No. S148863

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ROBERT WARD FRAZIER, Defendant and Appellant.	(Contra Costa County Sup. Ct. No. 041700-6)

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Contra Costa

HONORABLE JOHN C. MINNEY

MARY K. McCOMB
State Public Defender

EVAN YOUNG
Supervising Deputy State Public Defender
State Bar No. 112201
1111 Broadway, 10th Floor
Oakland, California 94607
Telephone: (510) 267-3300
young@ospd.ca.gov

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES

STATE CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

STATE STATUTES

JURY INSTRUCTIONS

TABLE OF AUTHORITIES

Page(s)

OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	S148863
Plaintiff and Respondent,	)	Contra Costa Cty Superior Court No. 041700-6
v.	)	
ROBERT WARD FRAZIER,	)	
Defendant and Appellant.	)	

APPELLANT'S REPLY BRIEF

In this reply, appellant addresses specific contentions made by respondent, but does not reply to arguments that are adequately addressed in his opening brief. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

I.

THE TRIAL COURT'S IMPROPER EXCLUSION FOR CAUSE OF PROSPECTIVE JUROR NO. 111 REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE

A. Introduction

Appellant argues that the trial court improperly excluded Juror No. 111 based on his opposition to the death penalty, despite the juror's unwavering and unambiguous assurances that he could follow the law and impose the death penalty. (AOB 36-68.) Respondent contends the court's ruling was reasonable and is owed deference by this Court. (RB 41-61.) Respondent is wrong on both counts; the trial court's ruling, which was based on a misrepresentation of the juror's statements and a misapplication of the law regarding the qualifications of capital jurors, is not entitled to deference, nor is it supported by substantial evidence.

Respondent and appellant do not disagree about the scope of the relevant facts as demonstrated by the nearly identical statement of facts and recitation of the law in both briefs, but the paths diverge about the legal propriety of the court's ruling.

B. Juror No. 111 Was a Qualified Capital Juror; His Exclusion Was Reversible Error

Respondent correctly acknowledges that Juror No. 111 stated his willingness to follow the law, keep an open mind, set aside his feelings about what the law ought to be, and said that he did not have difficulty being fair and impartial in considering the relevant aggravating and mitigating factors. (RB 48.) Respondent is wrong, however, in its statement that the juror "expressed a great deal of ambivalence about his ability to impose the death penalty in the case before him." (*Ibid.*) Just like the trial court's ruling, respondent's argument is based on a legally incorrect

analysis of the juror's statements. Not only did Juror No. 111 state without ambiguity that he could impose the death penalty, he also stated he could impose it in this case. His exclusion from appellant's jury, therefore, requires reversal of the death penalty.

Respondent argues that if Juror No. 111 was erroneously excused, the error was harmless. (RB 59-62.) This Court has consistently followed United Supreme Court precedent in holding that "[w]hen a trial court errs in excusing a prospective juror for cause because of that person's views concerning the death penalty, we must reverse the penalty." (*People v. Zaragoza* (2016) 1 Cal.5th 21, 41, citing *Gray v. Mississippi* (1987) 481 U.S. 648, 659–667.) Respondent's request to the Court to revisit its position should be denied.

1. Juror no. 111 was opposed to the death penalty, but willing to set aside his beliefs and follow the law.

Beginning with his questionnaire responses, Juror No. 111 made his position clear: he did not believe in the death penalty, but would follow the law. His answer to Question 83, which asked for his general feelings regarding the death penalty was: "I think it is not for human being [sic] to judge whether somebody should be killed. *I am against it, but I will obey the law & instructions from the court.*" (14 CT 4176, italics added.)[1] In response to Question 85(f), which asked, "Could you set aside your own personal feelings regarding what the law ought to be and follow the law as

---

[1] By omitting the second sentence of the response here (it is cited in full at RB 42), respondent mischaracterizes the record when it cites this answer in support of the claim that Juror No. 111 "made it clear that he did not feel qualified to impose the death penalty because he was a human being who was insufficiently wise to choose who should live or die." (RB 48, citing 14 CT 4176.)

the court explains it to you?" he answered, "Yes." (14 CT 4182.) Based on these written answers alone, Juror No. 111 "could not be excused for cause unless further questioning established that [he] w[as] in fact unable or unwilling to set aside [his] personal views and follow the law in determining penalty." (*People v. Leon* (2015) 61 Cal.4th 569, 592.)

In the course of answering a question by the prosecutor about the basis for his opposition to the death penalty, Juror No. 111 expressed doubt that he, rather than God, should – or could – decide whether a person should live or die. (12 RT 2510-2511.) When the prosecutor questioned him further about this dichotomy, Juror No. 111 explained:

> So right now there's a conflict between my civic duty and what I believe. And so given a choice of how do I choose between those two things, it's kind of one of those things I'm hoping that I don't have to – it doesn't have to come down to that. If it does come down to that, my belief is that I will follow my civic duty because it's not – in that case, I guess I justify the decision based on the fact it's really not my moral choice, it's my choice based on evidence and my civic duty to do this, and it's not like I'm personally volunteering to go and decide whether someone should live or die.

(*Ibid.*)

Respondent cites these statements made during voir dire as well as the questionnaire answers as examples of Juror No. 111's "ambivalence about his ability to impose the death penalty in the case before him." (RB 48.) Here, Juror No. 111 is discussing how his beliefs and his ability to follow the law would intersect. Respondent does not attempt to address the authorities cited in the opening brief that discuss why statements such as these are not disqualifying. (See AOB 65-68.)

Juror No. 111's position was unlike, for example, that of the juror in *People v. Rountree* (2013) 56 Cal.4th 823, 847, who felt that voting for the death penalty would violate his religious beliefs. This Court upheld the

dismissal of the juror, despite the juror's statements that, his religious beliefs notwithstanding, if chosen as a juror he would try to sit in judgment of another person. "[H]e was excused because he said it would be very hard for him to ignore his belief system in order to carry out his duties as a juror. This internal conflict, not the inherent difficulty of sitting in judgment, is what may render a prospective juror, including this one, excusable." (*Id.* at p. 848.) Juror No. 111 made no comparable statements, but rather stated clearly that he would follow his civic duty despite his beliefs.

Respondent cites this Court's decision in *People v. Bradford* (1997) 15 Cal.4th 1229, 1320, in which the dismissal of prospective jurors was upheld based on their statements that they could only impose the death penalty in cases with far more egregious facts than those in the case before them. (RB 49.) *Bradford* is easily distinguishable. Contrary to respondent's contention (RB 48-49), Juror No. 111 expressed his willingness to impose the death penalty in the case before him. In response to the prosecutor's question whether, under the bare facts of the present case, knowing nothing more about it than the charges against appellant – "one murder, one rape, one sodomy, and the special circumstances that you know about" – he could impose the death penalty, Juror No. 111 answered, "There's a chance, yes." (12 RT 2507.) Respondent distorts the record by editorializing that "the juror initially stated that there was *only* a 'chance' he could do it." (RB 49, italics added.) As noted, that is not what he said.

When asked by defense counsel whether he could potentially impose the death penalty, Juror No. 111 stated "That's – that's right." (12 RT 2519.) Respondent claims Juror No. 111 "hesitated" in responding, but fails to explain why the cold record can – or should – be read to signify hesitation rather than certainty in his answer. In fact, the juror's next statement, "I said that, and that's what I believe," makes certainty the more

likely explanation. (*Ibid.*)

Respondent persists in pointing to statements by Juror No. 111 and claiming, but offering no legal authority in support, that the statements are disqualifying. For example, respondent refers to Juror No. 111's answers to the prosecutor's questions in which he stated that in almost all cases he would not find it appropriate to impose the death penalty and that he was "leaning towards life." Respondent suggests that these answers were disqualifying. (RB 49, citing 12 RT 2505, 2506.) They are not. As this Court has repeatedly recognized, "the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror *ever* to impose the death penalty is not equivalent to a determination that such belief will 'substantially impair the performance of his [or her] duties as a juror' under *Witt* [citation]." (*People v. Stewart* (2004) 33 Cal.4th 425, 447, citing *People v. Kaurish* (1990) 52 Cal.3d 648, italics added.) Additionally, "'[i]t is entirely possible . . . that even a juror who believes that capital punishment *should never be inflicted* and *who is irrevocably committed to its abolition* could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State' (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 515, fn. 7, 88 S.Ct. 1770; see *Lockhart v. McCree* (1986) 476 U.S. 162, 176, 106 S.Ct. 1758, 90 L.Ed.2d 137." (*People v. Whalen* (2013) 56 Cal.4th 1, 30, disapproved of on another ground by *People v. Romero* (2015) 62 Cal.4th 1, 44, fn. 17, italics added.) That is, if even those prospective jurors who would have difficulty *ever* imposing the death penalty and those who are irrevocably committed to its abolition are not disqualified to serve, as long as they can set aside their beliefs, then surely Juror No. 111's feeling that the death penalty is not appropriate in most cases is not disqualifying.

The trial court referred to Juror No. 111's response to Question 43, which asked: "Will you have any difficulty keeping an open mind until you have heard all the arguments of both counsel, and the court has given you all the instructions?" The juror answered "No," and added, "Although I'm not confident I could recommend death in any scenario." (12 RT 2589; 14 CT 4161 [questionnaire].) This answer is far less definitive than the responses of the three prospective jurors in *People v. Leon*, who wrote in their questionnaires that they were "inclin[ed] to vote *automatically*" for LWOP. (61 Cal.4th at p. 592, italics added.) This Court found that, based on these answers, the jurors who – like Juror No. 111 – also stated they could set aside their personal feelings and follow the law, "appeared qualified to serve." Nothing Juror No. 111 said during voir dire by the court and counsel undermined or contradicted the questionnaire responses.

Respondent's refusal to acknowledge this legal truth leads it to cite as evidence of his disqualifying impairment Juror No. 111's "aversion to the death penalty," and to the prospect of serving on the jury based on his wife's experience as a capital juror. (RB 49.) While the juror made no secret of his opposition to the death penalty and his desire not to serve, neither of these is a disqualifying position. Moreover, in response to a specific question about the effect of his wife's experience on his own feelings, Juror No. 111 stated that it would not impact his ability to be fair. (12 RT 2500.)

Respondent neither acknowledges nor responds to authority cited in the opening brief that addresses this point. (See AOB 66, citing *People v. Rountree*, *supra*, 56 Cal.4th at p. 848 ["It is no doubt common for prospective jurors, or even sitting jurors, to believe, and perhaps to state, that sitting in judgment in a capital case would be difficult or even one of the hardest things they have been asked to do"]; *People v. Stewart*, *supra*,

33 Cal.4th at p. 446; see also, *People v. Avila* (2006) 38 Cal.4th 491, 530 ["mere *difficulty* in imposing the death penalty does not, per se, prevent or substantially impair the performance of a juror's duties"] original italics; *People v. Riccardi* (2012) 54 Cal.4th 758, 782 [jurors who "feared that actually being on a death jury would be difficult or uncomfortable" are "not disqualifiable under *Witherspoon -Witt*"].)

Because none of Juror No. 111's statements were remotely disqualifying, respondent's argument that they somehow undermine the juror's unwavering declarations that, notwithstanding his opposition to the death penalty he could impose it in this case, is wholly unsupported. (RB 49, quoting *Uttecht v. Brown* (2007) 551 U.S. 1, 18.)[2]

2. The court's ruling sustaining the prosecutor's challenge is based on a misrepresentation of Juror No. 111's consistent and unequivocal assertions that he could impose the death penalty in this case and a misapplication of the law regarding the qualifications of a capital juror.

Appellant argues in the opening brief that the trial court misrepresented Juror No. 111's statements and applied an incorrect legal standard in disqualifying him. (AOB 45-54.) Respondent defends the court's ruling because the juror "did not persuasively demonstrate an ability to properly engage in the weighing process and make a determination concerning the appropriateness of capital punishment after setting his

---

[2] Respondent's reliance on *Uttecht* is badly misplaced, and its attempt to compare the statements by the juror in *Uttecht* with those of Juror No. 111 must fail. There, among other things, the juror stated several times that he could consider imposing the death penalty only if the defendant "is . . . incorrigible and would reviolate if released," despite having been told repeatedly that if the defendant was convicted of first degree murder, he could not be released. (*Uttecht v. Brown*, *supra*, 551 U.S. at p. 14.)

feelings aside." (RB 52.) Initially, it should be noted that, "[t]he prosecution, as the party making the challenge, had the burden to establish the juror's impairment." (*People v. Zaragoza, supra*, 1 Cal.5th at p. 38, citing *People v. Stewart, supra*, 33 Cal.4th at p. 445.) Neither the prosecutor below, nor respondent here on appeal has met its burden.

Respondent begins by accusing appellant of "dissecting" the statements by the prosecutor and court in which they characterize the juror's statements, and argues that such characterizations are "immaterial" to the question of whether the trial court erred in dismissing Juror No. 111. (RB 51.) "What matters," respondent argues, "is whether the trial court's ruling fell within the bounds of its broad discretion." (*Ibid.*) On the contrary, the court's articulation of the record and its stated interpretation of the law are obviously "material" to this Court's task in ruling on the propriety of the trial court's actions. (See, e.g., *People v. Avila, supra*, 38 Cal.4th at p. 530, citing *People v. Stewart, supra*, 33 Cal.4th 425 [noting the "court's failure to conduct such an examination [beyond the questionnaires] was apparently based on its misunderstanding and misapplication of the standard necessary to excuse a prospective juror for cause based on his or her death penalty views"].)

Citing the juror's statements that his personal beliefs would make the "funnel" to a finding of death very narrow (12 RT 2513), and that the "bar is going to be higher in terms of the need for substantial aggravating circumstances" (12 RT 2515), respondent argues the trial court could reasonably infer that the juror was impaired. (RB 50.)

In questioning Juror No. 111 about how his attitudes toward the death penalty would affect his decision during the weighing process, the trial court came up with the "funnel" analogy. If, the court posited to the juror, he determined that the aggravating circumstances are so substantial in

comparison with the mitigating circumstances that a sentence of death is warranted, he would be allowed to, but would not be compelled to vote for death. To get to a decision to impose death, the court continued, "[l]et's call that the funnel that you would have to go through to get to that [decision]," and asked, "[y]ou feel that funnel would be made narrower because of your personal reluctance to impose [the death penalty]?" (12 RT 2512-2513.) Juror No. 111 responded that "maybe the answer to your question is yes, because when I look at this case and the sum total of the charges that are on the table, I – I think that that is going to be very – it's going to be a very narrow funnel." (12 RT 2513.)

In response to the court's later question, whether he felt that his opposition to the death penalty "would interfere with your ability to consider the options at either end," the juror replied, "I guess when you say aggravating and mitigating factors, I guess my answer is the bar is going to be higher in terms of the need for substantial aggravating circumstances." (12 RT 2515.) Respondent characterizes this statement as "evasive" and claims that the juror "essentially conceded his beliefs would hinder his ability to return the verdict of death." (RB 52.) Respondent goes on to claim that Juror No. 111's statement that the "funnel" would be narrow, "underscored that his reservations would cause him to prejudge the case in favor of life." (RB 52.) Respondent's assertions that the juror's answers to these questions are disqualifying are supported by neither the record nor legal authority.

The court's ruling, that "his personal beliefs . . . would result in him being unable to follow the law and impair his ability to accept the responsibilities for this case," was based on an inaccurate representation of the juror's statements combined with a legally erroneous application of the standards for the qualification of a capital juror. (12 RT 2591.) The court

believed – incorrectly – that the juror stated that even if he was convinced that the aggravating circumstances substantially outweighed the mitigating circumstances "he would nevertheless feel compelled *to impose his personal belief as a barrier*, if you will – I put it narrowing the funnel – *as a barrier to imposing the death penalty*." (12 RT 2590-2591, italics added.) The court admitted that it did not write down his exact answer, but recalled "he said, yes, that's true." (12 RT 2591.) The record shows the court was wrong in its recollection. In response to the court's "funnel" question, Juror No. 111 never used the word barrier or any other comparable word or phrase, nor could the words he did use be interpreted as such. Juror No. 111 said that, based on the charges he thought "it's going to be a very narrow funnel." (12 RT 2513.) As noted in the opening brief, but not addressed by respondent, Juror No. 111 also agreed that evidence of additional aggravating factors beyond what he presently knew about the facts of the case would "reopen the funnel," referring to the court's analogy of the "funnel" through which the juror would view the decision whether to impose the death penalty. (12 RT 2518.)

Similarly, when he was asked whether his personal beliefs would interfere with his ability to consider the death penalty as a sentencing option, the juror referred specifically to the process of weighing aggravating and mitigating factors and said that the "bar is going to be higher in terms of the need for substantial aggravating factors." (12 RT 2515.) The court made clear its erroneous characterization of the answer as disqualifying when it stated, "I took that to mean that the bar would be his personal beliefs which he had difficulty overcoming in considering the death penalty as a result." (*Ibid.*) That is not, however, an accurate rendition of what the juror said, and it ignores the juror's clear statements that he would follow the law.

If Juror No. 111 had said something that approximated the trial court's language, i.e., that having made the decision that the case warranted the death penalty, based on the existence of substantial aggravating factors, he would then refuse to vote for it because of his personal opposition, then the court may have been justified in finding that he was impaired, but that is not what the record shows. What Juror No. 111 actually said, is that his opposition to the death penalty would affect whether he ever made the determination that the aggravating factors were so substantial that they warranted the death penalty, that is, the bar would be higher – a legally authorized position. (*People v. Kaurish*, *supra*, 52 Cal.3d at p. 699.) But, if he arrived at the conclusion that the death penalty was warranted, he could impose it, in spite of his opposition.

The court's erroneous representation of the juror's statements is illustrated by the court's use of the term "add" when discussing what it believed to be the disqualifying aspect of the juror's beliefs.

> So, what I think I just heard you say, correct me if I'm wrong, is that when you get – if you were to arrive at this point, based on the evidence in this case, that under law [sic] you could see your way clear to the option of voting for [sic] death penalty, *your mind would then add to the equation* but I'm not for this at all, and on that ground I – that's reversing everything that I would otherwise do. I'm going to go the other way. I've narrowed the funnel towards the possibility of death by my personal belief.

(12 RT 2514, italics added.)[3]

---

[3] On another occasion later in the trial, the court used similar language to express the same erroneous analysis when it stated, "the appropriateness of the death vote, or the life vote, has to be made based on the weighing circumstances; *that they're not free to add*, under the guise of something that an individual feels is appropriate, *some other consideration, like their personal predilection*, their favoring of LWOP, their favoring of (continued...)

The court's statements reveal its mistaken belief that Juror No. 111's position – that the bar would be higher for finding aggravating circumstances – was disqualifying, in direct opposition to this Court's authority. This Court has consistently held that a juror's "high threshold for imposing the death penalty . . . does not necessarily mean the juror is substantially impaired within the meaning of *Witt*." (*People v. Martinez* (2009) 47 Cal.4th 399, 432, citing *People v. Stewart, supra*, 33 Cal.4th at p. 447; *People v. Kaurish, supra*, 52 Cal.3d at p. 699.) A juror "whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors . . . may not be excluded" unless the juror's beliefs would "actually preclude him from engaging in the weighing process." (*People v. Jones* (2012) 54 Cal.4th 1, 42.) Similarly, a juror like Juror No. 111, who would require more in the way of aggravating evidence before voting for the death penalty, may not be excluded absent evidence that he would be unable or unwilling to consider both penalties. And just as it might take more to get Juror No. 111 to vote for death, for a juror strongly in favor of the death penalty, it might take less. Both are acceptable positions. "That a prospective juror might weigh the aggravating and mitigating evidence in light of his or her death penalty views is not necessarily a ground for exclusion." (*People v. Mai* (2013) 57 Cal.4th 986, 1041.)

3. The court's decision was not based on the juror's demeanor.

Appellant argues that the trial court's disqualification of Juror No. 111 was based on the court's misapplication of the law and not on the juror's demeanor. (AOB 54-58.) Respondent claims appellant is trying to

---

[3](...continued)
death." (17 RT 3576, italics added.)

"circumvent the deference owed to the trial court." (RB 54-58.)

Relying primarily on this Court's decision in *People v. Capistrano* (2014) 59 Cal.4th 830, respondent makes the broad claim that "the fact that the trial court had the opportunity to observe Juror No. 111 during voir dire compels deference on appeal." (RB 57.) In the face of strong evidence that the trial court *did not* consider demeanor evidence in making its ruling, reliance by the reviewing court on the assumption that it did is misplaced. As noted in the opening brief, in contrast to its practice throughout voir dire of specifying when it was making demeanor findings in ruling on cause challenges, the court made no such statements with regard to Juror No. 111. (See AOB 54-56.)

In making its ruling, the trial court observed, "What do I get from all of this? [¶] I get a man struggling with his ability to accept the doctrines of law we would explain to him, to think about the fact that he might be under law and doing his duty feel compelled to reach a decision by the weighing process and then be prevented from doing it because of his personal beliefs." (12 RT 2591.) The court's statements are contradicted by the juror's repeated statements that, despite his personal opposition to the death penalty, he would follow the law. Moreover, the trial court itself made clear it based its ruling on the juror's statements and not on his demeanor. After the prosecutor questioned Juror No. 111 and before defense counsel began voir dire, the court interjected to ask "one more question to further define how you feel." The court went on to state, "And by the way, I really appreciate your debating this with us because it's sometimes hard to get enough *information* out for us to make a judgment, so you're very helpful." (12 RT 2512, italics added.) At that point, the court asked the "funnel" question. The court was seeking information and its ruling was based upon that information – the court specifically cited the juror's answer to the

"funnel" question as well as his answers from the questionnaire. (12 RT 2589-2590.) As discussed above, the court's ruling was based on something the juror never said – that he would impose a barrier to imposing the death penalty based on his personal beliefs – and on a legally erroneous decision that it was impermissible for the juror to have a higher threshold for finding aggravating evidence.

4. The trial court's finding is not binding because Juror No. 111's statements about his ability to impose the death penalty were neither conflicting nor ambiguous.

Juror No. 111 did not make conflicting or equivocal statements about his ability to impose a death sentence in this case, and therefore, the trial court's ruling that he was impaired will be upheld only if it is supported by substantial evidence. (*People v. Pearson* (2012) 53 Cal.4th 306, 327-328, citing *People v. Horning* (2004) 34 Cal.4th 871, 896-897.)

Respondent's claim that Juror No. 111 made conflicting and ambiguous statements is based on a distortion of the record. (RB 58-59.) For example, respondent erroneously characterizes as "evasive" the juror's response to the court's question whether his beliefs would prevent him from considering both sentencing options, in which he noted that the "bar would be higher" for aggravating circumstances. (RB 52.) Juror No. 111 made no bones about his position; the reality is that respondent, like the trial court, fails to acknowledge that the juror's honest, straightforward and consistent explanation of his state of mind is an acceptable one for a capital juror.

Respondent complains that Juror No. 111 "was unable to clearly identify whether his opposition to the death penalty was religious." (RB 59, citing 12 RT 2510.) In response to a question by the prosecutor whether his opposition was based on religion, Juror No. 111 initially said that he would not associate his beliefs with religion, but then concluded that his

preference would be that God make the decision whether someone should live or die. (12 RT 2510.) Even if this response could legitimately be characterized as ambiguous, respondent misses the point, for it is not a juror's ambivalence about his position on the death penalty that is being assessed at this point, it is the conflicting or ambiguous statements made about a juror's ability to set aside those beliefs and impose the death penalty in a given case. A court cannot excuse a prospective juror because he or she expressed equivocal views about capital punishment in general. (*People v. Nunez* (2013) 57 Cal.4th 1, 25, citing *People v. Guzman* (1988) 45 Cal.3d 915, 956, and *People v. Pearson*, *supra*, 53 Cal.4th at p. 331.)

During voir dire questioning, the prosecutor pressed Juror No. 111 to explain how his statements that he could impose the death penalty in this case fit in with his concern that he lacked the wisdom to make such a decision. (12 RT 2510-2511.) The juror responded by stating that there was a "conflict between my civic duty and what I believe." While he hoped he would not have to choose between the two, if it came to that, Juror No. 111 stated, "my belief is that I will follow my civic duty." (12 RT 2511.) Respondent claims that Juror No. 111's "struggle between his civic duty and his beliefs further supports the trial court's ruling." (RB 49.) Because the juror expressed no ambivalence about his ability to perform his civic duty, the statements do not justify his dismissal.

Respondent's claim that Juror No. 111 "equivocated by expressing uncertainty as to whether he could do it [impose the death penalty] without having done it before" (RB 49, citing 12 RT 2519; see also RB 59 [same]), mischaracterizes his answer, for in it he did not express equivocation, but simply a statement of fact: he could not say with 100 percent certainty that

he could do it, but only because he'd never been asked to before.[4] This Court "does not embrace" "the idea that a person is substantially impaired . . . because his or her ideas about the death penalty are indefinite, complicated or subject to qualifications . . . ." (*People v. Pearson, supra,* 53 Cal.4th at p. 331.) Additionally, this Court held in *Pearson,* "[t]o exclude from a capital jury all those who will not promise to immovably embrace the death penalty in the case before them unconstitutionally biases the selection process." (*Id.* at p. 332.)

In the opening brief, appellant contrasted the answers given by Juror No. 111 with those of jurors in several cases in which this Court found the answers to be conflicting or ambiguous. (AOB 63-65.) Respondent fails to distinguish these cases or to offer its own authority supporting its position. Instead, respondent makes the simple, conclusory statement that just because "the jurors' responses in those case were deemed to be conflicting or ambiguous dos not mean that Juror No. 111's answers in this case are not properly characterized as such." (RB 79.) Such a response, if it can even be called that, is impossible to rebut, except to say that it does not advance respondent's cause.

C. CONCLUSION

The trial court's exclusion of Juror No. 111 is unsupported by the record as a whole and is not entitled to deference. Accordingly, the trial court's excusal of Juror No. 111 was error which requires automatic reversal of the death judgment.

---

[4] This Court recently noted with approval a pro-death-penalty juror's citing "the insight of a colleague who had recently served as a capital juror that, whatever one's preconceived notions, it was impossible to understand the solemn realities of that role until one had experienced it." (*People v. Mai, supra,* 57 Cal.4th at p. 1045.)

II.

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE APPELLANT WAS ERRONEOUSLY DENIED HIS CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION AT THE PENALTY TRIAL

The trial court denied appellant's motion to represent himself at the penalty phase of trial because the court found the motion was untimely and equivocal. Thereafter, in response to appellant's renewal of the *Faretta* (*Faretta v. California* (1975) 422 U.S. 806, 834-835 (hereafter "*Faretta*)) motions throughout the penalty phase, the court continued to deny the motions on the grounds of possible delay and timeliness. Respondent defends the trial court's finding that the motion was untimely under the unitary-capital-trial theory and argues that the court did not abuse its discretion under *People v. Windham* (1977) 19 Cal.3d 121, 128-129 (hereafter "*Windham*"), in denying the motions. Respondent's arguments ignore the record and are unsupported by legal authority.

A. A Criminal Defendant Has A Constitutional Right To Self-Representation As Long As His Assertion Of That Right Will Not Unjustifiably Disrupt The Trial Or Otherwise Obstruct The Administration Of Justice

Appellant had the right under the Sixth and Fourteenth Amendments to proceed at trial without counsel (*Faretta, supra*, 422 U.S. 806), including, according to this Court, at the penalty phase of a capital trial (*People v. Blair* (2005) 36 Cal.4th 686, 736-740; *People v. Bradford* (1997) 15 Cal.4th 1229, 1364-1365; *People v. Clark* (1990) 50 Cal.3d 583, 617-618). Respondent does not disagree, but claims that the invocation of these rights was untimely and equivocal and therefore the trial court did not err in

denying appellant's motions for self-representation. (RB 77.)[5] Respondent concedes that the trial court's finding that appellant's requests were knowing and intelligent was correct and addresses only the grounds of timeliness and equivocation. (RB 77, fn. 26.)

B. Invocation of the Constitutional Right to Counsel Identified in *Faretta* Is Not Dependent on the Timing Of the Assertion; This Court's Interpretation of the Timeliness Requirement is Not Supported by State Law and Violates the Federal Constitution

Appellant argues in the opening brief that the timing of the invocation of the right to self-representation should not affect its constitutional basis (AOB 86-90), and that there is no logical or legal reason why the federal constitutional right to self-representation should be dependent upon anything more than an unequivocal request and a determination by the trial court that granting the request will not result in an unreasonable delay or affect the orderly administration of justice (AOB 90-94). Cases analyzing the timeliness of motions brought pursuant to *Faretta, supra*, 422 U.S. 806, to the extent that they have construed "timeliness" in a manner which allows trial courts to deny motions that are allegedly "untimely," but present no threat of delay or disruption, erect an unconstitutional barrier to defendants' *Faretta* rights. In response to both of appellant's arguments, respondent makes a broad argument regarding the constitutionality of the timeliness requirement. (RB 79-81.)

Respondent contends the timeliness requirement set forth in this Court's jurisprudence that transforms the right of self-representation from an absolute constitutional right to one subject to the trial court's discretion

---

[5] Respondent's brief changes the order of the arguments as presented in the opening brief. Appellant's reply will maintain the order of the opening brief.

is "constitutionally sound." (RB 80-81.) In support of its position, however, respondent does little more than cite cases that recognize the legitimacy of consideration by the court of the timeliness of a *Faretta* motion, but fails to address the lack of a basis for the transmutation of the Sixth Amendment right to self-representation into a non-constitutional right, depending on when in the proceedings it is asserted.

While appellant noted that *Faretta* did not have occasion to consider the timeliness of the assertion of the right to self-representation, California and other jurisdictions have read a timeliness requirement into the invocation of the right to self-representation. (AOB 88.) The purpose of the timeliness requirement is to prevent a defendant from misusing a *Faretta* motion to unjustifiably delay the trial or obstruct the orderly administration of justice – concerns consistent with *Faretta*. (*People v. Lynch* (2010) 50 Cal.4th 693, 724 (hereafter "*Lynch*").) Thus, appellant has no quarrel with respondent's recitation of federal cases upholding the timeliness requirement for *Faretta* motions.[6] (RB 81.)

Appellant's position is that the timing of the request affects the evaluation of the factors that may legitimately limit the right, e.g., delay or disruption of the trial (AOB 89), but the right does not evaporate at the point at which the request becomes untimely. As appellant noted, this is the reasonable interpretation of *Windham*, since the right of self-representation in California has its source only in the federal Constitution. Respondent does not address this point. Instead, respondent simply asserts that by

---

[6] This is also true for respondent's argument that the timeliness requirement for the assertion of the right to self-representation is justified by the State's interest in the prompt and orderly prosecution of criminal cases. (RB 80-81.) Again, appellant does not disagree with this proposition, and indeed the opening brief states, the "concern with unjustifiable delay and obstruction is consistent with *Faretta*." (AOB 90.)

delaying a request for self-representation until after the beginning of trial, "a defendant waives or forfeits his absolute constitutional right to self-representation." (RB 81, citing *Windham, supra*, 19 Cal.3d at p. 129, and *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050.) Apart from citation of these cases, respondent offers no analysis to support its position.

C. The Trial Court Erroneously Denied Appellant's *Faretta* Motion in Violation of the Sixth and Fourteenth Amendments

Once appellant understood what his attorneys planned to do at the penalty trial, and then heard from the court that it would allow them to do it, he filed a *Faretta* motion stating clearly and unequivocally that he wanted to represent himself. (6 CT 1873-1876.) At the hearing on the motion, he confirmed his unequivocal desire to represent himself, and in doing so, invoked what the United States Supreme Court and this Court have recognized to be the "core" of the *Faretta* right, that is, the right "to preserve actual control over the case [the defendant] presents to the jury." (*McKaskle v. Wiggins* (1984) 465 U.S. 168.) (Sealed 48 RT 9793-9794.)[7] This Court has recognized that the state may not constitutionally prevent a defendant from "controlling his own fate by forcing on him counsel who may present a case which is not consistent with the actual wishes of the defendant." (*Windham, supra*, 19 Cal.3d at p. 130.) Yet, this is precisely what happened to appellant when the court denied his *Faretta* motions.

1. The request was unequivocal

Following the July 26, 2006 hearing on in limine motions at which

---

[7] By an order filed September 23, 2015, this Court granted Respondent's "Application for Copy of Transcripts in Connection with In-Camera Hearings Related to Claims II and III." All of the reporter's transcripts referred to as "Sealed __ RT" in this brief were included in the Court's order.

counsel outlined the case in mitigation, appellant filed a written motion and followed up at the July 31, 2006 hearing on the motion with oral affirmation of his request and explained why he made the motion. The motion stated, "It is my intention to represent myself." (6 CT 1874.) The court denied the motion, ruling that appellant was not unequivocal in his request to represent himself. (Sealed 48 RT 9802-9803.)

a. Appellant unequivocally asserted his right to represent himself in his initial motion on July 31

It is difficult to argue that appellant's request was anything but unequivocal – he said it was, and he told the court in no uncertain terms why he wanted to represent himself: he did not want to go forward with the penalty trial he learned his attorneys had planned. "From what I've seen – or from what I've been allowed to see with regard to the video testimony, it is my appointed counsel's intention to mitigate the why of this sickening crime I've been convicted of." (Sealed 48 RT 9794.) Appellant knew he could not relitigate the question of guilt at the penalty trial, but he honestly believed that his attorneys' plan – to argue that he was a damaged individual and that explained why he committed the murder – would not sit well with the jury. He had a different plan: "Without mitigating the why, this does not automatically mean there is not mitigation worth of the jury's consideration." He said, "What I mean to only one other person is a mitigating factor," and he added, "I don't consider the jury so heartless that they would silently reject hearing how my friends and loved ones will be affected if they decided to have me executed." (Sealed 48 RT 9794-9795.)

In *People v. Marshall* (1997) 15 Cal.4th 1, this Court discussed which standard of review should govern a trial court's finding that a *Faretta* request was not unequivocal and asked whether the court's finding should

be accorded deference if supported by substantial evidence, or be subject to de novo review. (*Id.* at p. 24.) Ultimately, after noting that de novo review was the common standard employed by courts in other jurisdictions, this Court held that it need not determine which standard should apply because the defendant's claim failed under either one. Thereafter, in *People v. Danks* (2004) 32 Cal.4th 269, 295, 296, this Court cited the de novo standard articulated in *Marshall* for determining whether the defendant's request was unequivocal. In the present case, the trial court's denial of appellant's request on the ground that it was equivocal cannot stand, for the record lacks any evidence to support such a finding.

Respondent attempts to cast appellant's responses as "sudden" and "angry" in order to bring them under the rubric of cases holding that a *Faretta* motion made in the heat of the moment is not unequivocal. (RB 96, 97.) It is true that appellant was mocking in his description of some of the proposed mitigation evidence, and disagreed adamantly with counsel's description of him. (Sealed 48 RT 9795, 9800.) It is also true that he was emotional, as the trial court noted in observing that appellant was "upset in [sic] some of the stuff that you read, and somewhat frustrated by the things you were concerned about . . . ." (Sealed 48 RT 9803.) It is clear that appellant's behavior was prompted by his lack of control over the case. "We can hardly deny a party a constitutional right and then hold it against him that such denial prompted outrage and frustration." (*Moon v. Superior Court* (2005) 134 Cal.App.4th 1521, 1530-1531.) In *People v. Dent* (2003) 30 Cal.4th 213, this Court observed that while the defendant's *Faretta* request, made after the trial court removed counsel, was based in part on emotion, his further reasoning, that appointing new counsel would result in delay, "suggests a practical and not entirely emotional response." (*Id.* at p. 221.) The same can be said about appellant's response: once it became

clear that counsel intended to present a mitigation case he believed would be offensive to the jury, he explained the penalty phase case he would present – showing the jury what he meant to his family and friends. (Sealed 48 RT 9795.) Any emotion appellant demonstrated cannot fairly be characterized as equivocation about his motion for self-representation.

Respondent supports its assertion that appellant made the motion "under a cloud of sudden emotion," by claiming that he was hostile and emotional. (RB 96, citing *People v. Marshall supra*, 15 Cal.4th at p. 21.) Beyond citing *Marshall*, respondent makes no effort to apply either its facts nor the facts of the many cases cited by this Court in its opinion, to appellant's case. (See, e.g., *id.* at pp. 21-22.) The defendant in *Marshall* asked to represent himself after the trial court ordered that he supply blood and tissue samples, a move which this Court believed was an attempt to avoid having to comply with the order. Defendant's statements, which were rambling and asking for more time to think about it, did not "convey an unmistakable desire to forgo counsel." (*Id.* at p. 25.) In addition, the defendant had several times previously invoked the right to self-representation, then changed his mind, as well as asking for advisory counsel while he was representing himself, "indicating further ambivalence on his part about waiving the right to counsel." (*Id.* at p. 26.) Appellant's actions in this case – filing a written motion, affirming his request at the hearing on the motion and expanding upon his reasons for his decision, and making repeated requests for reconsideration of the motion throughout the penalty phase – are nothing like those of the defendant in *Marshall*.[8]

---

[8] While appellant is reluctant to repeat the authorities cited in the opening brief, it should be noted that respondent has made no attempt to explain how the facts of appellant's case differ from these: *People v.*

(continued...)

In support of the claim that appellant's request to represent himself was equivocal, respondent erroneously characterizes appellant's actions before his *Faretta* motion was heard on July 31 as "vacillati[ng]," between filing a *Marsden* motion, conferring with counsel after that motion was denied and seeking self-representation. (RB 95-96.) On the contrary, appellant's aim was clear from the beginning: he wanted to ensure that the case in mitigation his attorneys were planning was not the one the jury would hear. The fact that he sought to achieve it by various means – substituting counsel, trying to convince his attorneys to choose a different strategy and ultimately moving to represent himself – does not reflect equivocation, but rather determination. A *Faretta* request can be unequivocal, even if it is made after the denial of a *Marsden* motion. (See *People v. Michaels* (2002) 28 Cal.4th 486, 524; *People v. Weeks* (2008) 165 Cal.App.4th 882, 886-887; *United States v. Hernandez* (9th Cir. 2000) 203 F.3d 614, 621-622 [defendant's statement that "if you can't change [my

---

[8](...continued)
Halvorsen (2007) 42 Cal.4th 379, 431-434 [no question raised that defendant's statement – "'a new trial, a complete new trial. That would require a pro per status'" constituted an unequivocal request]; *People v. Joseph* (1983) 34 Cal.3d 936, 941 [no question raised that defendant's assertion – "'Your Honor, I request that the court would allow me to go pro per so I can defend myself'" – was unequivocal]; *Moon v. Superior Court* (2005) 134 Cal.App.4th 1521, 1529 ["There was nothing ambivalent about Moon's request for self-representation" where "he repeatedly told the magistrate he wanted to 'go pro per[]'" and "explained the basis for the request, namely that he believed he could do a better job than his court appointed attorney"]; *People v. Carlisle* (2001) 86 Cal.App.4th 1382, 1390 [reversing trial court's finding that *Faretta* request was equivocal where defendant had filled out a written petition to proceed in propria persona and signed it under penalty of perjury and counsel told court defendant's "'position right now is quite unequivocal, that he wants to represent himself, period'"].

attorney], I'd like to represent myself" was conditional but unequivocal *Faretta* request].)

Appellant's opening brief contains a lengthy discussion and citation to cases which demonstrate that his decision to represent himself based on his dissatisfaction and frustration with counsel's proposed strategy does not render his *Faretta* request equivocal. (AOB 95-99.) Appellant contrasted the facts of the present case, which support a finding that the request was unequivocal, with the facts of cases in which courts have deemed the request to be equivocal. (AOB 100-101.)

Respondent mentions only two of the several cases cited by appellant – *Stenson v. Lambert* (9th Cir. 2007) 504 F.3d 873 and *People v. Boyce* (2014) 59 Cal.4th 672 – both of which found either no assertion or an equivocal *Faretta* assertion, and offers the conclusory statement that the findings in the cases cited "do[] not mean that Frazier asserted the right unequivocally." (RB 97.) The facts of all of the cases cited, including the two mentioned by respondent, are clearly distinguishable from those in appellant's case, yet respondent fails to discuss *any* of the cases cited by appellant. It is hardly a legitimate response to simply dismiss the legal authority proffered by appellant with no attempt to show why it is neither binding nor persuasive, and to cite nothing in support of its own position.

Instead, respondent speculates that appellant was aware of the mitigation evidence his attorneys planned to present, and that "his sudden anger on the brink of the penalty phase about that evidence underscores that his request was made under the cloud of emotion" and made for the purpose of delay. (RB 97-98.) Respondent's premise is unsound: until he was aware of the course his attorneys planned to take, and until the court addressed the admissibility of the evidence they intended to present,

appellant did not have a complete picture of the proposed penalty trial.[9] Once appellant had that information, he began to take the steps necessary to prevent that case from being presented to the jury, but nothing in the record suggests that appellant's request for self-representation was the product of passing frustration or annoyance, made on the basis of emotion rather than a genuine desire to represent himself.

Appellant's request was not a spontaneous outburst – he filed a written motion, demonstrating that the request was the product of a considered decision. The record shows that there were ongoing discussions between appellant and his attorneys about the course the penalty trial would take and that his filing of the *Faretta* motion was hardly a spur-of-the-moment decision. In response to the court's questions at the hearing on the motion, appellant expressed no uncertainty or hesitation about his request, even though he acknowledged that it was motivated by dissatisfaction with the proposed strategy of his counsel. On this record, there is no basis for concluding appellant did not "truly desire[]" to represent himself. (*People v. Marshall, supra*, 15 Cal.4th at p. 23.)

b. Appellant unequivocally asserted his right to represent himself each time he renewed his motion

After the initial denial of the first *Faretta* motion, appellant did not abandon his attempts to represent himself, but renewed his motion several times throughout the penalty phase. The trial court continued to deny the requests.

Respondent cites appellant's suggestion that present counsel act as standby counsel as evidence that he was ambiguous about his request for self-representation. (RB 98.) As addressed in the opening brief, appellant

---

[9] This argument is addressed further at Argument II.B.1.b.iii., *post.*

never asked for nor conditioned his self-representation motion on appointment of his attorneys as advisory counsel, but instead offered to accept advisory counsel as an attempt at a compromise in the face of the trial court's refusal to grant his motion. (AOB 106-107; sealed 49 RT 10087-10088.) Respondent claims appellant's "ready desire to compromise rendered his request equivocal," and showed he was not "staunchly dedicated to carrying his own defense unaided by counsel." (RB 100.) As with the rest of respondent's argument that appellant's request was equivocal, these assertions completely ignore the record.

Respondent attempts to distinguish *Adams v. Caroll* (9th Cir. 1989) 875 F.2d 1441, cited by appellant, on various grounds. (RB 100-101; see AOB 108.) While it is correct, as respondent notes, that the decisions of a federal appeals court are not binding on this Court, they are "entitled to great weight." (*Elliott v. Albright* (1989) 209 Cal.App.3d 1028, 1034, citing 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 779, p. 750.) Indeed, in *Marshall* this Court relied in its analysis on not only *Adams*, but several other federal district court and circuit cases, as well as a North Carolina Supreme Court case. (*People v. Marshall, supra*, 15 Cal.4th at p. 23.)

Further, *Adams* was cited for its analysis of the defendant's conditional and repeated invocations of his right to self-representation, which were deemed by the court not to be equivocal. (AOB 108.) The court in *Adams* observed that, just as in the present case, and contrary to respondent's unsupported assertions, the defendant "persisted" in his request to represent himself which was not "a momentary caprice or the result of thinking out loud' he made the same request over and over again, at nearly every opportunity." (*Adams v. Carroll, supra*, 875 F.2d at p. 1445.) Respondent does not attempt to distinguish the case on these points,

but instead injects the unrelated issue of timeliness by noting that "the *Adams* motion was made pretrial, and did not involve a timeliness issue." (RB 101.)

In the end, respondent has not shown that appellant's renewed motions for self-representation were equivocal.

i. The automatic application of the unitary-capital-trial rule to a determination of the timeliness of a *Faretta* motion unreasonably and unjustifiably undermines the right to self-representation at the penalty phase of a capital case.

In its response to appellant's argument that the unitary-capital-trial rule should not be applied to defeat his constitutional right to self-representation, respondent glosses over the most important aspect of appellant's position, which is that the rule should not be *automatically* applied in every case to defeat a *Faretta* motion made at the penalty phase. (AOB 109-116.)

Beyond setting forth this Court's holdings in *People v. Hamilton* (1988) 45 Cal.3d 351, and *People v. Hardy* (1992) 2 Cal.4th 86, and stating its belief that appellant has failed to offer compelling reasons for the Court to reconsider those holdings, respondent offers little in response to appellant's arguments. (RB 83-84.) Respondent does not, for example, address the fact that the consequence of the automatic application of the capital-unitary-trial rule – rendering untimely every motion for self-representation at the penalty phase made after the start of the guilt phase and thus subject to the trial court's discretion – does not reconcile the "fundamental nature of the right [to self-representation] and the legitimate concern for the integrity of the trial process." (AOB 111, quoting *Chapman v. United States* (5th Cir. 1977) 553 F.2d 886, 895.) That is, while certain

aspects of a capital trial in California – the fact that the same jury sits at both phases of the trial and considers evidence from the guilt phase at the penalty phase – render designation of the proceeding as "unitary" appropriate for some purposes, it cannot be said that they constitute a rational basis for an across-the-board determination of untimeliness for motions made after the guilt verdict.

Respondent does not address appellant's points regarding the comparison of the guilt and penalty phases of a capital trial as they bear on the determination of the timeliness of a request for self-representation, except to assert that they "do not negate this Court's rationale for concluding that the guilt and penalty phases are substantially connected parts of a unitary trial." (RB 84; see AOB 111-113.) Appellant points out in the opening brief that the purpose of the penalty phase is significantly different than the guilt phase because it is "more normative and less factual." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1267.) As a result, at the penalty phase unique evidence is presented, to which different rules apply, and the jury's decision is guided by different legal principles. Most significant, however, is the nature of the case in mitigation compared to the defenses presented at the guilt trial. It is at this proceeding that the "supreme human dignity of being master of one's fate rather than a ward of the State," is most profoundly implicated. (*Indiana v. Edwards* (2008) 554 U.S. 164, 186, disn. opn. of Scalia, J.) Respondent's position – that this Court has previously addressed the challenge to the unitary-capital-trial rule as it relates to *Faretta* motions – begs the question because this Court has not passed on the specific arguments made by appellant.

As set forth in the opening brief, the facts of the present case illustrate why the broad application of the unitary capital trial rule is problematic with respect to determining the timeliness of a penalty trial

Faretta motion. (AOB 114-166.) In response to appellant's argument that the automatic application of the unitary-capital-trial rule renders the *Faretta* right illusory because it forces a defendant to make the motion before the guilt phase of a trial, without knowing the nature of a proposed penalty phase, or even if one will occur, respondent states "this Court has made clear that what a defendant knew or did not know before the start of trial is irrelevant to the timeliness inquiry." (RB 84, citing *People v. Cummings* (1993) 4 Cal.4th 1233.) Again, while it is true that this Court in *Cummings* held that the defendant's *Faretta* motion that was made after the trial had commenced was untimely under *Windham*, and rejected the defendant's argument that the motion was timely because it was made as soon as he became aware of his attorney's actions which prompted the motion (*id.* at p. 320), the Court did not address the argument presented by appellant regarding application of unitary-capital trial rule.[10]

Additionally, respondent contends the facts of appellant's case do not illustrate what is wrong with the automatic application of the unitary-capital-trial-rule because he *was* aware of the nature of the case in mitigation before jury selection began in March 2006, and thus could have made a timely motion to represent himself at the penalty phase. (RB 86.) Respondent's contention, based primarily on statements made by defense counsel during in camera hearings at which appellant was not present, is

---

[10] This language also seems to run counter to the clear language in *Windham* that "[w]hen the lateness of the request . . . can be reasonably justified the request should be granted." (*Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5.) Clearly, when the basis for the defendant's motion is not known, as happened in this case, that constitutes a reasonable justification for bringing the motion after the commencement of the guilt phase. This contention is addressed in the discussion of the timeliness of appellant's motion under *Windham* in Argument II.B.1.a.iii.

wholly unsupported. (RB 85.)

Appellant's knowledge of the evidence counsel intended to present at the penalty trial – and that which they would be permitted to present by the court – is addressed more fully in the following sections as it relates to a finding of timeliness under *Windham*. Appellant will address here, however, respondent's misplaced contention that the unitary-capital-trial-rule "serves to prevent precisely this type of dilatory conduct that interferes with the orderly administration of justice." (RB 86.) *Faretta* itself provides the necessary safeguard against the danger of delay or disruption of a capital trial by permitting the court to deny the request when it is shown that proceeding pro se will unjustifiably disrupt or delay the trial (see *Indiana v. Edwards*, *supra*, 554 U.S. at p. 171); application of the unitary-capital-trial-rule is not necessary.

Respondent has failed to offer any justification for the automatic application of the unitary-capital-trial-rule to deny *Faretta* motions made after the guilt phase.

ii. The Court's existing jurisprudence supports assessment of a motion for self-representation at the penalty phase by considering the totality of the circumstances under which the motion is made rather than under the automatic application of the unitary-capital-trial rule.

Neither this Court nor the United States Supreme Court has delineated a single point in time at which a *Faretta* motion becomes untimely. (See *Lynch*, *supra*, 50 Cal.4th at p. 722; *Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5.) This Court in *Lynch* held that a trial court may consider the totality of the circumstances that exist in assessing the timeliness of a motion for self-representation.

In the opening brief, appellant argues that under this Court's existing jurisprudence, the timeliness of a motion for self-representation made at or before the penalty phase may be assessed without the automatic application of the unitary-capital-trial rule. (AOB 116-119.) Respondent misconstrues appellant's position when it responds by noting that neither *Windham* nor *Lynch* addressed this question. (RB 86.) Appellant's position is not that those cases directly dealt with the issue, but rather, as set forth in the opening brief, that the approach taken in those cases provides an adequate and workable measure of whether a defendant's motion for self-representation at the penalty phase is timely. To this argument, respondent makes no response. Instead, as addressed below, respondent argues that even if *Windham* and *Lynch* are relevant to the question of the timeliness of appellant's *Faretta* motion, they do not support his claim that the motion was timely. (RB 87.)

iii. Appellant's *Faretta* motion was timely under *Windham* and *Lynch*.

Respondent acknowledges that this Court held in *Windham* that "when the lateness of the request and even the necessity of a continuance can reasonably be justified the request should be granted." (RB 87, quoting *Windham, supra*, 19 Cal.3d at p. 128, fn. 5.) Respondent claims, however, that the Court's directive does not apply to appellant because he cannot justify the delay in bringing the motion based on his prior knowledge of the case in mitigation his attorneys planned to present. (RB 87.)

Respondent argues that appellant's delay is not justified because he knew about the case in mitigation, as reflected in the transcripts of hearings under Penal Code section 987.9 during which counsel answered questions from the funding judge about the need for investigative resources. (RB 84-85.) In addition to the fact that appellant was absent from these hearings,

nothing that was said at any of the sessions, nor, indeed at any other time before the start of the guilt trial, shows that appellant had sufficient knowledge of the evidence his attorneys intended to present at the penalty trial to have enabled him to make a rational and informed decision to move to represent himself. (RB 85, citing 1 RT 68, 211-212; 3 RT 701-710.)

Respondent relies on the transcript of a hearing held on February 3, 2006, for the assertion that "[a]lthough Frazier was not present at these hearings, defense counsel made clear that they discussed their legal strategy with Frazier." (RB 85, citing sealed 1 RT 235.) Presumably respondent is referring to the statement on that page by Mr. Quandt: "And we are at a point where we're making critical trial strategy decisions that require his input, and he's often very distracted by these issues, and I'm concerned if he's able to make competent real good decisions about his trial strategy. So I think that [the court's order] would aid in our efforts in making appropriate decisions." (Sealed 1 RT 235.) There is a certain irony to this, since the purpose of the hearing – from which appellant was absent, to the court's chagrin[11] – was for counsel to ask the court to sign a meaningless order which they could use to placate appellant, with whom they were having difficulty communicating and establishing rapport. (Sealed 1 RT 233-234.) Nevertheless, even the most generous reading of counsel's statement does not support respondent's claim that "Frazier was likely well aware of the type of mitigation evidence defense counsel sought to present before the start of trial, yet waited until the first day of the penalty phase to request self-representation." (RB 85.)

---

[11] The court stated at the outset of the hearing, "All right, in the Frazier matter, defense counsel, at their request, have come into chambers without their client. I'm a little concerned that he's not here . . . ." (Sealed 1 RT 233.)

In appellant's opening brief, appellant states that he was prompted to move for self-representation at the July 26 hearing when he heard his attorney describe the mitigation evidence she planned to present. (AOB 115.) Respondent, seizing on this statement, erroneously claims appellant is suggesting that this was the first time appellant had heard of the mitigation evidence and disputes that appellant had no prior knowledge of the evidence to be presented at the penalty trial. (RB 85, citing AOB 115.) This is not, and has never been appellant's position: as the record clearly shows, appellant first raised the issue of representing himself at the penalty phase moments after the guilt verdicts were recorded on June 21, 2006. (46 RT 9456.) Two days later, at the end of a court session at which defense counsel listed the names of experts she intended to call at the penalty phase and estimated that she had 1800 pages of discovery to turn over to the prosecutor, appellant again mentioned the possibility of filing a *Faretta* motion. (47 RT 9477, 9513.) Appellant was obviously aware of some of the mitigation evidence based, at the very least, on what he'd heard in court. For example, he asked to be able to call his mother and ask whether she was agreeing to testify voluntarily. (Sealed RT 47 RT 9545.) What the record establishes, however, is that it was not until the July 26 hearing on the motions in limine, that appellant fully understood what it was counsel had planned for the penalty trial.

At the hearing on July 26, at which trial counsel laid out in detail the proposed mitigation evidence, including the videos of monkey experiments and appellant's family, appellant made a *Marsden* motion, in the course of which he explained, "I feel that the approach that they're taking in the penalty phase misrepresents me. And I'm not trying to get by the legal system by presenting cheap emotionalism to the jury of who – whatever their interpretation of what documentation they have means about me."

(Sealed RT 47 9644.)

Respondent claims the trial court knew trial counsel had communicated with appellant about penalty phase trial evidence. (RB 86, citing sealed 47 RT 9658-9659.) In denying the *Marsden* motion, the trial court stated, "It seems to me that based on what I've heard so far, and based on the fact that I know that they have communicated with you in a lot of these issues and continue to do so, I can't find a ground to grant this." (Sealed 47 RT 9658.) Certainly by this point, appellant was aware of the mitigation case counsel proposed to present; indeed, he was making every effort to stop them from doing so, by first moving to have them removed from the case and when that failed, moving to represent himself. This does not demonstrate that appellant was knowledgeable enough about the proposed mitigation case well before the start of the guilt phase such that he could have made an informed decision about whether to seek self-representation.

Applying the other *Lynch* factors to appellant's cases also does not support a finding of untimeliness. (*Lynch*, *supra*, 50 Cal.4th at p. 726 ["whether trial counsel is ready to proceed to trial, the number of witnesses, the complexity of the case, any ongoing pretrial proceedings"].) Asserting that "timeliness is separate from the issue of whether delay might be expected to follow the granting of a motion for self-representation," respondent claims that the fact that appellant told the court he would not seek a delay in the penalty phase did not "negate the fact that his motions were untimely." (RB 88, citing *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1007.) Appellant has acknowledged that while this fact is not determinative on the issue of timeliness, it is certainly relevant to *Windham*'s concern with avoiding disruption or delay of the trial. (AOB 120.) Respondent does not address this argument.

Instead, respondent defends as reasonable the trial court's assumption that if appellant were to represent himself, "delay would be inevitable," even though the court offered no basis for its assumption. (RB 88, citing sealed 48 RT 9805; 51 RT 10273-10274.) In fact, as set forth in the opening brief, the day after the court first denied appellant's motion, citing its belief that to do so would "inevitab[ly]" result in delay, appellant asked the court to reconsider its ruling and pointed out the court's failure to conduct the inquiry required by *Windham.* (AOB 121, citing sealed 49 RT 9916.) The trial court made no attempt to find out from appellant what he would do were he allowed to represent himself, and thus, whether the trial would be delayed, but instead simply refused to reconsider the motion, relying on its previous ruling. (Sealed 49 RT 9918-9919.)

Respondent acknowledges that the 72-hour period appellant said he would need for preparation of his case referred to a time period during which the court was not scheduled to be in session. (RB 90.) However, respondent argues that appellant's statement that the penalty phase would not be extended beyond the trial's end date estimated by defense counsel demonstrates that the proceedings would be delayed. Respondent claims that "given that Frazier's strategy differed from that of defense counsel, it is *entirely likely* that more pretrial issues would have arisen were he allowed to represent himself." (RB 88, italics added.) But because the trial court failed in its sua sponte duty to inquire into the specific factors underlying the self-representation request, as required by *Windham* (*Windham, supra,* 19 Cal.3d at p. 128), even when asked to do so by appellant, the record offers no support for respondent's claim.

The import of respondent's repetition of the argument that appellant's "later suggestion to have appointed counsel serve as standby counsel did not alleviate the burden of any delay," is unclear. (RB 88.) At

a hearing on one of his renewed *Faretta* motions, appellant offered to have standby counsel appointed as a condition of being granted the right to represent himself. (Sealed 49 RT 10087.) Appellant was doing everything he could to be allowed to represent himself, and agreeing to have standby counsel was one more way appellant hoped to convince the court to grant his motion. It is not a fact germane to the issue of delay, however.

D. Even Assuming the Motion Was Untimely, The Trial Court's Denial Of The Motion Was Error

This Court in *Windham* explicitly warned that the timeliness rule "should not be and, indeed, must not be used as a means of limiting a defendant's *constitutional* right of self-representation." (*Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5, original italics.) The rule's only intention is "that a defendant should not be allowed to misuse the *Faretta* mandate as a means to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice." (*Ibid.*) The trial court in this case abused its discretion in denying appellant's motion under *Windham*.

1. The reason for the request

Relying on the Court of Appeal opinion in *People v. Scott* (2001) 91 Cal.App.4th 1197, respondent argues that appellant's request for self-representation was motivated by his disagreement with counsel's trial tactics and was therefore an insufficient reason to grant his *Faretta* motion. (RB 92.) In *Scott*, the defendant made a *Faretta* motion shortly before the beginning of trial, immediately following denial of a *Marsden* motion. The defendant had made clear in two previous *Marsden* motions that he did not want his court-appointed counsel to represent him. According to the opinion, defendant's primary complaint was that counsel had not filed motions the defendant wanted, but which the attorney had deemed

inappropriate. (*Id.* at p. 1206, fn. 4.) Appellant's reason for wanting to represent himself at the penalty phase – that he believed counsel's proposed mitigation case would ensure that the jurors would vote for the death penalty – went well beyond a disagreement over tactics, but was instead as fundamental a breach as one could imagine. As this Court observed in *Boyce*, a defendant "may choose self-representation in order to control defense strategy." (*People v. Boyce*, *supra*, 59 Cal.4th at p. 704.)

Respondent disputes appellant's contention that he intended to present a non-frivolous defense. (RB 92.) Citing appellant's statements that he sought to present evidence from family members about the effect upon them of his execution, respondent correctly notes that such evidence is inadmissible. (*Ibid.*, citing *People v. Williams* (2013) 56 Cal.4th 165, 197.) While appellant could not present execution-impact evidence, he could have presented testimony that he is loved by his family and others, and that these individuals want him to live. (*People v. Bennett* (2009) 45 Cal.4th 577, 601, citing *People v. Ochoa* (1998) 19 Cal.4th 353, 456.) And while appellant may not have been aware of the legal distinction between the two types of evidence, he could have accomplished his purpose – demonstrating to the jury that he was a person whose life was valued by others – by using the same witnesses. Appellant was not asking to represent himself so that he could introduce a category of plainly inadmissible evidence, such as the results of a polygraph.

Moreover, it is no surprise that appellant believed this to be a permissible argument, having heard his attorneys and the prosecutor discussing the topic during the hearing on a defense in limine motion. The defense moved to be allowed to ask prospective jurors certain questions during death-qualification, including their ability to consider "the effect of defendant's execution on his family or friends." (2 CT 446.) When the

court asked both sides if they had authority for asking the question, none of the attorneys could cite a case, but the prosecutor stated his belief that it was permissible for the defense to "go into areas that have no other value except for ones involving mercy," and did not object to the question. The court ruled it could be asked. (3 RT 521.) As appellant made clear, he was aware that the court could impose certain limitations on the evidence he would be permitted to introduce at the penalty phase, and he assured the court of his willingness to abide by those rules. (See AOB 123-123 & fn. 34.)

2. Disruption or delay

As previously discussed (see pp. 37-38, *ante*), the record contains no evidence to suggest that appellant's motion was made for the purpose of delay or disruption, or that granting the motion would have resulted in either.

3. Quality of representation

Beyond noting that this Court in *Windham* included the quality of counsel's representation as one of the factors a trial court should consider in ruling on a mid-trial self-representation motion, respondent offers no argument to counter appellant's claim that this factor is irrelevant to the issue, especially in a case like the present one in which the very basis for the motion had nothing to do with counsel's competence. (RB 89; see AOB 132-133.) Instead, respondent claims that the trial court's consideration of counsel's competence "indicate[s] that it implicitly considered the factor as indicative of the illegitimacy of Frazier's request and the lack of justification for its lateness." (RB 90, citing *People v. Marshall* (1996) 13 Cal.4th 799, 828.) As discussed in the opening brief, *Marshall* is distinguishable. (See AOB 134-135.) There, the defendant offered as a justification for his motion his belief that he, rather than his attorneys, was

the only one capable of adequately interviewing certain witnesses. In denying the motion, the trial court considered the adequacy of trial counsel's efforts and the infeasibility of the defendant's contemplated investigation given that he was in custody. In that case, the trial court appropriately assessed trial counsel's performance in the context of determining that self-representation would be "infeasibile," i.e., likely to cause disruption and/or delay if the motion was granted. (*People v. Marshall, supra*, 13 Cal.4th at p. 827.) No similar justification exists in the present case, and thus, the trial court's belief in the present case that trial counsel was acting competently, and far more competently than appellant could in representing himself, was simply irrelevant and does not support the trial court's denial of appellant's motion.[12]

4. The defendant's proclivity to substitute counsel

Despite the fact that through the many hearings on appellant's *Faretta* motions, the trial court never mentioned this factor, respondent claims the record supports the court's "implicit consideration of this factor." (RB 91, citing *People v. Marshall, supra*, 13 Cal.4th at p. 828.) Although there is no requirement that the trial court explicitly cite the *Windham* factors or state its reasons for denying an untimely self-representation request (*Windham, supra*, 19 Cal.3d at p. 129, fn. 6; *People v. Bradford* (2010) 187 Cal.App.4th 1345, 1354), the record must reflect some substantial support for an inference that the trial court "had those factors in mind when it ruled." (*People v. Bradford, supra*, 187 Cal.App.4th at p. 1354; *People v. Scott* (2001) 91 Cal.App.4th 1197, 1206.) The record here contains nothing to support that inference, and even if it could be inferred

---

[12] Respondent concedes the trial court's concern with appellant's ability to represent himself was irrelevant. (RB 90.)

that the court did consider the factor, the record on this point does not, as respondent asserts, support the denial of appellant's motion. (RB 91.)

Noting that appellant made a *Marsden* motion before he made his first formal *Faretta* motion and thereafter made additional motions throughout the penalty phase, respondent claims "these repetitive motions evinced a proclivity to substitute counsel." (RB 91.) *Windham* directs the court to consider "the defendant's *prior* proclivity to substitute counsel" (*Windham, supra,* 19 Cal.3d at p. 128, italics added); respondent's omission of the word "prior" is telling. Each of appellant's motions was made in conjunction with the start of the penalty phase – there were no previous motions made, and therefore no proclivity at all, and certainly no *prior* proclivity. The purpose behind the *Windham* factors is to allow the trial court to evaluate the reason for the mid-trial request. The tendency of a defendant to substitute counsel might suggest a motivation to disrupt or delay the proceedings rather than a genuine desire for self-representation. In the present case, however, this factor, whether considered by the trial court or not, does not support the denial of self-representation.

Respondent is simply wrong in its claim that "the types of problems Frazier sought to remedy changed over time." (RB 91.) Every motion made by appellant was motivated by the same concern: his fundamental disagreement with his present attorneys about how best to make the case for life.

5. The length and stage of the proceedings

As previously discussed, although appellant's *Faretta* motion was made after the guilt phase and just before the penalty phase was set to begin, the record does not support a finding that granting the motion would result in a delay or that the motion was made for the purpose of delay or disruption.

Respondent claims, without support, that the timing of appellant's motion "suggests that he *did* attempt to delay trial." (RB 95, original italics.) On the contrary, appellant moved to represent himself as soon as the court had ruled on the admissibility of the mitigation evidence proffered by his attorneys – evidence that he believed would lead to a death verdict.

Respondent asserts – again with no support in the record – that "a continuance would likely have been necessary because the penalty phase was about to start. The change in defense strategy would likely have raised discovery and other pretrial issues." (RB 95.) Respondent does not and cannot identify any such issues suggested by this record. Again, it is important to point out the trial court's failure to make a record by questioning appellant about his proposed trial strategy. What evidence there is suggests appellant was right when he told the court there would be no delay occasioned by the court granting his motion.

Moreover, the same argument was rejected by the court in *People v. Nicholson* (1994) 24 Cal.App.4th 584, which held that acceptance of this position would result in the denial of every discretionary *Faretta* motion, since there is always a greater "potential" for delay with a self-represented defendant. The court observed, "Clearly, something more than a mere 'potential' is required – either a history of delaying tactics (prior requests for new attorneys or whatever" or a request for a continuance at the time the *Faretta* motion is made." (*Id.* at p. 594.) In the absence of either – as in the present case – the mere "potential" for delay is an insufficient basis for denying the motion.

It is only by mechanistically applying the unitary-capital-trial rule that one can agree with respondent that "the proceedings had progressed too far to make a change." (RB 95.) At the time of appellant's request, no witnesses had been called and appellant stated that he would not delay the

proceedings if he were permitted to represent himself. These facts were not refuted in any manner.

E. The Erroneous Denial Of The Right Of Self-Representation Requires Reversal

Respondent contends that any error in denying appellant's *Faretta* motion was harmless under either the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 or *People v. Brown* (1988) 46 Cal.3d 432, 446-448. (RB 101.) The argument is based, in part, on the misplaced belief that appellant could not have legally presented the case in mitigation that he proposed, i.e., showing the jurors what he meant to his friends and family, and what his death would mean to them. Respondent's error in this regard has been addressed elsewhere (see sec. D. 1., *ante*, at pp. 38-39), and will not be repeated here.

As set forth in the opening brief (see AOB 139), even if the right to self-representation is not unqualified because the request is deemed to be untimely, the nature of the right itself is not altered by the junction of the trial at which it is asserted. Therefore, reversal per se is the proper standard. But even if the Court were to apply a harmless error analysis, there is a reasonable probability that the jurors would have voted for LWOP rather than death. (See AOB 141-142.)

F. Conclusion

The trial court's denial of appellant's unequivocal, knowing and timely request to put on the case he believed would save his life was error under any standard. The automatic application of this Court's unitary-capital-trial rule, which largely dictated the trial court's ruling, must be reconsidered, so that the error in denying this fundamental constitutional right to every defendant who chooses self-representation at the penalty phase of a capital trial without consideration of the circumstances of the

request is not repeated.

//

//

III.

THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION AT THE SECTION 190.4 AND SENTENCING HEARINGS

As set forth in Argument II, *ante*, appellant's motion to represent himself at the penalty phase of trial was denied, as were the several requests for reconsideration and reassertion of *Faretta* rights he made throughout the proceedings. At post-verdict hearings, appellant again moved to represent himself, and again the motion was denied as untimely.

Appellant argues that the trial court erred in refusing to allow him to represent himself at the December 15, 2006 post-verdict proceedings in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights to self representation, due process, and a reliable sentencing hearing. (*Faretta, supra*, 422 U.S. at pp. 834-835; *Windham, supra*, 19 Cal.3d at pp. 128-129; see AOB 144-159.)

Respondent argues that the motion was properly denied because the motion was untimely and the court acted within its discretion under *Windham*. (RB 106-118.) Respondent's position is based on application of the unitary-capital-trial-rule and on a misreading of the record.

A. The Trial Court Erred in Denying Appellant's Request to Represent Himself at the Section 190.4 and Sentencing Hearings

1. The trial court erred in denying appellant's motion on the ground that he was not qualified to represent himself.

As noted in the opening brief, the trial court found that appellant's motion was made intelligently and with an awareness of the risks of self-representation (see AOB 146-147), yet the court denied the request based on the belief that because of appellant's background, experience and

education, he was not "capable" of representing himself in the closing proceedings of trial because they presented "highly technical" issues." (Sealed 58 RT 11790.) Respondent does not dispute the court's finding as to the voluntary and unequivocal nature of the request, and while implicitly conceding that the court's concern with Frazier's ability to represent himself, was "irrelevant," goes on to claim that the erroneous reliance on appellant's ability does not affect the soundness of the court's ruling. (RB 110-111, fn. 29.)

2. The request was timely

i. The section 190.4 and sentencing hearings are separate proceedings from the trial for purposes of determining the timeliness of a *Faretta* motion.

The trial court deemed appellant's motion to represent himself at the sentencing proceedings untimely because it was made after the guilt phase had begun, just as it did in assessing the motions made by appellant at the penalty phase. (Sealed 58 RT 11777.) Appellant argues that appellant's motion was not untimely because it was made before the sentencing proceedings – which are separate from the trial for purposes of determining the timeliness of a *Faretta* motion – and therefore the timeliness of the motion should not be determined in relation to the start of the guilt phase. (AOB 149-153.)

Respondent acknowledges that this Court has not decided the issue of the timeliness of a request for self-representation made after the penalty phase verdict. (RB 111; see AOB 150, citing *People v. Mayfield* (1997) 14 Cal.4th 668, 810.)

Respondent refers to this Court's decision in *People v. Doolin* (2009) 45 Cal.4th 390, but makes no attempt to distinguish its significantly different circumstances from those in the present case. (RB 111.) The

defendant in *Doolin* made a *Marsden* motion on the date set for sentencing and asked for a two-week continuance. When the motions were denied, he moved to represent himself and for an assistant to prepare a motion for new trial. (*Id.* at p. 452.) Appellant's motion contained no similar requests or conditions, and was consistent with appellant's position throughout the penalty phase that he believed he was better able than his attorneys to represent his own interests. Other than the *Doolin* case, respondent does not address any of the other cases cited in the opening brief in support of appellant's argument that a sentencing hearing is a separate proceeding from the trial and therefore the unconditional right to self-representation is available to a defendant who meets the *Faretta* conditions. (See AOB 151-153.)

ii. Appellant's self-representation motion was timely under *Windham* and *Lynch*.

Respondent argues appellant's motions for self-representation were untimely based on the unitary-capital-trial rule. (RB 112.) Appellant incorporates by reference the discussion of that rule in Argument II, *ante,* at pp. 29-32.

Appellant argues in the opening brief that the motion was timely under *Lynch* and *Windham* because it was made at the earliest opportunity after appellant discovered the unsatisfactory manner in which his attorneys proposed to handle the proceedings under Penal Code section 4007, which was December 8, 2006.[13]

---

[13] After the jury's death verdict on August 24, 2006, appellant was first brought to court on October 26, 2006, at which time he insisted upon and was granted his right to a hearing under section 4007, which was continued until December 8, 2006. The *Faretta* motion made on that day was prompted by appellant's dissatisfaction with counsel's handling of the (continued...)

Respondent contends appellant did not move to represent himself at the earliest opportunity and erroneously claims that appellant first moved to represent himself at the sentencing proceedings on December 15. (RB 112-113.) As the trial court recognized on December 8, appellant was making a *Faretta* motion for the remaining proceedings: "the new trial motion and the argument of your automatic request to have your [sic] reduction from death to life, both very hugely important issues to you." (Sealed 58 RT 11775-11776.) Respondent's arguments to the contrary are unconvincing in the face of the record.

iii. The trial court abused its discretion by denying the self-representation motion.

Appellant argues that the trial court abused its discretion in denying appellant's motion; respondent claims the court was within its rights under *Windham*. (RB 114-116.)

a. Quality of representation

As previously noted in Argument II, *ante*, at pp. 40-41, the relevance of the "quality of representation" factor under *Windham* in a case such as appellant's, when the motivation for the request is based on counsel's proposed litigation and not their competence, is highly questionable. Thus, this factor does not support the trial court's ruling.

b. The defendant's proclivity to substitute counsel

Respondent repeats its erroneous assertion from Argument II that appellant's efforts to replace counsel or represent himself at the penalty phase demonstrate a "prior proclivity to substitute counsel." (RB 115.) As

---

[13](...continued)
hearing. (See, e.g., Sealed 58 RT 11762-11767.)

has been shown, appellant's actions in no way suggest a motivation to disrupt or delay the proceedings rather than a genuine desire for self-representation, and therefore, this factor cannot be considered a legitimate basis for denying appellant's request to represent himself at the section 190.4 and sentencing hearings.

c. The reasons for the request

Respondent mischaracterizes appellant's argument about the reasons why he moved to represent himself at the post-penalty trial proceedings. Respondent incorrectly claims that appellant "made the motion because he believed that a defendant seeking to represent himself was not required to show that appointed counsel provided effective representation," and that he was concerned that the trial court's *Marsden* inquiry compromised his confidentiality. (RB 115.) Appellant expressed his concern that his attorneys were not planning to effectively litigate the Penal Code section 4007 motion, which he believed could have consequences for his case on appeal. (Sealed RT 58 11777.) While he mentioned to the court that he had been pursuing his right to self-representation since the penalty phase, the issue of "mitigation tactics" as respondent refers to it, was not the basis for the motion. (RB 115.)

d. Disruption or delay of proceedings

Respondent speculates that the trial court "implicitly found that delay would have been inevitable" were it to grant appellant's motion, "given the incredible lateness of the request and the absence of evidence that Frazier was prepared to proceed . . . ." (RB 116.) As noted in response to this same argument in Argument II, because the trial court failed in its duty under *Windham* to make an adequate record, there is no evidence to support respondent's position. (See Argument II, *ante*, pp. 37-38.)

Appellant's motion was made a week before the scheduled hearing and appellant did not request a continuance. In response, respondent relies on its erroneous contention, that appellant did not make his motion with regard to the motion for new trial and section 190.4 motion until December 15, to support its claim that the motion was untimely. (See fn. 13, *ante*.) Respondent does not address the lack of any objection by the prosecutor or point to any indication that granting the motion would have delayed or disrupted the hearings. (RB 116.) The timing of the motion presented no threat of disruption or delay and thus, appellant's request which was made a week before the scheduled section 190.4 and sentencing hearings weighed in favor of granting the motion.

Considering each of the factors set forth in *Windham* and *Lynch*, the trial court abused its discretion in denying appellant's motion for self-representation.

C. The Erroneous Denial of the Right of Self-Representation Requires Reversal

Respondent contends that any error in denying appellant's *Faretta* motion was harmless under either the standard of *People v. Watson*, *supra*, 46 Cal.2d at p. 836, or *People v. Brown*, *supra*, 46 Cal.3d at pp. 446-448. (RB 116-117.)

As appellant argues in Argument II, *ante*, the deprivation of a defendant's right of self-representation under *Faretta* is not subject to harmless error analysis and requires automatic reversal. (*McKaskle v. Wiggins*, *supra*, 465 U.S. at p. 177, fn. 8; *Faretta*, *supra*, 422 U.S. at p. 806; *People v. Joseph*, *supra*, 34 Cal.3d at p. 948.) Appellant argues as well that the holdings of intermediate appellate courts in California that the error is subject to harmless error analysis are flawed and should not be followed. Appellant incorporates these arguments by reference here. (See Arg. II,

ante, at p. 44; AOB 139-142.)

Even if the Court were to apply a harmless error analysis, appellant is entitled to relief, for had he been permitted to argue to the court the theory that he proposed to present as a case in mitigation – that his family and friends wanted him to live – there is a reasonable probability that the court would have seen the worth in appellant's argument and granted the section 190.4 motion and imposed a sentence of LWOP rather than death.

D. Conclusion

The trial court's denial of appellant's unequivocal, knowing and timely request to represent himself at the section 190.4 and sentencing hearings was erroneous, and appellant is entitled to new hearings.

//

//

IV.

THE CONVICTIONS AND DEATH JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY INSTRUCTED THE JURY TO CONSIDER APPELLANT'S PUTATIVE FLIGHT IN DECIDING HIS CULPABILITY

Appellant argues that the trial court should not have instructed the jury with CALCRIM No. 372, regarding "flight after crime," on various grounds. (AOB 161-168.) Respondent contends appellant has forfeited his arguments for failing to object in the trial court, that they fail on the merits, and that any error is harmless. (RB 119-141.)

The issue is joined, but appellant will reply to respondent's contention that the claims have been forfeited for failure to object. At the guilt phase instructional conference, the prosecution requested that the trial court instruct the jury with the flight instruction. (45 RT 9145.) Trial counsel objected, stating "I don't think it applies," based on the lack of evidence that he left the scene "immediately" after the crime, because the victim was not discovered until some period of time after the assault. (45 RT 9146-9147.)

Respondent claims that appellant failed to challenge the instruction on any of the grounds urged on appeal. (RB 121.) Not only is this contention belied by the record, as cited above, it is contrary to numerous opinions of this Court which have assessed the claim of instructional error on the merits, even in the absence of an objection. (See, e.g., *People v. Taylor* (2010) 48 Cal.4th 574, 630, fn. 13 [rejecting forfeiture argument to claim regarding flight instruction under Penal Code section 1259]; *People v. Wallace* (2008) 44 Cal.4th 1032, 1074, fn. 7 [same]; *People v. Smithey* (1999) 20 Cal.4th 936, 982, fn. 12.)

Appellant's claims regarding the flight instruction are fully cognizable on appeal and should be addressed on the merits by this Court.

V.

THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION FOR INDIVIDUAL SEQUESTERED VOIR DIRE

Appellant argues that the trial court's denial of the defense motion to conduct individual sequestered voir dire violated his rights under California and federal constitutional law. (AOB 170-177.) Respondent contends appellant has forfeited his constitutional claims, that those claims are meritless and that any error was harmless. (RB 141-150.)

Appellant believes the issue of the trial court's denial of the defense motion for sequestered voir dire is joined, and as appellant acknowledges in the opening brief, the contention that the federal Constitution requires sequestered death-qualification voir dire of every prospective juror in a capital case has been frequently rejected by this Court, but believes it is necessary to include this claim to ensure federal review. (See, e.g., *People v. Jurado* (2006) 38 Cal.4th 72, 101; *People v. Stitely* (2005) 35 Cal.4th 514, 536-537; *People v. Box* (2000) 23 Cal.4th 1153, 1180.)

VI.

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

Appellant has argued that the California death penalty statute is unconstitutional in several respects, both on its face and as applied in this case. Appellant acknowledges this Court's decisions rejecting these claims but asked that they be reconsidered. (AOB 178-192.) Respondent cites decisions of this Court that have rejected these claims. (RB 150-159.)

Respondent's assertion that appellant has forfeited certain claims because trial counsel failed to request a clarifying instruction from the court is without merit. (RB 154-156; Pen. Code, § 1259 ["the appellate court may . . . review any instruction given, refused or modified even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"].)

After appellant filed his opening brief, and after the State filed its respondent's brief, the United States Supreme Court held Florida's death penalty statute unconstitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584 because the sentencing judge, not the jury, made a factual finding, the existence of an aggravating circumstance, that is required before the death penalty can be imposed. (*Hurst v. Florida* (2016) ___ U.S. ___ [136 S.Ct. 616, 624] [hereafter "*Hurst*"].)[14] *Hurst* supports appellant's request in Argument VI.C.1 and VI.C.2 of his opening brief that this Court reconsider its rulings that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), does not require factual findings within the meaning of *Ring* (*People v. Merriman* (2014) 60 Cal.4th 1, 106), and therefore does not require the jury to find unanimously and beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances before the jury can impose a sentence of death (*People v. Prieto* (2003) 30 Cal.4th 226, 275). (See AOB at 181-185; see also, RB at 151-152 [State argues that

---

[14] Appellant's argument here does not alter his claim in the opening brief, but provides additional authority for argument in VI.C.1 and VI.C.2 of the opening brief. To the extent this Court considers this not to be true, appellant asks this Court to deem this argument a supplemental brief. Appellant has no objection to a supplemental brief by the Attorney General if this Court believes it necessary.

there is no constitutional requirement that the jury find that aggravating factors outweigh mitigating factors beyond a reasonable doubt].)

A. Under *Hurst*, Each Fact Necessary To Impose A Death Sentence, Including The Determination That The Aggravating Circumstances Outweigh The Mitigating Circumstances, Must Be Found By A Jury Beyond A Reasonable Doubt

In *Apprendi*, a noncapital sentencing case, and *Ring*, a capital sentencing case, the United States Supreme Court established a bright-line rule: if a factual finding is required to subject the defendant to a greater punishment than that authorized by the jury's verdict, it must be found by the jury beyond a reasonable doubt. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 589 [hereafter "*Ring*"]; *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 483 [hereafter "*Apprendi*"].) As the Court explained in *Ring*:

> The dispositive question, we said, "is one not of form, but of effect." [Citation]. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found, by a jury beyond a reasonable doubt. [Citation].

(*Ring*, *supra*, 536 U.S. at p. 602, quoting *Apprendi*, *supra*, 530 U.S. at pp. 494, 482-483.) Applying this mandate, the high court invalidated Florida's death penalty statute in *Hurst*. (*Hurst*, *supra*, 136 S.Ct. at pp. 621-624.) The Court restated the core Sixth Amendment principle as it applies to capital sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence of death*." (*Hurst*, *supra*, 136 S.Ct. at p. 619, italics added.) Further, as explained below, in applying this Sixth Amendment principle, *Hurst* made clear that the weighing determination required under the Florida statute was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst*, *supra*, 136 S.Ct. at p. 622.)

In Florida, a defendant convicted of capital murder is punished by either life imprisonment or death. (*Hurst, supra*, 136 S.Ct. at p. 620, citing Fla. Stat. §§ 782.04(1)(a), 775.082(1).) Under the statute at issue in *Hurst*, after returning its verdict of conviction, the jury rendered an advisory verdict at the sentencing proceeding, but the judge made the ultimate sentencing determinations. (*Hurst, supra*, at p. 620.) The judge was responsible for finding that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh aggravating circumstances," which were prerequisites for imposing a death sentence. (*Hurst, supra*, at p. 622, citing Fla. Stat. § 921.141(3).) The Court found that these determinations were part of the "necessary factual finding that *Ring* requires." (*Ibid.*)[15]

The questions decided in *Ring* and *Hurst* were narrow. As the Supreme Court explained, "Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." (*Ring, supra*, 536 U.S. at p. 597, fn. 4.) *Hurst* raised the same claim. (See Petitioner's Brief on the Merits, *Hurst v. Florida*, 2015 WL 3523406 at *18 ["Florida's capital sentencing scheme violates this [Sixth Amendment] principle because it entrusts to the

---

[15] The Court in *Hurst* explained:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla.Stat. § 775.082(1) (emphasis added). The trial court alone must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); see [*State v.*] *Steele*, 921 So.2d [538,] 546 [(Fla. 2005)].

(*Hurst, supra*, 136 S.Ct. at p. 622.)

trial court instead of the jury the task of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty'"].) In each case, the Court decided only the constitutionality of a judge, rather than a jury, finding the existence of an aggravating circumstance. (See *Ring*, *supra*, 536 U.S. at p. 588; *Hurst*, *supra*, 136 S.Ct. at p. 624.)

Nevertheless, the seven-justice majority opinion in *Hurst* shows that its holding, like that in *Ring*, is a specific application of a broader Sixth Amendment principle: any fact that is required for a death sentence, but not for the lesser punishment of life imprisonment, must be found by the jury. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) At the outset of the opinion, the Court refers not simply to the finding of an aggravating circumstance, but, as noted above, to findings of "each fact *necessary to impose a sentence of death*." (*Hurst*, *supra*, 136 S.Ct. at p. 619, italics added.) The Court reiterated this fundamental principle throughout the opinion.[16] The Court's language is clear and unqualified. It also is consistent with the established understanding that *Apprendi* and *Ring* apply to each fact essential to imposition of the level of punishment the defendant receives. (See *Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.); *Apprendi*, *supra*, 530 U.S. at p. 494.) The high court is assumed to understand the implications of the words it chooses and to mean what it says. (See *Sands v. Morongo*

---

[16] See *id.* at p. 621 ["In *Ring*, we concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts *necessary to sentence a defendant to death*," italics added]; *id.* at p. 622 ["Like Arizona at the time of *Ring*, Florida does not require the jury to make *the critical findings necessary to impose the death penalty*," italics added]; *id.* at p. 624 ["Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is *necessary for imposition of the death penalty*," italics added].

Unified School District (1991) 53 Cal.3d 863, 881-882, fn. 10.)

B. California's Death Penalty Statute Violates *Hurst* By Not Requiring That The Jury's Weighing Determination Be Found Beyond A Reasonable Doubt

California's death penalty statute violates *Apprendi*, *Ring* and *Hurst*, although the specific defect is different than those in Arizona's and Florida's laws: in California, although the jury's sentencing verdict must be unanimous (Pen. Code, § 190.4, subd. (b)), California applies no standard of proof to the weighing determination, let alone the constitutional requirement that the finding be made beyond a reasonable doubt. (See *People v. Merriman*, *supra*, 60 Cal.4th at p. 106.) Unlike Arizona and Florida, California requires that the jury, not the judge, make the findings necessary to sentence the defendant to death. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16 [distinguishing California's law from that invalidated in *Hurst* on the grounds that, unlike Florida, the jury's "verdict is not merely advisory"].) California's law, however, is similar to the statutes invalidated in Arizona and Florida in ways that are crucial for applying the *Apprendi/Ring/Hurst* principle. In all three states, a death sentence may be imposed only if, after the defendant is convicted of first degree murder, the sentencer makes two additional findings. In each jurisdiction, the sentencer must find the existence of at least one statutorily-delineated circumstance – in California, a special circumstance (Pen. Code, § 190.2) and in Arizona and Florida, an aggravating circumstance (Ariz. Rev. Stat. § 13-703(G); Fla. Stat. § 921.141(3)). This finding alone, however, does not permit the sentencer to impose a death sentence. The sentencer must make another factual finding: in California that "'the aggravating circumstances outweigh the mitigating circumstances'" (Pen. Code, § 190.3); in Arizona that "'there are no

mitigating circumstances sufficiently substantial to call for leniency'" (*Ring*, *supra*, 536 U.S. at p. 593, quoting Ariz. Rev. Stat. § 13-703(F)); and in Florida, as stated above, "that there are insufficient mitigating circumstances to outweigh aggravating circumstances" (*Hurst*, *supra*, 136 S.Ct. at p. 622, quoting Fla. Stat. § 921.141(3)).[17]

Although *Hurst* did not decide the standard of proof issue, the Court made clear that the weighing determination was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst*, *supra*, 136 S.Ct. at p. 622 [in Florida the judge, not the jury, makes the "critical findings necessary to impose the death penalty," including the weighing determination among the facts the sentencer must find "to make a defendant eligible for death"].) The pertinent question is not what the weighing determination is called, but what is its consequence. *Apprendi* made this clear: "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (*Apprendi*, *supra*, 530 U.S. at p. 494.) So did Justice Scalia in *Ring*:

> [T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether

---

[17] As *Hurst* made clear, "the Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.'" (*Hurst*, *supra*, 136 S.Ct. at p. 622, citation and italics omitted.) In *Hurst*, the Court uses the concept of death penalty eligibility in the sense that there are findings which actually authorize the imposition of the death penalty in the sentencing hearing, and not in the sense that an accused is only potentially facing a death sentence, which is what the special circumstance finding establishes under the California statute. For *Hurst* purposes, under California law it is the jury determination that the aggravating factors outweigh the mitigating factors that finally authorizes imposition of the death penalty.

> 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.).) The constitutional question cannot be answered, as this Court has done, by collapsing the weighing finding and the sentence-selection decision into one determination and labeling it "normative" rather than factfinding. (See, e.g., *People v. Karis* (1988) 46 Cal.3d 612, 639-640; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1366.) At bottom, the *Ring* inquiry is one of function.

In California, when a jury convicts a defendant of first degree murder, the maximum punishment is imprisonment for a term of 25 years to life. (Pen. Code, § 190, subd. (a) [cross-referencing §§ 190.1, 190.2, 190.3, 190.4 and 190.5].) When the jury returns a verdict of first degree murder with a true finding of a special circumstance listed in Penal Code section 190.2, the penalty range increases to either life imprisonment without the possibility of parole or death. (Pen. Code, § 190.2, subd. (a).) Without any further jury findings, the maximum punishment the defendant can receive is life imprisonment without the possibility of parole. (See, e.g., *People v. Banks* (2015) 61 Cal.4th 788, 794 [where jury found defendant guilty of first degree murder and found special circumstance true and prosecutor did not seek the death penalty, defendant received "the mandatory lesser sentence for special circumstance murder, life imprisonment without parole"]; *Sand v. Superior Court* (1983) 34 Cal.3d 567, 572 [where defendant is charged with special-circumstance murder, and the prosecutor announced he would not seek death penalty, defendant, if convicted, will be sentenced to life imprisonment without parole, and therefore prosecution is not a "capital case" within the meaning of Penal Code section 987.9];

People v. Ames (1989) 213 Cal.App.3d 1214, 1217 [life in prison without possibility of parole is the sentence for pleading guilty and admitting the special circumstance where death penalty is eliminated by plea bargain].) Under the statute, a death sentence can be imposed only if the jury, in a separate proceeding, "concludes that the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code, § 190.3.) Thus, under Penal Code section 190.3, the weighing finding exposes a defendant to a greater punishment (death) than that authorized by the jury's verdict of first degree murder with a true finding of a special circumstance (life in prison without parole). The weighing determination is therefore a factfinding.[18]

C. This Court's Interpretation Of The California Death Penalty Statute In *People v. Brown* Supports The Conclusion That The Jury's Weighing Determination Is A Factfinding Necessary To Impose A Sentence of Death

This Court's interpretation of Penal Code section 190.3's weighing directive in *People v. Brown* (1985) 40 Cal.3d 512 (revd. on other grounds *sub nom. California v. Brown* (1987) 479 U.S. 538) does not require a different conclusion. In *Brown*, the Court was confronted with a claim that the language "shall impose a sentence of death" violated the Eighth Amendment requirement of individualized sentencing. (*Id.* at pp. 538-539.) As the Court explained:

---

[18] Justice Sotomayor, the author of the majority opinion in *Hurst*, previously found that *Apprendi* and *Ring* are applicable to a sentencing scheme that requires a finding that the aggravating factors outweigh the mitigating factors before a death sentence may be imposed. More importantly here, she has gone on to find that it "is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole." (*Woodward v. Alabama* (2013) ___ U.S. ___ [134 S.Ct. 405, 410-411, 187 L.Ed.2d 449] (dis. opn. from denial of certiorari, Sotomayor, J.).)

> Defendant argues, by its use of the term "outweigh" and the mandatory "shall," the statute impermissibly confines the jury to a mechanical balancing of aggravating and mitigating factors . . . Defendant urges that because the statute requires a death judgment if the former "outweigh" the latter under this mechanical formula, the statute strips the jury of its constitutional power to conclude that the totality of constitutionally relevant circumstances does not warrant the death penalty.

(*Id.* at p. 538.) The Court recognized that the "the language of the statute, and in particular the words 'shall impose a sentence of death,' leave room for some confusion as to the jury's role" (*id.* at p. 545, fn. 17) and construed this language to avoid violating the federal Constitution (*id.* at p. 540). To that end, the Court explained the weighing provision in Penal Code section 190.3 as follows:

> [T]he reference to "weighing" and the use of the word "shall" in the 1978 law need not be interpreted to limit impermissibly the scope of the jury's ultimate discretion. In this context, the word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor "k" as we have interpreted it. By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.

(*People v. Brown, supra*, at p. 541, [hereafter "*Brown*"], footnotes

omitted.)[19]

Under *Brown*, the weighing requirement provides for jury discretion in both the assignment of the weight to be given to the sentencing factors and the ultimate choice of punishment. Despite the "shall impose death" language, Penal Code section 190.3, as construed in *Brown*, provides for jury discretion in deciding whether to impose death or life without possibility of parole, i.e. in deciding which punishment is appropriate. The weighing decision may assist the jury in reaching its ultimate determination of whether death is appropriate, but it is a separate, statutorily-mandated finding that precedes the final sentence selection. Thus, once the jury finds that the aggravation outweighs the mitigation, it still retains the discretion to reject a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979 ["[t]he jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death"].)

In this way, Penal Code section 190.3 requires the jury to make two determinations. The jury must weigh the aggravating circumstances and the mitigating circumstances. To impose death, the jury must find that the aggravating circumstances outweigh the mitigating circumstances. This is a factfinding under *Ring* and *Hurst*. (See *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 257-258 [finding weighing is *Ring* factfinding]; *Woldt v. People* (Colo. 2003) 64 P.3d 256, 265-266 [same].) The sentencing process, however, does not end there. There is the final step in the

---

[19] In *Boyde v. California* (1990) 494 U.S. 370, 377, the Supreme Court held that the mandatory "shall impose" language of the pre-*Brown* jury instruction implementing Penal Code section 190.3 did not violate the Eighth Amendment requirement of individualized sentencing in capital cases. Post-*Boyde*, California has continued to use *Brown*'s gloss on the sentencing instruction.

sentencing process: the jury selects the sentence it deems appropriate. (See *Brown, supra*, 40 Cal.3d at p. 544 ["Nothing in the amended language limits the jury's power to apply those factors as it chooses in deciding whether, under all the relevant circumstances, defendant deserves the punishment of death or life without parole"].) Thus, the jury may reject a death sentence even after it has found that the aggravating circumstances outweighs the mitigation. (*Brown, supra*, 40 Cal.3d at p. 540.) This is the "normative" part of the jury's decision. (*Brown, supra*, 40 Cal.3d at p. 540.)

This understanding of Penal Code section 190.3 is supported by *Brown* itself. In construing the "shall impose death" language in the weighing requirement of section 190.3, this Court cited to Florida's death penalty law as a similar "weighing" statute:

> [O]nce a defendant is convicted of capital murder, a sentencing hearing proceeds before judge and jury at which evidence bearing on statutory aggravating, and all mitigating, circumstances is adduced. The jury then renders an advisory verdict "[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." (Fla. Stat. (1976-1977 Supp.) § 921.141, subd. (2)(b), (c).) The trial judge decides the actual sentence. He *may* impose death if satisfied in writing "(a) [t]hat sufficient [statutory] aggravating circumstances exist . . . and (b) [t]hat there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances." (*Id.*, subd. (3).)

(*Brown, supra*, 40 Cal.3d at p. 542, italics added.) In *Brown*, the Court construed Penal Code section 190.3's sentencing directive as comparable to that of Florida – if the sentencer finds the aggravating circumstances outweigh the mitigating circumstances, it is authorized, but not mandated, to impose death.

The standard jury instructions were modified, first in CALJIC No. 8.84.2 and later in CALJIC No. 8.88, to reflect *Brown*'s interpretation of section 190.3.[20] The requirement that the jury must find that the aggravating circumstances outweigh the mitigating circumstances remained a precondition for imposing a death sentence. Nevertheless, once this prerequisite finding was made, the jury had discretion to impose either life or death as the punishment it deemed appropriate under all the relevant

---

[20] CALJIC No. 8.84.2 (4th ed. 1986 revision) provided:

> In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence (circumstances) is (are) so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

From 1988 to the present, CALJIC No. 8.88, closely tracking the language of *Brown*, has provided in relevant part:

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. 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. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

circumstances. The revised standard jury instructions, CALCRIM, "written in plain English" to "be both legally accurate and understandable to the average juror" (CALCRIM (2006), vol. 1, Preface, p. v.), make clear this two-step process for imposing a death sentence:

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances *both* outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.

(CALCRIM No. 766, italics added.) As discussed above, *Hurst*, *supra*, 136 S.Ct. at p. 622, which addressed Florida's statute with its comparable weighing requirement, indicates that the finding that aggravating circumstances outweigh mitigating circumstances is a factfinding for purposes of *Apprendi* and *Ring*.

D. This Court Should Reconsider Its Prior Rulings That The Weighing Determination Is Not A Factfinding Under *Ring* And Therefore Does Not Require Proof Beyond A Reasonable Doubt

This Court has held that the weighing determination – whether aggravating circumstances outweigh the mitigating circumstances – is not a finding of fact, but rather is a "'fundamentally normative assessment . . . that is outside the scope of *Ring* and *Apprendi*.'" (*People v. Merriman*, *supra*, 60 Cal.4th at p. 106, quoting *People v. Griffin* (2004) 33 Cal.4th 536, 595, citations omitted; accord, *People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263.) Appellant asks the Court to reconsider this ruling because, as shown above, its premise is mistaken. The weighing determination and the ultimate sentence-selection decision are not one unitary decision. They are two distinct determinations. The weighing question asks the jury a "yes" or "no" factual question: do the aggravating circumstances outweigh the mitigating circumstances? An affirmative answer is a necessary

precondition – beyond the jury's guilt-phase verdict finding a special circumstance – for imposing a death sentence. The jury's finding that the aggravating circumstances outweigh the mitigating circumstances opens the gate to the jury's final normative decision: is death the appropriate punishment considering all the circumstances?

However the weighing determination may be described, it is an "element" or "fact" under *Apprendi*, *Ring* and *Hurst* and must be found by a jury beyond a reasonable doubt. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) As discussed above, *Ring* requires that any finding of fact required to increase a defendant's authorized punishment "must be found by a jury beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. at p. 602; see *Hurst*, *supra*, 136 S.Ct. at p. 621 [the facts required by *Ring* must be found beyond a reasonable doubt under the due process clause].)[21] Because California applies no standard of proof to the weighing determination, a factfinding by the jury, the California death penalty statute violates this beyond-a-reasonable-doubt mandate at the weighing step of the sentencing process.

The recent decision of the Delaware Supreme Court in *Rauf v. State* (Del. Aug. 2, 2016, Case No. 39) 2016 WL 4224252 [hereafter "*Rauf*"] supports appellant's request that this Court revisit its holdings that the *Apprendi* and *Ring* rule do not apply to California's death penalty statute. *Rauf* held that Delaware's death penalty statute violates the Sixth

---

[21] The *Apprendi/Ring* rule addresses only facts necessary to increase the level of punishment. Once those threshold facts are found by a jury, the sentencing statute may give the sentencer, whether judge or jury, the discretion to impose either the greater or lesser sentence. Thus, once the jury finds a fact required for a death sentence, it still may be authorized to return the lesser sentence of life imprisonment without the possibility of parole.

Amendment under *Hurst*. (*Rauf, supra*, at *1 (*per curiam* opn. of Strine, C.J., Holland, J. and Steitz, J.).) In Delaware, unlike in Florida, the jury's finding of a statutory aggravating circumstance is determinative, not simply advisory. (*Id.* at *18.) Nonetheless, in a 3-to-2 decision, the Delaware Supreme Court answered five certified questions from the superior court and found the state's death penalty statute violates *Hurst*.[22] One reason the court invalidated Delaware's law is relevant here: the jury in Delaware, like the jury in California, is not required to find that the aggravating circumstances outweigh the mitigating circumstances unanimously and beyond a reasonable doubt. (*Id.* at *2; see *id.* at *39 (conc. opn. of Holland, J.).) With regard to this defect, the Delaware Supreme Court explained:

> This Court has recognized that the weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence. "[A] judge cannot sentence a defendant to death without finding that the aggravating factors outweigh the mitigating factors . . . ." The relevant "maximum" sentence, for Sixth Amendment purposes, that can be imposed under Delaware law, in the absence of any judge-made findings on the relative weights of the aggravating and mitigating factors, is life imprisonment.

(*Ibid.*) The Delaware court is not alone in reaching this conclusion. Other state supreme courts have recognized that the determination that the

---

[22] In addition to the ruling discussed in this brief, the court in *Rauf* also held that the Delaware statute violated *Hurst* because: (1) after the jury finds at least one statutory aggravating circumstance, the "judge alone can increase a defendant's jury authorized punishment of life to a death sentence, based on her own additional factfinding of non-statutory aggravating circumstances" (*Rauf, supra*, at *1-2 (*per curiam* opn.) [addressing Questions 1-2] and at *37-38 (conc. opn. of Holland, J.)); and (2) the jury is not required to find the existence of any aggravating circumstance, statutory or non-statutory, unanimously and beyond a reasonable doubt (*id.* at *2 (*per curiam* opn.) [addressing Question 3] and at *39 (conc. opn. of Holland, J.)).

aggravating circumstances outweigh the mitigating circumstance, like the finding that an aggravating circumstance exists, comes within the *Apprendi/Ring* rule. (See e.g., *State v. Whitfield, supra*, 107 S.W.3d at pp. 257-258; *Woldt v. People, supra*, 64 P.3d at pp. 265-266; see also *Woodward v. Alabama, supra*, 134 S.Ct. at pp. 410-411 (Sotomayor, J., dissenting from denial of cert.) ["The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is . . . [a] factual finding" under Alabama's capital sentencing scheme]; contra, *United States v. Gabrion* (6th Cir. 2013) 719 F.3d 511, 533 (en banc) [concluding that – under *Apprendi* – the determination that the aggravators outweigh the mitigators "is not a finding of fact in support of a particular sentence"]; *Ritchie v. State* (Ind. 2004) 809 N.E.2d 258, 265 [reasoning that the finding that the aggravators outweigh the mitigators is not a finding of fact under *Apprendi* and *Ring*]; *Nunnery v. State* (Nev. 2011) 263 P.3d 235, 251-253 [finding that "the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor" under *Apprendi* and *Ring*].)

Because in California the factfinding that aggravating circumstances outweigh mitigating circumstances is a necessary predicate for the imposition of the death penalty, *Apprendi*, *Ring* and *Hurst* require that this finding be made, by a jury and beyond a reasonable doubt.

//

//

CONCLUSION

For all of the reasons stated above, both the judgment of conviction and sentence of death in this case must be reversed.

DATED: February 17, 2017

Respectfully submitted,

MARY K. McCOMB
State Public Defender

EVAN YOUNG
Supervising Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 36(b)(2)

I, Evan Young, am the Supervising Deputy State Public Defender assigned to represent appellant ROBERT WARD FRAZIER in this Appellant's Reply Brief. I directed a member of our staff to conduct 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 is 20,690 words in length.

DATED: February 17, 2017

EVAN YOUNG
Supervising Deputy State Public Defender

Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Robert Ward Frazier**
Case Number: **Supreme Court Crim. No. S148863**
Contra Costa County Superior Court No. 041700-6

I, Kecia Bailey, the undersigned, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 1111 Broadway, 10th Floor, Oakland, California 94607. I served a copy of the following document(s):

APPELLANT'S REPLY BRIEF

by enclosing it in envelopes and

/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
/X/ **placing** the envelopes for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed on **February 17, 2017,** as follows:

Office of the Attorney General
Department of Justice
Victoria Ratnikova, Deputy Attorney General
455 Golden Gate Ave., Ste. 11000
San Francisco, CA 94102

Ms. Beverly Masinas
Appeals Clerk
Contra Costa County Superior Court
Appeals Division
725 Court St., Room 103
Martinez, CA 94553

John Cope
Office of the District Attorney
900 Ward Street
Martinez, CA 94553

California Appellate Project
303 2nd St., #600
San Francisco, CA 94105

Mr. Robert Ward Frazier, F-55038
2-EY-57
CSP-SQ
San Quentin, CA 94974

Each said envelope was then, on February 17, 2017 sealed and deposited in the United States Mail at Oakland, California, Alameda, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.
Signed on February 17 , 2017, at Oakland, California.

DECLARANT