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.