SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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DEATH PENALTY

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.	)	
MAGDALENO SALAZAR	)	CAPITAL CASE
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A. Introduction.

The sole special circumstance alleged against appellant was a prior murder conviction. Appellant was a 17 year old juvenile at the time. 3 CT 451-467; 6 RT 1083, 1089. Appellant was not the shooter in the prior juvenile case. The prosecutor in the prior murder case testified at the penalty phase in this case that appellant "was not the shooter" in the juvenile case. 6 RT 1077.

Appellant did not possess a gun in the present case. He did not fire a gun. He is innocent of the killing of Enrique Guevara. The prosecutor admitted that "the defendant doesn't appear to be the shooter." A-1 RT 42. The trial court acknowledged the prosecutor's opinion that appellant's case "was not an overwhelming case for murder." A-1 RT 84.

Here, the use of appellant's juvenile conviction as a special circumstance and as aggravating factors was unconstitutional. The reliance on the prior murder to establish death eligibility and to secure a death sentence violated appellant's 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.

B. The 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). The Eighth and Fourteenth Amendments exclude juveniles from such punishment, "no matter how heinous the crime." *Roper*, 543 U.S. at 568. The State's use of juvenile conduct as a trigger to obtain a death sentence strips the underlying premise from recent Supreme Court cases and renders them meaningless.

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.

In *Roper*, the Supreme Court extended *Thompson*'s rationale to defendants age eighteen. *Roper*, 543 U.S. at 571. The Supreme 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 v. Florida*, 560 U.S. 48, 69 (2010). The Supreme 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 *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 sum, the Supreme Court has firmly established that a juvenile cannot exhibit sufficient culpability to justify the imposition of a death sentence. *Thompson*, 487 U.S. at 835-838 ("[L]ess culpability should attach to a crime committed by a juvenile. . . The basis for this conclusion is too obvious to require extended explanation"); *Roper,* 543 U.S. at 572-575 ("The 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").

Respondent argues: "Appellant, relying on *Thompson v. Oklahoma* (1988) 487 U.S. 815, 977 [108 S.Ct. 2687, 101 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. Appellant's contention must be rejected because a prior juvenile conviction may be used as an aggravating factor to impose a death sentence." Supplemental Reply Brief "SRB" at 1-2. Appellant's argument is different than that stated by respondent. Appellant argues that his juvenile conduct should not have been used as an aggravating factor or as a special circumstance.

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

California's death penalty scheme permits the use of prior murder convictions as "special circumstances." Penal Code section 190.2. The use of prior murder convictions obtained before the age of eighteen violates the principles announced in *Thompson*, *Roper*, *Graham*, and *Miller* because juvenile conduct does not accurately reflect the true moral culpability of the offender. *See Roper*, 543 U.S. at 570. Accordingly, there is no legitimate penological reason to allow death sentences based on juvenile conduct.

Appellant's conduct as an adult does not make him eligible for the death penalty. The sole special circumstance in this case is a conviction for

conduct occurring when appellant was a minor. But for his conduct as a minor, appellant would not stand in line for execution. The conduct enabling appellant's death sentence was committed when he was legally incapable of sufficient culpability to warrant the death penalty. *Thompson*, 487 U.S. at 838; *Roper,* 543 U.S. at 578.

Respondent argues that this Court's precedent supports death eligibility because "appellant was not a minor when he committed his crimes against Guevara [so] *Thompson* is inapplicable." SRB at 2. Respondent cites *People v. Raley*, 2 Cal.4th 870 (1992) and *People v Jones*, 57 Cal.4th 899 (2013) in support of its argument. *Id.* Respondent incorrectly reads *Jones* and *Raley*.

Neither *Jones* or *Raley* addresses the issue before this Court - whether the special circumstance under Penal Code section 190.2(a)(2), as applied in this case, sufficiently narrows the class of defendants eligible for the death penalty. See Appellant's Opening Brief "AOB" at 116-120. *Raley* is silent on this issue.

In *Raley*, the defendant kidnaped, sexually assaulted, bludgeoned and stabbed two high school aged girls. *Raley*, 2 Cal.4th at 882-884. Raley was convicted of first degree murder and two special circumstance allegations were found true. *Id.* at 881. During the penalty phase, the prosecutor presented the testimony of two witnesses who alleged that Raley

had committed lewd acts against them when he was a minor. *Id.* at 885. On appeal, Raley argued that testimony about the lewd acts committed as a minor was inadmissable in the penalty phase of his trial under Penal Code section 190.3. *Id.* at 909. This Court rejected Raley's argument. *Id.*

Raley relied on *Thompson* in his argument for exclusion of his juvenile misconduct from the penalty phase. *Raley,* 2 Cal.4th at 909. This Court held that defendant's reliance on *Thompson* was improper. *Id.* "There, it was conduct committed when defendant was a minor that the state proposed to punish by death; here, it is conduct defendant committed as an adult that is to be punished by death." *Id.* "As we have explained before in rejecting a constitutional attack on the admission of evidence of juvenile misconduct, 'the penalty verdict is attributed to [defendant's] current conduct, i.e., murder with a special circumstance finding, not his past criminal activity." *Id.* (*quoting People v. Cox*, 53 Cal.3d 618, 690 (1991)). This Court held that evidence of juvenile misconduct is admissible in the penalty phase under Penal Code section 190.3(b). *Id.*

Appellant's argument is different. Appellant argues that, even if evidence of juvenile misconduct is admissible during the penalty phase as an aggravating factor, it is unconstitutional to use juvenile misconduct as a special circumstance under Penal Code section 190.2(a)(2).

Special circumstances must "genuinely narrow the class of persons

eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to other defendants." *Zant v. Stephens*, 462 U.S. 862, 877 (1983).[1] "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence."[2] *Roper*, 543 U.S. at 568 (*citing Godfrey v. Georgia*, 446 U.S. 420, 428-429 (1980) (plurality opinion)). The death penalty is limited to a narrow class of offenders who commit the most serious crimes, and whose "extreme culpability makes them the most deserving of execution." *Id.* (*quoting Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). Certain classes of offenders are exempt from the death penalty: the insane, the intellectually disabled, and juveniles. (*Id.* (*citing Thompson,* 487 U.S. 815; *Ford v. Wainwright*, 477 U.S. 399 (1986); *Atkins*, 536 U.S. 304)). These limitations

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[1] *Zant* addressed the Georgia death penalty scheme. In Georgia, "aggravating circumstances" are the functional equivalent of special circumstances in California. *Zant*, 462 U.S. at 872-873 ("Unless at least one of the ten statutory aggravating circumstances exists, the death penalty may not be imposed in any event. . .. Thus, in Georgia, the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty.")

[2] *Roper* addressed the Missouri death penalty scheme. In Missouri, "aggravating factors" are the functional equivalent of special circumstances in California. *Roper*, 543 U.S. at 588 ("The jury recommended the death penalty after finding the State had proved each of the three aggravating factors submitted to it. Accepting the jury's recommendation, the trial judge imposed the death penalty").

on death penalty eligibility "vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders." *Id.*

Appellant was found death eligible and sentenced to death based on a special circumstance that does not "genuinely narrow the class of persons eligible for the death penalty. . . [or] reasonably justify the imposition of a more severe sentence. . .." *Zant*, 462 U.S. at 877. Appellant's juvenile conviction for murder - where he was not the shooter - occurred when he exhibited a "lack of maturity and an underdeveloped sense of responsibility. . . that often result in impetuous and ill-considered actions and decisions." *Roper*, 543 U.S. at 569. "These differences render suspect any conclusion that a juvenile falls among the worst offenders." *Id.* at 570. This Court should not uphold a death sentence that resulted from conduct not attributable to the worst offenders.

Respondent also cites *Jones* in support of its position that California allows for death eligibility based on juvenile conduct. SRB at 2-3. Respondent argues: "[T]he 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.'" SRB at 2 (*quoting Jones*, 57 Cal.4th at 977; *quoting Raley,* 2 Cal.4th at 909). Respondent asserts that both *Thomas* and *Roper* are "inapplicable to appellant's case because he was not a minor when he

murdered Guevara, the crime for which he was sentenced to death." *Id.* Respondent's argument misses the mark.

In *Jones*, the defendant was convicted of first degree murder, and the jury found "special circumstance allegations rendering defendant eligible for the death penalty: that he murdered . . . during the commission or attempted commission of the crime of sodomy [citations omitted] and that he committed multiple murders [citations omitted]." *Jones*, 57 Cal.4th at 908. On appeal, Jones argued that the trial court erred by permitting his sister to testify about being raped by him when he was eleven and twelve years old. *Id.* at 977. This Court rejected Jones' argument, reaffirming its reasoning in *Raley*. *Id.* at 977-978.

Here, the issue is not whether the prosecutor can present evidence of juvenile misconduct at the penalty phase. Unlike Jones, appellant's adult conduct does not make him eligible for the death penalty. The only basis for appellant's death sentence is a conviction that occurred when he was seventeen years old. *Jones* is not instructive on that issue.

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

During the penalty phase, the prosecutor argued to the jury that appellant's prior conviction of murder constituted an aggravating factor(s) weighing in favor of a death sentence. 6 RT 1123-1127. The prosecutor's

closing argument focused almost exclusively on appellant's prior murder conviction. *Id.* In closing, the prosecutor argued that appellant's prior crime increased his moral culpability. *Id.*

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 use of this conduct undermined appellant's right to a reliable penalty determination since juvenile conduct does not accurately reflect moral culpability. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case").

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.

Respondent argues that this Court should not "expand *Roper*, *Thompson* and *Graham*. . . [to] 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." SRB at 3. Respondent is wrong.

"The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The Court in *Graham* held: "The Constitution prohibits the imposition of life without parole sentence on a juvenile offender who did not commit homicide." *Graham*, 560 U.S. at 82. "An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendant's youthfulness into account at all would be flawed." *Id.* at 76.

Appellant faces the most serious punishment under the law for being involved in a homicide as a minor where he was not the shooter. The Court in *Graham* recognized society's aversion to such severe punishments for misconduct committed as a juvenile. The Court in *Graham* noted that the overwhelming consensus on the diminished culpability of minors justifies curtailment of sentences even less severe and final than death. *Graham*, 560 U.S. at 68. (*citing Roper*, 543 U.S. at 551) ("No recent data provide reason to reconsider *Roper*'s holding that because juveniles have lessened

culpability they are less deserving of the most serious forms of punishments").

Roper and *Thompson* held that the execution of a defendant for juvenile conduct is cruel and unusual. *Roper*, 543 U.S. at 578-579; *Thompson*, 487 U.S. at 833-838. *Miller* held that mandatory life sentences for juveniles convicted of homicides is cruel and unusual. *Miller,* 132 S. Ct. at 2464. The Supreme Court has recognized that the evolving standards of decency prohibit the most severe punishments for juvenile misconduct because juveniles simply do not have the emotional maturity to incur culpability the same way that adults do. *Thompson*, 487 U.S. at 822; *Roper*, 543 U.S. at 570-574; *Miller,* 132 S. Ct. at 2463-2466.

Here, the prosecutor made appellant's prior juvenile conviction the centerpiece of his argument for the death penalty. Executing appellant based on juvenile misconduct, even if the principal crime occurred while he was an adult, contradicts the jurisprudence trend established by *Thompson, Roper, Miller*, and *Graham.* Those cases have firmly established that minors cannot be held accountable the same way that adults can, even when they commit the most horrific crimes. This Court should not allow appellant's juvenile crime to be considered during the penalty phase because, as a juvenile, appellant was not capable of sufficient culpability to warrant the ultimate punishment.

Respondent argues that appellant's "juvenile conviction was for homicide, and he was not sentenced to life without parole for the prior homicide. Hence, *Graham* does not apply here." SRB at 3. Respondent is wrong. Appellant was sentenced to life without parole for "the prior [juvenile] homicide." Clerk's Transcript 454. Appellant's constitutional right to be free from cruel and unusual punishment was violated when he was sentenced to life without parole for the juvenile conviction and when he was sentenced to death based on the prior juvenile murder conviction.

Respondent cites *Moore v. Missouri*, 159 U.S. 673, 677 (1895) in support of his argument that appellant should be executed because "this murder was committed while he was an adult. . .." SRB at 4. "He had been convicted for his participation in a previous murder, 'a situation into which [he] had previously brought himself.'" *Id.* (*quoting Moore*, 159 U.S. at 677). Respondent's reliance on *Moore* is misplaced.

In *Moore*, the defendant did not face the death penalty. *Moore*, 159 U.S. at 675-677. Moore faced a longer prison sentence for having committed a previous crime. *Id.* at 676. There is no mention of Moore being a juvenile during either of the offenses discussed. *Id.* at 675-680.

Appellant faces the death penalty. The death penalty mandates increased constitutional protections that do not apply in any other instance. *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (Proportionality review is

one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides.").

Simply said, *Moore* is an archaic case. The reasoning in *Moore* does not include the myriad developments in constitutional law over the last one hundred twenty years. *Moore* is not instructive in the twenty first century.

Respondent argues that prohibiting the execution of offenders for juvenile misconduct "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." *Id.* at 3 (*citing Boyd v. Newland*, 467 F.3d 1139, 1152 (9th Cir. 2006) ('[*Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)] does not preclude the use of nonjury juvenile adjudications to enhance the sentence of an adult offender')." Respondent argues: "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 aggravating factor under section 190.3, factor (b)]; *People v. Lucky* (1988) 45 Cal.3d 259, 296), but with principles established in the California Constitution and legislation. (*See* Cal. Const.. art. I section 28(g) [allowing use of any prior felony conviction, whether adult or juvenile, to enhance a sentence]; Pen. Code, section 667, subd. (d)(3)(b) [setting the

criteria for use of juvenile adjudications for purposes of the habitual offender enhancement].)" *Id.* at 4. Respondent's argument misses the mark.

Appellant's sentence was not simply enhanced. Appellant was subjected to the most severe sentence available under the law. The Supreme Court has consistently held that execution is a disproportionate punishment for juvenile misconduct. *Thompson*, 487 U.S. at 835-838; *Roper,* 543 U.S. at 560-564. Any law that allows juvenile conduct to be considered for non-death enhancements is not instructive on this issue. This Court's holdings cited by respondent interpreting Penal Code section 190.3 contradict the Supreme Court's reasoning regarding the culpability of minors.

E. The Juvenile Conviction Was Improperly Weighed Twice in Aggravation and as a Special Circumstance.

As noted, 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).

Respondent argues that appellant had no right to an admonition to the jury to not "double count" the special circumstance as an aggravating factor. SRB at 3-4, fn1. Respondent argues that such a jury instruction is

inappropriate because "[a]ppellant did not request such an instruction." *Id.* at 4. Respondent cites *People v. Proctor*, 4 Cal.4th 499, 550 (1992) in support of its argument. *Id.* at 4, fn 1.

In *Melton,* this Court found that other alleged crimes "may not each be weighed in the penalty determination *more than once* for exactly the same 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.* 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).

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." *Proctor*, 4 Cal.4th at 550. 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.

Indeed, the prior murder was triple counted.

"It is. . . fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices." *Moradi-Shalal v. Fireman's Fund Insurance Companies*, 46 Cal.3d 287, 296 (1988). The doctrine of stare decisis is based "on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system. . .." *Id.* "It is likewise established, however, that the foregoing policy is a flexible one which permits this court to reconsider, and ultimately depart from, our own prior precedent in an appropriate case." *Id.* "[Stare decisis] does indeed serve important values, it should nevertheless not shield court-created error from correction." *Id.* (Citations omitted) (internal quotations omitted). This Court "also recognized that reexamination of precedent may become necessary when subsequent developments indicate an earlier decision was unsound, or has become ripe for reconsideration." *Id* at 297. This Court found that departure from precedent is appropriate when "intervening changes in federal constitutional law demonstrate[] the unsoundness of some of the underling premises supporting our earlier decision. . .." *Id.*

The holding in *Proctor* that requires defendants to request instructions on double counting runs against federal constitutional law. "In

a capital sentencing proceeding, the sentencer's discretion must be guided to avoid arbitrary or irrational decisions." *California v. Brown,* 479 U.S. 538, 562 (1987) (*citing Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.) ("the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information."). This guidance "is provided, in part, through jury instructions." *Id.* "Given the awesome power that a sentencing jury must exercise in a capital case, it may be advisable for a State to provide the jury with some framework for discharging these responsibilities." *People v. Cox*, 53 Cal.3d 618, 676 (1991).

The holding in *Proctor* prevents the jury from being guided in making its determination about the appropriateness of the death penalty. Those defendants that do not receive the instruction on double-counting risk being convicted by a jury that is not correctly applying the standards developed to ensure a process consistent with *Furman* and the Eighth

Amendment.

Neither *Proctor,* nor cases it cites provide any reason for requiring trial counsel to request the jury instruction on double-counting. This Court should overrule its previous decision in *Proctor* because it infringes upon a defendant's Eighth Amendment rights. The trial court should be required to give instructions on double-counting *sua sponte.* Automatically giving instructions ensures that all juries receive the guidance required by the Constitution. The State will not suffer any cognizable harm or inconvenience from a requirement that courts automatically admonish jurors on double-counting.

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

A. Introduction.

Appellant's jury was death qualified. *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). 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.

In California, death qualification prevents citizens from serving as jurors in capital cases because of the moral and normative beliefs they hold 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.

Penalty phase jurors must determine if evidence exists to support an aggravating or mitigating factor; whether that factor is aggravating or mitigating based on its moral context; and must determine the weight of each factor. At each stage, the jury makes moral determinations: "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. "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, 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)). "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. Box*, 23 Cal.4th 1153, 1216 (2000); *People v. Padilla,* 11 Cal.4th 891, 956-957 (1995); and *People v. Haskett*, 30 Cal.3d 841, 863 (1982).

By excluding jurors who have moral and normative beliefs about the penalty, 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. The 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 evolving standards of decency under the Eighth Amendment. *See Coker v. Georgia,* 433 U.S. 584 (1977).

Since the process of death qualification in California results in a non-representative jury 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.

B. The Claim is Not Forfeited.

Respondent argues that "the claim is forfeited by appellant's failure to raise it below." SRB at 4 (*citing People v. Howard*, 51 Cal.4th 15, 26 (2010). Respondent is wrong.

First, appellant was not required to object because the error affected a fundamental right. The structural defect infected his entire trial. This Court has found that the violations of fundamental constitutional rights are exempt from the general forfeiture rule. *See People v. Vera,* 15 Cal. 4th 269, 276-277 (1997) ("Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights.").

Although this Court has not precisely defined what it deems to be a "fundamental" right, there are few rights more fundamental than the right to jury trial. *Bloom v. Illinois,* 391 U.S. 194, 207 (1968) ("the right to a jury trial is a fundamental matter in. . . criminal cases"). This Court should include violations of a capital defendant's constitutional right to an impartial jury in its definition of rights of fundamental and constitutional import.

Second, appellant was not required to lodge a contemporaneous objection because the question presented on appeal is a pure question of law. *Hale v. Morgan*, 22 Cal.3d 388, 394 (1978) ("We have held that a litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts"). This Court has recognized that the contemporaneous objection rule may be waived for "pure questions of law."

See People v. Williams, 43 Cal.4th 584, 624 (2008) (citations omitted). The pure question of law raised here, regarding the constitutionality of death qualification *voir dire*, merits waiver of the contemporaneous objection rule and a decision on the merits of the claim.

C. The Claim Should Be Granted on its Merits.

Respondent argues that "appellant's claim is meritless [because] this Court and the United States Supreme Court have both rejected the argument that the use of death-qualified jurors violates a defendant's state or federal constitutional rights." SRB at 4-5 (citations omitted). Respondent is wrong. Current empirical evidence demonstrates that death qualification jury selection is unconstitutional. *See* Supplemental Appellant's Opening Brief "SAOB" at 20-26.

Almost twenty years have passed since the Supreme Court decided *Lockhart*. The imposition of the death penalty must be assessed in light of the "evolving standards of decency that mark the progress of a maturing society." *Dulles*, 356 U.S. at 101 (plurality opinion). The constitutional facts upon which *Lockhart* was based are no longer valid. *See Birkenfeld v. City of Berkeley*, 19 Cal.3d 129, 160 (1976) ("Although the existence of 'constitutional facts' upon which the validity of an enactment depends is presumed in the absence of any showing to the contrary, their nonexistence can properly be established by proof") (citations omitted).

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). 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. And, in any event, death qualification runs afoul of the California Constitution.

Modern research proves that death qualification defeats accuracy in jury determinations. *See* SAOB at 22. Since *Lockhart* was decided, extensive studies have confirmed that the death qualification process biases the jury against the capital defendant. *See* SAOB at 23. Moreover, death qualified jurors are more likely than excludable jurors to endorse aggravating factors over mitigating factors. *Id.* The weight of the new empirical evidence discovered since *Lockhart* demonstrates that the Supreme Court's decision in *Lockhart* is no longer viable.

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

A. Introduction.

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 Mr. 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.

B. The Trial Court Improperly Excluded Evidence of Mr. Echeverria's Manslaughter Conviction as Unduly Prejudicial.

Respondent argues that evidence of Mr Echeverria's manslaughter conviction was properly excluded because its probative value was substantially outweighed by its prejudicial effect. SRB at 7. Respondent is wrong. Respondent does not identify any prejudicial effect that would justify the exclusion of the evidence.

All evidence that has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action"

is admissible. Evidence Code section 210; *see also* Evidence code section 350. The trial court has the discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will "create [a] *substantial danger* of undue prejudice." Evidence Code section 352 (emphasis added). "Evidence is substantially more prejudicial than probative if, broadly stated, 'it poses an *intolerable risk* to the fairness of the proceedings or the reliability of the outcome.'" *People v. Waidla*, 22 Cal.4th 690, 724 (2000) (*quoting People v. Alvarez*, 14 Cal.4th 155, 204 (1996) (citations omitted) (emphasis added).

The balancing test necessary to make this determination is especially delicate "where what is at stake is a criminal defendant's liberty." *People v. Lavergne*, 4 Cal.3d 735, 744 (1971). The trial court's discretion to exclude prejudicial evidence must "bow to the due process right of a defendant to a fair trial and his right to present all relevant evidence of significant probative value to his defense." *People v. Burrell-Hart*, 192 Cal.App.3d 593, 599 (1987). A trial court abuses its power when it "exercises its discretion in an arbitrary, capricious, or patently absurd manner." *People v. Thomas*, 53 Cal.4th 771, 806 (2012).

Here, the trial court's exclusion of Mr. Echeverria's manslaughter conviction was an abuse of discretion. Mr. Echeverria's conviction was obtained through a jury trial, and its accuracy was ensured by the most

stringent and reliable standard of proof in our legal system - proof beyond a reasonable doubt. The probative value of the conviction is very high because it demonstrates the level of culpability of those involved in the incident. A jury verdict finding appellant's equally - or more - culpable accomplice guilty of manslaughter was critical to appellant's penalty phase defense. Appellant's defense depended on demonstrating that the culpability of both participants in the shooting fell short of first degree murder.

Exclusion is only appropriate when the probative value "is substantially outweighed by. . . undue prejudice." Evidence Code section 352. To substantially outweigh this highly probative value of the evidence, the prejudicial effect of its introduction must be very high. Respondent does not identify any prejudicial effect of introducing evidence of Mr. Echeverria's manslaughter conviction.

Furthermore, the context of a criminal trial militates against excluding favorable evidence because a defendant has a due process right to present a complete defense. *Lavergne*, 4 Cal.3d at 744. (This balance [under Evidence Code section 352] is particularly delicate and critical where what is at stake is a criminal defendant's liberty"). The trial court abused its discretion by excluding highly probative exculpatory evidence in a criminal case, even though there was no danger of any, let alone severe,

prejudice from its introduction.

C. The Trial Court Violated Appellant's Constitutional Rights to Due Process and a Fair Trial By Excluding Evidence of Mr. Echeverria's Manslaughter Conviction.

Respondent argues that "*Chambers* is not applicable in the instant matter." SRB at 8 (*citing Chambers v. Mississippi*, 410 U.S. 284 (1973). Respondent is wrong.

Chambers held that a trial court violates a defendant's due process right to present a defense when it excludes probative evidence of another's culpability in the crime. *Chambers*, 410 U.S. at 302. The Ninth Circuit, citing *Chambers*, held: "The United States Supreme Court clearly established that the exclusion of trustworthy and necessary exculpatory testimony at trial violates a defendant's due process right to present a defense." *Cudjo v. Ayers*, 698 F.3d 752, 754 (9th Cir. 2012).

In *Cudjo*, the trial court excluded evidence of a confession that would have exculpated the defendant because its prejudicial effect outweighed its probative value. *Id.* at 757. The Court of Appeals held that because the court established that the evidence was trustworthy and the evidence was "critical to presenting an adequate defense," the exclusion of the evidence was error under *Chambers*. *Id.* at 762-765.

Similarly, here, the trustworthiness of the existence of Mr. Echeverria's conviction is not in doubt. The partial introduction of Mr.

Echeverria's conviction undermined appellant's defense. The trial court allowed testimony showing that Mr. Echeverria was convicted of the killing. Without explaining the nature of the conviction, the jury was left to speculate about Mr. Echeverria's exact culpability.

Evidence of the manslaughter conviction had a critical exculpating effect in this context. Without informing the jury of Mr. Echeverria's manslaughter conviction, the jurors likely assumed that an accomplice was already convicted of murder. The trial court committed error by excluding "trustworthy and necessary exculpatory testimony." *Cudjo*, 698 F.3d at 754.

Respondent argues that *Chambers* is inapplicable because "*Chambers* is closely tied to the facts and the Mississippi [voucher rule] that it considered." SRB at 8-9 (*quoting People v. Ayala*, 23 Cal.4th 225, 269 (2000). Not so. As noted, the Ninth Circuit recently held that *Chambers* applies to situations where the defendant's constitutional rights are violated by the exclusion of exculpatory evidence. *Cudjo*, 698 F.3d at 766. The Court held: "Nor is Petitioner's case distinguishable from *Chambers* on the ground that Gregory invoked his Fifth Amendment right, rather than the outdated voucher rule from *Chambers*." *Id.*

Respondent argues that "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].)" SRB at 9. Respondent misconstrues the holding in *Scheffer.*

In *Scheffer,* the Supreme Court held that the defendant could not rely on *Chambers* to introduce the results of a lie detector test to bolster his own testimony, in violation of Military Rule of Evidence 707. *Scheffer*, 523 U.S. at 305. The Supreme Court reasoned 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." *Id.* at 316. *Scheffer* is distinguishable from the present case.

In *Scheffer*, the trial court's application of Military Rule of Evidence 707 did not preclude defendant from testifying about any factual matter. Rather, it precluded the defendant from using lie detector test results to bolster his own credibility. *Scheffer*, 523 U.S. at 317. Evidence of the results of the lie detector test had a limited probative effect on the central issues. Moreover, it was unreliable; its introduction would have been cumulative; and the defense was not significantly affected by its exclusion. *Id.* at 313-317.

In *Chambers,* the Supreme Court held that the "[due process] right of an accused in a criminal trial to. . . defend against the State's accusations

. . . [is] not absolute, and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers*, 410 U.S. at 294-295. However, the court must "balance the interests of the accused against the interests of the state embodied in the evidentiary rule to determine which interest took priority in this situation." *Cudjo*, 698 F.3d 752, 764 (*citing Chambers* 410 U.S. at 294-295 *and Miller v. Stagner,* 757 F.2d 988, 994 (9th Cir. 1985)). In *Miller*, the Ninth Circuit developed a balancing test:

> [D]etermining whether the exclusion of evidence in the trial court violate[s] due process rights involves a balancing test. In weighing the importance of evidence offered by a defendant against the state interest in exclusion, the court should consider the probative value of the evidence on the central issue; its reliability; whether it is capable of evaluation by the trier of fact; whether it is the sole evidence on the issue or merely cumulative; and whether it constitutes a major part of the attempted defense.

Miller, 757 F.2d at 994.

Here, a jury found that the shooter, Mr. Echeverria, was guilty of manslaughter. This finding is very probative on the central issue - whether appellant is guilty of first degree murder. Both appellant and Mr. Echeverria were charged with the killing. A jury finding circumstances that Mr. Echeverria's culpability for the shooting was reduced from murder to manslaughter demonstrates that appellant's culpability is less than murder.

Mr. Echeverria's conviction of manslaughter was reliable. The jury

is capable of evaluating the significance of an accomplice's conviction. Mr. Echeverria's testimony was the sole source of information about the nature of his conviction. The introduction of Mr. Echeverria's conviction would not have been cumulative. Because all of the elements of the *Miller* balancing test are in favor of admission, the trial court should have admitted the evidence of Mr. Echeverria's manslaughter conviction.

Respondent argues that the holding in *Ayala*, relying on *Chambers*, requires a denial of appellant's claim because "*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." SRB at 8-9 (*quoting People v. Ayala*, 23 Cal.4th 225 (2000)). *Ayala* is distinguishable from the present case. The *Miller* balancing test does not favor admission of the evidence defendant Ayala sought to introduce.

In *Ayala,* defendant sought to introduce the hearsay statements of two individuals who were interviewed by his investigators, but who died before they could appear at trial. *Ayala*, 23 Cal.4th at 267. The statements were made to a person seeking exculpatory evidence. *Id.* at 270. They were not spontaneous, and there was no opportunity to cross examine the declarant. *Id.* This Court held that exclusion was proper, "[g]iven the potential unreliability of [the] statements." *Id.* In contrast, Mr. Echeverria's conviction is reliable.

D. The Claim is Not Forfeited.

Respondent argues that "appellant forfeited this claim by not raising it at trial." SRB at 10. Respondent is wrong.

Appellant raised the issue during the guilt phase and the court denied appellant's request to introduce evidence of the manslaughter conviction. Evidence Code section 354 provides an exception to forfeiture for the failure to object where an objection would have been futile. Raising the issue again would have been futile.

Furthermore, a defendant is not required to object to an error that undermines his or her fundamental Fourteenth Amendment right to a fair trial. *See Vera,* 15 Cal. 4th at 276-277; *and Bloom,* 391 U.S. at 207 ("the right to a jury trial is a fundamental matter in. . . criminal cases."). "[The] Fourteenth Amendment[] require[s] 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,* 438 U.S. at 604.

Appellant's Fourteenth Amendment right to a fair trial was undermined when the trial court excluded relevant mitigating evidence. No contemporaneous objection was necessary. *Vera*, 15 Cal.4th at 276-277 ("Not all claims of error are prohibited in the absence of a timely objection

in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights.")

E. The Trial Court Erred by Not Allowing Testimony about Mr. Echeverria's Manslaughter Conviction as a Mitigating Factor in the Penalty Phase.

Respondent argues that the trial court properly found Mr. Echeverria's conviction more prejudicial than probative. SRB at 11. Respondent is wrong. The introduction of this relevant evidence would not have had a prejudicial effect.

In *Williams*, this Court held: "The Eighth Amendment to the United States Constitution requires that a capital jury 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.'" *People v. Williams*, 40 Cal.4th 287, 320 (2006) (*quoting Lockett,* 438 U.S. at 604 (fns. & italics omitted); *see also Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *and Eddings v. Oklahoma*, 455 U.S. 104, 113-115 (1982). This Court explained: "Nonetheless, the trial court still determines relevancy in the first instance and retains discretion 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."

Williams, 40 Cal.4th at 320 (internal quotations omitted) (citations omitted). The evidence of Mr. Echeverria's conviction is relevant and its probative value is not substantially outweighed by the probability of confusing or misleading the jury.

Mr. Echeverria's manslaughter conviction demonstrates that appellant is not the "worst of the worst." Trial counsel has a right to argue that defendant is not "the worst of the worst." *People v. Farley*, 46 Cal.4th 1053, 1131 (2009) ("counsel's central point was that defendant's murders were not "the worst of the worst." He was not precluded from making such an argument, and ably did so").

Another jury did not convict the actual shooter of murder. Appellant was not the shooter. The manslaughter conviction of the shooter demonstrates a serious doubt about the appropriateness of sentencing appellant to die for the same crime. Mr. Echeverria's conviction for manslaughter is a significant, relevant mitigating factor because it shows the respective culpability of the defendant. Depriving the jury of the opportunity to consider this evidence violated the Eighth and Fourteenth Amendments.

"The concept of proportionality is central to the Eighth Amendment." *Graham v. Florida*, 560 U.S. 48, 59 (2010); *see Enmund v. Florida*, 458 U.S. 782, 816 (1982) (dissenting opinion, O'Connor, J.) ("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.") Not allowing the jury to consider Mr. Echeverria's manslaughter conviction offends the Eighth Amendment's central concept of proportionality.

Respondent argues that if Mr. Echeverria was convicted of murder and also sentenced to death, appellant would be arguing the evidence is inadmissable because it was unduly prejudicial. SRB at 11. Respondent is wrong. Appellant would have introduced the evidence to show that the shooter deserved death, but a non-shooter, or an accessory after the fact, did not deserve death.

Respondent argues that "[a]ppellant contends that under federal law, the fact that another equally culpable defendant will not be punished by death is a statutory mitigating factor. However, Decisions (sic) of the lower federal courts interpreting federal law, though persuasive, are not binding on state courts." SRB at 11 (*citing Raven v. Deukmejian*, 52 Cal.3d 336, 352 (1990)). In reference to the mitigating factor, "[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death," as codified in 18 U.S.C. section 3592(a)(4), respondent argues that federal law is persuasive but not binding on state courts. That said, the federal

Constitution is binding however.

In *Lockett*, the Supreme Court held that the Eighth and Fourteenth Amendments require that the sentencer consider as a mitigating factor "any aspect of 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*, 438 U.S. at 608-609. Federal law recognizes the relevancy to mitigation that "defendants, equally culpable in the crime, will not be punished by death." 18 U.S.C. section 3592(a)(4). Mr. Echeverria's manslaughter conviction is an aspect of the circumstance of the offense. Penal Code section 190.3(a). According to *Lockett*, the trial court must allow the jury to consider this mitigating factor in accordance with the federal Constitution.

In *Moore* (not cited by respondent), this Court held that "evidence concerning coparticipants' sentences is properly excluded from the penalty phase of a capital trial because such evidence is irrelevant." *People v. Moore*, 51 Cal.4th 1104, 1141 (2011) (citations omitted). This Court reasoned that "the fact that a different jury under different evidence, found that a different defendant should not be put to death is no more relevant than a finding that such a defendant should be sentenced to death. Such evidence provides nothing more than incomplete, extraneous, and confusing information to a jury, which is then left to speculate: 'Why did that jury do

that? What was different in that case? What did that jury know that we do not know?' [Fn. omitted.] Any attempt to answer these questions is further stymied by the normative nature of a jury's penalty decision under California law." *Id.* at 1181-1182 (citations omitted) (internal quotations omitted). *Moore* is distinguishable from the present case.

Appellant sought the introduction of evidence regarding Mr. Echeverria's fact finding on the circumstances of the shooting, not a jury's normative findings about the appropriateness of the death penalty. The penalty phase jury must conduct an individualized assessment of the propriety of the death penalty by considering all mitigating factors. *Boyde v. California*, 494 U.S. 370, 377 (1990) ("[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence."). The sentence of Moore's accomplice would have no relevancy to Moore's sentence because it was a normative determination based on factors personal to the accomplice. Mr. Echeverria's conviction is highly relevant because it was based on the objective fact findings of a jury about the incident for which appellant was convicted.

F. The Trial Court's Error Was Prejudicial.

Respondent argues than any error in excluding Mr. Echeverria's manslaughter conviction is harmless. Respondent is wrong.

A trial court's erroneous exclusion of defense evidence is reviewed under the *Watson* standard. *People v. Watson*, 46 Cal.2d 818, 837 (1956). *Watson* held that an error is harmless if it does not appear reasonably probable a result more favorable to the defendant would have been reached absent an error. *Id.*

Here, if the jury had heard that the person who had pulled the trigger had only been convicted of manslaughter, it would have changed the jury's outlook on the culpability of appellant. Instead, the trial court allowed evidence of Mr. Echeverria's conviction for the killing, but left the jury speculating about the extent of his culpability. If the jury erroneously assumed that he was guilty of murder, the jurors were more likely to convict appellant of murder, despite evidence suggesting that neither appellant's nor Mr. Echeverria's culpability justified a murder conviction. At the least, had the jury heard of the manslaughter conviction during the penalty phase, it would not have sentenced appellant to death since he did not pull the trigger.

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

A. Introduction.

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.

Respondent argues that accessory after-the-fact is a lesser-related crime, not a lesser included crime. SRB at 14 (*citing People v. Majors* 18 Cal.4th 385, 408 (1998)). Respondent argues that instruction on accessory after-the-fact was subject to the principles governing instructions on lesser-related offenses, not lesser-included offenses. *Id.* (*citing People v. Schmeck,* 37 Cal.4th 240, 291-292 (1998). Respondent argues that the trial court properly denied appellant's request for the instruction on the lesser-related offense. *Id.* Respondent is wrong.

B. The Trial Court's Refusal to Instruct the Jury on Accessory After-the-fact Liability Was a Denial of Due Process.

Respondent argues that appellant did not have a constitutional right to compel the trial court to instruct the jury on lesser-related offenses. SRB at 14-15. Respondent contends that the trial court did not have a right or

duty to exercise its discretion to instruct the jury on the lesser-related offense of accessory after-the-fact. *Id.* (*citing People v. Hall*, 200 Cal.App4th 778, 981 (2011); *People v. Jennings* 50 Cal.4th 616, 668 (2010); *People v. Kraft*, 23 Cal.4th 978, 1064 (2000). While respondent's position may find support in state precedent, its position runs afoul of federal due process.

The Due Process Clause of the United States Constitution prohibits states from depriving persons of life without due process of law. United States Constitution, Amendment XIV. The "Due Process Clause guarantees the fundamental elements of fairness in a criminal trial." *Spencer v. State of Texas*, 385 U.S. 554, 563-564 (1967). The denial of due process "is to be tested by an appraisal of the totality of facts in a given case." *Gideon v. Wainwright,* 372 U.S. 335, 339 (1963). The concept of due process is "less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights." *Id.*

Respondent argues that "a criminal defendant does not have a 'unilateral entitlement to instructions on lesser offenses which are not necessarily included in the charge.'" SRB at 14 (*People v. Birks*, 19 Cal.4th 108, 136 (1998)). Not so.

For over a decade, this Court held that "due process requires that instructions on related offenses be given on request of the defendant in

appropriate circumstances." *People v. Geiger*, 35 Cal.3d 510, 526 (1984). In *Birks*, this Court found that this requirement was unfair to prosecutors because it allowed defendants to request instructions on crimes with elements that the prosecutor neither charged nor sought to prove. *Birks*, 19 Cal.4th at 112-113. This Court reasoned that these unanticipated charges may unfairly surprise prosecutors and undermine their ability to prepare a case. *Id.* at 112. Thus, this Court held that lesser-related offenses cannot be given solely upon defendant's request. *Id.*

Appellant argues that the trial court should instruct juries on lesser-related offenses in the interest of justice. Judges are empowered to dismiss charges in the furtherance of justice to ensure that a defendant receives a fair trial. See Penal Code section 1385; *People v. Superior Court* (*Romero*), 13 Cal.4th 497, 530 (1996). Judges must be able to include lesser-related charges for the same reason.

Appellant's due process rights were violated when the court refused to instruct the jury on the lesser-related crime of accessory after-the-fact. The trial court did not consider both the constitutional rights of the defendant and the interests of society as required by *Romero*. Instead, it simply refused to give the instruction based on *Birks*.

The "interest of society" to obtain a fair trial would not have been harmed by the jury instruction on accessory after-the-fact liability. None of

the concerns raised in *Birks* apply here. Even prior to trial, the prosecutor admitted that "the defendant doesn't appear to be the shooter." A-1 RT 42. The trial court noted "that the case is not an overwhelming case for murder. . ." A-1 RT 84. These statements demonstrate that the prosecutor could not have been surprised by an instruction on accessory after-the-fact liability. This was a reasonable charge that the prosecutor would have been prepared to prove.

On the other hand, appellant was denied the benefit of the jury receiving an instruction on a crime that was supported by substantial evidence. Jurors were left with a difficult all-or-nothing choice of convicting appellant of murder or acquitting him entirely. Ultimately, appellant was convicted and sentenced to death while Mr. Echeverria, who pulled the trigger and ended the victims life, was convicted of manslaughter and sentenced to prison. This outcome, brought about by the trial court's failure to instruct on accessory after-the-fact liability, constitutes "a denial of fundamental fairness, shocking to the universal sense of justice." *Gideon*, 372 U.S. at 339.

Respondent cites California cases stating that the defendant does not have a right to instructions on lesser-related offenses unless the prosecutor agrees to include those offenses. SRB at 14-15 (*citing People v. Kraft*, 23 Cal.4th 978, 1064 (2000); *People v. Jennings*, 50 Cal.4th 616, 668 (2010)).

Respondent also argues that there is no federal constitutional right that compels courts to instruct juries on lesser-included offenses. *Id.* (*citing Hopkins v. Reeves*, 534 U.S. 88, 96-97 (1998); *Kraft*, 23 Cal.4th at 1064; *People v. Foster*, 50 Cal.4th 1301, 1343 (2010)). While these cases state that there is no rule requiring instruction of lesser-related offenses in all cases, the cases do not flat prohibit the instruction on lesser-related offenses. Due process requires courts to instruct on lesser-related offenses when doing so does not unfairly surprise prosecutors and undermine their ability to prepare a case.

The federal Constitution requires that all processes that deprive defendants of life, liberty, or property must contain fundamental elements of fairness. *Spencer*, 385 U.S. at 563-564. Due process is a concept that is "fluid [and] is to be tested by an appraisal of the totality of facts in a given case." *Gideon,* 372 U.S. at 339. Respondent's rigid interpretation of when it is appropriate to give instructions on lesser-related offenses runs afoul of due process. A rigid rule preventing the giving of instructions on lesser-related offenses undermines the "right to due process, which reflects a fundamental value in our American constitutional system." *Boddie v. Connecticut,* 401 U.S. 371, 374 (1971).

C. The Trial Court Should Have Followed the *Geiger* Rule Rather than the *Birks* Rule.

Geiger was decided in 1984. The crime occurred in 1993. 3RT at 606-607, 613. *Birks* was decided in 1998. The trial started in 1999. RT at 250.

Respondent argues that *Birks* applies retroactively. Respondent's position is inconsistent with due process. "Due process guarantees prohibit courts from retroactively applying judicial decisions that expand criminal liability." *People v. Cuevas*, 12 Cal.4th 252, 275 (1995); *Bouie v. City of Columbia*, 378 U.S. 347, 352-354 (1964). A rule cannot be retroactive if it "deprives one charged with [a] crime of any defense available according to law at the time when the act was committed." *Beazell v. Ohio*, 269 U.S. 167, 169-170 (1925).

Appellant was deprived of the ability to defend himself by arguing that his culpability and punishment should be limited to accessory after-the-fact liability. By not allowing the jury to decide on accessory after-the-fact liability, the trial court effectively expanded the criminal liability appellant faced. The all-or-nothing choice before the jury did not allow them to consider alternative charges for which there was substantial evidence. Thus, appellant's liability was expanded when the jury found that he had some liability, but did not have the option of convicting him of a lesser-

related crime.

Respondent argues that the Court in *Birks* mandated that its rule be fully retroactive. SRB at 15. Blanket retroactivity of *Birks* violates due process. The principle of due process is flexible, fluid, and fact-specific. *Gideon,* 372 U.S. at 339. "That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, fall short of such denial." *Id.* Whereas retroactivity may be appropriate in some, or even most, cases, the court should apply the *Geiger* rule instead of the *Birks* rule in this case.

In the context of this case, the lack of an accessory after-the-fact liability jury instruction effectively expanded appellant's criminal liability by forcing the jury into an all-or-nothing choice of either convicting appellant of murder or acquitting him entirely. Had the lesser-related instruction been given, appellant's liability could have been limited to his actual involvement in the crime. The instruction on the lesser-related offense was critical to appellant's defense because substantial evidence demonstrated that he was, at most, the person who drove the vehicle from the scene. The trial court's refusal to give the appropriate jury instruction violated due process.

D. The Trial Court Error Was Prejudicial.

Respondent argues that any error was harmless. SRB at 16. Respondent is wrong.

An error is harmless when it is not reasonably probable that a result more favorable to the defendant would have been reached absent the error. *Watson*, 46 Cal.2d at 837. In *Ngo,* the Court of Appeal held that it was harmful error to exclude instructions on a lesser-included offense. *People v. Ngo*, 225 Cal.App.4th 126, 158 (2014). The trial court did not instruct the jury on the lesser-included crime. *Id.* at 130 The jury was not shown direct evidence of the principal crime and the evidence was contradictory. *Id.* at 159. The Court of Appeal held that failure to instruct on the lesser-included offense "presented the jurors with an 'all-or-nothing' choice." *Id.* at 160 (*quoting People v. Barton*, 12 Cal.4th 186, 196 (2014)). Putting the jury into such a position was prejudicial error because the evidence was more consistent with the lesser-included offense. *Id.* at 161.

Here, the jury heard evidence that Mr. Echeverria shot the victim. No compelling evidence of appellant's shooting the victim was presented to the jury. No one saw appellant shoot the victim. No gun was recovered from appellant. The prosecutor admitted that "the defendant doesn't appear to be the shooter." A-1 RT 42.

As in *Ngo*, the evidence of appellant's direct involvement was weak

and contradictory. The evidence was more consistent with accessory after-the-fact liability. Yet, the jury was left with an all-or-nothing choice of convicting appellant of murder or acquitting him entirely. Had the jury been given the option of holding appellant responsible for his conduct without having to convict him of murder, there is a reasonably probable chance that the jury would have convicted him of being an accessory after-the-fact.

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

A. Introduction.

Respondent acknowledges that "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." SRB at 18 (*citing Skipper*, 476 U.S. at 4 (1986)). Respondent also acknowledges that the "Eighth Amendment to the federal Constitution requires that a 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.'" *Id.* at 18 (*quoting Williams*, 40 Cal.4th at 320).

Yet, respondent argues: "Nonetheless, even in the penalty phase the trial court 'determines the relevance 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 issues or misleading the jury." *Id.* (*quoting Williams*, 40 Cal.4th at 320). While respondent is correct in its general statement of the law on the admissibility of mitigating evidence, respondent's argument that the testimony of appellant's relatives about their opinion on the appropriate sentence was properly excluded is wrong. 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.

B. The Trial Court Erred in Limiting Trial Counsel's Direct Examination of the Mitigation Witnesses.

Respondent argues that the trial court did not abuse its discretion when it ordered appellant's counsel to avoid questions about the defense witnesses' opinion on the appropriate sentence for appellant. SRB at 18. Respondent argues that it was proper for the trial court to preclude questions about the mitigation witnesses' feelings on punishment because such questions addressed a "gray area." *Id.* In support of its position, respondent cites *People v. Ochoa*, 19 Cal.4th 353, 456 (1998). Respondent misses the point.

Indeed, *Ochoa* supports appellant's position that the trial court improperly excluded relevant evidence of the witnesses' opinions as to the appropriateness of a death sentence. In *Ochoa*, "at defendant's request, the jury was given this instruction: 'You may take sympathy for the defendant into consideration in determining whether or not to extend mercy to the defendant.' But the court deleted from the proposed written instruction the words 'and his family' following the first instance of 'defendant.'" *Id.* at 454. This Court held that it was improper to instruct the jury to consider

sympathy for the defendant's family because the "jurors could have interpreted it to mean that if they wished to spare defendant's family the emotional distress of execution, they could return a verdict of imprisonment." *Id.* at 456. "That. . . would not have been properly stated law." *Id.* "[S]ympathy for a defendant's family is not a matter that a capital jury can consider in mitigation. . .." *Id.*

Here, appellant never proposed a jury instruction directing jurors to consider sympathy for his family. Instead, appellant wanted to introduce evidence of his family members' opinions that they wanted appellant to live. In *Ochoa*, this Court held that "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." *Id.* "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." *Id.*

Here, the trial judge limited trial counsel's inquiry by prohibiting him from asking about the witnesses' opinions on the appropriate sentence and specifying the subjects that trial counsel could address. 6RT at 1108 ("But, you know, try to stay away from [asking about whether the witness is opposed to execution]. 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.") The

trial judge excluded evidence that this Court explicitly held is relevant to a defendant's character. *Ochoa*, 19 Cal.4th at 456 ("this evidence [of family member's opinion on propriety of death] is relevant because it constitutes indirect evidence of the defendant's character." Neither the prosecutor nor respondent argue that the evidence was prejudicial.

Furthermore, the trial judge impermissibly limited the scope of direct examination by specifying the subjects that could be addressed. In the penalty phase, the sentencer may not be precluded from considering "any relevant mitigating evidence." *Eddings,* 455 U.S. at 114 (1982). Mitigation evidence is not limited to statutory mitigation factors. *Hitchcock v. Dugger*, 481 U.S. 393, 398-399 (1987).

The trial court's ruling narrowed the scope of the questioning of appellant's family to only a few topics. This limitation on what should have been a broad and permissive direct examination unconstitutionally narrowed the scope of the questioning and prevented the jury from hearing all relevant mitigating factors. The error violated the Constitution.

C. The Trial Court's Error Was Structural.

Respondent argues that the trial court's error in this case is not structural and "[t]herefore harmless error analysis applies. SRB at 19. Respondent claims that the case relied upon by appellant to demonstrate structural error, *Abdul-Kabir v. Quarterman*, 550 U.S. 223, 264 (2007), is

distinguishable. *Id.* Respondent argues that unlike in *Abdul-Kabir*, this case did not involve a ruling that "prevented a jury from hearing mitigating evidence." *Id.* "Instead, the issue involved a single evidentiary ruling that actually had no affect on the presentation of the evidence." *Id.* Respondent is wrong. The trial court's ruling limited the scope of mitigation evidence. The ruling prevented the jury from hearing relevant evidence.

In *Abdul-Kabir*, the Supreme Court held that "before a jury can undertake the grave task of imposing a death sentence, it must be allowed . . . to decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense." *Abdul-Kabir*, 550 U.S. at 263-264. "[W]hen the jury is not permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence - because it is forbidden from doing so by statute or by judicial interpretation of a statute - the sentencing process is fatally flawed." *Id.* at 264.

In *Nelson*, the Court of Appeals concluded that 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, 314 (5th Cir. 2006) (*en banc*), *cert. den.* 551 U.S. 1141 (2007) ("the Supreme Court has never applied a harmless-error analysis to a *Penry* claim or given any indication that harmless error might apply in its long line

of post-*Furman* cases addressing the jury's ability to give full effect to a capital defendant's mitigating evidence." (*citing Tennard v. Dretke*, 542 U.S. 274 (2004); *Penry v. Johnson*, 532 U.S. 782 (2001); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Eddings*, 455 U.S. 104; *Lockett*, 438 U.S. 586).

Here, the jury was explicitly prevented from hearing relevant mitigating evidence when the trial court prohibited trial counsel from questioning mitigation witnesses about their opinions on whether appellant should live. The trial court specified a limited number of subjects that trial counsel was allowed to address. By doing so, the trial court prevented appellant from presenting mitigation evidence falling outside the limited scope of questioning established by the trial court.

With such limitations on the presentation of evidence, the jury could not have given full effect to appellant's mitigating evidence. Preventing a jury from fully considering mitigating evidence requires automatic reversal, without an harmless error analysis. *Quarterman*, 472 F.3d at 314.

D. The Trial Court's Error Was Prejudicial.

Respondent argues that any error by the trial judge in excluding mitigation evidence was harmless under any standard. SRB at 19 (*citing Williams*, 40 Cal.4th at 320.) Respondent is wrong.

In *Williams,* defendant's father punched Williams mother while she was pregnant with Williams. *Williams*, 40 Cal.4th at 320. This Court

reasoned that the incident had no probative value to mitigation because the incident did not occur in the defendant's conscious presence. *Id.* Defendant did not demonstrate that he was injured from the incident. *Id.* Thus, it was irrelevant to his character or circumstances. *Id.* This Court held: "We conclude that 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." *Id.*

Here, the trial court excluded evidence that is relevant as a matter of law. *See Ochoa*, 19 Cal.4th at 456. The trial court's limitations on what could be addressed by trial counsel during the direct examination of mitigation witnesses excluded relevant mitigation evidence falling outside the court's narrow scope of allowed subjects. As noted, the trial court stated: "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." 6RT 1108. The trial court's ruling precluded inquiry into topics such as the psychological and emotional problems that appellant experienced and family problems affecting appellant's behavior. Because the potential body of evidence excluded was so expansive, appellant was prejudiced by the trial court's ruling.

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

A. Introduction.

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.

B. The Claim Is Not Forfeited.

Respondent notes that trial counsel did not object to the prosecutor's misstatement of the law during the prosecutor's closing arguments. SRB at 20. Respondent argues that the prosecutorial misconduct claim is forfeited because trial counsel did not make a specific objection during the trial. *Id.* Respondent cites *People v. Clark,* 52 Cal.4th 856, 960 (2011) and *People v. Hill*, 17 Cal.4th 800, 820 (1998) in support of its position. *Id.* Respondent misconstrues the holdings in *Clark* and *Hill.*

In *Hill*, this Court held: "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion - and on the same ground - the defendant made an assignment of misconduct and request that the jury be admonished to disregard the impropriety."

Hill, 17 Cal.4th at 820. "The forgoing, however, is only the general rule." *Id.* "A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. *Id.* (*citing People v. Arias*, 13 Cal.4th 92, 159 (1996); *People v. Nogeura*, 4 Cal.4th 599, 638 (1992)); *see also Clark,* 52 Cal.4th at 960 ("The failure to timely object and request an admonition will be excused if doing either would have been futile, or if an admonition would not have cured the harm"). "In addition, failure to request the jury be admonished does not forfeit the issue for appeal if 'an admonition would not have cured the harm caused by misconduct.'" *Id.* (*quoting People v. Bradford*, 15 Cal.4th 1229, 1333 (1997) (*quoting People v. Price*, 1 Cal.4th 324, 447 (1991)).

Here, the objection would have been futile and any curative admonition would have been insufficient to cure the harm. In the penalty phase, the jury's "'sentencing function is inherently moral and normative, not factual.'" *People v. Brown*, 33 Cal.4th 382, 401 (2004) (*quoting People v. Rodriguez*, 42 Cal.3d 730, 779 (1986)). Once the jury heard that its function in the penalty phase was that of a fact-finder - a role consistent with its function in the guilt phase - the jurors would have associated their function in the guilt phase with the penalty phase.

The weighing of the moral significance of mitigating and aggravating factors is already a complex task - radically different than

anything a jury does in any other context. *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985) ("This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'"). In the same vein, this Court held: "Given the awesome power that a sentencing jury must exercise in a capital case, it may be advisable for a State to provide the jury with some framework for discharging these responsibilities." *Cox*, 53 Cal.3d at 676.

Here, the prosecutor's insistence that the jury's penalty phase function involved fact finding undermined the framework for discharging the jury's "awesome responsibility." *Caldwell,* 472 U.S. at 341. The prosecutor's argument created an unacceptable risk of confusion. An admonition from the judge would not have been sufficient to alleviate the problem. The jury was extensively instructed on its fact-finding function during the guilt phase. The prosecutor's comments merged the two function's in the jurors' minds. An admonition would not have undone the harm. Because an objection and a request for an admonition would have been futile and ineffective in curing the harm, the prosecutorial misconduct claim is not forfeited.

Respondent requests that this Court rule on forfeiture even if it reaches the merits of the issue. SRB at 20, fn2 (*citing Harris v. Reed*, 489

U.S. 255, 264 fn10 (1989). While *Harris* allows this Court to address forfeiture in an alternative holding, there is nothing compelling the court to do so. *See Harris,* 489 U.S. at 264 fn10 ("a state court need not fear reaching the merits of a federal claim in an alternative holding. . . [because federal law] curtails reconsideration of the federal issue on federal habeas as long as the state court explicitly invokes a state procedural bar rule as a separate basis for decision"). If this Court rejects appellant's claim on the merits, it need not reach the procedural issues. *People v. Fuiava*, 53 Cal.4th 622, 649 fn7 (2012) ("We need not decide whether defendant's appellate claim fails on this procedural ground. . .because the claim fails on its merits"). If this Court reaches the issue on the merits, the Court's holding should not include rulings on issues that are not necessary to the resolution of the claim.

C. The Prosecutor Committed Misconduct by Misstating the Law to the Jury During Closing Argument.

Respondent notes that a denial of due process occurs when a prosecutor's "intemperate behavior [that] comprises a pattern of conduct so egregious that it infects the trial with. . . unfairness. . .." SRB at 21 (*citing People v. Gray*, 37 Cal.4th 168, 215-216 (2005); *People v. Gionis*, 9 Cal.4th 1196, 1214 (1995). Respondent also notes that a violation of state law occurs when a prosecutor "commits misconduct by use of deceptive or

reprehensible methods to persuade either the court or the jury." *Id.* (*citing Gray*, 37 Cal.4th at 215-216; *Ochoa*, 19 Cal.4th at 428; *People v. Price*, 1 Cal.4th 324, 447).

Respondent argues that prosecutorial misconduct results in reversible error only if it prejudiced the defendant. *Id.* (*citing People v. Bolton*, 23 Cal.3d 208, 214 (1979); *People v. Haskett*, 30 Cal.3d 841, 861 (1982). Respondent also argues that "the prosecutor did not misstate the law and, even if he did, he did not commit misconduct by misstating the law during closing argument." *Id.* Respondent is wrong.

"[I]t is improper for the prosecutor to misstate the law generally [citations]. . .." *People v. Marshall*, 13 Cal.4th 799, 831 (1996). This Court has repeatedly held that the jury's function during the penalty phase does not consist of fact finding, but rather constitutes a single normative assessment on the propriety of the death penalty for the defendant. *See, e.g. People v. Carpenter*, 15 Cal.4th 312, 417 (1997) ("[T]he sentencing function is inherently moral and normative, not factual"), *People v. Monterroso*, 34 Cal.4th 743, 796 (2004) (same); *People v. Griffin*, 33 Cal.4th 536, 595 (2004) (finding penalty phase "determinations do not amount to the finding of facts, but rather constitute a single fundamentally normative assessment"); *People v. Moon*, 37 Cal.4th 1, 40 (2005) (characterizing the "the penalty jury's principal task" as a "moral

endeavor").

Here, the prosecutor explicitly misstated the fundamental function of the jury during the penalty phase. During his penalty phase closing argument, the prosecutor misstated the law: "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 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..." 6RT at 1123. The prosecutor later stated that the jury's job is "evaluating the mitigating factors versus the aggravating factors." *Id.*

Respondent argues that the prosecutor did not misstate the law because he 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." SRB at 23. Respondent misses the point. The prosecutorial misconduct consisted of telling the jury that their function of weighing aggravating versus mitigating circumstances was a fact-finding mission.

The prosecutor's misconduct allowed the prosecutor to argue that appellant's previous conviction for murder had more weight than appellant's mitigating evidence because the conviction was proven beyond

a reasonable doubt. The prosecutor argued that appellant "has been convicted in a prior trial, one very much like this one." 6RT at 1123. The prosecutor exacerbated the effect of the misstatement by making factual arguments in support of his incorrect statement of the law. By applying facts to a misstated law, the prosecutor gave the error more weight than if he had simply misstated the law.

Respondent notes that "in reviewing claims of misconduct during the 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." SRB at 23-24 (*citing People v. Dennis*, 17 Cal.4th 468, 522 (1998)). Respondent also notes that "in this inquiry [courts] do not lightly infer that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statement. *Id.* at 24 (internal quotations omitted) (*citing People v. Brown*, 31 Cal.4th 518, 553-554 (2003)). Respondent's comments skirt the issue.

Respondent argues that no misconduct occurred because there was no "reasonable possibility that the jury construed or applied the comments in an objectionable manner." *Id.* at 23 (*citing People v. Cunningham*, 25 Cal.4th 926, 1019 (2001). Respondent further argues that "it was clear from the entirety of the prosecutor's statement that she [sic] was talking about the whole trial, in general terms, and not specifically the jury's duty to

impose the proper sentence." *Id.* at 24. Respondent is wrong.

Here, during closing argument, the prosecutor specifically stated: "the penalty phase process . . . is essentially a truth-seeking mission." 6RT at 1123. Respondent's interpretation of the prosecutor's statement as referring to the whole trial generally is erroneous.

The prosecutor's misstatement of the fundamental purpose of the penalty phase colored all further instructions to the jury about weighing mitigating factors against aggravating factors. The jury knew that the murder conviction was based on proof beyond a reasonable doubt. Because the jury was under the misconception that it must act as a fact finder, the jury would give more weight to the conviction based on its certainty rather than its normative implications. In the context of the entire argument, an improper assertion that the jury must act as fact-finders was reasonably likely to have been misconstrued by the jurors in a way that was harmful to appellant.

Respondent argues that "the prosecutor's comments accurately informed the jury that it would have to determine if the aggravating circumstances substantially outweighed the mitigating circumstances." SRB at 24. Respondent misses the point.

Even if the prosecutor properly stated the standard the jury must apply, the grave error consisted of misconstruing the mechanism by which

to conduct the analysis. The law states that the appropriateness of a death sentence must be a normative determination. *Carpenter*, 15 Cal.4th at 417 ("[T]he sentencing function is inherently moral and normative, not factual"). The prosecutor argued that it was a truth-seeking mission, and asked the jurors to "evaluate the facts and determine what is true and what isn't true. . .." 6RT at 1123. This statement by the prosecutor directly contradicted firmly established law that a penalty phase jury must not act as fact-finders and must make a normative determination instead.

D. The Prosecutor's Misconduct Was Prejudicial.

Respondent argues that any alleged misconduct was not prejudicial. Respondent is wrong.

Prosecutorial misconduct must have a reasonably probable chance of prejudicing the defendant to justify the reversal of a conviction. *Bolton*, 23 Cal.3d at 214 ("the test of prejudice is whether it is reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the comment attacked by the defendant"); *Cunningham*, 25 Cal.4th at 1019 ("To be prejudicial, prosecutorial misconduct must bear a reasonable possibility of influencing the penalty verdict"). A prosecutor commits misconduct when he misstates the law. *Marshall*, 13 Cal.4th at 831.

Here, the prosecutor committed misconduct when he told the jurors

that they must act as fact-finders during the penalty phase. The prosecutor punctuated his misstatement of the law by stating that it was "[o]ne of the most important things to keep in mind." 6RT at 1123. This misconduct prejudiced appellant because it misconstrued the fundamental function that the jurors were required to perform.

Immediately after telling the jury that they must determine what is true, the prosecutor asserted that appellant "has been convicted in a prior trial, one very much like this one, where there are twelve jurors, or the crime of murder . . .." 6RT at 1123-1124. The prosecutor improperly implied that the jury must determine the existence of aggravating or mitigating factors based on how thoroughly they had been proven and weakened the mitigating factors that had not been proved to a prior jury. In the context of this case, the prosecutor's statement prejudiced the defendant, because it improperly strengthened the aggravating factor and special circumstance of the prior conviction. The jury should have weighed the normative implications or moral significance of the prior conviction rather than weighing it based on the thoroughness with which it was established.

The prosecutor's misstatement of the jury's function in the penalty phase likely lead the jury to improperly apply the law in a way that was prejudicial to appellant. As a result, the death sentence must be reversed.

XV. THE CUMULATIVE ERRORS WARRANT RELIEF.

Respondent argues that no errors occurred and that, even if they did, appellant "is entitled to a fair trial, not a perfect one." SRB at 25 (*citing People v. Welch*, 20 Cal.4th 701, 775 (1999)). That said, it is important to recall that this Court cautioned that "such a truism cannot be allowed to obscure the true nature of the pertinent inquiry." *Hill*, 17 Cal.4th at 844. "We take defendant's claim to be a call not for a 'perfect' trial, but for one in which his guilt or innocence was fairly adjudicated." *Id.* The judgment must be reversed when cumulative error results in "a clear showing of a miscarriage of justice." *Id.* (*citing* Cal. Const. art. VI, section 13; *Chapman v. California*, 386 U.S. 18, 24 (1967)).

Respondent argues that appellant's trial was fair. SRB at 25. Respondent is wrong. Sadly, appellant's trial was laden with over a dozen prejudicial errors.

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. The trial court failed to correctly respond to the jury's written question regarding the degree of murder. 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. The trial court failed to instruct the jury to view with caution evidence of

pre-offense statements attributed to appellant. Charging appellant with capital murder when the sole special circumstance was a juvenile conviction in which appellant was not the shooter. The trial court abused its discretion by conducting a constitutionally inadequate voir dire. California's death penalty statute, as interpreted by this Court and as applied at appellant's trial, is unconstitutional. Death qualification jury selection is unconstitutional. The trial court prohibited trial counsel from eliciting information regarding Mr. Echeverria's conviction. The trial court failed to instruct the jury with an accessory after-the-fact instruction. The trial court limited the permissible testimony of appellant's witnesses. The prosecutor committed misconduct by misstating the law regarding the moral and normative nature of the penalty phase determination.

These dozen errors, when considered in the cumulative, violated Article I of the California Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the liberty interests in the non-arbitrary operation of California laws and statutes under the Fifth and Fourteenth Amendments to the United States Constitution. These federal and state constitutional violations resulted in a miscarriage of justice, necessitating a reversal of appellant's conviction and death sentence.

CONCLUSION

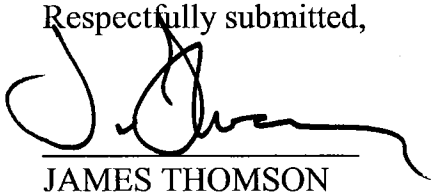
Here, the only special circumstance alleged against appellant was a prior murder conviction that occurred when appellant was a 17 year old juvenile. 3 CT 451-467; 6 RT 1083, 1089. He was not the shooter.

Appellant did not possess or fire a gun in the present case. He did not kill of Enrique Guevara. He is innocent.

For all the reasons stated above, the entire judgment - the conviction, the special circumstance finding, and the sentence of death - must be reversed.

Dated: March 5, 2015

Respectfully submitted,



JAMES THOMSON

Attorney for Appellant
MAGDALENO SALAZAR NAVA

CERTIFICATE OF COMPLIANCE

I hereby certify that, according to my word processing software, this brief contains 14,794 words. Appellant's reply brief contains 30,755 words. Together, appellant's reply brief and this supplemental reply brief contain 45,549 words.

Dated: March 5, 2015

JAMES THOMSON
Counsel for Appellant
MAGDALENO SALAZAR NAVA

DECLARATION OF SERVICE

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

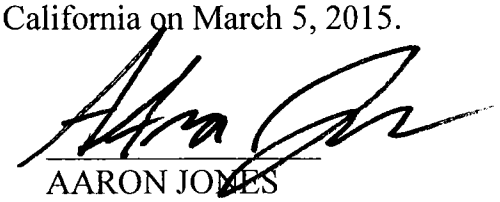
I, AARON JONES, the undersigned, declare as follows:

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

On March 5, 2015, I served the attached **APPELLANT'S SUPPLEMENTAL REPLY 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 on March 5, 2015.



AARON JONES