In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **CHESTER DEWAYNE TURNER,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S154459

Los Angeles County Superior Court Case No. BA273283
The Honorable William R. Pounders, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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INTRODUCTION

In his Supplemental Opening Brief, appellant asserts two additional claims. He challenges the sufficiency of the evidence of an additional element of a criminal threats incident admitted under section 190.3, subdivision (b) ("factor (b)"),[1] and he challenges this Court's forfeiture rule with regard to such claims. Like the two elements challenged in the Opening Brief, substantial evidence supported the specific intent element of the criminal threats incident, and any possible error was harmless beyond a reasonable doubt. The Court's forfeiture rule is well-established and well-reasoned and need not be reconsidered. Appellant's additional claims should therefore be rejected, and the convictions and sentence should be affirmed.

ARGUMENT

I. SUFFICIENT EVIDENCE SUPPORTED THE SPECIFIC INTENT ELEMENT OF THE FACTOR (B) CRIMINAL THREATS INCIDENT

Appellant initially challenged two elements of the criminal threats incident against Deputy Uyetatsu, which was admitted at the penalty phase under factor (b). (AOB 135-149.) Respondent reviewed the substantial evidence supporting those elements. (RB 115-122.) Appellant now claims that the evidence supporting a third element, specific intent, was insufficient. (Supp. AOB 1-4.) However, substantial evidence showed that appellant specifically intended that his statement be communicated to Deputy Uyetatsu and taken as a threat. In any event, as fully explained in the Respondent's Brief (RB 122-126), any possible error was harmless beyond a reasonable doubt.

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[1] Statutory designations are to the Penal Code unless otherwise stated.

One of the five elements of a criminal threats violation under section 422 is that the defendant made the threat "with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228; RB 117-118.) A threat may be "communicated by the threatener to a third party and by him conveyed to the victim." (*People v. Felix* (2001) 92 Cal.App.4th 905, 911.) Where the defendant "did not personally communicate a threat to the victim, it must be shown that he specifically intended that the threat be conveyed to the victim." (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 861 [insufficient evidence of intent to communicate threat to police officer depicted in violent painting where minor turned it in to art class for credit, stated he did not think the officer would see it, and there was no reason to believe she would].)

A defendant's intent is generally determined based on all of the circumstances. (See *People v. Manisbusan* (2013) 58 Cal.4th 40, 87; *People v. Elliot* (2005) 37 Cal.4th 453, 474; *People v. Hartley* (2016) 248 Cal.App.4th 620, 628.) The crime of criminal threats in particular "is not subject to a simple check-list approach to determining the sufficiency of the evidence." (*In re Ryan D., supra*, 100 Cal.App.4th at p. 862.) Instead, "all of the circumstances can and should be considered in determining whether a terrorist threat has been made." (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1014; see also *In re Ryan D.*, at p. 862 [court must "determine whether, viewed in their totality, the circumstances are sufficient to meet the requirement that the communication 'convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat.'"].) The circumstances here, particularly appellant's history of hostility toward Deputy Uyetatsu, the angry state in which the threat was made, and the jail setting, all suggest an inference that appellant intended his threat to be communicated to Deputy Uyetatsu.

The evidence of appellant's criminal threat against Deputy Uyetatsu was detailed in the Respondent's Brief's Statement of Facts, Part C.4. (RB 31-33.) Substantial evidence supported finding that appellant had the specific intent that his statement be communicated to Deputy Uyetatsu and taken as a threat. First, "the climate of hostility" between the defendant and victim may support an inference of the defendant's intent. (*In re David L.* (1991) 234 Cal.App.3d 1655, 1659.) Here, appellant's attitude and demeanor toward Deputy Uyetatsu were generally described as "intimidating" (19RT 2771) and "utter disgust" (19RT 2834). When she was in the unit, his "whole demeanor would change." (19RT 2770, 2845.) He stopped what he was doing, put his arms up against his cell door, and glared at her. (19RT 2771-2772, 2779, 2834-2835.) He refused to cooperate with her even when it meant losing a meal or other privileges. (19RT 2831-2834, 2839-2840.) In short, he had no qualms about showing his hostile feelings toward her. It can thus be inferred that appellant intended his statement that "he was going to kill the bitch" (19RT 2798), be communicated to her and taken as a threat.

Second, the manner in which the threat is made can support an inference that the defendant intended that the threat be communicated to the victim. (*In re David L.*, *supra*, 234 Cal.App.3d at p. 1659.) Appellant's statement was made to another inmate while they were locked in a high security housing unit. (19RT 2765-2766, 2798-2799.) Appellant was "upset" and "mad" at Deputy Uyetatsu at the time. (19RT 2798.) They were on lockdown, and his statement was loud enough for the other inmate to hear him in the adjacent cell. (19RT 2799.) These circumstances suggest appellant intended others to hear his threat and communicate it to Deputy Uyetatsu. (See *In re Ryan D.*, *supra*, 100 Cal.App.4th at p. 863 [defendant's anger or rage at time threat is made considered in evaluating intent].)

Third, "in evaluating intent, the setting in which the defendant makes the remarks must be considered." (*People v. Felix*, *supra*, 92 Cal.App.4th at p. 913 [insufficient evidence of intent that private statements about highly personal thoughts made during therapy would be communicated by therapist where defendant had expectation of privacy].) Appellant was an experienced inmate. Jail cells are not private spaces where someone can expect their conversation to remain private. (*Hudson v. Palmer* (1984) 468 U.S. 517, 522-530 [104 S.Ct. 3194, 82 L.Ed.2d 393] [no expectation of privacy in prison cell]; *People v. Davis* (2005) 36 Cal.4th 510, 527 [recording of pretrial detainee's jail cell permissible because no expectation of privacy].) In addition to a general lack of privacy in a jail cell, it is well understood that inmates often report such information to get favorable treatment. Even if appellant believed only the other inmate would hear his threat, he would have known that it would likely be passed on to Deputy Uyetatsu. The jury could have inferred from this, combined with his anger and generally hostile attitude toward her, that he intended his statement to be communicated to Deputy Uyetatsu and taken as a threat.

Finally, for all the reasons set out in the Respondent's Brief (pages 122-126), any possible error in admitting evidence of the threat was harmless beyond a reasonable doubt. Specifically, the threat was only one of five violent or threatening crimes admitted under factor (b), and the other four (murder, sexual assault, rape, and forcibly resisting arrest) were far more serious. The threat was "of marginal significance" compared to the ten charged murders. (See *People v. Collins* (2010) 49 Cal.4th 175, 218-219, citation and quotation marks omitted.) Even without evidence of the threat, the aggravating evidence supporting death would have been overwhelming. There was thus no reasonable possibility that evidence of the criminal threat affected the verdict, so any possible error in admitting it was harmless. (*Id.* at p. 220; see also *People v. Montiel* (1993) 5 Cal.4th

877, 930, disapproved on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13 [no prejudice where unadjudicated prior violent crimes were least serious and most weakly supported of aggravating factors including brutal capital murder, other incidents of violence, and recidivism].)

II. THIS COURT HAS DETERMINED THAT FORFEITURE APPLIES TO CLAIMS OF SUFFICIENCY OF FACTOR (B) EVIDENCE, AND APPELLANT'S CLAIM IS FORFEITED

Appellant acknowledges that this Court has held that the forfeiture rule applies to claims of sufficiency of evidence admitted under factor (b). (Supp. AOB at 5-6.) He asks that the Court reconsider its ruling and find that forfeiture does not apply to such claims. (Supp. AOB 5-14.) The Court's existing rule is sound and there is no reason to revisit it.

This Court squarely addressed this issue in *People v. Montiel, supra*, 5 Cal.4th at p. 928. It held the defendant's claim for insufficient evidence of prior crimes at the penalty phase was "waived as [a] direct appellate issue[], since trial counsel made no effort to exclude or strike the evidence and submitted no request that the jury be instructed to disregard it." It found that if the defendant believed the evidence supporting a prior crime was insufficient, he was "obliged in general terms to object, or to move to exclude or strike the evidence, on that ground." (*Id.* at p. 928, fn. 23.) The Court explained that the ultimate issue at the penalty phase "is the appropriate punishment for the capital crime, and evidence on that issue may *include* one or more other discrete criminal incidents." (*Ibid.*, citing § 190.3, factors (b), (c), italics in original.) This made it fundamentally different than a "claim that evidence supporting his *conviction* is legally insufficient." (*Ibid.*, italics in original.)

The Court has consistently upheld this rule. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1175 [defendant "cannot argue on appeal the

evidence should not even have been admitted without objecting on this ground at trial"]; *People v. Hamilton* (2009) 45 Cal.4th 863, 934; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1060 [claim of insufficient evidence "not cognizable on appeal because defendant failed to object or otherwise raise the issue at trial"].)

In *People v. Hamilton, supra*, 45 Cal.4th at pages 933-934, the jury was permitted to consider two related unadjudicated incidents, one of assault and one of battery. The defendant at trial "sought to exclude any argument or instructions regarding the crime of assault . . ., arguing the evidence presented was insufficient to establish an assault as a factor in aggravation under section 190.3, factor (b)." (*Ibid.*) On appeal, the defendant challenged the sufficiency of both the assault and the battery. (*Id.* at p. 934.) With regard to the battery, the Court noted that the defendant did not challenge the sufficiency of the evidence at trial "and did not object to the evidence when it was introduced." (*Ibid.*) It thus held that "he may not do so now for the first time on appeal." (*Ibid.*, citing Evid. Code, § 353 and *People v. Benavides* (2005) 35 Cal.4th 69, 92 [claim forfeited because defendant failed to object to evidence of prior uncharged acts of physical and sexual abuse under Evidence Code section 1101, subdivision (a)].)

With regard to factor (b) evidence, the "defendant is not on trial for the past offense, [and] is not subject to conviction or punishment for the past offense." (*People v. Valencia* (2008) 43 Cal.4th 268, 298, citations and quotation marks omitted.) In this way, factor (b) evidence is similar to evidence admitted under Evidence Code section 1101, subdivision (b) ("1101(b)"). This Court has accordingly compared factor (b) evidence to 1101(b) evidence, at least inferentially. (See *People v. Hamilton, supra*, 45 Cal.4th at p. 934.) Under 1101(b), evidence of an uncharged offense is admissible if relevant to prove a fact ("such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . .

."), other than a defendant's criminal disposition. It is merely one factor for the jury to consider. (See CALCRIM No. 375.) Under factor (b), "the evidence of criminality . . . is simply one factor the penalty jury is to consider in deciding the appropriate punishment for the capital offense." (*People v. Valencia*, at p. 298, citation and quotation marks omitted.) Just as a defendant must object to 1101(b) evidence to preserve a sufficiency challenge on appeal (*People v. Benavides*, *supra*, 35 Cal.4th at p. 92), so too must a defendant object on sufficiency grounds to preserve such a challenge to factor (b) evidence (*People v. Hamilton*, at p. 934).

There is thus no basis to revisit the Court's forfeiture rule, and the Court should find appellant's sufficiency challenges to the factor (b) evidence forfeited.

CONCLUSION

For these reasons, as well as those stated in the Respondent's Brief, respondent respectfully asks that the judgment of conviction and sentence of death be affirmed.

Dated: December 16, 2016

Respectfully submitted,

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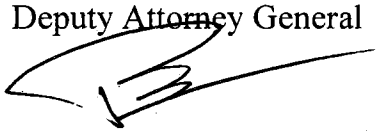

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CERTIFICATE OF COMPLIANCE

I certify that the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 2,039 words.

Dated: December 16, 2016

KAMALA D. HARRIS
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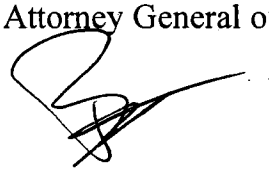

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DECLARATION OF SERVICE

Case Name: *People v. Turner*

No.: **S154459**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On December 16, 2016, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On December 16, 2016, I caused **eight** copies of the **SUPPLEMENTAL RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street,

First Floor, San Francisco, CA 94102-4797 by **FedEx, Tracking # 810789342104**.

On December 16, 2016, I caused one electronic copy of the **SUPPLEMENTAL RESPONDENT'S BRIEF** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 16, 2016, at Los Angeles, California.

Marianne A. Siacunco	
Declarant	Signature

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