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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. PAUL NATHAN HENDERSON Defendant and Appellant.	)	No. S098318 (Riverside Superior Court No. INF027515)

APPELLANT'S SECOND SUPPLEMENTAL REPLY

ON AUTOMATIC APPEAL

FROM A JUDGMENT AND SENTENCE OF DEATH

Superior Court of California, County of Riverside

Hon. Thomas N. Douglass, Judge

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Appellant submits this Second Supplemental Reply Brief.

INTRODUCTION

Respondent's Second Supplemental Brief ("RSSB") reveals that Respondent either misunderstands or hopes this Court will misunderstand the argument in Appellant's Second Supplemental Brief ("ASSB"). The argument can be summarized as follows. Applying the methodology approved by the U.S. Supreme Court, recent research shows an emerging national consensus against executing inadvertent felony murderers. (*See*, G. Binder et al., *Unusual: The Death Penalty for Inadvertent Killing* (2018) 93 Ind. L.J. 549 ("*Unusual*"), attached as Appendix A to ASSB.) That consensus shows that the perpetrator of a felony must intend to kill or be recklessly indifferent to life before the death penalty may be imposed. The evidence below, though conflicting, was nevertheless sufficient for a jury to have concluded that Appellant was an inadvertent "killer." But because Appellant was found to be the perpetrator of the underlying felonies, under the current state of the law in California the jury was not required to consider – and the prosecutor told the jury it should not consider – Appellant's mental state before finding him death-eligible. In light of the emerging

national consensus, this Court should reverse the special circumstances findings and death sentence, and remand so that a properly instructed jury can determine whether, before finding the special circumstances true, Appellant was at least recklessly indifferent to human life during the commission of the crime.

ARGUMENT

A. Empirical Research Reveals That Capital Punishment For Inadvertent Killers Has Become Truly "Unusual."

The research described in *Unusual* reveals that nearly two-thirds of U.S. jurisdictions oppose the death penalty for "inadvertent" killers, and that in the last 45 years no more than five such individuals have been executed. Respondent does not dispute that, by any measure, the death penalty for felony murderers who were no more than negligent is demonstrably "unusual."

Indeed, Respondent has almost nothing to say about the compelling empirical findings underlying the ASSB. Instead, in a single paragraph tucked away at the very end of the RSSB, Respondent first scolds Appellant for "selectively [relying] on two law review articles written by the same author . . . ." (RSSB, p. 11.) It is true the two articles Appellant cites in the ASSB were written by the same authors; why that matters Respondent declines to state.

Respondent's real point, though, resides in its sly use of the word "selectively." The not-so-subtle implication is that relevant research exists that Appellant has ignored. If that is so, why then has Respondent not seen fit to call such research to the Court's attention? Respondent's omission speaks volumes.

Next, Respondent asserts that by including in their analysis jurisdictions that prohibit the death penalty altogether, the authors of *Unusual* are "grossly skewing [the] results for the relevant states which have capital punishment." (*Id*.) To the contrary, the authors anticipated and specifically addressed the argument Respondent has made, emphasizing that the U.S. Supreme Court itself includes jurisdictions that prohibit capital punishment when determining whether a national consensus against particular capital sentencing practices exists. They write, "Twenty jurisdictions do not permit the death penalty in any case. According to the Court, a decision against the death penalty is a decision against its various applications." (*Unusual*, *supra*, at p. 562.) In a footnote, they explain that the "Court counts abolitionist states as prohibiting a specific practice for the purpose of determining consensus. *See Roper* [*v. Simmons* (2005)] 543 U.S. [551], 564 ('When *Atkins* was decided, 30 states prohibited

the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether . . . .')." (*Id*. at fn. 81.) Thus, it is perfectly appropriate to count states that prohibit the death penalty among those jurisdictions that prohibit capital punishment for inadvertent killers. The bottom line then is this: California is among the minority of jurisdictions that permit inadvertent killers to be made death-eligible.

B. A Properly Instructed Jury Could Have Found, And Should Have The Opportunity To Find, That Appellant Was An Inadvertent Killer.

Unable to rebut the evidence demonstrating an emerging national consensus against the death penalty for inadvertent killers, Respondent expends nearly all its energy reciting evidence from which the jury below could have found that Appellant was *not* an "inadvertent killer." Fair enough, but that only highlights Appellant's argument.

The evidence below was *conflicting* as to whether Appellant could be considered an "inadvertent," reckless, or intentional killer. Leaving aside the evidence from which the jury could have concluded Appellant was not even inside the Baker's home and was, at most, an accomplice to the crime, the evidence also showed that Appellant

(who, for these purposes only, we assume was the perpetrator) was heavily under the influence of drugs at the time of the crime; he entered the Baker's home without a weapon and was initially gentle with, even solicitous of, the Bakers; he bound and gagged them loosely and permitted Mrs. Baker to free herself of her restraints to attend to her husband; he took steps to avoid causing Mr. Baker's death by placing the gag in his mouth in such a way that Mr. Baker could easily remove it; Mr. Baker could have died of a heart attack at any time, with or without the crime; the knife wound to Mr. Baker's neck may have been inflicted *after* he died and, in any event, was superficial and not fatal; and, Appellant showed profound remorse for what had happened and, while in custody, asserted he "did not mean to kill" Mr. Baker. (See evidence recited at ASSB, pp. 13-14.)

Appellant does not contend he was an inadvertent killer as a matter of law. Rather, he contends the evidence could have led a properly instructed jury to conclude the killing was inadvertent. But under the current state of the law in California, the fact the evidence regarding Appellant's mental state was conflicting was simply irrelevant when it came to whether he was death-eligible. The jury was not instructed to consider his mental state because the robbery

and burglary felony murder special circumstances in California require no particular culpable mental state before the perpetrator can be subjected to the death penalty. (*People v. Anderson* (1987) 43 Cal.3d 1; *People v. Stamp* (1969) 2 Cal.App.3d 203.) It is for this reason that the prosecution abandoned premeditation and deliberation, and relied solely upon felony murder, as a basis for conviction, and then told the jury it could simply ignore whether Appellant had a culpable mental state when making its special circumstances findings. (19 RT 4237, 4240.)

The categorical approach to capital punishment for felony murder in California is no longer tenable in the face of the emerging national consensus against executing inadvertent killers. To comport with the Eighth Amendment, juries should henceforth be instructed that before the perpetrator of a killing during commission of a felony can be made death-eligible they must find the defendant was at least recklessly indifferent to life during the crime. Since the evidence below would have supported a finding that Appellant had any one of a range of alternative mental states, the jury may have found him death-eligible even if it believed he was no more than negligent in causing Mr. Baker's death. That would and should be unlawful in view of the

national consensus against executing inadvertent killers. (Cf. *Hedgpeth v. Pulido* (2008) 555 U.S. 57, 58 ["A conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one"].)

CONCLUSION

This Court should reverse and remand for a new trial on the special circumstances findings and sentence of death.

Dated: May 8, 2019

/s/ Martin H. Dodd
Martin H. Dodd
Attorney for Appellant
Paul Nathan Henderson

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 8.630(b)(1)(A) of the California Rules of Court. This brief uses a proportional typeface and 14-point font, and contains 1,268 words.

Dated: May 8, 2019

Respectfully submitted,

/s/ Martin H. Dodd
Martin H. Dodd
Attorney for Appellant,
Paul Nathan Henderson

CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

I am an employee of the law firm of Futterman Dupree Dodd Croley Maier LLP, 601 Montgomery St., Suite 333, San Francisco, CA 94111. I am over the age of 18 and not a party to the within action. I am readily familiar with the business practice of Futterman Dupree Dodd Croley Maier LLP for the collection and processing of correspondence.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **May 8, 2019**, at San Francisco, California.

/s/ Kristine Kahey
Kristine Kahey

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Supreme Court of California

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/s/Martin Dodd

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