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 OPENING BRIEF

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I.
THE EVIDENCE OF CRIMINAL THREAT AT THE PENALTY PHASE WAS INSUFFICIENT FOR ANY JUROR TO FIND THAT APPELLANT HAD THE SPECIFIC INTENT TO THREATEN DEPUTY UYETATSU BEYOND A REASONABLE DOUBT

In his opening brief, appellant alleged that the evidence introduced at the penalty phase to establish that appellant had committed a criminal threat towards Deputy Uyetatsu was insufficient to prove two elements of section 422 beyond a reasonable doubt. (AOB 135-149) The evidence however, was also insufficient to establish another element of the offense, that the defendant made the threat with the specific intent that the statement was "to be taken as a threat." (Cal. Penal Code, § 422; *People v. Toledo* (2001) 26 Cal.4th 221, 227.)

As set forth in the opening brief (AOB 135-137), jail inmate Antonio M. testified that appellant told him that, if he was convicted, he would kill Deputy Uyetastu. Antonio M. informed jail staff that appellant made this statement, and staff in turn notified Uyetatsu. There was no evidence however, that appellant intended that Uyetatsu ever receive the threat, and thus no evidence to establish the specific intent element of the purported criminal offense.

While section 422 does not require that a threat be personally communicated to the victim by the person who makes the threat, it does require sufficient evidence that the defendant intended the threat to be so communicated. (*People v. Felix* (2001) 92 Cal.App.4th 905, 913; *In re David L.* (1991) 234 Cal.App.3d 1655, 1659; *In re Ryan D.* (2002) 100 Cal.App.4th 854, 861.) Where, as here, the threat was made indirectly to a third person, it must be shown that the accused specifically intended that the threat be conveyed to the victim. (*In re Ryan D.*, 100 Cal.App.4th at p. 861); *People v. Felix, supra,* 92 Cal.App.4th at p. 913; *In re David L., supra,* 234 Cal.App.3d at p. 1659.) As further explained: "[A] person violating section 422 must intend that the victim receive and understand the threat . . . . While the statute does not require that the violator intend to cause death or serious bodily injury to the victim, not all serious injuries are suffered to the body. The knowing infliction of mental terror is equally deserving of moral condemnation." *(People v. Solis* (2001) 90 Cal.App.4th 1002, quoting *People v. Thornton* (1992) 3 Cal.App.4th 419, 424.) Indeed, section 422 has been described as a crime of "psychic violence," (*People v. Thornton* 3 Cal.App.4th at p. 424) and as such the defendant must intend to cause fear or "mental terror" in the object of the threat him or herself.

The prosecutor in this case presented no evidence to establish the intent element of section 422. There was no evidence that appellant intended Uyetatsu to learn of his planned violence against her. (See *In re Ryan D.* 100 Cal.App.4th at p. 864 [no criminal threat where minor brought threatening painting to art class but did not display it to the victim, put it in a location where he knew she would see it, or advise her that she should see the painting].) There was no evidence appellant instructed Antonio M. to deliver the threat to Uyetatsu or to report it to anyone else and no evidence that appellant was aware that Antonio M. was likely to report his statement to the jail staff. (Compare, *In re David L., supra,* 234 Cal.App.3d at p. 1659 ["The communication of the threat to a friend of the victim who was also witness to certain of the antecedent hostilities supports the inference the minor intended the friend act as intermediary to convey the threat to the victim."] with *People v. Felix, supra,* 92 Cal.App.4th at p. 913 [no evidence of intent where threat was communicated to psychotherapist and defendant was not aware of therapist's duty to disclose threats, did not instruct therapist to tell the victim, and there was no proof defendant wanted his statements conveyed to the victim].) Antonio M. testified that he and appellant were on lockdown and talking "amongst ourselves" on the tier when appellant made the statement. (19RT 2799.) Although he described appellant as being "upset," there was no evidence that appellant was speaking loudly or within the earshot of anyone other than Antonio M. when he made the statements, nor intended his words to be overheard by anyone. (Cf. *People v. Lipsett* (2014) 223 Cal.App.4th 1060, 1065 [sufficient evidence of intent where defendant yelled the statement at the top of his lungs while engaged in a "tug of war" with victim over a bike he was trying to steal].) There was simply nothing put before the jury from

which they could permissibly infer that appellant made the statement with the specific intent that Uyetatsu would receive it or that she would experience any "mental terror" from his statement.

For all these reasons, the evidence was not sufficient to prove the second element of a criminal threat, and thus, even if this Court rejects the arguments raised in appellant's opening brief regarding the third and fourth elements, the evidence is insufficient to establish the offense underlying appellant's alleged uncharged criminal conduct.

Appellant demonstrated in his opening brief and reply brief that there is a reasonable possibility that the jury's consideration of this unproven and invalid aggravating factor affected the penalty verdicts (*People* v. *Brown* (1988) 46 Cal.3d 432, 447), and such consideration cannot be found harmless beyond a reasonable doubt as not contributing to the sentence rendered. (*Chapman* v. *California* (1967) 386 U.S. 18, 24.) Accordingly, appellant's death sentences must be reversed.

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II.

APPELLANT DID NOT FORFEIT HIS CLAIM THAT THE EVIDENCE OF CRIMINAL THREAT AT THE PENALTY PHASE WAS INSUFFICIENT TO ESTABLISH THE ELEMENTS OF THE UNCHARGED CRIMES

In the event this court considers that appellant's insufficiency of the evidence arguments raised herein and in the opening brief might be forfeited due to the lack of objection by counsel, appellant urges this Court to reconsider its prior holding that the forfeiture rule applies to all challenges to the sufficiency of evidence of unadjudicated offenses introduced to obtain a death sentence.

1. There Is No Rationale for Requiring an Objection to the Sufficiency of Factor (b) Evidence

It is well-established that appellate claims of sufficiency of the evidence to establish the elements of criminal offenses are cognizable on appeal even in the absence of any objection in the trial court. "Parties may generally challenge the sufficiency of the evidence to support a judgment for the first time on appeal because they 'necessarily objected' to the sufficiency of the evidence by 'contesting [it] at trial.' [citations]." (*People v. McCullough* (2013) 56 Cal.4th 589, 596; see *People v. Rodriguez* (1998) 17 Cal.4th 253, 262 [sufficiency challenge to prior "strike" allegation not forfeited by lack of objection]; cf. *In re Troy Z.* (1992) 3 Cal.4th 1170, 1180-1181 [guilty plea or no contest plea waives challenge to the sufficiency of the evidence].) Thus, there is an exception to the general rule that an objection must be raised in the trial court to avoid forfeiture of sufficiency of the evidence claims, and this Court has held that "questions of the sufficiency of the evidence are not subject to forfeiture." (*People v. Butler* (2003) 31 Cal.4th 1119, 1126-1128, & fn. 4; *Tahoe National Bank v.*

Phillips (1971) 4 Cal.3d 11, 23, fn. 17 ["contention that a judgment is not supported by substantial evidence" is an "exception" to the rule that "points not urged in the trial court cannot be raised on appeal"].)

Despite the long-standing principle that sufficiency of the evidence claims are not forfeited by lack of objection, this Court has applied a different rule in connection with claims challenging the sufficiency of factor (b) evidence introduced in aggravation at the penalty phase. (*People v. Montiel* (1993) 5 Cal.4th 877, 928, fn. 23.) For the same reasons that claims challenging the sufficiency of the evidence of the charged offenses, of the special circumstances, or of the other sentencing factors do not require a trial-level objection for appellate review, no objection should be required to permit appellate review of the evidence of unadjudicated offenses presented at the penalty phase of a capital trial.

Before the opinion in *Montiel*, this Court was faced several times with sufficiency of factor (b) evidence claims that had not been raised in the trial court. In *People v. Boyd* (1985) 38 Cal.3d 762, this Court held that factor (b) required that the underlying uncharged offenses be proven beyond a reasonable doubt. This Court then assessed the evidentiary sufficiency of several incidents under factor (b), some of which were objected to and some of which were not. (*Id.* at pp. 777-778.) With regard to the unobjected to factor (b) incidents, having found the evidence sufficient, this Court declined to "decide whether the defense's failure to object bars it from raising this point on appeal." (*Id.* at p. 777.) After *Boyd*, this Court continued to reach and reject the merits of factor (b) sufficiency claims without deciding whether or not such claims were forfeited by lack of objection. (See, e.g., *People v. Carrera* (1989) 49 Cal.3d 291 [assuming sufficiency of factor (b) evidence claim was properly raised despite the lack

of objection, and finding the evidence sufficient].)

However, this Court has also found factor (b) evidence to be insufficient despite the lack of any objection before the trial court. In *People v. Thompson* (1988) 45 Cal.3d 86, this Court considered, among other factor (b) evidence, the defendant's alleged discussion about killing a witness against him. Although the record does not indicate that trial counsel objected to the sufficiency of this factor (b) evidence, in *Thompson* this Court cited the substantive rule applied in *Boyd* and held that there was insufficient substantial evidence to establish a violation of the criminal statute prohibiting solicitation of murder. (*Id.* at p. 129 ["Since there was insufficient substantial evidence to establish violation of section 653f as a separate crime, we conclude that whatever the relevance of this evidence at the guilt phase to show defendant's consciousness of guilt, the trial court should not have permitted it to be argued under factor (b) at the penalty phase."].)

Application of the general forfeiture exception to sufficiency of the evidence claims where the challenged evidence was presented to prove unadjudicated criminal activity under factor (b) at the penalty phase of a capital trial was first squarely addressed by this Court in *People v. Montiel*, *supra*, 5 Cal.4th at p. 928. Without citation to any prior authority on the issue, this Court explained its rejection of the general rule in a brief footnote:

> Even if defendant need do nothing at trial to preserve an appellate claim that evidence supporting his *conviction* is legally insufficient, a different rule is appropriate for evidence presented at the penalty phase of a capital trial. There the ultimate issue is the appropriate punishment for the capital crime, and evidence on that issue may *include* one or more other discrete criminal incidents. (§ 190.3, factors (b), (c).) If

> the accused thinks evidence on any such discrete crime is too insubstantial for jury consideration, he should be obliged in general terms to object, or to move to exclude or strike the evidence, on that ground.

(*People v. Montiel, supra*, 5 Cal.4th at p. 928, fn. 23, italics in original.)

This forfeiture holding in *Montiel* has been reiterated in subsequent decisions of this Court. (See, e.g., *People v. Livingston* (2012) 53 Cal.4th 1145, 1175; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1060.) In *Livingston*, this Court was confronted with the argument that there is a distinction between claims that the factor (b) evidence was so insubstantial that it should never have been presented to the jury, i.e. that it was error to admit the evidence in the first instance, and claims that such evidence, once presented, was insufficient to actually establish the uncharged offense. This Court apparently rejected such distinction for the sole reason that factor (b) evidence is admitted as aggravating evidence to obtain a death sentence, and not to obtain a conviction. Other than quoting the above-cited footnote from *Montiel*, this Court only explained the distinction as follows:

> Defendant claims he is not challenging the admission of the evidence but its sufficiency, a challenge a defendant may make on appeal from a conviction without an objection. But, as we explained in *Montiel*, here the evidence was admitted at the penalty phase of a capital trial as aggravating evidence, not to support a conviction for that crime.

(*People v. Livingston*, *supra*, 53 Cal.4th at p.1175.)

The reasons stated in *Montiel* and *Livingston* provide no basis for a distinction between sufficiency of evidence claims directed toward evidence of the charged offenses or special circumstances and claims directed toward evidence of uncharged offenses at the penalty phase. Claims relating to the sufficiency of guilt phase evidence are not subject to forfeiture because the

defendant "'necessarily objected' to the sufficiency of the evidence by 'contesting [it] at trial.' [citations]." (*People v. McCullough*, *supra*, 56 Cal.4th at p. 596.) This is apparently the rule whether the defense actually mounted any challenge, either through objections, motions to exclude or strike, cross-examination, presentation of evidence or argument, to the prosecution's evidence regarding one or more elements of any of the charged offenses. Even where the defendant at trial did not argue to the jury that the prosecution failed to meet its burden as to *any* element of a charged offense, under *McCullough,* he is deemed to have "contested" the sufficiency of the evidence for that offense simply by going to trial on that charge. This Court has apparently entertained the merits of sufficiency of the evidence claims regarding a specific crime in cases where multiple crimes were charged, but the defendant presented no defense whatsoever to the specific crime for which he challenges the sufficiency of the evidence on appeal, as well as in cases where multiple special circumstances are alleged, but defendant challenged none or only one special circumstance during trial.

To the extent that this Court's footnote in *Montiel* distinguished factor (b) evidence from evidence presented at the guilt phase based on the fact that the prosecution may present evidence of multiple prior criminal incidents to support a death sentence when it stated that "evidence on that issue may *include* one or more other discrete criminal incidents," the rationale for this distinction is not clear. (*People v. Montiel* (1993) 5 Cal.4th 877, 928, fn. 23.) While, unlike at the guilt phase, the penalty phase jury is not required under California law to indicate which, if any, of the factor (b) offenses were established beyond a reasonable doubt, the same is true when the defendant is convicted of first-degree murder and

evidence was presented on more than one factual theory, such as premeditated and deliberate murder, torture murder, lying in wait, felony murder or any of the other grounds described in section 189. Where multiple theories of first-degree murder are presented to the jury, this Court does not require the jury to render a unanimous verdict or make specific findings as to which theory or theories it found were established beyond a reasonable doubt. (*People v. Beardslee* (1991) 53 Cal. 3d 68, 92 [a jury may convict a defendant of first degree murder . . . without making a unanimous choice of one or more of several theories proposed by the prosecution, e.g., that the murder was deliberate and premeditated or that it was committed in the course of a felony"].) Nonetheless, this Court addresses all guilt phase sufficiency of evidence claims regardless of whether or not there was an objection below.

Similarly, where burglary murder is alleged or argued as the basis for first-degree felony murder or the felony-murder special circumstance, the prosecution may rely on more than one "target offense," such as theft, rape, or any other felony and "the jury need not unanimously decide, or even be certain, which felony defendant intended as long as it finds beyond a reasonable doubt that he intended some felony." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132-1133.) Despite the fact that, just like factor (b) evidence, evidence of intent to support a burglary-murder conviction or special circumstance "may *include* one or more other discrete criminal incidents," i.e. the evidence may support the intent to commit one or more target offense, this Court does not require an objection to the sufficiency of the burglary murder or special circumstance evidence to preserve the issue for appeal. (See, e.g., *People v. Tully* (2012) 54 Cal. 4th 952, 1007-1008 [evidence sufficient to support burglary-murder conviction and special

circumstance based on intent to commit theft, *or* intent to commit rape.]

In light of this, there is no logical reason why a penalty phase trial, at which the defendant necessarily argues that the prosecution has failed to establish that the aggravating factors, including any uncharged factor (b) crimes, outweigh any mitigating factors, does not serve to "contest" the prosecution's evidence in the same way that a guilt phase trial does. If this Court discerns some distinction between the strength of the evidence needed to support the elements of a crime or a special circumstance finding at the guilt phase, and the strength of the evidence needed to support the elements of a crime as a sentencing factor at the penalty phase of a capital trial, the law does not support any such distinction. Each element of each unadjudicated offense under factor (b) must be established beyond a reasonable doubt before it can be weighed as an aggravating factor at sentencing just as each element of a crime or special circumstance must be established by precisely the same quantum of proof.

Nor do this Court's cases about forfeiture create a meaningful difference between sufficiency of evidence claims that affect guilt versus claims that affect only the sentence. In *People v. Rodriguez*, *supra*, 17 Cal.4th 253, 261-262, for instance, the Court addressed the sufficiency of the evidence supporting a prior felony "strike" under the three strikes law. This Court found that the prosecution's abstract of judgment offered at trial to support one of the strike allegations was insufficient to sustain the trial court's finding and reversed. (*Id.* at p. 262.) Applying the rule set forth in *McCullough*, *supra*, 56 Cal.4th at p. 596, this Court rejected the Attorney General's argument that the claim was forfeited because the defendant raised the issue for the first time on appeal, stating: "[t]o the contrary, defendant at the outset mounted the most complete challenge possible to the

strike allegation: He demanded a trial." (See also *People v. (Roger) Rodriguez* (2004) 122 Cal.App.4th 121, 129 [no forfeiture of insufficiency claims relating to sentencing enhancements].)

The logic of *Montiel* also does not hold up in light of how and when factor (b) sufficiency is considered by trial courts and weighed by juries. Under the reasoning of *People v. Montiel, supra*, 5 Cal.4th at p. 928, fn. 23, the defendant must necessarily "object, or [] move to exclude or strike the evidence" in support of each insufficient factor (b) incident to preserve the claim for appellate review. But it is entirely unclear when the time is ripe for such an objection or motion to be made. The issue cannot adequately be resolved at an in limine *Phillips* hearing because at such a hearing, the trial court does not make the ultimate sufficiency determination based on all available evidence at such a hearing and it may lack, or indeed properly exclude, critical defense evidence. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 225 [trial court need not consider defense rebuttal testimony at the *Phillips* hearing].) The prosecutor's proffer at the hearing also may go beyond what it actually presents to the jury.

Nor does it suffice to require a defendant to move to "exclude or strike the evidence," *People v. Montiel, supra*, 5 Cal.4th at p. 928, fn. 23, after the actual evidence demonstrating insufficiency is adduced during trial. It is often entirely speculative when evidence tips from the point of relatively weak to legally insufficient. Even a formalistic requirement of a motion to strike at the close of evidence would be both legally premature and ineffectual. It would be premature because sufficiency error does not even *occur* until the jury finds against the defendant. (Cf. *People v. Guiton* (1993) 4 Cal.4th 1116, 1125 [sufficiency error "occurs when a jury, properly instructed as to the law, convicts on the basis of evidence that no

reasonable person could regard as sufficient"].)[1] Even if the close of evidence were the legally appropriate point at which to raise claimed insufficiency of the evidence and request its exclusion, striking the evidence at this juncture would do little to prevent the very same claim from being raised on appeal, because the jury's thought process would have been infected by presentation of the evidence in the first place. In other words, even if such a motion to strike or exclude were granted, this Court would be faced with a constitutional claim that the jury's individualized weighing process was tainted by irrelevant and inflammatory evidence, despite the court's instruction to strike it from consideration after the close of evidence. Thus, the purposes of the forfeiture doctrine would not be served. (Cf. *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468 ["[t]he purpose of the waiver doctrine is to bring errors to the attention of the trial court so they may be corrected or avoided"].)

Moreover, while application of the forfeiture rule to a claim that the trial judge improperly admitted certain evidence may be warranted because the claim is based on trial court error, in contrast, a sufficiency of the evidence claim is not based on any notion of judicial error but on fundamental constitutional principles of due process and/or reliability.

Finally, given the heightened standard for reliability in death determinations, *Woodson v. North Carolina*, (1976) 428 U.S. 280, 305, forfeiture should not be applied to factor (b) sufficiency claims. In a capital

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[1] Because this Court has steadfastly refused to require special findings on factor (b) evidence (see, e.g., *People v. McDowell* (2012) 54 Cal.4th 395, 443), the only evidence available to the defendant that the jury may have improperly used insufficient factor (b) evidence against him is after the verdict is reached.

case, it is critical that evidence of a defendant's past crimes that are used to put him to death is not wholly insufficient. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1138 [allowing collateral challenge of prior murder conviction because "the unique nature of the death penalty imposes a special need for reliability in the determination of the applicability and appropriateness of this ultimate sanction."].) The gravity and seriousness of a death judgment should not be undermined by insubstantial allegations of wrongdoing that may inflame and confuse a jury.

As Justice Arabian noted in his concurrence in *People v. Welch*, when the allegedly forfeited claim "implicat[es] fundamental principles of policy and constitutional guaranties . . . the prerequisite of an objection to appellate review would frustrate rather than subserve the interests of justice." (*People v. Welch* (1993) 5 Cal.4th 228, 241, (conc. opn. of Arabian, J.).) The importance of rendering a fair and reliable death judgment based on substantiated evidence implicates just such important policy and constitutional guarantees, regardless of whether defense counsel argued the insufficiency of evidence to the judge.

Accordingly, this Court should reconsider its ruling that the sufficiency of factor (b) evidence must be challenged in the trial court or such challenges will be deemed forfeited on appeal. Appellant urges this Court to address the merits of hia challenges to the evidence presented in this appeal, despite the lack of objection.

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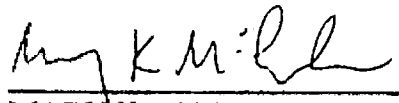
CONCLUSION

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

DATED: November 16, 2016

Respectfully submitted,



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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 4,095 words in length.

Dated: November 16, 2016

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 **November 16, 2016**, at Sacramento, California.

Marsha Gomez
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