IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHESTER DEWAYNE TURNER, Defendant and Appellant.	Case No. S154459 (Los Angeles Sup. Ct. No. BA273283-01)

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

Honorable William R. Pounders, Judge

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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Defendant and Appellant.	)	

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

INTRODUCTION

In the first argument of his Supplemental Opening Brief, appellant showed that the evidence of criminal threat was insufficient for any juror to find beyond a reasonable doubt that appellant had the specific intent to threaten Deputy Uyetatsu. (SAOB 1-5.)[1] In the second, appellant showed that his failure to object did not forfeit his claim that the evidence admitted as factor (b) evidence at the penalty phase was insufficient to establish the elements of the crime of criminal threat. (SAOB 6-14.) Respondent argues that there is sufficient evidence of specific intent and that any possible error

[1] The following abbreviations are used throughout this brief: "AOB" refers to appellant's opening brief; "SAOB" refers to appellant's supplemental opening brief; "RB" refers to respondent's brief; "SRB" refers to respondent's supplemental brief; and "RT" refers to the Reporter's transcript on appeal.

was harmless beyond reasonable doubt. (SRB 1-5.) Respondent urges that this Court's rule that the forfeiture rule applies to claims of sufficiency of the evidence under factor (b) should not be reconsidered. (SRB 5-7.) As shown below, respondent is incorrect.

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I

THERE WAS INSUFFICIENT EVIDENCE OF SPECIFIC INTENT TO THREATEN THE JAIL DEPUTY

Respondent does not dispute that when the defendant does not personally communicate a threat to the victim, the record must show that "he specifically intended that the threat be communicated to the victim." (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 861.) Respondent asserts, however, that "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. (SRB 2.) Respondent cites *In re David L.* (1991) 234 Cal.App.3d 1655, 1659, for the proposition that a "climate of hostility" between the defendant and the victim may support an inference of the defendant's intent. (SRB 3.) Respondent then cites the evidence that appellant was hostile towards the deputy and showed those hostile feelings as evidence demonstrating that appellant intended his threat to kill her to be communicated to her by the person whom overheard the threat, fellow jail-inmate Antonio M. (*Ibid.*) However, the bare evidence that appellant did not like the deputy does not show that he intended a threat communicated to Antonio M. to be further communicated to the victim.

The very case cited by respondent, *In re David L.,* demonstrates this. In that case, the Court of Appeal held that it was "[t]he communication of the threat to a friend of the victim who was also witness to certain of the antecedent hostilities" that supported an inference that the defendant intended the "friend to act as intermediary to convey the threat." (*In re David L., supra,* 234 Cal.App.3d at p. 1659.) In other words, it was the evidence that the listener had the kind of relationship with the victim that

the jury could reasonably conclude that the listener would communicate the threat to the victim (and that the defendant knew this) that made the defendant's demonstrated hostility to the victim relevant. Here, the only evidence is that appellant did not like the deputy. There was no evidence that Antonio M. had the kind of relationship with the deputy that he would have passed along the threat to her. More important, there is no evidence that appellant knew anything at all about Antonio M.'s relationship with the deputy, much less that he believed that Antonio M. had the kind of relationship where Antonio M. could be counted on to tell the deputy about the threat.

Rather, the evidence in this case is like that in *People v. Felix* (2001) 92 Cal.App.4th 905, 913, where the Court of Appeal found that there was no evidence of intent to communicate where the threat was communicated to the defendant's therapist and there was no evidence that the defendant was aware of the therapist's duties to disclose and the defendant did not instruct the therapist to tell the victim about the threat. As in *Felix,* in this case there is no evidence that appellant was aware of any relationship between Antonio M. and the deputy such that appellant was aware that Antonio M. would communicate the threat. Additionally, there is no evidence that appellant instructed Antonio M. to communicate the threat.

Respondent asserts that because the threat was made in the jail setting there was no reason for appellant to expect his "conversation to remain private." (SRB 4.) No doubt appellant did not expect that his threat would remain private given that he communicated it to Antonio M. However, evidence that appellant made his threat to another inmate falls far short of evidence showing that in communicating the threat to fellow inmate Antonio M. he intended to communicate the threat to the deputy. In

fact, the prison setting suggests the opposite. Antonio M. testified that communicating appellant's supposed threat to the authorities put him in danger. (19RT 2802.) The fear of being put in danger surely makes the prison setting a reason that it was less likely that appellant believed that by making a threat in the earshot of Antonio M. the threat would be communicated to Deputy Uyetatsu.

Regarding prejudice, respondent simply repeats the arguments it made in its brief (SRB 4-5, see RB 122-126) which were adequately addressed in appellant's reply (ARB 54-57).

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II

APPELLANT DID NOT FORFEIT HIS CLAIM THAT THE FACTOR (B) EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE ELEMENTS OF THE CRIMINAL THREAT

In *People v. Montiel* (1993) 5 Cal.4th 877, 928, fn. 23, and *People v. Livingston* (2012) 53 Cal.4th 1145, 1175, this Court held that, unlike claims of insufficiency of the evidence for a charged crime brought at the guilt phase or special circumstance phase of a capital case, the forfeiture rule applies to claims of sufficiency of evidence admitted at the penalty phase of a capital case under Penal Code section 190.3, subdivision (b) ("factor (b)"). Appellant showed that the basis for this rule, i.e., that the evidence admitted under factor (b) at the penalty phase is admitted "as aggravating evidence, not to support a conviction for that crime" (*People v. Livingston, supra*, 53 Cal.4th at p. 1175) is an inadequate basis for a distinction between sufficiency of evidence claims directed toward evidence of the charged offenses and claims directed toward evidence of uncharged offenses at the penalty phase. (SAOB 8-12.) Respondent urges that the current rule is sound and that there is no reason to revisit it.

Respondent asserts that factor (b) evidence is similar to evidence of other crimes admitted under Evidence Code section 1101, subdivision (b) ("1101(b)"). It observes that a defendant is not on trial for the uncharged crimes admitted under 1101(b); rather, the evidence of such a crime "is admissible if relevant to prove a fact ('such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident...')." (SRB 6.) According to respondent, "[j]ust as a defendant must object to 1101(b) evidence to preserve a sufficiency challenge on appeal [citation] so too must a defendant object on sufficiency grounds to challenge factor (b) evidence forfeited [citation]." (SRB 7.)

Respondent has shown no valid authority for one of the propositions upon which its argument depends. It cites *People v. Benavides* (2005) 35 Cal.4th 69, 92, for the rule that failure to object to the sufficiency of the evidence of 1101(b) evidence forfeits a claim of the insufficiency of 1101(b) evidence on appeal. *Benavides* stands for no such thing. In *Benavides*, the defendant asserted that the evidence was inadmissible under Evidence Code section 1101, subdivision (a), and the court held that the failure to object on this ground waived the issue on appeal. (*Ibid.*) There was no claim on appeal that there was insufficient evidence of the elements of the uncharged conduct. As such, *Benevides* does not help respondent.

More importantly, respondent's assertion that there is a parallel between 1101(b) evidence and factor (b) evidence is baseless. A defendant may contest the elements of the charged crime without necessarily contesting the fact which the uncharged conduct is admitted to prove (i.e., motive, opportunity, intent, etc.) For example, the defendant contests identity when the 1101(b) evidence was admitted for the purpose of showing intent. By way of contrast, as appellant has shown in his supplemental opening brief, at a penalty phase, the defendant's argument that the prosecution has failed to establish that the aggravating factors, including any uncharged factor (b) crimes, outweighs any mitigating factors necessarily contests the prosecution's evidence of those crimes. (SAOB 11.) With factor (b) evidence, unlike 1101(b) evidence, because appellant "'necessarily objected' to the sufficiency of the evidence by 'contesting [it] at trial.' [citations]" (*People v. McCullough* (2013) 56 Cal.4th 589, 596), he may challenge the sufficiency of the evidence for the first time on appeal. (SOAB 5.)

CONCLUSION

For all the foregoing reasons, the sentence and judgment of death must be reversed.

DATED: January 17, 2017

Respectfully submitted,

MARY K. MCCOMB
State Public Defender

Attorney for Appellant

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(2))

I am the State Public Defender and represent appellant, CHESTER DEWAYNE TURNER, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates is 1607 words in length.

Dated: January 17, 2017

MARY K. MCCOMB

DECLARATION OF SERVICE

Case Name: **People v. Chester Turner**
Case Number: **Supreme Court Case No. S154459**
Los Angeles County Superior Court No. BA273283-01

I, **Marsha Gomez**, declare as follows: I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 770 L Street, Suite 1000, Sacramento, California 95814. I served a copy of the following document(s):

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I declare under penalty of perjury that the foregoing is true and correct. Signed on **January 17, 2017**, at Sacramento, California.

Marsha Gomez