In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

NOEL JESSE PLATA & RONALD TRI TRAN,

Defendants and Appellants.

CAPITAL CASE

Case No. S165998

Orange County Superior Court Case No. 01HF0193
The Honorable William R. Froeberg, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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XV. THERE WAS SUFFICIENT EVIDENCE THAT THE CRIMES WERE COMMITTED IN ASSOCIATION WITH OR FOR THE BENEFIT OF A CRIMINAL STREET GANG

In his supplemental AOB, Plata repackages his argument that there was insufficient evidence that the crimes in this case were committed for the benefit of, at the direction of, or in association with a criminal street gang (Pen. Code,[1] § 186.22, subd. (b)(1)). (Supp. AOB 23–35.) As discussed in Respondent's Brief (RB 121–128), there was sufficient evidence that the crimes in this case were committed in association with and for the benefit of the VFL. Therefore, reversal of the gang enhancement is not warranted.

A. There Was Substantial Evidence That the Crimes Were Committed in Association with the VFL

Plata devotes several pages to discussing how "criminal street gang," used in the first prong of subdivision (b)(1), and "gang members," used in the second prong of subdivision (b)(1), have different meanings.[2] (Supp. AOB 25–31.) Respondent does not dispute that "criminal street gang" and "gang members" mean different things and are not interchangeable terms. However, that does not mean that evidence that two or more gang members committed a crime together is insufficient to establish that the crime was committed "in association" with a "criminal street gang."

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

[2] Subdivision (b)(1) provides that "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any *criminal street gang*, with the specific intent to promote, further, or assist in any criminal conduct by *gang members*, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows . . . ." (Italics added.)

When two or more gang members commit a crime together, especially a crime that is a primary activity of the gang, the jury can reasonably infer that the crime was committed in association with the gang. In *People v. Morales* (2003) 112 Cal.App.4th 1176 (*Morales*), the defendant, a member of the Puente Trece gang, and two other gang members committed robbery, one of the gang's primary activities. The court held that absent evidence that the gang members were "on a frolic and detour unrelated to the gang," the jury could "reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members." (*Id*. at p. 1198.)

Similarly, in *People v. Martinez* (2008) 158 Cal.App.4th 1324 (*Martinez*), the defendant, an admitted member of the King Kobras, committed robbery with another admitted member. (*Id*. at p. 1332.) This evidence supported the finding that the crime was committed "in association" with the gang. (*Ibid*.)

In *People v. Ochoa* (2009) 179 Cal.App.4th 650 (*Ochoa*), the court noted, "[A]lthough all gangs regularly commit certain crimes, the fact that an *individual gang member* commits one of those crimes by himself is not substantial evidence that he did so for the benefit of, at the direction of, or in association with the gang, even if it is the gang's 'signature' crime." (*Id*. at p. 661, fn. 7, italics added.) The court then observed that in the case of *People v. Ramon* (2009) 175 Cal.App.4th 843, the fact that "the defendant had a fellow gang member in the stolen vehicle with him would support a finding that he acted in association with the gang." (*Ibid.*, cited by *People v. Albillar* (2010) 51 Cal.4th 47, 62 (*Albillar*).)

Plata argues, "in the absence of any evidence the defendant relied on his membership and the apparatus of the gang, there must be evidence that at least three gang members acted in concert to sustain the enhancement." (Supp. AOB 30.) Plata cites no authority for this proposition, which is

contradicted by *Martinez* (two members of the King Kobras) and the language of *Ochoa* quoted above (two gang members in *Ramon*).

Plata and Tran, two members of the VFL, together committed murder, robbery, and burglary, primary activities of the gang. There was no evidence that Plata and Tran were on "a frolic and detour unrelated to the gang." Therefore, the jury could reasonably infer that the crimes in this case were committed in association with the VFL.[3]

Furthermore, as in *Albillar*, the record supports a finding that Plata and Tran "relied on their common gang membership and the apparatus of the gang" in committing the crimes.[4] (*Albillar*, *supra*, 51 Cal.4th at p. 60.) In *Albillar*, the gang expert testimony established that the defendants' common gang membership "ensured that they could rely on each other's cooperation in committing these crimes and that they would benefit from committing them together. They relied on the gang's internal code to ensure that none of them would cooperate with the police and on the gang's

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[3] Plata argues that Nye's testimony must be disregarded because Nye's opinion "assumed the incorrect legal theory that two gang members who commit a primary gang activity together, always do so for the benefit of, at the direction of or in association with the gang." (Supp. AOB 34.) However, as discussed above, evidence that two or more gang members committed a primary activity of the gang together can support a finding that the crime was committed "in association" with the gang.

[4] Relying on *Albillar*, Plata states, "[T]o prove that a crime was committed in association with a criminal street gang, as opposed to merely with 'gang members,' there *must* be evidence that the defendant relied on his gang membership and the apparatus of the gang in committing the offense." (Supp. AOB 30, italics added.) Plata reads too much into *Albillar*. *Albillar* did not say such a showing is *required* to prove the "in association with" element. Indeed, after concluding that there was substantial evidence that the crimes in the case before it were committed in association with a gang, *Albillar* cited to *Martinez*, *Morales*, and footnote 7 in *Ochoa*.

reputation to ensure that the victim did not contact the police." (*Id*. at p. 62.)

Similarly, in this case, when a hypothetical tracking the facts of this case was posed to the prosecution's gang expert, Westminster Police Department Sergeant Mark Nye, Nye explained that both of the gang members would be expected to back each other up during the commission of the crime. (8 RT 1556.) When testifying about Asian gang culture, Nye explained that there is an absolute expectation that a gang member is going to back up his fellow gang member during the commission of the crime. (8 RT 1478.) Nye also explained that when gang members commit crimes together, everyone has a role in the commission of the crime, and everyone is expected to stick to that role. (8 RT 1479.) In addition, Nye talked about "ratting" and how "the rule is you do not tell law enforcement anything." (8 RT 1477–1478.)

Nye's testimony, combined with the evidence that Plata and Tran assisted each other in carrying out the crimes, constituted substantial evidence that Plata and Tran "came together as gang members" to commit the crimes, and thus committed the crimes in association with the gang. (*Albillar*, *supra*, 51 Cal.4th at p. 62)

B. There Was Substantial Evidence That the Crimes Were Committed for the Benefit of the VFL

Nye testified that the crimes in this case would have been done for the benefit of the gang because the gang supports itself from proceeds from the criminal activity of its members, and the crimes would enhance the reputation of the gang as well as the reputation of the individual members of the gang. (8 RT 1557–1558.) Nye's testimony supported a finding that the crimes were committed to benefit the VFL.

Plata argues that Nye's testimony was not supported by the evidence in this case because there was no evidence that any gang members shared in

the monetary proceeds of the robbery and no evidence that the community learned that the crimes were committed by VFL members. (Supp. AOB 32.) However, under *Albillar*, Nye's testimony regarding the enhancement of the VFL's reputation was sufficient to support a finding that the crimes were committed for the benefit of the gang. [5]

In *Albillar*, this court explained, "Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a [ ] criminal street gang' within the meaning of section 186.22 (b)(1)." (*Albillar, supra*, 51 Cal.4th at p. 63.) The gang expert in *Albillar* testified that when three gang members commit a brutal attack on a victim, they elevate their individual status within the

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[5] Plata points to portions of Nye's testimony that allegedly show that Nye believed that a crime would be for the benefit of a gang if it was done to benefit "other members" of the gang. (Supp. AOB 33–34.) However, a closer look at this testimony reveals that Nye was discussing "gang purpose," including the "in association with" element, which can be satisfied by evidence of two gang members committing a crime together. When asked whether it would be a "gang crime" if two gang members committed a home invasion robbery and did not share the proceeds with anyone else, Nye responded, "If you're committing a home invasion robbery, you're netting money for each other. There's two of you, so you're benefiting each other, other members. *You're doing it in association with another gang member . . . .*" (8 RT 1559, italics added.) Similarly, when asked if it is automatically a "gang crime" when a gang member commits a crime with another gang member, Nye said, "Again, it would depend on the type of crime we're talking about. If we're talking about a home invasion robbery or a burglary, crimes that this gang regularly commits, and you're sharing proceeds with another member of that gang and helping support him, I would think so." (8 RT 1560.)

In any event, as Plata concedes, it is not necessary to show that a criminal street gang benefitted both monetarily and in its reputation for violence. (See Supp. AOB 32 [using conjunction "or" in referencing ways in which a criminal street gang can benefit].) The evidence of the reputational benefit to the VFL fully supports the jury's gang enhancement findings.

gang and also benefit the reputation of the overall entity. (*Id*. at p. 63.) In response to a hypothetical based on the facts of the case, the expert testified: "More than likely this crime is reported as not three individual named Defendants conducting a rape, but members of [Southside] Chiques conducting a rape, *and that goes out in the community by way of mainstream media or by way of word of mouth*. That is elevating [Southside] Chiques' reputation to be a violent, aggressive gang that stops at nothing and does not care for anyone's humanity." (*Ibid*., italics added.)

Albillar does not mention any evidence that the defendants bragged about their crimes or that news of the crimes leaked out into the community. Law enforcement learned that the defendants had raped the victim because she reported it. (*Albillar*, *supra*, 51 Cal.4th at p. 53.) Thus, a gang expert's opinion regarding the reputational enhancement of a gang need not be supported by evidence that gang members bragged about the crime or that the community at large actually learned about the gang's involvement in the crime.

At any rate, as discussed in Respondent's Brief (RB 127–128), there was evidence that Plata and Tran bragged or took credit for the crimes. Plata talked about the crimes with fellow gang member, Terry Tackett. (6 RT 1183–1184.) Tran had Korean characters, meaning "forgive," tattooed on his neck. (8 RT 1552.) This evidence supports an inference that Plata and Tran wanted it to be known that they had committed the crimes to enhance their reputations within the gang and elevate the status of the gang itself. There is no requirement that the People also prove that the reputation of the gang was actually enhanced within the community.

Accordingly, substantial evidence was presented that the crimes in this case were committed for the benefit of the VFL, a criminal street gang.

XVI. THE IMPOSITION OF THE DEATH PENALTY ON 18, 19, AND 20-YEAR-OLD OFFENDERS IS NOT UNCONSTITUTIONAL

Plata was 20 years, 5 months, and 21 days old at the time of the crimes in this case. Plata argues that under the reasoning of *Roper v. Simmons* (2005) 543 U.S. 551 (*Roper*), the Eighth Amendment prohibits the execution of youthful offenders who were 18 to 20 years old at the time of their crimes. Plata further argues that a categorical ban on the imposition of the death penalty on such youthful offenders is warranted because the death penalty cannot be reliably imposed upon them. However, Plata has failed to establish a basis for moving the line drawn by *Roper* at 18 years of age to 21. Plata has also failed to show that there is an unacceptable risk that juries will not give individualized consideration to the mitigating circumstance of youth when the death penalty is sought against 18 to 20 year olds.

A. Plata Has Failed to Establish That *Roper* Should Be Extended to 18, 19, and 20-Year-Old Offenders

1. Supreme Court decisions regarding juveniles and the death penalty

In *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830, a plurality of the United States Supreme Court determined that it would offend civilized standards of decency to execute a person who was younger than 16 years old at the time of his or her offense. The plurality opinion explained that all of the States that had expressly established a minimum age in their death-penalty statutes required that the defendant have attained at least the age of 16 at the time of the capital offense. (*Id*. at p. 829.) The opinion noted that the last execution for a crime committed when the offender was under the age of 16 was in 1948, and that only 5 of 1,393 defendants sentenced to death during the years 1982 through 1986 were less than 16 years old at the time of the offense. (*Id*. at p. 832.) "The road we have traveled during the

past four decades—in which thousands of juries have tried murder cases—leads to the unambiguous conclusion that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community." (*Ibid*.)

In *Stanford v. Kentucky* (1989) 492 U.S. 361, decided the following year, the Court held that the Eighth and Fourteenth Amendments did not prohibit the execution of juvenile offenders between the ages of 16 and 18. Based upon an examination of the States' laws regarding capital punishment, the Court concluded that there was no national consensus against the execution of juvenile offenders who were 16 years or older at the time of the capital offense. (*Id*. at pp. 370–373.) Of the 37 States that permitted capital punishment, 15 declined to impose it upon 16-year-old offenders and 12 declined to impose it upon 17-year-old offenders. (*Id*. at p. 370.) The Court was unpersuaded by statistics showing that a far smaller number of offenders under 18 than over 18 had been sentenced to death in this country, and only about two percent of the total number of executions that occurred between 1642 and 1986 were for crimes committed under the age of 18. (*Id*. at pp. 373–374.)

Sixteen years after *Stanford* was decided and three Terms after the decision in *Atkins v. Virginia* (2002) 536 U.S. 304 [holding that executing intellectually disabled[6] offenders violated the Eight Amendment], the Court revisited the issue of the constitutionality of executing juveniles who were under the age of 18 when the crime was committed. In *Roper*, the Court

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[6] The United States Supreme Court has explained that references in its prior opinions to mental retardation refer to the identical phenomenon that is now referenced as intellectually disabled. (*Hall v. Florida* (2014) 134 S.Ct. 1986, 1990.) This Court's recent discussions are also in accord with current terminology. (See, e.g., *People v. Boyce* (2014) 59 Cal.4th 672, 717, fn. 14.) Accordingly, unless quoting directly from an earlier decision, the People will also utilize current terminology.

took a two-step approach to analyzing the issue. (*Roper, supra*, 543 U.S. at p. 565.) First, the Court undertook "a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question." (*Ibid*.) Then the Court considered whether, "in the exercise of [its] own independent judgment, . . . the death penalty is a disproportionate punishment for juveniles." (*Ibid*.)

At the first step of its analysis, the Court concluded, "[T]he objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles . . . as 'categorically less culpable than the average criminal.'" (*Roper, supra*, 543 U.S. at p. 567.) The Court pointed out that 12 States rejected the death penalty altogether, and 18 States maintained the death penalty but "by express provision or judicial interpretation" excluded juveniles from its reach. (*Id*. at p. 564.) Five States that had allowed the juvenile death penalty at the time of *Stanford* had abandoned it, showing "the consistency of the direction of change." (*Id*. at pp. 565–566.) Furthermore, in the previous 10 years, only three States had executed prisoners for crimes committed as juveniles. (*Id*. at p. 565.)

The Court then determined, in the exercise of its own independent judgment, that the Eighth Amendment prohibits the imposition of the death penalty on juvenile offenders under the age of 18. (*Id*. at p. 568.) In reaching this conclusion, the Court relied on three general differences between juveniles under 18 and adults that "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders": (1) a lack of maturity and underdeveloped sense of responsibility of juveniles; (2) the vulnerability and susceptibility of juveniles to negative

influences and outside pressures; and (3) the more transitory and less fixed personality traits of a juvenile. (*Id*. at pp. 569–570.)

As explained by the Court, once the diminished culpability of juveniles under the age of 18 is recognized, "it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults." (*Id*. at p. 572.) Retribution in the form of death is not proportional when applied to a juvenile with diminished culpability. (*Ibid*.) As for deterrence, "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." (*Ibid*.) Accordingly, "[N]either retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders." (*Ibid*.)

2. Plata has failed to establish a national consensus that 18 to 20 year olds should be categorically excluded from the death penalty

Plata contends that two trends demonstrate that there is a national consensus that individuals who are 18 to 20 years of age should be categorically excluded from the death penalty: (1) the use of the death penalty to execute 18, 19, and 20-year-old offenders has "become exceptionally rare"; and (2) there have been legislative changes that "evince a national consensus that individuals under the age of 21 should be considered less culpable"—e.g., laws regulating the possession of guns, alcohol and marijuana by individuals under the age of 21 and laws extending benefits such as education, foster care, and juvenile justice to 18 to 20 year olds. (Supp. AOB 38.) Neither of these alleged "trends" demonstrate a national consensus against the death penalty for 18 to 20 year olds.

The death penalty statistics cited by Plata are misleading and do not establish any consensus against the execution of 18 to 20 year olds. Plata

asserts that 30 States have either formally abolished the death penalty or have not conducted an execution in more than a decade. (Supp. AOB 40.) However, this statistic pertains to the death penalty and executions in general and does not indicate a trend toward abolition of the death penalty for 18 to 20 year olds.

In *Roper*, the Court found a "consistency of direction of change" based on the fact that five States that had allowed the juvenile death penalty at the time of *Stanford* had since abandoned it. (*Roper*, *supra*, 543 U.S. at p. 565.) In contrast, here, no State that maintains the death penalty has "by express provision or judicial interpretation" excluded offenders under 21 from the death penalty. (*Roper*, *supra*, 543 U.S. at p. 564.)[7]

Plata also points to what he characterizes as "a marked and consistent decline in executions of individuals who were under 21 at the time of the offense." (AOB 40.) Plata asserts that as of 2016, only 15 States had carried out such an execution in the previous 15 years. (AOB 40.) However, this statistic can be explained by the fact that, as noted by Plata, 30 States have either abolished the death penalty or have not conducted an execution in more than a decade. Moreover, this statistic does not compare to *Roper's* statistic that in the 10 years prior to the decision, only *three* States had executed offenders for crimes committed as juveniles. (*Roper*, s*upra*, 543 U.S. at p. 565.)

Plata cites to statistics relied upon by the Kentucky state court in *Bredhold*. In *Bredhold*, the court stated that the number of executions of defendants under 21 in the last five years has been cut in half from the two

[7] Last year, a Circuit judge in Kentucky (the equivalent of a California Superior Court judge) ruled that Kentucky's death penalty statute is unconstitutional when applied to offenders who were under the age of 21 when they committed their crimes. (*Commonwealth v. Bredhold* (Ky.Cir.Ct. 2017) 2017 WL 8792559 (*Bredhold*).) The court's ruling is currently on appeal to an intermediate state appellate court.

previous five year periods. (*Bredhold, supra*, 2017 WL 8792559 at *3.) Excluding the State of Texas, there were 14 executions of defendants under the age of 21 between 2011 and 2016, compared to 29 executions in the years 2006 to 2011, and 27 executions in the years 2001 to 2006. (*Ibid*.) But statistics also show that *the number of executions in general has decreased* from a high of 98 in 1999 to just 20 in 2016. (*Ibid*.) Therefore, the decrease in number of executions of defendants under the age of 21 does not reveal a trend toward not executing this particular category of offenders.[8]

In addition to death penalty statistics, Plata points to legislative trends prohibiting individuals under 21 years old from engaging in potentially risky behaviors such as purchasing handguns, purchasing or consuming alcohol, using recreational marijuana, and gambling. (Supp. AOB 43–49.) Plata also discusses legislation extending special protections to individuals 18 to 21 years of age, including laws relating to foster care, educational and child welfare services, and "youthful offenders." (Supp. AOB 49–52.) Plata argues that these laws "reflect a legislative recognition that young people between the ages of 18 and 21 are less mature or responsible than fully developed adults" and "demonstrate a national consensus in favor of recognizing such limitations in the capital context." (Supp. AOB 43.)

However, legislative trends in areas that do not pertain to the death penalty are irrelevant for purposes of determining the national consensus regarding the execution of 18 to 20 year olds. As explained by the United

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[8] Indeed, comparing the number of executions of defendants under the age of 21 (excluding Texas) to the number of all executions during the three five-year periods (see https://deathpenaltyinfo.org/documents/FactSheet.pdf), defendants who were under 21 comprised 8.4% of the defendants executed from 2001 to 2006, 12.6% of the defendants executed from 2006 to 2011, and 7.4% of the defendants executed from 2011 to 2016.

States Supreme Court, "The beginning point is a review of objective indicia of consensus, as expressed in particular by the *enactments of legislatures that have addressed the question*." (*Roper*, *supra*, 543 U.S. at p. 564, italics added.) Thus, in *Roper*, the Court examined the death penalty laws of the various States to determine how many of the States prohibited the juvenile death penalty. (*Id*. at pp. 565–566.) Similarly, in *Atkins*, the Court reviewed "the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded." (*Atkins*, *supra*, 536 U.S. at p. 313.) The Supreme Court did not attempt to discern the national consensus regarding these death penalty issues by surveying laws pertaining to juveniles or the intellectually disabled in other contexts.[9]

Plata has not come forward with any evidence establishing a national consensus against the death penalty for 18 to 20 year olds. Therefore, *Roper* should not be extended to prohibit the execution of 18 to 20 year olds.

3. This court should not determine, in the exercise of its own independent judgment, that the death penalty is a disproportionate punishment for 18 to 20 year olds

Plata appears to urge this court to determine, in the exercise of its own independent judgment, that the death penalty is a disproportionate punishment for 18 to 20-year-old offenders. (Supp. AOB 53–66.) Citing to numerous articles, Plata argues that scientific evidence shows that individuals between the ages of 18 and 21 display the same youthful characteristics as juveniles—i.e., a diminished ability to appreciate the

[9] Plata also refers to the views of the ABA as well as international law in support of his argument that a national consensus has arisen in opposition to the execution of 18 to 20-year-old offenders. (Supp. AOB 41–42.) For the same reasons as discussed above, this information does not constitute "objective indicia of consensus."

seriousness and risks in a given situation, the tendency to engage in sensation seeking, impulsivity, vulnerability to coercive pressure, and a still developing brain. (Supp. AOB 54–61.) Plata also points to legislation extending certain protections to individuals under the age of 21 as proof that legislators recognize and rely on the vulnerabilities of individuals between the ages of 18 and 21. (Supp. AOB 61–66.)

Plata's argument for extending *Roper* is unpersuasive because the *Roper* court was fully aware that similar arguments could be made for offenders 18 years old and over but chose to draw the line at the age of 18. The Court explained:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. *The qualities that distinguish juveniles from adults do not disappear when an individual turns 18*. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

(*Roper*, *supra*, 543 U.S. at p. 574, italics added.)

Then, as now, research showed that individuals between the ages of 18 and 21 are continuing to develop and mature. One article cited by *Roper* explicitly defines "adolescence," as used in the article, as "extending from puberty to the early 20's." (Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective* (1992) 12 Developmental Rev. 339, 340.) The article discusses how adolescents within this age range engage in reckless behavior more than any other age group. (Arnett, *supra*, 12 Developmental Rev. at pp. 341–344.)[10]

[10] The Arnett article begins with the following quotation: "I would that there were no age between ten and three-and-twenty, or that youth

Then, as now, some laws use 21 as the age when individuals are permitted to engage in certain activities. For example, at the time of *Roper*, the minimum drinking age across the nation was 21 (see https://alcoholpolicy.niaaa.nih.gov/underage-drinking) and the federal Gun Control Act of 1968 prohibited licensed firearm dealers from selling guns to individuals under the age of 21.

No reason exists for moving the line that has already been drawn by *Roper*. Indeed, this court has already refused to do so. In *People v. Gamache* (2010) 48 Cal.4th 347, Gamache argued that the death penalty was unconstitutional for crimes committed as an 18 year old. This court determined that neither the federal nor state constitution prohibited the death penalty for 18 year olds. (*Id*. at p. 405.) Since *Gamache*, there have been no new developments that warrant a different outcome.

B. The Death Penalty, As Applied to 18 to 20-Year-Old Offenders, Is Not Unreliable

Plata argues that the execution of 18 to 20-year-old offenders violates the Eighth and Fourteenth Amendments "because of the severe risk youth presents to the reliability of a death sentence." (Supp. AOB 66.) Relying on *Roper* and *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*), Plata argues that there is an unacceptable likelihood that a jury will not give proper consideration to the mitigating factor of youth.

However, in *Gamache*, this court pointed out that "under our death penalty scheme, a jury may consider a defendant's age as part of the matrix of factors that may lead it to choose life without the possibility of parole instead of death." (*Gamache*, *supra*, 48 Cal.4th at p. 405.) Section 190.3,

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would sleep out the rest; for there is nothing in between but getting wenches with child, wronging the ancientry, stealing, fighting . . . ." (Shakespeare, The Winter's Tale, act III, scene 3.) Shakespeare confirms that it has long been recognized that individuals continue to mature into their early twenties.

factor (i) specifically lists "[t]he age of the defendant at the time of the crime" as something that the jury shall take into account if relevant.

In support of his unreliability argument, Plata points to the following language in *Roper*:

> An unacceptable likelihood exists that the brutality of cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant's youth may even be counted against him.

(*Roper*, *supra*, 543 U.S. at p. 573.) However, Plata quotes this language out of context.

The quoted language was the Court's response to the government's argument that *even accepting the diminished culpability of juveniles*, a categorical rule barring imposition of the death penalty on juveniles was not necessary because the jury could consider mitigating arguments related to youth on a case-by-case basis. The Court explained, "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." (*Id*. at pp. 572–573.)

In contrast, here, it has not been established that 18 to 20 year olds, as a group, have insufficient culpability. Therefore, there is no unacceptable risk that the jury will fail to give mitigating weight to the circumstances of youth when the offender is 18 to 20 years old.

Graham is also distinguishable. In *Graham*, the Court held that the Eighth Amendment prohibits imposition of a life without parole sentence on juvenile offenders who did not commit homicide. The Court explained that a categorical rule was necessary in part because "the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings." (*Graham*, *supra*, 560 U.S. at p. 78.) For

example, juveniles have difficulty in weighing long-term consequences, a corresponding impulsiveness, and a reluctance to trust defense counsel. (*Ibid*.) All of these factors can lead to poor decisions by the juvenile offender and are likely to impair the quality of a juvenile defendant's representation. (*Ibid*.)

As in *Roper*, *Graham*'s discussion regarding the necessity of a categorical rule hinged upon the Court's prior determination that the sentencing practice at issue was cruel and unusual due to the diminished culpability of juveniles. Furthermore, *Graham* did not involve the death penalty.[11]

Nothing prevented the jury from properly considering Plata's age as a mitigating factor. Therefore, his sentence was reliable and did not violate the Eighth and Fourteenth Amendments.

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[11] Death penalty sentencing schemes offer procedural safeguards to enhance the reliability of the verdicts. For example, the jury must find that one or more special circumstances exist before the defendant is eligible for a death sentence. (§ 190.2.) Because of the differences between capital and non-capital procedures, cases and statutes that concern the reliability of sentencing determinations as to youthful offenders in the life without parole context are inapplicable to a determination of the reliability of the death penalty as applied to youthful offenders.

CONCLUSION

For all the reasons stated above and in Respondent's Brief, respondent respectfully requests that the judgment be affirmed in its entirety.

Dated: August 31, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** uses a 13 point Times New Roman font and contains 5,512 words.

Dated: August 31, 2018

XAVIER BECERRA
Attorney General of California

/S/ Christine Y. Friedman
CHRISTINE Y. FRIEDMAN
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Plata &Tran**
No.: **S165998**

I declare:

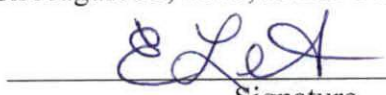
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On August 31, 2018, I electronically served the attached **RESPONDENT'S SUPPLEMENTARY BRIEF** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on August 31, 2018, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

The Honorable William R. Froeberg
Judge
Orange County Superior Court
Central Justice Center
700 Civic Center Drive West
Department C40
Santa Ana, CA 92701

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 31, 2018, at San Diego, California.

E. Longe-Atkin
Declarant



Signature

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. PLATA (NOEL) & TRAN (RONALD)**
Case Number: **S165998**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **Christine.Friedman@doj.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
SUPPLEMENTAL BRIEF	Respondents Supplementary Brief

Service Recipients:

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Catherine White Law Office of Catherine White, APC 193690	white193690@gmail.com	e-Service	8/31/2018 11:30:25 AM
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Orange County District Attorney Department of Justice, Office of the Attorney General-San Diego	appellate@da.oc.gov	e-Service	8/31/2018 11:30:25 AM
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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

8/31/2018

Date

/s/Christine Friedman

Signature

Friedman, Christine (186560)

Last Name, First Name (PNum)

Department of Justice, Office of the Attorney General-San Diego

Law Firm