revealed that the Colt pistol was the murder weapon. (6RT 1444-1445.)

At the crime scene, Los Angeles County Sheriff's Sergeant John Greenwood and Deputy Fant collected a total of seven shell casings -- one underneath a fence on the sidewalk, three on the street in front of the patrol car, and three on the street by the driver's side of the patrol car. (5RT 1351, 1356, 1358-1359; 6RT 1441, 1453-1457.) All seven shell casings were .45 caliber. (5RT 1360l; 6RT 1443.) Sergeant Greenwood also collected four "projectiles or fragments of projectiles" below the driver's side of Deputy Hoenig's patrol car. (5RT 1361.) Additionally, there were three other bullet fragments recovered from the keyboard of the mobile digital console in Deputy Hoenig's car, the rear of a van parked nearby, and the hubcap of a second van parked nearby. (5RT 1362.) Finally, a bicycle was found near the bullet on the sidewalk; it did not have any lights on it. (5RT 1364, 1366.)

The rear passenger and back windows of deputy Hoenig's patrol car were shot out. A bullet had traveled through the dashboard and struck the

inside of the windshield, in front of the steering wheel, but it did not penetrate the windshield. Based on bullet trajectory analysis, Deputy Fant determined that the shooter stood near the bike on the sidewalk when he fired the bullet that hit the dashboard and windshield. (6RT 1462-1463.) Deputy Fant recovered that bullet from inside the patrol car; it had glass and blood on it.[3] (6RT 1464-1465.)

Blood Spatter Evidence

Los Angeles County Sheriff's Criminalist Dean Gialamas processed Deputy Hoenig's patrol car. (6RT 1489.) When Criminalist Gialamas arrived at 6:50 a.m., Deputy Hoenig's car was still running and all the doors were closed. Criminalist Gialamas tried to turn off the engine, but he could not do so because the gear shift was set between the "Park" and "Reverse" positions, which indicated that it had not been fully engaged in the park position. (6RT 1492-1493.)

There was a tremendous amount of blood spatter inside the patrol car. (6RT 1495.) Criminalist Gialamas documented the blood evidence on a hand-drawn diagram (People's Exh. No. 68). Criminalist Gialamas drew the diagram while sitting in the driver's seat. The blood spatter pattern on the windshield showed that the blood traveled away from the gear shift in an upward direction to the left. (6RT 1495-1496.) There was also tissue evidence and other blood evidence on various portions of the equipment inside the car. (6RT 1497-1498.) However, there was no blood on the gear shift lever, which indicated that something blocked or prevented blood from splattering on the gear shift lever. That evidence suggested that Deputy Hoenig's hand was on the gear shift lever when the bullet struck his

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[3] During trial on November 23, 1998, the court permitted the jury to view Deputy Hoenig's patrol car in the courthouse "bus bay." The jury could only walk around the car. (6RT 1574-1577.)

hand. (6RT 1500-1502.) Criminalist Gialamas also found blood droplets on the exterior of the rear left door, suggesting that the driver's door was opened when the blood droplets were deposited. (4RT 1499.)

Based on the directional blood spatter evidence present inside Deputy Hoenig's patrol car, the bullet trajectory analysis, and the coroner's report, Criminalist Gialamas opined that the bullet had to have traveled from outside of the patrol car, through the back window and toward the front windshield. Criminalist Gialamas explained that blood spatter generally traveled in the direction of the bullet. Since all the spatter evidence was toward the dash, that meant the bullet had to come from the opposite end, which was the rear of the car. (6RT 1502-1503.)

Appellant's Fingerprints are Found on the Murder Weapon

Los Angeles County Sheriff's Sergeant Thomas Lapisto processed the Colt .45 caliber semiautomatic pistol found at 10432 Montara Avenue. (6RT 1537.) Sergeant Lapisto recovered two identifiable fingerprints; one from the slide of the gun, and one from the magazine inside the gun. (6RT 1541-1543.) Forensic Identification Specialist William Leo later determined that the latent print from the slide matched appellant's left palm print just below the index finger. The latent print from the magazine matched appellant's left thumb print. (6RT 1552-1555.) Pursuant to departmental policy, two other sheriff's expert fingerprint examiners examined the latent prints, and they confirmed Mr. Leo's findings. (6RT 1556-1557.)

An Autopsy Reveals that Deputy Hoenig Bled to Death From a Gunshot Wound That Tore Through His Aorta

Dr. Eugene Carpenter performed the autopsy of Deputy Hoenig. (5RT 1369, 1371.) Deputy Hoenig did not have any alcohol or drugs in his system. (5RT 1372, 1374.) Deputy Hoenig had a small abrasion on his right cheek and bruising to his lips that are consistent with a fall onto an

asphalt street, and small abrasions on his knees and his wrists. (5RT 1375-1376.) Deputy Hoenig also had a blunt force injury on his right lower back due to a bullet hitting his bulletproof vest. (5RT 1376-1377.) That bullet traveled upward and lodged itself on the outside Deputy Hoenig's bulletproof vest. (6RT 1471-1472, 1480.)

Deputy Hoenig died from a gunshot wound to the upper chest just below his throat. The fatal bullet entered his chest from the front, passed through the breast plate in a downward motion, hit the aorta, and then exited the right lower back near the spine. (5RT 1377-1378, 1388, 1391, 1398-1399.) That bullet lodged itself inside Deputy Hoenig's bulletproof vest. (5RT 1391-1393; 6RT 1470-1474.) Dr. Carpenter explained that Deputy Hoenig lost consciousness within about five to ten seconds after sustaining the wound, and bled to death in less than a minute. (5RT 1389-1390.) Deputy Hoenig also had non-fatal through-and-through bullet wounds to his lower left leg and his right hand. The leg wound showed that the bullet entered the front of the leg while Deputy Hoenig's leg was bent, moved downward, and exited the back of the leg. The wound on the hand showed that the bullet entered near the wrist and exited out the base of the long finger. (5RT 1378, 1383; 6RT 1477.) Dr. Carpenter opined that a large caliber weapon, such as a .45 caliber semiautomatic pistol, caused all of Deputy Hoenig's wounds. (5RT 1384.) Deputy Hoenig's injuries were consistent with him falling to the ground after being shot in the leg, and the shooter advancing toward him while shooting in a downward manner. (5RT 1400-1401.)

Computer Animation Evidence

Parris Ward and Dr. Carley Ward worked for Biodynamics Engineering, a consulting firm on injury-causing events. (6RT 1559, 1592.) The Los Angeles County Sheriff's Department retained Mr. Ward and Dr. Ward to develop a computer animation re-enactment of the

shooting involving Deputy Hoenig. (6RT 1561, 1596.) The computer animation was based on the police reports, police photographs, the coroner's report and photographs, Mr. Ward's various measurements at the crime scene using a Nikon Total Station (a device used by surveyors to take precise measurements of terrain), Mr. Ward and Dr. Ward's examination of Deputy Hoenig's patrol car and bullet proof vest, and their consultation with other experts involved in this case. Mr. Ward took close to 200 measurements to accurately create a three-dimensional model of the crime scene, which included various landmarks, and items such as the bicycle, shell casings, various cars, and Officer Hoenig's patrol car. Mr. Ward also included in his measurements the view of an upstairs apartment overlooking Seminole Avenue. (6RT 1561-1569, 1582-1583, 1596-1597.)

The animation did not show the actual shooter moving in the conventional sense because Mr. Ward did not have any information about the shooter's body position or how he held his gun. Rather, the animation depicted the general locations where the shots were fired through the use of still frames that were "dissolved between them" based on the photographs of crime scene, the measurements taken by Mr. Ward, the physical evidence obtained from the crime scene, and the coroner's report and photographs. Mr. Ward explained to the jury that the computer animation was not meant to show what had actually happened. Rather, it was an "illustrative tool for explaining concepts." (6RT 1569-1570.)

Mr. Ward said the primary locations where the shooter fired his gun were determined from bullet trajectory, shell casing placement, and information he obtained from other experts involved in the case. (6RT 1571-1572, 1582-1583.) The shot sequence shown on the animation was numbered arbitrarily because Mr. Ward could not determine the actual sequence. However, it was his best estimate that the sequence was as follows: Shot number 1 occurred by a tree, shot numbers 2, 3, and 4 were

fired from the street on the driver's side of the patrol car, and shot numbers 5, 6, and 7 were fired over by the curb on the driver side. (6RT 1581-1583.) Mr. Ward determined this progression of shots made the most logical sense based on the evidence. (6RT 1586-1587.) With regard to shot numbers 2, 3, and 4, Mr. Ward opined that they were fired in the stated order based on his review of the evidence and information obtained from other experts in the case. Mr. Ward explained that shot number 1 was most easily defined because of the shell casing that was found by the bicycle, the broken patrol car's rear window, the bullet wound to Deputy Hoenig's hand, the bullet strike to the dashboard, and the bullet's final resting place by the driver's window. A trajectory analysis "connecting the dots between those points" would reveal the location of shot number 1. (6RT 1584-1585.)

According to Dr. Ward, shot number 1, fired from the tree, hit Deputy Hoenig's hand while he was still in the patrol car. That shot was fired "at some distance." (6RT 1598-1599.) Dr. Ward determined that shot number 2 was fired while Deputy Hoenig was still sitting in the patrol car, turned to his left with his feet flat on the ground to exit the car. The bullet hit Deputy Hoenig's leg, causing him to fall to his knees. The entry and exit wounds to Deputy Hoenig's leg suggested that he had turned to face the shooter. (6RT 1599-1600, 1604.) Shot number 3 was fired while Deputy Hoenig was leaning over. Dr. Ward believed the shooter took a step or two closer to Deputy Hoenig and shot Deputy Hoenig while he was on his knees. The bullet from shot number 3 entered Deputy Hoenig's chest and ripped through his aorta, causing him to bleed to death. (6RT 1601-1604.) The bullet wound to Deputy Hoenig's chest, and the lack of stippling and sooting, suggested that the shooter was fairly close to Deputy Hoenig when he fired the third shot, about four to six feet away. (6RT 1605-1607.) A shell casing found by the driver's side door supported that theory. (6RT

1609.) The shooter fired shot number 4 down at Deputy Hoenig while Deputy Hoenig either laid on the ground or leaned way over. This bullet hit Deputy Hoenig in the back and was stopped by his bulletproof vest. (6RT 1607-1609.)

Appellant Confesses to Murdering Deputy Hoenig

Los Angeles Sheriff's Sergeant Jack Ewell took appellant into custody after he was extracted from his hiding place. (6RT 1613, 1615-1616.) Sergeant Ewell asked appellant to take him to the location where appellant threw the murder weapon so no one would get hurt. Appellant led Sergeant Ewell to 10432 Montara Avenue. While they were walking to that location, appellant told Sergeant Ewell, "Why don't you just kill me. I deserve to die for what I did." Appellant also said, "I don't know why I did that. That cop was writing a ticket and I just started shooting him." Appellant spoke in English. (6RT 1616-1617.) Sergeant Ewell then took appellant to the paramedics for treatment of his dog bite wounds. (6RT 1618.) Deputy Geisler later recovered the Colt .45 caliber semiautomatic pistol at 10432 Montara Avenue. (5RT 1347-1348; 6RT 1616.)

Los Angeles Sheriff's Sergeant Isaac Aguilar and his partner Detective Martin Rodriguez took custody of appellant after he was treated by the paramedics. (6RT 1623-1625, 1654, 1657.) Sergeant Aguilar advised appellant of his constitutional rights from a Sheriff's Department admonition card. Sergeant Aguilar read appellant his rights in English because appellant said he understood English. Appellant indicated he understood his rights and initialed paragraphs 5, 6, and 7 on the card as it was read to him. Appellant also signed, dated, and put the time on the card. (6RT 1625-1628, 1642, 1657.)

Sergeant Aguilar and Detective Rodriguez drove appellant to Downey Community Hospital for additional treatment of the dog bite. (6RT 1629, 1657.) Sergeant Aguilar spoke to appellant during the ride to the hospital.

Most of their conversation was tape-recorded by a hidden recording device that was attached to Detective Rodriguez's arm. (6RT 1629-1631.)

Appellant said that before the shooting, he was at a house on Stanford Avenue near Seminole Avenue and Montara Avenue. Appellant was carrying a silver Colt .45 caliber gun with a black grip. Appellant had stolen the gun from his uncle two weeks before then, and had been carrying it around for the last three days to protect himself from gang members. (6RT 1630; People's Exh. No. 77A at pp. 4-5, 10, 15.) Appellant said he loaded the gun with seven or eight silver and gold bullets, and was contemplating using it to rob someone of money that night. (People's Exh. No. 77A at pp. 6, 10-11, 15-17.)

Appellant directed Sergeant Aguilar and Detective Rodriguez to the house on Stanford Avenue and also to the location on Long Beach Boulevard and Seminole Avenue where appellant first encountered Deputy Hoenig. (6RT 1630-1631, 1658-1660.) Appellant explained he was riding his bicycle on Long Beach Boulevard when he encountered Deputy Hoenig. (People's Exh. No. 77A at pp. 2, 6.) Appellant did not want to stop for Deputy Hoenig because he was "tweaking" and he had a gun on him. (People's Exh. No. 77A at p. 2.) Appellant claimed Deputy Hoenig tried to run him over with the patrol car, causing him to fall off his bike. Deputy Hoenig then got out of the patrol car and pointed a gun at him. Appellant initially said he got on the ground, and fired seven to nine shots at Deputy Hoenig before Deputy Hoenig shot at him, but appellant did not know whether he hit Deputy Hoenig. (*Id.* at pp. 2-3, 7-8, 14.) However, appellant later changed his story and said Deputy Hoenig shot at him first, and he then returned fire. (*Id.* at pp. 8-9.)

At the hospital, appellant told the treating doctor, "I think I shot a police officer." (6RT 1661.) After appellant received medical treatment, Sergeant Aguilar and Detective Rodriguez took him to the Sheriff's

Department homicide headquarters in the City of Commerce. (6RT 1633.) They interviewed appellant in an interview room that was wired with a hidden videotape recording device. (6RT 1633-1634.) Sergeant Aguilar and Detective Rodriguez sometimes spoke to appellant in Spanish. Although they were not fluent in Spanish, they spoke enough Spanish to be able to interview Spanish-Speaking suspects. (6RT 1624.)

Appellant again said that he had stolen the gun from his uncle, and was carrying it around for three days before the shooting. The gun was loaded with seven or eight bullets. (6RT 1665; People's Exh. No. 78A at pp. 9-10, 21-22.) Appellant had planned on using the gun to rob someone. (People's Exh. No. 78A at pp. 10-11.)

Appellant repeated that he was "tweaking" with his friends at an apartment on Stanford Avenue. (People's Exh. No. 78A at p. 3.) He was riding his bicycle home when Deputy Hoenig tried to stop him. (*Id.* at pp. 4, 6.) Deputy Hoenig was dressed in a uniform and driving a black and white patrol car. (*Id.* at pp. 14-16.) Deputy Hoenig motioned appellant to come over to the patrol car. (*Id.* at p. 24.) Appellant did not want to stop because he was "tweaking on speed" and had a gun on him. Appellant said Deputy Hoenig followed him and tried to "cut him off" with his patrol car. Appellant went around the car and fell down. (*Id.* at pp. 4, 7, 11-12.) When appellant got up and ran away, Deputy Hoenig got out of the car and fired one or two shots at him. Appellant took out a silver Colt .45 caliber handgun and fired seven or eight shots back at Deputy Hoenig. (6RT 1666; *Id.* at pp. 4, 8-9, 17-18.) Appellant said he was on the ground about 15 to 20 feet from Deputy Hoenig when he shot Deputy Hoenig. (People's Exh. No. 78A at pp. 17, 19-20.) Appellant heard Deputy Hoenig groan and saw him fall to the ground, but appellant thought Deputy Hoenig was reaching for another gun. Appellant did not know whether or not he had hit Deputy Hoenig, and he continued to run away. (*Id.* at pp. 4, 9, 16, 18.) Appellant

believed he shot through the back window of Deputy Hoenig's patrol car because he heard glass shatter. (*Id.* at pp. 26, 28.)

Appellant ran for two or three blocks and threw the gun on the roof of a house, and hid in a doghouse in the backyard of a house for about twenty minutes before a police dog found him. The dog bit appellant and dragged him out. Appellant claimed the police beat him after the dog bit him several times. (People's Exh. No. 78A at pp. 5, 20.)

At the time of the shooting, appellant said he wore a white shirt, a dark sweater, brown pants, black and white shoes, and a leather baseball cap. (*Id.* at pp. 30-31.) Appellant said that he shot Deputy Hoenig because he did not want to go to jail for possessing a gun. (*Id.* at p. 34.) Appellant also said he acted alone. (*Id.* at pp. 28-29, 37.) Appellant admitted he would have fled to Mexico if he had gotten away with the crime. (*Id.* at p. 36.)

According to Detective Rodriguez, appellant was alert, awake, and responsive during the interview. He spoke in both English and Spanish, and at no time indicated that he did not understand English or his constitutional/legal rights. Sergeant Aguilar and Detective Rodriguez never promised appellant anything or threatened him. (6RT 1640, 1642-1643.) Based on appellant's statements and Detective Rodriguez's training and experience, he believed appellant was under the influence of methamphetamine. (6RT 1662.) Detective Rodriguez explained that a central nervous stimulant, such as methamphetamine, generally speeds up the brain operation and escalate the spinal cord reaction to produce rapid movements, but it does not usually distort the reasoning process, that is, the individual's ability to understand, his/her awareness, and his/her coherence. Detective Rodriguez said that appellant was very aware of "what was going on" during the interview. (6RT 1663.) Appellant responded to directions and the questions appropriately. Appellant became tired and sleepy at the

end of the interview when the effects of the methamphetamine began to wear off. (6RT 1664.)

At the conclusion of the interview, Detective Rodriguez left the room to turn off the video camera. When he came back into the room, he picked up the admonition card that was read to appellant earlier that night. Appellant noticed the Spanish language side of the card and asked if he could read it. After appellant read the card aloud, Sergeant Aguilar asked him if he wanted to sign it. Appellant responded, "Yes," and initialed and signed the Spanish side of the card. (6RT 1641-1642, 1661-1662.)

Appellant's Blood Sample Tests Positive for Methamphetamine

Medical personnel obtained a blood sample from appellant while he was at Downey Community Hospital. (6RT 1515, 1633.) The blood sample tested negative for alcohol, but positive for methamphetamine. (6RT 1518, 1520.)

Los Angeles County Sheriff's Criminalist James Lovas testified that methamphetamine was a stimulant that causes a person to feel euphoric or talkative, or it could cause muscle tremors, dry mouth, lack of appetite, rapid speech, elevated pulse, elevated blood pressure, elevated body temperature, and dilated pupils. (6RT 1518.) When methamphetamine is ingested, it metabolizes into amphetamine. Appellant's blood sample showed 41 nanograms per milliliter of amphetamine and 222 nanograms per milliliter of methamphetamine. (6RT 1520.) Criminalist Lovas could not give an opinion about the level of intoxication or impairment that those concentrations would have on an individual. (6RT 1520-1522.) However, based on statistical research for the years 1995 through 1998 of methamphetamine and amphetamine cases submitted to the Sheriff's Department crime lab, Criminalist Lovas determined that 41 nanograms per milliliter was the average concentration of amphetamine found in the blood in those cases; 222 nanograms per milliliter was 33 percent lower than the

average concentration for methamphetamine found in the blood in those cases. (6RT 1522-1525.)

Eliseo Villa Discovers His Gun is Missing

Eliseo Villa was married to appellant's cousin; they lived in Compton. (4RT 1145.) Appellant stayed with Villa and his wife periodically. (4RT 1148.) Villa had his own business selling cars. In April 1991, Villa purchased a chrome "government model" "Colt Mark IV series 80" .45 caliber semiautomatic handgun to use as protection for his business. The serial number of the gun was SS44874, and it was registered with the California Department of Justice Automated Firearms System. (4RT 1146-1147; 5RT 1181-1182.) Villa normally kept the gun at work. However, in October 1997, he took the gun home and put it under his mattress because he was going on a trip and the business was going to be closed. Three days after returning from his trip, Villa discovered that his gun was missing. He became concerned when he heard about Deputy Hoenig's murder. (4RT 1148.) Villa reported the gun missing to the Sheriff's Department. Villas said that he never gave appellant permission to take his gun. (4RT 1149.)

B. Defense Evidence

The defense did not present any evidence in the guilt phase of trial.

PENALTY PHASE[4]

C. Victim Impact Evidence

The prosecution offered the testimony of the following witnesses to show the impact of the murder upon the victim's family and friends: Steven Hoenig, David Hoenig, Debra Hite, Deputy Terresa Gunnels, Mary

[4] As respondent will be referring to many witnesses with the same last name, respondent will use their first names to avoid confusion. No disrespect is intended.

Hoenig, and Robert Hoenig. The prosecutor also showed the jury numerous photographs of Deputy Hoenig during his life and of his funeral.

Deputy Hoenig was born on January 4, 1965. (7RT 1877.) He was the third oldest child of four children born to Mary and Robert Hoenig. (7RT 1820-1821.) Deputy Hoenig was nice, serious, private, "annoyingly neat," and he had a lot of friends. (7RT 1877-1878, 1900.) The family was close and took many trips together. (7RT 1896.) After receiving his bachelor degree from California State University Los Angeles, he enrolled in the law enforcement academy at Rio Honda College. Deputy Hoenig was sworn in as a Deputy Marshal in 1987. (7RT 1898-1899.) He became a Deputy Sheriff after the Marshal's Department merged with the Sheriff's Department. (7RT 1857-1858, 1900-1901.)

Steven Hoenig was Deputy Hoenig's younger brother. (7RT 1820.) Steven said Deputy Hoenig was his closest friend. (7RT 1828.) Steven and Deputy Hoenig were very close growing up because they were less than two years apart in age. They shared many of the same friends and belonged to the same organization -- Odd Fellows --that helped the elderly, poor, and disabled. Deputy Hoenig was the "highest state officer for that organization." (7RT 1821-1822.) When Deputy Hoenig was not working, he enjoyed many outdoors activities, especially fishing. Steven and Deputy Hoenig developed a fondness for fishing in their early childhood years when their father would take them camping. Steven and Deputy Hoenig continued to share their love of fishing, and often took fishing trips together. (7RT 1822-1824.) Steven took his last fishing trip with Deputy Hoenig a month before Deputy Hoenig was murdered. (7RT 1829-1830.)

Steven was away at college when he learned of Deputy Hoenig's death. (7RT 1830-1831.) He came home and personally thanked the officers who had tried to save his brother. The officers reassured Steven that his brother died while surrounded by people who loved him. (7RT

1833.) For four months after Deputy Hoenig's murder, Steven slept with his lights on because he had reoccurring nightmares about Deputy Hoenig's murder. (7RT 1834.) Steven failed most of his college classes, and took some time off school. Steven believed he had failed Deputy Hoenig by not being there for him the night he died. (7RT 1835-1837.)

David Hoenig was Deputy Hoenig's eldest brother. (7RT 1838.) David considered himself selfish and irresponsible, a "lost soul." Even though David did not have a close relationship with Deputy Hoenig, he believed Deputy Hoenig was his moral compass and had inspired him to change his life. After Deputy Hoenig's death, David decided to go back to school and to eventually become a police officer like his brother. (7RT 1839-1841.) David said he often visits the cemetery gates at night when he could not sleep. (7RT 1875-1876.)

Debra Hite was Deputy Hoenig's longtime girlfriend. (7RT 1846-1847.) Hite considered Deputy Hoenig her best friend, and she shared with the jury the memories of her last vacation with Deputy Hoenig. (7RT 1847-1849.) The program distributed at Deputy Hoenig's funeral featured a picture that Hite had given to the family, as well as her final note to Deputy Hoenig that read: "To Mike: [¶] I would rather have 30 minutes of wonderful than a lifetime of something special. [¶] Thank you for my eight years of wonderful." (7RT 1853.)

Los Angeles County Sheriff's Deputy Tressa Gunnels met Deputy Hoenig in 1990 while he was a Deputy Marshall at the Los Angeles County traffic court. (7RT 1854-1856.) When the Marshall's Department merged with the Sheriff's Department, both Deputy Hoenig and Deputy Gunnels were transferred to the Century Sheriff's Station, where they became partners assigned to traffic patrol. (7RT 1857-1858.) Deputy Gunnels explained that they responded to many traffic accidents, and when the accident involved children, Deputy Hoenig would give the children stuffed

animals that he kept in the trunk of their patrol car to calm down the children. (7RT 1859-1860.) Deputy Gunnels said that Deputy Hoenig was well liked at the Century Station as he was quiet and helpful. (7RT 1861.)

Deputy Gunnels recalled responding to the crime scene and seeing Deputy Hoenig lying on the ground in a pool of blood after the shooting. She explained that Deputy Hoenig's death affected the sheriff's deputies "a great deal," and that there had been a "dark cloud" hanging over the Century Station ever since his death. In fact, one of the officers who had rendered CPR to Deputy Hoenig at the scene went on leave and had not returned to work. Deputy Gunnels stated that it was "because of the gruesome scene that he saw that night." (7RT 1861-1868.) Deputy Gunnels said she would never recover from Deputy Hoenig's murder. (7RT 1873.)

Members of the Century Sheriff's Station each placed a rose near Deputy Hoenig's picture or gravesite to show their support, love, and respect. (7RT 1872.) Deputy Gunnels testified that the citizens of South Gate created a memorial for Deputy Hoenig at the crime scene with candles, notes, flowers, and other items. They also started a "Stop the Violence" campaign in honor of Deputy Hoenig. (7RT 1870.) The Sheriff's Department retired the numbers on Deputy Hoenig's patrol car after his death. (7RT 1869.)

Mary Hoenig was Deputy Hoenig's mother. Mary was disappointed that Deputy Hoenig worked in a one-man car in what she referred to as the "worst area to work in." (7RT 1881.) Mary expressed regret for blaming Deputy Hoenig's death on his captain after the shooting. (7RT 1883.) Following Deputy Hoenig's death, Mary attended some survivor group meetings to cope with his death. She was encouraged to keep a journal of her feelings, but her journal consisted of only three pages of letters to Deputy Hoenig. (7RT 1883.) Mary said that she stopped going to the

survivor meetings because they were depressing, she said, "It's like October 30th all over again, every time we go to one of these meetings . . . ." (7RT 1890.) When asked what she would say to Deputy Hoenig, Mary said, "I'm sorry." (7RT 1894.)

Robert Hoenig was Deputy Hoenig's father. (7RT 1896.) Robert recounted Deputy Hoenig and Steven's involvement in Odd Fellows, and said that he eventually joined the organization because he was proud of Deputy Hoenig's involvement. (7RT 1896-1897.) Robert talked about Deputy Hoenig's love for fishing and his frequent fishing trips to Lundy Lake with his friends from the Sheriff's Department. A week before his murder, Deputy Hoenig went to Lundy Lake with his friends and jumped into the cold water during the "Polar Bear Jump." (7RT 1902.) After Deputy Hoenig's death, several of his fishing mates from the Sheriff's Department went back to Lundy Lake to dedicate two plaques to Deputy Hoenig. One of the plaques is on display in the Lundy Lake general store, and the other one is on display in the youth station at the former Firestone Sheriff's Department. (7RT 1903-1904.) Robert helped clean out Deputy Hoenig's locker at the sheriff's station and claimed his car. In Deputy Hoenig's gear bag that was in the trunk of his patrol car, Robert found little gifts that Deputy Hoenig's kept for the children involved in accidents. (7RT 1906.)

Robert explained that during the course of trial, appellant was always smiling. Specifically, during the testimony of the police officer who performed CPR on Deputy Hoenig, appellant made eye contact with Robert and grinned at Robert. Robert felt angry that appellant "could assassinate [his] son and then just smile about it." (7RT 1908.) Robert testified his family was "deeply affected" by Deputy Hoenig's death, and they have not enjoyed a holiday season since his death. (7RT 1916.)

Finally, Robert read a poem authored by an officer who performed CPR on Deputy Hoenig:

> A demon killed a deputy tonight and bloodied the badge that he wore.
>
> He was shot in front of those he protected as several watched in horror.
>
> They watched from their windows and they watched from the street, they watched as a demon took Mike's last heartbeat.
>
> The demon's lawyer will stand up in court and demand the demon was right, but where was the court on that dark lonely street, when Mike could no longer fight?
>
> He patrolled the dangerous streets of that city, the streets that most could not walk. He lay on his back on those very streets, but Mike could no longer talk.
>
> Kneeling beside him we tried to revive a heartbeat or maybe a breath. His body never reacted, it never came back, Mike had been lost to death.
>
> I pleaded for God to give me more strength and let me see Mike alive. Mike, I pray for you then, and with all of my heart as I will for the rest of my life.

(7RT 1913-1914.) That officer ultimately left the force. (7RT 1914.)

D. Evidence in Mitigation

Defense counsel presented evidence in mitigation from appellant's family members and a family friend. Each witness asked the jury to impose life without the possibility of parole.

According to Juan Parra, appellant's eldest brother with whom appellant lived for eight months, appellant was a good hearted boy growing up. Appellant got along with everyone, and he was not violent. Parra testified that their father was deceased and their mother lived in Mexico. Appellant had six brothers and three sisters; some lived in the United States

and some lived in Mexico. Parra said that he had not been close to appellant "lately." (7RT 1919-1923.)

Luis Navarro was appellant's brother-in-law. Navarro was close to appellant because appellant lived with him and his wife (appellant's sister Blanca) for four or five years. Appellant worked for Navarro loading and unloading boxes for a delivery service. Navarro said that appellant was a hard worker, and he credited appellant for helping him get recognition for providing quality service. Navarro had never seen appellant get violent, break the law, or carry a gun during the years appellant lived with Navarro. Navarro had seen appellant use drugs, however. Appellant became a "totally different person" when he used drugs; he was violent, tense and pushy. (7RT 1923-1929.)

Maria Villa, appellant's cousin and the daughter of Eliseo Villa (owner of the gun used to murder Deputy Hoenig), testified that appellant lived with her family periodically, and he was like a brother to her. Villa said appellant was helpful, nice, and respectful. Maria denied seeing appellant with a gun, be violent, associate with gang, or get in trouble with the police. (7RT 1929-1932.) Villa stated she had never witnessed appellant do drugs, but she had seen him under the influence of drugs, which caused him to be paranoid and scary. According to Villa, appellant's drug use increased near the time of the murder. (7RT 1932-1933.)

Fernando Solano met appellant through appellant's family, and had been appellant's close friend for about twelve years. Solano said he had never seen appellant be violent, hit anyone, associate with gang members, or get in trouble with the police. Solano knew that appellant used methamphetamine and had seen appellant under the influence. Solano described appellant as erratic, nervous, and violent when he was under the influence of drugs, but Solano had not seen appellant lash out or get in fights. (7RT 1934-1938.) Solano admitted that appellant was a "totally

different" person and "very paranoid" when he was under the influence of drugs. (7RT 1940-1941.) Appellant used drugs a lot during the year before the murder. Solano tried to convince appellant to stop using drugs, but appellant responded that he did not care and wanted to die. (7RT 1942-1943.) Appellant had tried drug rehabilitation in the past in Mexico, and stopped using for a while. However, after appellant's father died, appellant came back to the United States and started using drugs again. (7RT 1943-1944.)

Solano testified appellant was a nice person. Even though appellant sometimes acted like a "tough guy," anyone could see that he was faking it. Solano believed that appellant was remorseful about Deputy Hoenig's murder even though he did not show it, because he may be confused about the event or did not understand it fully. Solano maintained that appellant was not the demon described in the poem read to the jury by Robert Hoenig. Solano believed the real demon was the drugs that appellant used. (7RT 1938-1940.)

Martin Parra was appellant's older brother. Parra lived in Mexico. Parra said he was close to appellant when appellant lived in Mexico. Parra had never seen appellant become violent, carry a gun, or use drugs. (7RT 1947-1948.) Parra said appellant was not a delinquent assassin, and blamed the killing on "the dirty stuff that's being sold here." (7RT 1948-1949.)

Blanca Navarro was appellant's sister; she was married to Luis Navarro. Blanca had lived with appellant for most of his life. She portrayed appellant as an obedient and thoughtful brother. Navarro said that appellant was loved by his parents, and that their parents taught them the difference between right and wrong. (7RT 1953-1957.)

Rosa Delgadillo was appellant's older sister. She asked the jury to give appellant life imprisonment, and asked the victim's family for forgiveness. (7RT 1957-1959.)

Eliseo Villa was appellant's uncle who owned the murder weapon. Villa had known appellant for fifteen years. Appellant had lived with Villa and his wife for a short time before the murder. Villa testified that appellant and his brothers and sisters were humble people. Prior to the murder, Villa had suspected that appellant's life was not going well because he was having problems at work. Villa advised appellant to behave better and take care of his job. Appellant cried during their conversation. Villa believed that appellant killed Deputy Hoenig because he was under the influence of drugs. Villa did not think appellant would have committed the crime if he were in the right frame of mind. (7RT 1959-1962.)

ARGUMENT

I. THE TRIAL COURT PROPERLY EXCUSED THREE PROSPECTIVE JURORS FOR CAUSE

Appellant contends the trial court erred under *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776] and *Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841], in improperly excusing for-cause three prospective jurors: (1) prospective Juror No. 4593, (2) prospective Juror No. 5637, and (3) prospective Juror No. 6611.[5] Appellant claims the trial court's excusals for-cause each of the three prospective jurors violated his constitutional right to due process and a fair trial, and constituted per se reversible error. (AOB 39-62.) To the extent appellant raises any state or federal constitutional or statutory issue not squarely grounded in *Wainwright*, those issues have been waived and are subject to procedural default since appellant failed to raise them in the trial court. (See *People v. Hines* (1997) 15 Cal.4th 997, 1035; *People v. Holt*

[5] Respondent will use the same numerical identification numbers used at trial to preserve the jurors' privacy, as provided by California law. (See Code of Civil Procedure, §§ 206 & 237.)

(1997) 15 Cal.4th 619, 666-667; *People v. Alvarez* (1996) 14 Cal.4th 155, 186.) In any event, respondent will demonstrate below that appellant's contention is meritless since the record contains substantial evidence supporting each of the three for-cause excusals.

A. The Applicable Law

In *Wainwright v. Witt*, *supra*, 469 U.S. 412, the United States Supreme Court held, "The proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Id.* at p. 424; see *People v. Williams* (1997) 16 Cal.4th 635, 667; *People v. Crittenden* (1994) 9 Cal.4th 83, 120-121; *People v. Mincey* (1992) 2 Cal.4th 408, 456.) The critical question in each challenge is "whether the juror's view about capital punishment would prevent or impair the juror's ability to return a verdict of death *in* the case before the juror. [Citation.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1318-1319, italics and quotation marks omitted; *People v. Hill* (1992) 3 Cal.4th 959, 1003.)

If a prospective juror provides conflicting or equivocal answers to questions concerning his or her impartiality, the trial court's determination as to that person's true state of mind, which may include an evaluation of the juror's demeanor, is binding on the appellate court. (*Wainwright v. Witt*, *supra*, 469 U.S. at pp. 428-429; see *People v. Cunningham* (2001) 25 Cal.4th 926, 975; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1319; *People v. Mayfield* (1997) 14 Cal.4th 668, 727; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 122; see also *Wainwright v. Witt*, *supra*, 469 U.S. at pp. 425-426.) More specifically,

> [A] trial court's rulings on motions to exclude for cause are afforded deference on appeal, for "appellate courts recognize

> that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor), gleans valuable information that simply does not appear on the record." [Citation.]

(*People v. Avila* (2006) 38 Cal.4th 491, 529.) The United States Supreme Court recently explained, "Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." (*Uttecht v. Brown* (2007) 551 U.S. 1, 9 [127 S.Ct. 2218, 167 L.Ed.2d 1014].)

Likewise, a prospective juror who has expressed an unwillingness to impose the death penalty may properly be excused for cause. (*People v. Jenkins* (2000) 22 Cal.4th 900, 986-987.) Any ambiguities in the record are to be resolved in favor of the trial court's determinations, and the reviewing court determines only whether the trial court's findings are fairly supported by the record. (*People v. Holt*, *supra*, 15 Cal.4th at p. 651; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 122; *People v. Howard* (1988) 44 Cal.3d 375, 417-418.)

B. The Trial Court Did Not Err When it Excused for Cause Three Jurors Who Expressed Reservations About Their Ability to Impose the Death Penalty in the Appropriate Situation

Among the venire of prospective jurors in appellant's case were Juror Nos. 4593, 5637, and 6611.

Juror No. 4593

Juror No. 4593's juror questionnaire appears on pages 300 through 303 of the Clerk's Transcript (Vol. II). In question number three of the questionnaire, which asked, "What are your general feelings about the death penalty," the juror responded, "Have mix [*sic*] feeling. Not sure can decide guilty or not guilty because it concerns people's life." (2CT 300.)

In question number ten, which asked, "Regardless of your views on the death penalty, would you as a juror, be able to vote for the death penalty on another person if you believed, after hearing all the evidence, that the penalty was appropriate," the juror answered, "Not sure." (2CT 302.) Finally, in question number thirteen, which asked, "Do you have any conscientious objections to the death penalty which you believe might impair your ability to be fair and impartial in a case in which the prosecution is seeking the death penalty," the juror responded, "Yes." (2CT 302.)

The voir dire for Juror No. 4593 appears at pages 222 through 235 of the Reporter's Transcript (Vol. I). During voir dire, the trial court explained to this juror that there are two phases of trial, the guilt phase and the penalty phase. The court said the jury may never get to the penalty phase if appellant was found not guilty or guilty of a lesser included offense. The court further explained the process of weighing aggravating and mitigating factors toward reaching a penalty determination. (1RT 224-225.) The juror indicated he understood the court's explanations of both the guilt and penalty phases of trial. (1RT 226.)

With regard to the juror's answers on the questionnaire, the court said, "As I read your answer to the questionnaire, you believe that you would not exercise your right to the option, but rather would not impose death. Am I stating your position correctly?" (1RT 226.) The juror responded,

> Well, because it's hard for me, even though I know he killed someone and -- but I -- what's kind of hard for me, too, is because my judgment -- I can't put people to death, you know, because my vote, or because my -- you know, even though I hear and, yes, I agree he killed this person, and maybe I agree with -- I heard all the evidence, but my conscience -- still kind of hard for me to, you know, because of my vote, I able to put this person to death. So, that's -- I think that's what my biggest feeling is.

(1RT 226.) The juror said that his feelings about the death penalty were based on both his personal beliefs and religious beliefs.[6] (1RT 227.) The court said that at some point in the trial, the juror may have to look at appellant and say, "Yes, I vote that death should be imposed." (*Ibid.*) The court asked if the juror would have a difficult time doing that. The juror said his "most honest" answer would that he would have a hard time doing that. (*Ibid.*)

Based on these answers, defense counsel asked the juror if he could vote for death if appellant was found guilty of killing an officer in the line of duty. The juror said, "If all the factor [*sic*] really convince me, I do, but I still will feel guilty. Even though I voted yes, but probably later on I would think because my vote I would cause -- I would cause a person's death, but I would still vote, yes." (1RT 228.)

The juror agreed with the prosecutor's statement that he (the juror) wanted to give the "right answer" to the judge, defense counsel, and the prosecutor. However, the prosecutor said, "The only real right answer is what you believe inside --[.]" (1RT 229.) The prosecutor went on to explain to the juror that the decision whether or not to impose the death penalty is a difficult for everyone. Based on the juror's answers to the questions on the questionnaire, the prosecutor believed the juror did not want to vote to end another person's life because of his value system and personal beliefs. (1RT 230.) The juror said, "Yes. But I would think it the other way too, because he took -- you know, because we already voted guilty, and I can feel he took the other person's life with the -- with no reason, or with the -- whatever the reason is, and I still can feel -- I will feel

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[6] In question number four of the questionnaire, which asked, "Are your views on the death penalty based on religious conviction," Juror No. 4593 answered, "No." (2CT 302.)

-- because the other person is already dead, and I feel I need to do some justice too, but --[.]" (1RT 231.) The juror expressed some confusion during the prosecutor's questioning of him about whether the fact that appellant would never be released from prison was justice enough for the juror, and whether the juror could impose the death penalty based on certain criteria that the judge will instruct on in the penalty phase. (1RT 232-234.) "But when it comes down to it," (1RT 234), and based on the juror's "beliefs, religious and personal moral values," the prosecutor asked if the juror could impose the death penalty knowing that he would have to live with that decision for the rest of his life. (1RT 235.) The juror responded:

> Yes, yes, I will still give you kind of like an in between answer, because right now -- for me right now I have really mixed feeling about that, because I can see it both side because -- but the other side is the -- the victim, you know, he died. And maybe because, you know, the cause is -- you know, I really feel sorry, or feel, you know, justice has to be made. But I will consider because my vote -- so, it's really -- I thought about it over weekend, and I really think I still have a mixed feeling right now. So, I probably answer I still cannot make -- probably cannot make a decision.

(1RT 235.)

The court found "that the juror's response demonstrates that his views would substantially impair his performance and duties as a juror in this case, and he would have difficulty in accordance with the instructions --[.]" The juror interrupted the court and said, "Yes." The court continued its statement, and excused the juror for cause. (1RT 236.)

Applying the above standards to the instant case, it is clear the trial court did not err in excusing Juror No. 4593. As demonstrated above, this juror repeatedly equivocated about whether he could impose the death penalty. Significantly, "when it came down to it," he repeatedly asserted that it would be difficult for him to put someone to death, that he had

"mixed feelings" on the matter, and that he could not make that decision. (1RT 226, 227, 235.) As noted by this Court in *People v. Roldan* (2005) 35 Cal.4th 646, a juror's response that he would have a "hard time" voting for the death penalty or that he would find the decision "very difficult" "indicate a degree of equivocation on the juror's part which, taken into account with the juror's hesitancy, vocal inflection, and demeanor, can justify a trial court's conclusion regarding the juror's mental state that the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Id.* at p. 697.)

Even though the juror expressed some willingness to be fair to both sides and vaguely indicated he had not foreclosed the possibility of returning a verdict of either life or death (1RT 228, 231), it appears from the record that the juror's show of willingness to be fair and possibly impose the death penalty was his attempt to give the "right answer" to the court and counsel, and to satisfy them by saying what he believed they wanted to hear (see 1RT 228, 229). Jurors commonly supply conflicting or equivocal responses to questions directed at their potential bias or incapacity to serve. When such conflicting or equivocal answers are given, the trial court, through its observation of the juror's demeanor as well as through its evaluation of the juror's verbal responses, is best suited to reach a conclusion regarding the juror's actual state of mind. (*People v. Hamilton* (2009) 45 Cal.4th 863, 890.) The trial court here resolved those differences in deciding to excuse this juror for cause. Even though the juror gave some conflicting answers, in the end and after having the weekend to think about it, the juror conceded that he still could not "make a decision." (1RT 235.) Notably, the juror *agreed* with the trial court's finding that "his views would substantially impair his performance and duties as a juror." (1RT 236.) The trial court's determination as to the prospective juror's true state

of mind, if supported by substantial evidence, as is the case here, is binding on the appellate court. (See *People v. Bradford*, *supra*, 15 Cal.4th at p. 1329; *People v. Carpenter* (1997) 15 Cal.4th 312, 357; *People v. Mayfield*, *supra*, 14 Cal.4th at p. 727; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 122.)

Indeed, the juror's answer to the questionnaire revealed the juror's equivocation in the matter. The juror wrote that he had "mix[ed] feelings" about the death penalty. (2CT 300.) He reiterated his "not sure" answer when asked if he could impose death if all the evidence showed it was appropriate. (2CT 301.) Not surprisingly, the juror marked, "Yes," when asked if he had any conscientious objection to the death penalty. (*Ibid.*)

Appellant contends this juror "repeatedly" stated he could vote for the death penalty. (AOB 43.) To the contrary, the juror only stated that there was a possibility that he could vote for the death penalty, and in the end agreed with the court that he would be impaired in his performance and duties as a juror. (1RT 228, 236.) When Juror No. 4593's statements during voir dire are view in context with his answers on the questionnaire, there is ample evidence to support the trial court's excusal for cause of this th juror since his views on the death penalty would "prevent or substantially impair the performance of [his] duties as a juror in accordance with [his] instructions and [his] oath." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; s*ee People v. Barnett* (1998) 17 Cal.4th 1044, 1114-1115 [while some answers showed willingness to follow the law and the court's instruction, other answers furnished substantial evidence of a prospective juror's inability to consider a death verdict].) Accordingly, the court did not abuse its discretion in excusing Juror No. 4593 for cause.

Juror No. 5637

Juror No. 5637's juror questionnaire appears on the pages 352 through 355 of the Clerk's Transcript (Vol. II). In question number three, which

asked the juror about his generally feeling about the death penalty, the juror responded, "Do not believe in death penalty." (2CT 352.) In question number four, which asked,

> Are you so strongly against the death penalty that no matter what the evidence shows, you would refuse to vote for guilt as to first degree murder or refuse to find the special circumstances true in order to keep the case from going to the penalty phase where death or life in prison without the possibility of parole is decided.

The juror marked, "Yes." (2CT 353.) Likewise, in question number six, which asked,

> Are you so strongly against the death penalty that if a jury found a defendant guilty of intentional first degree murder and found a special circumstance to be true, you would always vote against death, no matter what evidence of aggravation or mitigation might be presented at the penalty hearing in the case?

The juror again marked, "Yes." (2CT 353.) In question number ten, which asked if the juror could vote for death if it was the appropriate penalty, based on all the evidence, the juror wrote, "Don't Know." (2CT 354.) In question number twelve, which asked, "In the penalty phase would you automatically, in every case, regardless of the evidence, vote for life in prison without the possibility of parole?" The juror marked, "No." (*Ibid.*) Likewise, the juror marked, "No," to question number thirteen, which asked about his ability to be fair and impartial based on "any conscientious objections to the death penalty." (*Ibid.*)

The voir dire for Juror No. 4593 appears at pages 327 through 334 of the Reporter's Transcript (Vol. I). The trial court questioned the juror about his answers in question numbers three, four, and six. With regard to question number three, the juror said that he did not personally believe in the death penalty. When asked further whether the juror was saying he would under no circumstances impose the death penalty, the juror

answered, "I -- right now I don't think I would." (1RT 328.) The court then asked whether the juror could set aside his personal belief and impose the death penalty if the evidence showed it was justified, the juror said, "I think I could, yes, your honor." (*Ibid.*) Given a hypothetical where appellant was found guilty of murdering police officer, and the prosecution presented evidence that justified the death penalty, the court asked the juror whether he could impose the death penalty. The juror said, "I think I could, yes, but although I don't really believe in the death penalty." (1RT 329.) The juror said that for him to impose the death penalty, the scenario would have to be "quite bad." (1RT 329-330.) The court further clarified the hypothetical, "Well, what about killing a police officer sitting in a police car wearing his uniform, and there is no reason for killing him?" The juror answered, "I guess I could yeah." (1RT 330.) The court commented that the juror's answer "I guess I could" was "a little equivocal." (*Ibid.*) The court repeated the hypothetical and again asked if the juror could impose the death penalty. This time the juror answered, "Yes, I could." The juror also said he could also impose life without the possibility of parole. (*Ibid.*) The court reviewed the juror's answer to question number four, and asked if the juror's if his answer was the same at that point in time. The juror said, "I guess I could change that answer to no." (*Ibid.*) The juror said he could also change his answer to question number six. (1RT 331.)

Thereafter, defense counsel questioned the juror briefly, and asked the juror whether he could consider the two penalty options, including life in prison without the possibility of parole. The juror said that he could consider both types of penalties. (1RT 331-332.)

After reviewing the juror's answers to the questionnaire, the prosecutor observed that the juror was being sincere and honest when he answered the questions on the questionnaire. That the juror was basically conveying the belief that he "couldn't pull the switch." The prosecutor

asked the juror if "that summed up [his] feelings." The juror said, "I think so, sir. Yes." (1RT 332-333.) The prosecutor then asked, "And when the judge is asking the questions, everyone says they are fair and, yeah, both sides but deep down inside, you couldn't do it, could you?" The juror responded, "I guess I could do it, yeah." (1RT 333.) In response to the prosecutor's next question, the juror expressed that he would rather not impose the death penalty. (*Ibid.*) When asked by the prosecutor whether he was the right juror to sit on a capital case in light of his answers on the questionnaire and the questions asked of him during voir dire, the juror responded, "No." (1RT 334.)

The prosecutor challenged this juror for cause. The court excused the juror, finding that his "responses do demonstrate his views, would substantially impair his performance and duties as a juror in accordance with his oath and with his instructions by the court." (1RT 334.)

Here, substantial evidence was presented during the voir dire to support the trial court's ruling excusing Juror No. 5637 for cause. In particular, the juror did not believe in capital punishment. (2CT 352.) Significantly, as expressed in his questionnaire, and reaffirmed to the prosecutor, he was so against capital punishment that he would "refuse to vote for guilt . . .in order to keep the case from going to the penalty phase . . . ." (2CT 353; 1RT 332-333.) Furthermore, he expressed the inclination to vote for life without the possibility of parole, regardless of what the evidence of aggravation and mitigation may show. (*Ibid.*) The juror maintained his position when asked by the court whether he would impose the death penalty "under no circumstances" -- the juror said, "I -- right now I don't think I would." (1RT 328.)

Even though the juror suggested the remote possibility that he could impose the death penalty if the evidence justified the penalty in "bad" cases, the converse was also possible, that his strong feelings against the

death penalty could not be swayed. (*See People v. Cain* (1995) 10 Cal.4th 1, 60-61 [the trial court properly excused a prospective juror whose equivocal responses could have meant merely that she was unable to predict what she would do if in a position to vote for death because they also substantially supported the contrary conclusion that, despite her desire to have an open mind, her emotional leaning against death was so strong that she probably could not vote for it even if she thought the evidence justified it].) Indeed, the juror reiterated that he "did not really believe in the death penalty." (1RT 329.) Even when the court presented the juror with a hypothetical based on the facts of this case, the juror express equivocation; the court noted the juror's equivocal answer. (1RT 330.) Although the juror later declared a theoretical possibility that he could vote for the death penalty, the court legitimately could infer from the strength of the juror's views and subsequent contrary responses to the prosecutor, and his equivocal statements, that he was substantially impaired in his ability to perform his duties as a juror. The mere theoretical possibility that a juror might be able to reach a verdict of death in some case does not necessarily render the dismissal of the juror an abuse of discretion. (*People v. Wharton* (1991) 53 Cal.3d 522, 588-589.)

The record clearly shows that the juror equivocated to some extent, but he obviously favored a life sentence, and his answers on the questionnaire suggested he would not vote for death. Most significantly, the juror himself opined that he was not the right juror to sit on a capital case. (1RT 334.) Contrary to appellant's assertion that the juror's own opinion was "quite irrelevant" (AOB 53-54), the fact of the matter is that his opinion honestly shed light on his true ability to perform his duties as a juror. The bottom line is that even after repeatedly expressing the equivocal view that he "thought" he "could" impose a death verdict, the juror conceded his view that he could not "pull the switch" and would

rather not impose the death penalty, and was not "the right juror" to sit on a capital case. (1RT 333-334.) The record presents sufficient and ample evidence to support the trial court's excusal for cause of this prospective juror since his views concerning capital punishment would "prevent or substantially impair the performance of [his] duties as a juror in accordance with [his] instructions and [his] oath." (*Wainwright v. Witt*, supra, 469 U.S. at p. 424.) Neither the court nor the prosecutor did anything to "taint" the jury selection process as appellant suggests. (AOB 53.)[7] The juror's own written responses as well as his statements during voir dire spoke volumes of his inability to sit a juror in this case. Accordingly, the court did not abuse its discretion in excusing Juror No. 5637 for cause.

Juror No. 6611

Juror No. 6611's juror questionnaire appears on the pages 578 through 581 of the Clerk's Transcript (Vol. IV). This juror answered, "Neutral," to question number three which asked him about his general feelings about the death penalty. (4CT 578.)

During voir dire, the court asked the juror to explain what he meant by, "Neutral," in question number three of the questionnaire. (2RT 497.) The juror answered, "I really haven't -- I don't know. I've --[.]" (*Ibid.*) The court interrupted the juror to clarify the question, and asked that if appellant was found guilty of the charged crime, and based on all the evidence, could the juror impose death. The juror said, "I think so, yeah." (*Ibid.*) The juror further explained that he did not have any religious convictions that prevented him from imposing the death penalty. The court

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[7] Appellant does not cite any authority or tender an analysis why asking a juror about his ability "to pull the switch" is error. The claim is therefore waived. (*People v. Gray* (2005) 37 Cal.4th 168, 198.) The question was also entirely proper inasmuch as it underscore the magnitude of the juror's responsibility.

again asked if the juror could represent that he could impose the death penalty, and the juror said, "I believe so." (*Ibid.*) When asked by the court whether the juror had any hesitation, the juror said his answer was, "No," but this was a "big deal." (2RT 497-498.)

Defense counsel was given an opportunity to question the juror. Counsel asked the juror if he had any friends or family that was in law enforcement. The juror said that he did not. (2RT 498.) When asked by counsel if the juror could impose the death penalty if appellant was found guilty of killing a police officer and the evidence showed the appropriate penalty was death, the juror answered, "I think so." (*Ibid.*) Counsel pressed for a more definite answer by asking, "When you say you think so, the prosecution and I, we need 12 jurors up there and we need 12 jurors that could vote either for death or life without the possibility of parole. We can't have it just one-sided. Okay?" (*Ibid.*) "So do you think that if you thought it was appropriate, could you vote death?" The juror said, "I think I -- yes, I think." Counsel noted that the juror was "sort of shaking [his] head," and told the juror that it was fine if the juror could not vote for death. He would just be let go. (2RT 499.) The juror responded to that comment by saying, "I think I could do what would be called upon me. It's just this whole thing, I've never been here before, and this is a big case so I'm a little nervous." (*Ibid.*) Counsel told the juror that he was one of the few jurors who was called upon to decide this case, it was important for the parties to know whether the juror could vote for death -- "yes or no." The juror said, "Yes." The juror gave the same answer to counsel's question about his ability to impose life without the possibility of parole. (*Ibid.*)

The prosecutor then questioned the juror. The prosecutor first explained that this case "was a very serious case. It's the most serious case we deal with." (2RT 500.) The prosecutor then asked the juror, "If the question were on the ballot last week, should California have a death

penalty, how would you vote." (*Ibid.*) In the same equivocal manner that had been common to this juror's responses, he said, "I kind of feel like I'd probably vote yes because it does seem like there are some offenses that the state should have reserved for higher penalty, I guess." (*Ibid.*) The prosecutor went on to explain that California put people to death by lethal injection. He further explained that the parties had to have "a fair opportunity to get the result [they] want." The prosecutor expressed the concern that the juror's answers "don't guarantee [he's] going to vote for either side," and reiterated that the parties "need[ed] to have a fair chance." (*Ibid.*) The prosecutor continued,

> And assuming that we get to the penalty phase, I -- as the representative of this community -- need to know, can these jurors vote death. And what it really means is because we have a working death penalty now, that your vote means that he will be put to death in San Quintin by lethal injection. And essentially you voting death is like you pushing the button.
>
> And with your hesitancy here, listening to your answers from the judge and [defense counsel], I have a question in my mind, basically can you pull the trigger? Can you have your finger on the button, say I condemn you to death?
>
> And if you can't, that's perfectly fine because there's many cases you'd be a fine juror on, but not this one. So -- and only you know inside. It's obviously a weighty question. It's the most serious question we ask members of the public in this country to deal with.
>
> And there is a number of people that say I support the death penalty, we should have it on the books but I can't make that decision. Are you in that group?

(2RT 500-501.) There was no response from the juror. (2RT 501.)

At that moment, the court reassured the juror that "there is no right or wrong answer. We only want to know what your true beliefs are." (2RT 501.) The juror said, "Yeah," before the court added, "And I indicated also I want you to stand by whatever your beliefs are, so don't try to satisfy us.

You just tell us what your belief is." (*Ibid.*) The juror remarked that he had never been in this situation before. (*Ibid.*) He further explained, "I feel that I could weigh, you know, everything brought upon me, but, you know, you just never know until you get there. That's kind of how I feel on some things here. I -- I don't feel pre-dis- -- predisposition, you know, either way, but -- but you want to know if I -- if I would be able to." (2RT 502.)

The prosecutor explained that there was only one police officer victim in this case, unlike the Oklahoma City bombing where there were 168 victims killed. The prosecutor again reassured the juror that it was fine if he could not impose the death penalty. (2RT 502.) The juror did not respond, and the court noted that there was "substantial silence." The court asked if the juror was "mulling over in [his] mind whether or not [he] could or could not impose the death penalty" and if "at this point in time [the juror] still haven't reached a conclusion." (*Ibid.*) The juror responded, "True. I'm kind of hitting a blank just with --[.]" (*Ibid.*) At that point, the court found "that the juror's response does demonstrate that his views would substantially impair his duties as a juror in accordance with his oath and instruction by the court. The court excused the juror. (2RT 502-503.)

Here, substantial evidence was presented during voir dire to support the trial court's ruling excusing Juror No. 6611 for cause. Even though this juror's answers on his questionnaire suggested he could be fair to both sides and had not foreclosed the possibility of returning a verdict of either death or life without the possibility of parole, the record shows that his demeanor and attitude as observed by the trial court revealed more about his opinion regarding the death penalty than what he had expressed in the questionnaire.

During voir dire, most of the juror's answers showed equivocation -- "I don't know" (2RT 497), "I think so" (*Ibid*, 2RT 498), "I believe so" (2RT 497), "No, but . . ." (2RT 497-498), "I think I -- yes, I think" (2RT

499), ". . . yes . . . I guess" (2RT 500). It is not clear from the record how the juror appeared to the court and counsel as he answered the question posed to him -- whether his demeanor suggested sincerity, dissimulation or merely nervousness. But what is apparent from the record is the juror's equivocation. This juror's answers were so equivocal that defense counsel had to press for a more definite answer -- "yes or no," and even noted that while the juror said he "thinks" he could impose the death penalty, he was shaking his head. (2RT 498-499.) The prosecutor likewise noted the juror's "hesitance." (2RT 501.) The juror's equivocation prompted both defense counsel and the prosecutor to reassure the juror that it was "fine" if the juror could not vote for death, and the court added that there was "no right or wrong answer." (2RT 499, 501.)

Aside from his equivocal answers, the juror remained silent on two occasions when questioned by the prosecutor. (2RT 501-502.) Appellant speculates from the cold record that the juror's silence was because he "might have been wondering why no one seemed to be accepting his statements that he could vote for life or for death, once the evidence had been presented to him." (AOB 60.) That was unlikely the case given the trial court's observation that the juror was probably "mulling over in [his] mind whether or not [he] could or could not impose the death penalty" and at that "point in time [the juror] still haven't reached a conclusion." (2RT 502.) Indeed, at the end of voir dire, the juror specifically said it was "true" that he was still "mulling over" his ability to impose the death penalty and that he had "kind of hit a blank . . . ." (*Ibid.*)

The trial court was in the best position to assess the juror's state of mind based on his tentative responses, his demeanor, his vocal inflection, and other nonverbal cues. As this Court has explained in many decisions, "[t]here is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity. [Citations.] Rather, it is

sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror." (*People v. Abilez* (2007) 41 Cal.4th 472, 497-498, internal quotation marks omitted.) "[A]ppellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor) gleans valuable information that simply does not appear on the record." (*People v. Stewart* (2004) 33 Cal.4th 425, 451.) Thus, the reviewing court should defer to the trial court on the essentially factual question of Juror No. 6611's true state of mind. (*People v. Lewis* (2008) 43 Cal.4th 415, 483.)

It is clear from the record that each of the three prospective jurors was extensively questioned during voir dire about their views on the death penalty. The record demonstrates that the court properly excused Jurors Nos. 4593, 5637, and 6611, based on its impression that they were unable to faithfully and impartially apply the law, and no violation of appellant's right to an impartial jury occurred.

II. THE COMPUTER ANIMATION WAS PROPERLY ADMITTED AS DEMONSTRATIVE EVIDENCE

Appellant asserts the trial court erred in admitting a computer animation depicting the sequence of shots and the locations from which the shots were fired. Specifically, he argues the animation did not fairly and accurately depict the evidence in this case. (AOB 63-77.) Appellant's argument must be rejected. The one animation that was played to the jury was short, non-dramatic, and a fair and accurate depiction of the evidence, the experts' opinion, the prosecution's theory of the case. Therefore, the trial court did not abuse its discretion in admitting the computer animation as a demonstrative exhibit to assist the jury with understanding expert testimony.

A. Procedural Background

Prior to trial, the trial court held a hearing pursuant to Evidence Code section 402 with respect to the prosecutor's use of a computer animation that depicted the sequence of gunshots that ultimately killed Deputy Hoenig. The prosecutor proposed to call the creators of the computer animation, Parris Ward and Dr. Carley Ward, to testify to the procedure used in creating the animation and its compliance with the requirements and guidelines set forth in *People v. Hood* (1997) 53 Cal.App.4th 965. (4RT 1024-1028.) The prosecutor explained the animation would simply show the prosecution's theory regarding the order of the shots based on the physical evidence and expert opinions, but the exact order could not "be conclusively proven." The prosecutor recounted the detail of the animation as follows: Shot number 1 "came from the north side of the street, in the approximate location of where the bicycle was found." (4RT 1027.) More specifically, shot number 1

> came from the right rear of the radio car, went through the right rear window, through the steel cage separating the front seat from the back seat, over the top of the seat, passed through the deputy's right hand, which was on the gear shift lever in the approximate position of where it would be if you are putting a car -- shifting an automatic transmission, which is what his Crown Victoria was, into park. The bullet exited his hand, approximately the middle knuckle of the right hand where the -- the bottom knuckle where the finger joins [¶] [a]nd then went through the top of the dash, then into the windshield.

(4RT 1027-1028.) Shot numbers 2, 3, and 4, " struck Deputy Hoenig, [and] came from the driver's side of his radio car, while the shooter was in the street. [¶] Shots 2, 3, and 4 came from the left side of his car. And in the animation shot 2 is going through his left leg, just above the ankle. Shot 3 enters his upper torso, just above the top of his bulletproof vest, slightly below the neck. And shot 4 impacted the lower right rear quadrant of his

bulletproof vest, basically a shot in the back which was stopped by the vest." (4RT 1027-1028.) Finally, shot numbers "5, 6 and 7 came from a westward direction, shooting back towards the east, which would be from the front of the patrol car." (4RT 1028.)

The prosecutor stated he would make clear to the jury "that the order of the shots between 2, 3 and 4 could have been different, as well as [shot numbers] 5, 6 and 7[.]" He also said the shot sequence shown on the animation was "the best opinions based upon all of the physical evidence and expert opinion at the scene." The prosecutor said he would make that fact clear to the jury, and suggested the court instruct the jury with a "*Hood* instruction." (4RT 1028-1029.) Defense counsel objected to the admission of the animation, arguing the animation was speculative as to timing and order of shot numbers 2 through 7, as well as the location of the shooter when he fired those shots. (4RT 1030.)

Testimony of Parris Ward

Parris Ward worked for Biodynamics Engineering as a computer graphics and animation specialist. (4RT 1032.) Mr. Parris' training and experience included taking numerous classes in computer science and working as a professional photographer. By the time of the hearing, Mr. Ward had developed approximately 30 animations and simulations of various accidents scenes, and had twice testified in court as an expert in computer animation and reconstruction. Mr. Ward also had a law degree from Pepperdine University Law School and a degree in photo journalism. (4RT 1032-1033.)

In connection with this case, Mr. Ward developed a computer animation based on his review of the police reports, coroner's report, coroner's photographs, crime scene photos; the measurements he personally obtained from the crime scene in April 1998; his examination of Deputy Hoenig's patrol car; and his consultation with Dr. Ward and Dr.

Carpenter (the coroner). (4RT 1033-1038, 1041-1042, 1044-1046, 1048-1051.) Mr. Ward explained that at the crime scene, he used different reference points on the street to help him determine the placement of evidence such as Deputy Hoenig's patrol car and the expended bullets. (4RT 1038-1040, 1043-1044.) Mr. Ward used a popular surveyor's instrument to take precise measures (between one-hundredth of a foot and one-thousandths of a foot) of the crime scene, including the location of the bicycle. (4RT 1041-1043, 1047.) Mr. Ward measured various parts of Deputy Hoenig's patrol car by hand as well as with the surveyor's instrument. (4RT 1045-1046.) Additionally, Mr. Ward hired a professional digitizing company to digitally create the same model patrol car for use in the animation. The model was similar to Deputy Hoenig's patrol car "to a very high degree of precision," including the location of the gear shift lever and other parts of the car. (4RT 1051.)

The final animation video showed a series of gunshots from different positions based on all the evidence and expert opinions. (4RT 1052.) Mr. Ward explained the animation showed shaded gray areas to indicate the approximate location from which the shots were fired, rather than specific locations from which the shots were fired because shell casings bounce and roll around. (4RT 1055-1056.) For example, the three shots that were fired in proximity to Deputy Hoenig as he was exiting the patrol car (shot numbers 2, 3, and 4) had about an 80 degree radius that was defined by the car door and the car itself. For these shots to make contact with Deputy Hoenig, they had to have been fired within a certain range. Furthermore, the area placement of shot numbers 2, 3, and 4 were based on three shell casings that were found within the area of the shots, expert opinion with regard to Deputy Hoenig's body positions, and the trajectory of the bullet wounds to Deputy Hoenig's leg, chest, and back. (4RT 1028, 1055.) The entirety of the animation showed "three principal areas where the shots

[were] fired" -- the shooter fired one shot near the bicycle, a set of shots near the open door of the patrol car, and a final set of shots at the west end of the street. (4RT 1056.) Mr. Ward stated the animation was not intended to be a simulation of what happened, or to show the exact location of the shots. Rather, it was intended to be an illustration of the approximate area from which the shots were fired based on the evidence and expert opinion. (4RT 1052, 1061.)

Testimony of Dr. Carley Ward

Dr. Carley Ward was a biomechanical engineer, and she also worked at Biodynamics Engineering with her son, Parris Ward. (4RT 1066, 1070.) Dr. Ward holds a bachelor's degree in mechanical engineering, a master's degree in engineering mechanics, and a Ph.D. in biomechanics and dynamics. (4RT 1067.) Her training and experience included work with the Los Angeles County Coroner in biomechanical evaluations and autopsies to determining the cause of death. (4RT 1067-1068.) Dr. Ward had testified in court as a biomechanics expert about 350 times; fifteen of those times involved testimony about body positions and gunshots. (4RT 1069.)

In relation to this case, Dr. Ward reviewed the coroner's report, coroner's photographs and measurements, crime scene photographs, and the measurements taken by Mr. Ward around Deputy Hoenig's patrol car. Dr. Ward's analysis in this case and her contribution to the computer animation was limited to the shots around Deputy Hoenig, more specifically shot numbers 1 through 4. (4RT 1070-1071.) Based on the coroner's photographs and measurements, and bullet damage to Deputy Hoenig's pant leg, Dr. Ward theorized that Deputy Hoenig's leg was bent when he sustained the bullet wound to his leg. (4RT 1071.) With regard to the fatal shot to Deputy Hoenig's chest, Dr. Ward determined that Deputy Hoenig was either bent over or kneeling on his knees when he sustained

that wound. Dr. Ward based her opinion on the locations of the bullet entry and exit wounds. Dr. Ward opined the shooter could not have been eight to ten feet away from Deputy Hoenig when he fired the fatal bullet because the bullet trajectory was in a downward position. From that particular distance, the shooter would have had to be elevated about two stories to inflict that wound. (4RT 1073-1075.) Like Mr. Ward, Dr. Ward also explained the animation was intended to show the general position of the shooter, not his exact position. (4RT 1075.)

Trial Court Ruling

After considering the testimony of Mr. Ward and Dr. Ward, as well as defense counsel's objection, the court found the computer animation was relevant, and that the prosecutor had laid sufficient foundation for its admission. The court explained the animation would assist the jury in understanding "what transpired based upon the statements of the various experts[.]" In exercising its discretion under Evidence Code section 352, the court found the probative value of the evidence outweighed any prejudicial effect. The court indicated it would instruct the jurors pursuant to *Hood* before showing them the computer animation. (4RT 1080.)

Jury's Viewing of Computer Animation

Prior to playing the animation, the court instructed the jury as follows:

> What you're going to see is an animation based on a compilation of different expert opinions. This is similar to the expert using charts or diagrams to demonstrate their respective opinion. This is not a film of what actually occurred or an exact re-creation. It is only an aid to giving you a view as to the prosecution version of the events based upon particular viewpoints and based upon interpretation of the evidence.

(6RT 1572-1573.)

The computer animation (People's Exh. No. 1) was played for the jury during the testimony of Mr. Ward (6RT 1573) and again during Dr. Ward's testimony. Dr. Ward paused the video throughout her testimony to explain

her opinion and/or theory with regard to the specific wounds sustained by Deputy Hoenig. (6RT 1598-1610.)

B. The Computer Animation was Properly Admitted to Assist the Jury with Expert Testimony

Appellant asserts that *People v. Hood*, *supra*, 53 Cal.App.4th 965, is not applicable to this case. Appellant's main complaint about the computer animation here and below is that it did not fairly and accurately represent the shot sequence and/or the shooter's position when he fired the shots. (AOB 66-76.) Although the holding of *Hood* is not directly applicable, it's reasoning with regard to computer animation provides guidance on the view of computer animation as demonstrative aids. *Hood*'s reasoning is consistent with case authorities in jurisdictions that have addressed the issue. These jurisdictions uniformly hold that computer animations are admissible as demonstrative aids to enhance the jury's understanding of testimony. There is no reason for this Court to reject the reasoning of *Hood*.

In *Hood*, the defendant was charged with premeditated and deliberate murder. The first trial resulted in a hung jury. The defendant was convicted as charged after a second trial. (*People v. Hood*, *supra*, 53 Cal.App.4th at p. 967.) Before the first trial, the prosecution sought to introduce a computer animation that depicted the shooting based on information from the defendant's secretary, the measurements taken by a detective from the crime scene, the pathologist's reports and opinions, and the reports and opinions of ballistics and gunshot residue experts. The defense opposed admission of the animation, arguing among other things that computer animation had not gained scientific acceptance under *People v. Kelly* (1976) 17 Cal.3d 24, necessary for admissibility. The trial court permitted the prosecutor to introduce the animation, finding that it was nothing more than an illustrative exhibit similar to drawings by an expert,

and it was not evidence in and of itself. (*People v. Hood*, *supra*, 53 Cal.App.4th at p. 968.)

Both parties ultimately introduced computer animation of the shooting during the first trial. Prior to the second trial, the defense prepared a new computer animation because it had concluded the first animation was not as accurate as it could be. Nevertheless, the defendant objected to the prosecutor's use of its computer animation on the basis of foundation. The trial court overruled the objection, finding that both computer animations (prosecution and defense) had adequate foundation. (*People v. Hood*, *supra*, 53 Cal.App.4th at p. 968.)

Before the prosecutor's animation was played to the jury, the court instructed the jurors that the animations were based on a compilation of opinions and designed to assist testimony similar to charts, diagrams, and drawings. They were not intended to show what actually happened or to recreation of "every detail or every event or every movement." Rather, they were "only an aid to giving an overall view of a particular version of the events, based on particular viewpoints or particular interpretations of the evidence." (*People v. Hood*, *supra*, 53 Cal.App.4th at p. 968.)

On appeal, the defendant claimed the prosecution's computer animation was erroneously admitted because it did not meet the requirements of *Kelly*. (*People v. Hood*, *supra*, 53 Cal.App.4th at pp. 969-970.) The defendant also claimed the animation invaded the province of the jury on the ultimate issue of how the killing occurred, and lacked foundation as it

> was based on "a number of factors, including the reactions and stats [*sic*] of mind of two people under conditions of extreme stress, for which there simply was no clear evidence. [The computer expert who prepared the prosecution's animation] cumulated assumptions (styled as 'expert' inferences) together to create an overall scenario that became remote from the necessary evidentiary foundation. [¶] Even the prosecution

> witnesses admitted other explanations of the proven facts were possible . . . . [¶] This re-enactment was also based on inadmissible speculation regarding the position and posture of [the victim] at the time of the shots . . . . [¶] . . . [T]he resulting construct improperly sought to demonstrate [Hood]'s purported intent by portraying his actions in conformity with the prosecution's mental state theory."

(*Id.* at p. 970, alterations in original.) The Court of Appeal rejected the defendant's *Kelly* claim, finding the computer animation was tantamount to drawings to illustrate testimony. The Court of Appeal viewed the animation as "a mechanized version of what a human animator does when he or she draws each frame of activity, based upon information supplied by experts, then fans through the frames, making the characters drawn appear to be moving." (*Id.* at p. 969.) Therefore, it concluded, "there was no *Kelly* issue as to the functioning of the computer in creating the animations." (*Id.* at p. 969.) With regard to the other claims, the Court of Appeal found the defendant had waived them as he failed to assert them in the trial court. (*Id.* at pp. 970-971.)

Although the *Hood* opinion did not address the foundational requirements for the admission of computer animation, the Court of Appeal's reasoning that computer animations are nothing more than demonstrative aids to testimony is sound. Jurisdictions viewing computer animation as merely illustrating the expert witness' testimony require only that the animation meet the rules of admissibility for demonstrative evidence.[8] A computer animation does not need to be exact in every detail (*State v. Harvey* (La. App. 2 Cir. 1995) 649 So.2d 783, 788), and courts generally have allowed the admission of a computer animation if it is

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[8] "Demonstrative evidence" is that which is "tendered for the purpose of rendering other evidence more comprehensible to the trier of fact." (2 McCormick on Evidence § 212 (John W. Strong et al. eds., 5th ed.1999).)

authenticated by testimony of a witness with personal knowledge of the content of the animation, upon a showing that it is a fair and accurate representation of what it is purports to depict, and that it will help to illustrate the expert's testimony given in the case. (See *State v. Sayles* (Iowa 2003) 662 N.W.2d 1, 10 [a prosecution's expert witness had knowledge of content of shaken infant syndrome animation and could testify that it correctly and adequately portrayed the facts that would illustrate her testimony); *Hinkle v. City of Clarksburg* (4th Cir. 1996) 81 F.3d 416, 424-425 [holding that a computer animation of events at issue in trial is not unduly prejudicial if it is sufficiently close to the actual events and is not confused by the jury for the real life events themselves); *People v. Cauley* (Colo. App. 2001) 32 P.3d 602, 607 (holding that, "[a] computer animation is admissible as demonstrative evidence if the proponent of the video proves that it: 1) is authentic ...; 2) is relevant ...; 3) is a fair and accurate representation of the evidence to which it relates; and 4) has a probative value that is not substantially outweighed by the danger of unfair prejudice . . ."); *Clark v. Cantrell* (S.C. 2000) 339 S.C. 369, 386 ("[A] party may authenticate a video animation by offering testimony from a witness familiar with the preparation of the animation and the data on which it is based ... [including] the testimony of the expert who prepared the underlying data and the computer technician who used that data to create it.]; *Bledsoe v. Salt River Valley Water Users' Assoc.* (Ariz. App. 1994). 179 Ariz. 469, 472 [the animation's proponent must show the computer simulation fairly and accurately depicts what it represents]; *State v. Farner* (Tenn. 2001) 66 S.W.3d 188, 209 [to be admissible, a computer-generated animation must be relevant and a fair and accurate depiction of the event it purports to portray]; *People v. Cauley* (Colo. App. 2001) 32 P.3d 602, 607 [a computer animation is admissible as demonstrative evidence if the proponent of the video proves that it is: 1) authentic, 2) relevant, 3) a fair

and accurate representation of the evidence to which it relates, and 4) has a probative value that is not substantially outweighed by the danger of unfair prejudice]; *Cleveland v. Bryant* (Ga. App. 1999) 512 S.E.2d 360, 362 [computer animation which merely illustrates a witness' testimony is admissible if it is a fair and accurate representation of the scene sought to be depicted].)

In *Harris v. State* (Okla. Crim. App. 2000) 13 P.3d 489, a case relied upon by appellant (AOB 70-71), an expert witness for the prosecution used in his testimony a computer animation of the trajectory of a bullet passing through the victim's body. The Court of Appeal concluded the video and the computer-generated animation were "properly categorized as illustrative or demonstrative aids used to explain the expert's testimony, because they merely give visual meaning and definition to the testimony." (*Id.* at p. 495.) The court offered the following guidelines for trial courts to use when deciding whether a computer animation should be permitted:

> In order for a video or computer crime scene reenactment to be seen by a jury, as an aid to illustrate an experts [*sic*] witness' testimony, the [trial] court should require (1) that it be authenticated-the trial court should determine that it is a correct representation of the object portrayed, or that it is a fair and accurate representation of the evidence to which it relates, (2) that it is relevant, and (3) that its probative value is not "substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise." [Citation.]

(*Ibid.*) The court further held the trial court should instruct the jury at the time the animation is shown that "the exhibition represents only a re-creation of the proponent's version of the event; that it should in no way be viewed as an actual recreation of the crime, and like all evidence, it may be accepted or rejected in whole or in part." (*Ibid.*)

A trial court must also ensure the opposing party is given the opportunity before trial to examine the animation. (*Harris v. State*, *supra*, 13 P.3d at p. 495.) The court noted that "expert testimony can be very confusing" and concluded computer animations could clear "up the confusion and ma[k]e the expert's testimony easier to understand." (*Id.* at p. 496.)

In this case, the trial court did not abuse its discretion in admitting the computer animation because the court conducted a careful and thorough review similar to that described in *Harris* prior to admitting it. The court ensured that the above admissibility requirements were met and then gave the jury an appropriate limiting instruction.

As to the first requirement, during the Evidence Code section 402 hearing, the prosecutor stated he intended to use the computer animation, which was prepared by Mr. Ward and Dr. Ward to show the sequence of shots that were fired by the shooter in the killing of Deputy Hoenig. The prosecutor represented that the animation would show shot number 1 "came from the north side of the street, in the approximate location of where the bicycle was found." (4RT 1027.) More specifically, the prosecutor stated that he believed shot number 1

> came from the right rear of the radio car, went through the right rear window, through the steel cage separating the front seat from the back seat, over the top of the seat, passed through the deputy's right hand, which was on the gear shift lever in the approximate position of where it would be if you are putting a car -- shifting an automatic transmission, which is what his Crown Victoria was, into park. The bullet exited his hand, approximately the middle knuckle of the right hand where the -- the bottom knuckle where the finger joins [¶] [a]nd then went through the top of the dash, then into the windshield.

(4RT 1027-1028.) Further, the prosecutor believed shot numbers 2, 3, and 4,

> actually struck Deputy Hoenig, [and] came from the driver's side of his radio car, while the shooter was in the street. [¶] Shots 2, 3, and 4 came from the left side of his car. And in the animation shot 2 is going through his left leg, just above the ankle. Shot 3 enters his upper torso, just above the top of his bulletproof vest, slightly below the neck. And shot 4 impacted the lower right rear quadrant of his bulletproof vest, basically a shot in the back which was stopped by the vest.

(4RT 1027-1028.) Finally, the prosecutor believed that shot numbers "5, 6 and 7 came from a westward direction, shooting back towards the east, which would be from the front of the patrol car." (4RT 1028.) The prosecutor clearly explained the order of the shots shown on the animation was the prosecutor's theory of the shot sequence, "but it cannot be conclusively proven." (*Ibid.*) The prosecutor stated he would make clear to the jury "that the order of the shots between 2, 3 and 4 could have been different, as well as [shot numbers] 5, 6 and 7[.]" He asserted the shot sequence shown on the animation was "the best opinions based upon all of the physical evidence and expert opinion at the scene." (4RT 1028-1029.)

Moreover, the prosecutor called the creators of the computer animation, Mr. Ward and Dr. Ward, to testify at the hearing to authenticate the animation. Mr. Ward testified in creating the animation, he relied on various report and photographs, spent a day at the crime scene taking precise measurements and reconstructing evidence, consulted with other experts, and personally examined Deputy Hoenig's patrol car. (4RT 1033-1051.) He explained that based on the evidence he reviewed and the opinion of other experts, the animation depicted shaded gray areas to show the general location of the shooter rather than the exact location of the shooter. (41055-1056.) For example, the three shots that were fired in proximity to Deputy Hoenig as he was exiting the patrol car (shot numbers 2, 3, and 4) had about an 80 degree radius that was defined by the car door and the car itself. For these shots to make contact with Deputy Hoenig,

they had to have been fired within a certain range. Furthermore, the area placement of shot numbers 2, 3, and 4 were based on three shell casings that were found within the area of the shots, expert opinion with regard to Deputy Hoenig's body positions, and the trajectory of the bullet wounds to Deputy Hoenig's leg, chest, and back. (4RT 1028, 1055.) The entirety of the animation showed "three principal areas where the shots [were] fired" -- the shooter fired one shot near the bicycle, a set of shots near the open door of the patrol car, and a final set of shots at the west end of the street. (4RT 1056.)

Dr. Ward testified that with regard to her work in creating the animation, she reviewed the coroner's report, photographs, and measurements, as well as crime scene photographs, and the measurements taken by Mr. Ward around Deputy Hoenig's patrol car. Dr. Ward's specified her contribution to the computer animation was limited to shot numbers 1 through 4. (4RT 1070-1071.) Based on the evidence that she reviewed, Dr. Ward opined that Deputy Hoenig's leg was bent when he sustained the bullet wound to his leg, and that he sustained the fatal shot to the chest while he was either bent over or kneeling on his knees. (4RT 1071.) Dr. Ward based her opinion on the locations of the bullet entry and exit wounds. Dr. Ward opined the shooter could not have been eight to ten feet away from Deputy Hoenig when he fired the fatal bullet because the bullet trajectory was in a downward position. The shooter would have to be elevated about two stories to inflict that wound from that distance. (4RT 1071, 1073-1075.)

Both Mr. Ward and Dr. Ward stated the animation was not intended to be a simulation of the shooting, or to show the exact location of the shooter. Rather, it was intended to be an illustration of the approximate locations from which the shots were fired. (4RT 1052, 1061, 1075.) Defense counsel never challenged the reliability and/or accuracy of any of the

evidence relied upon by Mr. Ward and Dr. Ward, and at no time did Mr. Ward or Dr. Ward indicate the animation was not a fair and accurate depiction of the evidence and/or their opinion. Given this evidence, the court property found the prosecutor had laid adequate foundation for admission of the animation.

As to the second and third requirement, the trial court found the computer animation was relevant to the expert's opinion. The court carefully conducted an Evidence Code section 352 balancing test, and in so doing, it specifically found the probative value of the animation outweighed any prejudicial effect. (4RT 1080.)

Finally, counsel was given the opportunity to view the animation prior to trial (4RT 1029), and the court instructed the jury on the limited purpose of the animation pursuant to *Hood*, stating that the animation was demonstrative, similar to the use of charts or diagrams to illustrate testimony. The court further instructed that the animation was not "a film of what actually occurred or an exact re-creation," but "only an aid to giving [the jurors] a view as to the prosecution [*sic*] version of the events based upon particular viewpoints and based upon interpretation of the evidence." (6RT 1572-1573.)

Because the trial court properly considered all of the requirements for admitting computer animation evidence and also gave an appropriate limiting instruction, there was no abuse of discretion here.

Appellant's reliance on *Dunkle v. State* (Okla. Crim. App. 2006) 139 P.3d 228, does not assist his argument because that case is factually distinguishable. (AOB 70-74.) In *Dunkle*, the defendant was charged with shooting and killing her fiancé. (*Id.* at p. 231.) The prosecutor sought to use several computer animations that depicted a man and woman standing in different positions while interchangeably holding a gun at the location of the shooting. (*Id.* at pp. 249-250.) The defendant challenged the

prosecution's use of the computer animations to show that the defendant's version of a shooting was inconsistent with the evidence. The trial court found that the animations were merely demonstrative aids and overruled the defendant's objections. (*Id.* at p. 246.) On appeal, the Court of Appeal noted the victim only had one bullet wound, the bullet did not pass through any solid surface other than the victim's body, and the bullet was never found. (*Id.* at p. 248.) The court found the expert "had no objective physical evidence from which to determine the position of the victim's body, at the time of the shooting, in relation to some other known point or surface." (*Ibid.*) The court found the use of the animations was inappropriate and misleading and that the data, including physical evidence, the crime scene analysis, and the defendant's statements, did not support the computer animations. (*Id.* at pp. 249-250.) The Court concluded, "Because the animations were not fairly representative of the evidence in the case, they were not relevant." (*Id.* at p. 251.) The trial court in *Dunkle* had also failed to instruct the jury on how to view and evaluate the animations. (*Ibid.*)

Unlike *Dunkle*, appellant's case did not involve use of multiple animations. The one animation that was played to the jury was consistent with the evidence, experts' opinion, and the prosecution's theory of the case. None of the prosecution's physical evidence showed the shooter was at some location other than the general area shown on the animation, nor did defense counsel challenge the reliability and/or accuracy of any of the evidence relied upon by Mr. Ward and Dr. Ward in making the animation.

The animation was introduced during Mr. Ward and Dr. Ward's testimony and served only to illustrate their opinion and theory of the case. Unlike the lack of "objective evidence" in *Dunkle*, the approximate locations where the shooter had fired his gun were determined from bullet trajectory, shell casing placement, and information Mr. Ward obtained from

other experts involved in the case. (6RT 1571-1572, 1582-1583.) Mr. Ward was careful to explain that the animation did not actually show the actual shooter moving in the convention sense because Mr. Ward did not have any information about the shooter's body position or how he held his gun. Rather, the animation depicted the locations where the shots were fired through the use of still frames that were "dissolved between them" based on the photographs of crime scene, the measurements taken by Mr. Ward, the physical evidence obtained from the crime scene, and the coroner's report and photographs. Mr. Ward explained the computer animation was not meant to show what had actually happened. Rather, it was an "illustrative tool for explaining concepts." (6RT 1569-1570.)

Mr. Ward also made clear to the jury that the shot sequence shown on the animation was numbered arbitrarily because Mr. Ward could not determine the actual sequence of the shots. However, it was his best estimate that the sequence was as follows: Shot number 1 occurred by a tree, shot numbers 2, 3, and 4 were fired from the street on the driver's side of the patrol car, and shot numbers 5, 6, and 7 were fired over by the curb. (6RT 1581-1583.) This progression of shots made the most logical sense based on the evidence. (6RT 1586-1587.)

Likewise Dr. Ward's opinion as illustrated on the animation was based on the evidence found on the coroner's reports, photos, and measurements. According to Dr. Ward, shot number 1, fired from the tree, hit Deputy Hoenig's hand while he was still in the patrol car. That shot was fired "at some distance." (6RT 1598-1599.) Counsel did not contest Dr. Ward's opinion in this regard. (4RT 1029.) Moreover, it was consistent with Nada Watson's testimony that she saw appellant shoot Deputy Hoenig from the back window while the deputy was sitting in his car reaching for a "walkie-talkie" on his radio. (5RT 1205-1206.)

Dr. Ward determined shot number 2 was fired while Deputy Hoenig was still sitting in the patrol car, turned to his left with his feet flat on the ground to exit the car. The bullet hit Deputy Hoenig's leg, causing him to fall to his knees. The entry and exit wounds to Deputy Hoenig's leg suggested that he had turned to face the shooter. (6RT 1599-1600, 1604.) This was also consistent with Watson's testimony that appellant stood near the left rear tire of Deputy Hoenig's patrol car and fire two shots at the deputy while the deputy sat in his car with his body half way outside the car (5RT 1202-1205), and it was consistent with Sandra Carranza's testimony that the shooter moved in a southeasterly direction as he shot Deputy Hoenig (5RT 1284-1285).

Shot number 3 was fired while Deputy Hoenig was leaning over. Dr. Ward believed the shooter took a step or two closer to Deputy Hoenig and shot Deputy Hoenig while he was on his knees. The bullet from shot number 3 entered Deputy Hoenig's chest and ripped through his aorta, causing him to bleed to death. (6RT 1601-1604.) The bullet wound to Deputy Hoenig's chest, and the lack of stippling and sooting, suggested that the shooter was fairly close to Deputy Hoenig when he fired the third shot, about four to six feet away. (6RT 1605-1607.) A shell casing found by the driver's side door supported that theory. (6RT 1609.)

The shooter fired shot number 4 down at Deputy Hoenig while Deputy Hoenig laid on the ground or leaning way over. This bullet hit Deputy Hoenig in the back, and was stopped by his bulletproof vest. (6RT 1607-1609.)

It is apparent that Mr. Ward and Dr. Ward's opinions illustrated by the animation were based on objective physical evidence, which were consistent with eyewitness testimony. The computer animation shown to the jury in this case is in no way similar to the ones utilized in *Dunkle*. Thus, *Dunkle* is of no assistance to appellant's position on this issue.

C. Any Alleged Error Was Harmless

Under Evidence Code section 353 and section 13 of article VI of the California Constitution, a judgment shall not be set aside for the erroneous admission of evidence unless the error resulted in a miscarriage of justice. (*People v. Breverman* (1998) 19 Cal.4th 142, 172-173; *People v. Watson* (1956) 46 Cal.2d 818, 836.) As explained in *People v. Watson*, *supra*, at page 836, under the miscarriage of justice standard, a defendant is not entitled to reversal unless, but for the complained of error, there is a reasonable probability the defendant would have received a better result. (*See People v. Cole* (2004) 33 Cal.4th 1158, 1199 [applying *Watson* test to erroneous admission of photographs of victim].)

Here, any alleged error in allowing the prosecutor to use the computer animation was harmless. Since the presentation was merely a visual representation of the testimony, testimony that appellant does not complain was erroneously admitted, the use of the presentation would have had a negligible effect. This is especially true in light of the strong evidence of guilt (see below). (See *People v. Hart* (1999) 20 Cal.4th 546, 648 [any error in admitting cumulative photographs of victim in penalty phase was harmless in light of other evidence of guilt].) Moreover, the animation was not inflammatory -- it merely depicted the general location of the shooter, and not the shooter himself. (6RT 1569-1570.) Compared to the autopsy photos, crime scene photos, and other evidence of the murder, the computer animation was pedestrian in nature. And the trial court specifically instructed the jury on how to view and evaluate the animation. (6RT 1572-1573.)

Finally, the evidence of guilt against appellant was simply overwhelming. Several eyewitnesses identified appellant as the shooter. (5RT 1196, 1216-1219, 1296-1297, 1299-1300, 1303-1304.) In fact, Nada Watson knew appellant personally, and watched in horror as he murdered

Deputy Hoenig. (5RT 1192-1193, 1199-1208.) Appellant was found hiding near the crime scene. (5RT 1331-1336.) After his arrest, appellant led investigators to the location where he had thrown the murder weapon, and appellant's palm and finger prints were later found on the murder weapon. (6RT 1541-1543, 1552-1557, 1616.) And most significantly, appellant confessed to murdering Deputy Hoenig on at least three separate occasions following his arrest. (6RT 1617, 1630-1631, 1658-1661, 1667-1668; People's Exh. No. 77A & 78A.) Appellant so much as conceded the evidence against him was overwhelming by claiming that the computer animation was cumulative in nature. (AOB 73.) So even if the trial court erred in admitting the computer animation, appellant cannot articulate how such evidence would be prejudicial when, by definition, the jury already had the evidence shown on the animation properly before it from other witnesses. In light of all these circumstances, there is *no* reasonable probability that appellant would have received a better result at trial if the computer animation was excluded from evidence. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) For the same reasons, any federal constitutional error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

III. CALJIC NO. 8.85 DID NOT VIOLATE APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A RELIABLE SENTENCING DETERMINATION

Appellant contends the failure of CALJIC No. 8.85 (Factors (a), (b), & (c) Cover Different Conduct) to identify statutory mitigating factors that were relevant solely as potential mitigators precluded a fair, reliable and evenhanded administration of the death penalty. (AOB 78-80.) Appellant further argues the inclusion of "extreme mental or emotional disturbance" as a mitigating factor under factor (d) of section 190.3 and CALJIC No. 8.85, precluded the jury from considering as mitigating evidence a mental

or emotional disturbance that were less than extreme. He claims the use of the terms "extreme" and "substantial" violated his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments as well as state law.[9] (AOB 80-84.) Appellant recognizes that in *People v. Farnam* (2002) 28 Cal.4th 107, 191-192, this Court rejected this argument, but suggests this Court has not "adequately addressed the underlying reasoning presented by appellant" and asks this Court to reconsider its decision in *Farnam*. (AOB 78.) Appellant's arguments are without merit.

First, appellant did not request the trial court modify the instructions now challenged on appeal. Thus, this claim is not preserved for this appeal. (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 391.) Second, the instruction did not violate constitutional principles. The trial court had no obligation to instruct the jury on which factors are aggravating and which are mitigating. (*People v. Marks* (2003) 31 Cal.4th 197, 237; *People v. Farnam*, *supra*, 28 Cal.4th at p. 191; *People v. Taylor* (2001) 26 Cal.4th 1155, 1180; *People v. Anderson* (2001) 25 Cal.4th 543, 601.)

CALJIC No. 8.85, the implementing instruction for the aggravating and mitigating factors set forth in section 190.3, was given in relevant part as follows:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial in this case. You shall

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[9] Appellant fails to provide any authority for his one sentence assertion that instructing the jury with CALJIC No. 8.85 violated state law. (See AOB 79.) He never indicates what state law was violated or makes any argument under state law. Because matters perfunctorily asserted without argument or authority in support thereof are not properly raised (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214, fn. 11), respondent declines to speculate as to the nature of appellant's state law claim.

consider, take into account and be guided by the following factors, if applicable:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.

(b) The presence of absence of criminal activity by the defendant, other than the crime for which the defendant has been tried in the present proceedings, which involve the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

. . .

(k) Any other circumstances which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentences less than death, whether or not related to the offense for which he is on trial. You must disregard any instruction given to you in the guilt or innocence phase of this trial which conflicts with that principle.

(8RT 1973-1976; 5CT 931-932.) This instruction was proper.

This Court has repeatedly held that the failure to identify which factors are aggravating and which are mitigating is not error -- "the aggravating and mitigating nature of the factors is self-evident within the context of each case." (*People v. Dickey* (2005) 35 Cal.4th 884, 928; see also *People v. Moon* (2005) 37 Cal.4th 1, 41-42; *People v. Farnam*, *supra*, 28 Cal.4th at p. 191; *People v. Hillhouse* (2002) 27 Cal.4th 469, 509.)

Appellant has provided no reason for this Court to depart from these decisions.

Appellant also complains that the jury could only consider mental illness or duress that was "extreme" and being under the domination of another person only if it was "substantial." (AOB 80; see 8RT 1974-1975; 5CT 931-932.) This Court has established that while factor (d) of section 190.3 and CALJIC No. 8.85 only permit consideration of "extreme mental or emotional disturbance," factor (k), the catch-all provision, permits "consideration of nonextreme mental or emotional conditions." (*People v. Turner* (1994) 8 Cal.4th 137, 208, quoting *People v. Clark* (1992) 3 Cal.4th 41, 163; see also *People v. Moon*, *supra*, 37 Cal.4th at p. 42; *People v. Blair* (2005) 36 Cal.4th 686, 753; *People v. Yeoman* (2003) 31 Cal.4th 93, 165; *People v. Weaver* (2001) 26 Cal.4th 876, 993; *People v. Mayfield*, *supra*, 14 Cal.4th at p. 806; *People v. Davenport* (1995) 11 Cal.4th 1171, 1203.) Appellant's argument to the contrary is thus clearly at odds with the decisions of this Court.

Furthermore, in *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 308 [110 S.Ct. 1078, 108 L.Ed.2d 255], the United States Supreme Court held that a similar catch-all provision in Pennsylvania's jury instruction comported with the Eighth Amendment. The corresponding California provision, factor (k) of section 190.3 and CALJIC No. 8.85, was similarly upheld as constitutional in *Boyde v. California* (1990) 494 U.S. 370, 381-383 [110 S.Ct. 1190, 108 L.Ed.2d 316]. Thus, the aggravating and mitigating factors set forth in section 190.3 and CALJIC No. 8.85 are not "unconstitutionally vague, or arbitrary, or render the sentencing process unreliable under the Eighth and Fourteenth Amendments." (*People v. Moon*, *supra*, 37 Cal.4th at p. 42.) Therefore, appellant's argument must be rejected.

IV. CALJIC NO. 8.88 AS GIVEN WAS VALID AND PROPERLY DEFINED THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS

Appellant challenges CALJIC No. 8.88 in several respects. (AOB 85-120.) Appellant acknowledges his challenges have been previously rejected by this Court, but submits this Court incorrectly decided those cases and should now reconsider its decisions. (AOB 86.) Appellant's failure to object to the instruction or request it be modified on these grounds bars him from raising this issue on appeal. (*People v. Arias* (1996) 13 Cal.4th 92, 171.) Nevertheless, there is no reason for this Court to reconsider its numerous cases rejecting arguments identical to those made by appellant.

The jury was instructed pursuant to CALJIC No. 8.88 as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed upon the defendant.
>
> After having heard all the evidence, and then after you've heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of the aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign

> whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without the possibility of parole.

(8RT 1976-1978; 5CT 933-934.)

A. CALJIC No. 8.88 Properly Informed the Jury Of Its Responsibility in Determining Whether to Impose Death or A Sentence of Life Without the Possibility of Parole

Appellant claims that CALJIC No. 8.88 did not convey to the jury that a life sentence was required if the aggravating factors did not outweigh the mitigating factors. (AOB 87-90.)

The trial court need not expressly instruct the jury that a sentence of life imprisonment without parole is mandatory if the aggravating circumstances do not outweigh those in mitigation (*People v. Kipp* (1998) 18 Cal.4th 349, 381; *People v. Duncan* (1991) 53 Cal.3d 955, 978.) As previously noted, this Court has found CALJIC No. 8.88 gives the jury adequate instruction on how to return a life sentence (*People v. Taylor*, *supra*, 26 Cal.4th 1155, 1181; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1138; *People v. Frye* (1998) 18 Cal.4th 894, 1023-1024; see *People v. Arias*, *supra*, 13 Cal.4th at pp. 170-171) and the standard instruction has been consistently upheld. (*People v. Moon*, *supra*, 37 Cal.4th at p. 43; *People v. Smith* (2005) 35 Cal.4th 334, 370; *People v. Medina* (1995) 11 Cal.4th 694, 781-782; *People v. Duncan*, *supra*, 53 Cal.3d at p. 978.) CALJIC No. 8.88 permits a death penalty only if aggravation is so substantial in comparison with mitigation that death is warranted; if aggravation failed even to

outweigh mitigation, it could not reach this level. (*People v. Smith*, *supra*, 35 Cal.4th at p. 370.) The instruction was proper.

B. CALJIC No. 8.88 Properly Imparted to the Jury that It Could Return a Sentence of Life Without the Possibility of Parole Even in the Absence of Mitigating Factors

Next, appellant contends that because CALJIC No. 8.88 did not inform the jurors that they had the discretion to impose a sentence of life without the possibility of parole even in the absence of mitigating factors, the instruction improperly reduced the prosecution's burden of proof in violation of appellant's rights to due process and a reliable penalty determination under the Eighth and Fourteenth Amendments. (AOB 91-92.) This Court has repeatedly rejected his contention. (See *People v. Lindberg* (2008) 45 Cal.4th 1, 52; *People v. Moon*, *supra*, 37 Cal.4th at p. 43; *People v. Ray* (1996) 13 Cal.4th 313, 355; *People v. Duncan*, *supra*, 53 Cal.3d 955, 978-979).

C. CALJIC No. 8.88 is Not Unconstitutionally Vague in Instructing the Jury that It Must be Persuaded that Aggravating Circumstances Must be "So Substantial" In Comparison to Mitigating Factors That It can Impose Death Instead of Life Without the Possibility of Parole

Next appellant claims that CALJIC No. 8.88 is unconstitutionally vague and violates his rights under the Eighth and Fourteenth Amendments by informing the jury that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without the possibility of parole." (AOB 92-94; see 8RT 1978; 5CT 933-934.) The phrase in the instruction telling the jurors that the aggravating factors must be "so substantial" as compared to the mitigating factors that death is warranted is not impermissibly vague.

This Court has previously held that the phrase "so substantial" in the last paragraph of the instruction properly instructs the jury that aggravating circumstances must outweigh mitigating ones. (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 52; *People v. Moon*, *supra*, 37 Cal.4th at p. 43; *People v. Young* (2005) 34 Cal.4th 1149, 1227; *People v. Arias*, *supra*, 13 Cal.4th at p. 171.) CALJIC No. 8.88 is not vague and adequately guides the jury's sentencing discretion. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1028 ["Is not overly vague for using the words 'so substantial' as a modifying phrase"]; *People v. Smith*, *supra*, 35 Cal.4th at p. 369; *People v. Carter* (2003) 30 Cal.4th 1166, 1226 [rejecting argument that phrase "so substantial" contained in CALJIC No. 8.88 was unconstitutionally vague, conducive to arbitrary and capricious decision making, and created an unconstitutional presumption in favor of death].)

Further, the United States Supreme Court has stated that once the jury finds the defendant is within a category of persons eligible for the death penalty, the sentencer may be given "'unbridled discretion' in determining whether the death penalty should be imposed." (*Tuilaepa v. California* (1994) 512 U.S. 967, 979-980 [114 S.Ct. 2630, 129 L.Ed.2d 750].) Indeed this Court has cited the *Tuilaepa* case in rejecting a claim that the phrase "so substantial" is too vague. (*People v. Davenport*, *supra*, 11 Cal.4th at p. 1231.) As appellant presents no persuasive reason for this Court to revisit any of its past rulings, his claims should be rejected. (See *People v. Frye*, *supra*, 18 Cal.4th at p. 1024; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193.)

D. CALJIC No. 8.88 Does Not Violate the Eighth and Fourteenth Amendments by Use of the Term "Warrants" Rather than "Appropriate"

Appellant next attacks CALJIC No. 8.88 for instructing the jury that to impose the death penalty, it must find the aggravating circumstances so

substantial compared to those in mitigation that it "warrants death instead of life without parole." (AOB 94-95.) Appellant claims the term "warrants," violates his Eighth and Fourteenth Amendment rights arguing that "just because death may be warranted, or authorized, in a given case does not mean it is necessarily appropriate." (AOB 95.)

In *People v. Breaux* (1991) 1 Cal.4th 281, 315-316, this Court termed this same contention "spurious." The Court held that use of the term "warrants" is not a considerably broader term than "appropriate," as the defendant argued and that the language of CALJIC No. 8.84.2 (the precursor to CALJIC No. 8.88), essentially informed the jury that "it could return a death verdict only if the aggravating circumstances predominated and death [was] the appropriate verdict." (*People v. Breaux*, *supra*, 1 Cal.4th at p. 316; accord, *People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 122 [relying on *Breaux* to reject identical challenge to CALJIC No. 8.88]; *People v. Crew* (2003) 31 Cal.4th 822, 858; *People v. Boyette* (2002) 29 Cal.4th 381, 464-465.)

> "By advising that a death verdict should be returned only if aggravation is 'so substantial in comparison with' mitigation that death is 'warranted,' the instruction clearly admonishes the jury to determine whether the balance of aggravation and mitigation makes death the appropriate penalty."

(*People v. Smith*, *supra*, 35 Cal.4th at p. 370, citing *People v. Arias*, *supra*,13 Cal.4th at p. 171.)

CALJIC No. 8.88 gives the jury adequate instruction on how to return a life sentence. (*People v. Taylor*, *supra*, 26 Cal.4th at p. 1181; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1138; *People v. Frye*, *supra*, 18 Cal.4th at pp. 1023-1024.) Further, there is certainly no federal claim involved here since the United States Supreme Court has approved language providing that if the aggravating circumstances outweigh the mitigating circumstances the jury "shall impose a sentence of death." (*Boyde v. California*, *supra*, 494

U.S. at pp. 373-377.) The jury in this case was told, "In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." (8RT 1978; 5CT 933.) Appellant has neither acknowledged, nor attempted to demonstrate why this Court should reconsider, its prior decisions rejecting his contention.

E. Burden of Proof

1. <u>The Failure To Have A Penalty Phase Instruction On The Burden Of Proof Does Not Violate The United States Constitution</u>

Appellant contends that his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated because the jury was not instructed in the penalty phase that all aggravating factors had to be proven by the prosecution beyond a reasonable doubt. (AOB 95-102.) This Court has consistently rejected similar contentions. (See *People v. Hovarter*, *supra*, 44 Cal.4th at p. 1028 ["Is not flawed for failing to assign the burden of proof to one of the parties"]; *People v. Moon*, *supra*, 37 Cal.4th at pp. 43-44; *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 417-418 [because the penalty decision is "inherently moral and normative" rather than factual, instruction on the burden of proof is not required]; *People v. Osband* (1996) 13 Cal.4th 622, 709-710 [rejecting claim that federal constitution required penalty phase jury to be instructed that all aggravating factors and decision to impose death penalty had to be supported by proof beyond a reasonable doubt].)

Appellant argues, however, that this Court should revisit this issue in light of the United States Supreme Court's decisions in *Jones v. United States* (1999) 526 U.S. 277 [119 S.Ct. 1215, 143 L.Ed.2d 311], *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], and

Ring v. Arizona (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]. (AOB 96.) Recently, this Court did reexamine its decisions in light of *Apprendi*, *Ring*, and the more recent decision in *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]. This Court determined that those cases have not altered the Court's conclusion that no burden of proof is required in the penalty phase of a capital trial. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) "[U]nder the California death penalty scheme, once a defendant has been found guilty of first degree murder and one or more special circumstances have been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole.' [Citation]." (*People v. Ward* (2005) 36 Cal.4th 186, 221-222 quoting *People v. Prieto* (2003) 30 Cal.4th 226, 263.) The Court need not reexamine its decisions yet again.

2. The Trial Court was Not Required to Instruct the Jury on Burden of Persuasion

Appellant also contends the failure to instruct the jury that the prosecution bears "some burden" of persuasion at the penalty phase violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 102-105.) Appellant acknowledges this Court has rejected this contention. (AOB 102, citing *People v. Hayes* (1990) 52 Cal.3d 577, 643.)

This Court has repeatedly held that "[b]ecause the determination of penalty is essentially moral and normative [citation omitted] and therefore different in kind from the determination of guilt, there is no burden of proof or burden of persuasion." (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643; *People v. Blair*, *supra*, 36 Cal.4th at p. 753; *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 417-418.) There is no compelling reason to reexamine this Court's decisions.

3-5. The Trial Court was not Required to Instruct the Jury on the Burden of Proof on Mitigating Circumstances or That There was no Unanimity Requirement Regarding the Mitigating Circumstances

Appellant further claims the instructions violated the Fifth, Sixth, Eighth, and Fourteenth Amendments by failing to instruct the jury on the standard of proof required for mitigating circumstances, i.e., that the defendant bears no particular burden to prove mitigating factors and that the jury was not required to unanimously agree on the existence of mitigation. He urges the failure to so instruct cause structural error mandating reversal. (AOB 105-110.)

As with appellant other arguments, this Court has repeatedly held the California death penalty statute is not unconstitutional because it does not contain a requirement that the jury be given burden of proof or standard of proof instructions for finding aggravating and mitigating circumstances in reaching a penalty determination. (*People v. Stitely* (2005) 35 Cal.4th 514, 574; *People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Vieira* (2005) 35 Cal.4th 264, 300; *People v. Morrison* (2004) 34 Cal.4th 698, 730-731; *People v. Welch* (1994) 20 Cal.4th 701, 767-768) Because appellant offers no meritorious reason for this Court to reconsider this rule, his claim should be rejected.

Similarly, appellant's claim that the jury should have been instructed that appellant bore no particular burden to prove mitigating factors and that the jury was not required to unanimously agree on the existence of mitigation has also been rejected by this Court. In *Breaux*, the defendant claimed that the trial court improperly rejected his proposed jury instruction that unanimity was not required for consideration of mitigating evidence. (*People v. Breaux*, *supra*, 1 Cal.4th at p. 314.) This Court disagreed, explaining:

> There was nothing in the instructions to limit the consideration of mitigating evidence and nothing to suggest that any particular number of jurors was required to find a mitigating circumstance. The only requirement of unanimity was for the verdict itself. [Citation.] [¶] The instructions that were given in this case unmistakably told the jury that each member must *individually* decide each question involved in the penalty decision. They were told to consider all the evidence, specifically including any circumstance in mitigation offered by defendant. We find no error in the court's refusal to give defendant's proposed instruction.

(*Id.* at p. 315, italics in original.)

Such was the case here. As in *Breaux*, there was nothing in the given instructions that limited the jurors' consideration of mitigating evidence or that suggested that "any particular number of jurors was required to find a mitigating circumstance." (See *People v. Breaux*, *supra*, 1 Cal.4th at p. 315.) Also, similar to the instructions in *Breaux*, the jurors were instructed with CALJIC No. 8.88 (1989 rev.), which told them that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without the possibility of parole." (8RT 1978; 5CT 933-934.) Appellant has provided no persuasive reason for this Court to reexamine this holding.

F. Jury Unanimity on Aggravating Factors in not Constitutionally Compelled

Again recognizing that this Court has previously rejected his claim that the constitution requires a jury unanimously find aggravating circumstances (AOB 110, citing *People v. Bacigalupo* (1991) 1 Cal.4th 103, 147, & *People v. Taylor*, *supra*, 52 Cal.3d at p. 749), appellant nevertheless asserts that the failure to require unanimity as to aggravating circumstances "encouraged the jurors to act in an arbitrary, capricious and

unreviewable manner, and slant the sentencing process in favor of execution." (AOB 110-111.) He asserts the United States Supreme Court's decision in *Ring* "undercuts the constitutional validity of this Court's ruling in *Bacigalupo*." (AOB 111.) This Court has already rejected appellant's argument.

In *People v. Griffin* (2004) 33 Cal.4th 536, 593, this Court expressly held that the constitution does not require jury unanimity as to the existence of aggravating factors. In *People v. Blair*, *supra*, 36 Cal.4th at page 753, this Court reaffirmed its holding after considering the ramifications of *Apprendi*, *Ring*, and *Blakely*. It need not do so again in this case.

G. Written Findings Regarding Aggravating Factors is not Required

Appellant argues that CALJIC No. 8.88 as given at trial violated his rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment and article I, sections 7 and 24 of the California Constitution, because the jury was not require to make explicit written findings as to which factors in aggravation it relied upon in imposing the death penalty. (AOB 113-119.) As with appellant's previous challenges to California's death penalty scheme, this Court has repeatedly rejected the claim that unanimous written findings regarding aggravating factors are constitutionally required. (See e.g., *People v. Blair*, *supra*, 36 Cal.4th at p. 753; *People v. Griffin*, *supra*, 33 Cal.4th at pp. 593-594; *People v. Snow* (2003) 30 Cal.4th 43, 126; *People v. Maury* (2003) 30 Cal.4th 342, 440.) Having offered no compelling reasons for reconsideration, appellant's contention fails.

H. The Trial Court was not Required to Instruct the Jury On Presumption of Life Without Possibility of Parole

Finally, appellant contends the trial court should have been required to instruct the jury with the presumption of life. He maintains that the court's failure to instruct the jury with the presumption of life violated his right to due process under the Fifth and Fourteenth Amendments, his Eighth Amendment rights to a reliable penalty determination and to be free from cruel and unusual punishment, and to his Fourteenth Amendment right to equal protection. (AOB 119-120.)

This Court has repeatedly rejected this challenge, holding a trial court is not required to instruct on a "'presumption of life.'" (*People v. Dunkle* (2005) 36 Cal.4th 861, 940 citing *People v. Combs* (2004) 34 Cal.4th 821, 868; *People v. Arias*, *supra*, 13 Cal.3d at p. 190.) There being no requirement for the trial court to do so, appellant's constitutional challenges must fail.

V. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE MEANING OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

Appellant claims neither CALJIC No. 8.88 nor any other instruction informed the jurors that a sentence of life without the possibility of parole meant that appellant would "*never*" be considered for parole. (AOB 121, emphasis in original.) Thus, he maintains the trial court had a sua sponte duty "to instruct on the true meaning of this sentence." (AOB 121-127.) Appellant recognizes this Court previously rejected this argument finding a proposed instruction that "A sentence of life without the possibility of parole means that the Defendant will remain in state prison for the rest of his life and will not be paroled at any time." (*People v. Gardon* (1990) 50 Cal.3d 1223, 1277; see also *People v. Thompson* (1988) 45 Cal.3d 86, 130-131.) However, he suggests this Court should reconsider these decisions in light of *Simmons v. South Carolina* (1994) 512 U.S. 154 [114 S.Ct. 2187, 129 L.Ed.2d 133], and *Kelly v. South Carolina* (2002) 534 U.S. 246 [122

S.Ct. 726, 151 L.Ed.2d 670]. (AOB 121-124.) This Court has considered the impact of *Simmons*, in rejecting this argument and need not reconsider its decisions. (*People v. Smithey* (1999) 20 Cal.4th 936, 1008-1009; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1271; *People v. Arias, supra,* 13 Cal.4th at pp. 172-174.) The trial court is not required to instruct the jury that life without the possibility of parole means the defendant will never be paroled. (*People v. Dunkle*, *supra*, 36 Cal.4th at p. 940.) Thus, appellant's contention should be summarily rejected.

VI. BECAUSE APPELLANT HAS NOT DEMONSTRATED ANY ERRORS, THERE ARE NO ERRORS WHICH TAKEN CUMULATIVELY REQUIRE REVERSAL OF APPELLANT'S CONVICTION AND DEATH SENTENCE

Throughout appellant's opening brief, appellant alleges that even if an error does not individually require reversal of his murder conviction and special circumstance finding and/or his death sentence, when taken together the cumulative effect of such errors requires reversal. (See AOB 128-130.) None of appellant's claims demonstrate any error at any stage of trial. Moreover, even assuming there were any errors, taken individually or together, those errors do not require reversal of appellant's murder conviction, the special circumstance findings, or the jury's determination that death was the appropriate penalty for appellant's crime. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1223; *People v. Koontz* (2002) 27 Cal.4th 1041, 1094 [guilt phase instructional error did not cumulatively deny defendant a fair trial and due process]; *People v. Cooper* (1991) 53 Cal.3d 771, 830 ["little error to accumulate"];.)

The evidence against appellant was simply overwhelming in both the guilt and penalty phases of trial. Even if this Court finds there were few errors, whether considered individually or for their cumulative effect, any error or combination of errors could not have affected the outcome of the trial. (See *People v. Seaton* (2001) 26 Cal.4th 598, 675, 691-692; *People v. Ochoa* (2001) 26 Cal.4th 398, 447, 458; *People v. Catlin* (2001) 26 Cal.4th 81, 180.) "The pertinent question in determining whether there is cumulative error is whether the defendant's guilt or innocence was fairly adjudicated." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham, supra,* 25 Cal.4th at p. 1009; *People v. Box* (2000) 23 Cal.4th 1153, 1214, 1219.) Even if appellant has demonstrated a few errors, which he has not, there is no reasonable possibility that the sentencing jury would have reached a different result absent any of the alleged errors. (*People v. Maury, supra,* 30 Cal.4th at p. 444; *People v. Jones, supra,* 29 Cal.4th at p. 1268; *People v. Burgener* (2003) 29 Cal.4th 833, 884.)

VII. BASED ON THE NUMEROUS DECISIONS OF THIS COURT REJECTING CONSTITUTIONAL CHALLENGES TO CALIFORNIA'S CAPITAL SENTENCING STATUTE, THIS COURT SHOULD REJECT APPELLANT'S CHALLENGES AS WELL

Appellant claims the use of the death penalty as a regular form of punishment, and the failure to provide intercase proportionality review, violate the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments. (AOB 131-138.) Because this Court has repeatedly rejected such challenges, it should reject appellant's challenges as well. (See i.e., *People v. Dickey, supra,* 35 Cal.4th at p. 931 [law not defective in failing to require intercase proportionality review];

People v. Brown (2004) 33 Cal.4th 382, 402; *People v. Lewis* (2001) 26 Cal.4th 334, 394-395.)

Nor has appellant demonstrated the death penalty scheme in California is used "for a substantial number of crimes" in violation of the Eighth and Fourteenth Amendments. (AOB 133.) Appellant cannot make this showing as this Court has repeatedly held that the special circumstances provisions of California's death penalty law adequately narrows the class of death-eligible offenders. (*People v. Brown*, *supra*, 33 Cal.4th at p. 401; *People v. Frye*, *supra*, 18 Cal.4th at p. 1028 [rejecting challenge that special circumstance provisions perform no narrowing function; nor have they been construed in an "overly expansive manner"].)

Based on the foregoing, all of appellant's challenges to California's capital sentencing scheme must again be rejected by this Court.

VIII. APPELLANT'S DEATH SENTENCE DOES NOT VIOLATE INTERNATIONAL LAW

Finally, appellant contends that his death sentence violates international law. (AOB 139-141.) However, as appellant acknowledges, this contention has been previously rejected the claim that California's death penalty scheme and an individual death sentence violates Article VII of the International Covenant of Civil and Political Rights (ICCPR), and the Eighth Amendment of the United States Constitution (AOB 141, citing *People v. Ghent* (1987) 43 Cal.3d 739, 778-779; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511), appellant urges this Court to reconsider its holdings and find appellant's death sentence violates international law. (AOB 141.) First, there is no reason for this Court to reexamine its rulings. (*People v. Dickey*, *supra*, 35 Cal.4th at p. 932.) Second, appellant does not have standing to allege a violation of the ICCPR. Even if he did, no international law violation occurred because neither California's capital sentencing scheme nor appellant's death sentence violate the state or

federal constitution. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1055.) Appellant's Eighth Amendment claim should also be rejected because appellant has failed to establish the existence of a national consensus against executing those who commit crimes like the ones committed by appellant.

The United States is, as appellant points out, a signatory to the ICCPR. (*People v. Brown*, *supra*, 33 Cal.4th at pp. 402-403.) But because treaties generally apply only to disputes between sovereign governments, appellant lacks standing to challenge the death penalty under the ICCPR. (*Hanoch Tel Oren v. Libyan Arab Republic* (D.D.C. 1981) 517 F.Supp. 542, 545 547; but see *United States v. Duarte Acero* (11th Cir. 2000) 208 F.3d 1282, 1286 ["The clear language of the ICCPR manifests that its provisions are to govern the relationship between an individual and his state"].) Even assuming appellant does have standing, his claim fails on the merits.

"International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements." (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511; accord, *People v. Cook* (2006) 39 Cal.4th 566, 620; *People v. Boyer* (2006) 38 Cal.4th 412, 489.) With respect to the ICCPR, as this Court recently observed:

> [The United States] signed the [ICCPR] on the express condition "[t]hat the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." (138 Cong. Rec. S4781 01 (Apr. 2, 1992); see Comment, The Abolition of the Death Penalty: Does "Abolition" Really Mean What You Think it Means? (1999) 6 Ind. J. Global Legal Studies 721, 726 & fn. 33.)

(*People v. Brown*, *supra*, 33 Cal.4th 382, 403-404.)

As discussed infra, there were no state or federal constitutional law violations in this case. Consequently, this Court need not consider whether such violations "would also violate international law[.]" (*People v. Dickey*, *supra*, 35 Cal.4th at p. 932; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511; accord, *People v. Brown*, *supra*, 33 Cal.4th at p. 404 [declining to find law defective based on international law where no other defect in imposing the death penalty against defendant was found].)

Appellant's related Eighth Amendment claim also does not provide a basis for relief. The problem with appellant's argument is that it is not the international community's views that are relevant to the Eighth Amendment analysis; "it is American conceptions of decency that are dispositive[.]" (*Stanford v. Kentucky* (1989) 492 U.S. 361, 370 [109 S.Ct. 2969, 106 L.Ed.2d 306].)

Because appellant has failed to show there is a national consensus against imposing a sentence of death in cases like his, his international law and related Eighth Amendment claims fail. (Compare *Atkins v. Virginia* (2002) 536 U.S. 304, 314-316, 321 [122 S.Ct. 2242, 153 L.Ed.2d 335] [holding the execution of a mentally retarded prisoner violates the Eighth Amendment's ban on cruel and unusual punishment after noting a national consensus against this practice had emerged].)

CONCLUSION

In sum, appellant has not shown that any of the trial court's rulings regarding excusal of prospective jurors and the admissibility of evidence were erroneous. Nor has he demonstrated that the instructions given in the guilt and/or penalty phases were faulty and that the California death penalty is unconstitutional. For these reasons, respondent respectfully requests this Court affirm appellant's first degree murder conviction, the special circumstance findings, and his death sentence.

Dated: March 29, 2010

Respectfully submitted,

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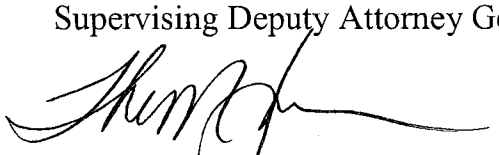

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 26,424 words.

Dated: March 29, 2010

EDMUND G. BROWN JR.
Attorney General of California

TAYLOR NGUYEN
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***PEOPLE v. ENRIQUE PARRA DUENAS*** Case No.: **S077033**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 29, 2010, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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FOR DELIVERY TO:
HON. DEWEY LAWES FALCONE, JUDGE

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 29, 2010, at Los Angeles, California.

Vanida S. Sutthiphong
Declarant

Signature

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