SUPREME COURT COPY

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SUPREME COURT
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IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CUITLAHUAC TAHUA RIVERA, Defendant and Appellant.	Colusa County Superior Court Case No. CR 46819 Hon. S. William Abel, Judge Automatic Appeal From A Judgment and Sentence of Death

Appellant Cuitlahuac Tahua Rivera's Reply Brief

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DEATH PENALTY

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IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CUITLAHUAC TAHUA RIVERA, Defendant and Appellant.	Colusa County Superior Court Case No. CR 46819 Hon. S. William Abel, Judge ——— Automatic Appeal From A Judgment and Sentence of Death

Appellant Cuitlahuac Tahua Rivera's Reply Brief

Introduction

Appellant Cuitlahuac Tahua Rivera respectfully submits this reply to respondent's brief. Appellant replies to contentions by respondent necessitating an answer to present the issues fully to this court. Appellant does not reply to arguments that are adequately addressed in the opening brief. The absence of a reply to any particular argument,

sub-argument or allegation made by respondent, or of a reassertion of any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant, but reflects the view that the issue has been adequately presented and the positions of the parties fully joined. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

/ / /

Guilt Phase and Special Circumstance Issues

1. The evidence is insufficient to sustain the finding that appellant committed the murder in count 1 with premeditation and deliberation, requiring reduction of the offense to second degree murder.

Appellant explained in his opening brief that the evidence is insufficient to elevate an intentional killing of Stephan Gray from second degree murder to deliberate and premeditated first degree murder. (Appellant's Opening Brief ("AOB") 45-55.)

The encounter with Gray arose from a traffic stop initiated by Gray, and thus there was no evidence of a pre-planned killing. (RT 6:1240-1252;[1] see Respondent's Brief ("RB") 7-8.) The prosecution failed to adduce substantial evidence of a gang motive for the shooting, resulting in the jury finding *not* true the gang special circumstance. (CT 47:13591.) Appellant fired two shots while running away from Gray, revealing a hasty, unconsidered act insufficient to elevate even an intentional killing to first degree deliberate and premeditated murder. (AOB 48-55; see *People v. Bender* (1945) 27 Cal.2d 164, 181 ["the

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[1] References to rules are to the California Rules of Court, "RT" designates the Reporter's Transcript, and "CT" designates the Clerk's Transcript. Volume and page references are in the format "volume:page."

mere intent to kill is not the equivalent of a deliberate and premeditated intent to kill"]; *People v. Manriquez* (2005) 37 Cal.4th 547, 590.)

Respondent acknowledges that first degree deliberate and premeditated murder "requires more than a showing of intent to kill." (RB 27.)

Respondent argues that beyond showing a specific intent to kill Gray, there was "at least some evidence of all three" factors described in *People v. Anderson* (1968) 70 Cal.2d 15–i.e., planning, motive, and manner of killing. (RB 29.) Respondent is mistaken.

With respect to planning activity, respondent argues that after Gray began following Peterson's vehicle "appellant made two phone calls for people to come get him." (RB 29.) But absent speculation, there is nothing in these two calls suggesting appellant intended to even shoot Gray, let alone kill him. The fact that appellant was running away from Gray–and only fired *after* Gray gave chase–demonstrates an unplanned, impulsive shooting.

As further evidence of planning, respondent points to appellant's possession of a loaded .45-caliber handgun and a prior statement that appellant was "going to do something" to Gray. (RB 30.) But

appellant's possession of a gun and his prior statement do not support a reasonable inference of an intent to kill Gray because the encounter with Gray was entirely unplanned. Appellant's action in running away from Gray, and only firing upon him *after* Gray gave chase, further belies any inference of an intent to kill from appellant's possession of the gun and the prior statement.

Respondent cites *People v. Morris* (1988) 46 Cal.3d 1 for the holding that "defendant's possession of a weapon in advance of the shooting and his rapid escape support [an] inference of planning activity[.]" (RB 30, *People v. Morris, supra*, 46 Cal.3d at p. 23, disapproved on another ground in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.) In *Morris*, the defendant "brought a .38-caliber revolver to a public bathhouse during the early morning hours, parked his car near by, and shot the victim twice from close range inside an enclosed restroom with no witnesses present." (*People v. Morris, supra*, 46 Cal.3d at p. 22.) *Morris* is inapposite because there the defendant initiated the contact with the victim, and thus the defendant's possession of the firearm and subsequent use of the firearm supported a reasonable inference of a pre-planned intent to kill. (*Id*. at. pp. 22-23.) Contrary to

respondent's suggestion, this court in *Morris* did not suggest that a similar inference of an intent to kill could arise from a defendant's possession of a firearm in connection with an entirely unintended encounter with the victim.

Respondent argues that appellant's failure to dispose of the gun before using it shows pre-planning activity–i.e., appellant "did not attempt to give the handgun to Peterson, hide it in the vehicle, or otherwise dispose of it." (RB 30.) But appellant's subsequent action in running away from Gray and only firing after Gray gave chase shows that appellant merely intended to maintain possession of the gun.

Respondent asserts that "Peterson's behavior was also evidence that appellant planned to kill Officer Gray." (RB 30.) Respondent states that the jury could reasonably have inferred that "Peterson's attempt to get out of the car and confront Officer Gray was a conscious effort to stall him and prevent a situation in which appellant would try to kill him." (RB 30.) But such an inference is entirely speculative. (See *People v. Harvey* (1984) 163 Cal.App.3d 90, 105, fn. 7 ["Substantial evidence means more than simply one of several plausible explanations for an ambiguous event"].) There is no evidence to support a finding

that Peterson was somehow running interference for appellant. Peterson was the driver of the vehicle, and thus might be expected to engage Gray as she did by exiting the vehicle to talk to him.

Respondent argues that the jury "could have inferred that appellant ran from Officer Gray so as to put enough distance between them so that appellant could grab his gun and shoot Officer Gray before the officer had time to react." (RB 30-31.) But this is mere speculation and conjecture, upon which a conviction cannot be sustained. It amounts to an argument that such a scenario is plausible, but plausibility is not the test. (*Louis & Diederich, Inc. v. Cambridge European Imports, Inc.* (1987) 189 Cal.App.3d 1574, 1584-1585 ["An inference must be the product of logic and reason" and "must rest on the evidence, on probability rather than on speculative possibility or conjecture"].)

Implicitly acknowledging the speculative nature of the argument made in the preceding paragraph, respondent next writes: "*Even if appellant had not intended to kill Officer Gray before he started running*, during his run of approximately 100 feet with Gray on his tail (46 CT 13084), appellant had sufficient time to reflect on his decision and weigh the considerations for and against turning around and

shooting Officer Gray." (RB 31, italics added.) But this argument suggests no more than the possible formation of a specific intent to kill, which is insufficient to sustain a conviction for first degree murder. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

Respondent points to the prosecution's gang evidence, stating that the "gang culture appellant belonged to" made him "mentally prepared to commit violence and kill a police officer if the opportunity presented itself." (RB 31.) Here again, respondent's argument ignores the salient fact that appellant only fired at Gray while appellant was running away from Gray and after Gray began a foot pursuit. (RT 5:1065-1067, 6:1256-1258.) In other words, contrary to respondent's suggestion, this is not a case where the defendant was out looking to kill a police officer, and upon finding a police officer executed a planned killing.

Moreover, a purported gang motive for the killing is entirely speculative. There was no evidence that any gang was trying to kill Gray. Appellant was not in the presence of any gang members when the killing occurred. Nor was appellant in gang territory. No gang epithets were uttered, nor gang signs used. Further, the jury found *not* true the gang special circumstance, which required a finding that the murder was

carried out to further the activities of a criminal street gang. (AOB 107-121.)

Respondent argues that evidence of motive shows an intent to kill with premeditation and deliberation. (RB 32.) Respondent points to appellant's knowledge of Gray and to appellant's statements to Peterson during the traffic stop showing anger toward Gray. (RB 32.) Respondent argues that from this evidence the "jury reasonably could have inferred that appellant murdered Officer Gray because of his hatred and to fulfill his previous threat." (RB 32.) But any such inference is belied by the fact that appellant ran from Gray, and did not fire until after Gray gave chase. (RT 5:1065-1067, 6:1256-1258.) Eyewitness Yolanda Rosa Cabanas testified on cross-examination, in part:

> Q: And you said that this person turned around to their right, correct, before they started firing?
>
> A: Yes.
>
> Q: Did they continue to -- you said they continued to take some steps; is that correct?
>
> A: Yes. Yes.
>
> Q: You say -- was the person stepping towards the officer or was he stepping away from the officer?

A: *He was running away from the officer.*

Q: So kind of backpedaling type?

A: Not exactly. *He was running with his body twisted towards the officer.*

Q: *So he didn't turn all the way around then*?

A: *No*. [RT 6:1179, italics added.]

This case stands in stark contrast to cases suggested by respondent's argument–i.e., where prior contact and animosity demonstrates a deliberate, premeditated killing in view of the defendant's planned encounter with the victim. (See *People v. Rogers* (2013) 57 Cal.4th 296, 330 [defendant initiated contact with murder victim, revealing a deliberate and premeditated intent to kill].)

Respondent points to appellant's possession of a firearm, and his parole status and gang affiliation, arguing that a "jury reasonably could find that appellant decided to kill Officer Gray to avoid being caught with the gun and to escape certain incarceration." But this argument again ignores the salient fact that appellant ran from Gray, and did not fire until after Gray gave chase, thereby demonstrating an intent to avoid Gray. (RT 5:1065-1067, 6:1256-1258.) Moreover, even if "appellant

decided to kill Officer Gray" that specific intent to kill is insufficient to elevate an express malice second degree murder to a deliberate and premeditated first degree murder. (See *People v. Bender, supra*, 27 Cal.2d at p. 181 ["the mere intent to kill is not the equivalent of a deliberate and premeditated intent to kill"].)

Turning to the third *Anderson* factor–i.e., the manner of killing, from which it might be inferred the defendant had a preconceived design to kill–respondent acknowledges that the shots were fired in "rapid fashion" as appellant was running away from Gray (RB 33), which suggests a hasty shooting. (See *People v. Wolff* (1964) 61 Cal.2d 795, 821 ["legislative classification of murder into two degrees would be meaningless if 'deliberation' and 'premeditation' were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill"]; see *People v. Ratliff* (1986) 41 Cal.3d 675, 695 [even a shooting at close range does not necessarily demonstrate an intent to kill]; *Braxton v. United States* (1991) 500 U.S. 344, 349 [shooting "at a marshal" establishes "a substantial step toward [attempted murder], and perhaps the necessary intent"].)