No. S148863

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ROBERT WARD FRAZIER, Defendant and Appellant.	(Contra Costa County Sup. Ct. No. 041700-6)

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Contra Costa

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	S148863
Plaintiff and Respondent,	)	Contra Costa Cty Superior Court No. 041700-6
v.	)	
ROBERT WARD FRAZIER,	)	
Defendant and Appellant.	)	

APPELLANT'S REPLY BRIEF

In this reply, appellant addresses specific contentions made by respondent, but does not reply to arguments that are adequately addressed in his opening brief. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

I.

THE TRIAL COURT'S IMPROPER EXCLUSION FOR CAUSE OF PROSPECTIVE JUROR NO. 111 REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE

A. Introduction

Appellant argues that the trial court improperly excluded Juror No. 111 based on his opposition to the death penalty, despite the juror's unwavering and unambiguous assurances that he could follow the law and impose the death penalty. (AOB 36-68.) Respondent contends the court's ruling was reasonable and is owed deference by this Court. (RB 41-61.) Respondent is wrong on both counts; the trial court's ruling, which was based on a misrepresentation of the juror's statements and a misapplication of the law regarding the qualifications of capital jurors, is not entitled to deference, nor is it supported by substantial evidence.

Respondent and appellant do not disagree about the scope of the relevant facts as demonstrated by the nearly identical statement of facts and recitation of the law in both briefs, but the paths diverge about the legal propriety of the court's ruling.

B. Juror No. 111 Was a Qualified Capital Juror; His Exclusion Was Reversible Error

Respondent correctly acknowledges that Juror No. 111 stated his willingness to follow the law, keep an open mind, set aside his feelings about what the law ought to be, and said that he did not have difficulty being fair and impartial in considering the relevant aggravating and mitigating factors. (RB 48.) Respondent is wrong, however, in its statement that the juror "expressed a great deal of ambivalence about his ability to impose the death penalty in the case before him." (*Ibid.*) Just like the trial court's ruling, respondent's argument is based on a legally incorrect

analysis of the juror's statements. Not only did Juror No. 111 state without ambiguity that he could impose the death penalty, he also stated he could impose it in this case. His exclusion from appellant's jury, therefore, requires reversal of the death penalty.

Respondent argues that if Juror No. 111 was erroneously excused, the error was harmless. (RB 59-62.) This Court has consistently followed United Supreme Court precedent in holding that "[w]hen a trial court errs in excusing a prospective juror for cause because of that person's views concerning the death penalty, we must reverse the penalty." (*People v. Zaragoza* (2016) 1 Cal.5th 21, 41, citing *Gray v. Mississippi* (1987) 481 U.S. 648, 659–667.) Respondent's request to the Court to revisit its position should be denied.

1. Juror no. 111 was opposed to the death penalty, but willing to set aside his beliefs and follow the law.

Beginning with his questionnaire responses, Juror No. 111 made his position clear: he did not believe in the death penalty, but would follow the law. His answer to Question 83, which asked for his general feelings regarding the death penalty was: "I think it is not for human being [sic] to judge whether somebody should be killed. *I am against it, but I will obey the law & instructions from the court.*" (14 CT 4176, italics added.)[1] In response to Question 85(f), which asked, "Could you set aside your own personal feelings regarding what the law ought to be and follow the law as

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[1] By omitting the second sentence of the response here (it is cited in full at RB 42), respondent mischaracterizes the record when it cites this answer in support of the claim that Juror No. 111 "made it clear that he did not feel qualified to impose the death penalty because he was a human being who was insufficiently wise to choose who should live or die." (RB 48, citing 14 CT 4176.)

the court explains it to you?" he answered, "Yes." (14 CT 4182.) Based on these written answers alone, Juror No. 111 "could not be excused for cause unless further questioning established that [he] w[as] in fact unable or unwilling to set aside [his] personal views and follow the law in determining penalty." (*People v. Leon* (2015) 61 Cal.4th 569, 592.)

In the course of answering a question by the prosecutor about the basis for his opposition to the death penalty, Juror No. 111 expressed doubt that he, rather than God, should – or could – decide whether a person should live or die. (12 RT 2510-2511.) When the prosecutor questioned him further about this dichotomy, Juror No. 111 explained:

> So right now there's a conflict between my civic duty and what I believe. And so given a choice of how do I choose between those two things, it's kind of one of those things I'm hoping that I don't have to – it doesn't have to come down to that. If it does come down to that, my belief is that I will follow my civic duty because it's not – in that case, I guess I justify the decision based on the fact it's really not my moral choice, it's my choice based on evidence and my civic duty to do this, and it's not like I'm personally volunteering to go and decide whether someone should live or die.

(*Ibid.*)

Respondent cites these statements made during voir dire as well as the questionnaire answers as examples of Juror No. 111's "ambivalence about his ability to impose the death penalty in the case before him." (RB 48.) Here, Juror No. 111 is discussing how his beliefs and his ability to follow the law would intersect. Respondent does not attempt to address the authorities cited in the opening brief that discuss why statements such as these are not disqualifying. (See AOB 65-68.)

Juror No. 111's position was unlike, for example, that of the juror in *People v. Rountree* (2013) 56 Cal.4th 823, 847, who felt that voting for the death penalty would violate his religious beliefs. This Court upheld the

dismissal of the juror, despite the juror's statements that, his religious beliefs notwithstanding, if chosen as a juror he would try to sit in judgment of another person. "[H]e was excused because he said it would be very hard for him to ignore his belief system in order to carry out his duties as a juror. This internal conflict, not the inherent difficulty of sitting in judgment, is what may render a prospective juror, including this one, excusable." (*Id.* at p. 848.) Juror No. 111 made no comparable statements, but rather stated clearly that he would follow his civic duty despite his beliefs.

Respondent cites this Court's decision in *People v. Bradford* (1997) 15 Cal.4th 1229, 1320, in which the dismissal of prospective jurors was upheld based on their statements that they could only impose the death penalty in cases with far more egregious facts than those in the case before them. (RB 49.) *Bradford* is easily distinguishable. Contrary to respondent's contention (RB 48-49), Juror No. 111 expressed his willingness to impose the death penalty in the case before him. In response to the prosecutor's question whether, under the bare facts of the present case, knowing nothing more about it than the charges against appellant – "one murder, one rape, one sodomy, and the special circumstances that you know about" – he could impose the death penalty, Juror No. 111 answered, "There's a chance, yes." (12 RT 2507.) Respondent distorts the record by editorializing that "the juror initially stated that there was *only* a 'chance' he could do it." (RB 49, italics added.) As noted, that is not what he said.

When asked by defense counsel whether he could potentially impose the death penalty, Juror No. 111 stated "That's – that's right." (12 RT 2519.) Respondent claims Juror No. 111 "hesitated" in responding, but fails to explain why the cold record can – or should – be read to signify hesitation rather than certainty in his answer. In fact, the juror's next statement, "I said that, and that's what I believe," makes certainty the more

likely explanation. (*Ibid.*)

Respondent persists in pointing to statements by Juror No. 111 and claiming, but offering no legal authority in support, that the statements are disqualifying. For example, respondent refers to Juror No. 111's answers to the prosecutor's questions in which he stated that in almost all cases he would not find it appropriate to impose the death penalty and that he was "leaning towards life." Respondent suggests that these answers were disqualifying. (RB 49, citing 12 RT 2505, 2506.) They are not. As this Court has repeatedly recognized, "the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror *ever* to impose the death penalty is not equivalent to a determination that such belief will 'substantially impair the performance of his [or her] duties as a juror' under *Witt* [citation]." (*People v. Stewart* (2004) 33 Cal.4th 425, 447, citing *People v. Kaurish* (1990) 52 Cal.3d 648, italics added.) Additionally, "'[i]t is entirely possible . . . that even a juror who believes that capital punishment *should never be inflicted* and *who is irrevocably committed to its abolition* could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State' (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 515, fn. 7, 88 S.Ct. 1770; see *Lockhart v. McCree* (1986) 476 U.S. 162, 176, 106 S.Ct. 1758, 90 L.Ed.2d 137." (*People v. Whalen* (2013) 56 Cal.4th 1, 30, disapproved of on another ground by *People v. Romero* (2015) 62 Cal.4th 1, 44, fn. 17, italics added.) That is, if even those prospective jurors who would have difficulty *ever* imposing the death penalty and those who are irrevocably committed to its abolition are not disqualified to serve, as long as they can set aside their beliefs, then surely Juror No. 111's feeling that the death penalty is not appropriate in most cases is not disqualifying.

The trial court referred to Juror No. 111's response to Question 43, which asked: "Will you have any difficulty keeping an open mind until you have heard all the arguments of both counsel, and the court has given you all the instructions?" The juror answered "No," and added, "Although I'm not confident I could recommend death in any scenario." (12 RT 2589; 14 CT 4161 [questionnaire].) This answer is far less definitive than the responses of the three prospective jurors in *People v. Leon*, who wrote in their questionnaires that they were "inclin[ed] to vote *automatically*" for LWOP. (61 Cal.4th at p. 592, italics added.) This Court found that, based on these answers, the jurors who – like Juror No. 111 – also stated they could set aside their personal feelings and follow the law, "appeared qualified to serve." Nothing Juror No. 111 said during voir dire by the court and counsel undermined or contradicted the questionnaire responses.

Respondent's refusal to acknowledge this legal truth leads it to cite as evidence of his disqualifying impairment Juror No. 111's "aversion to the death penalty," and to the prospect of serving on the jury based on his wife's experience as a capital juror. (RB 49.) While the juror made no secret of his opposition to the death penalty and his desire not to serve, neither of these is a disqualifying position. Moreover, in response to a specific question about the effect of his wife's experience on his own feelings, Juror No. 111 stated that it would not impact his ability to be fair. (12 RT 2500.)

Respondent neither acknowledges nor responds to authority cited in the opening brief that addresses this point. (See AOB 66, citing *People v. Rountree*, *supra*, 56 Cal.4th at p. 848 ["It is no doubt common for prospective jurors, or even sitting jurors, to believe, and perhaps to state, that sitting in judgment in a capital case would be difficult or even one of the hardest things they have been asked to do"]; *People v. Stewart*, *supra*,

33 Cal.4th at p. 446; see also, *People v. Avila* (2006) 38 Cal.4th 491, 530 ["mere *difficulty* in imposing the death penalty does not, per se, prevent or substantially impair the performance of a juror's duties"] original italics; *People v. Riccardi* (2012) 54 Cal.4th 758, 782 [jurors who "feared that actually being on a death jury would be difficult or uncomfortable" are "not disqualifiable under *Witherspoon -Witt*"].)

Because none of Juror No. 111's statements were remotely disqualifying, respondent's argument that they somehow undermine the juror's unwavering declarations that, notwithstanding his opposition to the death penalty he could impose it in this case, is wholly unsupported. (RB 49, quoting *Uttecht v. Brown* (2007) 551 U.S. 1, 18.)[2]

2. The court's ruling sustaining the prosecutor's challenge is based on a misrepresentation of Juror No. 111's consistent and unequivocal assertions that he could impose the death penalty in this case and a misapplication of the law regarding the qualifications of a capital juror.

Appellant argues in the opening brief that the trial court misrepresented Juror No. 111's statements and applied an incorrect legal standard in disqualifying him. (AOB 45-54.) Respondent defends the court's ruling because the juror "did not persuasively demonstrate an ability to properly engage in the weighing process and make a determination concerning the appropriateness of capital punishment after setting his

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[2] Respondent's reliance on *Uttecht* is badly misplaced, and its attempt to compare the statements by the juror in *Uttecht* with those of Juror No. 111 must fail. There, among other things, the juror stated several times that he could consider imposing the death penalty only if the defendant "is . . . incorrigible and would reviolate if released," despite having been told repeatedly that if the defendant was convicted of first degree murder, he could not be released. (*Uttecht v. Brown*, *supra*, 551 U.S. at p. 14.)

feelings aside." (RB 52.) Initially, it should be noted that, "[t]he prosecution, as the party making the challenge, had the burden to establish the juror's impairment." (*People v. Zaragoza, supra*, 1 Cal.5th at p. 38, citing *People v. Stewart, supra*, 33 Cal.4th at p. 445.) Neither the prosecutor below, nor respondent here on appeal has met its burden.

Respondent begins by accusing appellant of "dissecting" the statements by the prosecutor and court in which they characterize the juror's statements, and argues that such characterizations are "immaterial" to the question of whether the trial court erred in dismissing Juror No. 111. (RB 51.) "What matters," respondent argues, "is whether the trial court's ruling fell within the bounds of its broad discretion." (*Ibid.*) On the contrary, the court's articulation of the record and its stated interpretation of the law are obviously "material" to this Court's task in ruling on the propriety of the trial court's actions. (See, e.g., *People v. Avila, supra*, 38 Cal.4th at p. 530, citing *People v. Stewart, supra*, 33 Cal.4th 425 [noting the "court's failure to conduct such an examination [beyond the questionnaires] was apparently based on its misunderstanding and misapplication of the standard necessary to excuse a prospective juror for cause based on his or her death penalty views"].)

Citing the juror's statements that his personal beliefs would make the "funnel" to a finding of death very narrow (12 RT 2513), and that the "bar is going to be higher in terms of the need for substantial aggravating circumstances" (12 RT 2515), respondent argues the trial court could reasonably infer that the juror was impaired. (RB 50.)

In questioning Juror No. 111 about how his attitudes toward the death penalty would affect his decision during the weighing process, the trial court came up with the "funnel" analogy. If, the court posited to the juror, he determined that the aggravating circumstances are so substantial in