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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. ANTOLIN GARCIA-TORRES, Defendant.	Criminal Case No. 213515 PEOPLE'S RESPONSE TO DEFENDANT'S MOTIONS *IN LIMINE* FILED 9/19/2016 1) Motion to Strike the Death Penalty 2) Motion for Fair Jury Selection 3) Motion to Prohibit Victim Impact Evidence 4) Motion to Exclude PC §190.3 Evidence

This single response addresses all four of the defendant's motions filed with this Court on September 19, 2016.

A. Defendant's Motion to Strike the Death Penalty

The defendant moves this Court to strike the death penalty allegation. He frames his argument with citations to dissents in *Glossip v. Gross* (2015) 135 S.Ct. 2726 (Breyer dissenting) and *Brooks v. Alabama* (2016) 136 S.Ct. 708 (Mem denying cert. and stay, Breyer dissenting). The dissents in these cases do not support his argument; nor do the holdings. However, the California Supreme Court has considered and rejected defendant's specific claims concerning the constitutionality of California's death penalty scheme. This Court is, of course, bound by such decisions, not dissents that express a desire for the Supreme Court to take up a question.

1. California's death penalty scheme has been repeatedly ruled constitutional

The defendant argues that the essential components of a constitutional death penalty scheme include (1) that the pool of death eligible defendants is narrowed in an objective way, and (2) that every eligible defendant is entitled to individualized sentencing in which his or her character and background are put into evidence, giving the jury unfettered discretion to exercise mercy. With respect to the first prong it has recently been said that, "California law adequately narrows the class of persons eligible for the death penalty." *People v. Clark* (2016) 63 Cal.4th 522, 643 (citing *People v. Ramos* (2004) 34 Cal.4th 494, 532-33); *see also People v. Duff* (2014) 58 Cal.4th 527, 568 ("California's special circumstances (see § 190.2) adequately narrow the class of murderers eligible for the death penalty").

On the second prong that defendant challenges, California law adequately provides individualized sentencing that defendant says is required.

> [E]vidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

PC §190.3. It has long been determined that this procedure ensures that every defendant will receive individualized sentencing. E.g. *People v. Lucas* (1995) 12 Cal.4th 415, 498 (noting that "this state's capital sentencing scheme requires the jury to make an assessment of the defendant's background and culpability and to make an individualized determination of the appropriate punishment.").

Defendant's motion should be denied.

2. Defendant's *Jones* Claim is Not Ripe

The defendant also makes a so-called *Jones* claim; that is, he argues that "the delay in implementing the death penalty after a jury has returned a death verdict render[s] its implementation arbitrary." [Def. Mot. to Strike Death Penalty at 6.] This argument is premature.

Defendant has not suffered a death judgment, much less a single day of his alleged unconstitutional delay from such judgment to execution. As a result, he can claim no arbitrariness. In any reading of a *Jones* claim, it deals with delays after judgment. The defendant simply cannot know what kind of delays await him at this time, and it would be rank speculation by this Court to presume what the length of delay will look like in several years, assuming he is sentenced to death in the first place.

Additionally, this claim was rejected by *People v. Seumanu* (2015) 61 Cal.4th 1293 only one year ago. Acknowledging the result, defendant states that he "seeks an evidentiary hearing to establish the things that were missing from the *Seumanu* trial court record." [Def. Mot. to Strike Death Penalty at 6.] However, the defendant makes no argument justifying the larding of the record with studies, expert opinions, facts and data to establish an alleged fact prematurely. It is hardly a wise use of this Court's resources, and defendant cites to no authority that establishes he has the right to the answer to this question prior to a death judgement.

Defendant's request should be denied. To grant it now would necessitate a lengthy hearing in order to determine whether the delays in the other cases were caused by the State or dilatory tactics by the defendants in those cases. It would be a novel argument indeed, to spare defendant the ultimate punishment based upon the dilatory tactics and frivolous claims of defendants in other cases.

B. Defendant's Motion for "Fair Jury Selection Procedures"

1. The Jury Commissioner will not call prospective jurors from south county

The defendant asks this Court to specifically exclude "south county" jurors from the selection pool. While the defense does not define "south county," the People invite this Court to take judicial notice under EC §452(h) that the Santa Clara County Jury Commissioner generally asks prospective jurors to report to the court nearest their home zip code.[1/] Accordingly, in the ordinary course prospective jurors from Coyote, Gilroy, Morgan Hill, and San Martin will report

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[1/] As this Court has indicated it has already spoken to the Jury Commissioner, the Court may already have this information.

to the Morgan Hill courthouse, not the Hall of Justice. Since jurors from those cities are pre-allocated to specific locations that do not include the Hall of Justice, this Court need not order the Jury Commissioner to avoid sending a summons to prospective jurors in these cities.

The People are informed that in select instances the Jury Commissioner will change its ordinary courthouse assignment to meet specific needs; however, there is no current reason to expect that the Jury Commissioner will do so in this case and therefore defendant's request is moot. Regardless, the defendant is not legally entitled to his request and he cites to no compelling reason that biased jurors cannot be weeded out in the normal process of jury selection.

There is no debate that unqualified jurors will not serve. Summoning or declining to summon "south county" jurors does not change this fact. While the defendant does not state it, his real concern is whether biased jurors will taint the jury pool, however, that is the subject of his sequestered voir dire request which is discussed below. Given the total lack of authority for his proposition and the fact that he his asking that qualified jurors be deprived of the right and obligation to serve, his motion should be denied.

2a. The court should remove from venire all conscientious objectors

Citing *People v. Mills* (2010) 48 Cal.4th 158, defendant concedes that "death qualifying" a jury is constitutionally permissible. [Def. Mot. for Fair Jury Selection Procedures at 3.] Indeed, in *Mills* death qualifying a jury was described as having "long been a part of capital trials in California." *Id.* at 171. However, in virtually his very next breath defendant argues that "removal of jurors based on their opposition to the death penalty results in a jury that is not drawn from a fair cross-section of the community."[2/] *Ibid.* Yet the California Supreme Court, in *Mills* itself, stressed that "death penalty opponents, 'or for that matter any other group defined solely in terms of shared attitudes that render members of the group unable to serve as jurors in a particular case, may be excluded from jury service without contravening any of the basic objectives of the fair-cross-section requirement.' It is also well settled that this exclusion does not violate

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[2/] Neither is defendant's request to exclude the entirety of south county jurors, however the defense may define "south county."

defendant's right to an impartial jury." *Id.* at 172 (quoting *Lockhart v. McCree* (1986) 476 U.S. 162, 176-177).

Each side is entitled to a jury that will fairly apply the law, which includes imposing the death penalty in an appropriate case. The defendant provides no compelling argument that would permit this Court to deviate from the command of the California Supreme Court.

2b. The court is not permitted to impanel separate juries for guilt and penalty

Defendant also asks this Court for a separate jury to try his penalty phase. This would be contrary to state law and is not mandated by the Constitution. *Mills, supra,* 48 Cal.4th at 172. "Section 190.4, subdivision (c), expresses the Legislature's long-standing preference for a single jury to decide both guilt and penalty, and this preference does not violate a capital defendant's federal or state rights to due process, to an impartial jury, or to a reliable death judgment." *People v. Davis* (2009) 46 Cal.4th 539, 626. Defendant's request must be denied.

3. Defendant is not entitled to individual sequestered voir dire

Defendant additionally asks for sequestered voir dire. "[S]ection 223[3/] vests the trial court with discretion to determine the advisability or practicability of conducting voir dire in the presence of the other jurors." *Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1184. "Group voir dire may be considered 'impracticable' where it has resulted in 'actual, rather than merely potential, bias.'" *People v. Jackson* (2016) 1 Cal.5th 269, 357 (quoting *People v. Taylor* (2010) 48 Cal.4th 574, 606). "[T]he trial court retains the discretion to conduct sequestered voir dire if it concludes that collective voir dire would not be practicable." *People v. Thomas* (2012) 53 Cal.4th 771, 789.

In *People v. Bryant* (2014) 60 Cal.4th 335, the defendant requested individual sequestered voir dire, citing pretrial publicity. The California Supreme Court affirmed the trial court's denial of the defendant's motion, rejecting the argument that "prospective jurors could be influenced by the questions posed to and answers given by others" as "pure speculation." *Id.* at 397-98. Where,

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[3/] "Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases." Code Civ. Proc. §223.

as here, the "defendant's motion was a generic, boilerplate one that made no attempt to show specifically why open court voir dire in this case was not practicable," the court properly exercises its discretion in denying the motion. *People v. Capistrano* (2014) 59 Cal.4th 830, 863.

The defendant will, of course, cite to Dr. Bronson's survey and testimony. The People ask this Court to take Dr. Bronson's survey with the same amount of concern that Dr. Bronson conveyed when it was pointed out to him that his survey contained obvious, and basic, math errors. Dr. Bronson did not have the underlying data in order to check the accuracy of the rest of the survey results and made no effort, other than to assume the identified errors were the only ones, to re-evaluate his conclusions. If the survey company cannot do basic addition, there is little reason to credit the more complicated process of accumulating the survey answers and then cross-tabulating them to give meaningful results.

4. Defendant's request for extensive voir dire

The defendant has requested extensive voir dire. The People have already briefed this court with respect to this particular issue. Please refer to the People's filing of September 16, 2016, entitled People's Proposed Jury Questionnaire.

5. The Court has no authority to order that jurors be paid minimum wage

The defendant requests that this Court order that jurors be paid at least minimum wage for their jury service. It is unclear who would be bound by this proposed order. Is defendant asking the court to order jurors' employers, whether public or private, to pay their employees minimum wage for their jury service? If the juror is unemployed, who would be ordered to pay? Defendant does not say. Then there is the question of which minimum wage, the City of San Jose, state or federal?

In his motion, defendant cites no authority, and the People are aware of none, that permits a trial court to authorize more payment than the command of the Legislature. Section 215 of the Code of Civil Procedure provides that, except for government employees, jurors are entitled to fifteen dollars a day and to thirty-four cents per mile traveled to court. The People are aware of no authority deviating from the juror compensation scheme outlined in CCP §215.

While the juror fee is outdated, it is the Legislature's command. Defendant has cited no case for the concept that he is constitutionally entitled to the extremely few jurors who would be able to serve if paid minimum wage, but not able to serve without it. In fact, the defendant makes no effort to establish that such an order would achieve its stated objective. Minimum wage in San Jose is $10.30 per hour.[4/] Given the cost of living in Santa Clara County, it is rather doubtful that minimum wage would make any difference in more than a handful of persons' ability to serve, if any.

C. Defendant's Motion to Prohibit Admission of Victim-Impact Evidence

First the defendant seeks to prohibit victim impact testimony; however, he appropriately acknowledges not only that California law permits it, but the Constitution does as well. As a result, his request on this score should be denied.

Next, the defendant argues that victim impact testimony for the 190.3(b) crimes should not be permitted. Defendant again appropriately acknowledges that it is permitted by statute and controlling case authority. Evidence and prosecutorial argument regarding the impact of a defendant's factor (b) crimes on the victims of that criminal activity is "relevant to the jury's penalty determination, subject to the same limitations on its admissibility that govern victim impact evidence as it relates to the capital crime." *People v. Johnson* (2016) 62 Cal.4th 600, 648.

Finally, the defendant requests an Evidence Code section 402 hearing regarding the victim impact testimony itself. Pursuant to the notice provisions of PC §190.3, the People advised the defendant that we intend to offer victim impact evidence should the trial reach a penalty phase.[5/] The purpose of providing notice of evidence in aggravation "is to advise the accused of the evidence against him so that he may have a reasonable opportunity to prepare a defense at the penalty stage." *People v. Whalen* (2013) 56 Cal.4th 1, 73, *disapproved on other grounds, People*

[4/] If a typical workday for a juror was 9 to noon, and 1:30 to 4:30 (with Fridays off), each juror would receive a grand total of $61.80 per day which comes to an extra $187.20 per week.

[5/] Filing the notice with the Court is not mandated. The People have provided the defendant with additional written notice as well, but it should be noted that written notice, while preferable, is not required. *People v. Wilson* (2005) 36 Cal.4th 309, 349.

v. Romero & Self (2015) 62 Cal.4th 1, 44 fn. 17. Defendant is "not entitled to a summation of the witnesses' expected testimony" [*People v. Williams* (2013) 56 Cal.4th 165, 196] yet that is exactly what he asks of this Court, and more.

Perhaps aware of the foregoing, defendant explains that he "is asking for a section 402 hearing regarding victim-impact evidence because it can be so powerful and because it may be difficult to control." [Def. Mot. to Prohibit Admission of Victim-Impact Evidence at 5.] Put in more plain terms, defendant is asking this Court to preview the testimony of Sierra's mother, father, sister, and others who have suffered from her loss before a jury has been impaneled. The defendant seeks the same from the women he attacked in the Safeway parking lots. Section 402 hearings are to assist this Court in determining admissible evidence. They are not depositions; nor are they previews for either side.

Defendant makes no effort to establish that, without a full preview of the testimony, the Court will not be able to fulfill its gatekeeping function regarding admission of evidence. He says that such evidence is difficult to control. Even if true, and we only have the defendant's word on this alleged fact, it will hardly be easier to control witnesses whose loved ones have been murdered a second time around before the jury. There is no known dispute as to what the law permits in this area, and even if there were, the defendant could bring the motion and the Court would rule. Whatever that ruling, the People will follow it.

What the law does allow is quite broad. Indeed, the very concept of prejudicial victim impact evidence is something of a misnomer considering what is permitted. The California Supreme Court has found that victim impact evidence was not unduly prejudicial where "the testimony painted a picture of 'the complete devastation of two families.'" *People v. Simon* (2016) 1 Cal.5th 98, 140. *See also People v. Kopatz* (2015), 61 Cal.4th 62, 91 (victim impact evidence not unduly prejudicial where "the family members' testimony properly explained the nature of their relationship with the victims, the immediate effects of the murders, and the residual and continuing impact of the murder on their lives"); *People v. Pearson* (2013) 56 Cal.4th 393, 464-467 (victim impact evidence not unduly prejudicial or excessive where thirteen witnesses provided victim

impact testimony); *People v. Garcia* (2011) 52 Cal.4th 706, 751 ("The People are entitled to present a complete life history of the murder victim from early childhood to death. Such evidence, which typically comes from those who loved the murder victim, shows how they missed having that person in their lives.") (citations and quotations omitted); *People v. Chism* (2014), 58 Cal.4th 1266, 1328 ("Evidence presented at the penalty phase need not be devoid of emotional content").

The defendant makes no effort to articulate topics of concern, but instead asks for effectively a pre-trial deposition of sorts. Given that there is no federal constitutional right to such a preview, the California Constitution should control. Article I, Section 28(b) grants the victims and their families the right, among other things, "to refuse an interview, deposition, or discovery request by the defendant, the defendant's attorney, or any other person action on behalf of the defendant." Ca. Const., Art. I, section 28(b)(5). No case cited by the defense obligates the Court to conduct such a hearing and in fact the California Supreme Court has denied that the defendant has such a right. *People v. Montes* (2014) 58 Cal.4th 809, 877.

This Court can preview any photographs or other exhibits that may be used at a penalty phase. The Court can order the victim impact witnesses to, for example, not offer their opinion about the defendant or the proper verdict. *See, e.g., People v. Cage* (2015) 62 Cal.4th 256. It seems that what defendant hopes to manage is the range of questions this prosecutor will ask. An EC § 402 hearing is not necessary for that. The People are aware of the range of permissible victim impact evidence and should counsel have any concerns they can make a specific motion regarding a specific topic or take it on a question and answer basis.

The defendant's motion should be denied.

D. Defendant's Motion for a *Phillips* hearing

Phillips hearings are advisable in a very narrow set of circumstances, none of which are present here. Since there is substantial evidence of the defendant's PC §190.3(b) crimes, conducting a *Phillips* hearing with sworn testimony is unnecessary.

"[T]he purpose of a *Phillips* hearing is to determine whether the prosecution has substantial evidence to support the other-crimes evidence it intends to introduce in aggravation." *People v. Whisenhunt* (2008) 44 Cal.4th 174, 225. At a *Phillips* hearing, the prosecution need not prove the

190.3(b) other-crimes evidence beyond a reasonable doubt; "evidence that would allow a rational trier of fact to make a determination beyond a reasonable doubt as to [such] criminal activity" is sufficient. *People v. Ochoa* (1998) 19 Cal.4th 353, 449. "[T]his preliminary inquiry is discretionary and, if held, need not be an evidentiary hearing. If the court does elect, in its discretion, to conduct such an inquiry it may be based on an offer of proof." *People v. Jones* (2011) 51 Cal.4th 346, 380.

Here, the People's offer of proof can be found in the court files of defendant's prior criminal conduct of violence and are discussed in more detail below.

1. Defendant's Battery of Jeff Dye - June 16, 2010

On June 16, 2010, defendant punched Mr. Dye in the face. Bloodied and vomiting, Mr. Dye was taken to the hospital. Mr. Dye, as well as others, will testify to these facts. Since battery is plainly a crime involving the use, attempted use, or threatened use of violence, it is admissible as 190.3 factor (b) evidence. From this obvious quantum of evidence, a rational jury could conclude beyond a reasonable doubt that defendant punched Mr. Dye. Accordingly, there is no need to conduct a further hearing.

It seems that the defendant suggests there is some question regarding the available evidence or indeed whether a crime was even committed because of the case being dismissed. On December 6, 2010, the People were then unable to secure the attendance of the victim, Mr. Dye. He is now, however, under subpoena and available for factor (b) testimony.

The People ask this Court to take judicial notice of its own court file which contains the reports to support the above facts, specifically docket number F1034542.

2. Defendant's Resisting Arrest - May 29, 2009

On May 29, 2009, Morgan Hill police observed a known felon run into a residence where defendant was then residing. Pursuing the felon led officers inside the residence. When Officers Dini and Thomas encountered the defendant, he said; "Get out of my house you fucking pigs." As defendant was yelling, he postured to fight. Delaying the officers from capturing a known fleeing felon, the officers arrested the defendant, who not only continued to physically resist the officers, but also continued to verbally berate them by calling them "fucking pigs." The defendant

pled guilty to this crime, specifically Penal Code section 148(a)(1).

In *People v. Lightsey* (2012) 54 Cal.4th 668, the California Supreme Court concluded that "resisting or obstructing a law enforcement officer in the performance of his duties, in violation of section 148, with an implied threat of force or violence [is] admissible under section 190.3, factor (b)." *Id.* at 727-728. The California Supreme Court agreed with the trial court that such evidence presents a question for the jury, not the court. *Id.* at 728 (noting that "the jury could find the incident constituted obstructing the officer during his lawful duties, and defendant's actions carried an implied threat of violence").

Accordingly, it is up to the jury to decide whether defendant's actions used, or carried an implied threat of, violence. Given that two police officers will testify that the defendant took a fighting stance and physically resisted their efforts to arrest him, there is ample evidence from which a jury could so find. That defendant plead guilty to the crime is conclusive evidence that such a crime occurred and is also admissible. *See* EC § 452.5.

The People ask this Court to take judicial notice of its own court file which contains the reports to support the above facts, specifically docket number FF930239.

3. The PC § 261.5 charge

The People have not provided notice of, and do not plan to offer, the PC § 261.5 conduct under PC § 190.3(b). As of now, the People have no evidence that the defendant's sexual intercourse with the seventeen-year-old victim was accomplished by the use or attempted use of force or violence or the express or implied threat to use force or violence under PC § 190.3(b). Should such evidence come to the attention of the People, we will notify the defendant and offer the conduct as permitted in *People v. Jennings* (1988) 46 Cal.3d 963, 984.

4. *People v. Jones* (2011) 51 Cal.4th 346, 380

To illustrate that an oral proffer with no testimony is sufficient, even if the evidence not overly compelling, this Court could look to the proffer approved in *Jones, supra*, 51 Cal.4th at 380. The prosecutor planned to present evidence in aggravation of the defendant's other criminal activity involving force or violence. *Id.* at 378. Just as the defendant in the present case argues a *Phillips* hearing is advisable because the People dismissed the PC §243(d) charge against him, the

defendant in *Jones* stated that the robbery charges against him had been dismissed (on a conceded 995), and demanded a *Phillips* hearing to determine whether there was sufficient evidence to support a robbery. *Id.* The prosecutor argued an evidentiary hearing was not required, and simply made an offer of proof, advising the trial court that (1) one of three eyewitnesses to the robbery selected defendant's photograph out of a lineup, with only 50 percent certainty; (2) there were no other eyewitness identifications; (3) defendant and another person were apprehended in a nearby residence within a very short period of time of the robbery; and that (4) stolen property was found in that residence. *Id.* at 379. Despite the circumstantial and exceedingly brief nature of the prosecutor's offer or proof, the trial court ruled that the prosecutor's "offer of proof was a sufficient inquiry into the sufficiency of the evidence, and that an evidentiary hearing was not required." *Id.*

The Supreme Court in *Jones* ruled the proffer was sufficient. Given the People's offer of proof here, which exceeds the proffer in *Jones* in both factual detail and quantum of evidence, the defendant's request to hold a *Phillips* hearing should be denied.

DATED: September 30, 2016

Respectfully submitted,

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