SUPREME COURT COPY

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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **MAGDALENO SALAZAR,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S077524

SUPREME COURT
FILED
FEB - 6 2015
Frank A. McGuire Clerk
Deputy

Los Angeles County Superior Court Case No. BA081564
The Honorable Robert J. Perry, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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DEATH PENALTY

TABLE OF CONTENTS

Page

Introduction 1

VI. The Supreme Court's holding in *Roper v. Simmons* (2005) 543 U.S. 551 [125 S.Ct. 1183, 161 l.Ed.2d 1], does not prohibit the use of prior murder convictions, committed when appellant was a juvenile, as an aggravating circumstance to render appellant death eligible for a murder committed while he was an adult 1

X. Death-qualification during voir dire is proper 4

XI. The trial court properly excluded testimony regarding co-defendant Echeverria's conviction 5

A. Underlying proceedings 5

B. Applicable law 6

C. The trial court properly exercised its discretion 7

D. Any error was harmless 11

XII. The trial court properly denied appellant's request to instruct the jury on the lesser-related offense of accessory after the fact liability 13

A. Underlying proceedings 13

B. The trial court properly denied appellant's request for the lesser-included jury instruction 14

C. Any error was harmless 16

XIII. The trial court properly limited the testimony of appellant's witnesses during the penalty phase of the trial 17

A. Underlying proceedings 17

B. Applicable law 18

C. The trial court did not abuse its discretion 18

D. Any error was harmless 19

TABLE OF CONTENTS
(continued)

Page

XIV. Appellant's claim of prosecutorial misconduct was not preserved for appellate review, and in any event, the claim is without merit because no misconduct occurred and appellant suffered no prejudice 20

A. Appellant's claim of prosecutorial misconduct has been forfeited 20

B. The prosecutor did not commit misconduct 21

C. Appellant was not prejudiced by the alleged act of misconduct 24

No Cumulative Error Resulted 25

TABLE OF AUTHORITIES

Page

CASES

Abdul-Kabir v. Quarterman
(2007) 550 U.S. 233 [27 S.Ct. 1654, 167 L.Ed.2d 585] 19

Apprendi v. New Jersey
(2000) 530 U.S. 466 [120 S. Ct. 2348, 147 L. Ed. 2d 435] 3

Auto Equity Sales, Inc. v. Superior Court
(1962) 57 Cal.2d 450 ..... 15, 16

Boyd v. Newland
(9th Cir. 2006) 467 F.3d 1139 3

Boyde v. California
(1990) 494 U.S. 370 [110 S.Ct. 1190, 108 L.Ed.2d 316] 25

Chambers v. Mississippi
(1973) 410 U.S. 284 [93 S.Ct. 1038, 35 L.Ed.2d 297] 8, 9, 10

Coleman v. Thompson
(1991) 501 U.S. 722 [111 S.Ct. 2546, 115 L.Ed.2d 640] 21

Collins v. Youngblood
(1990) 497 U.S. 37 [110 S.Ct. 2715, 111 L.Ed.2d 30] 16

Eddings v. Oklahoma
(1982) 455 U.S. 104 [102 S.Ct. 869, 71 L.Ed.2d 1] 10

Graham v. Florida
(2010) __U.S.__ [130 S.Ct. 2011] 3

Harris v. Reed
(1989) 489 U.S. 255 [109 S.Ct. 1038, 103 L.Ed.2d 308] 21

Hopkins v. Reeves
(1998) 524 U.S. 88 [118 S.Ct. 1895, 141 L.Ed.2d 76] 15

In re Sheena K.
(2007) 40 Cal.4th 875 11

Lockhart v. McCree
(1986) 476 U.S. 162 [106 S.Ct. 1758, 90 L.Ed.2d 137] 5

Moore v. Missouri
(1895)159 U.S. 673 [16 S.Ct. 179, 40 L.Ed. 301] 4

People v. Ayala
(2000) 23 Cal.4th 225 ..... 8, 9

People v. Birks
(1998) 19 Cal.4th 108 ..... 14, 15, 16

People v. Bolton
(1979) 23 Cal.3d 208 21

People v. Breverman
(1998) 19 Cal.4th 142 ..... 16, 17

People v. Brown
(2003) 31 Cal.4th 518 23

People v. Burrell–Hart
(1987) 192 Cal.App.3d 593 7

People v. Chism
(2014) 58 Cal.4th 1266 5

People v. Clark
(2011) 52 Cal.4th 856 ..... 20, 21

People v. Cuevas
(1995) 12 Cal.4th 252 16

People v. Cunningham
(2001) 25 Cal.4th 926 23

People v. Davis
(1995) 10 Cal.4th 463 20

People v. Dennis
(1998) 17 Cal.4th 468 24

People v. Elliot
(2005) 37 Cal.4th 453 25

People v. Foster
(2010) 50 Cal.4th 1301 14

People v. Garceau
(1993) 6 Cal.4th 140 21

People v. Geiger
(1984) 35 Cal.3d 510 ..... 14, 15, 16

People v. Gionis
(1995) 9 Cal.4th 1196 21

People v. Gonzalez
(1990) 51 Cal.3d 1179 25

People v. Gray
(2005) 37 Cal.4th 168 21

People v. Hall
(2011) 200 Cal.App.4th 778 14

People v. Haskett
(1982) 30 Cal.3d 841 21

People v. Hill
(1998) 17 Cal.4th 800 20

People v. Hovarter
(2008) 44 Cal.4th 983 24

People v. Howard
(2010) 51 Cal.4th 15 4

People v. Jackson
(1996) 13 Cal.4th 1164 5

People v. Jennings
(2010) 50 Cal.4th 616 ..... 14, 15

People v. Jones
(2013) 57 Cal.4th 899 2

People v. Jones,
(2003) 29 Cal.4th 1229 25

People v. Kaurish
(1990) 52 Cal.3d 648 .....5, 6

People v. Kraft
(2000) 23 Cal.4th 978 .....14, 15

People v. Lavergne
(1971) 4 Cal.3d 735 7

People v. Lenart
(2004) 32 Cal.4th 1107 5

People v. Lucky
(1988) 45 Cal.3d 259 4

People v. Majors
(1998) 18 Cal.4th 385 14

People v. McCullough
(2013) 56 Cal.4th 589 10

People v. McKinnon
(2011) 52 Cal.4th 610 14

People v. Mickey
(1991) 54 Cal.3d 612 5

People v. Ochoa
(1998) 19 Cal.4th 353 .....18, 19, 21

People v. Phillips,
supra, 22 Cal.4th.....25

People v. Pitts
(1990) 223 Cal.App.3d 606 20

People v. Price
(1991) 1 Cal.4th 324 21

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

People v. Raley
(1992) 2 Cal.4th 870 2

People v. Rodrigues
(1994) 8 Cal.4th 1060 21

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

People v. Sapp
(2003) 31 Cal.4th 240 25

People v. Schmeck
(2005) 37 Cal.4th 240 14

People v. Steele
(2002) 27 Cal.4th 1230 5

People v. Szadziewicz
(2008) 161 Cal.App.4th 823 24

People v. Tran
(2011) 51 Cal.4th 1040 7

People v. Tully
(2012) 54 Cal.4th 952 5

People v. Watson
(1956) 46 Cal.2d 818 ..... 11, 13, 16

People v. Welch
(1999) 20 Cal.4th 701 25

People v. Williams
(2006) 40 Cal.4th 287 ..... 10, 18, 19

People v. Wilson
(2008) 44 Cal.4th 758 24

People v. Yeoman
(2003) 31 Cal.4th 93 21

Raven v. Deukmejian
(1990) 52 Cal.3d 336 11

Roper v. Simmons
(2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 1] 1, 2, 3

Skipper v. South Carolina
(1986) 476 U.S. 1 [106 S.Ct. 1669, 90 L.Ed.2d 1] 10, 18

Thompson v. Oklahoma
(1988) 487 U.S. 815 [108 S.Ct. 2687, 101 L.Ed.2d 702] 1, 2, 3

United States v. Scheffer
(1998) 523 U.S. 303 [118 S.Ct. 1261, 140 L.Ed.2d 413] 9

Weeks v. Angelone
(2000) 528 U.S. 225 [120 S.Ct. 727, 145 L.Ed.2d 727] 24

STATUTES

Evid. Code
§ 210 7
§ 350 7
§ 352 7
§ 353 11

Pen. Code,
§ 190.3 4
§ 667, subd. (d)(3)(b) 4

CONSTITUTIONAL PROVISIONS

Cal. Const., Article I, § 28(g) 4

U.S. Const. Eighth Amend. 1, 2, 10, 18

OTHER AUTHORITIES

CALJIC No. 8.88 ..... 22, 24

INTRODUCTION

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 new counsel of record. On January 7, 2014, appellant filed Appellant's Supplemental Opening Brief. The same date, this Court indicated Respondent may file a Supplemental Respondent's Brief within 30 days.

VI. THE SUPREME COURT'S HOLDING IN *ROPER V. SIMMONS* (2005) 543 U.S. 551 [125 S.CT. 1183, 161 L.ED.2D 1], DOES NOT PROHIBIT THE USE OF PRIOR MURDER CONVICTIONS, COMMITTED WHEN APPELLANT WAS A JUVENILE, AS AN AGGRAVATING CIRCUMSTANCE TO RENDER APPELLANT DEATH ELIGIBLE FOR A MURDER COMMITTED WHILE HE WAS AN ADULT

Reiterating a claim raised in his opening brief (AOB 113-130), appellant contends that his death sentence is unconstitutional because it is based upon his juvenile conduct. (AOB 2-12.) Once again, appellant's claim must be rejected.

The special circumstance alleged in this case was a prior murder conviction arising out of an attempted robbery-murder that took place when appellant was 17 years old. After being found guilty of first degree murder for the shooting death of Guevara, appellant waived his right to a jury trial on the special circumstance, and admitted his prior conviction for first degree murder. (2CT 449; 6RT 1068.) Appellant was sentenced to death following a penalty phrase trial. (6RT 1144.) Appellant, relying on *Thompson v. Oklahoma* (1988) 487 U.S. 815, 977 [108 S.Ct. 2687, 101 L.Ed.2d 702] and *Roper v. Simmons* (2005) 543 U.S. 551, 578 [125 S.Ct. 1183, 161 L.Ed.2d 1], now claims that his death sentence violates the Eighth Amendment because it was imposed due to a murder he committed when he was a juvenile. (AOB 2-12.) Appellant's contention must be

rejected because a prior juvenile conviction may be used as an aggravating factor to impose a death sentence.

In *Thompson v. Oklahoma*, the United States Supreme Court determined the Eighth Amendment prohibits imposing the death penalty on those who committed their capital crimes when they were less than 16 years old. (*Thompson v. Oklahoma* (1988) 487 U.S. 815, 977 [108 S.Ct. 2687, 101 L.Ed.2d 702].) *Thompson* is inapplicable to appellant's claim. In fact, this Court rejected this precise claim in *People v. Raley* (1992) 2 Cal.4th 870, and more recently affirmed *Raley's* holding in *People v. Jones* (2013) 57 Cal.4th 899, 977. In *Raley*, the defendant, also relying on *Thompson v. Oklahoma*, argued, "the admission of evidence of juvenile misconduct violates the Eighth Amendment of the United States Constitution because it permits aggravation of sentence for the capital crime for conduct not considered criminal when it occurred." (*People v. Raley*, *supra*, 2 Cal.4th at p. 909.) "This Court rejected the argument because the analogy to *Thompson* was inapt: the defendant's death penalty sentence "'is attributable to [his] current conduct, i.e., murder with a special circumstance finding, not his past [juvenile] criminal activity.' " (*People v. Jones*, *supra*, 57 Cal.4th at p. 977; quoting *People v. Raley*, *supra*, 2 Cal.4th at p. 909.) As appellant was not a minor when he committed his crimes against Guevara, *Thompson* is inapplicable.

In *Roper v. Simmons*, the United States Supreme Court determined that sentencing someone to death for a crime committed when that person was a juvenile violated the Eighth Amendment. (*Roper v. Simmons* (2005) 543 U.S. 551, 578 [125 S.Ct. 1183, 161 L.Ed.2d 1].) *Roper* is inapplicable to appellant's case because he was not a minor when he murdered Guevara, the crime for which he was sentenced to death. (*People v. Jones*, *supra*, 57 Cal.4th at p. 977), *Roper* says nothing about using a prior juvenile murder

conviction as a "special circumstance" to make an adult defendant death-eligible. Thus, his claim fails.

Nor does *Graham v. Florida* (2010) __U.S.__ [130 S.Ct. 2011], provide appellant any relief. (SAOB 6-7.) *Graham* holds that sentencing juvenile offenders to life without the possibility of parole is unconstitutional in non-homicide offenses, forbidding states from deciding "at the outset" that a juvenile offender will never be fit to reenter society. (*Graham v. Florida*, *supra*, 130 S.Ct at p. 2029.) *Graham* is inapplicable. Notwithstanding the fact that appellant committed the underlying crime as an adult, his juvenile conviction was for homicide, and he was not sentenced to life without parole for that prior homicide. Hence, *Graham* does not apply here.

Nevertheless, appellant asks this Court to expand *Roper*, *Thompson* and *Graham* and, in essence, prevent a jury from giving any weight to crimes committed as a juvenile when determining whether the death penalty is appropriate for a later murder committed as an adult. (SAOB 4-11.) Contrary to appellant's assertion otherwise, such a rule is not mandated by *Thompson*, *Roper*, or any other litany of cases, nor does it comport with well-established sentencing considerations, which legitimately allow the sentencer to consider the effects of recidivism, including criminal acts committed when the defendant was a juvenile. (*Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, 1152 [*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S. Ct. 2348, 147 L. Ed. 2d 435] does not preclude the use of nonjury juvenile adjudications to enhance the sentence of an adult offender]).) Further, contrary to appellant's assertion otherwise (SAOB 11-12), it ignores the distinction between double sentencing for a prior crime versus taking the fact of a defendant's criminal

history into account when determining the appropriate sentence for continued criminal behavior.[1]

Here, appellant was sentenced to death for the murder of Guevara because this murder was committed while he was an adult, and he had been properly convicted for his participation in a previous murder, "a situation into which [he] had previously brought himself." (*Moore v. Missouri* (1895) 159 U.S. 673, 677 [16 S.Ct. 179, 40 L.Ed. 301].) Such a finding comports not only with this Court's precedent (see *People v. Roldan* (2005) 35 Cal.4th 646, 737 [jury may consider evidence of juvenile violent criminal misconduct as an aggravating factor under section 190.3, factor (b)]; *People v. Lucky* (1988) 45 Cal.3d 259, 296), but with the principles established in the California Constitution and legislation. (See Cal. Const., art. I, § 28(g) [allowing use of any prior felony conviction, whether adult or juvenile, to enhance a sentence]; Pen. Code, § 667, subd. (d)(3)(b) [setting the criteria for the use of juvenile adjudications for purposes of the habitual offender enhancement].)

Accordingly, appellant's claim must be rejected.

X. DEATH-QUALIFICATION DURING VOIR DIRE IS PROPER

Appellant contends that the guilt and penalty judgments must be reversed because death qualification is unconstitutional. (SAOB 13-28.) First, the claim is forfeited by appellant's failure to raise it below. (*People v. Howard* (2010) 51 Cal.4th 15, 26.) In any event, appellant's claim is meritless. This Court and the United States Supreme Court have both

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[1] Appellant contends that trial court should have given an instruction, sua sponte, to avoid double counting the prior murder conviction. (SAOB 12). However, as appellant concedes, this Court has ruled such an instruction need only be given upon request by the defendant. (*People v. Proctor* (1992) 4 Cal.4th 499, 550.) Appellant did not request such an instruction.

rejected the argument that the use of death-qualified jurors violates a defendant's state or federal constitutional rights. (*Lockhart v. McCree* (1986) 476 U.S. 162 [106 S.Ct. 1758, 90 L.Ed.2d 137] ["The death qualification process is not rendered unconstitutional by empirical studies concluding that, because it removes jurors who would automatically vote for death or for life, it results in juries biased against the defense."]; *People v. Chism* (2014) 58 Cal.4th1266, 1286; *People v. Tully* (2012) 54 Cal.4th 952, 1066; *People v. Lenart* (2004) 32 Cal.4th 1107, 1120, *People v. Steele* (2002) 27 Cal.4th 1230, 1240, and *People v. Jackson* (1996) 13 Cal.4th 1164, 1198-1199.) Based on the foregoing authority – clearly ruling that a death-qualified jury is not unconstitutional as appellant claims – appellant's claim should be rejected. (See *Lockhart, supra*, 476 U.S. at pp. 176-177; see also *People v. Mickey* (1991) 54 Cal.3d 612, 662; *People v. Kaurish* (1990) 52 Cal.3d 648, 674.)

XI. THE TRIAL COURT PROPERLY EXCLUDED TESTIMONY REGARDING CO-DEFENDANT ECHEVERRIA'S CONVICTION

Appellant contends the trial court erred when it limited Echeverria's testimony regarding his conviction for the instant crime. (SAOB 28-33.) Appellant's claim must be rejected.

A. Underlying Proceedings

Co-defendant Enrique Echeverria was tried separately from appellant. During appellant's trial, appellant sought to introduce evidence that co-defendant Echeverria had been tried and convicted for the same crime. Appellant expressed an interest in also introducing evidence that co-defendant Echeverria was convicted of voluntary manslaughter, but acknowledged that it may not be relevant. (3RT 601.) The prosecutor objected to the mentioning of the voluntary manslaughter conviction. (*Id.*) The trial court ruled that appellant could introduce evidence that co-defendant Echeverria was tried and convicted for killing Guevara; however,

he could not mention voluntary manslaughter. The trial court stated "You cannot tell [the jury] this guy got manslaughter because it was a different case, different evidence . . . ." (3RT 602.) Ultimately, the parties stipulated that co-defendant Echeverria was convicted of killing Guevara. The stipulation was read to the jury as follows: "[T]he companion of [appellant], Enrique Echeverria, was convicted of killing Enrique Guevara in a prior trial." (3RT 603.)

Co-defendant Echeverria then testified for the defense. Appellant once again sought to introduce testimony that co-defendant Echeverria was convicted of voluntary manslaughter. The prosecution objected. (5RT 856.) The trial court denied the request as follows:

> I think that it would be inviting [the jury] 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 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.

(5RT 857.) Co-defendant Echeverria proceeded to testify to the events that happened, including that he shot and killed Guevara, went to trial and was convicted for killing Guevara, and was sent to prison for the killing. (5RT 860-861.) Co-defendant Echeverria further testified that Guevara shot first and that Echeverria shot Guevara with his entire clip, which was 14 bullets. (5RT 874-876.)

B. Applicable Law

Evidence Code section 350 provides: "No evidence is admissible except relevant evidence." Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Conversely, irrelevant

evidence is evidence "having no probative value; not tending to prove or disprove a matter in issue." (Black's Law Dict. (8th ed.2004) p. 848, col. 1.)

Moreover, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) This provision "permits the trial judge to strike a careful balance between the probative value of the evidence and the danger of prejudice, confusion and undue time consumption," but also "requires that the danger of these evils substantially outweigh the probative value of the evidence. This balance is particularly delicate and critical where what is at stake is a criminal defendant's liberty." (*People v. Lavergne* (1971) 4 Cal.3d 735, 744; *People v. Tran* (2011) 51 Cal.4th 1040, 1047.) Accordingly, Evidence Code "section 352 must bow to the due process right of a defendant to a fair trial and his [or her] right to present all relevant evidence of significant probative value to his [or her] defense. [Citations.] Of course, the proffered evidence must have more than slight relevancy to the issues presented. [Citation.]" (*People v. Burrell–Hart* (1987) 192 Cal.App.3d 593, 599.)

C. The Trial Court Properly Exercised Its Discretion

Here, the trial court properly exercised its discretion when it found that the probative value of the evidence of the actual crime Echeverria was convicted did not outweigh the danger of undue prejudice. As the trial court properly noted, Echeverria was tried in a separate trial, with different evidence, and by a different jury. (3RT 602.) Evidence that he was convicted of voluntary manslaughter would add nothing of significance to the evidence before the jury in the instant matter.

Nevertheless, appellant, relying on *Chambers v. Mississippi* (1973) 410 U.S. 284, 302 [93 S.Ct. 1038, 35 L.Ed.2d 297], contends that reversal is required because exclusion of the evidence violated his federal constitutional rights to due process and a fair opportunity to present a defense. (SAOB 30-32.) Appellant's claim must be rejected because *Chambers* is not applicable to the instant matter.

In *Chambers*, a defendant in a murder trial called a witness who had previously confessed to the murder. (*Chambers v. Mississippi*, *supra*, 410 U.S. at p. 294.) After the witness repudiated his confession on the stand, the defendant was denied permission to examine the witness as an adverse witness based on Mississippi's "'voucher' rule," which barred parties from impeaching their own witnesses. (*Id.* at pp. 294-295.) Mississippi did not recognize an exception to the hearsay rule for statements made against penal interests, thus preventing the defendant from introducing evidence that the witness had made self-incriminating statements to three other people. (*Id.* at pp. 297-299.) The United States Supreme Court noted that the State of Mississippi had not attempted to defend or explain the rationale for the voucher rule. (*Ibid.*) The court held that "the exclusion of this critical evidence, coupled with the State's refusal to permit [the defendant] to cross-examine [the witness], denied him a trial in accord with traditional and fundamental standards of due process." (*Id.* at p. 302.)

In *People v. Ayala* (2000) 23 Cal.4th 225, this Court considered whether the defendant "had either a constitutional or a state law right to present exculpatory but unreliable hearsay evidence that is not admissible under any statutory exception to the hearsay rule." (*Id.* at p. 266.) The defendant relied on *Chambers* and argued the trial court had "infringed on various constitutional guaranties when it barred the jury from hearing potentially exculpatory evidence." (*Id.* at p. 269.) This Court rejected the defendant's argument and held that

> "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense. [Citations.] [But i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." [Citation.] . . . Moreover, both we [citation] and the United States Supreme Court [citation] have explained that *Chambers* is closely tied to the facts and the Mississippi evidence law that it considered. *Chambers* is not authority for the result defendant urges here."

(*People v. Ayala*, *supra*, 23 Cal.4th at p. 269.)

Moreover, the United States Supreme Court has clarified that *Chambers* "does not stand for the proposition that the defendant is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence." (*United States v. Scheffer* (1998) 523 U.S. 303, 316 [118 S.Ct. 1261, 140 L.Ed.2d 413].) The Court went on to explain that, by its ruling, it was not signaling a diminution in the validity or respect normally accorded to the states regarding their rules of criminal procedure and evidence, but only that, given the unique facts of that case, the court had found the defendant there had been deprived of a fair trial. (*Chambers*, *supra*, 410 U.S. at pp. 302-303.)

The circumstances of this case did not approach those of *Chambers* where constitutional rights directly affecting the ascertainment of guilt were implicated. Here, unlike in *Chambers*, the trial court did not exclude any evidence that someone else committed the shooting. Rather, the trial court permitted Echeverria to testify that he, and only he, not only shot Guevara 14 times, but that he was convicted for shooting him in a separate proceeding. Thus, the trial court did not abuse its discretion.

Appellant also contends that the denial of the evidence violated his right to present mitigating evidence during the penalty phase. (SAOB 32-33.) Appellant's contention must be rejected.

It is well established that at the penalty phase of a capital case, the fact finder may not be precluded from considering any relevant mitigating evidence. (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4 [106 S.Ct. 1669, 90 L.Ed.2d 1]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 114 [102 S.Ct. 869, 71 L.Ed.2d 1].) The Eighth Amendment to the federal Constitution requires that a capital jury be permitted to consider in mitigation " 'any aspect of a defendant's character or record, and any circumstance of the offense that the defendant proffers as a basis for a sentence less than death.' [Citation.]" (*People v. Williams* (2006) 40 Cal.4th 287, 320.) "Nonetheless, even in the penalty phase the trial court '"determines relevancy in the first instance and retains jurisdiction to exclude evidence whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury."' [Citation.]" (*Id.*)

Here, as an initial matter, appellant forfeited this claim by not raising the issue during the penalty phase of appellant's trial. In fact, appellant did not even address Echeverria's admission that he shot Guevara or had been convicted for the crime during his presentation of mitigating factors. "'[A] constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" (*People v. McCullough* (2013) 56 Cal.4th 589, 593, quoting *In re Sheena K.* (2007) 40 Cal.4th 875, 880-881.) With certain exceptions, a defendant generally must preserve claims of trial error by contemporaneous objection as a prerequisite to raising them on appeal. (See, e.g., Evid. Code, §§ 353

[erroneous admission of evidence], 354 [erroneous exclusion of evidence].) Thus, appellant has forfeited his claim of error.

In any event, the trial court properly found the evidence was more prejudicial than probative. Echeverria was tried based on different evidence and by a different jury. Had Echeverria also been sentenced to death, appellant would be arguing the evidence inadmissible because it was unduly prejudicial. Furthermore, Echeverria was allowed to fully testify at the guilt phase that he shot and killed Guevara, stood trial, and was convicted for the shooting. Thus, his claim fails.

Appellant contends that under federal law, the fact that another equally culpable defendant will not be punished by death is a statutory mitigating factor. (SAOB 33.) However, "Decisions of the lower federal courts interpreting federal law, though persuasive, are not binding on state courts." (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 352.) In addition, under California law there is no such mitigating factor. Thus, his claim fails.

D. Any Error Was Harmless

Even if the trial court erred, the error was harmless and the judgment should be affirmed. A trial court's erroneous exclusion of defense evidence is reviewed under the *Watson* standard, which states an error is harmless if it does not appear reasonably probable a result more favorable to the defendant would have been reached absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 837.) Here, a result more favorable to appellant would not have been reached had the trial court admitted the testimony. First, Echeverria did testify at the guilty phase that it was he, not appellant that shot Guevara. He further testified that he stood trial for the shooting, was convicted, and was in prison. Nevertheless still, in spite of this evidence, the jury convicted appellant of first degree murder.

Moreover, overwhelming evidence supported appellant's conviction for first degree murder. The record reflected that appellant and co-defendant Echeverria entered the Yoshinoya Beef Bowl restaurant looking for trouble. They immediately began approaching customers, asking about gang affiliations. (3RT 606-607, 617.) Appellant approached Lemus, Salazar, and Ramirez, who were sitting down and eating a meal, and asked where Lemus and the others were from, meaning to which gang did they belong. (3RT 609, 617, 620.) Appellant then stated that he and Echeverria were "Harpys" gang members. (3RT 608-609.) Appellant and Echeverria were then over heard talking about taking "care of the business," or taking "care of the neighborhood." Appellant stated that he did not "want to be caught slipping." Mendez testified that this meant that appellant and Echeverria had to protect their territory from other gangs. (3RT 635-637.) Mendez heard appellant tell Echeverria to get his gun. (3RT 642-643, 654-655.) Appellant was already armed with the 9-millimeter. (3RT 649-651, 655-656; 4RT 742-744, 746-748, 751, 786-789.)

Multiple witnesses then testified that appellant and Echeverria were standing outside the Yoshinoya when a car drove-up and parked in the lot. The passenger, Giovanni Guevara, got out of the car and went into Yoshinoya. The driver, Enrique Guevara, who had a cast on his leg, then got out of the car and walked past Yoshinoya towards the café located next door. (4RT 741-742.) Mendez, Turner, and Antelo all saw appellant and Echeverria with guns. Appellant and Echeverria, with guns drawn and cocked, walked towards Guevara and asked, "Don't I know you from somewhere?" After that, appellant and Echeverria argued with Guevara and began pushing him. The men wrestled as they pushed Guevara into the café next to Yoshinoya. Echeverria, also with a gun, stepped into the café and the shooting started. Appellant and Echeverria ran out of the café, got

into a car, and drove away. Guevara lay dead on the floor of the café. (4RT 786-789.)

Guevara was shot nine times and died of multiple gunshot wounds. (4RT 820-831, 838-840, 850.) Fifteen bullet casings were recovered from the crime scene. Twelve of the casings belonged to a 9-millimeter and were all fired from the same gun. The remaining three casings belonged to a .25 caliber handgun, and all were fired from the same gun. (4RT 846.) No one saw Guevara with a weapon. (4RT 742-744, 746-748, 751, 791.) Accordingly, it is not reasonably probable that appellant would have obtained a more favorable result absent the error since there was more than sufficient evidence establishing his role in the shooting. This claim must fail.

XII. THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST TO INSTRUCT THE JURY ON THE LESSER-RELATED OFFENSE OF ACCESSORY AFTER THE FACT LIABILITY

Appellant contends that the trial court's refusal to instruct on the lesser-related offense of accessory after-the-fact violated his rights to a "fair trial, a jury trial, due process and a reliable capital trial." (SAOB 34-40.) Appellant is mistaken.

A. Underlying Proceedings

During discussions regarding the guilt phase jury instructions, appellant requested an instruction on accessory after-the-fact. (5RT 946.) The trial court denied the request, noting that it was not a lesser-included offense. The trial court stated that "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." (*Id.*)

B. The Trial Court Properly Denied Appellant's Request For The Lesser-Included Jury Instruction

Because it is well established that being an accessory after-the-fact is not a lesser included offense of murder (*People v. Majors* (1998) 18 Cal.4th 385, 408), appellant's request for an instruction was subject to the principles governing instructions on lesser-related offenses. (*People v. Schmeck* (2005) 37 Cal.4th 240, 291-292, abrogated on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-643). Here, the trial court properly denied appellant's request because it had no duty to instruct on a lesser-related offense, even if the instruction requested was supported by substantial evidence. (*People v. Hall* (2011) 200 Cal.App.4th 778, 781 ["'A defendant has no right to instructions on lesser related offenses, even if he or she requests the instruction and it would have been supported by substantial evidence'"], quoting *People v. Jennings* (2010) 50 Cal.4th 616, 668; *People v. Schmeck* (2005) 37 Cal.4th 240, 292 ["a trial court has no duty to instruct on an uncharged lesser related offense when requested to do so by the defendant"], citing *People v. Birks* (1998) 19 Cal.4th 108, 136; *People v. Kraft* (2000) 23 Cal.4th 978, 1064 [defendant not entitled to instruction on lesser related accessory liability offense even if supported by the evidence].) In overruling its decision in *People v. Geiger* (1984) 35 Cal.3d 510, in which the court permitted a defendant to determine unilaterally on what lesser related offenses a trial court must instruct the jury, the Court in *Birks* stated that a criminal defendant does not have "a unilateral entitlement to instructions on lesser offenses which are not necessarily included in the charge." (*People v. Birks*, *supra*, 19 Cal.4th at p. 136.)

Moreover, "there is no federal constitutional right of a defendant to compel the giving of lesser-related-offense instructions. " (*People v. Foster* (2010) 50 Cal.4th 1301, 1343; see also *People v. Kraft*, *supra*, 23 Cal.4th at

p. 1064 [defendant not entitled to instruction on lesser related offense even if supported by evidence].)" In *Hopkins v. Reeves* (1998) 524 U.S. 88, 96-97 [118 S.Ct. 1895, 141 L.Ed.2d 76], the United States Supreme Court held that criminal defendants do not have a federal constitutional right to jury instructions on lesser related, as opposed to lesser included, criminal offenses. Accordingly, appellant was not entitled to an instruction on the lesser-related offense. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Nevertheless, appellant contends that the trial court was still obligated to undertake "the required analysis" by reviewing the "evidence of appellant's conduct presented at trial." (SAOB 37-39.) However, this Court has repeatedly held that "[a] defendant has no right to instructions on lesser related offenses, *even if* he or she requests the instruction and it would have been *supported by substantial evidence*, because California law does not permit a court to instruct concerning an uncharged lesser related crime unless agreed to by both parties." (*People v. Kraft*, *supra*, 23 Cal.4th at pp. 1064-1065 (emphasis added); see also *People v. Jennings* (2010) 50 Cal.4th 616, 668; *People v. Birks*, *supra*, 19 Cal.4th at pp. 136-137.) Thus, appellant's claim must be rejected.

Finally, appellant contends that the trial court was required to follow *Geiger* because at the time the offense was committed, *Geiger* was still good law. (SAOB 39.) However, this contention was foreclosed by the *Birks* decision itself. This Court declared its holding in *Birks* "fully retroactive." (*People v. Birks*, *supra*, 19 Cal.4th at p. 136.) The Court then observed:

> Due process does not preclude such a result, since the new rule we announce today neither expands criminal liability nor enhances punishment for conduct previously committed. (*People v. Cuevas* (1995) 12 Cal.4th 252, 275[]; see Bouie v.

City of Columbia (1964) 378 U.S. 347, 352-354 [84 S.Ct. 1697, 1701-1703, 12 L.Ed.2d 894].) On the contrary, our holding merely withdraws the procedural opportunity for conviction of a reduced offense not encompassed by the accusatory pleading and selected solely by the defendant."

(*People v. Birks*, *supra*, 19 Cal.4th at p. 136.) The *Birks'* Court also implicitly rejected any argument that retroactive application of the decision would deprive him of a defense available under previous law. (See *Collins v. Youngblood* (1990) 497 U.S. 37, 42-43 [110 S.Ct. 2715, 111 L.Ed.2d 30].) *Birks* observed that when a defendant engages in criminal conduct, he "acquire[s] no cognizable reliance interest (*People v. Cuevas*, *supra*, 12 Cal.4th 252, 276) in escaping conviction on the pleadings by the means set forth in *Geiger*." (*People v. Birks*, *supra*, 19 Cal.4th at pp. 136-137.)

Once again, this Court is bound to follow its own directive that its decision in *Birks* be retroactively applied. (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455.) Pursuant to *Birks*, the trial court properly refused to give lesser-related-offense instructions requested solely by the defense.

C. Any Error Was Harmless

In any event, any alleged error was harmless. (See *People v. Breverman* (1998) 19 Cal.4th 142, 178; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) As previously discussed in Subpart D. of Argument XI, *ante*, overwhelming evidence supported appellant's conviction for first degree murder and established that he instigated and was an active partivipant in the shooting, not merely and accessory after-the-fact. Therefore, it is not reasonably probable that appellant would have obtained a more favorable result had the instruction on accessory after-the-fact been given. (See *People v. Breverman*, *supra*, 19 Cal.4th at p. 178.) This claim must fail.

XIII. THE TRIAL COURT PROPERLY LIMITED THE TESTIMONY OF APPELLANT'S WITNESSES DURING THE PENALTY PHASE OF THE TRIAL

Appellant contends the trial court impermissibly limited the testimony of his witnesses in violation of right to present all potentially mitigating evidence in his defense. SAOB 40-48.) Appellant's contention must be rejected.

A. Underlying Proceedings

During the penalty phase of the trial, the court informed the prosecution, in regards to victim impact testimony that the court did "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." (6RT 1084.) Later, Maria Elena Salazar, appellant's mother, testified for appellant as a penalty phase witness. During her testimony, Salazar stated, "[L]et him stay a few years in jail. But, please, don't five him the death penalty." (6RT 1096-1104.)

After appellant's next witness was sworn in, the prosecutor asked to approach the bench. (6RT 1107.) The prosecutor noted that the court had indicated that testimony as the appropriate sentence would not be admitted. The court noted that this was a "gray area." The court asked appellant to get the impact the case has on the witness, "that he loves his brother and will visit him in prison and he is a good guy. The court asked appellant to try and avoid what the appropriate sentence should be with the witnesses. (6RT 1107-1108.) Guillermina Juarez then testified for appellant. When asked if appellant should be punished for what he had done, Juarez answered, "Give him time in prison but not his whole life and not the death penalty." (6RT 1110-1112.) With his final witness, appellant did not ask any questions with regard to what the appropriate sentence should be. (6RT 1118.)

B. Applicable Law

As previously provided, it is well established that at the penalty phase of a capital case, the fact finder may not be precluded from considering any relevant mitigating evidence. (*Skipper v. South Carolina*, *supra*, 476 U.S. at p. 4.) The Eighth Amendment to the federal Constitution requires that a capital jury be permitted to consider in mitigation " 'any aspect of a defendant's character or record, and any circumstance of the offense that the defendant proffers as a basis for a sentence less than death.' [Citation.]" (*People v. Williams*, *supra*, 40 Cal.4th at p. 320.) "Nonetheless, even in the penalty phase the trial court '"determines relevancy in the first instance and retains jurisdiction to exclude evidence whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury."' [Citation.]" (*Id.*)

C. The Trial Court Did Not Abuse Its Discretion

Here, the trial court did not abuse its discretion when it asked appellant to try and avoid questions regarding his witness's testimony regarding the appropriate sentence. The trial court properly indicated the area was a "gray area." In *People v. Ochoa* (1998) 19 Cal.4th 353, 456, this Court stated,

> what is ultimately relevant is a defendant's background and character--not the distress of his or her family. A defendant may offer evidence that he or she is loved by family members or others, and that these individuals want him or her to live. But this evidence is relevant because it constitutes indirect evidence of the defendant's character. The jury must decide whether the defendant deserves to die, not whether the defendant's family deserves to suffer the pain of having a family member executed.

Here, the trial court, in line with *Ochoa*, specifically instructed appellant to ask the appropriate impact questions and to avoid questions about the appropriate sentence to avoid any problems. In any event, the court's ruling did *not* limit the witnesses' testimony. The court did not strike Salazar's testimony asking the jury not to give appellant the death penalty. Furthermore, even after the court's alleged erroneous ruling, Juarez asked the jury to avoid sentencing appellant to jail for his "whole life" or the death penalty. Moreover, the prosecutor did not object when this testimony was presented. Thus, any alleged ruling did not improperly limit the scope of mitigating evidence, as appellant claims.

D. Any Error Was Harmless

Appellant contends any error was structural and therefore requires automatic reversal. (SAOB 45-48.) For this contention, appellant relies on *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 264 [27 S.Ct. 1654, 167 L.Ed.2d 585], a case involving a Texas jury instruction that prevented juries from considering some of the mitigating evidence. *Abdul-Kabir* is clearly distinguishable from the instant case. This case does not involve a jury instruction that prevented a jury from considering the full effect of the mitigating evidence. Instead, the issue involved a single evidentiary ruling that actually had no affect on the presentation of the evidence. Therefore, harmless error analysis applies.

The trial court did not abuse its discretion in excluding this testimony, and, even if it had, the error would have been harmless under any applicable standard. (*People v. Williams*, *supra*, 40 Cal.4th at p. 320.) As discussed, two of appellant's three witnesses during the penalty phase were allowed to request that the jury not impose the death penalty. The jury was aware that, as defense witnesses, the witnesses wanted the jury to spare his life as opposed to sentencing him to death. Moreover, the factors in aggravation, including the circumstances of the crime and the fact that

appellant had killed on more than one occasion, far outweighed any factors in mitigation.

XIV. APPELLANT'S CLAIM OF PROSECUTORIAL MISCONDUCT WAS NOT PRESERVED FOR APPELLATE REVIEW, AND IN ANY EVENT, THE CLAIM IS WITHOUT MERIT BECAUSE NO MISCONDUCT OCCURRED AND APPELLANT SUFFERED NO PREJUDICE

Appellant next claims that the prosecutor committed prejudicial misconduct during closing argument by misstating the law on the nature of jury's penalty phase determination. (SAOB 48-55.) Because no objection was offered below, this claim has been forfeited. Regardless, the claim does not entitle appellant to relief because no misconduct occurred, and appellant suffered no prejudice from the alleged act of misconduct.

A. Appellant's Claim Of Prosecutorial Misconduct Has Been Forfeited

A defendant may not complain of prosecutorial misconduct on appeal if he has failed at trial either to object timely to the conduct or to request a proper admonition. (*People v. Clark* (2011) 52 Cal.4th 856, 960; *People v. Hill* (1998) 17 Cal.4th 800, 820.) Further, the objection must be specific as to the basis for the claim of prosecutorial misconduct. (*People v. Davis* (1995) 10 Cal.4th 463, 531-532; *People v. Pitts* (1990) 223 Cal.App.3d 606, 691-692.) A review of the record confirms that no objection was raised, either generally or on prosecutorial misconduct grounds. Because appellant did not specifically object to misconduct during the prosecutor's closing argument, this claim has been forfeited.[2] (*People v. Clark, supra*, 52 Cal.4th at p. 960.)

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[2] Respondent requests that this Court rule on the forfeiture argument. Appellant's failure to raise a specific and timely objection below means his claim is forfeited and procedurally defaulted. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20; *People v. Garceau* (1993) 6 Cal.4th 140, 173, overruled on another point in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-

(continued...)

B. The Prosecutor Did Not Commit Misconduct

Assuming this Court reaches the merits of appellant's claim, the claim should be rejected. A prosecutor's "intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Gray* (2005) 37 Cal.4th 168, 215-216; *People v. Gionis* (1995) 9 Cal.4th 1196, 1214, internal quotation marks omitted.) Under state law, a prosecutor "commits misconduct by the use of deceptive or reprehensible methods to persuade either the court or the jury." (*People v. Gray, supra*, 37 Cal.4th at pp. 215-216; *People v. Ochoa* (1998) 19 Cal.4th 353, 428; *People v. Price* (1991) 1 Cal.4th 324, 447.) Furthermore, in order to prevail on a claim of prosecutorial misconduct, an appellant must demonstrate not only that the misconduct actually occurred, but also that his right to a fair trial was prejudiced by the complained-of action. (*People v. Bolton* (1979) 23 Cal.3d 208, 214; see *People v. Haskett* (1982) 30 Cal.3d 841, 861.)

Here, appellant's specific claim is that the prosecutor committed misconduct by misstating the law during his closing argument of the penalty phase. (SAOB 48-49.) He is mistaken. In relevant part, the prosecutor made the following statements during closing argument:

> One of the most important things to keep in mind, is that this whole process, the whole trial process, the penalty phase process, the reason why you are here and Mr. Meyers is here

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(...continued)
118.) A state procedural default bars subsequent federal habeas review of the claim, except under narrow circumstances. (*Coleman v. Thompson* (1991) 501 U.S. 722, 750 [111 S.Ct. 2546, 115 L.Ed.2d 640].) Respondent accordingly requests an explicit ruling on this issue, even if the merits are reached. (*Harris v. Reed* (1989) 489 U.S. 255, 264, fn. 10 [109 S.Ct. 1038, 103 L.Ed.2d 308].)

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.

The judge talked to you at the beginning of this trial about the death penalty, about what would take place in the penalty phase and your job evaluating the mitigating factors versus the aggravating factors.

As the judge told you, there is no burden of proof but there is a standard to be applied with the aggravating factors and the mitigating, that [] the aggravating substantially outweigh those mitigating factors. That is something you need to decide when you go back to deliberate.

(3RT 598-600.)

The jury was instructed with CALJIC No. 8.88, in pertinent part, as follows:

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. [¶] [¶]

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.

In weighing the various circumstances, you determine under the relevant evidence which penalty is justified 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.

(6RT 1138-1140.)

Simply stated, the prosecutor did not misstate the law. The prosecutor correctly noted that it was the jury's job to evaluate the aggravating and mitigating circumstances and determine whether the aggravating circumstances substantially outweigh the mitigating circumstances. Thus, there was no prosecutorial misconduct.

In any event, "[i]n evaluating a claim of prejudicial misconduct based upon a prosecutor's comments to the jury, we decide whether there is a reasonable possibility that the jury construed or applied the prosecutor's comments in an objectionable manner." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1019.) "'In conducting this inquiry, [courts] "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.'" (*People v. Brown* (2003) 31 Cal.4th 518, 553-554.) When read in context, the prosecutor's statement, "

Appellant focuses on the prosecutor's statement just prior to discussing the aggravating and mitigating circumstances where she states, "the reason why you 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." However, in reviewing claims of misconduct during closing argument, this Court must focus on how the statement would, or

could, have been understood by a reasonable juror in the context of the entire argument. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) "No misconduct exists if a juror would have taken the statement to state or imply nothing harmful." (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 839.)

Here, it was clear from the entirety of the prosecutor's statement that she was talking about the whole trial, in general terms, and not specifically the jury's duty to impose the proper sentence. Thus, the prosecutor's closing argument did not render the trial fundamentally unfair nor did it constitute a deceptive or reprehensible method of persuading the court or jury. Instead, the prosecutor's comments accurately informed the jury that it would have to determine if the aggravating circumstances substantially outweighed the mitigating circumstances. Given that the prosecutor's argument, viewed in context, was a clear reference to CALJIC No. 8.88, no prosecutorial misconduct occurred.

C. Appellant Was Not Prejudiced By The Alleged Act Of Misconduct

Assuming, without conceding, that the prosecutor's closing argument amounted to misconduct, appellant suffered no prejudice. As noted above, the trial court instructed the jury with CALJIC No. 8.88, which was a correct statement of law. Juries are presumed to understand and follow the instructions. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005; *People v. Wilson* (2008) 44 Cal.4th 758, 803; accord, *Weeks v. Angelone* (2000) 528 U.S. 225, 234 [120 S.Ct. 727, 145 L.Ed.2d 727].) Juries are aware statements by the prosecutor are merely argument and are the statements of an advocate. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1224, fn. 21, citing *Boyde v. California* (1990) 494 U.S. 370, 384 [110 S.Ct. 1190, 108 L.Ed.2d 316].) Thus, in the context of the instructions and the prosecutor's entire argument, there was no reasonable probability that the jury construed

the prosecutor's comments improperly, and as such, appellant was not prejudiced. For these reasons, appellant's claim should be rejected.

NO CUMULATIVE ERROR RESULTED

Appellant contends the cumulative effect of the alleged errors discussed in the previous arguments requires reversal. (SAOB 55-58.) The claim is without merit because the foregoing arguments demonstrate "there was no error . . . to cumulate" (*People v. Phillips*, *supra*, 22 Cal.4th at p. 244), or there was no prejudice from any alleged error (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 1056 ["trial was not fundamentally unfair, even if we consider the cumulative impact of the few errors that occurred"]; accord, *People v. Elliot* (2005) 37 Cal.4th 453, 487; *People v. Sapp* (2003) 31 Cal.4th 240, 287, 316; *People v. Jones* (2003) 29 Cal.4th 1229, 1268). A defendant is entitled to a fair trial, not a perfect one. (*People v. Welch* (1999) 20 Cal.4th 701, 775.) Appellant received a fair trial.

Dated: February 5, 2015

Respectfully submitted,

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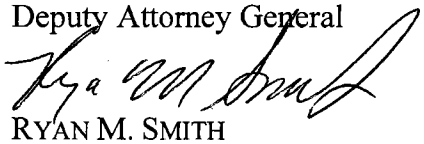

RYAN M. SMITH
Deputy Attorney General
Attorneys for Respondent

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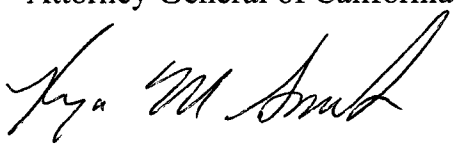
CERTIFICATE OF COMPLIANCE

I certify that the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 7,040 words.

Dated: February 5, 2015

KAMALA D. HARRIS
Attorney General of California



RYAN M. SMITH
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE
CAPITAL CASE

Case Name: **People v. Magdaleno Salazar** No.: **S077524**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On February 5, 2015, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

On February 5, 2015, I caused eight (8) copies of the **SUPPLEMENTAL RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by FEDERAL EXPRESS, **Tracking # 8062 7079 4038**.

On February 5, 2015, I caused one electronic copy of the **SUPPLEMENTAL RESPONDENT'S BRIEF** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 5, 2015, at Los Angeles, California.

E. Obeso
Declarant

Signature

SERVICE LIST

Case Name: **People v. Magdaleno Salazar** No.: **S077524**

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Habeas Corpus Resource Center
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SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **MAGDALENO SALAZAR,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S077524

SUPREME COURT
FILED
FEB - 9 2015
Frank A. McGuire Clerk
Deputy

Los Angeles County Superior Court Case No. BA081564
The Honorable Robert J. Perry, Judge

SUPPLEMENTAL DECLARATION OF SERVICE REFLECTING SERVICE OF THE SUPPLEMENTAL RESPONDENT'S BRIEF ON JAMES S. THOMSON

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DEATH PENALTY

DECLARATION OF SERVICE
CAPITAL CASE

Case Name: **People v. Magdaleno Salazar** No.: **S077524**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On February 6, 2015, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

James S. Thomson
Attorney at Law
819 Delaware Street
Berkeley, CA 94710-2064

On February 6, 2015, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by transmitting a true copy via electronic mail to Mr. James S. Thomson, using the email address as follows: **James@ycbtal.net**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 6, 2015, at Los Angeles, California.

E. Obeso
Declarant

Edith Obeso
Signature

LA1999XS0008/51693299.doc

DECLARATION OF SERVICE
CAPITAL CASE

Case Name: **People v. Magdaleno Salazar** No.: **S077524**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On February 6, 2015, I served the attached **SUPPLEMENTAL DECLARATION OF SERVICE REFLECTING SERVICE OF THE SUPPLEMENTAL RESPONDENT'S BRIEF ON JAMES S. THOMSON** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

On February 6, 2015, I caused eight (8) copies of the **SUPPLEMENTAL DECLARATION OF SERVICE REFLECTING SERVICE OF THE SUPPLEMENTAL RESPONDENT'S BRIEF ON JAMES S. THOMSON** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 via U.S. mail.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 6, 2015, at Los Angeles, California.

E. Obeso
Declarant

Signature

LA1999XS0008/51695675.doc

Case Name: **People v. Magdaleno Salazar** No.: **S077524**

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