SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA	)	Supreme Court Case No. S077524
Respondent	)	Los Angles County Superior Court Case No. BA 081 564
v.	)	CAPITAL CASE
MAGDALENO SALAZAR	)	
Appellant	)	

SUPREME COURT
FILED

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DEATH PENALTY

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TABLE OF CONTENTS

INTRODUCTION 1

VI. CHARGING APPELLANT WITH CAPITAL MURDER WHEN THE SOLE SPECIAL CIRCUMSTANCE WAS A JUVENILE CONVICTION, IN WHICH APPELLANT WAS NOT THE SHOOTER, WAS FEDERAL CONSTITUTIONAL ERROR 2

E. The Use of Juvenile Conduct As a Basis for a Death Sentence Violates the Federal Constitution. 4

F. The State Cannot Rely on Juvenile Conduct to Support a Death or Life Without Parole Sentence 7

G. Appellant's Death Sentence Is Unconstitutional Because Appellant's Purported Death-Worthiness Was Based on Juvenile Conduct 9

H. The Juvenile Conviction Was Improperly Weighed Twice in Aggravation 11

X. DEATH QUALIFICATION JURY SELECTION IS UNCONSTITUTIONAL IN GENERAL AND AS APPLIED IN THIS CASE 13

A. Background 14

B. Death Qualification Voir Dire Violated Appellant's Constitutional Rights 20

C. Appellant's Convictions and Death Sentence Should be Reversed 26

XI. THE TRIAL COURT ERRED BY PROHIBITING TRIAL COUNSEL FROM ELICITING INFORMATION REGARDING CO-DEFENDANT ENRIQUE ECHEVERRIA'S CONVICTION FOR MANSLAUGHTER . . . 28

A. Background. 29

B. The Trial Court Violated Appellant's Rights to Present a Defense and to Due Process 30

C. The Trial Court Violated Appellant's Right to Present a Case in Mitigation and to Reliable Sentencing . . 32

XII. THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST TO INSTRUCT THE JURY ON ACCESSORY AFTER-THE-FACT LIABILITY 34

A. Background 34

B. The Trial Court Erred by Refusing to Give the Accessory After-the-Fact Instruction 35

C. The Trial Court Error Was Prejudicial 39

XIII. THE TRIAL COURT IMPERMISSIBLY LIMITED THE TESTIMONY OF APPELLANT'S WITNESSES 40

A. Background 41

B. The Trial Court's Oral Ruling Impermissibly Limited the Scope of Mitigation That Appellant Could Develop through the Penalty Phase Witnesses 43

C. The Trial Court's Limitation on the Scope of Mitigating Evidence Requires Reversal Without an Inquiry into Prejudice 45

XIV. THE PROSECUTOR COMMITTED MISCONDUCT BY MISSTATING THE LAW GIVEN THE MORAL AND NORMATIVE NATURE OF DEATH PENALTY DETERMINATIONS IN CALIFORNIA 48

A. Background. 48

1. The Prosecutor's Argument and Instructions 48

2. The Characterization of the Penalty Phase Decision Process 50

B. The Prosecutor's Argument Was Contrary to Law 52

C. The Prosecutor's Argument Misled the Jury Regarding the Consideration of Mitigating Evidence 52

D. The Prosecutorial Misconduct Was Prejudicial 54

XV. THE CUMULATIVE ERRORS WARRANT RELIEF 55

TABLE OF AUTHORITIES

FEDERAL CASES

Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007) 45, 47

Alcala v. Woodford, 334 F.3d 862 (9th Cir. 2003) 56

Apprendi v. New Jersey, 530 U.S. 466 (2000) 50, 51

Atkins v. Virginia, 536 U.S. 304 (2002) 4, 17

Beck v. Alabama, 447 U.S. 625 (1980) 40

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Bradley v. Judges of the Superior Court for the County of Los Angeles, 372 F.Supp. 26 (C.D. Cal. 1974) 26

Buchanan v. Kentucky, 482 U.S. 402 (1987) 13

Chambers v. Mississippi, 410 U.S. 284 (1973) 30, 31

Coble v. Quarterman, 496 F.3d 430 (5th Cir. 2007) 47

Coker v. Georgia, 433 U.S. 584 (1977) 17

Cooper v. Sanders, 837 F.2d 284 (7th Cir. 1988) 56

Cudjo v. Ayers, 698 F.3d 752 (9th Cir. 2012) 30, 31

Eddings v. Oklahoma, 455 U.S. 104 (1982) 43, 44

Enmund v. Florida, 458 U.S. 782 (1982) 32

Furman v. Georgia, 408 U.S. 238 (1972) 16

Graham v. Florida, 560 U.S. 48 (2010) 6, 8, 19

Green v. Georgia, 442 U.S. 95 (1979) 31

Hedlund v. Ryan, 750 F.3d 793 (9th Cir. 2014) 44

Hitchcock v. Dugger, 481 U.S. 393 (1987) 44

Lockett v. Ohio, 438 U.S. 586 (1978) . . . . . passim

Lockhart v. McCree, 476 U.S. 162 (1986) 20, 28

Lunbery v. Hornbeak, 605 F.3d 754 (9th Cir. 2010) 30

Marks v. United States, 430 U.S. 188 (1977) 39

Miller v. Alabama, 567 U.S. __, 132 S. Ct. 2455 (2012) . . . . . passim

Morgan v. Illinois, 504 U.S. 719 (1992) 20

Nelson v. Quarterman, 472 F.3d 287 (5th Cir. 2006) 44, 45, 46

Pennsylvania v. Ashe, 302 U.S. 51 (1937) 44

Penry v. Lynaugh, 492 U.S. 302 (1989) 53

Ring v. Arizona, 536 U.S. 584 (2002) 49

Roper v. Simmons, 543 U.S. 551 (2005) . . . . . passim

Skipper v. South Carolina, 476 U.S. 1 (1986) 44

Solem v. Helm, 463 U.S. 277 (1983) 32

Thompson v. Oklahoma, 487 U.S. 815 (1988) . . . . . passim

Trop v. Dulles, 356 U.S. 86 (1958) 21

Tuilaepa v. California, 512 U.S. 967 (1994) 7

United States v. Carolene Products, 304 U.S. 144 (1938) 19, 20, 23

United States v. Necoechea, 986 F.2d 1273 (9th Cir. 1993) 54

Wainwright v. Witt, 469 U.S. 512 (1985) 18

Walton v. Arizona, 497 U.S. 639 (1990) 44

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Witherspoon v. Illinois, 391 U.S. 510 (1968) . . . . . passim

Woodson v. North Carolina, 428 U.S. 280 (1976) 9, 42, 51

Wygant v. Jackson Bd. of Education, 476 U.S. 267 (1986) 17

STATE CASES

Hovey v. Superior Court, 28 Cal. 3d 1 (1980) 15

In re Joseph B., 34 Cal.3d 952 (1983) 3

Manduley v. Superior Court, 27 Cal.4th 537 (2002) 3

People v. Ashmus, 54 Cal.3d 932 (1991) 11

People v. Avena, 13 Cal.4th 394 (1996) 8

People v. Birks, 19 Cal.4th 108 (1998) 34

People v. Bolin, 18 Cal.4th 297 (1998) 52

People v. Breverman, 19 Cal.4th 142 (1998) 36

People v. Brown, 33 Cal.4th 383 (2004) 51

People v. Carpenter, 15 Cal.4th 312 (1997) 51, 55

People v. Catlin, 26 Cal.4th 81 (2001) 18

People v. Easley, 34 Cal. 3d 858 (1983) 12

People v. Fudge, 7 Cal.4th 1075 (1994) 42

People v. Geiger, 35 Cal.3d 510 (1984) 34

People v. Griffin, 33 Cal.4th 536 (2004) 51

People v. Haskett, 30 Cal.3d 841 (1982) 13

People v. Hill, 17 Cal.4th 800 (1998) 54

People v. Jandres, 226 Cal.App.4th 340 (2014) 54

People v. Mattson, 50 Cal. 3d 826 (1990) 11, 12

People v. Mendoza, 24 Cal.4th 130 (2000) 13

People v. Moon, 37 Cal.4th 1 (2005) 51, 52

People v. Ochoa, 19 Cal.4th 353 (1998) 43

People v. Padilla, 11 Cal.4th 891 (1995) 13

People v. Pinholster, 1 Cal. 4th 865 (1992) 11

People v. Prieto, 30 Cal. 4th 226 (2003) . . . . . passim

People v. Proctor, 4 Cal.4th 499 (1992) 12

People v. Ray, 13 Cal.4th 313 (1996) 8

People v. Rodriguez, 42 Cal.3d 730 (1986) 13, 48, 50

People v. Roldan, 35 Cal.4th 646 (2005) 45, 46

People v. Rundle, 43 Cal.4th 76 (2008) 36

People v. Smith, 30 Cal. 4th 581 (2003) 13, 51

People v. Yeoman, 31 Cal.4th 93 (2003) 8

FEDERAL STATUTES

Title 18 U.S.C. section 3592 . . . . . 33, 34

STATE STATUTES

Code of Civil Procedure section 229 20

Penal Code section 32 38

Penal Code section 190.2 10

Penal Code section 190.3 7

Penal Code section 203 3

Penal Code section 1159 35

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INTRODUCTION.

On June 28, 2013, appellant submitted a pro se pleading titled "Appellant's Supplemental Opening Brief." In his pro se supplemental brief, appellant sought to inform this Court that he did not possess or fire a gun, and that he is innocent of the killing of Enrique Guevara.

On July 2, 2013, this Court returned the pro se brief to appellant, unfiled.

On January 16, 2014, the Office of the State Public Defender filed a motion to withdraw as counsel for appellant. On April 16, 2014, this Court granted the motion and substituted the undersigned as counsel of record.

Having reviewed the record and researched various issues, counsel for appellant submits this Supplemental Opening Brief. Appellant supplements Argument VI with additional sub-arguments and advances six new arguments as follows:

Argument X: Death qualification voir dire is unconstitutional in general and as applied in this case.

Argument XI: The trial court erred by prohibiting trial counsel from eliciting information regarding co-defendant Enrique Echeverria's conviction for manslaughter.

Argument XII: The trial court erred by denying appellant's request to

instruct the jury on accessory after-the-fact liability.

Argument XIII: The trial court impermissibly limited the testimony of appellant's witnesses.

Argument XIV: The prosecutor committed misconduct by misstating the law given the moral and normative nature of death penalty determinations in California.

Argument XV: The cumulative errors warrant relief.

VI. CHARGING APPELLANT WITH CAPITAL MURDER WHEN THE SOLE SPECIAL CIRCUMSTANCE WAS A JUVENILE CONVICTION, IN WHICH APPELLANT WAS NOT THE SHOOTER, WAS FEDERAL CONSTITUTIONAL ERROR.

The sole special circumstance alleged against appellant was a prior murder conviction arising out of an attempted robbery-murder that occurred in November 1991. Appellant was a 17 year old juvenile at the time. 3 CT 451-467; 6 RT 1083, 1089.

The prosecutor in the prior murder case testified at the penalty phase of the instant case. 6 RT 1078.[1] Deputy District Attorney Keri Modder

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[1] The record is not clear whether Deputy District Attorney Keri Modder was a witness for the prosecution or the defense. Trial counsel initially stated that he wanted Ms. Modder to testify to establish that appellant was not the shooter in the prior robbery-murder. 6 RT 1062. Ultimately, Ms. Modder was questioned by the prosecutor and explained the circumstances of the robbery-murder. 6 RT 1074-1078.

testified that appellant "was not the shooter" in the juvenile case. 6 RT 1077.

Appellant has argued that the use of the juvenile conviction as a special circumstance was unconstitutional. Appellant's Opening Brief, Argument VI at 113-130. Appellant supplements that argument with additional arguments. The use of the unconstitutional special circumstance impacted appellant's trial from the beginning – the death qualification of his jury – to the end – his death sentence predicated on a juvenile conviction.

In short, the reliance on the prior murder that occurred when appellant was a juvenile[2] – violated his rights to due process, a fair trial, a reliable conviction and sentence, and to be free from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I of the California Constitution.

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[2] Appellant was charged as an adult in the prior murder case. California Welfare and Institutions Code sections 707(d)(1), (d)(2)(A)-(C), and (d)(3)(A)-(C); *Manduley v. Superior Court,* 27 Cal.4th 537 (2002). Had appellant been charged as a juvenile, the juvenile adjudication would not have been a criminal conviction and could not have been used as the basis for a special circumstance. *In re Joseph B.*, 34 Cal.3d 952, 955 (1983); Penal Code section 203.

E. Use of Juvenile Conduct As a Basis For a Death Sentence Violates the Federal Constitution.

"[T]he death penalty is reserved for a narrow category of crimes and offenders." *Roper v. Simmons*, 543 U.S. 551, 569 (2005). Even where a crime is "severe in absolute terms," the death penalty may only be imposed where the offender is among those "whose extreme culpability makes them 'the most deserving of execution.'" *Id.* at 568 (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). The Eighth and Fourteenth Amendments exclude certain categories of defendants, including juveniles, from such punishment, "no matter how heinous the crime." *Roper*, 543 U.S. at 568.

In *Thompson*, a plurality of the Supreme Court determined that the Eighth and Fourteenth Amendments prohibit imposing capital punishment on any offender who committed the crime before age sixteen. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988). The justices reasoned that the two primary justifications for the death penalty – retribution and deterrence – are ill-served by the execution of juvenile offenders. *Id.* at 834-837.

Retribution is not accomplished because "adolescents as a class are less mature and responsible than adults," and thus bear less culpability. *Id.* at 834-37. Adolescents' relatively large "capacity for growth," and "society's fiduciary obligations to its children" also militate against the appropriateness of retribution. *Id.* at 837. The goal of deterrence is not

accomplished because adolescents commit only a small portion of willful homicides and are less likely than adults to engage in a "cost-benefit" analysis before acting. *Id.* Thus, the imposition of capital punishment on those defendants under age sixteen consequently produces "nothing more than the purposeless and needless imposition of pain and suffering." *Id.* at 838 (internal quotation marks omitted).

In *Roper*, the Supreme Court extended *Thompson*'s rationale to defendants age eighteen. *Roper*, 543 U.S. at 571. In doing so, the Court rejected the State's argument that juries should be permitted to make a case-by-case determination of whether the death penalty is appropriate for particular juvenile defendants, reasoning that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." *Id.* at 572-73. Although some offenders under age eighteen may be more mature than some adults, the Court concluded that "a line must be drawn," and eighteen is "the point where society draws the line for many purposes between childhood and adulthood." *Id.* at 574. The Court noted that it is "difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects corruption."

Id. at 573. Consequently, the Supreme Court fixed eighteen as "the age at which the line for death eligibility ought to rest." *Id.* at 574.

In *Graham*, the Supreme Court extended the principles announced in *Thompson* and *Roper* to juveniles sentenced to life imprisonment without the possibility of parole for non-homicide crimes. *Graham*, 560 U.S. __, 130 S.Ct. 2011, 2027 (2010). The Court held that the Eighth and Fourteenth Amendments forbid the "'second most severe penalty permitted by law'" to be imposed upon a juvenile offender who neither killed nor intended to kill. *Id.* In its findings, the Court relied upon scientific data showing that "parts of the brain involved in behavior control continue to mature through late adolescence." *Id.* at 2028 (citing *Roper*, 543 U.S. at 570). From this data, the Court determined that the actions of juveniles are "less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." *Id.*

In *Miller*, the Supreme Court held that a mandatory sentence of life without the possibility of parole for an offender who was under eighteen years old at the time of the crime violates the Eighth Amendment's ban on cruel and unusual punishment, even when the crime was murder. *Miller v. Alabama*, 567 U.S. __, 132 S. Ct. 2455, 2464 (2012). In so holding, the Court explained:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him – and from which he cannot usually extricate himself – no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.

Id. at 2468.

Together, these four cases establish that juveniles are less culpable for criminal conduct committed before the age of eighteen than adult offenders, and, because of their lesser culpability, they must not be treated by the criminal justice system in the same way that the criminal justice system treats adult offenders. Allowing the State to use juvenile conduct in order to serve as the difference between a life and a death sentence would strip the underlying premise from *Thompson, Roper, Graham*, and *Miller* and render them meaningless.

F. The State Cannot Rely on Juvenile Conduct to Support a Death or Life Without Parole Sentence.

In California, juries are presented with a list of aggravating factors and mitigating factors, and instructed to impose the death penalty where, in their judgment, the aggravating factors "outweigh" the mitigating factors. Penal Code section 190.3. The aggravating factors include the

circumstances of the charged offense and any special circumstances, any prior acts of violence by the defendant, and any prior felony convictions of the defendant. *Id.*; *see Tuilaepa v. California*, 512 U.S. 967, 969 (1994). The rationale behind the second two factors, according to this Court, is that prior violence "committed *at any time in the defendant's life* . . . show[s] his propensity for violence" and assists the jury in "determining whether he is the type of person who deserves to die." *People v. Ray*, 13 Cal.4th 313, 350 (1996) (emphasis added); *see also People v. Yeoman*, 31 Cal.4th 93 (2003); *People v. Avena*, 13 Cal.4th 394 (1996).

California's scheme, which allows for the use of violent conduct and convictions obtained before age eighteen as "special circumstances" and "aggravating factors," violates the principles announced in *Thompson*, *Roper*, *Graham*, and *Miller*. Supreme Court jurisprudence has made it clear that juvenile conduct does not accurately reflect the true moral culpability of the offender. *See Roper*, 543 U.S. at 570 ("From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult."). Accordingly, there is no legitimate penological reason to allow a jury to impose a death sentence based on juvenile conduct. Moreover, allowing either the State to base its decision to seek death or the jury to base its decision to give death on juvenile conduct violates the very purpose of

the Eighth Amendment's prohibition of "needless imposition of cruelty and suffering." *Thompson*, 487 U.S. at 838.

G. Appellant's Death Sentence Is Unconstitutional Because Appellant's Purported Death-Worthiness Was Based on Juvenile Conduct.

During the penalty phase of the trial, the prosecutor argued to the jury that appellant's prior conviction of murder during the commission of an attempted robbery constituted an aggravating factor weighing in favor of a death sentence.[3] 6 RT 1123-1127. As noted, appellant was a juvenile at the time of the killing and was not the shooter. A-1 RT 42; 3 CT 456; 3 CT 466.

The prosecutor's closing argument was very brief. 6 RT 1122-1127. However, the argument focused almost exclusively on appellant's prior murder conviction. *Id.* In closing, the prosecutor argued that appellant's prior crime committed when he was a juvenile increased his moral culpability.

> Consider when you do so the facts involved in your case, and what you've heard the facts to be from the prior case; that when

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[3] By the time of the prosecutor's argument, the jury had already heard that appellant had "admitted the special circumstance in this case." 6 RT 1072. The jury was told that the special circumstance "that was alleged in this case [was] that the defendant was previously convicted of first degree murder on October 23rd of 1996 in Los Angeles Superiro Court." 6 RT 1071-1072.

> an apartment manager was coming back from a store, three individuals, the defendant being one, chose to put on ski masks, load a firearm, confront this man for his money and then ultimately the man was shot and killed.
>
> Ask yourselves where responsibility lies and think about the choices that Mr. Salazar had.

6 RT 1125.

Given the Supreme Court's holding that juvenile conduct does not accurately reflect moral culpability, the use of this conduct undermined appellant's right to a reliable penalty determination. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (finding that, "because of that qualitative difference [between capital and non-capital sentences], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."). In short, to impose the death penalty based on appellant's juvenile act constitutes "purposeless and needless imposition of pain and suffering." *Thompson*, 487 U.S. at 838 (internal quotation marks omitted).

The State's use of appellant's prior juvenile conviction to establish death eligibility under both Penal Code section 190.2(a)(2) (prior murder special circumstance) and to establish the basis for the death penalty under Penal Code section 190.3(b) and (c) (aggravating factors) violated the Fifth,

Eighth, and Fourteenth Amendments and corollary state law.[4] In light of the Supreme Court's proscription against basing death eligibility and death sentences upon murders committed before the defendant reached the age of eighteen, as well as the higher standards of reliability applicable to capital verdicts, the use of appellant's juvenile conviction as the predicate for the capital prior murder special circumstance, as the predicate for the aggravating factors, and as the predicate for the death sentence requires reversal of appellant's prior murder special circumstance finding and death sentence.

H. The Juvenile Conviction Was Improperly Weighed Twice in Aggravation.

Appellant's prior juvenile conviction was used to establish death eligibility under Penal Code section 190.2(a)(2) (prior murder special circumstance) and to establish the basis for the death penalty under Penal Code section 190.3(b) and (c) (aggravating factors).

This Court has found that other alleged crimes "may not each be weighed in the penalty determination *more than once* for exactly the same

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[4] In addition, using the prior juvenile act as factor (b) and factor (c) aggravation impermissibly double counted the act of aggravation. *See People v. Monterroso*, 34 Cal.4th 743, 789 (2004) ("A trial court should, when requested, instruct the jury against double-counting these circumstances.").

purpose." *People v. Melton*, 44 Cal.3d 713, 768 (1988) (emphasis in original). This Court recognized that "a jury given no clarifying instructions might conceivably double-count any 'circumstances' which were also 'special circumstances.'" *Id.* Similarly, in *Monterroso*, this Court recognized: "A trial court should, when requested, instruct the jury against double-counting these circumstances." *Monterroso*, 34 Cal.4th 743, 789 (2004). Here, the jury was not given any instruction to avoid double-counting the prior murder conviction.

In *Proctor*, this Court held that "[a]lthough defendant urges that the trial court has a sua sponte duty to so instruct, we have indicated only that upon defendant's request such an instruction should be given." *People v. Proctor*, 4 Cal.4th 499, 550 (1992). Appellant submits that this Court should reconsider its holding in *Proctor* and find that the jury should be instructed against double-counting whenever the evidence raises the possibility that the jury may improperly do so. Alternatively, the instruction should have been given here where the same facts – the prior shooting – was used to form the basis for defendant's special circumstance and two aggravating factors.

* * *

X. DEATH QUALIFICATION JURY SELECTION IS UNCONSTITUTIONAL IN GENERAL AND AS APPLIED IN THIS CASE.

Appellant's jury was death qualified. Death qualification inquires "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *People v. Ashmus*, 54 Cal.3d 932, 961-962 (1991) (citations omitted); *see also Buchanan v. Kentucky*, 482 U.S. 402, 408, n. 6 (1987).

Here, the trial court asked each juror to self-identify as belonging to one of four loosely defined and malleable categories. *See* Appellant's Opening Brief at 133-140; 1 RT 297-300 (defining, for the first time, the four categories of attitudes towards the death penalty). The trial court (1) declined to use written jury questionnaires; (2) declined to conduct individual voir dire regarding the jurors' views on the death penalty; (3) repeatedly used leading questions; (4) declined to permit follow-up questions by counsel before summarily excusing jurors; and (5) proceeded too rapidly through voir dire for defense counsel to follow the proceeding. *See* Appellant's Opening Brief at 133-140.

Death qualification in general and in this case violated appellant's rights to equal protection, due process, reliable sentencing and the right to a

jury trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments and Article I of the California Constitution.

A. Background.

In California, death qualification prevents citizens from serving as jurors in capital cases because of their moral and normative beliefs concerning the death penalty. Yet, California law specifically requires capital jurors to make moral and normative decisions in deciding to impose a capital sentence. *See People v. Mattson*, 50 Cal. 3d 826, 846 (1990). This contradictory process leads to a skewed and biased capital jury, which violates the state and federal constitutions.

This Court has held that the only question that a trial court need resolve during death qualification is "whether any prospective juror has such conscientious or religious scruples about capital punishment, in the abstract, that his views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Mattson*, 50 Cal. 3d at 845. This test focuses on the abstract, conscientious, or religious scruples of prospective jurors, not case specific considerations. *People v. Pinholster,* 1 Cal. 4th 865, 918 (1992). A scruple is "an ethical consideration or principle that inhibits action." *Merriam-Webster's Collegiate Dictionary* 10th Edition (1995). Accordingly, the

"views" that matter are, ultimately, moral ones. *Mattson*, 50 Cal. 3d at 846.

Penalty phase jurors' duties entail three moral and sympathetic judgments. First, they must determine if evidence exists to support an aggravating or mitigating factor. Second, they must determine whether that factor is aggravating or mitigating based on its moral context. Finally, they must determine the weight of each factor. At each stage, the jury makes moral determinations. The jury instructions inform the jurors: "You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." CALJIC 8.88. In that regard, this Court has held: "A penalty phase jury performs an essentially normative task. As the representative of the community at large, the jury applies its own moral standards to the aggravating and mitigating evidence to determine if death or life is the appropriate penalty for that particular offense and offender." *People v. Mendoza*, 24 Cal.4th 130, 192 (2000).

The jury's duty at the penalty phase in California is quite different from a jury's duty at the guilt phase. In the guilt phase, juries find facts and apply the law to those facts. Unlike the guilt phase determination, this Court has held that, the penalty phase determination in California is "'inherently moral and normative, not factual.'" *People v. Prieto*, 30 Cal.

4th 226, 263 (2003) (quoting *People v. Rodriguez,* 42 Cal.3d 730, 779 (1986)); *see also People v. Box* 23 Cal.4th 1153, 1216 (2000). "Unlike the guilt determination, where appeals to the jury's passions are inappropriate, in making the penalty decision, the jury must make a moral assessment of all the relevant facts as they reflect on its decision." *People v. Smith,* 30 Cal. 4th 581, 634 (2003); *People v. Padilla,* 11 Cal.4th 891, 956-957 (1995); and *People v. Haskett,* 30 Cal.3d 841, 863 (1982).

By excluding those jurors who have moral and normative beliefs about the penalty – which in many cases lead them to question the propriety of its application – the process of death qualification narrows the sentencing body to those who: (1) do not have a strong opinion regarding the moral and normative issues involved in a death penalty case; (2) are predisposed to make findings in aggravation; (3) are predisposed to disregard factors in mitigation;(4) are conviction prone; and (5) are death prone.[5] These excluded citizen's voices are eliminated from jury service and from the data that courts rely on to determine whether a particular punishment meets the

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[5] Byrne, "*Lockhart v. McCree*: Conviction-Proneness and the Constitutionality of Death-Qualified Juries," 36 Cath. U. L. Rev. 287, 318 (1986); Brooke M. Butler and Gary Moran, *The Role of Death Qualification in Venireperson's Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26:2 Law and Human Behavior 175, 183 (2002). (finding that "a death qualified jury is significantly more likely to impose the death penalty than a jury comprised of excludables.")

evolving standards of decency under the Eighth Amendment. *See Coker v. Georgia,* 433 U.S. 584 (1977).[6]

Since the process of death qualification in California results in a non-representative jury – both conviction and death prone – it does not meet the standards of heightened reliability required by the Eighth Amendment. To their detriment, capital defendants receive vastly different juries at the guilt phase in comparison with non-capital defendants. Capital defendants charged with different varieties of capital murder also receive vastly different juries at the penalty phase from each other as a result of case-specific death qualification. Significantly, this Court has not ensured state wide standards to prevent these vagaries. As a result, death qualification in California also violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

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[6] The Supreme Court has held repeatedly that one of the best sources of objective information on such evolving standards are verdicts of jurors who have the responsibility of deciding whether to impose the punishment. *See e.g. Furman v. Georgia*, 408 U.S. 238, 278-279, and 299 (1972) (concurring opinion of J. Brennan); *Id.* at 439-442 (J. Powell, C.J. Burger, J. Blackmun, and J. Rehnquist dissenting). The process of analyzing jury determinations as evidence of the "evolving standards of decency" is one of the few, long standing, consistent areas of Supreme Court death penalty law. In fact, three Supreme Court justices wrote separately to emphasize their belief that the actions of sentencing juries, along with legislative judgments, are the *sole reliable factors* in the "evolving standards" analysis. *Atkins,* 536 U.S. at 322-325 and 328 (C.J. Rehnquist, J. Scalia, and J. Thomas dissenting).

In the end, and as described above, in part, death qualification is unconstitutional for a host of reasons:

1. No statute requires death qualification of penalty phase jurors and the statutes governing jury selection in criminal cases foreclose death qualification. *See* Code of Civil Procedure section 229(h);

2. Death qualification leads to a jury that is conviction prone and prone to impose a death sentence;

3. Death qualification defeats the purposes underlying the right to a jury trial because it fails to preserve public confidence in justice, and removes the belief that the sharing in the administration of justice is a civic responsibility;

4. Death qualification allows for gamesmanship by prosecutors to obtain pro-conviction and pro-death jurors;

5. Death qualification breaks the essential link between community values and the penal system by excluding from penalty deliberations certain community members and certain community values, thereby preventing formation of "the indicators" by which courts ascertain contemporary standards of decency;

6. Death qualification results in an unconstitutional death penalty scheme because without statutory grounding, the "substantially

impaired" test is irrational;

7. Death qualification leads to the unconstitutional exclusion of women, minorities, and religious persons from capital juries;

8. By providing different schemes for selecting juries in capital and non-capital cases, California discriminates between two classes of defendants and impinges on the fundamental right to an impartial jury at the guilt phase and the right to life at both the guilt and penalty phases;

9. Death qualification is not narrowly tailored, or the least drastic means to achieve the stated goal;

10. Death qualification and its influence throughout the trial, violates the heightened reliability requirement in capital trials;

11. Death qualification has no standards and the unfettered discretion leads to wildly disparate and arbitrary treatment of similarly situated capital defendants;

12. Death qualification violates the right to jury trial because the purpose of a jury is to guard against the exercise of arbitrary power through the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over conditioned or biased response of a judge; and

13. Death qualification undermines the purposes of the right to a

jury trial, by excluding individuals with views against the death penalty from petit juries and failing to create juries based on a fair cross-section of the community.

B. Death Qualification Violated Appellant's Constitutional Rights.

The Supreme Court has addressed death qualification procedures in a number of cases, beginning with *Witherspoon v. Illinois*, 391 U.S. 510 (1968). *See also Wainwright v. Witt*, 469 U.S. 512 (1985), *Lockhart v. McCree*, 476 U.S. 162 (1986), *Morgan v. Illinois*, 504 U.S. 719 (1992). The Supreme Court rejected general constitutional challenges to the death qualification process and held that the federal Constitution does not prohibit the excusal for cause, prior to the guilt phase, of potential jurors whose opposition to the death penalty impaired their ability to serve as jurors at a sentencing phase trial.

This Court has rejected similar arguments. *See People v. Catlin*, 26 Cal.4th 81, 112 (2001). However, the "constitutional facts" upon which *Lockhart* was based are no longer valid. As such, this Court does not have to defer to the Supreme Court's holding in *Lockhart* and its progeny. *Cf. United States v. Carolene Products*, 304 U.S. 144, 153 (1938). And, in any event, death qualification runs afoul of the California Constitution.

Deference is no longer compelled because death qualification

procedures are contrary to long-standing constitutional jurisprudence that death penalty juries represent the values of the community and that this function is crucial to provide information from which the courts discern evolving standards of decency. The imposition of the death penalty must be assessed in light of "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). As Justice John Paul Stevens noted recently in discussing the constitutional touchstone of evolving standards: "Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time." *Graham v. Florida*, 560 U.S. 48, 85 (2010) (concurring opn.).

So too with respect to death penalty procedures. Social science evidence has made clear the improper, prejudicial impact of death qualification voir dire on jury panels.[7] Here, the death qualification of appellant's jury took place "in the context of record high abstract support of the death penalty." Craig Haney, Aida Hurtado, and Luis Vega, *Modern Death Qualification: New Data on Its Biasing Effects*, 18:6 Law and Human

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[7] *See e.g.*, Smith, "Due Process Education for the Jury: Overcoming the Bias of Death Qualified Juries," 18 Sw. U.L.Rev. 493, 509 (1989).

Behavior 619, 621 (1994). Death qualification "operates to exclude persons whose death penalty attitudes would merely impair them in performing their functions in a capital trial, and it eliminates persons on the basis of extreme death penalty support as well as opposition." *Id.* Likewise, historical research demonstrates that death qualified juries controvert the right to the jury trial guarantee and "frustrate[] the founder's understanding as to the role of the criminal jury."[8]

Modern research proves that death qualification, and the exclusion of individual's with scruples towards the death penalty, defeats accuracy in jury determinations by inhibiting the comparison of different understandings of the evidence, and the jury's ability to reach a decision consistent with the evidence.[9] Significantly, death qualification decreases jurors' conscientiousness in their role as a sentencer, increases the likelihood that they will deny responsibility for the defendant's punishment, and increases the likelihood that they will rush to judgment.[10] In sum, all

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[8] G. Ben Cohen & Robert J. Smith, *The Death of Death Qualification*, 59: 87 Western Reserve Law Review 3 (2008).

[9] Nicole L. Waters & Valerie P. Hans, *A Jury of One: Opinion Formation, Conformity, and Dissent on Juries*, Cornell Legal Studies Research Paper No. 08-030 (1994).

[10] William J. Bowers, Wanda D. Foglia, Jean E. Giles & Michael E. Antonio, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision*

modern studies have found that the death qualification process undoubtedly biases the jury *against the capital defendant*, and makes their determinations more death prone.[11]

Modern research confirms that death qualified venirepersons are more likely than excludable jurors to endorse aggravating factors over mitigating factors.[12] Modern studies have supplemented this conclusion with other verifiable studies proving that death qualified venirepersons possess a host of other behavioral and attitudinal features that bias their

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Making, 63 Wash. & Lee L. Rev. 931 (2006).

[11] Eisenberg, Garvey & Wells, *The Deadly Paradox of Capital Jurors*, 74 S. Cal. L. Rev. 371 (2001); Garvey, Johnson & Marcus, *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 Cornell L. Rev. 627 (2000); Bowers & Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605 (1999); Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 Colum. L. Rev. 1538 (1998); Hoffman, *Where's the Buck - Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 Ind. L.J. 1137 (1995); Bowers, Sandys & Brewer, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing when the Defendant is Black and the Victim is White*, 53 DePaul L. Rev. 1497 (2004); and Sandys, *'Cross-Overs' - Capital Jurors who Change their Minds about Punishment: A Litmus Test for Sentencing Guidelines*, 70 Ind. L.J. 1183 (1995).

[12] Brooke M. Butler and Gary Moran, *The Role of Death Qualification in Venireperson's Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26:2 Law and Human Behavior 175 (2002) (concluding that death qualified venirepersons, when compared to excludable venirepersons were more likely to endorse aggravating circumstances and that *Lockhart v. McCree* frustrated the constitutional capital sentencing scheme envisioned in *Gregg v. Georgia*).

views of the evidence and proceedings during a capital trial.[13] Some of these features include: (1) a tendency to place undue emphasis upon victim impact evidence;[14] (2) a tendency to possess higher levels of homophobia, modern racism, and modern sexism;[15] and (3) a tendency to overly trust forensic and scientific evidence even when developed by a dubious methodology.[16]

The Capital Jury Project found that death qualified juries are biased

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[13] Brooke Butler & Gary Moran, *The Impact of Death Qualification, Belief in Just World, Legal Authoritarianism, and Locus of Control on Venireperson's Evaluation of Aggravating and Mitigating Circumstances in Capital Trials*, 25 Behav. Sci. Law 57 (2007).

[14] Brooke Butler, *The Role of Death Qualification in Venireperson's Susceptibility to Victim Impact Statements*, 14(2) Psychology, Crime & Law, 133, 135-36 (2008).

[15] Brooke Butler, *Death Qualification and Prejudice: The Effect of Implicit Racism, Sexism, and Homophobia on Capital Defendants' Right to Due Process*, 25 Behav. Sci. Law 857, 858 (2007); Levinson, et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 NYU L. Rev. 513 (2014); Lynch & Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathetic Divide,"* Law and Society Review, Vol. 45, Issue 1, 69 (2011); and Summers, et al., *Death Qualification as Systemic Exclusion of Jurors with Certain Religious and Other Characteristics*, Journal of Applied Social Psychology, Vol. 40, Issue 12, 3218 (2010).

[16] Brooke Butler, *The Role of Death Qualification and Need for Cognition in Venireperson's Evaluations of Expert Scientific Testimony in Capital Trials*, 25 Behav. Sci. Law 561, 562 (2007).

and impaired in seven different ways:[17] (1) **Prejudgment**: Death qualified juries are prone to premature decision making; (2) **Death Bias**: Death qualified juries are corrupted by the death qualification procedures; (3) **Mitigation Impairment**: Death qualified juries suffer from a pervasive failure to comprehend and follow instructions regarding mitigation; (4) **Fatal Ignorance**: Death qualified juries are likely to suffer from the widespread belief that death is mandatory in some cases; (5) **Irresponsibility**: Death qualified juries are likely to evade responsibility for their sentencing decisions; (6) **Racism**: Death qualified juries are likely to use the defendant or the victim's race (or both) as a factor in sentencing decisions; and (7) **Early Release Fears**: Death qualified juries are likely to erroneously believe that life sentences will not result in lengthy incarcerations. In combination, these seven biases prevent death qualified juries from impartially and objectively evaluating guilt phase evidence and making a moral and normative sentencing determination.

Importantly, experience has shown what was previously suspected, prosecutors acknowledge that death qualification skews the jury and that they use the practice to their advantage in obtaining conviction-prone and

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[17] William J. Bowers, *The Capital Jury Project: Rationale, Design, and a Preview of Early Findings*, 70 Ind. L. J. 1043 (1995).

death-prone juries.[18] This use results in an affirmative incentive for prosecutors to pursue the death penalty in cases, where guilt is very much in question, in order to secure a more favorable jury through death qualification. This practice is unchecked by the judicial process.

Death qualification also impacts the jurors that it excludes from service. This process violates the prospective jurors' rights. "It is well established that action by a state in arbitrarily depriving a person of the opportunity to serve on a jury is a violation of a right secured by the United States Constitution." *Bradley v. Judges of the Superior Court for the County of Los Angeles*, 372 F. Supp. 26, 30 (C.D. Cal. 1974).

C. The Constitutional Error Warrants Reversal of Appellant's Convictions and Sentence.

Death qualification prevents citizens from serving as jurors in capital cases based on their "moral and normative" beliefs despite the fact that the law specifically requires capital jurors to make "moral and normative" decisions. These citizen's voices are eliminated from jury service and from the data that the courts rely on to determine whether a particular punishment offends evolving standards of decency under the Eighth Amendment. To make matters worse, California allows case-specific death qualification

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[18] Garvey, "*The Overproduction of Death*," 100 Colum. L. Rev. 2030, 2097 n. 163 (2000).

whose effect, among others, is to remove jurors who would be highly favorable to specific mitigation evidence in violation of the Eighth Amendment.

To their detriment, capital defendants receive vastly different juries at the guilt phase in comparison with other defendants. As noted, the data shows that minorities, women, and religious people are disproportionately removed from sitting on juries because of death qualification. Capital defendants face guilt juries that are more prone to convict and penalty juries that are more prone to return a death verdict.

Moreover, the State engages in death qualification with the intent of achieving these results. The very process of death qualification skews capital juries to such a degree that they can no longer be said to be impartial and fully represent the community. Importantly, this Court has not established any uniform guidelines for death qualification in response to any of these constitutional problems, resulting in a failure of due process, and the disparate treatment of capital defendants.

From beginning to end, death qualification violated appellant's rights in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments and Article I of the California Constitution. The process accomplished what was expressly prohibited by the Supreme Court:

> In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.
>
> It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.' It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death.

Lockhart, 476 U.S. at 179 (quoting *Witherspoon* 391 U.S. at 520-521 (footnotes and internal citations omitted).

Death qualification in appellant's case was unconstitutional. Accordingly, appellant's convictions, special circumstance finding, and penalty must be reversed.

XI. THE TRIAL COURT ERRED BY PROHIBITING TRIAL COUNSEL FROM ELICITING INFORMATION REGARDING CO-DEFENDANT'S ENRIQUE ECHEVERRIA'S CONVICTION FOR MANSLAUGHTER.

Severed co-defendant Enrique Echeverria testified at appellant's trial that he shot the victim. 5 RT 860. Trial counsel sought to introduce evidence that Echeverria was convicted of voluntary manslaughter for the killing. 3 RT 601. The trial court denied trial counsel's request. 3 RT 602. The trial court violated appellant's right to present a defense, due process, and to a reliable sentencing determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments and Article I of the California Constitution.

A. Background.

Immediately prior to making his opening statement, trial counsel asked for a sidebar conference. He stated: "I intend to tell this jury that Echeverria was tried of the same killing and was convicted." 3 RT 601. Following the prosecutor's objection, the trial judge held that he would permit a statement "that there was a trial and that matter has been concluded," but further held that "[y]ou cannot tell them this guy got manslaughter because it was a different case, different evidence . . . ." 3 RT 602. Ultimately, the parties stipulated that Echeverria "was convicted to [sic] killing . . . but not as to what the result was." 3 RT 602. The stipulation was read to the jury: "[T]he companion of Magdaleno Salazar, Enrique Echeverria, was convicted of killing Enrique Guevara in a prior trial." 3 RT 603.

During a break in Echeverria's examination, counsel notified the trial court and prosecutor that he wanted "to elicit from [Echeverria] that he's in for voluntary manslaughter." 5 RT 856. The prosecutor objected. *Id.* The trial court denied the request.

> I think that it would be inviting to speculate as to what he was convicted of and why he was convicted of voluntary manslaughter as opposed to what the proper verdict might be in this case. And it might be of manslaughter. I believe he should be limited to stating that yes, I was convicted of something that arose from the same incident without

specifying what felony.

5 RT 857.

Echeverria then testified that he shot and killed the victim. 5 RT 860. He testified that he had gone to trial and been convicted of that killing. 5 RT 861. He testified that he was in prison for that killing. *Id.*

B. The Trial Court Error Violated Appellant's Rights to Present a Defense and to Due Process and Warrants Reversal.

The exclusion of the nature of Echeverria's conviction violated appellant's due process right to present evidence in his own defense. *See Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). In *Chambers*, the defendant sought to introduce the testimony of witnesses that another man had confessed to the murder for which the defendant was accused. *Id.* at 289. The trial court did not permit the introduction of the testimony. *Id.*

The Supreme Court reversed because "the rulings of the trial court deprived Chambers of a fair trial." *Chambers*, 410 U.S. at 302. The Court held that the "right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Id.* at 294; *see also Green v. Georgia*, 442 U.S. 95, 97 (1979).

The Ninth Circuit Court of Appeals has recently "held that the defendant's right to present a defense was violated 'by the exclusion of

probative admissible evidence that another person may have committed the crime.'" *Cudjo v. Ayers*, 698 F.3d 752 (9th Cir. 2012) (quoting *Lunbery v. Hornbeak*, 605 F.3d 754, 760 (9th Cir. 2010)). The defendant in both *Chambers* and *Cudjo* sought to introduce evidence that another person "had allegedly previously confessed to the crime; the defense was prevented from cross-examining the alternate suspect at trial; and the trial court's application of the hearsay rules prevented the defendant's witness from testifying to the alternate suspect's confession." *Cudjo*, 698 F.3d at 766 (citing *Chambers*, 410 U.S. at 289-94).

Here, the State did not introduce sufficient evidence to find that appellant had committed the killing. *See* Appellant's Opening Brief, Argument I. Prior to trial, the trial court acknowledged the prosecutor's opinion that appellant's case "was not an overwhelming case for murder." A-1 RT 84. The trial court expressed a similar sentiment when he asked the prosecutor if the guilt phase could be tried in three or four days and stated "[a]nd then if it comes out voluntary manslaughter, we're done. And we just all go home." A-1 RT 79.

Appellant's jury was informed that Echeverria had been convicted of this killing, but was left to speculate as to his level of culpability and his sentence. Informing the jury that Echeverria had been convicted of

voluntary manslaughter would have demonstrated his level of culpability for the killing, the nature of the killing, and that he was not sentenced to death. The error violated appellant's constitutional rights and was prejudicial. Accordingly, appellant's conviction and special circumstance finding must be reversed.

C. The Trial Court Error Violated Appellant's Right to Present a Case in Mitigation and to Reliable Sentencing.

"[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 608-609 (1978). The evidence that appellant's co-defendant was convicted of voluntary manslaughter and not sentenced to death should have been admitted as mitigating evidence.

A sentence must be proportionate to the crime committed. *Solem v. Helm*, 463 U.S. 277 (1983). This calculation of proportionality includes a comparison to others involved in the crime. *See Enmund v. Florida*, 458 U.S. 782, 816 (dissenting opinion, O'Conner, J.) (finding "the Court should decide not only whether the appellant's sentence of death offends contemporary standards as reflected in the responses of legislatures and

juries, *but also whether it is disproportionate to the harm that the petitioner caused and to the petitioner's involvement in the crime.*") (emphasis added). Indeed, under federal law, evidence that "[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death" is a statutory mitigating factor. 18 U.S.C. section 3592(a)(4).

Here, regardless of what the jury speculated regarding Echeverria's sentence, the jury was deprived of vital information that could have demonstrated appellant's lesser culpability and shown that he should not be sentenced to death. If the jury speculated that Echeverria was convicted of murder, but that appellant was less culpable than Echeverria, they were left with no information to compare to, because they did not know that Echeverria had been found guilty of voluntary manslaughter and sentenced to a sentence less than death.

Alternatively, if the jury believed that Echeverria had been sentenced to death, they likely would have concluded that appellant should receive the same sentence. In either event, had the jury been adequately informed, they would not have returned a sentence of death. Accordingly, appellant's death sentence must be reversed.

XII. THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST TO INSTRUCT THE JURY ON ACCESSORY AFTER-THE-FACT LIABILITY.

The trial court refused to give appellant's requested after-the-fact accessory instruction. The refusal was erroneous. The trial court violated appellant's rights to a fair trial, a jury trial, due process, and a reliable capital trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments and Article I of the California Constitution.

A. Background.

During the settling of guilt phase jury instructions, trial counsel asked: "Can I request an accessory instruction, after-the-fact accessory? I think the evidence supports that or it could possibly support that." 5 RT 946. The trial court denied appellant's request, finding that after-the-fact accessory is "not a lesser-included offense to murder." *Id.* The trial court then held, "under the recent Supreme Court decision, lesser-related offenses are not to be given. That would be a lesser-related offense. So that request is denied."[19] *Id.*

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[19] The trial court did not identify the "recent Supreme Court decision." 5 RT 946. The trial court was likely referring to *People v. Birks*, 19 Cal.4th 108, 136 (1998). *Birks* was decided by this Court on August 31, 1998. Trial in this case commenced on January 25, 1999.

In *Birks*, this Court overruled its own precedent, *People v. Geiger*, 35 Cal.3d 510 (1984). This Court found: "*Geiger* was wrong to hold that a criminal defendant has a unilateral entitlement to instructions on lesser

B. The Trial Court Erred by Refusing to Give the After-the-Fact Accessory Instruction.

The trial court's finding that the "recent Supreme Court decision" compelled its decision was erroneous. Prior to *Birks*, the giving of the lesser-related instruction would have been mandatory. *People v. Geiger*, 35 Cal.3d 510 (1984). In *Birks*, this Court held that the lesser-related instructions are no longer mandatory. However, the Court held that the trial court retains discretion to give lesser-related instructions.

California courts must instruct the jury on any offense that is necessarily included in any charged crime, and which is supported by substantial evidence in the record. Penal Code section 1159. For more than a decade, and at the time of the instant crime, this Court also mandated jury instructions on any uncharged lesser-related offense supported by the evidence.

> California law has long provided that even absent a request, and over any party's objection, a trial court must instruct a criminal jury on any less-er offense "necessarily included" in the charged offense, if there is substantial evidence that only the lesser crime was committed. This venerable instructional rule ensures that the jury may consider all supportable crimes necessarily included within the charge itself, thus encouraging the most accurate verdict permitted by the pleadings and the evidence. The rule also accords both parties equal procedural treatment,

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offenses which are not necessarily included in the charge. *Geiger* is therefore overruled." *Birks*, 19 Cal.4th at 136.

> and thus benefits and burdens both to the same degree. Neither party is unfairly surprised by instructions on lesser necessarily included offenses because, by definition, the stated charge gives notice to both that all the elements of any such offense are at issue. By the same token, neither party has a greater right than the other either to demand, or to oppose, instructions on lesser necessarily included offenses. Finally, if lesser offenses are necessarily included in the charge the prosecution has chosen to assert, instructions on the lesser offenses, even when given over the prosecution's objection, cannot undermine the prosecution's traditional authority to determine the charges.
>
> More recently, *People v. Geiger* (1984) 35 Cal. 3d 510 (*Geiger*) held that in certain circumstances, the defendant has a state constitutional right to instructions on lesser offenses that are not necessarily included in the stated charge, but merely bear some conceptual and evidentiary "relationship" thereto. Because the accusatory pleading gives the defendant no notice of such "nonincluded" offenses, *Geiger* concluded that instructions on lesser merely "related" offenses can be given only upon the defendant's request.

Birks, 19 Cal.4th at 112.

In *Birks*, this Court reconsidered the *Geiger* rule and rejected it. This Court found that the rule had proven to be unworkable in practice, and unfair to the prosecutor, who could be bound to proof of a charge chosen on the option of the defense and which the prosecutor had not prepared to prove or disprove. *Birks*, 19 Cal.4th at 129 ("The prosecution thus may suffer unfair prejudice when the trial evidence first suggests the lesser offense, and the defendant then has the superior power to determine whether instructions thereon shall be given.").

In *Birks*, this Court did not find that requests for instructions on lesser related offenses are necessarily prohibited. Instead, this Court found that trial courts should consider whether, by giving the instruction, the prosecution would be unfairly prejudiced. *See People v. Rundle*, 43 Cal.4th 76, 147 (2008) ("In *Birks*, however, we overruled the holding of *Geiger* that a defendant's unilateral request for a related-offense instruction must be honored over the prosecution's objection."); and *People v. Breverman*, 19 Cal.4th 142, 168 (1998) (noting that the effect of the *Birks* opinion was "to abrogate the California rule entitling the defendant to *demand* instructions on lesser merely related offenses supported by the evidence.") (emphasis added).

Here, the trial court erred by flatly denying the request for an instruction on accessory as a lesser-related offense. The trial court improperly treated the issue as foreclosed by the *Birks* opinion – as though the *Birks* opinion had eliminated any consideration of lesser related offenses. The trial court therefore declined to exercise its discretion to consider giving the accessory instruction.

The trial court should have undertaken the required analysis and found that, based on the evidence of appellant's conduct presented at trial, that a request for the instruction could not have come as an undue surprise.

As the trial court noted, "the People are of the opinion that – that the case is not an overwhelming case for murder . . . ." A-1 RT 84. Prior to trial, the prosecutor admitted that "the defendant doesn't appear to be the shooter." A-1 RT 42. Thus, it was reasonable for the prosecution to have anticipated that the defense would request instructions on a lesser related offense. Indeed, the prosecutor did not object to defendant's request for the instruction. 5 RT 946.

Moreover, this is not a case where the defendant testified and surprised the prosecutor by presenting a novel defense. Instead, appellant's defense was characterized by noting inconsistencies in the prosecution's theory and stressing the insufficiency of the evidence. The evidence presented by the prosecutor plainly supported the accessory instruction. For instance, Kathy Mendez testified that appellant and Echeverria drove away following the shooting. Appellant was driving. 3 RT 656, 686. This evidence gave rise to the accessory charge because appellant drove Echeverria (the admitted and convicted shooter) away from the crime scene. *See* Penal Code section 32.

In sum, the trial court erred by summarily denying trial counsel's request for the jury instruction without conducting any analysis as required by *Birks*. Had the trial court properly considered the request, it would have

found that the instruction was warranted given the nature of the evidence presented at trial.

Alternatively, the trial court should have followed *Geiger* because, at the time of the alleged offense, *Geiger* was good law. *Geiger*, 35 Cal.3d 510. This Court should reconsider its holding that *Birks* may be applied retroactively, particularly in a capital case. "[D]ue process protects against judicial infringement of the right to fair warning that certain conduct will give rise to criminal penalties." *Webster v. Woodford*, 369 F.3d 1062, 1070 (9th Cir. 2004) (citing *Marks v. United States*, 430 U.S. 188, 191-192 (1977)). Here, at the time of appellant's offense, he would have been entitled to the requested after-the-fact accessory instruction. The trial court's denial of the after-the-fact accessory instruction effectively "expand[ed] criminal liability" because it made it much more likely that appellant would be convicted of the instructed crime – although the facts of his crime closely fit the crime of after-the-fact accessory. *Birks*, 19 Cal.4th at 136.

C. The Trial Court Error Was Prejudicial.

The trial court error was prejudicial. Under the standard for review of federal constitutional error, applied when a lesser included offense is omitted in a death penalty trial, there is a reasonable probability that the jury

would have found accessory after-the-fact as a lesser-related offense. *Beck v. Alabama*, 447 U.S. 625, 643-645 (1980).

There was insufficient evidence that appellant committed the killing. *See* Appellant's Opening Brief, Argument I. The defense proceeded on the theory that appellant was present at the shooting, but did not shoot the victim. The evidence showed that appellant "took Enrique to the hospital" following the shooting. 3 RT 715. Appellant "got Enrique and put him in the hospital." 3 RT 719. There was ample evidence that appellant was at the scene and that he assisted Echeverria following the shooting.

Echeverria admitted that he shot and killed Guevara. Echeverria was convicted of committing the shooting. Thus, had the jury been presented with a factually accurate charge, it is likely that they would have chosen to convict appellant of being an accessory, rather than having committed first-degree murder. Accordingly, appellant's conviction and special circumstance finding must be reversed.

XIII. THE TRIAL COURT IMPERMISSIBLY LIMITED THE PERMISSIBLE TESTIMONY OF APPELLANT'S WITNESSES.

The trial court's limitation of appellant's penalty phase witnesses' testimony violated his rights to present all potentially mitigating evidence in his defense under the Eighth and Fourteenth Amendments and Article I of

the California Constitution.

A. Background.

Prior to the beginning of testimony in the penalty phase, the trial court told the prosecutor, in the context of victim impact evidence: "I do not allow victims to address the defendant nor do I allow them to tell the jury what the victim believes the appropriate sentence in his or her opinion should be." 6 RT 1084. The trial court did not address defense counsel regarding this restriction.

Appellant's first penalty phase witness was Maria Elena Salazar, appellant's mother. 6 RT 1096. Ms. Salazar described her son's childhood, including an automobile accident when he was eleven years old. 6 RT 1097-1098. She testified that "those people who knew [appellant], appreciated him." 6 RT 1101. She testified that she "love[s] him very much." 6 RT 1103. Trial counsel asked her if appellant had committed the crimes: "[D]o you think he should be punished for those crimes?" 6 RT 1103. Mrs. Salazar responded: "[L]et him stay a few years in jail. But, please, don't give him the death penalty." 6 RT 1103-04.

After appellant's second penalty phase witness, Guillermina Juarez was sworn in, the prosecutor asked to approach the bench. 6 RT 1107. The prosecutor stated: "I thought the Court's ruling was that we couldn't inquire

of the impact witnesses – and I assumed on either side – as to what the appropriate sentence should be." 6 RT 1107. Trial counsel argued that he had not violated the Court's order. *Id.*

The trial court found counsel's prior question to be in a "gray area." 6 RT 1107. The trial court ruled: "Don't ask them – I think – I think it is permissible for him to say do you want him to die as opposed to should he be executed. That is a fine distinction." 6 RT 1108. The trial court then limited the testimony defense counsel could introduce: "But, you know, try to stay away from that area. Just get from her the impact that it has, that she loves her brother and will visit him in prison and he is a good guy." 6 RT 1108.

Ms. Juarez testified that appellant was a "special" brother. 6 RT 1110. She had spoken with appellant "everyday" since he was in jail. 6 RT 1111. Trial counsel asked Ms Juarez if she thought: "[H]e should be punished in any way for what he did?" 6 RT 1112. Ms. Juarez responded: "Give him time in prison but not his whole life and not the death penalty." *Id.*

Trial counsel limited his examination of the next witness, Loretta Corral, to those topics permitted by the trial court's order. Ms. Corral testified that appellant "helped [her] a lot." 6 RT 1117. She testified that

appellant "is a very lovable person." 6 RT 1118. She visited appellant "[e]very visiting day." *Id.* Trial counsel did not ask Ms. Corral any questions about her thoughts as to what the appropriate sentence should be.

B. The Trial Court's Oral Ruling Impermissibly Limited the Scope of Mitigation That Appellant Could Develop Through the Penalty Phase Witnesses.

In *Lockett,* the Supreme Court reversed a death penalty verdict because the limited range of mitigating circumstances allowed under Ohio's death penalty statute was incompatible with the Eighth and Fourteenth Amendments. *Lockett,* 438 U.S. at 608-609.

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. [Footnotes omitted.] . . . The need for treating each defendant in a capital case with that degree of respect due the uniqueness to the individual is far more important than in noncapital cases.

Id. at 604-605 (plurality opinion of Burger, C. J). The Supreme Court added: "Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Id.* at 604 n. 12.

In *Eddings,* the Supreme Court explained: "By requiring that the sentencer be permitted to focus 'on the characteristics of the person who

committed the crime,' *Gregg v. Georgia* [(1976)] 428 U.S. 153,] 197, the rule in *Lockett* recognizes that 'justice . . . requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender.' *Pennsylvania v. Ashe*, 302 U.S. 51, 55 (1937)." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

In a capital case, the sentencer may not refuse to consider or be precluded from considering "any relevant mitigating evidence." *Eddings*, 455 U.S. at 114. This rule is well established. *See, e.g.*, *Skipper v. South Carolina,* 476 U.S. 1, 4 (1986); *Walton v. Arizona*, 497 U.S. 639, 649 (1990); *Hedlund v. Ryan*, 750 F.3d 793, 814-815 (9th Cir. 2014); and *People v. Fudge*, 7 Cal.4th 1075, 1113-1115 (1994). In *Hitchcock,* the Supreme Court added that mitigation evidence is not limited to statutory mitigation factors. *Hitchcock v. Dugger,* 481 U.S. 393, 398-399 (1987)

Here, the trial court's instruction to defense counsel to "[j]ust get from her the impact that [this case] has, that he loves his brother and will visit him in prison and he is a good guy" unconstitutionally limited the scope of the mitigating evidence.[20] 6 RT 1108. The trial court's ruling

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[20] Appellant is aware that this Court has found that evidence that a jury "could have interpreted [] to mean that if they wished to spare defendant's family the emotional distress of execution" is not admissible penalty phase evidence. *People v. Ochoa*, 19 Cal.4th 353, 456 (1998). Appellant does not contest this Court's holding here. In *Ochoa*, this Court

identified the only topics of permissible mitigation evidence. Any testimony diverging from these topics was impermissible under the Court's ruling. The scope of evidence permitted by the trial court falls short of the rule that "any relevant mitigating evidence" is admissible. *Eddings*, 455 U.S. at 114.

C. The Trial Court's Limitation on the Scope of Mitigating Evidence Requires Reversal Without an Inquiry into Prejudice.

When the sentencer has been precluded from considering relevant mitigating evidence, the Supreme Court has held that the sentencing procedure is "fatally flawed." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264 (2007). Prejudice is not required to be shown.

In *Nelson*, the Court of Appeal examined the Supreme Court's *Lockett* jurisprudence and concluded that the harmless error analysis should not be undertaken when the jury was precluded from giving full effect to a defendant's mitigating evidence. *Nelson v. Quarterman*, 472 F.3d 287 (5th Cir. 2006) (*en banc*), *cert. den.* 551 U.S. 1141 (2007). The Court in *Nelson* noted that the Supreme Court had "never applied a harmless error analysis . . . or given any indication that harmless error might apply" in its many

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was addressing whether a specific type of testimony was admissible. Here, the Court improperly specified and limited the permissible subjects of penalty phase testimony.

decisions finding *Lockett* error. *Id.* at 314.

The Court in *Nelson* reasoned that this is because the error deprives the sentencer "of a 'vehicle for expressing its 'reasoned moral response to the defendant's background, character, and crime,' "which precludes it from making" 'a reliable determination that death is the appropriate sentence." *Id.* at 314-315. The reasoned moral judgment made by the sentencer "differs from [the] fact-bound judgments made "in other contexts and from "cases involving defective jury instructions in which the Court has found harmless review error to be appropriate." *Id.* at 315. The Court concluded: "Given that the entire premise of the *Penry* line of cases rests on the possibility that the [sentencer's] reasoned moral response might have been different from its answers to the special issues had it been able to fully consider and give effect to the defendant's mitigating evidence, it would be wholly inappropriate for an appellate court, in effect, to substitute its own moral judgment for the [sentencer's] in these cases." *Nelson*, 472 F.3d at 315.

In *Coble*, the Court of Appeals reserved a conviction, without assessing prejudice, where there was a "reasonable likelihood that the [sentencer] would interpret the instructions in a manner that precluded it from fully considering and giving full effect to all of defendant's mitigating

evidence." *Coble v. Quarterman*, 496 F.3d 430, 444 (5th Cir. 2007).

Prior to the decision of the Supreme Court in *Abdul-Kabir*, this Court had held that when the sentencer is precluded from considering relevant mitigating evidence, reversal is not necessarily required. *People v. Roldan*, 35 Cal.4th 646, 739 (2005). Instead, this Court found that the reviewing court must determine if the error was harmless beyond a reasonable doubt under *Chapman*, 386 U.S. 18, 24. *Roldan*, 35 Cal.4th at 739. The logic and rationale of the Court of Appeals in *Nelson* and *Coble* should lead this Court to reject conducting an harmless error analysis.

First, in light of the more recent federal authorities – including *Abdul-Kabir* – this Court should find that *Lockett* error cannot be harmless and that appellant's death sentence, imposed without consideration of relevant mitigating evidence, is reversible *per se*. Second, in *Roldan*, the trial court prohibited testimony regarding one specific area of testimony. *Roldan*, 35 Cal.4th at 738-739. Roldan was then able to introduce substantially similar testimony despite this restriction. Here, however, the trial court enumerated the permissible areas of testimony and the testimony then followed those areas. The trial court prevented mitigation subjects from being discussed during the witness' testimony.

Significantly, as a result of the trial court's error, there is no record

to assess for harmless error. The jury was prohibited from so much as hearing additional mitigating evidence that did not fit within the scope of the Court's order. Thus, the trial court violated the Eighth Amendment's protection of reliable sentencing proceedings and appellant's death sentence must be set aside, without considering prejudice.

XIV. THE PROSECUTOR COMMITTED MISCONDUCT BY MISSTATING THE LAW GIVEN THE MORAL AND NORMATIVE NATURE OF DEATH PENALTY DETERMINATIONS IN CALIFORNIA.

The prosecutor misstated the law regarding the nature of the jury's penalty phase determination. The prosecutorial misconduct violated appellant's rights to due process and to a reliable capital sentencing under the Fifth, Sixth, Eighth, and Fourteenth Amendments and Article I of the California Constitution.

A. Background.

1. Prosecutor's Argument and Instructions.

At the beginning of his penalty phase argument, the prosecutor argued:

> One of the most important things to keep in mind, is that this whole process, the whole trial process, the penalty phase process, the reasons why are here and Mr. Meyers is here is essentially a truth-seeking mission. It is to evaluate the facts and determine what is true and what isn't true and what to do with those facts once you make that determination.

6 RT 1123. The prosecutor then argued, that based on the results of this "truth seeking mission," the jurors were to apply "a standard . . . with the aggravating factors and the mitigating [factors], that that the aggravating substantially outweigh those mitigating factors." 6 RT 1123.

Later, the jury was instructed pursuant to CALJIC 8.88:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without the possibility of parole, shall be imposed on the defendant.
>
> After having heard all the evidence and after having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity or adds to its injurious consequences which is above and beyond the elements of the crime itself.
>
> A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them.
>
> You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors are you are permitted to consider.

> In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.
>
> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances, that it warrants death instead of life without parole.

6 RT 1139-1140; 3 CT 480-481.

2. This Court's Characterization of the Penalty Phase Decision Process.

In *Rodriguez*, this Court held that "the sentencing function is inherently moral and normative, not factual; the sentencer's power and discretion under both the 1978 and 1977 provisions is to decide the appropriate penalty for the particular offense and offender under all the relevant circumstances." *People v. Rodriguez,* 42 Cal.3d 730, 779 (1986). Since this Court decided *Rodriguez*, the Supreme Court has clarified that the Fifth, Sixth, Eighth, and Fourteenth Amendments require that findings of any facts that "operate as the functional equivalent of an element of a greater offense" must be made beyond a reasonable doubt and unanimously by a jury. *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (quotation omitted); *see also Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 477-78 (2000).

Numerous capital appellants have argued in this Court that the jury's findings of the existence of aggravating and mitigating factors and whether the aggravating factors outweigh the mitigating factors is a factual finding that increases the offense and potential penalty. Thus, constitutional protections should be extended to those findings and the findings must be made unanimously and beyond a reasonable doubt. This Court has repeatedly rejected those arguments; instead finding that the moral and normative nature of the penalty phase decisions are not factual findings. *See, e.g. People v. Carpenter,* 15 Cal.4th 312, 417 (1997) ("[T]he sentencing function is inherently moral and normative, not factual"), *Monterroso*, 34 Cal.4th at 796 (same); *People v. Griffin*, 33 Cal.4th 536, 595 (2004) (same); *People v. Brown*, 33 Cal.4th 383, 401-402 (2004) (same); *Smith*, 30 Cal.4th at 642 (2003) (same); *Prieto*, 30 Cal.4th at 275 (2003) (same); *People v. Moon*, 37 Cal.4th 1, 40 (2005) (same).

This Court's case law is based on the reasoning that "the penalty phase determination in California is *normative, not factual*." *Prieto*, 30 Cal.4th at 275 (emphasis added); *see also Griffin*, 33 Cal.4th at 595 (finding penalty phase "determinations do not amount to the finding of facts, but rather constitute a single fundamentally normative assessment"); *Moon*, 37 Cal.4th at 40 (characterizing the "penalty jury's principal task" as a "moral

endeavor"); *Dickey*, 35 Cal.4th at 930-31. This Court has held that the penalty decision "is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." *Prieto*, 30 Cal.4th at 275.

B. The Prosecutor's Statement Was at Odds with this Court's Characterization of the Penalty Phase Determination.

In essence, the prosecutor insisted that "[o]ne of the most important things [for the jury] to keep in mind . . . is to evaluate the facts and determine what is true and what isn't true." 6 RT 1123. This statement is inapposite to this Court's description of the jury's determination being "normative, not factual." *Prieto*, 30 Cal.4th 275. Indeed, this Court has found: "The penalty jury's principal task is the moral endeavor of deciding whether the death sentence should be imposed on a defendant who has already been determined to be 'death eligible' as a result of the findings and verdict reached at the guilt phase." *Moon*, 37 Cal.4th at 40 (quoting *People v. Bolin*, 18 Cal.4th 297, 342 (1998)). The erroneous argument was misconduct.

C. The Prosecutor's Argument Misled the Jury Regarding the Consideration of Mitigating Evidence.

The prosecutor's argument also violated the Supreme Court's holding in *Woodson*. "In order to ensure 'reliability in the determination

that death is the appropriate punishment in a specific case,' *Woodson* [*v. North Carolina*], 428 U.S. [280,] 305 [1976,] the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime." *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989).

Here, the prosecutor asked the jurors to "evaluate the facts and determine what is true and what isn't true . . . ." 6 RT 1123. However, the prosecutor then pointed out that appellant "has been convicted in a prior trial, one very much like this one, where there are twelve jurors, of the crime of murder during the commission of a robbery while a principal, during the commission of that crime used a firearm." 6 RT 1123-1124. In effect, the prosecutor asked the jury to determine the existence of aggravating or mitigating factors based on how thoroughly they had been proven. The prosecutor then emphasized that the aggravating factors – prior felony (murder) conviction and violent conduct – had already been found to be true beyond a reasonable doubt, by a jury "much like this one." 6 RT 1123.

By making the dispute factual, the prosecutor was then able to argue that the aggravating factors had already been found true by a jury. Yet, appellant could not make the same showing, due to the "normative" nature

of the mitigating factors. Appellant could not make the "factual" showing that the prosecutor's argument required him to make in order for the jury to impose a life sentence.

D. The Prosecutorial Misconduct Was Prejudicial.

For the reasons provided in Argument XII, subsection C, this Court should find that the misstatement regarding the role of aggravating and mitigating evidence is reversible error per se, without assessing the prejudicial impact. Assuming that this Court finds that appellant must show prejudicial error, respondent cannot demonstrate that the error was harmless beyond a reasonable doubt.

Appellant introduced mitigating evidence in the short penalty phase presentation through three witnesses. The parties stipulated that appellant "while held in the county jail, has had no disciplinary action taken against him . . . ." 6 RT 1090. Appellant's mother and sister testified about his sweet and loving nature. 6 RT 1097-1114. Loretta Corral, a friend who looked up to appellant described appellant as a "very lovable person." 6 RT 1118. She stated that "he helps – he helped a lot of people, you know." 6 RT 1118.

Yet, the prosecutor's argument encouraged the jury to focus on the extent to which the mitigating and aggravating factors had been proven

instead of answering the moral and normative question of what is the "appropriate penalty." *Carpenter*, 15 Cal.4th at 417. The prosecutor effectively put a thumb on death's side of the scale of justice because the aggravating factors had been proven and found by a previous jury, whereas the mitigation evidence came through defendant friendly witnesses limited to testimony about "the impact that [this case] has, that [the witnesses] love [appellant] and will visit him in prison and he is a good guy." 6 RT 1108.

Due to the normative nature of the mitigating evidence, the mitigating factors could not be proven under the same standard – especially given the paucity of penalty phase evidence. Thus, the improper argument cannot be found to be harmless beyond a reasonable doubt. Accordingly, appellant's death sentence must be reversed.

XV. THE CUMULATIVE ERRORS WARRANT RELIEF.

Here, the individual errors are sufficiently prejudicial to warrant a new trial. In any event, reversal is required because of the cumulative errors. *People v. Jandres,* 226 Cal.App.4th 340, 361 (2014) ("Under the 'cumulative error' doctrine, we reverse the judgment if there is a 'reasonable possibility' that the jury would have reached a result more favorable to the defendant absent a combination of errors."); and *People v. Hill*, 17 Cal.4th 800, 844 (1998) ("a series of trial errors, though

independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error."); and *Cooper v. Sanders*, 837 F.2d 284, 288 (7th Cir. 1988). "Although individual errors looked at separately may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial as to require reversal." *United States v. Necoechea*, 986 F.2d 1273, 1280 (9th Cir. 1993).

The "collective presence of the[] errors [in appellant's case] is devastating to one's confidence in the reliability of this verdict and therefore requires, at the very least, a new trial." *Alcala v. Woodford,* 334 F.3d 862, 893 (9th Cir. 2003) (citation omitted). Tragically, the following errors occurred during appellant's trial:

1. The unanimity of doubt language in CALJIC No. 8.71 and CALJIC No. 8.72 unconstitutionally lowered the state's burden of proof for murder;

2. The trial court failed to correctly respond to the jury's written question regarding the degree of murder;

3. The trial court failed to instruct the jury that appellant had no duty to withdraw if the victim responded with such sudden deadly force that withdrawal was not possible;

4. The trial court failed to instruct the jury to view with caution

evidence of pre-offense statements attributed to appellant;

5. Charging appellant with capital murder when the sole special circumstance was a juvenile conviction in which appellant was not the shooter;

6. The trial court abused its discretion by conducting a constitutionally inadequate voir dire;

7. California's death penalty statute, as interpreted by this Court and as applied at appellant's trial, is unconstitutional;

8. Death qualification jury selection is unconstitutional;

9. The trial court prohibited trial counsel from eliciting information regarding Echeverria's conviction;

10. The trial court failed to instruct the jury with an accessory after-the-fact instruction;

11. The trial court limited the permissible testimony of appellant's witnesses; and

12. The prosecutor committed misconduct by misstating the law regarding the moral and normative nature of the penalty phase determination.

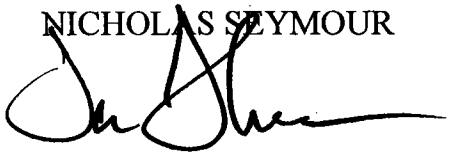
The errors during appellant's trial, when considered in the cumulative, violated Article I of the California Constitution and the Fifth,

Sixth, Eighth and Fourteenth Amendments and liberty interests in the non-arbitrary operation of California laws and statutes under the Fifth and Fourteenth Amendments.

Dated: December 23, 2014

Respectfully submitted,

JAMES THOMSON
NICHOLAS SEYMOUR

By: 

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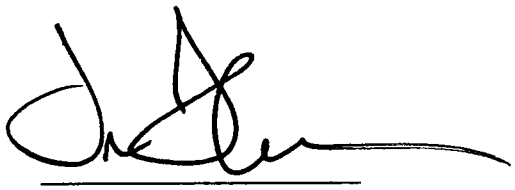
CERTIFICATE OF COMPLIANCE

I hereby certify that, according to my word processing software, this brief contains 12,566 words. Appellant's opening brief contains 58,788 words. Together, appellant's opening brief and this supplemental brief contain 71,354 words.

Dated: December 23, 2014



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DECLARATION OF SERVICE

Re: *People v. Salazar* Case No: S077524

I, AARON JONES, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action.

On December 23, 2014, I served the attached **APPELLANT'S SUPPLEMENTAL OPENING BRIEF** by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Berkeley, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, for there is regular communication by mail between the place of mailing and each of the places so addressed.

Ryan Smith Deputy Attorney General Los Angeles Office 300 South Spring St., Suite 1702 Los Angeles, CA 90013 Los Angeles Superior Court Clerk of Appeals 210 W. Temple Street, Room M-3 Los Angeles, CA 90012	Magdaleno Salazar Nava, P-34200 San Quentin State Prison San Quentin, CA 94974

I declare under penalty of perjury, as defined by the State of California and the United States, that the foregoing is true and correct and that this declaration was executed in Berkeley, California December 23, 2014.

AARON JONES