In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **BYRON WILSON,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S087533

Los Angeles County Superior Court Case No. A164899
The Honorable Curtis B. Rappe, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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Pursuant to this Court's Order of November 4, 2020, respondent files this supplemental respondent's brief to appellant's supplemental opening brief filed October 16, 2020.

ARGUMENT

I. THE JURY'S SPECIAL CIRCUMSTANCE FINDINGS THAT APPELLANT COMMITTED THE MURDERS DURING A ROBBERY OR ATTEMPTED ROBBERY SHOULD BE AFFIRMED

Appellant contends that the robbery-murder special circumstance findings should be reversed based on his contentions in the opening brief arguing that the robbery convictions for counts 5 and 8 should be reversed. (AOB 7-9.)

There is no basis to overturn the jury's true findings as to the robbery-murder special circumstance allegations. The law does not require a conviction of the underlying offense for a special circumstance to stand. (See *People v. Morris* (1988) 46 Cal.3d 1, 16-18; see also *People v. Cash* (2002) 28 Cal.4th 703, 737.) As discussed in the respondent's brief at pages 203-208, 215-216, 220, the evidence in this case overwhelmingly showed that appellant and co-perpetrator Pops went to the carwash to commit robbery. The jury was instructed that to find the robbery-murder special circumstance true as to counts 1 through 4, the jury had to find, inter alia, "[t]he murder was committed while a defendant was engaged in or was an accomplice in the commission *or attempted commission* of a robbery." (5CT 1208

[CALJIC No. 8.81.17], italics added.)[1] Thus, regardless of any alleged infirmities underlying counts 5 and 8, the evidence is fully sufficient to support the true findings on the robbery-murder special circumstance allegations.

In any event, there were no reversible errors as to counts 5 and 8. In his opening brief, appellant contends that the trial court erred in failing to instruct the jury sua sponte on theft as a lesser included offense of the Dunn robbery because, he asserts, the evidence suggests his intent to steal Dunn's El Camino was formed after the murders were committed. (AOB 199-201 [Arg. IV].) As discussed in the respondent's brief at pages 218-220, that claim should be rejected because overwhelming evidence proved that appellant and Pops formed the intent to rob Dunn of his El Camino before the murders occurred. There was thus insubstantial evidence of a mere theft, which would have required the trial court to sua sponte instruct on that lesser crime. Nevertheless, any error was harmless. (*People v. Breverman* (1998) 19 Cal.4th 142, 165 [error in failing to instruct the jury sua sponte on a lesser included offense is reviewed for prejudice under the *Watson* harmless error standard]; *People v. Joiner* (2000) 84 Cal.App.4th 946, 972.)

Appellant also contends in his opening brief the trial court erred in not granting his acquittal motion (Pen. Code, § 1118.1) at the close of the prosecution's case as to the robbery of Hurd in

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[1] The jurors were also instructed they "must decide separately each special circumstance alleged in this case as to each of the defendants." (5CT 1206 [CALJIC No. 8.80.1].)

count 5 because the evidence was insubstantial to prove that property was specifically taken from Hurd. (AOB 202-204 [Arg. V].) As discussed in the respondent's brief at pages 203-208, the claim lacks merit because there was extremely strong circumstantial evidence that a robbery at the business occurred (i.e., marijuana and money were stolen) and, as a co-owner of the business, Hurd had constructive possession of that property.

Based on the foregoing, the robbery-murder special circumstance findings should be affirmed.

II. JUROR NO. 9 DID NOT COMMIT MISCONDUCT

Appellant contends Juror No. 9's unintentional failure to disclose on the jury questionnaire that she served as an alternate juror 15 or 16 years before appellant's trial constituted misconduct that caused a presumption of prejudice, which the prosecution failed to rebut. (Supp. AOB 10-20.) The claim lacks merit. The questionnaire did not specifically request information about jurors' prior service as alternates. In any event, the record does not remotely establish a substantial likelihood of bias on the part of Juror No. 9.

"[O]ne accused of a crime has a constitutional right to a trial by impartial jurors. [Citations.] '"The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution."'" (*In re Hitchings* (1993) 6 Cal.4th 97, 110.) This Court has recognized that voir dire is essential to safeguarding the constitutional right to fair and unbiased proceedings. "'Voir dire plays a critical

function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. [Citation.] Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges where provided by statute or rule.'" (*Ibid.*)

"'A juror who conceals relevant facts or gives false answers during the voir dire examination . . . undermines the jury selection process and commits misconduct.'" (*In re Boyette* (2013) 56 Cal.4th 866, 889, citing *Hitchings*, *supra*, 6 Cal.4th at p. 111.) "Such misconduct includes the unintentional concealment, that is, the inadvertent nondisclosure of facts that bear a ""substantial likelihood of uncovering a strong potential of juror bias."""" (*In re Manriquez* (2018) 5 Cal.5th 785, 797, citing *Boyette*, at p. 889.) "An *unintentional* concealment caused by an honest mistake during voir dire, however, 'cannot disturb a judgment in the absence of proof that the juror's wrong or incomplete answer hid the juror's actual bias. Moreover, the juror's good faith when answering voir dire questions is the most significant indicator that there was no bias.'" (*Manriquez*, at pp. 797-798, citing *In re Hamilton* (1999) 20 Cal.4th 273, 300; see *People v. Wilson* (2008) 44 Cal.4th 758, 823 ["'Although intentional concealment of material information by a potential juror may constitute implied bias justifying his or her disqualification or removal [citations], mere inadvertent or unintentional failures to disclose are not

accorded the same effect'" and should be analyzed based upon "whether the juror is sufficiently biased to constitute good cause" for removal of the juror].)

> Although juror misconduct raises a presumption of prejudice [citations], [a reviewing court] determine[s] whether an individual verdict must be reversed for jury misconduct by applying a substantial likelihood test. That is, the "presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant." [Citation.] In other words, the test asks not whether the juror would have been stricken by one of the parties, but whether the juror's concealment (or nondisclosure) evidences bias.

(*Boyette*, *supra*, 56 Cal.4th at pp. 889-890.) Finally, a juror evidences actual bias if he or she has "a state of mind . . . in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." (Code Civ. Proc., § 225, subd. (b)(1)(C); see *Manriquez*, *supra*, 5 Cal.5th at p. 799.)

As discussed in the respondent's brief at pages 265-266, Juror No. 9 was interviewed after trial by codefendant Pops's trial attorneys.[2] She mentioned in passing that she had previously served as an alternate juror on either a death penalty

[2] Various jurors were interviewed in conjunction with appellant's and codefendant Pops's new trial motions. (See generally RB 256-281.)

case or a non-death penalty murder case in which the defendant was a juvenile.

At a court hearing, Juror No. 9 later testified she served as an alternate on a death penalty case around 1984. She was not substituted in for one of the jurors and never deliberated. Regarding question 40-A of the questionnaire relating to prior jury service, Juror No. 9 wrote that she served as a juror in 1992 in a civil personal injury case and reached a verdict. Juror No. 9 did not recall her prior service as an alternate, however, until possibly "months" or "weeks" into appellant's trial. None of the questioning during jury voir dire had jogged her memory. (RB 267; 39RT 6338-6339.)

The trial court found that Juror No. 9 was "very credible" and had "not intentionally concealed anything." The court also noted that question 40-A was not clear as to whether it encompassed situations where a juror merely sat as an alternate. (RB 268; 39RT 6392-6393, 6395-6396.) At a later proceeding on the new trial motion, the court reiterated its finding that Juror No. 9 was credible and honestly forgot about her prior service as an alternate. (RB 269; 40RT 6434-6435.) Ultimately, the court found that Juror No. 9's inadvertent omission did not demonstrate actual bias. (RB 269; 40RT 6437.)

Appellant's argument that misconduct was shown and the prosecution failed to rebut the presumption of prejudice, skips a step in the analysis; appellant bears the initial burden of demonstrating that Juror No. 9 failed to disclose material information that had been requested of her in voir dire. If he can

establish a material nondisclosure amounting to juror misconduct, only then is he entitled to a rebuttable presumption of prejudice. Whether juror misconduct has been established and whether the defendant was prejudiced by any misconduct are questions subject to independent review, accepting the trial court's credibility determinations and findings of historical fact when supported by substantial evidence. (*People v. Gamache* (2010) 48 Cal.4th 347, 396; *People v. Ault* (2004) 33 Cal.4th 1250, 1261–1263; *People v. Nesler* (1997) 16 Cal.4th 561, 582.)

Here, appellant has not carried his burden of showing any juror misconduct had occurred in this case. In order to make out a case of concealment, the voir dire questioning must be "sufficiently specific to elicit the information which is not disclosed." (*People v. Blackwell* (1987) 191 Cal.App.3d 925, 929.) Question 40-A of the jury questionnaire asked whether the prospective juror had "been a juror in the past," *and* whether a verdict had been reached. (See 7CT 1735.) Juror No. 9 disclosed she had previously been a juror who reached a verdict. The trial court was correct that it was not necessarily clear that the question asked for information about service as an alternate who was not substituted in as a juror and thus never deliberated to a verdict. (39RT 6392-6393, 6395-6396.)

Even assuming Juror No. 9 should have disclosed her prior experience as an alternate juror 15 or 16 years earlier, prejudice against appellant cannot reasonably be inferred from her failure to do so. The touchstone of juror concealment analysis is whether there is a substantial likelihood that the juror in question was

actually biased against the defendant. Lacking supporting evidence, appellant's claim of bias is wholly speculative.

The case on which appellant's claim is primarily based, *Manriquez* (AOB 6, 10-12, 19-20), illustrates the paucity of juror misconduct in this case. In *Manriquez*, it was later discovered that a juror had failed to disclose prior abuse she suffered as a minor that in many respects mirrored the mitigation evidence presented by the defendant.

> The defense evidence in mitigation was introduced through the testimony of . . . [Manriquez's] relatives, each of whom described the deprivation and abuse [Manriquez] suffered as a child in rural Mexico. The witnesses testified that [Manriquez's] childhood was marred by extreme cruelty, vicious beatings, grinding poverty, forced labor, and a lack of care, education, affection, or encouragement by the adults in [Manriquez's] life.

(*Manriquez*, *supra*, 5 Cal.5th at p. 792.) Several questions in the juror questionnaire utilized in that case requested information about whether a prospective juror had ever "been the victim of a crime," "experienced or been present during a violent act," "ever seen a crime being committed," and "ever been in a situation where you feared being hurt or being killed as a result of violence of any sort." (*Id*. at p. 794.) Juror C.B. did not disclose any history of abuse, being a victim, or experiencing or seeing violence or a crime. Neither party examined her about these topics during voir dire. Because Manriquez had peremptory challenges remaining when C.B. was in the jury box, he could have challenged her, but did not. Juror C.B. served as the jury's foreperson. (*Ibid*.)

Juror C.B. wrote in a voluntary posttrial questionnaire the following:

> "The mitigating circumstances offered during the sentencing phase [were] actually a detriment in most of the [jurors'] minds, especially mine. I grew up on a farm where I was beat[en], raped, [and] used for slave labor from the age of [five through] 17. I am successful in my career and am a very responsible Law abiding citizen. It is a matter of choice!" (Underscoring in original.)

(*Manriquez*, *supra*, 5 Cal.5th at p. 794.) Juror C.B. provided a declaration and testified at an evidentiary hearing in which she detailed the extreme abuse, violence, and molestation she suffered as a child. Juror C.B. had discussed her experiences with the other jurors during the penalty deliberations. (*Id*. at pp. 794-796.) Juror C.B. testified that she answered the juror questionnaire honestly at the time, but in hindsight should have answered the pertinent questions by revealing what happened to her as a minor. (*Id*. at p. 796.)

This Court deferred to the referee's findings that Juror C.B. was credible and the omissions were inadvertent because the juror believed, at the time, that the questions related to crimes and abuse that occurred during adulthood. (*Manriquez*, *supra*, 5 Cal.5th at pp. 801-809.) Ultimately, this Court found that while Juror C.B.'s inadvertent omissions constituted misconduct, Manriquez had failed to demonstrate a substantial likelihood that Juror C.B. was actually biased against him. (*Id*. at pp. 811-818.)

Here, the totality of the circumstances show there was no substantial likelihood of actual bias. The omitted information

was not personal to Juror No. 9 in the sense that she was the victim of a crime or had experienced circumstances similar to the facts underlying appellant's charges or penalty defense. Her prior service as an alternate juror clearly had little impact on her since she failed to recall the experience until sometime during appellant's trial. She voluntarily disclosed her prior service to defense counsel. There was a notable passage of time between her service as alternate and petitioner's trial. There is also no evidence that Juror's No. 9's experience had compromised her ability to evaluate the evidence before her. Moreover, the type of omitted information objectively does not suggest bias.

Appellant complains that the trial court never asked Juror No. 9 specific questions about the prior case. (AOB 16-17.) The trial court, however, requested that the attorneys offer suggested questions. The only questions proffered by defense counsel related to when Juror No. 9 recalled her prior service and whether the questioning of other prospective jurors during voir dire jogged her memory. (39RT 6341-6343.) Although given the opportunity, defense counsel asked no further questions in an effort to establish bias. (39RT 6344.)

What is clear is that Juror No. 9's prior service as an alternate had so little effect on her that she simply forgot about the experience. This shows that there was no substantial likelihood of bias. As noted, the trial court found credible Juror No. 9's explanation that she simply forgot about her prior service as an alternate. In fact, appellant's trial counsel Mr. Thomason agreed that the juror's omission was inadvertent due to a lack of

memory. (39RT 6384.) The trial court found the inadvertent omission was not the kind of information that would have demonstrated actual bias on the juror's part. (39RT 6437.)

Based on the foregoing and the argument presented in the respondent's brief, the trial court acted within its discretion in denying appellant's new trial motion based on jury misconduct claims.

III. THIS COURT SHOULD NOT CHANGE LONG-ESTABLISHED PRECEDENT TO HOLD THAT A LOST OPPORTUNITY TO USE A PEREMPTORY CHALLENGE WARRANTS REVERSAL EVEN IN THE ABSENCE OF PREJUDICIAL JUROR MISCONDUCT

Relying on Justice Liu's dissent in *Manriquez*, *supra*, 5 Cal.5th at page 819-822, appellant asks this Court to abandon the long-established objective test of substantial likelihood of bias in favor of a highly subjective test that focuses on whether the juror would have been stricken by one of the parties by use of a peremptory challenge. (Supp. AOB 21-22.) Appellant does not offer a cogent reason to change this Court's well tested approach to juror misconduct claims.

Respondent submits, that Justice Liu's dissenting opinion in *Manriquez* was based on the unique nature of the misconduct in that case where a juror failed to disclose requested material information that ultimately mirrored the defense's mitigation evidence. In any event, appellant fails to offer a persuasive reason for this Court to abandon its precedent which tasks whether

> "an individual verdict must be overturned for jury misconduct or irregularity ""is resolved by reference to the substantial likelihood test, an objective standard."" [Citations.] Any presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the defendant." (*Hamilton*, *supra*, 20 Cal.4th at p. 296.) "In other words, *the test asks not whether the juror would have been stricken by one of the parties, but whether the juror's concealment (or nondisclosure) evidences bias*." (*Boyette*, *supra*, 56 Cal.4th at p. 890.)

(*In re Cowan* (2018) 5 Cal.5th 235, 248 [Justice Liu writing for a unanimous court holding an inadvertent omission did not constitute reversible juror misconduct], italics added.)

As this Court has explained, the

> "standard is a pragmatic one, mindful of the 'day-to-day realities of courtroom life' [citation] and of society's strong competing interest in the stability of criminal verdicts." (*Hamilton*, *supra*, 20 Cal.4th at p. 296; see *McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 555 . . . (plur. opn.) ["To invalidate the result of a 3-week trial because of a juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give"].)

(*Manriquez*, *supra*, 5 Cal.5th at p. 798.)

This Court should reject appellant's invitation to overturn the long-established pragmatic standard used to evaluate claims of juror misconduct and to adopt a subjective test that focuses on a defense attorney's personal assessment that the juror might

have been peremptorily challenged, regardless of any evidence of actual or implied bias.

CONCLUSION

Based on the foregoing reasons and those discussed in the respondent's brief, respondent respectfully requests that the judgment against appellant be affirmed.

Dated: November 30, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13 point Century Schoolbook font and contains 3,068 words.

Dated: November 28, 2020

XAVIER BECERRA
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/s/ Douglas L. Wilson
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Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE

Case Name: ***The People of the State of California v. Byron Wilson***

Case No.: **Supreme Court No. S087533**
Los Angeles County Superior Court No. BA164899

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.

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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 November 30, 2020, at Los Angeles, California.

C. Esparza — Declarant

s/ C. Esparza — Signature

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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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11/30/2020

Date

/s/Consuelo Esparza

Signature

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