IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JAVANCE WILSON Defendant and Appellant.	No. S118775 San Bernardino County Superior Court No. FVA 12968 Death Penalty Case

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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

Honorable James A. Edwards, Judge

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INTRODUCTION

In this supplemental brief, appellant raises two additional subclaims to Argument IV of his Opening Brief. In Argument IV, appellant established that the trial court erroneously excluded evidence of Sylvester Seeney's recantation of his statements to police and his preliminary hearing testimony. (AOB 181-192.) Appellant further demonstrated that the exclusion of the recantation deprived him of his constitutional right to present a complete defense and his rights to truth in evidence, a fair trial, and reliable guilt and penalty determinations. (AOB 192-195.) In this brief, appellant also asserts that the exclusion of the recantation violated his confrontation rights. This confrontation-clause violation constitutes an additional ground for vacating the judgment. In addition, appellant argues in this brief that if this Court deems appellant's underlying state-law evidentiary claim forfeited, then he was deprived his constitutional right to the effective assistance of counsel. Moreover, appellant asserts that California's capital-sentencing scheme violates *Hurst v. Florida* (2016) ___ U.S. ___ [136 S.Ct. 616].

I

THE EXCLUSION OF SYLVESTER SEENEY'S RECANTATION VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO CONFRONT ADVERSE WITNESSES

A. Facts and Procedural History

As explained in Appellant's Opening Brief and Reply Brief, Sylvester Seeney was the prosecution's most important witness. (AOB 14-19, 140, 171; ARB 75-76, 95.) Seeney was appellant's half-brother, and his contention that appellant told him and Melody Mansfield, appellant's common-law wife, that he had killed two taxicab drivers comprised the only direct evidence of appellant's guilt of the capital crimes. (AOB 171-172; ARB 95.) As such, it was critical for the jury to hear all of the evidence pertaining to the truth or falsity of Seeney's accusations regarding appellant's alleged admissions.

Between the preliminary hearing and the first trial, Seeney met with appellant's trial attorney and investigator at the facility where Seeney was incarcerated. (1 Supp. CT 241-258.) During their conversation, Seeney said that his interrogators frightened him with warnings that he faced lengthy imprisonment if he did not cooperate with them and provide evidence to incriminate appellant in the crimes against the taxicab drivers. (1 Supp. CT 241-243.) In addition, Seeney told defense counsel and the investigator that, contrary to Seeney's statements during his interrogation and to his testimony at the preliminary hearing, appellant never confessed to having committed crimes against taxicab drivers. (1 Supp. CT 254-256.) At a subsequent suppression hearing, Seeney was asked if his preliminary hearing testimony had been truthful. In response, Seeney invoked his Fifth Amendment privilege against self-incrimination. (3 RT 798-805.) Seeney

also indicated that he would invoke his Fifth Amendment privilege at trial; consequently, the trial court declared him an unavailable trial witness. (3 RT 802; 6 RT 1511.)

As discussed in Appellant's Opening and Reply Briefs, the trial court excluded evidence of Seeney's recantation as inadmissible hearsay. Defense counsel sought to admit the recantation for a hearsay purpose, but the trial court ruled that the hearsay exceptions in Evidence Code sections 1230 and 1235 did not apply in this case. Defense counsel then asked the trial court to admit the recantation for impeachment purposes only, but the trial court erroneously determined that it was inadmissible because Seeney was unavailable as a witness and would therefore have no opportunity to explain or deny the inconsistency. (AOB 177-181, 186-191; ARB 89.)

B. The Refusal to Admit Seeney's Recantation into Evidence Violated Appellant's Confrontation-Clause Rights

In his Opening Brief and Reply Brief, appellant showed that the recantation was admissible under Evidence Code section 1202, for purposes of impeaching Seeney's statements to the police and his preliminary hearing testimony, and that the exclusion of the evidence constituted state-law error, deprived appellant of a meaningful opportunity to present a complete defense and his constitutional rights to truth in evidence, a fair trial, and reliable guilt and penalty determinations. (AOB 181-195.) In addition, the trial court's ruling violated appellant's right to confront adverse witnesses under the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 15 of the California Constitution.

The confrontation clause imbued appellant with the right to impeach Seeney's preliminary hearing testimony with Seeney's recantation of that testimony. Under the United States Supreme Court's Sixth Amendment

jurisprudence, it is clear that a criminal defendant's right to confront an adverse witness includes the right "to impeach, i.e., discredit, the witness." (*Davis v. Alaska* (1974) 415 U.S. 308, 316.) Mere physical confrontation of that witness does not satisfy the Sixth Amendment, because "one of the important objects of the right of confrontation was to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses." (*Berger v. California* (1969) 393 U.S. 314, 315.) To be constitutionally adequate, the confrontation of an adverse witness must include a meaningful opportunity to challenge that witness for "prototypical form[s] of bias." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680.) A witness's inconsistent statements are among the "prototypical forms of bias" because they "undoubtedly provide[] valuable aid to the jury in assessing [his] credibility." (*Harris v. New York* (1971) 401 U.S. 222, 225.)

Seeney's recantation contained "inconsistent statements [that] may be used to impeach the credibility of a witness." (*United States v. Hale* (1975) 422 U.S. 171, 176.) A recantation is the quintessential inconsistent statement. In his recantation, Seeney explained that he had inculpated appellant because law enforcement officers threatened him with a long prison term if he did not cooperate to form a case against appellant. Moreover, in the recantation, Seeney indicated that his most damning accusation — that appellant admitted to committing the crimes against the taxicab drivers — was not true. Accordingly, the recantation fell squarely within the United States Supreme Court's confrontation-clause precedents. (See *Delaware v. Van Arsdall, supra*, 475 U.S. at p. 680 [finding violation of confrontation right to impeach witness over plea deal given in exchange for his testimony]; *United States v. Alford* (1931) 282 U.S. 687, 693 [finding violation of confrontation right to impeach witness to show "that

his testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention"].)

Although the cross-examination of a witness at trial is the typical method for challenging a witness's credibility, it is not the only method. The United States Supreme Court has "reject[ed] the view that the Confrontation Clause applies of its own force only to in-court testimony." (*Crawford v. Washington* (2004) 541 U.S. 36, 50.) Rather, the Supreme Court has held that the confrontation clause applies to all witnesses who "'bear testimony,'" whether in court or out of court, against the accused. (*Id.* at p. 51, quoting 2 N. Webster, *An American Dictionary of the English Language* (1828).) Indeed, exempting people who provide out-of-court testimony from impeachment would hinder the confrontation clause's goal of "ensuring that convictions will not be based on the charges of . . . unchallengeable [] individuals." (*Lee v. Illinois* (1986) 476 U.S. 530, 540.) Accordingly, the confrontation clause gave appellant the right to impeach Seeney's prior testimony at trial although the trial court found Seeney unavailable to testify at trial.

Appellant's cross-examination of Seeney at the preliminary hearing was not constitutionally adequate confrontation because the recantation contained important new information that was not cumulative. During cross-examination, defense counsel asked Seeney about the pressures he felt when he was interrogated by the police and asked Seeney about what the officers had said to him. (14 RT 3748-3760.) Indeed, in the recantation Seeney explained that he had previously lied because he had succumbed to police pressure and feared he would face a lengthy incarceration if he did not cooperate with law enforcement. Seeney recanting and saying that he had testified falsely when implicating appellant was far more powerful

evidence that he had provided false testimony than defense counsel revealing that Seeney had a motive to testify falsely. Thus, the difference between the recantation and the impeachment at the preliminary hearing was one of kind, not degree. (See *Blackston v. Rapelje* (6th Cir. 2015) 780 F.3d 340, 355 [holding exclusion of unavailable prosecution witnesses' recantations violated confrontation clause]; *Whitley v. Ercole* (S.D.N.Y. 2010) 725 F.Supp.2d 398, 423, *revd on other grounds* (2d Cir. 2011) 642 F.3d 278 [holding admission of prior testimony and exclusion of recantation violated confrontation clause].)

C. The Violation of Appellant's Confrontation-Clause Rights Requires Reversal of the Judgment

In his Opening Brief and Reply Brief, appellant demonstrated that the exclusion of Sylvester Seeney's recantation and the concomitant violation of appellant's constitutional rights was not harmless error. (AOB 195-198; ARB 92-95.) To recapitulate, there was no incriminating physical evidence, and Seeney was the only witness who testified to appellant's purported admissions to the two homicides. (AOB 195-196; ARB 92.) The United States Supreme Court has recognized that in the absence of any physical evidence, "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." (*Napue v. Illinois* (1959) 360 U.S. 264, 269.)

Given the absence of incriminating physical evidence and any other testimony corroborating Seeney's preliminary hearing testimony, the prosecution's case hinged on appellant's alleged admission of guilt to Seeney. Seeney's credibility was therefore a critical issue, and admission of his recantation would clearly have undermined it and cast doubt on whether appellant had in fact admitted committing the crimes. Under the

circumstances, respondent cannot establish beyond a reasonable doubt that the violation of appellant's right under the confrontation clause to impeach Seeney's preliminary hearing testimony and prior statements by introducing his subsequent recantation and explanation of why he lied, was harmless. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Chapman v. California* (1967) 386 U.S. 18, 24.) Appellant's conviction and death sentence must therefore be reversed.

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II

TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO CITE EVIDENCE CODE SECTION 1202 WHEN SEEKING TO INTRODUCE SEENEY'S RECANTATION FOR IMPEACHMENT

As noted above (see *ante*, at p. 3), the defense initially sought to present Seeney's recantation for a hearsay purpose. After the trial court rejected that request, trial counsel asked that the recantation be admitted for impeachment only. When making this fallback argument, trial counsel did not explicitly cite Evidence Code section 1202, the provision for admitting hearsay declarants' inconsistent statements. Because Seeney's prior preliminary hearing testimony was admitted at appellant's trial, the admission of Seeney's recantation fell squarely under this section of the Evidence Code. (ARB 89-91.)

In its brief, respondent argued that appellant forfeited his claim that the trial court erroneously excluded Seeney's recantation under Evidence Code section 1202. (RB 74.) In his Opening Brief and Reply Brief, appellant asserted that his section-1202 claim had been preserved for appellate review. (AOB 184-186; ARB 87-89.)

In the event that this Court concludes that appellant forfeited his section-1202 claim, counsel's failure to cite section 1202 when seeking to introduce the recantation to impeach Seeney's preliminary hearing testimony deprived appellant of the effective assistance of counsel to which he is constitutionally entitled under the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 15 of the California constitution. (See *Strickland v. Washington* (1984) 466 U.S. 668, 693-694; *In re Scott* (2003) 29 Cal.4th 783, 811; *People v. Staten* (2000) 24 Cal.4th 434, 450.)

Counsel's failure to cite Evidence Code section 1202 fell below accepted professional standards and cannot be explained as a matter of sound trial strategy. (See *Strickland v. Washington*, *supra*, 466 U.S. at p. 689; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.) Because there was no conceivable tactical purpose behind counsel's failure, this Court may reach the issue despite the absence of anything in the appellate record showing why counsel failed to object. (*People v. Centeno* (2014) 60 Cal.4th 659, 675, citing *People v. Lewis* (2001) 25 Cal.4th 610, 675.)

When trial counsel unsuccessfully attempted to introduce the recantation for a hearsay purpose, he cited Evidence Code sections 770, 1230, and 1235. (8 CT 2202; 17 RT 4487.) When counsel made his fallback argument that the recantation was admissible solely for impeachment, he cited section 1235's common-law antecedent, which is also section 1202's ancestor. When he sought to admit the evidence for impeachment only, trial counsel articulated the substance, purpose, and relevance of the evidence. (AOB 184; ARB 87-89.) The one thing counsel did not do was cite Evidence Code section 1202. If this Court deems trial counsel's failure to cite section 1202 to have forfeited appellant's claim to foundational impeachment evidence of the prosecution's star witness, then trial counsel's performance fell below accepted professional standards, as there was no conceivable strategic reason to omit citation of the applicable Evidence Code section when arguing for admission of the evidence. Indeed, had counsel pointed the court to the language of section 1202, it would have clarified that Seeney's unavailability was not a bar to admission of his recantation. (See Evid. Code, § 1202.)

Furthermore, for the reasons described in Argument I, *ante*, and in Appellant's Opening Brief and Reply Brief, it is reasonably probable that

appellant would not have been convicted had the trial court been made aware that Seeney's recantation was admissible under section 1202. (See AOB 183-192, 195-198; ARB 89-91, 93-97.) Under the circumstances, counsel's failure to direct the court's attention to that section of the Evidence Code was prejudicial and requires reversal. (See *Strickland v. Washington*, *supra*, 466 U.S. at p. 694 [enunciating reasonable probability standard for proving prejudice in ineffective-assistance-of-counsel claims].)

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III

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

In Argument X of his Opening Brief, appellant challenged the California death penalty scheme on grounds that this Court has rejected in previous decisions holding that the California law does not violate the United States Constitution. (AOB 267-281.) Recently, the United States Supreme Court held Florida's death penalty statute unconstitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Ring v. Arizona* (2002) 536 U.S. 584 *(Ring)* 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] (*Hurst*).) *Hurst* provides new support to appellant's claims in Argument X.C. of his Opening Brief. (AOB 270-277.) In light of *Hurst*, this Court should 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 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).

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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*, *supra*, 536 U.S. at p. 589; *Apprendi*, *supra*, 530 U.S. at p. 483.) 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*, 136 S.Ct. 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*, 136 S.Ct. 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.*)[1]

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) 2015 WL 3523406 at 18 ["Florida's capital sentencing scheme violates this [Sixth Amendment] principle because it entrusts to the trial court instead of the jury the task of 'find[ing] an aggravating

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[1] 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* [(Fla. 2005)] 921 So.2d [538,] 546.

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

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.[2] 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*

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[2] See *Hurst*, *supra*, 136 S.Ct. 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 Dist. (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, "'[t]hat there are insufficient mitigating circumstances to outweigh aggravating circumstances'" (*Hurst*, *supra*, 136 S.Ct. at p. 622, quoting Fla. Stat. § 921.141(3)).[3]

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*:

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[3] 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.

> [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 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.[4]

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 (*Brown*) (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

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[4] 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. "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] (dis. opn. from denial of cert., Sotomayor, J.).)

Eighth Amendment requirement of individualized sentencing. (*Brown*, *supra*, 40 Cal.3d at pp. 538-539.) As the Court explained:

> [D]efendant 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.

(*Brown*, *supra*, 40 Cal.3d at p. 541, fns. omitted.)[5]

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

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[5] In *Boyde v. California* (1990) 494 U.S. 370, 377 (*Boyde*), 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.

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 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. (*Id.* at p. 540.) This is the "normative" part of the jury's decision. (*Ibid.*)

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.§ 921.141, subd. (2)(b), (c) (1976-1977 Supp.).) 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.[6] The requirement that the jury must find that the aggravating circumstances outweigh the mitigating circumstances remained a

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[6] 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.

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 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].)[7] 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*

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[7] 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.

(Del. 2016) 145 A.3d 430 (*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 Amendment under *Hurst*. (*Rauf, supra*, 145 A.3d at pp. 433-434 (*per curiam* opn. of Strine, C.J.).) In Delaware, unlike in Florida, the jury's finding of a statutory aggravating circumstance is determinative, not simply advisory. (*Id.* at p. 456 (conc. opn. of Strine, C.J.).) 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*.[8] (*Id.* at pp. 433-434 (*per curiam* opn.).) 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. (*Ibid.*; see *id.* at pp. 485-487 (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

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[8] 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" (*id.* at pp. 433-434 (*per curiam* opn.) [addressing Questions 1-2]; *id.* at p. 484 (conc. opn. of Holland, J.) [same]); 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 p. 434 (*per curiam* opn.) [addressing Question 3]; *id.* at pp. 485-487 (conc. opn. of Holland, J.) [same]).

> 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.

(*Rauf, supra*, 145 A.3d at p. 485 (conc. opn. of Holland, J.), quotation and fns. omitted.)

The Delaware court is not alone in reaching this conclusion. Other state supreme courts have recognized that the determination that the 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 (dis. opn. from denial of cert., Sotomayor, J.) ["[t]he 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*].)

The recent decision of the Florida Supreme Court in *Hurst v. State*

(Fla. 2016) 202 So.3d 40 also supports appellant's claim that the weighing determination is a factual matter. On remand, following the decision of the United States Supreme Court, the Florida court reviewed whether a unanimous jury verdict was required in capital sentencing. The court began by looking at the state's capital sentencing scheme, requiring a jury to "find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." (*Id.* at p. 53.) Each of these considerations, including the weighing process itself, was described as "elements" that the sentencer must determine, akin to elements of a crime during the guilt phase. (*Id.* at pp. 53-54.) The court emphasized that the "critical findings necessary for imposition of a sentence of death" were "on par with elements of a greater offense." (*Id.* at p. 57.) It concluded that under *Hurst*, *supra*, 136 S.Ct. 616, "all the findings necessary for imposition of a death sentence are 'elements' that must be found by a jury." (*Ibid.*) There was nothing that separated the capital weighing process from any other finding of fact. (See also *Rauf*, *supra*, 145 A.3d at p. 485 (conc. opn. of Holland, J.), ["the weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence"].)

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. As appellant's jury was not required to make this finding, appellant's death sentence must be reversed.

CONCLUSION

For all of the foregoing reasons, appellant asks this Court to reverse his convictions and set aside his sentence of death.

Dated: May 4, 2017

Respectfully submitted,

MARY K. McCOMB
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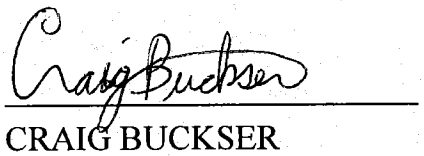
Assistant State Public Defender



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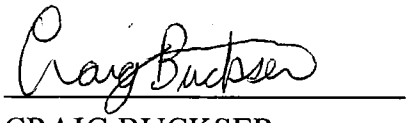
Deputy State Public Defender

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

I am the Deputy State Public Defender assigned to represent appellant, JAVANCE WILSON, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates is 7,327 words in length.

Dated: May 4, 2017



CRAIG BUCKSER
Deputy State Public Defender

DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Wilson (Javance)***
Case Number: **Cal. Supreme Court No. S118775**
San Bernardino County Sup. Ct. Case No. FVA 12968

I, the undersigned, declare as follows:

I am over the age of 18, not a party to this case. I am employed in the county where the mailing took place. My business address is 770 L Street, Suite 1000, Sacramento, California 95814. I served a copy of the following document(s):

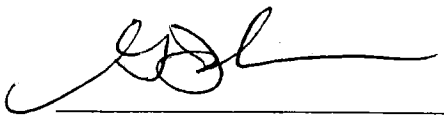
APPELLANT'S SUPPLEMENTAL OPENING BRIEF

by enclosing it in envelopes and placing the envelope for collection and mailing on the date and 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 prepaid.

The envelopes were addressed and mailed on **May 4, 2017**, as follows:

Donald W. Ostertag Office of the Attorney General P.O. Box 85266 San Diego, CA 92186	Javance Wilson, V-05878 CSP-SQ, 4-EB-117 San Quentin, CA 94974
San Bernardino County Superior Court Attn: Appellate Division 8303 Haven Avenue Rancho Cucamonga, CA 91730	California Appellate Project 101 Second Street, Suite 600 San Francisco, CA 94105

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **May 4, 2017**, at Sacramento, California.



GARY JOHNSTON