IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHRISTOPHER ALAN SPENCER, Defendant and Appellant.	**AUTOMATIC APPEAL** Crim. S057242 Santa Clara County Superior Court No. 155731

APPELLANT'S REPLY BRIEF

Automatic Appeal from the Judgment of the Superior Court of the State of California for the County of Santa Clara

HONORABLE HUGH F. MULLIN III JUDGE

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
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Plaintiff and Respondent,	)	Crim. S057242
	)	
v.	)	
	)	Santa Clara County
	)	Superior Court
CHRISTOPHER ALAN SPENCER,	)	No. 155731
	)	
Defendant and Appellant.	)	
	)	

APPELLANT'S REPLY BRIEF

INTRODUCTION

Appellant in this Rely Brief will address specific matters, in light of Respondent's Brief, where additional briefing may benefit this Court. However, no attempt will be made to respond to all of Respondent's contentions, because many if not most of those contentions have already been addressed in advance in Appellant's Opening Brief. Any occasion of Appellant not responding or replying to any particular argument, sub-argument or allegation made by Respondent is not a concession or waiver by Appellant. (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

In this brief, Appellant assumes this Court's familiarity with the salient facts and arguments set forth in the parties' prior briefing.

As used in this Reply Brief, "AOB" refers to Appellant's Opening Brief. "RB" refers to Respondent's Brief.

ARGUMENT

I

THE TRIAL COURT ERRONEOUSLY GRANTED THE PROSECUTION'S CHALLENGE UNDER *WITHERSPOON V. ILLINOIS* AND *WAINWRIGHT V. WITT*, VIOLATING APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR AND IMPARTIAL JURY AND TO BE FREE OF CRUEL AND UNUSUAL PUNISHMENTS AND ARBITRARY IMPOSITION OF THE DEATH PENALTY. (U.S. CONST., AMENDS. VI, VIII, XIV; CAL. CONST., ART. I, SECS. 15, 16, 17.)

Respondent contends there was substantial evidence to support the trial court's dismissal of juror C-67 for cause, based on that juror's expression of a religious bias against the death penalty. (RB 20.) Respondent asserts that juror C-67's uncertainty about imposing a death sentence was a "substantial impairment" of that juror's ability to follow the law; *i.e.*, to weigh mitigating evidence and aggravating evidence and reach a death verdict, if warranted, based on the result of that weighing process. (*Id.*) Respondent is mistaken.

As noted at AOB page 60 a "higher threshold" for imposition of the death penalty imposed by a prospective juror, even one based on religious scruples against, the death penalty is not evidence of substantial impairment. (*Witherspoon v. Illinois* (1968) 391 U.S. 510. 522-523; *People v. Kaurish* (1990) 52 Cal.4th 648, 699.) At the very least, it betrays a tendency to vote in a particular fashion, which does not amount to evidence of substantial

impairment. (*People v. Stewart* (2004) 33 Cal.4th 425, 448-449) In this case, juror C-67's statements of philosophical opposition to the death penalty were less strident than those occurring in *People v. Stewart*, *supra,* at p. 448. *Stewart* involved categorical statements of opposition to the death penalty, which are not present here; yet such statements were not found to be evidence of substantial impairment.1 While statements such as those presented here and in Stewart may invite further inquiry, such inquiry may or may not generate substantial evidence on the issue of the juror's impairment or lack of it. (*People v. Stewart, supra*, at p. 448) In fact, substantial impairment is present if, and only if, the juror cannot engage in the weighing process. (*People v. Kaurish, supra,* at p. 699.)

In this case, further inquiry generated a response from the juror that he would be able to impose the death penalty in an appropriate case. (64 RT 19981-19982.)2 On this discrete factual issue, there is no other evidence

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1 Accordingly, Respondent's assertion that *Stewart* does not assist Appellant because juror C-67 expressed a religious bias against the death penalty, is inexplicable and incorrect. (RB 20.)

2 The record discloses the following questions propounded to juror C-67, and the following answers obtained:

Q: Do you think the death penalty would ever be warranted in any kind of a case?

A: Yes.

Q: Do you think that it would be possible for you to vote for the death penalty in

and thus, no ambiguity.3

For this reason, Respondent's predictable attempt to salvage the dismissal of juror C-67 on grounds that the reviewing court must defer to the trial court's judgment as to the prospective juror's state of mind is unavailing. This principle applies only if there is substantial evidence of impairment. Here there is none; nor is there ambiguity on the determinative issue of whether the juror could impose the death penalty in an appropriate case. (*Cf. People v. Vigil* (2011) 51 Cal.4th 1210, 1243 [reviewing court may defer to the trial court where ambiguity exists on the issue of substantial impairment].) As stated, juror C-67 may well have set a higher than usual bar for imposition of the death penalty; but *as a matter of law* this did not amount to "substantial impairment."

Indeed, abdication of judicial review of the trial court's conclusion in cases such as the present case, in which, under this Court's prior rulings, there is no evidence of "substantial impairment," would effectively allow *all* prosecution-initiated dismissals of prospective jurors on *Witt-Witherspoon*

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a given case without going into what that case might be?

A: I can imagine things horrible enough to get me to vote for the death penalty. (64 CT 19981-19982.)

3 Respondent correctly notes that at one point the juror indicated that he would prefer castration to the death penalty (RB 20), a belief that could well be held by many if not most jurors. Respondent does not articulate how this was evidence of substantial impairment.

grounds to be insulated from appellate review. A trial court's statement that he or she did not like the juror's looks, or had a negative 'gut" reaction to the juror, without more, would automatically be binding.

Uttecht v. Brown (2007) 551 U.S. 1, cited by Appellant on this point (AOB 69), reiterated the principle that such rulings must be amenable to meaningful appellate review. This requires facts in support of the trial court's ruling and an adequate record for appellate review. Both of which are incompatible with the notion that an unquestioning deference is afforded to the trial court's ruling simply because the ruling was made, which is the logical end result of Respondent's argument under the circumstances of this case. In other contexts, at least, it is clear that an exercise of judicial discretion must be meaningful and effective and not merely a *pro forma* exercise. (*E.g.*, *People v. Harris* (1998) 60 Cal.App.4th 727, 737-741 [admission of evidence of uncharged conduct] citing *United States* v. *Myers* (5th Cir. 1977) 550 F.2d 1036, 1044.)

This reasoning should apply here. The trial court dismissed juror C-67, in effect, based on an adverse "gut reaction." (64 RT 19881-19883; *e.g.*, *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1244.) However, the record lacks any *legally cognizable evidence* on the issue of substantial impairment of this juror, which demonstrates that none was present here. Accordingly, there is simply no principled basis for affording deference to the court's conclusion.

For the above reasons, and for those set forth in Appellant's Opening Brief, the judgment of death must be reversed.

II

APPELLANT'S ARREST WAS MADE WITHOUT PROBABLE CAUSE IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS; THEREFORE, ANY SUBSEQUENT STATEMENTS HE MADE WHILE IN CUSTODY WERE THE ILLEGAL FRUITS OF THAT ARREST AND THEIR ADMISSION INTO EVIDENCE WAS IN ERROR

Appellant contends that his arrest was without probable cause. (AOB Argument II.)

Respondent's arguments in opposition have, for the most part, been addressed and refuted in advance in Appellant's Opening Brief. Briefly summarized, on this issue Respondent contends that the informant upon whose information the arrest was based, was a "citizen informant;" therefore, law enforcement authorities were justified in relying on the information provided by her in arresting Appellant, without the requirement that such information be corroborated. (RB 26-27.) Respondent further contends that in any case, the informer's information was corroborated, thereby permitting law enforcement to arrest Appellant based on the informer's tips. (*Id.*)

Respondent's arguments are without merit.

As stated at AOB pages 83-84, "a citizen informant is one who has witnessed or is a victim of a crime." (*People v. Schulle* (1975) 51 Cal.App.3d 809, 814-815.) In Appellant's case, there is no indication that the relied upon informant either witnessed or was a victim of a crime. The informer here, therefore, was not a "citizen informant." Respondent utterly fails to address this deficiency.

Regarding the issue of "corroboration," Respondent points out that

some details of the information provided by the informer were independently discovered by police detectives in the course of the investigations of the stun gun robberies and the LeeWards murder. (RB 26-27.) However, as noted in Appellant's Opening Brief, none of this purported corroboration pertained to the alleged criminal activity itself (AOB 84; see, *People v. Costello* (1988) 204 Cal.App.3d 431, 446). Such facts therefore were insufficient to supply the corroboration required so as to uphold the arrest of Appellant based on the anonymous informer's tip.

Because the information supplied by the anonymous informant was the sole basis for Appellant's arrest, and that information, as a matter of law, did not supply probable cause for the arrest, the arrest was invalid. As argued at AOB page 90, all fruits of that arrest, including Appellant's confession, should have been suppressed as "fruit of the poisonous tree." (*Wong Sun v. United States* (1963) 371 U.S. 471, 488.) There is no principled argument available, and Respondent offers none, where the admission of the fruits of this improper arrest could not possibly have affected the verdict in Appellant's case. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Accordingly, the judgment must be reversed.

III

APPELLANT'S STATEMENT TO SERGEANT KEECH WAS OBTAINED WITHOUT PROPER RE-ADVISEMENT OF *MIRANDA* IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS; THEREFORE ITS ADMISSION INTO EVIDENCE WAS IN ERROR

The parties agree that the question of whether a re-advisement of *Miranda* rights is necessary (*Miranda v. Arizona* (1966) 384 U.S. 436) depends on the totality of the circumstances. (AOB 97; RB 32.)

In Appellant's case, the time lapse between the two interrogations in question, four hours, is not determinative as to either parties' position. However, the fact that Appellant was interrogated by two separate agencies concerning different matters, weighs in favor of a requirement for a re-advisement. (*People v. Quirk* (1982) 129 Cal.App.3d 618.) As does Appellant's lack of prior contacts with the criminal justice system. Respondent points out that because Appellant had prior misdemeanor convictions, he was therefore familiar with law enforcement thus eliminating the need for a re-advisement. (RB 31.) However, this fact is not determinative, and a far cry from the cases in which the suspect's *felony* record with the criminal justice system was invoked as a factor supporting Respondent's position that a re-advisement was not necessary. (RB 30-31; see *People v. Mickle* (1991) 54 Cal.3d 140, 171-172 [forcible rape, lewd conduct].) *People v. Smith* (2007) 40 Cal.4th 483, 504-505 [domestic violence].)

Respondent relies heavily upon the fact that at Appellant's first interrogation by the San Jose police concerning a liquor store robbery, he was advised and waived his *Miranda* rights; at his second interrogation, this time by the Santa Clara police concerning the LeeWards murder investigation, he was asked if he previously waived his rights during the liquor store interrogation and again at the end of the interrogation he was asked what he was of advised of during the liquor store interrogation by the San Jose police officers. (RB 28-29; 1 Supp. CT 2 55-56.) Importantly, the officer from the second interrogation, although he questioned Appellant about his waiver regarding the liquor store interrogation, he never informed Appellant that he had the same rights regarding the murder interrogation. Additionally, Appellant had to be prompted in order to remember those rights previously made to him, indicating that he did not remember them at the time of the *commencement* of the second interrogation. Indeed, this is affirmative evidence that at the commencement of the second interrogation, Appellant was *not* aware of and did *not* understand his rights under *Miranda.* Accordingly, under the circumstances of *this* case, it cannot be inferred that that the re-advisement was unnecessary because the suspect was aware of and understood his rights.

Viewing the totality of the circumstances, Appellant's confession was obtained in violation of *Miranda.* While it would have been a simple

matter to re-advise Appellant *prior* to the second interrogation, the detective declined to do so, likely, because such a procedure would have raised the risk that Appellant would invoke his constitutional rights under the Fifth Amendment and the Santa Clara detective may not have been able to obtain Appellant's confession. As a result, Appellant indeed confessed, though that confession was *not* based on a knowing and intelligent waiver of Appellant's *Miranda* rights.4

This Court recognizes that a confession is "like a kind of bombshell that shatters the defense." (*People v. Neal* (2003) 31 Cal.4th 63, 86.) Accordingly, the gravity of the error is such that the prosecution cannot meet the "harmless error" standard of *Chapman v. California* (1967) 386 U.S. 18, 24, which requires the prosecution to prove beyond a reasonable doubt that the error was harmless and did not affect the verdict.

Appellant's confession to capital murder and burglary/robbery was the core of the prosecution's case. Under these circumstances, there is no principled argument available that the error could not possibly have affected the verdict. (*Chapman, supra*, at p. 24.)5 Accordingly, the judgment must be reversed.

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4 Such law enforcement subterfuge, now routine, has been roundly criticized by this Court. (*People v. Neal* (2003) 31 Cal.4th 63, 79-82.)

5 While Respondent suggests that the appropriate standard for harmless error in this situation is whether "the weight of evidence supported the jury's verdict" (RB 38), this is incorrect. The correct standard is as set forth above and in *Chapman, supra.*

IV

APPELLANT'S STATEMENT TO SERGEANT KEECH WAS INVOLUNTARY IN THAT IT WAS THE PRODUCT OF COERCION THAT OVERBORE APPELLANT'S FREE WILL IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS; THEREFORE ITS ADMISSION INTO EVIDENCE WAS IN ERROR

The question to be resolved in determining whether a defendant's statement is voluntary, is whether the defendant's will was overborne by improper police practices and techniques. (*People v. Carrington* (2009) 47 Cal.4th 145, 175.) This determination is made based on the totality of the circumstances. (*Colorado v. Spring* (1987) 479 U.S. 564.)

Respondent, in contending that Appellant's confession was voluntary, parses the numerous factors indicative of an involuntary confession in this case, "analyzes" them in isolation, then concludes that Appellant's confession was voluntary. (RB 34.) Respondent's analysis obscures the issue. Correctly analyzed, the totality of the circumstances show that Appellant's confession was involuntary.

Interrogations that seek to exploit particular and peculiar vulnerabilities of the suspect, and are conducted with such persistence as to convey that the interrogators will be satisfied only with the story the interrogators want to hear, and the interrogation continues until such time as the suspect capitulates, are all indicators that the resulting confession was the product of free will being overborne and therefore, coerced. (See *People v. Carrington, supra*, at p. 176; *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1485-6.) Similarly, threats or promises of leniency may invalidate a confession. (*Malloy v. Hogan* (1964 378 U.S. 1, 7.) Uses of false or

misleading information, while not categorically forbidden, are factors to be considered in determining the voluntariness of a confession. (*People v. Hogan* (1982) 31 Cal.3d 815, 841.)

The interrogation in Appellant's case contained all of the above elements which combined to cause Appellant's free will to be overborne, rendering his confession involuntary. First and foremost, Appellant's interrogators focused on the fact that he was facing a possible death sentence, i.e., a vulnerability particular to Appellant. (See e.g., *People v. Carrington, supra*, 47 Cal.4th at p. 176 [religious anxieties].) Unmistakably, interrogating officers made it clear that Appellant's case was a death penalty case and, as told to him by the interrogators, if Appellant failed to cooperate, he would "fry." (1 CT Supp. 2 17.) This fact by itself lends itself to the conclusion that the resulting confession was involuntary. Respondent seeks to mitigate this problem by suggesting that the officers' use of the word "fry" did not refer to the death penalty. (RB 35.) Appellant will let this argument speak for itself. In a word, Respondent's argument can most charitably be described as disingenuous.

Having established that Appellant was facing a death sentence which, as suggested by the officers, was more likely to occur if he did not cooperate, a blatantly false proposition, the officers further suggested that matters would go better for Appellant if he was involved in the crime but not as the main actor (1 CT Supp. 2 16, 32), also blatantly false. While exhortations to tell the truth and exhortations that matters will go better for the suspect if he does so are not necessarily improper, the "exhortations" in Appellant's case crossed

the line when they honed in on the life-or-death question of whether Appellant wanted to tell the officers what they wanted to hear (life) or not (death). In fact, this was a false and misleading choice and exploited Appellant's particular vulnerability. Moreover, Appellant's vulnerability was exacerbated by the length of the interrogation and the fact that Appellant was obviously ill, a factor minimized by Respondent (RB 37) but clearly indicative of a defendant in a physically weakened condition. (See *People v. Esqueda, supra,* at pp. 1485-1486.)

All of the foregoing, Appellant's fear of the death penalty, the false suggestion that he might have a better chance of avoiding it if he cooperated with officers and admitted his involvement rather than if he did not and his physically compromised condition, were further exploited by the officers' browbeating of Appellant and their sending a clear message that the interrogation would go on ad infinitum if the officers did not get the story they wanted. (See, *People v. Esqueda, supra,* at p. 1486.)

When the combined effect of these factors is considered, it is clear that a confession, whether true or not, was a foregone conclusion. Based on the circumstances of the interrogation and the applicable authorities, the confession was manifestly involuntary. The facts of this case confirm this Court's conclusion "that a confession is "like a kind of bombshell that shatters the defense." (*People v. Neal, supra,* 31 Cal.4th at p. 86.)

Accordingly, the prosecution cannot meet the "harmless error" standard of *Chapman,* which requires the prosecution to prove beyond a reasonable doubt that the error was harmless and did not affect the verdict.

(*Chapman v. California* (1967) 386 U.S. 18, 24.) Appellant's confession to capital murder was the core of the prosecution's case. Under these circumstances, there is no principled argument available that the error could not possibly have affected the verdict. (*Chapman, supra*, at p. 24.)

Accordingly, the judgment must be reversed.

V

THE SUPERIOR COURT, AND THIS COURT, HAVE DENIED APPELLANT HIS RIGHTS TO DUE PROCESS, MEANINGFUL APPELLATE REVIEW, COUNSEL, AND A NONARBITRARY DETERMINATION OF HIS SUITABILITY FOR THE DEATH PENALTY, BY VIRTUE OF THEIR REFUSAL TO ALLOW APPELLANT TO RAISE ON APPEAL, ISSUES WHICH WERE PROPERLY PRESERVED BELOW AND WHICH SIMILARLY SITUATED DEFENDANTS ARE PERMITTED TO RAISE ON APPEAL. THESE INCLUDE ALLEGATIONS OF BAD-FAITH PROSECUTION AND POTENTIAL INSTRUCTIONAL ISSUES

The gravamen of this claim is that Appellant was denied due process and meaningful appellate review by virtue of the refusal of the trial court to include the transcript of codefendants' (Travis and Silveria) trial as part of the record on appeal in his case. Appellant has pointed out that the codefendants' transcript was relied upon by the trial court in denying Appellant's claim under *In re Sakarias* (2005) 35 Cal.4th 140, 156, *Thompson v. Calderon* (9th Cir. 1997) 120 F.3d 1045, 1055-1057 and like cases, which ruled that it was improper for the prosecution to rely on inconsistent theories at different trials of the same case but of different defendants. (AOB 126.) The codefendants' transcript was not merely a proper part of Appellant's record on

appeal, it was indispensable for purposes of demonstrating that the trial court's ruling was erroneous.

Respondent contends Appellant was not denied meaningful appellate review because the "inconsistent theories" ("Sakarias") claim is one that must be raised by way of habeas corpus, not appeal. Respondent also asserts that this claim was never presented at any hearing below; nor was codefendants' transcript ever presented to the trial court in support of the claim. (RB 40-42.)

Respondent is wrong on all counts.

The record clearly reflects that Appellant raised the "inconsistent theories" issue in the trial court, when trial counsel objected to the prosecutor's closing argument that improperly exaggerated and inflated Appellant's role in the present offenses:

> MR. MANTELL [outside the presence of the jury]: I'm very disturbed about where the argument is going at this point. I recognize that there are some lacunae in the evidence in this case with regard to the details of every actor's participation, but I apparently am about to hear . . . Travis and Silveria reduced to the position of stooges for Chris Spencer. And that I think is not permissible.
>
> This case has already been tried once where they were the principals and Mr. Spencer was absent. Of course, that was not the prosecution's theory at the time. But more importantly there is on the record of this case evidence which the prosecution must be aware of which establishes very clearly the tertiary position of Chris Spencer in the planning and plotting of this entire operation.

> I think that the suggestion by the prosecution that this is even possible to the jury on the basis of hard evidence to the contrary in this case hovers perilously close to shystering, if it does not in fact fall over the edge. I would like it abandoned. I would like the jury admonished. I think that one more word and a motion for mistrial would be in order. (86 RT 22390.)

As noted at AOB pages 119-121, 126-127, the trial court's remarks following trial counsel's objection ("stick to what was brought out during the course of this trial. What the theory of a prior trial was has absolutely nothing to do with this case." (86 RT 22390), accomplished two objectives: First, it effectively overruled Appellant's objection, thus preserving the issue for appellate review; and second, it implicated the substantive portions of the Silveria/Travis transcript which were inconsistent with the prosecution's argument at Appellant's trial:

> In this case it [the "inconsistent theories" reference) wasn't only objected to in the trial court, it was fully developed in that the Court over objection permitted such argument by ruling that the prosecutor was to argue on the record of this case. This allowed the prosecutor to argue the facts of this case regardless of what he argued in Silveria/Travis I, even if it was factually incompatible with what he argued in this case. This effectively overruled Appellant's objection and presupposed that the prosecutor did not raise arguments incompatible with theories presented in Appellant's case, in Silveria/Travis I. (AOB 27, fn. 31.)

The Silveria/Travis transcript, notwithstanding, Respondent's contention to the contrary (RB 42), was indeed before the trial court; Appellant's trial judge heard the Silveria/Travis trial, and could not have overruled Appellant's