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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,)
) No. S077033
Plaintiff and Respondent,)
) Los Angeles
) County
v.) Superior Court
) No. BA109664
)
ENRIQUE PARRA DUENAS,)
)
Defendant and Appellant.)

APPELLANT'S REPLY BRIEF

Appeal From the Judgment of the
Superior Court of the State of California
for the County of Los Angeles

The Honorable Dewey F. Falcone, Judge

RONALD F. TURNER
State Bar No. 109452

5050 Laguna Blvd. Suite 12-PMB 322
Elk Grove, California 95758

Telephone: (916) 396-6412
Fax: (916) 327-0459

Attorney for Appellant

DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	**No. S077033**
Plaintiff and Respondent,	)	
	)	**Los Angeles**
	)	**County**
v.	)	**Superior Court**
	)	**No. BA109664**
	)	
ENRIQUE PARRA DUENAS,	)	
	)	
Defendant and Appellant.	)	
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State Bar No. 109452

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Telephone: (916) 396-6412
Fax: (916) 327-0459

Attorney for Appellant

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ENRIQUE PARRA DUENAS,	)	
	)	
Defendant and Appellant.	)	
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APPELLANT'S REPLY BRIEF

INTRODUCTION

In this brief, Appellant addresses specific contentions made by Respondent, but does not reply to arguments which are adequately addressed in Appellant's Opening Brief ("AOB"). The decision to not address any particular argument, sub-argument or allegation made by Respondent, or to not reassert any particular point made in the AOB, does not constitute a concession, abandonment or waiver of the point made by Appellant. (See, *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.) The decision only reflects Appellant's view that the issue has been adequately presented and the positions of the parties fully joined. The arguments in this Reply Brief are numbered to correspond to the argument numbers in the AOB.

I.

THE TRIAL COURT ERRED IN EXCUSING PROSPECTIVE JURORS #4593, #5637 AND #6611 FOR CAUSE

Appellant showed in his opening brief that the trial court erroneously excused prospective jurors #4593, #5637, and #6611 for cause during voir dire. Each prospective juror had demonstrated that he or she could and would follow the court's instructions and could vote for death during the penalty phase if that judgment was warranted by the evidence. None of the three prospective jurors showed that their views on the death penalty would substantially impair his or her ability to serve on the jury as required for exclusion. Each excusal therefore violated Appellant's rights to due process and a fair trial by an impartial jury under the Sixth and Fourteenth Amendments of the United States Constitution. (*Witherspoon v. Illinois* (1968) 391 U.S. 510; *Wainwright v. Witt* (1985) 469 U.S. 412), and article I, section 16 of the California Constitution.)

Respondent argues that each of these prospective jurors showed that their views on the death penalty would substantially impair his or her ability to serve on a capital case jury, or at least, that each showed sufficient equivocation toward the death penalty that the trial court did not err in excusing each prospective juror for cause. (Respondent's Brief, pp. 28-45.)

A. **Appellant's Right to A Death-Qualified But Impartial Jury**

To restate the controlling rule here, a prospective juror may not be excused for cause unless the juror's views on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." (*Wainwright v. Witt, supra*, 469 U.S. at p. 421.) A prospective juror is not "prevented or substantially impaired" from performing his or her duties as a juror unless the juror is "unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*People v. Stewart* (2004) 33 Cal.4th 425, 447.) This rule protects the defendant's "right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment." (*Uttecht v. Brown* (2007) 551 U.S. 1, 9; 127 S.Ct. 2218, 2224.)

This Court emphasized in *People v. Wilson* (2008) 44 Cal.4th 758, that to achieve "the constitutional imperative of impartiality, the law permits a prospective juror to be challenged for cause *only* if his or her views in favor of or against capital punishment would prevent or substantially impair the performance of his [or her] duties as a juror in accordance with the court's instructions and the juror's oath." (*Id.* at p. 778-779, quoting *People v. Blair* (2005) 36 Cal.4th 686, 741; interior quotation marks omitted; emphasis added.)

The United States Supreme Court in *Uttecht v. Brown, supra,* deferred to a trial court's ruling on a defense challenge for cause, stating that when

"there is ambiguity in the prospective juror's statements, the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, [is] entitled to resolve it in favor of the State." (127 S.Ct. at p. 2223; interior quotation marks and citations omitted; bracketed text in original.) Nonetheless, the deference accorded a trial judge in a capital case is not limitless. This Court stated in *Wilson*, "[T]rial courts must, before trial, engage in a conscientious attempt to determine a prospective juror's views regarding capital punishment to ensure that any juror excused from jury service meets the constitutional standard, thus protecting an accused's right to a fair trial and an impartial jury." (*People v. Wilson, supra*, 44 Cal.4th at p. 779.)

Before a trial court may remove a prospective juror for cause because of the juror's views on the death penalty, the court "must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would prevent or substantially impair the performance of his or her duties (as defined by the court's instructions and the juror's oath)." (*People v. Wilson, supra*, 44 Cal.4th at p. 785, quoting *People v. Stewart* (2004) 33 Cal.4th 425, 445.)

A critical point of law in Appellant's case is that a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case. (*People v. Wilson, supra*, 44 Cal.4th at pp. 785-786, quoting *People v. Stewart, supra*, 33 Cal.4th at p. 446.) A prospective juror who personally opposes the death penalty may nonetheless serve on a capital case jury so long as the juror clearly states that he or she is willing to temporarily set aside his or her own beliefs in deference to the instructions of the court. (*Lockhart v. McCree* (1986) 476 U.S. 162, at p. 176.) This Court has stated, in this regard, "The real question is whether the juror's attitude will 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his

oath.'" (*People v Wilson, supra*, 44 Cal.4th at pp. 785-786, quoting *People v. Stewart, supra*, 33 Cal.4th at p. 446.)

Thus, unless a prospective juror's personal views on the death penalty would actually *preclude* him or her "from engaging in the weighing process and returning a capital verdict," a trial court may not remove a prospective juror for cause. (*People v. Wilson, supra*, 44 Cal.4th at p. 786, quoting *People v. Stewart, supra*, 33 Cal.4th at p. 446.)

This Court reversed the defendant's death sentence in *Wilson* because a holdout juror was erroneously excused during penalty deliberations. The holdout juror assigned greater weight to the mitigating evidence than did other jurors, and this Court stated that the juror did not thereby disqualify himself as a capital case juror. (*People v. Wilson, supra*, 44 Cal.4th at p. 841.) A trial court therefore errs if it excuses a *prospective* juror because the prospective juror indicates he or she would assign great weight to mitigating evidence, or to put this the way one of the three prospective jurors excused here put it, it would be difficult for him to vote for death unless the evidence was "quite bad." (2 RT 330.)

B. The Trial Court Erred in Removing Prospective Juror #4593 For Cause

Prospective juror #4593's answers to three questions on the Juror Questionnaire showed conscientious consideration of the difficulty anyone should have before concluding that he should vote for a death verdict. Prospective juror #4593 did not indicate, either in his Juror Questionnaire answers or in his voir dire testimony, that he could not vote for a death verdict in this case. Prospective juror #4593 wrote, in answer to Juror Questionnaire question three, asking for the juror's general feelings about the death penalty, "Have mixed feelings. Not sure can decide guilty or not guilty, because it concerns people's life." Question number ten asked whether the prospective

juror would be able to vote to apply the death penalty regardless of the prospective juror's personal views on the death penalty. Prospective juror #4593 wrote, "Not sure." Question number thirteen asked whether the prospective juror had any conscientious objections to the death penalty. Prospective juror #4593 wrote, "Yes." (2 RT 222-224.)

However, when the trial court asked prospective juror #4593 if his Juror Questionnaire answers meant that he would *not* impose the sentencing option of death, prospective juror #4593 responded that his conscience would make it "kind of hard" to vote for death, not that he could not vote for death. (2 RT 226.) The prospective juror confirmed that he had some religious beliefs as well as a personal belief that "would make it hard" for him to impose death. (2 RT 227.) But the trial court did not ask the prospective juror directly if he could *not* vote for death. Nor did the court ask the prospective juror whether he would fail to follow the court's instructions.

Defense counsel asked the key question of this prospective juror, which was whether the juror, if he had found Appellant guilty of killing a police officer in the line of duty, and he thought the appropriate punishment was death, "[C]ould you vote for death for my client?" Prospective juror #4593 responded, "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*." (2 RT 228, emphasis added.) Defense counsel then asked, to be sure of the prospective juror's answer, "Okay. So you could vote death?" Prospective juror #4593 once again answered, "Yes." (*Ibid.*)

The prosecutor, in turn, asked prospective juror #4593, "When it comes down to it you told Mr. Leonard that you could vote death, but you'd feel bad?" Prospective juror #4593 again answered, "Yes." (2 RT 230.) The prosecutor then suggested to the prospective juror that because the death

penalty was against the prospective juror's personal value system, and the prospective juror had religious objections as well, the prospective juror would "not want to vote to end another person's life." (*Ibid.*)

Prospective juror #4593 agreed with the prosecutor's suggestion that he would not "want" to have to vote for death, but he then elaborated, "But I would think the other way too. Because [Appellant] 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 – because the other person is already dead, and I feel I need to do some justice too . . . " (2 RT 231.) Subsequently, the prosecutor asked the prospective juror, "My question to you is, with your beliefs, religious and personal moral values, would you be able to [vote for death], knowing how you are going to feel the rest of your life having done it?" (2 RT 235.)

Prospective juror #4593 responded: "Yes." The prospective juror then elaborated on this affirmative answer, stating, "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 [sic] 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*." (2 RT 235; emphasis added.)

The following statement by the prospective juror must be read in light of these and earlier affirmations by the prospective juror of his ability to vote for death in this particular case involving the murder of a police officer while acting in the line of duty: "But I will consider because my vote – so, it's really – I thought about it over the 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." (*Ibid.*) Because the prospective juror's statement here begins "But I will consider" – meaning he would consider voting for death –

his final statement "I still . . . probably cannot make a decision" has to mean that at that point in time, before he heard the evidence at trial, he could not make a decision whether to vote for life or for death, rather than meaning that he did not know if he could vote for death at all.

Respondent speculates that this prospective juror's expression of willingness to vote for either life or death if there were a penalty trial was an attempt to give a "right answer" to the court and counsel, to "satisfy them by saying what he believed they wanted to hear." (Respondent's Brief, p. 34.) There is no sound basis for this supposition. This prospective juror had been candid from the start that voting for death would be difficult; but he did repeatedly state that he *could* vote for death if it were proven that Appellant had killed a police officer acting in the line of duty. For this reason, the trial court erred in excusing prospective juror #4593 for cause.

This Court stated in *People v. Wilson* that a prospective juror who simply believed it would be "difficult" to impose the death penalty "is entitled – indeed, duty bound – to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror." (*People v. Wilson*, *supra*, 44 Cal.4th at p. 786, quoting *People v. Stewart*, *supra*, 33 Cal.4th at p. 446.)

The trial court failed to distinguish, as Appellant argued in his opening brief, between this prospective juror's concern that voting for death would be morally and/or emotionally difficult, and the situation where a prospective juror indicates that he simply could not vote for death. Every prospective juror should go into a capital trial with "mixed feelings" about whether to impose a sentence of death. Prospective juror #4593 stated in his answers that he had no enthusiasm for voting for death in this case, but that he could do so if the prosecution proved Appellant did kill a police officer without any justification, and this aggravating circumstance outweighed any mitigation the defense

presented. The prospective juror's answers and the clarifying questions he posed (see, e.g., 2 RT 234:8-11) demonstrated only that he was conscientious in wanting to understand and follow the court's instructions.

Prospective juror #4593 recognized that a person had been killed and he recognized that "justice has to be made." (2 RT 235.) The United States Supreme Court stated in *Witherspoon* that a prospective juror's mere hesitancy to sit in judgment in a capital case is *not* an adequate ground to exclude a prospective juror for cause. The Supreme Court held a prospective juror had been erroneously excluded, where she had repeatedly stated that "she would not 'like to be responsible for . . . deciding somebody should be put to death.'" (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 515.) This kind of reluctance does not disqualify a juror, because "'[e]very right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow-man.'" (*Ibid.*)

The Supreme Court also stated in *Adams v. Texas* (1980) 448 U.S. 38, that mere emotions or feelings akin to those prospective juror #4593 expressed here are insufficient grounds to exclude a prospective juror for cause, because "neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty." (*Id.* at p. 50.)

This Court also has ruled many times that a prospective juror's aversion to serving on a capital jury does not justify exclusion for cause. (*People v. Bradford* (1969) 70 Cal.2d 333, 346-347 ["The decision that a man should die is difficult and painful, and veniremen cannot be excluded simply because they express a strong distaste at the prospect of imposing that penalty."]; *People v. Lanphear* (1980) 26 Cal.3d 814, 841 ["[A]bhorrence or distaste for sitting on a jury that is trying a capital case is not sufficient"]; *People v. Stanworth*

(1969) 71 Cal.2d 820, 837 ["the mere fact that a venireman may find it unpleasant or difficult to impose the death penalty cannot be equated with a refusal by him to impose that penalty under any circumstances"].)

Prospective juror #4593's questionnaire answers and voir dire testimony distinguish this situation from the situations in the cases Respondent cites to support the trial court's excusal for cause of this prospective juror. In *People v. Roldan* (2005) 35 Cal.4th 646, cited by Respondent at p. 34 of Respondent's Brief, each of the two prospective jurors removed for cause were unequivocally unable to vote for death. The first prospective juror excused for cause, when asked if she would "never vote for a verdict of death," had admitted, "Probably, yeah. It's very hard." When the trial court probed this answer further, asking the prospective juror, "No one says this is going to be easy. You said your answer was probably never?" the prospective juror agreed, stating, "Probably never." (*Id.* at p. 697.)

The second prospective juror excused for cause in *Roldan* admitted she "honestly did not know" whether she might even refuse to vote for a first degree murder verdict to avoid reaching the penalty phase. This prospective juror admitted she found it "hard to answer" whether she would vote "not guilty" irrespective of the evidence in order to avoid having a penalty trial. This prospective juror also stated,: "I don't think I could ever vote for death." (*Id.* at p. 890.) Prospective juror #4593 here clearly is not comparable to either of these prospective jurors in *Roldan*.

In *People v. Hamilton* (2009) 45 Cal.4th 863, also cited by Respondent at p. 34 of Respondent's Brief, the trial court asked the prospective juror who was subsequently excused for cause "if he could ever actually return a verdict of death," and the prospective juror replied unequivocally, "No, sir." The trial court subsequently asked, "Realistically, then, do you think you would always choose the other choice, the other option of life without possibility of parole?"

The prospective juror answered unequivocally, "Yes." (*Id.* at p. 890.) Once more, Respondent asserts a false equivalency between the prospective juror properly excused for cause in *Hamilton* with prospective juror #4593 here. There is no equivalency between these two very different prospective jurors.

In *People v Barnett* (1998) 17 Cal.4th 1044, cited by Respondent at p. 35 of Respondent's Brief, the excluded prospective juror's statements clearly showed an "inability to conscientiously consider a death verdict." (*Id.* at pp. 1114-1115.) The prospective juror, throughout her voir dire, "repeatedly said she did not know whether she could vote for the death penalty if she were to conclude that death was the appropriate punishment in the case." (*Id.* at p. 1115, fn. 50.) When the prosecutor pressed the prospective juror to state whether she could "in good conscience say that you would vote to put another human to death," the prospective juror had responded, "I don't think so. I don't think I could." (*Ibid.*) This response justified the prospective juror's removal for cause, but it is far different from the answers prospective juror #4593 gave here.

For the above reasons, the trial court did not have sufficient basis to find that prospective juror #4593's personal views on the death penalty prevented or substantially impaired him from performing his duties as a juror. Therefore, the Court must find that the trial court erred in removing prospective juror #4593 for cause, and must reverse appellant's conviction for murder as well as his sentence of death.

C. The Trial Court Erred in Removing Prospective Juror #5637 For Cause

Prospective juror #5637 answered Juror Questionnaire questions number three, four and six in ways that prompted the trial court to question the prospective juror closely. The prospective juror answered question three, regarding his general feelings about the death penalty, "Do not believe in death

penalty." (2 RT 327-328.) Asked by the trial court if he had a religious reason for this answer on the questionnaire, however, the prospective juror stated this was "just a personal belief." (2 RT 328.) The court then asked, "Do you think you could set aside your personal belief and impose the death penalty if you heard evidence that you felt justified the death penalty?" The prospective juror answered, "I think I could, yes, your honor." (*Ibid.*)

The trial court asked the prospective juror if he could impose the death penalty even though he did not believe in it, and the prospective juror responded that although he did not believe in the death penalty, he had never been confronted with the situation of applying it. (*Ibid.*) The trial court asked if the prospective juror could vote for death in this case, and the prospective juror answered he did not know if he could or not, "until the situation comes up to me." (2 RT 329.) The trial court then asked the prospective juror if he could impose the death penalty *after* hearing all the guilt and penalty trial evidence, and the prospective juror responded, "I think I could, yes, although I don't really believe in the death penalty." (*Ibid.*)

The trial court asked the prospective juror again, "Well, you don't believe in the death penalty, but you still think you could impose the death penalty?" (*Ibid.*) Prospective juror #5637 answered again, "I think I could, yeah." (*Ibid.*) The trial court asked, "The facts or scenario I give you, the killing a police – " at which point the prospective juror interjected, "It would have to be, to me, a scenario that's – that's – that is quite bad." (2 RT 329-330.) The trial court then asked, "Well, what about killing a police officer sitting in a police car wearing his uniform, and there is no reason for killing him?" The prospective juror answered, "I guess I could, yeah." (2 RT 330.)

The trial court felt that these answers were still "a little equivocal." So the trial court then asked the prospective juror very directly, "I've got to have you represent, because I'm going to ask you the opposite side of the coin also.

My question to you then, and I need to know, based upon the factual scenario I gave to you, and you heard nothing else, just that he killed a police officer sitting in a police car in uniform, no reason to do so, could you impose the death penalty?" Prospective juror #5637 answered this key question without equivocation, "Yes, I could." (*Ibid.*)

The trial court then asked the prospective juror if his answer to Juror Questionnaire question number four, "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 circumstance 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?" was still the same. The prospective juror stated that he could change that answer to "No." He also stated he could change his answer to question number six (whether the prospective juror would always vote against death) to "No." (2 RT 330-331.)

When defense counsel subsequently asked prospective juror #5637 if he could consider both the death penalty and life without the possibility of parole, he answered unequivocally, "Yes, I'd be able to consider both." (2 RT 331-332.) When the prosecutor asked the prospective juror, "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 prospective juror answered consistently, "I guess I could do it, yeah." The trial court asked, "You guess you could do it, did you say?" Prospective juror #5637 answered "Yeah." (*Ibid.*)

Prospective juror #5637's answers above establish that he was not removable for cause, despite his dislike for the death penalty. The prosecutor, not wanting to have to use a peremptory challenge on this prospective juror, got the prospective juror to agree that voting for the death penalty was something he "would rather not" be forced to do, and then inappropriately

asked the prospective juror, "[D]o you think you are the right – a juror to sit on a capital case where the prosecution is seeking the death penalty?" Prospective juror #5637 answered, "No." (2 RT 334.) This answer to the prosecutor's vague and compound question could have multiple meanings.

The trial court erred in excusing prospective juror #5637 for cause, after the prospective juror repeatedly stated that he could vote for the death penalty in this case. The prosecutor should not have been allowed to ask the prospective juror if *he* thought he was "the right juror" for a penalty trial, since this question called for a legal opinion which the prospective juror was not qualified to give. The prospective juror could not be expected to know that his personal opposition to the death penalty did not make him a "wrong juror" if he could put aside his personal opinion on this issue, which he had stated to the trial court that he could do.

The record shows that prospective juror #5637 clarified his own thinking and attitude toward the death penalty during the course of the questioning by the trial court and by defense counsel. The prospective juror told defense counsel that he could impose a sentence of death in this very case, if appellant were guilty of murdering a police officer without any justification.

Prospective juror #5637's questionnaire answers and voir dire testimony distinguish his excusal from the excusals in the cases Respondent cites to support the trial court's excusal for cause of this prospective juror. In *People v. Cain* (1995) 10 Cal.4th 1, cited by Respondent at p. 39 of Respondent's Brief, the statements of each of the two prospective jurors excused for cause there contrast sharply with prospective juror #5637's statements here. The first prospective juror in *Cain* whose excusal was at issue stated, "I don't know how my insides would respond when it came down to that [voting for death], if I had to come all the way down to that point and decide." Because of this answer and others, defense counsel in *Cain* stated he did not think the

prospective juror met the *Witt* standard and he would not oppose a challenge for cause. This Court noted in *Cain* that not only the prosecutor, but also defense counsel and the prospective juror herself all agreed that her mental state was such that it impaired her ability to perform her duties as a capital case juror. (*Id.* at pp. 60-61.)

The second prospective juror whose excusal was at issue in *Cain* also clearly should have been excused, in contrast to prospective juror #5637 here. The second prospective juror in *Cain* answered "yes" when asked if he would refuse to consider the death penalty no matter what the evidence. The prospective juror subsequently stated that he could not conceive of a case where he would vote for the death penalty and could not conceive of himself "being part of a jury that sentences a man to death." (*Id.* at p. 61.)

In *People v. Wharton* (1991) 53 Cal.3d 522, also cited by Respondent at p. 39 of Respondent's Brief, the prospective juror whose excusal was at issue there stated he did not think he would vote to impose the death penalty "unless it was shown that the accused's death would 'benefit' someone." He did not believe the penological goal of punishment was such a "benefit" and he did not believe the death penalty was a solution or penalty that benefitted anyone. Further, that prospective juror stated that he could vote for the death penalty only "if it could be shown that by doing so he could bring the victim back to life." (*Id.* at p. 588.) These statements clearly disqualified that prospective juror to sit on a capital case jury, and also clearly distinguish his views from those expressed by prospective juror #5637 in this case.

Unlike the extreme position taken by the prospective juror in *Wharton*, *supra*, prospective juror #5637's statements that he would rather not be put in the position of having to vote for a sentence of death or life without parole did not constitute a basis for disqualifying him as a capital case juror. Moreover, the question posed by the prosecutor, asking whether prospective juror #5637

thought he was the "right" juror to sit on this case, was inherently ambiguous, as well as legally meaningless, for the reasons stated previously. Because the prospective juror did not personally believe in the death penalty, but he would not know that the controlling law does not disqualify him to sit on a capital jury because of this personal belief, prospective juror #5637 naturally answered, "No." What is controlling here is instead that prospective juror #5637 stated repeatedly that he could vote for death in this very case.

For this reason, this Court must find that the trial court erred in removing prospective juror #5637 for cause, and must reverse appellant's conviction for murder and his sentence of death.

Appellant also contests Respondent's assertion that Appellant waived his claim that the trial court erred in allowing the prosecutor to repeatedly ask the prospective jurors if they could "pull the switch" and/or "pull the trigger" to execute Appellant, for failure to cite authority or tender an analysis why asking a prospective juror if he could "pull the switch" is error. (Respondent's Brief, p. 40, fn. 7.) First, it is clear that the trial court has the power to restrict either party from conducting improper voir dire. (*People. v Medina* (1995) 11 Cal.4th 694, 746 ["The power of the judge to control the proceedings includes the exercise of discretion over the manner in which the voir dire will be conducted"]; *People v. Rich* (1988) 45 Cal.3d 1056, 1105 [voir dire not properly used to compel jurors to commit to vote a particular way].)

Second, Appellant did state why it was improper to allow the prosecutor to ask prospective jurors if they could "pull the switch." Appellant stated in the AOB that the trial court tainted the jury selection process with partiality because the prosecutor's use of the term "pull the switch" was an obvious reference to execution by electric chair, that this phrasing was obviously intended to provoke an emotional reaction from the prospective juror through referring to a discarded method of execution now seen as barbaric, and that the

prosecutor's questioning improperly invited the prospective juror to imagine himself in the situation where he personally was Appellant's executioner. (AOB, p. 53.). This type of questioning exceeds the boundaries of properly underscoring "the magnitude of the juror's responsibility" for the sentencing decision, to use Respondent's phrasing. (Respondent's Brief, p. 40, fn. 7.)

Third, the claim of error was not waived for failure to cite authority because there is no direct authority on point on this claim. Appellant is arguing that this type of questioning exceeds the parameters of proper voir dire questioning, and that this Court should disapprove the use of "Can you pull the switch?" questioning in voir dire. In *People v. Clark* (1990) 50 Cal.3d 583, this Court made clear that trial courts should restrict voir dire questioning that goes beyond whether the prospective juror has an "open mind" on the penalty determination. The Court ruled that the trial court there properly restricted "questions related to the jurors' attitudes toward evidence that was to be introduced in [that] trial." (*Id.* at p. 597.)

This restriction went by the boards repeatedly during the voir dire in Appellant's trial, but Appellant's claim of error here is similarly premised on certain kinds of questioning being out of bounds. In the effort to determine whether a prospective juror has an "open mind" on the penalty determination, it is improper to so personalize the decision as to ask the prospective juror if he was capable *himself* of standing outside the death chamber and "pulling the switch" to execute Appellant.

D. The Trial Court Erred in Removing Prospective Juror #6611 For Cause

Prospective juror #6611's answers to Juror Questionnaire questions did not provide any basis for his removal for cause. Respondent even admits that "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." (Respondent's Brief, p. 43.) Prospective juror #6611 answered questionnaire question number three, regarding his general feelings about the death penalty, "Neutral." In fact, none of this prospective juror's answers to the questions on the Juror Questionnaire suggested the prospective juror had any difficulty with imposing a sentence of death. (See CT 207, 578-581, Juror Questionnaire Form filled out by prospective juror #6611.)

During voir dire, the trial court asked prospective juror #6611 if he could and would impose the death penalty, after he heard the evidence presented at the trial. Prospective juror #6611 answered, "I think so. Yeah." (2 RT 497.) Asked if he had any religious convictions that would keep him from imposing the death penalty, the prospective juror answered, "No" (he had answered this question similarly on his Juror Questionnaire). When the trial court commented, "Okay. And that's a tremendous responsibility to be able to say yes, I can impose the death penalty if I feel the circumstances warrant it," and then asked, "Can you represent to us that that's what you could do?" prospective juror #6611 answered, "I believe so." (*Ibid.*) The trial court asked, "Okay. You believe so. Any hesitation at all?" and the prospective juror answered, "No." The prospective juror then commented, "This is just – it's a big deal." (2 RT 497-498.)

Defense counsel asked the prospective juror, "If you got to the penalty phase, you would have found my client guilty of killing a police officer, first degree murder, you would have found that true beyond a reasonable doubt. No reason for my client to kill a police officer but he did. Okay? Knowing that, you are in the penalty phase. If the appropriate punishment was death, could you vote death if you felt that was the appropriate punishment?" and the Prospective juror answered, "I think so." (2 RT 498.)

Defense counsel subsequently asked the prospective juror again, "So do you think that if you thought it was appropriate, could you vote death?" and prospective juror #6611 again answered, "I think I – yes, I think." (2 RT 499.) The prospective juror explained that serving as a juror in such a serious matter made him nervous but he would follow the instructions given and perform his duty, stating, "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.*)

Defense counsel then asked once more, "If you heard all the evidence and you said this man killed a police officer and I think the appropriate punishment is death, can you bring that back? Yes or no. If you can't, fine. But we have to know." The prospective juror answered, "Yes." (*Ibid.*)

The prosecutor asked prospective juror #6611 if the death penalty were on the ballot the previous week, how would the prospective juror have voted. The prospective juror answered, "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.*)

Despite prospective juror #6611's positive Juror Questionnaire answers and his affirmative answers to voir dire questions about his ability to vote for death if he felt a death verdict were appropriate, the prosecutor asked the prospective juror once more, "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?" (2 RT 501.)

Prospective juror #6611 did not respond immediately, and the trial court then stated, "You know, as I indicated for as far as we're concerned, there is no right or wrong answer. We only want to know what your true beliefs are," to which prospective juror #6611 responded, "Yeah." The trial court continued, "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." Prospective juror #6611 explained again that he had never been in the situation before of deciding whether to vote for life or death of another person, and he felt that he would have to weigh all the evidence. (2 RT 502.) The prosecutor then stated, "All right. We have one police officer that was killed here. This isn't like the Oklahoma City bombing where you had 168 people killed. Okay? And in this situation, it's your answer that counts, what's inside of you. And if you couldn't do it, that's perfectly fine." (*Ibid.*)

Prospective juror #6611 did not respond immediately. The trial court then stated, "There has been a substantial silence and that's because you're mulling over in your mind whether or not you could or could not impose the death penalty; is that right? And at this point in time you still haven't reached a conclusion. Is that a fair answer?" (*Ibid.*) Prospective juror #6611 responded, "True. I'm kind of hitting blank just with –" (*Ibid.*) The trial court cut off the prospective juror from completing his statement, and stated, "Okay. I think I'm going to make a finding 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. And there is no reflection on you. It's – and I appreciate you not knowing, and I don't know what a lot of people would do in your position, but I'm going to excuse you . . . ." (2 RT 502-503.)

The trial court erred in excusing prospective juror #6611. The prospective juror had stated repeatedly that he could vote for the death penalty in this case, and that he had no religious or personal objections to the death

penalty. His problem in answering questions stemmed from the fact that the prospective juror was admittedly "a little nervous." (2 RT 499.) Nervousness during voir dire does not disqualify a prospective juror from sitting on a capital jury. When prospective juror #6611 was allowed to answer questions without interruption and to explain his views, he stated that he could accept either penalty, depending on the evidence presented.

Prospective juror #6611's questionnaire answers and voir dire testimony, as with prospective jurors #4593 and #5637, distinguish his excusal from the excusals in the cases Respondent cites to support the trial court's excusal for cause of prospective juror #6611. In *People v. Avilez* (2007) 41 Cal.4th 472, cited by Respondent at p. 45 of Respondent's Brief, the juror whose excusal was at issue had filled out his Juror Questionnaire in a manner which the trial judge thought was "in some ways incomprehensible. It is filled with discussions of quasi-religious statements, man's sinful nature and rebellious[ness] towards God's commands as the cause of crime and so forth and on and on." (*Id.* at p. 496.) Most importantly, the juror "stated he could not vote to sentence someone to death. He affirmed that opinion after a recess had given him some time to think about his views about capital punishment." (*Id.* at p. 498.) In contrast, prospective juror #6611, did not at any time state that he could not vote to sentence Appellant to death.

Similarly, in *People v. Lewis* (2008) 43 Cal.4th 415, also cited by Respondent at p. 45 of Respondent's Brief, the first of two prospective jurors whose excusals were at issue expressed in her juror questionnaire "general opposition to the death penalty, stating several times that no murder deserves the death penalty and that she did not 'believe in the death penalty.'" (*Id.* at p. 483.) On voir dire, this prospective juror stated several times that she did not think she could impose a death sentence. (*Id.* at pp. 483-485.) The second of the prospective jurors similarly expressed general opposition to the death

penalty in her juror questionnaire, and stated on the questionnaire that if the case reached the penalty phase, she would always vote for life imprisonment without possibility of parole. (*Id.* at p. 485.) On voir dire, the prospective juror walked back from that statement only to the point of stating that she "might be willing to consider the death penalty in certain very narrow circumstances, she gave as an example the Jeffrey Dahmer case." But in the circumstances made known to her of the capital case for which she was a prospective juror, she had already "made up her mind" that the circumstances did not call for the imposition of a death sentence. (*Id.* at p. 486.) Thus, neither of the two prospective jurors whose excusals were at issue in *Lewis* compare at all to prospective juror #6611 here.

The trial court erred in excusing prospective juror #6611 for cause because the prospective juror did not answer any Juror Questionnaire question or give an answer to a voir dire question which disqualified him from sitting on Appellant's jury. The prospective juror repeatedly affirmed that he could vote either for death or for life. The prospective juror stated that until he heard the evidence at trial, he was "neutral" about imposing a death sentence. Prospective juror #6611 was nervous, but this did not give the trial court cause to excuse the juror. For this reason, Appellant was denied his constitutional right to an impartial jury, he did not receive a fair trial and his conviction for murder and his sentence of death must be reversed.

* * * * *

II.

THE TRIAL COURT ERRED IN ADMITTING THE COMPUTER ANIMATION DEPICTING THE SEQUENCE OF SHOTS AND LOCATIONS FROM WHICH THE SHOOTER FIRED.

In the AOB, Appellant showed that the computer animation depicting the sequence of shots fired at Deputy Hoenig and the locations from which the shots were fired lacked foundation, was based on speculation, was misleading, and therefore was both irrelevant and inadmissible, and that showing the computer animation prejudiced Appellant. Respondent argues otherwise. (Respondent's Brief, pp. 45-64.)

A. <u>The "402" Hearing Evidence and Argument</u>

At the "402" hearing on the admissibility of the computer animation, Parris Ward and Dr. Carley Ward explained the procedure and premises they used to prepare the animation. The prosecutor argued that the preparation and contents of the computer animation met the requirements advanced in *People v. Hood* (1997) 53 Cal.App.4th 956, the sole California criminal decision addressing the admissibility of such computer animations.

As described by the prosecutor, the animation depicts shot number one as coming from the north side of the street, near where Appellant's bicycle was found. The animation shows this bullet traveling through the rear window of the police car, hitting Deputy Hoenig in the hand, and then going through the top of the dash and into the windshield. (4 RT 1028.) The animation shows shots two, three and four being fired from the left of the police car. The animation shows shot number two going through Deputy Hoenig's left leg just above the ankle, shot number three entering Deputy Hoenig's upper torso, just above his bulletproof vest, and shot number four hitting the lower right rear quadrant of the bulletproof vest, and being stopped by the vest. The animation

shows shots five, six and seven being fired from a location west and in front of the police car. (*Ibid.*)

The prosecutor admitted that the order of the shots as shown in the computer animation could not be conclusively proven. (*Ibid.*) The prosecutor stated he would tell the jury that the order of shots two through seven could have been different than the order of the shots depicted in the animation. The prosecutor also suggested the trial court give the jurors the "*Hood* instructions" regarding the animation. (4 RT 1028-1029.)

Defense counsel agreed that the evidence supported a conclusion that shot number one went through the back window of Deputy Hoenig's police car, but he argued that neither the physical evidence nor any expert testimony could establish the actual and correct order of shots number two through seven. (4 RT 1029-1030.) Further, counsel disputed whether the locations of shell casings at the crime scene were reliable indicators of where shots had been fired from, because police officers and paramedics had stepped all over the scene in their attempt to save the life of Deputy Hoenig, which likely resulted in the shell casings being moved around during those activities. Therefore, counsel argued, any animation depicting any particular sequence to shots number two through seven, or where the shooter was standing at the time these shots were fired, rested only on speculation. (1 RT 186; 4 RT 1030.)

Parris Ward, who testified that he created the animation in conjunction with Dr. Carley Ward (4 RT 1052), agreed on cross-examination that he was not a ballistics expert, that shell casings ejected from a handgun can fly as far as three feet away from the location from which the gun is fired, and that the casings located at the crime scene could have been moved by personnel at the shooting scene during their attempts to give life-saving treatment to Deputy Hoenig. (4 RT 1061.) Dr. Carley Ward on cross-examination agreed that she

could not say how far away from Deputy Hoenig the shooter was when he fired the bullet that entered Deputy Hoenig's throat area. (4 RT 1077.)

The trial court ruled the computer animation admissible under Evidence Code section 352, and stated it would instruct the jury according to the guidelines set out in *People v. Hood.* (4 RT 1080.)

B. ***People v. Hood*** **Is Inapposite and Does Not Control This Case**

The appellate court in *Hood* did not address several arguments pertinent to the admissibility of the computer animation offered by the prosecution here. In *People v. Hood*, the defendant fired seven bullets into the victim after the victim had been tried but acquitted of the murder of the defendant's wife. The victim went to the defendant's business office, but there were no witnesses to the shooting. The prosecution argued that the defendant deliberately killed the victim, while the defendant maintained he thought the victim was pulling out a gun when he shot the victim. (53 Cal.App.4th at p. 967.)

The prosecution sought to introduce a computer animation of the shooting, based upon witness reports and measurements taken at the scene, the pathologist's report, and the reports of ballistics and gunshot residue experts. The defendant argued the animation was not admissible under the *Kelly 2* formulation (*People v. Leahy* (1994) 8 Cal.4th 587). The trial court ruled that the animation was in the nature of an illustration of the testimony of the expert witnesses, and was not being introduced as evidence in and of itself. (53 Cal.App.4th at p. 968.)

The defendant subsequently objected that the computer animation lacked proper foundation, and the trial court overruled that objection as well. (*Ibid.*) Before the animation was played to the jury, the trial court instructed the jury that the computer animation was "based on a compilation of a lot of different experts' opinions . . . . [It] is nothing more than that kind of an expert

opinion being demonstrated or illustrated by the computer animation, as opposed to charts and diagrams." (*Ibid.*)

The defense also presented a computer animation, and during the defendant's testimony, the trial court also instructed the jury that:

> I . . . again remind you that all of the animated video reenactments or re-creations are only designed to be an aid to testimony or reconstruction, the same as if an expert testified and drew certain diagrams on the board. They are not intended to be a film of what actually occurred or an exact re-creation . . . . They are 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.

(53 Cal.App.4th at pp. 968-969.)

The Court of Appeal recognized that "scientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury. . . ." (53 Cal.App.4th at p. 969, quoting *People v. Kelly* (1976) 17 Cal.3d 24, 31-32.) However, the appellate court agreed that the computer animation did not need to meet the requirements of the *Kelly* formulation, because it viewed the animation as "tantamount to drawings by the experts . . . to illustrate their testimony." (53 Cal.App.4th at p. 969.) The appellate court concluded that the instructions given the jury concerning both animations sufficiently removed "the danger that the jury was swept away by the presentation of a new scientific technique which it could not understand and, therefore, would not challenge." (*Id.* at pp. 969-970.)

However, the appellate court in *Hood* did not address at all several pertinent arguments against admitting a computer animation offered by the prosecution, because the defendant had failed to assert these arguments at trial, including: (1) the prosecution's animation was based not only on the physical evidence but also on the reactions and states of mind of two witnesses, for which there simply was no clear evidence, (2) the computer expert who

prepared the animation cumulated various assumptions together to create an overall scenario even more remote from the necessary evidentiary foundation than the original evidence, (3) the prosecution witnesses themselves conceded that other explanations of the facts were possible, and (4) the computerized re-enactment was based on "inadmissible speculation regarding the position and posture of [the victim] at the time of the shots." (*Id.* at p. 970.) In Appellant's case, trial counsel properly raised all these arguments, but the trial court ignored them.

The court in *Hood* rejected the defendant's contention that the probative value of the animation outweighed its prejudicial impact because the animation preyed on the emotions of the jury. The appellate court characterized the animation as "clinical and emotionless." (*Id.* at p. 972.) The court in *Hood* misjudged the prejudicial impact that *any* computer animation has on a defendant's right to a fair trial, because such computer animations inevitably – and unfairly – take on "a posture of mystic infallibility in the eyes of a jury."

This problem was appropriately recognized in *Dunkle v. State* (Okla. Crim. App. 2006) 139 P.3d 228. As Appellant explained in the AOB, the defendant in *Dunkle* was convicted of murdering her fiancee outside the home they were sharing. The defendant denied it was she who had shot the victim, and maintained that he had either shot himself intentionally, or accidentally as the defendant attempted to prevent him from shooting himself. (139 P.3d at p. 231.) The defendant challenged the crime scene "re-enactments" generated on a computer that accompanied the testimony of the prosecution's crime scene reconstruction expert. The appellate court reversed (*id.* at pp. 245; 251), applying a three-part test originally set forth in *Harris v. State* (2000 OK CR 20, 13 P.3d 489) to assess whether a computer re-enactment is admissible. First, the re-enactment must be able to be authenticated, that is, the court has to be able to establish that the re-enactment correctly represents the object

portrayed, or fairly and accurately represents the evidence to which it relates. Second, the trial court has to have a sound basis for ruling that the re-enactment is relevant. Third, the probative value of presenting the computer re-enactment must not be substantially outweighed by the danger of unfair prejudice, particularly from the needless presentation of cumulative evidence. (139 P.3d at p. 247.)

The appellate court in *Dunkle* contrasted the computer animation which had been held admissible in *Harris* with the computer animations presented in Ms. Dunkle's case. In *Harris*, the victim was shot three times in the head and once in the side of the abdomen while seated in the passenger seat of a car. The computer animation depicted the trajectory of the bullet passing through the victim's abdomen and into the car seat. This computer animation had been authenticated and was relevant. Moreover, in contrast to the point of the computer animation presented in Appellant's case, the measurements of the bullet trajectories, and of entry and exit wounds in *Harris* provided the basis for a scientific analysis establishing "the position of *the victim's body* at the time of the shooting." (139 P.3d at p. 247, quoting *Harris v. State*, *supra*, 13 P.3d at p. 496; emphasis added.) In Appellant's case, the main focus of the computer animation was to depict the location of *the shooter* when each shot was fired, an inherently far more problematic proposition.

The computer animations at issue in *Dunkle* were a series of re-enactments depicting the victim posed in various positions relative to the steps on the outside of a home, and relative to various positions of the defendant, with a gun held by one or the other or both of them. The appellate court held that the computer animations were potentially highly misleading and that therefore their admission required reversal. The court in *Dunkle* found that the evidence in the case "simply did not adequately support the assumptions implicit in each of the four animations." (139 P.3d at p. 250.)

The *Dunkle* court also emphasized that computer-based animations have can be highly prejudicial and misleading because computer-generated images "lend an air of technical and scientific certainty to the 're-enacted' evidence, which may or may not be justified." (*Ibid.*)

The appellate court also concluded that because the computer animations presented there were not fairly representative of the evidence in the case, they were not relevant. Furthermore, because they were not fairly representative of the evidence, they had little or no probative value, and whatever value they had was substantially outweighed by their potential to mislead and confuse the jury. Additionally, because the animations restated the prosecution's theory of the case, based upon previously admitted evidence and did not contain new content or analysis, they were also needlessly and unfairly cumulative. (*Id.* at p. 251.)

As Appellant pointed out in his opening brief, the computer animation here presents the same problems as in *Dunkle*. First, as the prosecutor admitted, shots number two through seven are depicted in the animation in that order based purely on inferences, and moreover, those inferences rested on data shot through with unreliability, since there was no way of knowing whether the shell casings located at the scene were situated in their original landing points, or had been inadvertently moved by the many police and non-police personnel who initially showed up at the crime scene. The best the prosecutor could do was to say the animation showed the *likely* order of the shots. (4 RT 1028.) Even this assertion by the prosecutor is too strong, because the activities of the police and medical personnel at the crime scene irretrievably tainted any effort to determine what the true original positions of the shell casings had been. For this reason, as defense counsel correctly argued, it was pure speculation to assert what the sequence was of shots two through seven, or where the shooter was standing when those shots were fired.

(4 RT 1030.) Respondent acknowledges the creators of the computer animation "did not have any information about the shooter's body position or how he held his gun." (Respondent's Brief, p. 61.) A computer animation resting on speculation gives a highly falsified impression of accuracy, what the comedian Stephen Colbert famously referred to as "truthiness."

As in the *Dunkle* case, the computer animation here clearly could not be a "fair and accurate representation of the evidence to which it related," and for this reason the computer animation was not relevant and therefore also not admissible.

Second, the computer animation here contained no new evidence, and therefore was inadmissible because it was entirely cumulative. Worse yet, in this case, the computer animation did not accompany testimony by a legitimate ballistics expert, but instead accompanied the lengthy testimony of its own two creators, who moreover, knew nothing about ballistics. Presenting the computer animation became the occasion for two additional witnesses to recapitulate earlier testimony and unfairly give the speculation underlying the computer animation the "air of technical and scientific certainty" (*Dunkle v. State*, *supra*, 139 P.3d at p. 250) that it certainly did not deserve.

Respondent does not challenge the correctness of the appellate court's decision in *Dunkle, supra*. Indeed, Respondent points out at page 60 of Respondent's Brief that the court there found the use of the computer animation inappropriate and misleading because the data it rested on "did not support the computer animations." (139 P.3d at pp. 249-250.) Further, Respondent acknowledges the correctness of the *Dunkle* court's conclusion that "[b]ecause the animations were not fairly representative of the evidence in the case, they were not relevant." (*Id.* at p. 251.)

Respondent unsuccessfully attempts to distinguish *Dunkle* from Appellant's case by arguing that the computer animation played here "was

consistent with the evidence, experts' opinion, and the prosecution 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." (Respondent's Brief, p. 60.)

Respondent is incorrect that defense counsel did not challenge the reliability and/or accuracy of the "evidence" that the Wards relied upon in creating the animation. Appellant noted above that defense counsel argued that neither the physical evidence – nor any expert testimony – could reliably establish the actual and correct order of shots number two through seven, or whether the locations shell casings were found at the crime scene constituted reliable evidence of where shots had been fired from, because police officers and paramedics attempting to provide aid to Deputy Hoenig had stepped all over the scene, which likely resulted in shell casings getting moved around before anyone formally designated the locations of the shell casings. Defense counsel had specifically – and correctly -- argued that a computer animation suggesting any particular sequence to shots numbered two through seven, or suggesting where the shooter was standing at the time these shots were fired, rested only on speculation. (1 RT 186; 4 RT 1029-1030.)

That the computer animation here was consistent with the prosecution's theory of the case, as Respondent argues, is not a basis for distinguishing *Dunkle* from appellant's case, since the animations found inadmissible in *Dunkle* because they were misleading were also offered by the prosecution to illustrate its theory of the case (murder vs. accidental or intentionally self-inflicted shooting). *Dunkle* is not distinguishable from appellant's case, because the primary problem with the computer animation in each case is that

the "evidence" for the events depicted was not undisputed, or objectively reliable.

Demonstrative evidence that is not grounded on undisputed facts is simply inadmissible. In *United States v. Gaskell* (11th Circuit 1993) 985 F.2d 1056, the prosecution argued a shaken baby case by presenting a witness shaking a doll. The appellate court held that the demonstration "tended to implant a vision of [the defendant's] actions in the jurors' minds that was not supported by adequate factual basis," and therefore the unfairly prejudicial effects of this demonstration overwhelmed its "slight" probative value. (*Ibid.*) In *Hinkle v. City of Clarksburg, W. Va.* (4th Cir.1996) 81 F.3d 416, the circuit court noted that a computer-animated videotape must show actual known facts to be admissible, because such video is the equivalent of a real-life re-creation of events. (*Id.* at pp. 424-425.)

In *State v. Stewart* (2002) 643 N.W.2d 281, the appellate court held that a computer animation was inadmissible to illustrate an expert witness's opinion regarding the manner in which the crime occurred, because the animation did not merely recreate the facts but sought to present speculation as fact – the same fatal flaw in the computer animation presented here.

In sum, the appellate opinion in *People v. Hood* did not address the relevant objections raised by Appellant below in *this* case, the computer animation here could not and did not fairly and accurately represent established facts in the case, and the computer animation in any case was purely cumulative. For all these reasons, this Court must find that the computer animation was inadmissible.

C. Appellant was Prejudiced by the Admission of the Computer Animation

During his closing argument, the prosecutor went through each frame in the computer animation to support his arguments about bullet trajectories,

where each shot was fired from, and what the intent of the shooter was with each shot. (7 RT 1768-1770; 1782-1783.) According to the prosecutor, the animation presented *the* sequence of events in the murder of Deputy Hoenig. The prosecutor argued the animation showed that Appellant was not so high on methamphetamine that he could not deliberate and premeditate. (7 RT 1781-1782.)

The prosecutor used the computer animation to sway the minds of the jurors on the issues of deliberation and premeditation. This was indeed effective, but it was also prejudicial, since the computer animation should have been ruled inadmissible. For all the reasons stated herein, the prosecutor's reliance on the computer animation unfairly tainted the jury's consideration of the issues of deliberation and premeditation, requiring that this Court reverse appellant's conviction of first-degree murder and his sentence of death.

* * * * *

VIII.

BECAUSE THE DEATH PENALTY VIOLATES INTERNATIONAL LAW, BINDING ON THIS COURT, THE DEATH SENTENCE HERE MUST BE VACATED

Appellant argued in the AOB that the California death penalty procedure violates the provisions of international treaties and the fundamental precepts of international human rights, and that because international treaties ratified by the United States are binding on state courts, the death penalty as administered in California, and specifically in Appellant's case, is invalid. Appellant also argued that to the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, Appellant was raising this claim under the Eighth Amendment as well. (See *Atkins v. Virginia* (2002) 536 U.S. 304, at p. 316, fn. 21; *Stanford v. Kentucky* (1989) 492 U.S. 361, at pp. 389-390 [dis. opn. of Brennan, J.].)

Respondent argues that (1) Appellant does not have standing to raise this claim (Respondent's Brief, pp. 81-82), and (2) there were no state or federal constitutional violations in Appellant's case, and international law has no application where the conviction and sentence are in accord with state and federal constitutional requirements. (Respondent's Brief, p. 83.)

Appellant does have standing to raise the claim that his conviction and sentence violate international law and treaties, and this Court is required to enforce the provisions of these laws and treaties. The concepts of civil and political rights enshrined in human rights treaties that the United States has signed, including the International Covenant of Civil and Political Rights ("ICCPR"), closely parallel state and federal constitutional provisions regarding these rights. The international standards, to which courts in the United States must adhere, are based in large part on legal principles first embodied in the United States Bill of Rights itself. Key provisions of the

United States Bill of Rights have a distinctly international context, drawing on both British and French sources. (See, e.g., *Gregg v. Georgia* (1976) 428 U.S. 153, 169-170; *Harmelin v. Michigan* (1991) 501 U.S. 952, 966 (Scalia, J., concurring) [both cases noted that the English Bill of Rights of 1689 is undoubtedly the precursor of the Eighth Amendment].) It is the responsibility of the United States judiciary to interpret and enforce treaty provisions that confer justiciable rights. (See, e.g., *Holmes v. Laird* (D.C. Cir. 1972) 459 F.2d 1211, 1215, 1222 [domestic courts are not only equipped to enforce self-executing treaties affecting individual rights, but by virtue of the Supremacy Clause are required to do so].)

Therefore, individuals such as Appellant have standing before the United States courts to raise violations of their treaty-based rights. Individuals can enforce a treaty when it prescribes a rule by which the rights of private citizens may be determined. (*Head Money Cases* (1884) 112 U.S. 580, 598-599.) United States courts were designed to provide a forum for raising and resolving treaty claims; for more than two centuries, even non-citizens have had the right to bring suit in the United States courts for violations of international law. (See, e.g., *United States v. Rauscher* (1886) 119 U.S. 407 [an individual has standing to seek redress for violation of an international extradition treaty; the doctrine of specialty voids prosecution on a charge other than that specified in the extradition warrant].)

Regarding Respondent's second argument, that international law has no application where a conviction and sentence are in accord with state and federal constitutional requirements, Appellant has two replies. First, Respondent's argument is contingent on there being no violation of state or federal constitutional requirements in Appellant's case. Appellant has raised claims of such violations, and if this Court finds any of these claims valid, then

Respondent concedes that Appellant's conviction and sentence are also in violation of international law and treaties.

Second, to the extent that this Court has previously concluded that international law need not be considered as long as standards of domestic law have been met, the Court is effectively relegating international law principles to the ash heap, by holding that international law is no broader than the law of the individual sovereign state. By this logic, every nation can claim that international law is only binding to the extent that it reiterates domestic law. This cannot be the case.

The United States Constitution and Supreme Court jurisprudence recognize that international law is part of the law of this land, and that international treaties have supremacy in this country. (U.S. Const., art. VI, §2.) Customary international law, or the "law of nations," is equated with federal common law. (Restatement Third of the Foreign Relations Law of the United States (1987), pp. 145, 1058; see *Eye v. Robinson* (1884) 112 U.S. 580; U.S. Const., art. I, §8 [Congress has authority to "define and punish . . . offenses against the law of nations"].) This Court therefore has an obligation to fully consider possible violations of international law, even where the conduct complained of is not currently a violation of domestic law. Most particularly, this Court should enforce violations of international law where that law provides more protections for individuals than does domestic law.

* * * * *

CONCLUSION

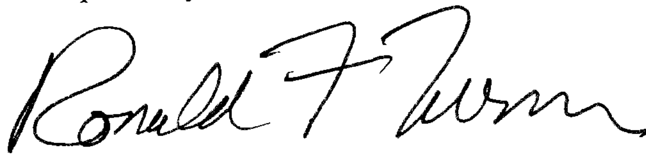
For all the foregoing reasons, appellant's conviction for murder and his judgment of death must be reversed.

Counsel's Certificate as to Length of Brief Pursuant to Rule 36(b)

I hereby certify that I have verified, through the use of our word processing software, that this brief, excluding the table, contains approximately 12,013 words.

DATED: February 18, 2011

Respectfully submitted,



RONALD F. TURNER
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Enrique Parra Duenas*** **Crim. No. S0077033**
(Los Angeles County Superior Court No. BA109664)

I, Ronald Turner, declare that I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is 5050 Laguna Blvd., Suite 112-PMB 322, Elk Grove, California 95758.

On February 19, 2011, I served the attached

APPELLANT'S REPLY BRIEF

by placing a true copy thereof in an envelope addressed to the persons named below at the address shown, and by sealing and depositing said envelope in the United States Mail at Elk Grove, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, for there is regular communication by mail between the place of mailing and each of the places so addressed.

Enrique Parra Duenas
P.O. Box P-26900
San Quentin, CA 94974

Mel Greenlee
California Appellate Project
101 Second St., 6th Floor
San Francisco, CA 94105

Taylor Nguyen
Office of the Attorney General
300 South Spring St., Suite 1702
Los Angeles, CA 90013

I declare under penalty of perjury that the foregoing is true and correct.
Executed on February 19, 2011, at Elk Grove, California.

Declarant