

COPY SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

BILLY RAY WALDON,
ALSO KNOWN AS N.I. SEQUOYAH,

Defendant and Appellant.

No. S025520

San Diego Superior Court
No. CR82986

Death Penalty Case

SUPREME COURT
FILED

JUN 19 2017

Jorge Navarrete Clerk

Appeal from the Judgment of the Superior Court
of the State of California for the County of San Diego

Deputy

Honorable David M. Gill, Judge

APPELLANT'S SECOND SUPPLEMENTAL REPLY BRIEF

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DEATH PENALTY

TABLE OF CONTENTS

Page

XXIII GIVEN THE UNIQUENESS OF THE DEATH PENALTY AND THE NEED FOR HEIGHTENED RELIABILITY OF DEATH JUDGMENTS, THE TRIAL COURT ERRED BY ALLOWING APPELLANT TO REPRESENT HIMSELF AT HIS CAPITAL TRIAL..... 1

XXIV THE TRIAL COURT VIOLATED PENAL CODE SECTION 686.1 BY PERMITTING APPELLANT TO REPRESENT HIMSELF AT HIS CAPITAL TRIAL..... 3

XXV CALIFORNIA’S DEATH PENALTY STATUTE AND CALJIC INSTRUCTIONS, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT’S TRIAL, VIOLATE THE UNITED STATES CONSTITUTION..... 4

CONCLUSION 8

CERTIFICATE OF COUNSEL 9

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>Apprendi v. New Jersey</i> (2000) 530 U.S. 466	5, 6, 10
<i>Baze v. Rees</i> (2008) 553 U.S. 35	2
<i>Faretta v. California</i> (1975) 422 U.S. 806	1
<i>Hurst v. Florida</i> (2016) ___ U.S. ___ [136 S.Ct. 616]	5, 6
<i>Indiana v. Edwards</i> (2008) 554 U.S. 164	1, 4
<i>Kansas v. Carr</i> (2016) ___ U.S. ___ [136 S. Ct. 633]	8
<i>Martinez v. Court of Appeal</i> (2000) 528 U.S. 152	2
<i>Ring v. Arizona</i> (2002) 536 U.S. 584	5, 10
<i>Street v. New York</i> (1969) 394 U.S. 576	3, 4
<i>Strickland v. Washington</i> (1984) 466 U.S. 668	2

STATE CASES

<i>Hurst v. State</i> (Fla. 2016) 202 So.3d 40	6, 7, 9
<i>People v. Brown</i> (1985) 40 Cal.3d 512	5
<i>People v. Brown</i> (1988) 46 Cal.3d 432	9
<i>People v. Burney</i> (2009) 47 Cal.4th 203	9

TABLE OF AUTHORITIES

	Page(s)
<i>People v. Merriman</i> (2014) 60 Cal.4th 1	6
<i>People v. Prieto</i> (2003) 30 Cal.4th 226	6
<i>People v. Williams</i> (2016) 1 Cal.5th 1166	9
<i>People v. Winbush</i> (2017) 2 Cal.5th 402	9
<i>Rauf v. State</i> (Del. 2016) 145 A.3d 430	6, 7, 9

FEDERAL STATUTES

28 U.S.C. §	2254(b)	3, 4
-------------	---------------	------

STATE STATUTES

Fla. Stat. §	921.141(3)	6
Pen. Code §§	190.3(i)	9
	686.1	3, 4

COURT RULES

Cal. Rules of Court	rule 8.630(b)(2)	12
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APPELLANT'S SECOND SUPPLEMENTAL REPLY BRIEF

XXIII

**GIVEN THE UNIQUENESS OF THE DEATH PENALTY AND THE
NEED FOR HEIGHTENED RELIABILITY OF DEATH JUDGMENTS,
THE TRIAL COURT ERRED BY ALLOWING APPELLANT TO
REPRESENT HIMSELF AT HIS CAPITAL TRIAL**

In Appellant's Second Supplemental Opening Brief (ASSOB) at pages 1-5, appellant has argued that the trial court erred by allowing appellant to represent himself. The right to self-representation under *Faretta v. California* (1975) 422 U.S. 806, is not absolute. (*Indiana v. Edwards* (2008) 554 U.S. 164, 171 (*Edwards*)). At times it is outweighed by "the government's interest in ensuring the integrity and efficiency of the trial." (*Edwards, supra*, 554 U.S. at p. 177, quoting *Martinez v. Court of Appeal* (2000) 528 U.S. 152, 163.) As appellant has argued, given the uniqueness of the death penalty and the heightened need for reliability in capital proceedings, a capital defendant must be represented at all phases of trial or at least at the penalty phase in particular. (ASSOB 2-4.)

Respondent points out, correctly, that this Court has already rejected appellant's claim in more than one case. (Second Supplemental

Respondent's Brief (SSRB) 5-8.) But respondent incorrectly contends that appellant has "provide[d] no basis for reconsidering these decisions." (SSRB 8.)

Appellant has provided this basis: the Eighth and Fourteenth Amendments to the United States Constitution, as interpreted by the United States Supreme Court. The Constitution requires "that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and the accuracy of factfinding." (*Strickland v. Washington* (1984) 466 U.S. 668, 704 (conc. & dis. opn. of Brennan, J.); see *Baze v. Rees* (2008) 553 U.S. 35, 84 (conc. opn. of Stevens, J.)) Although a capital defendant may have some autonomy interest in self-representation, that interest is outweighed by the acute need for reliability in capital cases.

Again, even if appellant's claim is foreclosed by this Court's precedent, appellant has raised it to preserve the issue and to exhaust it for purposes of federal review. (See *Street v. New York* (1969) 394 U.S. 576, 582; 28 U.S.C. § 2254, subd. (b).)

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XXIV
THE TRIAL COURT VIOLATED PENAL CODE SECTION 686.1 BY
PERMITTING APPELLANT TO REPRESENT HIMSELF AT HIS
CAPITAL TRIAL

Appellant has argued that besides the constitutional issues addressed above in Argument XXIII, the trial court also violated Penal Code section 686.1,¹ which requires that “a defendant in a capital case shall be represented in court by counsel at all stages of the preliminary and trial proceedings.” (ASSOB 6-8.)

Respondent mischaracterizes appellant’s argument as suggesting “that the statutory provision for counsel in capital cases trumps the constitutional recognition of the right to waive counsel and proceed pro se.” (SSRB 8.) Appellant readily acknowledges that a state statute that violates the federal Constitution cannot be given effect. Appellant’s argument is that section 686.1 is not constitutionally infirm. As appellant argued in the ASSOB at page 7, the Supreme Court held in *Edwards, supra*, 554 U.S. at p. 177, that a state is permitted under the Constitution to restrict self-representation when the integrity of its criminal justice system at stake. Given the constitutional requirement of heightened reliability in capital cases, section 686.1 can and must be enforced.

Again, even if appellant’s claim is foreclosed by this Court’s precedent, appellant has raised it to preserve the issue and to exhaust it for purposes of federal review. (See *Street v. New York, supra*, 394 U.S. at p. 582; 28 U.S.C. § 2254, subd. (b).)

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¹ All further statutory references are to the Penal Code unless otherwise indicated.

XXV
CALIFORNIA'S DEATH PENALTY STATUTE AND CALJIC INSTRUCTIONS, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATE THE UNITED STATES CONSTITUTION

Appellant has argued that this Court's previous decisions regarding the constitutionality of California's death penalty scheme, as challenged under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*), should be reconsidered in light of *Hurst v. Florida* (2016) ___ U.S. ___ [136 S.Ct. 616] (*Hurst*). (ASSOB 9-24.)

Much of respondent's discussion regarding Argument XXV does not address the substance of appellant's claim. For instance, respondent argues that *Hurst* is distinguishable because there is no judicial factfinding in California's death penalty scheme and the jury's verdict is not merely advisory. (SSRB 9-11.) It is true, but irrelevant, that California's statute is different from the former Florida scheme in these respects. The issue before this Court is not the procedural role of the jury in imposing death, but the factual determinations the jury must make in serving that role. As appellant argued (ASSOB 19), this Court has construed Florida's sentencing directive to be comparable to California on the relevant point, that is, a death sentence is authorized (though not mandated) only if the sentencer finds that aggravating circumstances outweigh mitigation. (*People v. Brown* (1985) 40 Cal.3d 512, 542 (*Brown*).)

In the past, this Court distinguished between the weighing of aggravation and mitigation on the one hand, and the kind of factual determinations at issue in *Apprendi* and *Ring* on the other. (See, e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 262-263; *People v. Merriman* (2014) 60 Cal.4th 1, 106.) *Hurst* made clear that the weighing decision, "that there are insufficient mitigating circumstances to outweigh

aggravating circumstances,” was part of the “necessary factual finding that *Ring* requires.” (*Hurst v. Florida, supra*, 136 S.Ct. at p. 622, citing former Fla. Stat. § 921.141(3).) The significance of *Hurst* for California, then, is that it brings the weighing process clearly within the ambit of *Ring*.

At least two state supreme courts have agreed with appellant’s analysis: the Florida Supreme Court in *Hurst v. State* (Fla. 2016) 202 So.3d 40, and the Delaware Supreme Court in *Rauf v. State* (Del. 2016) 145 A.3d 430. Although appellant discussed these cases in the ASSOB at pages 37-39, respondent does not address either opinion. In Florida, the state supreme court described the sentencing factors, including the weighing process itself, as “elements” that the sentencer must determine, akin to elements of a crime during the guilt phase. (*Hurst v. State, supra*, 202 So.3d at pp. 53-54.) The court emphasized that the “critical findings necessary for imposition of a sentence of death” were “on par with elements of a greater offense.” (*Id.* at p. 57.) In Delaware, the state supreme court explained that the weighing determination “is a factual finding necessary to impose a death sentence.” (*Rauf v. State, supra*, 145 A.3d at p. 485 (conc. opn. of Holland, J.)) These cases support appellant’s contention that even though the sentencer differs under the former Florida scheme and under California’s death penalty law, the necessary factual findings are similar.

Although this Court has emphasized the normative aspect of a juror’s penalty decision to find that California is not bound by *Apprendi* or *Ring*, the weighing determination and the ultimate sentence-selection decision are not a unitary finding. As appellant has argued, they are two distinct determinations. The jury’s finding that the aggravating circumstances outweigh the mitigating circumstances is the necessary factual finding that brings the jury to its final normative decision: is death

the appropriate punishment considering all the circumstances? (ASSOB 22-23.)

Respondent glosses over the distinction between the jury's two penalty-phase determinations in arguing that *Kansas v. Carr* (2016) __ U.S. __ [136 S. Ct. 633] (*Carr*) "effectively forecloses Waldon's argument that determinations at the penalty phase must be made beyond a reasonable doubt." (SSRB 11.) It is true that *Carr* questioned whether the sentence-selection decision is a factual determination to which a standard of proof can meaningfully be applied. (*Carr, supra*, 136 S. Ct. at p. 642.) But appellant has not argued otherwise. Appellant's argument pertains to the first part of the jury's penalty determination, concerning the existence of aggravating circumstances and whether they outweigh the mitigating circumstances, not to the second part, i.e., the determination of whether death ultimately ought to be imposed. Contrary to respondent's argument, *Carr* supports appellant's position because the Supreme Court specifically noted that the determination of whether an aggravating factor exists is "a purely factual determination," and that is a determination for which it is possible to apply a standard of proof. (*Ibid.*)²

Respondent's citation to *People v. Brown* (1988) 46 Cal.3d 432, 456, for the proposition that age may be either an aggravating or a mitigating factor, illustrates appellant's point. (SSRB 11-12.) It is true that under Penal Code section 190.3, subdivision (i), jurors may consider a defendant's age at the time of the offense and this factor is not necessarily

² Accordingly, to the extent this Court has relied on *Carr* to reject appellant's claim (see *People v. Winbush* (2017) 2 Cal.5th 402, 489; *People v. Williams* (2016) 1 Cal.5th 1166, 1204), appellant requests that this Court reconsider the issue, taking into account appellant's argument presented here and in the ASSOB, and the analysis in *Hurst v. State, supra*, 202 So.3d 40, and *Rauf v. State, supra*, 145 A.3d 430.

aggravating or mitigating. This does not mean, however, that there is no fact finding to be done. It simply means that the jurors must make a factual determination about the existence of aggravating and mitigating factors, including the age of the defendant. (See *People v. Burney* (2009) 47 Cal.4th 203, 260 [jurors must make “certain actual findings in order to consider certain circumstances as aggravating factors”].) The weighing question then asks jurors to determine a second factual issue: do the aggravating circumstances outweigh the mitigating circumstances? It is only when these factual findings are made that the jury can determine whether death is warranted.

In *Apprendi*, the United States Supreme Court emphasized that the “relevant inquiry is one not of form, but of effect.” (*Apprendi, supra*, 530 U.S. at p. 494.) As Justice Scalia wrote later in *Ring*, “all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.” (*Ring, supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.)) How a circumstance is labeled – whether as aggravating, mitigating, or as capable of being interpreted either way – does not change the factual nature of the finding that is made. That the process calls for jurors to then determine whether the aggravating circumstances substantially outweigh the mitigating circumstances does not change the factual nature of this inquiry.

The determination that aggravating circumstances outweigh mitigation is a necessary predicate to the imposition of the death penalty and one that must be made beyond a reasonable doubt. Appellant was not sentenced under these standards. His death sentence must be reversed.

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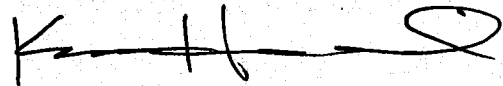
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CONCLUSION

For all of the reasons argued above and in appellant's prior briefing in this case, the judgment against appellant must be reversed.

Dated: June 16, 2017

MARY K. McCOMB
State Public Defender

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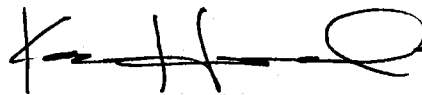
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(Cal. Rules of Court, rule 8.630(b)(2))

I am the Senior Deputy State Public Defender and represent appellant, BILLY RAY WALDON, AKA N.I. SEQUOYAH, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates is 1,862 words in length.

Dated: June 16, 2017



KAREN HAMILTON
Senior Deputy State Public Defender

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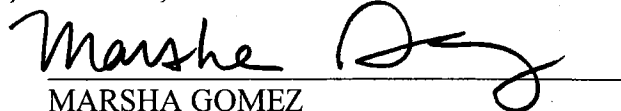
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **June 16, 2017**, at Oakland, California.


MARSHA GOMEZ

