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RONALD F. TURNER
State Bar # 109452
321 High School Rd. NE Suite D3 PMB 124
Bainbridge Island, WA 98110
Telephone: (916) 396-6412

May 7, 2012

Frederick K. Ohlrich
Court Administrator and Clerk of the Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *People v. Enrique Parra-Duenas*, No. S077033
Supplemental Letter Brief (Refiled with Certificate of Length)

Dear Mr. Ohlrich:

The California Supreme Court recently decided two cases bearing on appellant's argument that the trial court excused three prospective jurors for cause without sufficient justification, thereby violating appellant's right to a fair trial by an impartial jury. (See, Appellant's Opening Brief, Argument I, pp. 39-62.) I am submitting this Supplemental Letter Brief at this time because oral argument in appellant's case has been calendared for May 29, 2012.

In *People v. Allen and Johnson* (2011) 53 Cal.4th 60, the Court reversed the guilt and penalty verdicts because the trial judge discharged a juror during guilt phase jury deliberations without sufficient justification. In *People v. Pearson* (2012) 53 Cal.4th 306, the Court reversed the penalty verdict because the trial judge excused a prospective juror for cause without sufficient justification.

In *Allen and Johnson,* the Court unanimously concluded that the discharge of a sitting juror deprives a defendant of a fair trial if the basis for discharge does not appear "on the record as a demonstrable reality." 53 Cal.4th at p. 71. The Court held that neither grounds on which the trial court discharged the juror in question withstood scrutiny. The record failed to demonstrate that the juror "refused to listen to all of the evidence, began deliberations with a closed mind, or declined to deliberate." *Ibid.* The record also did not show that the juror had relied on facts not in evidence. *Id.* at p. 78.

In *Pearson*, the Court also unanimously concluded that the grounds on which the trial judge excused a *prospective* juror for cause did not withstand

DEATH PENALTY

scrutiny. The prospective juror, C.O., wrote on her juror questionnaire that she had no particular feelings about the death penalty. She was uncertain if she approved or disapproved of it. 53 Cal.4th at pp. 328-329. C.O. also stated, "I'm uncertain of how I really feel about the death penalty, unless I had everything presented in front of me, so I don't know what I really meant on that one." *Id* at p. 329.

Pressed on whether she was "for or against the death penalty," C.O. stated, "I'd have to be an actual juror to see what's presented for me. I'm not saying that I can't vote for it or that I wouldn't vote for it, but I think that I have to have all of the evidence before I can say anything concerning the case itself." *Ibid.* The trial court excused C.O. for cause, finding she had given "equivocal" and "conflicting" responses about capital punishment, and had stated she was "not sure" where she stood on whether she could vote for death. *Id.* at p. 330.

This Court read the record differently, finding that none of C.O.'s juror questionnaire or voir dire answers suggested views that would substantially impair her ability to perform her duties as a capital juror. Her general views on the death penalty were "vague and largely unformed," but "on whether she could vote to impose it, her responses were definite and consistent." *Ibid.* The Court noted that she "repeated several times that she could vote for death in an appropriate case." *Id.* at p. 331.

The Court stated that to the extent the trial court excused C.O. because she had "equivocal" views on the merits of the death penalty itself, the trial court "rested its ruling on an erroneous view of the law. C.O.'s possession of such views . . . did not itself disqualify her from service in this case, so long as she could follow her oath to conscientiously consider the death penalty." *Ibid.* C.O.'s responses on this latter issue "were unequivocally affirmative." *Ibid.*

The Court stated emphatically that to "exclude from a capital jury all those who will not promise to immovably embrace the death penalty in the case before them unconstitutionally biases the selection process." *Id.* at p. 332. In appellant's case, the trial court also unconstitutionally biased the jury selection process by excusing three scrupled jurors without justification. For the convenience of the Court, I will refer to these three jurors as Juror A (Prospective Juror No. 4593), Juror B (Prospective Juror No. 5637), and Juror C (Prospective Juror No. 6611).

Juror A stated on his Juror Questionnaire that he had "mixed feelings" about the death penalty. He was not sure he could "decide guilty or not guilty,

because it concerns people's life." 1RT 222. Asked if these answers meant that he would not impose a sentence of death, Juror A responded that he would find it "kind of hard" to vote for death. 1RT 226.

Defense counsel thereafter asked the correct question, "Sir, I understand it's hard to impose the death penalty, but the real question is, if this is an appropriate case, and you found my client guilty of killing a police officer in the line of duty and we get to the penalty phase, and you thought the appropriate punishment was death, could you vote for death for my client?" Juror A 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.*" 1RT 228 (Emphasis added).

The prosecutor repeatedly questioned Juror A about whether he could vote for death in this case, and Juror A repeatedly stated he could, because he felt "I need to do some justice too." 1RT 231. The prosecutor finally asked, "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?" 1RT 235. Juror A responded, "Yes." Juror A then added, " 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.*" 1RT 235 (emphasis added).

Juror A also stated, "I still have a mixed feeling right now. So, I probably answer I still cannot make – probably cannot make a decision." *Ibid.* Juror A began this last statement with the words "But I will consider" – meaning he would consider voting for death – so what his last statement, "I still . . . probably cannot make a decision" meant is not clear. But based on all of his previous statements, it most likely meant that at that time, before he heard the evidence at trial, he could not make a decision whether to vote for life or for death. To interpret the statement to mean that he did not know if he could vote for death at all would contradict all his previous statements that he *could* return a verdict of death.

The trial court did not seek to clarify Juror A's last statement. Instead, it 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 and his oath.

Therefore, the court is going to find cause and excuse this juror." 1RT 236 (Emphasis added).

The trial court's statement shows it excused Juror A based on an erroneous view of the law, as occurred in *Pearson.* Having "difficulty" in voting for death is not justification for excusal. In *People v. Stewart* (2004) 33 Cal.4th 425, the Court stated that "a prospective juror who simply would find it 'very difficult' ever 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." *Id.* at p. 446. For this reason, a trial court cannot excuse prospective jurors for cause based on answers to questions which are not sufficiently pointed to establish that the jurors would not consider voting for a death sentence. *Ibid.*

The Court reiterated this point in *Pearson*, stating that regardless of a prospective juror's personal views on the death penalty, he or she cannot be excused for cause if the record shows the prospective juror "could follow her oath to conscientiously consider the death penalty." *People v. Pearson*, *supra*, 53 Cal.4th at p. 331.

The trial court here erroneously excused Juror A on the ground that he would have *difficulty* in imposing a sentence of death. The record here does not show that Juror A could not conscientiously consider the death penalty; in fact, it shows the opposite. Moreover, the trial court left the record here in the same kind of indecipherable state with regard to Juror A's views and capabilities as the record was left with regard to the erroneously excused prospective jurors in *Stewart*.

Like Juror C.O. in *Pearson*, Juror A here did not know where "he stood" with regard to the death penalty, but he said he *could* return a death verdict in this case if all the facts really "convinced" him this was the appropriate punishment. 1RT 228. Since Juror A repeatedly stated he could impose a sentence of death, any ambiguity in Juror A's last answer cannot establish as a demonstrable reality that Juror A was substantially impaired as a capital juror.

Juror B (Prospective Juror No. 5637) wrote on his juror questionnaire, "Do not believe in the death penalty" (1RT 327-328), but in answer to the trial court's question, "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?" (1RT 328), Juror B responded, "I think I could, yes, your honor." *Ibid.*

Juror B thereafter consistently stated that he could return a verdict of death in an appropriate case. Juror B even stated that he wanted to change his juror questionnaire answers to reflect that he could return a verdict of death in appellant's case. 1RT 330-331. Nonetheless, the prosecutor asked, "[D]o you think you are the right – a juror to sit on a capital case where the prosecution is seeking the death penalty?" 1RT 334. Juror B answered "No," and the prosecutor made a challenge for cause, which the trial court granted. *Ibid.*

The prosecutor's question was entirely inappropriate and Juror B's answer was inherently ambiguous. Did Juror B think that he should answer "No" because of his general views about the death penalty? Did Juror B know that as a matter of law his *general views* did not disqualify him from serving as a capital juror? The record shows only that Juror B had reservations about the death penalty generally, and would find it "difficult" to impose a death sentence. But Juror B, as did C.O. in *Pearson*, repeatedly stated that he could consider imposing a death sentence in this case. On this record, the trial court did not have sufficient grounds to excuse Juror B for cause.

Juror C (Prospective Juror No. 6611) gave no answers on the juror questionnaire suggesting he would have any problem with returning a death verdict. His general feelings about the death penalty were "neutral" (4CT 578), like C.O.'s views in *Pearson*. The trial court asked Juror C what he meant by this answer, and Juror C responded similarly to C.O. in *Pearson*, "I really haven't – I don't know. I've –" at which point the trial court interposed a new question: Would Juror C be able to "look at Mr. Duenas" and impose the death penalty if the jury found him guilty as charged, and based on all the evidence Juror C had heard? Juror C responded, "I think so. Yeah." 2RT 497.

In response to further questioning, Juror C stated he believed he could impose a death sentence. When the trial court asked if he had "any hesitation at all," Juror C answered "No." He then commented, appropriately, "This is just – it's a big deal." 2RT 497-498.

When defense counsel questioned Juror C, the prospective juror continued to state he thought he could vote for death if he felt it was the appropriate punishment. 2RT 498-499. Defense counsel noted that Juror C was shaking his head while answering, and Juror C explained, "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." 2RT 499. Under *Pearson*, a prospective juror's stating he felt nervous and showing by his demeanor that he indeed was nervous is not grounds to excuse him for cause where he otherwise states, as did Juror C here, that he *could* return a verdict of death in an appropriate case. Juror C subsequently affirmed again that he could "bring back" a death sentence if he thought this was the appropriate punishment for killing a police officer. *Ibid.*

Asked by the prosecutor how he would have voted if the death penalty had been on the ballot the previous week, Juror C responded, "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." 2RT 500. The prosecutor stated he needed to know if jurors could vote for death, and suggested that "essentially you voting death is like you pushing the button." 2RT 500-501. Inappropriate as this remark was, the prosecutor proceeded to escalate this "juror as executioner" imagery, stating, "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?" 2RT 501.

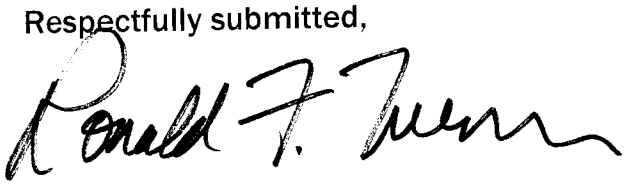
When Juror C did not respond, the trial court stated they needed to know what Juror C's "beliefs" were. Juror C explained, "I've never been in this situation before . . . so I – I feel that I could weigh, you know, everything brought upon me, but, you know, you just never know until you get there. That's 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 501-502.

The prosecutor then stated if Juror C did not have it "inside" him to vote for death, that was "perfectly fine." 2RT 502. When Juror C did not respond, the trial court asked if he were mulling over whether he could or could not impose the death penalty, and Juror C responded, "True. I'm kind of hitting blank just with –" at which point, the trial court interrupted Juror C's answer and made a finding that Juror C's response demonstrated "that his views would substantially impair his duties as a juror in accordance with his oath and instruction by the Court." *Ibid.*

The views Juror C expressed did not disqualify him for capital jury duty, since he was "neutral" on the death penalty and he stated he could impose a death verdict in appellant's case. Juror C's nervousness caused him to momentarily "hit a blank" in answering further questions, but in the context of his overall answers, this was not a sufficient reason to excuse him for cause.

This Court has made clear that a trial court can determine if a prospective juror is actually substantially impaired in being able to carry out the duties of a capital juror only through asking precise questions directed specifically to the issue of substantial impairment. In appellant's case, the record contains only muddled answers to muddled questions on this point. The only clear statements made by Jurors A, B and C affirmatively demonstrated their ability to perform their duties as jurors. The record in appellant's case shows scrupled jurors were unconstitutionally excused, and as in *Pearson*, the Court must reverse appellant's death sentence.

Respectfully submitted,



RONALD F. TURNER
Counsel for Appellant Parra-Duenas

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

People v. Enrique Parra-Duenas Case No. S077033

I hereby certify that I have verified, through the use of our word processing software, that this brief, excluding the table, contains approximately 2,728 words.

DATED: May 7, 2012

Respectfully submitted,

RONALD F. TURNER
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: *People v. Enrique Parra-Duenas* Case No. S077033

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 321 High School Rd NE STE D3 PMB124, Bainbridge Island, Washington 98110.

On May 7, 2012, I served the attached

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by placing a true copy thereof in an envelope addressed to the person named below at the address shown, and by sealing and depositing said envelope in the United States Mail at Bainbridge Island, Washington, with postage thereon fully prepaid. There is delivery service by United States Mail at the place so addressed, for there is regular communication by mail between the place of mailing and the place 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 under the laws of the State of California that the foregoing is true and correct.

Executed on May 7, 2012, at Bainbridge Island, Washington.

Declarant