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 Reply Brief

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DEATH PENALTY

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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.

At the penalty phase of Mr. Gomez's trial, the prosecutor elicited the ethnic background of two jail guards Mr. Gomez was charged with assaulting. A court has no discretion to admit such evidence; it is constitutionally irrelevant. The prosecutor then compounded the error, invoking the evidence that these guards were Mexican American in arguing that Mr. Gomez, who is also of Mexican descent, should be put to death.

Respondent contends that it is entirely permissible for a prosecutor to elicit the race or ethnic background of a criminal defendant's victims and then employ that evidence in an argument for death. In support of that contention, respondent makes three flawed assertions.

First, respondent argues that the prosecutor's argument cannot have evoked the pernicious notion that it is natural or understandable to do violence against members of a different racial

or ethnic group, while attacking members of one's own group makes a defendant more culpable or dangerous. That is so, respondent suggests, because "there appears to be no such pernicious notion outside of hate-groups lingering at the margins of society." (SSRB 8.)

Initially, Mr. Gomez takes issue with respondent's assertion that such a view is limited to extremist hate groups. Broadly speaking, the assumption that individuals favor members of their own racial or ethnic group is one that the Supreme Court has identified as having an impact on the criminal justice system.[1]

More specifically, as Mr. Gomez pointed out in his supplemental brief, the United States Supreme Court has had to

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[1] See *Batson v. Kentucky* (1986) 476 U.S. 79, 89 [prosecutors may not peremptorily challenge jurors "*on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant*" (emphasis added)]; compare *id.* at 138 (Rehnquist, C.J., dissenting) ["The use of group affiliations, such as . . . race . . . as a 'proxy' for potential juror partiality, based on the assumption or belief that members of one group are more likely to favor defendants who belong to the same group, has long been accepted as a legitimate basis for the State's exercise of peremptory challenges."]; see also *Powers v. Ohio* (1991) 499 U.S. 400, 424 (Scalia, J., dissenting); AOB 437-438, fn. 145; cf. *People v. Bain* (1971) 5 Cal.3d 839, 846-849 [prosecutor erred when he argued that, as a Black person, he would not prosecute the defendant, who was Black, if he thought he was innocent].

make clear that interracial violence is not something to be tolerated by accommodation, and that such accommodation perpetuates the notion that "race matters most." (*Johnson v. California* (2005) 543 U.S. 499, 507-508; see SSAOB 4-5.)

In any event, even if the notion that interracial violence is something to be expected, while intraracial violence makes the perpetrator more dangerous were limited to hate groups on society's fringes, it is unclear how that would support respondent's argument or distinguish the issue here from that in *Buck v. Davis* (2017) 137 S.Ct. 759. Surely, a race-based argument is not any more permissible because it evokes an idea espoused only by an overtly racist fringe. In any case, the racist stereotype at issue in *Buck* – that Black people are more dangerous – surely is a view held only by overt racists. (*Id.* at 776 [opinion that Black people are more dangerous "coincided precisely with a particularly noxious strain of racial prejudice . . . ."].) The perniciousness of the stereotype, of course, did nothing to render the evidence constitutional in *Buck*. (*Ibid.*) Respondent's argument thus fails to distinguish *Buck* in any meaningful way.

Second, respondent contends that the prosecutor "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." (SSRB 8.) That is beside the point, as the Supreme Court has made clear.

Justice Scalia, dissenting, made an argument similar to respondent's in *Powers v. Ohio, supra,* 399 U.S. 400, a *Batson* case. His dissent attempted to distinguish the categorical exclusion of a group from jury service – which, he said, stigmatizes the group as incompetent or untrustworthy – from peremptory strikes on the basis of group membership – which, he said, imply nothing more than the undeniable reality that people are more sympathetic to members of their own racial group. (*Id.* at 424.) The Court, however, had already rejected this view in *Batson*, and implicitly rejected it again in *Powers.* (See *Batson, supra,* 476 U.S. at 89; *id.* at 138 (Rehnquist, C.J., dissenting).) These cases thus make clear that racial classifications – particularly the assumption that individuals will favor members of their own racial group – are constitutionally

impermissible even if they do not stigmatize any particular racial group.

In any event, in *Buck*, it does not appear that the witness who opined that Buck posed a greater future danger because he was Black attached any moral judgment to that claim. (*Buck, supra,* 137 S.Ct. at 769 [witness testified that it is a "sad commentary" that "Hispanics and black people[] are overrepresented in the Criminal Justice System" and that race is a factor that predicts future dangerousness, and prosecutor, in summation, invoked future dangerousness testimony without apparent moral judgment].) Respondent thus again fails to distinguish *Buck*.

Respondent's attempt to justify the prosecutor's argument loses sight of the context in which it was made: The prosecutor urged jurors to make the ultimate moral judgment that Mr. Gomez deserved to die, and in so urging, the prosecutor invoked the shared ethnicity of Mr. Gomez and two jail guards he was accused of attacking. In this context, no interpretation of the prosecutor's argument renders it permissible.

Third, respondent contends, "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." (SSRB 8.) But as Mr. Gomez pointed out in appellant's opening and reply briefs, the law provides that racial animus – not the lack thereof – may be aggravating and may support a finding of future dangerousness. (See, e.g., *Barclay v. Florida* (1983) 463 U.S. 939, 949 & fn. 7; see AOB 436, ARB 151.) The fact that violence does *not* spring from racial animus, therefore, can hardly be aggravating. In attempting to argue that the fact that Mr. Gomez does not harbor racial animus is aggravating, respondent has turned the law regarding evidence of racial animus on its head.

Respondent concludes by asserting that nothing in this case violated the basic principles that discrimination on the basis of race is especially odious in the criminal justice system or that relying on race to impose punishment "'poisons public confidence'" in the judicial process. (SSRB 8-9, citing *Rose v. Mitchell* (1979) 443 U.S. 545, and *Davis v. Ayala* (2015) 135 S.Ct. 2187.)

Respondent is wrong, and it is unclear how *Rose v. Mitchell* and *Davis v. Ayala* and the principles they stand for assist respondent's argument. With the court's blessing, the prosecutor injected evidence of race into a case in which it had no legitimate relevance, and then marshalled that evidence in support of death. Respondent's argument appears to boil down to the suggestion that as long as a prosecutor does not specifically argue that a defendant is more dangerous because he is Black, or Mexican, a race-based argument will pass constitutional muster. That is incorrect. Neither subtler forms of racial prejudice, nor any irrelevant racial classifications, can constitutionally play a role in the sentencing process. (AOB 435-436, 438-439.)

Ayala, in particular, supports Mr. Gomez's argument, not respondent's. *Ayala* addressed discrimination in the exercise of peremptory challenges (though *Ayala* involved, specifically, the exclusion of the defendant's attorney from a portion of a *Batson* hearing). (*Ayala, supra,* 135 S.Ct. at 2193, 2208.) As noted above, the *Batson* line of cases aims to eliminate not just overt discrimination

(i.e., exercising a peremptory challenge against a juror because the attorney exercising the challenge bears animus against a racial group the juror belongs to), but also a subtler form of discrimination: the assumption that jurors will be partial to defendants who share their race or ethnicity. (*Batson, supra,* 476 U.S. at 89.) That is the same type of insidious notion evoked by the prosecutor's argument here.

As Justice Liu recently noted in his concurring opinion in *People v. Gutierrez,* even a finding that a prosecutor probably intentionally discriminated on the basis of race in jury selection "should not brand the prosecutor a . . . bigot." (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1183 (Liu, J. concurring).) Here, likewise, Mr. Gomez does not seek to brand the prosecutor a racist. Indeed, with respect to the claim of error in summation, the prosecutor's good or bad faith is irrelevant. (AOB 439-440; see *People v. Centeno* (2014) 60 Cal.4th 659, 666-667.) The question is simply whether an irrelevant racial classification has been brought to bear on the sentencing decision. It is clear that it has.

Finally, Mr. Gomez notes that respondent has not reiterated its claim that the error was harmless because it was "completely benign" and "not a significant aspect of the prosecution's aggravation case." (RB 194.) In light of the reversal in *Buck* – which applied a more forgiving harmless error standard than the one applicable here and made clear that "toxins" such as race-based arguments can be "deadly in small doses" (*Buck, supra,* at 137 S.Ct. at 776-777) – a claim of harmlessness could not succeed. (See SSAOB 6-7.) That is all the more the case because the deliberations and verdicts in this case make clear that death was not a foregone conclusion. (See AOB 441-442.)

Conclusion

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

Dated: August 29, 2017

Lynne S. Coffin
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Mr. Gomez

Word count certification

I, Laura S. Kelly, associate counsel for Ruben Perez Gomez, certify pursuant to the California Rules of Court that the word count for this document is 1,684 words, excluding the cover, the tables, and this certificate. I prepared this document on my computer using Microsoft Word, and this is the word count generated by that program for this document.

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Laura S. Kelly

Declaration of Service

Re: People v. Ruben Perez Gomez, S087773

On August 29, 2017, I served the within

Appellant's second supplemental reply 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 have served the Attorney General, CAP-SF, and lead counsel Lynne S. Coffin through the TrueFiling system, as reflected in the proof of service generated by TrueFiling.

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

Executed on August 29, 2017, at Irvine, California

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Laura S. Kelly