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**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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

# APPELLANT'S REPLY IN SUPPORT OF ADDITIONAL REQUEST FOR JUDICIAL NOTICE

ON AUTOMATIC APPEAL

FROM A JUDGMENT AND SENTENCE OF DEATH

Superior Court of California, County of Riverside

Hon. Thomas N. Douglass, Judge

In its Opposition to Appellant's Additional Request for Judicial Notice ("Opp."), filed on April 14, 2020, Respondent contends that Appellant has failed to articulate the "relevance" of the additional evidence as to which judicial notice has been requested. (Opp., p. 3.) This argument is as disingenuous as it is lacking in merit and it should be rejected.

Indeed, the claim that Appellant failed to demonstrate the "relevance" of the evidence was merely a smokescreen designed to provide Respondent an opportunity to submit an unauthorized sur-rebuttal to the very arguments in Appellant's Opening Brief ("AOB"), and particularly in Appellant's Reply Brief ("ARB"), the judicially-noticeable facts are intended to support. Appellant submits that the "relevance" of the evidence is obvious on its face – so obvious that Appellant thought it more appropriate simply to cite to the sections of the AOB and ARB to which the evidence related, and thereby avoid making additional legal arguments that were not specifically authorized. But since Respondent professes not to understand the purpose of the request for judicial notice, Appellant explains below why the evidence is material and relevant to the issues before the Court.

Appellant has argued that the *Batson/Wheeler* error in this case requires reversal as a matter of law. (AOB, pp. 136-137; ARB, pp. 44-49.) In Respondent's Brief ("RB") on appeal, Respondent argued – as it has here – that a limited remand to complete the *Batson* analysis can cure any error. (RB, p. 57; Opp., p. 3.) Appellant refuted that argument in the ARB:

> Mr. Henderson's trial occurred 13 years before this Reply Brief was filed. According to the State Bar website, neither the prosecutor, Dianna Carter, nor lead defense counsel, Clark Head, is now practicing law in Riverside County. (http://members.calbar.ca.gov/fal/MemberSearch/QuickSearch.) The trial judge, the Hon. Thomas Douglass, has apparently retired. There is at least a chance that the relevant participants from 2001 will not even be able to be gathered together. But even if they could make themselves available, there is no realistic possibility that the prosecutor will be able to recall whatever reason she may have had in 2001 for the challenge. Any reason she might propose at this late date would "reek[] of afterthought." (*Miller-El* [*v. Dretke* (2005) 454 U.S. 231]at 246.) The passage of time also makes it very unlikely that Mr. Henderson's trial counsel will be able to recall the facts sufficiently to "point[] out where the prosecutor's purported justifications might be pretextual or indicate bad faith." (*Ayala v. Wong* (9th Cir., Feb. 25, 2014) 2014 U.S. App. LEXIS 3699, *53 [en banc].)
>
> Most important of all, it is inconceivable that the trial judge could project himself backward in time a decade and a half to "evaluate not only whether the prosecutor's demeanor belie[d] a discriminatory intent, but also whether [Ms. Bowens's] demeanor [could] credibly be said to have exhibited the basis for the strike [which will be] attributed" to her. (*Snyder* [*v. Louisiana* (2008) 552 U.S. 472] at 477.) And, how will the judge weigh the apparent similarities between Ms. Bowens and the jurors who were not challenged? Surely he cannot be expected to recall the answers and demeanor of those other jurors as well.

(ARB, pp. 46-47 [footnotes omitted].)

In making the foregoing argument, Appellant requested judicial notice that, as of 2014 when the ARB was filed, Judge Douglass had apparently retired and the prosecutor Dianna Carter was no longer a prosecutor in Riverside County. (ARB, p. 46, fn. 13.) Appellant's Additional Request now before the Court is simply an update to those earlier judicially-noticeable facts: Judge Douglass has since passed away; Dianna Carter is apparently out of state and may no longer even be practicing law.

Its protestations to the contrary notwithstanding, Respondent understood the relevance of these more recent facts as the argument in its Opposition to the

Additional Request readily demonstrates. That argument is even less persuasive now than it was in Respondent's Brief seven years ago. Even at the time of Appellant's Reply Brief in 2014 a *meaningful* limited remand was not feasible given the passage of time since the trial. Any effort on remand to complete the *Batson* analysis would have been little more than a charade. (ARB, pp. 47-48; see *Snyder, supra,* 552 U.S. at 486 ["Nor is there any realistic possibility that this subtle question of causation could be profitably explored further on remand at this late date, more than a decade after petitioner's trial."].)

The intervening events foreclose even a charade on remand. *If* Ms. Carter could be located and compelled to testify before the trial court and *if* she could somehow articulate a reason why she challenged Ms. Bowens 19 years ago, no substitute judge will be able to make a determination about the *bona fides* of that reasoning. And that is because the substitute judge did not see and hear Ms. Bowens, the challenged juror; did not see and hear the other jurors with whom Ms. Bowens should be compared; and did not see and hear Ms. Carter when she challenged Ms. Bowens and then declined at the time to provide her reasoning for doing so. The cold transcript from the trial and the jury questionnaires contain sufficient information to raise an inference of discrimination in the challenge, but they provide no insight whatsoever about either Ms. Bowens' or Ms. Carter's credibility and demeanor at the time. As the U.S. Supreme Court in *Snyder* recognized, a remand in such circumstances to complete the *Batson* analysis is no remedy at all. (552 U.S. at 486.)

The death of Judge Douglass alone is enough to show that there is no prospect here for a limited remand and that reversal is compelled.

## CONCLUSION

Appellant requests that the Court take judicial notice of the facts set forth in the Additional Request for Judicial Notice.

Dated: April 16, 2020

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 Street, 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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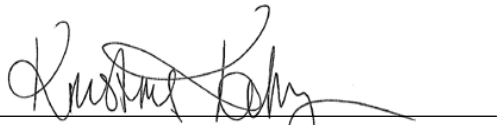
I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 16, 2020 in California.



Kristine Kahey

Supreme Court of California
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**STATE OF CALIFORNIA**
Supreme Court of California

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/s/Kristine Kahey
Signature

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Last Name, First Name (PNum)

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