SUPREME COURT COPY

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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RUBEN P. GOMEZ, Defendant and Appellant.	CAPITAL CASE Case No. S087773

Los Angeles County Superior Court Case No.
BA156930
The Honorable William R. Pounders, Judge

SUPREME COURT
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SECOND SUPPLEMENTAL RESPONDENT'S BRIEF

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ARGUMENT

THE TRIAL COURT PROPERLY PERMITTED THE PROSECUTION TO INTRODUCE EVIDENCE OF THE RACE OR ETHNICITY OF THE DEPUTIES ASSAULTED BY APPELLANT TO ARGUE THAT APPELLANT'S FUTURE DANGEROUSNESS APPLIED TO ANYONE AT THE PRISON WITHOUT REGARD TO RACE OR ETHNICITY

Appellant's twentieth claim on appeal is that "the prosecutor's elicitation, and the trial court's admission, over objection, of evidence regarding the ethnic background of two jail officers appellant attacked, evidence which the prosecutor then employed arguing for death, requires reversal." (AOB 434-442.) In the respondent's brief, respondent argued that appellant's claim is forfeited, fails on the merits, and any error was harmless. (RB 190-194.) In his second supplemental opening brief, appellant asserts this claim is supported by the United State Supreme Court opinion in *Buck v. Davis* (2017) 137 S.Ct. 759. (2SOB 1-7.) However, as explained below, *Buck* did not substantially change the relevant law, and the holding of that case does not support appellant's claim on appeal.

A. Introduction

Appellant's claim fails on the merits because the prosecution properly elicited, and the court properly admitted, the deputies' ethnicity during the penalty phase because it was relevant to appellant's future dangerousness. In this context, the prosecutor properly argued that appellant's violence against two sheriff's deputies while in custody was "not the result of a racial or ethnic conduct" and that race "had nothing to do with" appellant's attacks against the three deputies while in custody. Thus, the prosecutor merely argued that appellant was dangerous and would attack jail staff and inmates without regard to their race or ethnicity.

In his second supplemental opening brief, appellant asserts that his claim of constitutional error is supported by the recent United States

Supreme Court opinion in *Buck*. (2SOB 1-7.) Respondent disagrees. *Buck* only reiterated the firmly established prohibition against the admission of evidence or argument, at the penalty phase of a capital trial, that persons of a particular race or ethnicity are inherently more dangerous or likely to commit violence in the future. The case was before the Court due to unusual circumstances where the defense, rather than the prosecution, introduced an expert's testimony and report stating that minorities, Hispanics, and Black people, like Buck, were overrepresented in the criminal justice system. In five other cases where the same expert's testimony was introduced by the prosecution, the state of Texas conceded error, but maintained Buck was not entitled to relief because the expert was called by the defense. Under these circumstances, the Court found that Buck's trial counsel rendered a prejudicial deficient performance, even thought the expert opined that Buck was unlikely to commit crimes in the future.

B. *Buck v. Davis*

Buck shot and killed his former girlfriend and her friend. He also shot his sister-in-law, but she survived. Buck was convicted of capital murder. During the penalty phase, under Texas law, the jury had to determine whether Buck was likely to commit acts of violence in the future, i.e. his "future dangerousness." The death penalty could be imposed if the jury "found—unanimously and beyond a reasonable doubt— 'a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.'" If this question was answered in the affirmative, then the jury had to determine whether there were mitigating factors nevertheless warranting a sentence of life in prison rather than the death penalty. (*Buck*, *supra*, 137 S.Ct. at p. 768.)

During the penalty phase, in order to prove Buck's future dangerousness, the prosecution relied on the facts of Buck's crimes, his

lack of remorse, his history of domestic violence, and his prior convictions. In addition to calling Buck's father and stepmother, defense counsel called two experts who both opined that Buck was unlikely to be a danger if he were sentenced to life in prison. (*Buck*, *supra*, 137 S.Ct. at p. 768.)

One of these experts, Dr. Walter Quijano, was appointed by the presiding judge. Dr. Quijano interviewed Buck prior to trial and wrote a report. In forming his opinion that Buck was unlikely to engage in future violence, Dr. Quijano relied, in part, on seven statistical factors. "Race" was one of the factors. The report stated: "'4. **Race**. Black: Increased probability. There is an over-representation of Blacks among violent offenders.'" Defense counsel received a copy of the report prior to trial. Defense counsel called Dr. Quijano at trial and had the report placed into evidence. During his testimony, Dr. Quijano identified race as a factor known to predict future dangerousness, and identified minorities, Hispanics, and Black people as being overrepresented in the criminal justice system. During deliberations, which lasted two days, the jury asked to see the defense experts' reports. After completing deliberations, the jury returned a sentence of death. The Supreme Court found that Buck's defense counsel had rendered prejudicial ineffective assistance by calling Dr. Quijano as a witness, specifically asking about race, and admitting the report into evidence. (*Buck*, *supra*, 137 S.Ct. at pp. 768-769, 775-777.)

C. *Buck* does not Support or Strengthen Appellant's Contention

The opinion in *Buck* does not strengthen appellant's contention because it did not change the legal landscape and involved a distinct issue from the one herein. *Buck* addressed a discrete situation: The use of a defendant's race as a factor favoring the death penalty. That did not happen in the instant case. As argued in the respondent's brief, the prosecution did not ask the jury to consider appellant's race to determine the penalty. Thus,

this case did not involve "a disturbing departure from the basic premise that our criminal law punishes people for what they do, not who they are." (*Buck*, *supra*, 137 S.Ct. at p. 778.) Rather, the prosecution asked the jury to impose the death penalty because appellant was dangerous as evidenced by his attacks on guards and another inmate. In *Buck*, the jury was provided expert medical evidence that in no uncertain terms stated that Black people are more likely to commit acts of violence than people of other races. In the instant case, the prosecutor did not in any way invoke the "powerful racial stereotype" that Black men, or other minorities, are more prone to violence.

In asking about the ethnicity of two prison guards appellant attacked, the prosecution sought to establish that appellant's violent actions in custody had nothing to do with race, and therefore no prison guards were safe. The prosecutor told the jury: "We've shown this man's history of past violence, and we've shown that this man's conduct while in custody is not the result of a racial or ethnic conduct" because the victims' race or ethnicity had "nothing to do with it." (31RT 4571.) This argument did not suggest that people of any particular race are more violent than people of other races, and therefore falls far outside the scope of *Buck*. Rather, the prosecution merely observed that appellant did not select his victims based on race or ethnicity, so there was no reason to think that any of the prison staff or inmates was safer due to their race or ethnicity. This, in turn, was relevant to the question of appellant's future dangerousness and the likelihood he would commit violent crimes if sentenced to life without parole. *Buck* is inapposite because in *Buck* the jury was essentially told that Black people are more violent than other races, and in the instant case the jury was told that race was not a factor in appellant's selection of victims.

Appellant asserts the prosecutor's argument "relied upon the pernicious notion that it is natural or understandable to violently attack

members of a different racial ethnic group, while attacking members of one's own group makes one more culpable and dangerous." (2SOB 4.) Appellant's assertion is flawed because it relies on false assumptions. First, there appears to be no such pernicious notion outside of hate-groups lingering at the margins of society. Second, the prosecution did not rely on any such notion. The prosecution did not assert any kind of moral judgment that attacking a person of a particular race is worse than attacking a person of a different race. Nor did the prosecution assert that attacking a person of the same race or ethnicity is somehow worse or better than attacking a person of a different race or ethnicity. Third, the prosecution only pointed out that appellant did not select his victims based on race or ethnicity, so all of the prison guards and inmates were potentially future targets of appellant's violence. (31RT 4571, 4573-4574.) Thus, unlike in *Buck*, the jury was not told that race is an "immutable characteristic [that] carried with it an increased probability of future violence" or asked to consider expert testimony that "appealed to a powerful racial stereotype" which "might well have been valued by jurors as the opinion of a medical expert bearing the [trial] court's imprimatur." (*Buck*, *supra*, 137 S.Ct. at pp. 765-766.)

In *Buck*, in finding the case involved "extraordinary circumstances" under the Federal Rules of Civil Procedure, Rule 60(b), the Supreme Court reaffirmed established principles involving the seriousness of the use of a defendant's race in the criminal justice system. The Court cited its prior opinion in *Rose v. Mitchell* (1979) 443 U.S. 545, 555 (racial discrimination on selection of grand jury), and reiterated: "'Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.'" Citing *Davis v. Ayala* (2015) 135 S.Ct. 2187, 2208 (peremptory challenges against minority prospective jurors), the Court reiterated: "Relying on race to impose a criminal sanction 'poisons public confidence'

in the judicial process." Again citing *Rose*, the Court stated: "It thus injuries not just the defendant but 'the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of out courts.'" (*Buck*, *supra*, 137 S.Ct. at p. 778.) Nothing in this case violated those basic principles.

CONCLUSION

Accordingly, for the foregoing reasons, and the reasons discussed in the respondent's brief, respondent respectfully requests that appellant's twentieth claim be denied.

Dated: June 8, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached SECOND SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 1,668 words.

Dated: June 8, 2017

XAVIER BECERRA
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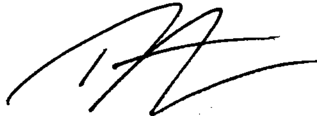

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DECLARATION OF SERVICE

Case Name: **People v. Gomez**

No.: **S087773**

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.

On June 8, 2017, I served the attached **SECOND SUPPLEMENTAL RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On June 8, 2017, I caused original and 8 copies of the **SECOND SUPPLEMENTAL RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by **FedEx, Tracking #8107 8034 0457**.

On June 8, 2017, I caused one electronic copy of the **SECOND SUPPLEMENTAL RESPONDENT'S BRIEF** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

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 June 8, 2017, at Los Angeles, California.

Lily Hood
Declarant

Signature

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