SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

People of the State of California,

Plaintiff and Respondent,

v.

Ruben Perez Gomez,

Defendant and Appellant

No. S087773

Superior Court No. BA156930



# Appellant's Second Supplemental Opening Brief

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DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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|---|---|
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## Cases



## Federal Constitution



## California Constitution

## Argument

**The admission of evidence regarding the ethnic background of two jail guards Mr. Gomez was charged with assaulting, and the prosecutor's invocation of this evidence as a reason to impose the death penalty, require reversal.**

The prosecutor in this case invoked, as a reason to impose death, the insidious notion that while violence between races or ethnic groups may be natural and understandable, violence against members of one's own ethnic group shows that the perpetrator is more dangerous. (31RT 4571.)

Over objection, the trial court allowed the prosecution to present evidence that two jail guards Mr. Gomez was charged with assaulting were Mexican-American, like Mr. Gomez. (30RT 4449, 4467.) The prosecutor then used that evidence to argue that Mr. Gomez was more dangerous and more worthy of a death sentence. (31RT 4571; see AOB Argument XX & ARB Argument XX.)

Mr. Gomez now submits this supplemental opening brief in order to address the application of *Buck v. Davis* (2017) 137 S.Ct. 759 to his claim. *Buck* makes even more clear that the error in Mr.

Gomez's case requires reversal. Like the expert in *Buck*, the prosecutor here made an argument for death – specifically, an argument about future dangerousness – that hinged on race and ethnicity and relied on deep-seated and invidious stereotypes.

***

In *Buck*, defense counsel presented the testimony of Dr. Walter Quijano, a psychologist who evaluated Buck and testified about his potential to pose a future danger. Though Quijano identified some factors that made Buck less likely to be dangerous in the future, Quijano also testified that Buck's race – Buck is Black – rendered it more likely that he posed a future danger. (*Buck, supra,* 137 S.Ct. at pp. 768-769.)

The Supreme Court held that Buck had demonstrated that counsel was ineffective in presenting Quijano's testimony, and reversed the Fifth Circuit's denial of a certificate of appealability. (*Buck, supra,* 137 S.Ct. at p. 780.) The Court made clear – again – that "[r]elying on race to impose a criminal sanction 'poisons public confidence' in the judicial process" and thus "injures not just the

defendant, but 'the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.'" (*Id.* at p. 778 [citation omitted]; see U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15.)

While the error in this case is not identical to the error in *Buck*, the distinction does not warrant a different result. Though the prosecutor did not argue that Mr. Gomez was likely to be dangerous simply because he is Hispanic, he argued that Mr. Gomez was more dangerous because both he and two jail guards he was accused of assaulting were Hispanic. Of course, predicating an argument for the imposition of the death penalty on the race of any victim or potential future victim is equally unconstitutional. (See generally, *McCleskey v. Kemp* (1987) 481 U.S. 279; *Kelly v. Stone* (9th Cir. 1975) 514 F.2d 18, 19.)[1]

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[1] In *Pena-Rodriguez v. Colorado* (2017) 137 S.Ct. 855, 863, in reversing a state supreme court decision invoking the "no-impeachment" rule to prevent inquiry into bias during jury deliberations, the Supreme Court made clear that Hispanic identity, while it may be referred to as "ethnicity," is subject to the same analysis as race under the Constitution.

More, the prosecutor's argument – like the argument in *Buck* – played on powerful stereotypes relating to race and ethnicity that have no legitimate part in the criminal justice system. The prosecutor argued that Mr. Gomez was more culpable and more dangerous because he attacked not only individuals of a different ethnicity, but individuals who shared his ethnicity. (31RT 4571.) This argument relied upon the pernicious notion that it is natural or understandable to violently attack members of a different racial or ethnic group, while attacking members of one's own group makes one more culpable and dangerous.

In *Johnson v. California,* the Supreme Court held that strict scrutiny applied to the Department of Corrections' policy of segregating new inmates on the basis of race, a policy prison officials attempted to justify by citing the risk of racial violence. (*Johnson v. California* (2005) 543 U.S. 499, 507-508.) The Court not only rejected the notion that interracial violence is something to be accommodated by segregation, but went further, suggesting that the assumption that interracial or interethnic violence is to be expected

harms, rather than calms, relations between races and ethnic groups: "By perpetuating the notion that race matters most, racial segregation of inmates 'may exacerbate the very patterns of [violence that it is] said to counteract.'" [Citations.] (*Ibid.*)

In *Johnson*, in refusing to relax the strict scrutiny applied to racial classifications, the Court invoked its "'unceasing efforts to eradicate racial prejudice from our criminal justice system.'" (*Johnson, supra,* 543 U.S. at p. 512 [citation omitted].) "It must become the heritage of our Nation," the Court recently reiterated, "to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons." (*Pena-Rodriguez, supra,* 137 S.Ct. at p. 867.)

In keeping with these efforts, *Buck* also makes clear that references to race as a basis for a capital sentencing decision cannot be dismissed as "de minimis," as the state has attempted to do here. (*Buck, supra,* 137 S.Ct. at p. 777; see RB 194 [contending that "this point was not a significant aspect of the prosecution's aggravation case"].)

"Some toxins," the Court recognized, "can be deadly in small doses." (*Buck, supra,* 137 S.Ct. at p. 777.) The Supreme Court concluded that the impact of the two references to race during the expert's testimony "cannot be measured simply by how much air time [the matter] received at trial or how many pages it occupies in the record." (*Ibid.*) The Court reached this conclusion even though – unlike in this case – it does not appear that the prosecutor, in argument, specifically invoked the testimony about race as a reason to impose death. (*Id.* at pp. 768-769, 772 [noting prosecutor invoked expert's testimony, though not stating that prosecutor specifically invoked race]; see *Buck v. Stephens* (S.D. Tex. 2014) 2014 U.S. Dist. LEXIS 185635, at * 13 [prosecution did not make a race-based argument in closing].)

And even under the more forgiving standard applicable to ineffective assistance of counsel claims, the Supreme Court concluded that *Buck* had demonstrated prejudice. (*Buck, supra,* 137 S.Ct. at p. 777.)

Here, of course, the burden of proving that the error was harmless beyond a reasonable doubt lies with the state. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The risk that racial prejudice has influenced a capital sentencing proceeding is reviewed with "special seriousness." (*Turner v. Murray* (1986) 476 U.S. 28, 35-36, fn. 8.) As the United States Supreme Court has made clear, "the discretion entrusted to the jury at a capital sentencing hearing" "gives greater opportunity for racial prejudice to operate than is present when the jury is restricted to factfinding." (*Ibid.*)

In the context of this case, where the court overruled counsel's objection to the testimony about ethnic background, communicating that the matter was a proper subject for deliberations; where the prosecutor invoked the testimony in arguing for death; and where the deliberations and verdicts make clear that death was not a foregone conclusion, the state cannot meet this burden. (See AOB 441-442.)

Mr. Gomez respectfully asks this Court to reverse his death sentences.

## Conclusion

For the reasons set forth above, in appellant's opening brief, and in appellant's reply brief, Mr. Gomez respectfully asks this Court to reverse the death sentences.

Dated: May 8, 2017

Lynne S. Coffin
Counsel for Mr. Gomez

Laura S. Kelly
Associate Counsel for Mr. Gomez

**Word count certification**

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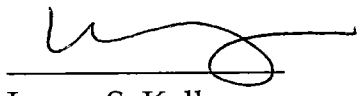

Laura S. Kelly

**Declaration of service**

Re: People v. Ruben Perez Gomez, S087773

On May 9, 2017, I served the within

**Appellant's second supplemental opening brief**

on each of the following, by placing true copies thereof in envelopes addressed respectively as follows, and depositing them in the United States mail at Irvine, California:

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I declare under penalty of perjury that the foregoing is true and correct.

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Laura S. Kelly

**Corrected Declaration of Service**

Re: People v. Ruben Perez Gomez, S087773

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 9, 2017, at Irvine, California

Laura S. Kelly