In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ARTURO JUAREZ SUAREZ,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S105876

Napa County Superior Court Case No. CR 103779
The Honorable W. Scott Snowden, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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INTRODUCTION

This brief is filed in response to the Court's May 7, 2020, order granting appellant Suarez's application to file a supplemental brief and requesting a supplemental respondent's brief. For the reasons provided below, neither of the two new arguments raised by appellant materially changes the analysis for his death qualification claims, which should still be denied. Because the facts and procedural history of appellant's case are not relevant to the legal arguments raised in his supplemental opening brief, those sections are omitted here.

ARGUMENT

I. DEATH QUALIFICATION DOES NOT ACT AS A PROXY FOR RACIAL DISCRIMINATION AND DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

Appellant first claims that the death qualification process for selecting jurors in capital cases acts as a proxy for racial discrimination and "produces unrepresentative juries that are not comprised of a fair cross-section of the community." (Supp. AOB 6.) As a result, he claims, this process violates the equal protection clause. This is a variation of a claim he raised in his opening brief, in which he asserted, inter alia, that the death qualification process violated his right to equal protection of the laws and the International Convention on the Elimination of All Forms of Racial Discrimination. (AOB 73-74.) Appellant specifically argued in his opening brief that "Death qualification skews on race, gender, and religion in jury composition. Numerous studies have shown that 'proportionately more blacks

than whites and more women than men are against the death penalty.'" (AOB 84.)

In our respondent's brief, we relied on numerous decisions from this Court and the United States Supreme Court upholding the death qualification process against constitutional challenges. (RB 23, citing *Lockhart v. McCree* (1986) 476 U.S. 162, 176-177; *People v. Chism* (2014) 58 Cal.4th 1266, 1286; *People v. Taylor* (2010) 48 Cal.4th 574, 603.)

Appellant's refinement of his claim in terms of racial discrimination does not change the analysis. To begin, as this Court held in *People v. Mendoza* (2016) 62 Cal.4th 856, appellant's claim of racial discrimination is forfeited because he did not make this argument in the trial court. In *Mendoza*, the defendant alleged on appeal that excluding persons opposed to the death penalty in all cases has a "negative impact on the racial, gender, and religious composition of juries." (*Id.* at p. 913.) However, he had not raised that argument in the trial court and, thus, had deprived the prosecution and trial court of the opportunity to address that claim. Accordingly, this Court held the claim was forfeited. (*Ibid.*) The same analysis applies here because appellant did not preserve his claim of racial discrimination in the trial court. (See AOB 108 [appellant conceding that trial counsel did not object to death qualification on constitutional grounds].)

Mendoza is also helpful in evaluating the merits of appellant's racial discrimination claim. Rejecting Mendoza's challenge to death qualification, this Court reiterated: "The

death qualification process is not rendered unconstitutional by empirical studies concluding that, because it removes jurors who would automatically vote for death or for life, it results in juries biased against the defense. . . . The impacts of the death qualification process on the *race, gender, and religion of the jurors do not affect its constitutionality*." (*Mendoza*, *supra*, 62 Cal. 4th at p. 914, italics added, quoting *People v. Howard* (2011) 51 Cal.4th 15.)

Appellant attempts to avoid that conclusion by citing another empirical study, a March 2020 article published in the Michigan Law Review. (Supp. AOB 7, citing Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury* (2020) 118 Mich. L. Rev. 785.) In that piece, the author reviewed approximately 400 criminal jury trials in Mississippi and Louisiana to evaluate the racial impact of challenges for cause. (*Id.* at p. 790.) But nowhere in the article is there any analysis of jury selection (or death qualification) in California. In fact, there is just one reference to California in the entire article, a footnoted citation to a California Court of Appeal decision collecting cases on jury selection. (*Id.* at p. 814, fn. 165.) Appellant's citation of articles that do not purport to study or reach conclusions about California's jury selection process, let alone death qualification, does not undercut this Court's reasoning in *Mendoza* and *Howard*.

II. *PEOPLE V. RISER* (1956) 47 CAL.2D 566 SHOULD NOT BE OVERTURNED

Appellant also contends that this Court should overturn its decision in *People v. Riser* (1956) 47 Cal.2d 566, which

interpreted California Code of Civil Procedure section 229 (as applied through the Penal Code) to permit challenges for cause against prospective jurors whose views would preclude them from imposing the death penalty. (Supp. AOB 10.) This claim amplifies an argument made in appellant's opening brief, where he asserted that the "judicial gloss" put on section 229 by California courts is "contrary to the statute's express language." (AOB 78-79.)

In *Riser*, a prospective juror stated during the death qualification process that "he did not believe in capital punishment, that nothing would prevent his finding defendant guilty if the evidence warranted it, but that in no event would he vote for the death penalty." (47 Cal.2d at p. 573.) The prosecution challenged the juror for cause and, over defense objection, the trial court sustained the challenge. (*Ibid.*) On appeal, the defendant claimed the strike was improper under Penal Code section 1074, subdivision (8), which stated: "A challenge for implied bias may be taken for all or any of the following causes, and for no other . . . (8) If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror." (*Ibid.*) The defendant argued that, although this provision required the "exclusion of jurors whose determination of *guilt* would be affected by their views of capital punishment, neither its language nor its policy require the exclusion of those whose assessment of *punishment* alone would be influenced."

(*Ibid*., italics added.) This Court held that reading the statute to apply only to a determination of guilt and not to the imposition of sentence at the penalty phase "would be doing violence to the purpose of these sections of the Penal Code." (*Id*. at p. 576.) Permitting jurors to serve in capital cases when they had declared they would not impose a death sentence "would in all probability work a de facto abolition of capital punishment, a result which, whether or not desirable of itself, it is hardly appropriate for this court to achieve by construction of an ambiguous statute." (*Ibid*.)

This holding in *Riser* has been affirmed numerous times by this Court in the decades since it was decided, and the Legislature has not amended the Penal Code or California Rules of Civil Procedure to reverse its impact. (See *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 8-9; *People v. Washington* (1969) 71 Cal.2d 1061, 1089-1090; *People v. Gonzales* (1967) 66 Cal.2d 482, 498; *People v. Smith* (1966) 63 Cal.2d 779.) As this Court warned in 1956, a contrary interpretation of section 229 would lead to the absurd result of excluding some death penalty opponents from the guilt phase where the issue of death is not relevant, while permitting them to serve during the penalty phase, when that question is squarely at issue. Appellant's interpretation would also fly in the face of decades of practice and precedent from this Court and the United States Supreme Court and would invite jury nullification of the death penalty system. People with such strong objections to capital punishment that they would not

consider a lawful sentencing option have the right to express that view at the ballot box, but not in the jury box.

CONCLUSION

Accordingly, respondent requests that the judgment be affirmed.

Dated: May 11, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13 point Century Schoolbook font and contains 1,293 words.

Dated: May 11, 2020

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M. T. Otanes	***/s/ M. T. Otanes***
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