In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JAVANCE MICKEY WILSON,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S118775

San Bernardino County Superior Court
Case No. FVA12968
The Honorable James A. Edwards, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

INTRODUCTION

On May 5, 2017, Appellant Javance Wilson (hereafter "Wilson") filed a request for permission to file a Supplemental Opening Brief. This court granted his request on May 18, 2017, and ordered Respondent to file a Supplemental Respondent's Brief on or before June 17, 2017.

In his supplemental brief, Wilson raises three additional claims. First, he contends the exclusion of Sylvester Seeney's "recantation" violated his Sixth Amendment right to confront adverse witnesses. In a related claim, he contends his trial counsel rendered constitutionally deficient representation by failing to cite Evidence Code[1] section 1202 when seeking admission of Seeney's statement. Finally, Wilson contends the United States Supreme Court's recent decision in *Hurst v. Florida* (2016) __ U.S. [136 S.Ct. 616; 193 L.Ed.2d 504] (*Hurst*) provides additional support for his argument that California's death penalty sentencing scheme is unconstitutional.

All three claims should be rejected. The exclusion of Seeney's interview statements did not violate Wilson's Sixth Amendment rights because Wilson was previously afforded the right to confront and cross-examine Seeney at the preliminary hearing. Wilson has not shown his trial counsel's failure to cite section 1202 when seeking admission of Seeney's interview constituted a violation of his constitutional right to counsel because he has not shown any prejudice. Finally, the Supreme Court's decision in *Hurst* does not alter or change this Court's previous decisions regarding the constitutionality of California's capital sentencing scheme. This Court has already rejected these claims in other cases, and should continue to do so here.

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[1] Any unlabeled citations to statutory provisions are to the Evidence Code.

ARGUMENT

I. THE EXCLUSION OF SEENEY'S SUBSEQUENT STATEMENT DID NOT VIOLATE WILSON'S CONSTITUTIONAL RIGHT TO CONFRONT ADVERSE WITNESSES

First, Wilson contends the trial court's exclusion of the transcript of Seeney's interview with the defense team was not just erroneous under state law[2], and various other federal provisions, (see AOB 181-195), but also that the error violated his Sixth Amendment right to confront and cross-examine adverse witnesses, namely Seeney. (Supp. AOB 2-7.) Wilson has forfeited this claim by failing to raise it below. Further, the exclusion of Seeney's interview, even if erroneous, did not implicate

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[2] Respondent wishes to correct a position advanced in the Respondent's Brief. There, Respondent argued Seeney's interview with the defense team was not admissible under section 1202 because Seeney was a "witness who has previously testified," and thus was not a hearsay declarant. (See RB 75.) Upon further review and consideration, this position is incorrect. Respondent agrees with Wilson (see Reply Brief at 89-91) that inconsistent statements from a hearsay declarant are admissible for impeachment purposes under section 1202, and that the admission of Seeney's preliminary hearing testimony made him a hearsay declarant at Wilson's trial. (See *People v. Blacksher* (2011) 52 Cal.4th 769, 808 [Section 1202 permits admission of inconsistent out-of-court statements of hearsay declarant to impeach declarant's credibility, but such statements may not be admitted for their truth]; *People v. Corella* (2004) 122 Cal.App.4th 461, 470 [same]; *People v. Osorio* (2008) 165 Cal.App.4th 603, 616 [prosecution impeached unavailable witness's spontaneous statement with a subsequent hearsay statement].) Accordingly, to the extent Seeney's interview was inconsistent with his preliminary hearing testimony, it qualified for admission under section 1202. However, Respondent maintains that the claim has been forfeited by failing to raise it in the trial court, that the error is one of state law subject to review under *People v. Watson* (1956) 46 Cal.2d 818, harmless under that standard, and even if considered an error of federal constitutional dimension, the error was harmless beyond a reasonable doubt. (See RB 75-77.)

Wilson's rights under the Sixth Amendment. And, if the exclusion of the interview did infringe on Wilson's Sixth Amendment rights, Respondent has shown the error was harmless beyond a reasonable doubt.

At the outset, this claim has been forfeited because Wilson never claimed in the trial court that exclusion of Seeney's interview would violate Wilson's right to confront Seeney. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 809 [confrontation clause claim forfeited by failing to raise it below].) "[E]xcept to the extent his claims rely on the same facts and legal standards the trial court itself was asked to apply, defendant has forfeited his contentions of federal constitutional error by failing to assert them before the trial court." (*People v. Riccardi* (2012) 54 Cal.4th 758, 801, abrogated on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192.) The parties discussed the admission of this statement at length, (17 RT 4482-4498) and Wilson's trial counsel made a number of claims regarding the admissibility of the evidence and the unfairness in excluding it—he did not claim, as he does now on appeal, that the exclusion of the evidence would violate his right to confront Seeney. Thus, Wilson's Sixth Amendment claim has been forfeited.

Even if preserved, Wilson has failed to show a violation of his Sixth Amendment right to confront Seeney. Wilson's claim of a Sixth Amendment violation fails to appreciate the most critical circumstance of this case – Wilson was afforded an opportunity to confront and cross-examine Seeney. (See *Crawford v. Washington* (2004) 541 U.S. 36, 54 [finding admission of testimonial hearsay violates the confrontation clause, "unless [the declarant] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."].) His opportunity to do so was at the preliminary hearing, not the trial, but this Court and the United States Supreme Court have long held that the admission of prior testimony under these circumstances does not violate the Sixth Amendment, even where

subsequent developments may have changed the cross-examination conducted by the defense.

The Sixth Amendment does guarantee a criminal defendant the right to confront and cross-examine the witnesses against him. But, this right, like most, is not absolute, and, "may 'in appropriate cases' bow to other legitimate interests in the criminal trial process. (*People v. Carter* (2005) 36 Cal.4th 1114, 1172, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 295 [93 S.Ct. 1038, 35 L.Ed.2d 297]; accord *Barber v. Page* (1968) 390 U.S. 719, 722 [88 S.Ct. 1318, 20 L.Ed.2d 255].) And while the federal constitution guarantees an opportunity for effective cross-examination, it does not guarantee a cross-examination that is "as effective as a defendant might prefer." (*People v. Carter* (2005) 36 Cal.4th 1114, 1172; see also *Crawford v. Washington* (2004) 541 U.S. 36, 59 [124 S.Ct. 1354, 158 L.Ed.2d 177], and *Chambers v. Mississippi* (1973) 410 U.S. 284, 295 [93 S.Ct. 1038, 35 L.Ed.2d 297].)

As relevant here, an exception to the confrontation requirement exists where the witness is unavailable, has given testimony at a previous judicial proceeding against the same defendant, and was subject to cross-examination by that defendant. (§ 1291; see also *Carter*, *supra*, 36 Cal.4th at p. 1172; see also *People v. Zapien* (1993) 4 Cal.4th 929, 975 (*Zapien*) [finding section 1291 does not offend the federal or state constitutions].) As this Court explained in *Zapien*, the opportunity to confront and cross-examine a witness at a preliminary hearing is sufficient to satisfy the defendant's constitutional rights, "not because the opportunity to cross-examine the witness at the preliminary hearing is considered an exact substitute for the right of cross-examination at trial, but because the interests of justice are deemed served by a balancing of the defendant's right to effective cross-examination against the public's interest in effective prosecution." (*Ibid.*, citing *Ohio v. Roberts* (1980) 448 U.S. 56, 64 [100

S.Ct. 2531, 65 L.Ed.2d 597, 606]; see also *California v. Green* (1970) 399 U.S. 149, 165–168 [90 S.Ct. 1930, 26 L.Ed.2d 489].)

Both the United States Supreme Court and this Court "have concluded that 'when a defendant has had an opportunity to cross-examine a witness at the time of his or her prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation requirement, regardless whether subsequent circumstances bring into question the accuracy or the completeness of the earlier testimony.'" (*People v. Wilson* (2005) 36 Cal.4th 309, 343, citing *People v. Samayoa* (1997) 15 Cal.4th 795, 851–852, and *California v. Green* (1970) 399 U.S. 149, 165-166 [90 S.Ct. 1930, 26 L.Ed.2d 489]; see *People v. Hollinquest* (2010) 190 Cal.App.4th 1534, 1548 [rights to confrontation and cross-examination are not violated, "simply because the defendant did not conduct a particular form of cross-examination that in hindsight might have been more effective."].) Accordingly, Wilson's Sixth Amendment rights were not violated by the exclusion of Seeney's interview because his constitutional rights had already been fully satisfied when he was afforded an opportunity to confront and cross-examine Seeney at the preliminary hearing.

Wilson's argument that his right to confrontation was violated because he was not permitted to impeach Seeney's preliminary hearing testimony with the subsequent statement is without merit. The Sixth Amendment does include, as part of the right to cross-examine a witness, a limited right to impeach that witness during the cross-examination. (*Davis v. Alaska* (1974) 415 U.S. 308, 316 [94 S.Ct. 1105; 39 L.Ed.2d 347] ["[T]he cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness."].) Wilson was afforded this right at the preliminary hearing, and exercised it by engaging in cross-examination on topics that showed Seeney's statements implicating Wilson were not reliable. (See 14 RT 3742-3762.) The Sixth Amendment right to cross-examination does not

include a right to limitless cross-examination. (See e.g. *People v. Brown* (2003) 31 Cal.4th 518, 545 ["[R]eliance on Evidence Code section 352 to exclude evidence of marginal impeachment value that would entail the undue consumption of time generally does not contravene a defendant's constitutional rights to confrontation and cross-examination."].) Even were this court to find that Wilson's opportunity to confront and cross-examine Seeney at the preliminary hearing was insufficient to afford Wilson the protections enumerated in the Sixth Amendment, Wilson cannot establish a Sixth Amendment violation unless he can show that the exclusion of this evidence, "would have produced 'a significantly different impression of [the witness's] credibility.'" (*People v. Pearson* (2013) 56 Cal.4th 393, 455–56, citing *Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 680 [106 S.Ct. 1431], *Brown*, *supra*, 31 Cal.4th at pp. 545–546)

The admission of the interview with the defense team would not have produced a significantly different impression of Seeney's credibility. The jury was already aware that Seeney's credibility was compromised because of his relationship to Wilson. Seeney testified he had a good relationship with Wilson, and that he loved his brother. (14 RT 3729.) During the preliminary hearing testimony, Seeney was having trouble making admissions against his brother. (14 RT 3734-3735 ["I know it is hard, Mr. Seeney, but you need to answer the question."].) He was emotional and crying, a point that was noted on the record and read to the jury as part of the transcript of the testimony. (14 RT 3735.) Seeney admitted he lied to police when he was first contacted about Wilson's involvement in the murders out of loyalty to his brother. (14 RT 3740, 3763.) Anything Seeney said during the excluded interview that was favorable to Wilson would have been viewed in the context of Seeney's relationship and demonstrated loyalty to Wilson. This was particularly true given the context of the interview – it was done by Wilson's defense team on the eve

of Wilson's trial, outside of court and without the formalities of a courtroom, presiding judge, and swearing an oath to tell the truth. And, having already heard that Seeney had difficulty testifying against Wilson, the jury would have viewed Seeney's subsequent interview as an attempt to mitigate the impact of his previous statements on his relationship with his brother, not as an honest attempt to clarify the record or tell the truth.

In addition, the cross-examination of Seeney at the preliminary hearing made it clear that Seeney felt pressured by police to make admissions, one of the predominant themes from the excluded interview. The bulk of the cross-examination of Seeney during the preliminary hearing focused on the pressure the police exerted during their interview with Seeney, and defense counsel highlighted the threats made against him if he did not cooperate and disclose information against Wilson. Seeney explained that the Ohio officers that interviewed him suggested he would spend a long time in jail if he did not disclose information. (14 RT 3748, 3753-3754.) The Ohio officers also told Seeney he would be considered an accessory to murder if he did not disclose, and that his knowledge of the commission of the crimes and presence at the scene was enough to consider him an accessory, even if he did not participate. (14 RT 3748, 3760.) Seeney was told that he had to disclose if we wanted any chance of "getting out of it" and saving himself. (14 RT 3755-3756, 3758.) The officers threatened him and frightened him, but he maintained he did not know anything about Wilson's involvement in any murders, and confirmed he had told the officers the truth. (14 RT 3749, 3757-3759.) Seeney explained he was scared he was going to spend a lot of time in custody if he did not talk to the police officers, and explained that he continued to be scared about that when he spoke to the San Bernardino officers. (14 RT 3749.)

A large portion of the excluded interview with the defense team covered nearly identical territory. Seeney explained he was scared when he

was arrested and interviewed in Ohio. (1 Supp.CT 241-242.) Seeney said the Ohio officers were trying to scare him by telling him he was going to serve prison time. (1 Supp.CT 242.) Seeney described the San Bernardino officers as "cool" and trying to be cool to get him to say the things they wanted to hear. (1 Supp.CT 243.) But, they were scaring him too and trying to pressure him. (1 Supp.CT 244.) Seeney believed the officers when they told him he was going to go to prison for a long time. (1 Supp.CT 245.) To the extent the excluded interview was valuable impeachment because Seeney explained his admissions were colored by the pressure he felt and the threats issued by the interviewing officers, all of that information was already before the jury as Wilson's defense attorney questioned Seeney at length about it during the preliminary hearing.

Seeney also told the defense team the DA offered him immunity for some residential burglaries, if Seeney agreed to testify against Wilson. (1 Supp.CT 246.) But, the jury was aware of this as well since the immunity agreement was referenced during the preliminary hearing testimony and entered into evidence at the trial. (14 RT 3741, 3744; see also Exhibit 230, 19 RT 4996.)

Finally, during the excluded interview, Seeney said he loved his brother but was hurt by him, and that Wilson had not really told Seeney all the things Seeney testified to. (1 Supp.CT 249.) Seeney said he simply repeated what the police told him they already knew. (1 Supp.CT 249-250.) When asked what specifically he had lied about, Seeney explained that the officers told him they knew about the .44 Magnum, and they described it. Upon hearing that, Seeney thought, "dang, you know? How they know that?" (1 Supp.CT 250.) Seeney explained that then the detective asked him if he had seen the gun, Seeney said, "I mean it's kind of – I mean she's saying I did, I mean, and we was all right there so, I mean, but – but, I mean, that's it." (1 Supp.CT 251.) In context, these statements actually

support Seeney's preliminary hearing testimony, they do not refute it. Seeney was surprised to discover the police knew about the .44 magnum and then inferred Woodruff, his girlfriend, told the police about the gun as they had been together when Wilson showed them the gun. This is consistent with what Seeney said at the preliminary hearing. (14 RT 3740.)

The only true denial from Seeney during the excluded interview that conflicted with his preliminary hearing testimony came immediately after this comment when Seeney explained he had seen a gun, but he was not sure if it was a .44 Magnum. (1 Supp.CT 251.) The defense investigator then drew a picture of a .44 and described some of its characteristics, and Seeney said he had not seen a gun matching that description. (1 Supp.CT 253.) They asked Seeney if Wilson told him he used a .44 Magnum, or any kind of big gun to do any "killings or robberies or anything like that." Seeney said no, Wilson did not tell him he used a large gun. (1 Supp.CT 256.) Again, given the context of the interview, Seeney's inconsistent statement regarding whether he ever saw a .44 Magnum would not have produced a significantly different impression of Seeney's credibility. On the whole, the jury was aware that Seeney had sometimes lied to police officers, and sometimes told them the truth. His statements were only credible to the extent they could be corroborated by other testimony and physical evidence. Had the interview with the defense team been admitted, the jury's perception of Seeney's credibility would not have been altered significantly, and thus, Wilson cannot show that the exclusion of this evidence rises to the level of a violation of his Sixth Amendment rights.

Even assuming Wilson could demonstrate a confrontation clause violation, the violation was harmless under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], because it is "clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the error." (*People v. Capistrano* (2014) 59 Cal.4th 830, 873

[violations of the Sixth Amendment are reviewed for harmless error under *Chapman*], citing *People v. Livingston* (2012) 53 Cal.4th 1145, 1159, and see *Neder v. United States* (1999) 527 U.S. 1, 18 [119 S.Ct. 1827, 144 L.Ed.2d 35].) In *People v. Brown* (2003) 31 Cal.4th 518, 545–46, this court found the exclusion of impeachment evidence harmless beyond a reasonable doubt because the witness's testimony was "largely consistent" with the testimony of other witnesses, and consistent with the physical evidence. (*Ibid.*) The error in this case is harmless for many of the same reasons.

First, as explained above, the excluded interview was only admissible as impeachment evidence, and could not have been used by the jury as substantive evidence of the truth of the matters therein. (*People v. Blacksher* (2011) 52 Cal.4th 769, 808 [Section 1202 permits admission of inconsistent out-of-court statements of hearsay declarant to impeach declarant's credibility, but such statements may not be admitted for their truth]; *People v. Corella* (2004) 122 Cal.App.4th 461, 470 [same].) The jury would have been instructed on this point, and told to consider the interview only for its relevance in impeaching Seeney's testimony. (See Evid. Code § 355.) As explained above, the interview would not have substantially altered the credibility of Seeney's testimony, and thus, it would not have lead the jury to reject Seeney's testimony in its entirety. Beyond the similarities between the preliminary hearing testimony and the excluded interview (discussed above), several facts from Seeney's preliminary hearing testimony were corroborated by other evidence, demonstrating its truthfulness, and never denied or refuted during the excluded interview. Specifically, Seeney testified Wilson told him about the gun jamming during the attempted murder of Richards—a fact that was confirmed by Richards himself. (14 RT 3738, 15 RT 3852-3853.) Seeney also testified that immediately before the murders of Dominquez and

Henderson, Seeney gave Wilson Seeney's white puffy jacket at a barbeque. (14 RT 3631-3632, 3731-3732.) Karen Smith, a witness to the Henderson murder, testified that she saw the shooter fleeing the scene in a white puffy jacket. (15 RT 3984-3985.) Seeney also explained that Wilson had told him about injuring his leg when he was dragged by the getaway car following the murder of Henderson, a description which was entirely consistent with Smith's observations of the shooter as he fled the scene. (14 RT 3736, 15 RT 3984-3985; 16 RT 4037-4038.) Seeney testified Woodruff had been involved in some of the residential burglaries, specifically, he said she was the getaway driver. (14 RT 3762.) Woodruff herself confirmed this fact. (14 RT 3654-3655.)

Even assuming the best possible scenario for Wilson – i.e. that the admission of the interview would have led the jury to reject Seeney's testimony all together, the record still shows the error was harmless beyond a reasonable doubt because the complete discrediting of Seeney would not have altered the outcome. As explained in the Respondent's Brief, Seeney's testimony was largely duplicative of Phyllis Woodruff's testimony. (See RB 63, 76-77.) Woodruff testified Wilson admitted robbing a cab driver and sticking a gun in his mouth to try to kill him. Wilson told Woodruff the gun had jammed. Wilson also showed Woodruff the wallet he had taken from the cab driver, which included Richards' picture ID. (14 RT 3647-3648.) Wilson told Woodruff he had given the defective gun to a friend, Brian McKinney, and a search of McKinney's home later uncovered the gun. (14 RT 3642, 3649; 15 RT 3998-4001.) Woodruff testified Wilson had taken her to see the taxi he stole from Richards, which he had parked in a nearby apartment complex. (14 RT 3649-3650.) Woodruff also remembered seeing Wilson with the .44 Magnum handgun that was used to murder Dominguez and Henderson, and remembered him admiring and boasting about the gun. (14 RT 3652-3653.)

Wilson also admitted to his then-wife that he had killed the cab drivers. (14 RT 3640, 3733-3735.) And, when arrested in Ohio, before he was told why he was being arrested, Wilson said, "I know. Its because of those murders." (15 RT 3965.)

In addition to Woodruff's testimony, and Wilson's other admissions, Richards, the attempted murder victim, positively identified Wilson in a photo line-up, and at trial. (17 RT 4467; 15 RT 3873-3874.) For all the reasons explained in the Respondent's Brief, his identifications of Wilson were highly reliable. (See RB 25-39.) The attempted murder of Richards was nearly identical to the murder of Dominguez, suggesting both crimes were committed by the same person. Both involved the robbery and murder of cab drivers in San Bernardino within two months of each other. The cabs were called from the exact same grocery store, and directed to the exact same remote location on Laurel Avenue. (14 RT 3567, 3580; 15 RT 3773-3774, 3848.) There, Wilson attempted to shoot Richards but the gun jammed, and he successfully shot and killed Dominguez.

Wilson's fingerprints were inside Dominguez's cab. (15 RT 4001-4002.) Dominguez's cell phone was used less than two hours after his murder to call a third cab, one driven by Victor Henderson. (15 RT 3840-3841; 16 RT 4177-4178.) Henderson drove Wilson to a neighborhood where Wilson attempted to rob him as well, and shot and killed him. The ballistics experts confirmed that the same gun was used to kill Dominguez and Henderson. (15 RT 3922-3923, 3938.) Smith, the witness to the Henderson murder saw the shooter running towards a getaway car. The driver of the car started leaving before the shooter was fully inside the vehicle, injuring the shooter's leg. (15 RT 3984-3985; 16 RT 4037-4038.) Several witnesses testified that Wilson did not have a leg injury immediately before the Henderson murder, but did have a leg injury immediately after. (14 RT 3593, 3698, 3706, 3725-3726.)

For all of these reasons, even if Wilson could establish a Sixth Amendment violation, the record shows any error was harmless beyond a reasonable doubt. Given the corroborating evidence, Seeney's preliminary hearing testimony would not have been rejected in its entirety. Even assuming the admission of Seeney's interview would have discredited Seeney so significantly that the jury would have rejected his testimony all together, the remaining evidence demonstrates that it is "clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the error." (*Capistrano, supra,* 59 Cal.4th at p. 873.) Wilson's claim that the exclusion of Seeney's interview violated his Sixth Amendment rights should be rejected.

II. WILSON HAS NOT SHOWN HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

In a related claim, Wilson contends his trial counsel was constitutionally deficient for failing to cite Evidence Code section 1202 when he argued for the admission of Seeney's interview transcript. (Supp. AOB 8-10.) Because Wilson cannot show prejudice, this court need not determine whether trial counsel's failure to cite section 1202 constituted deficient performance. Without a sufficient showing of prejudice, this claim must be rejected.

To prevail on a claim of ineffective assistance of counsel, defendant "must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice." (*People v. Hart* (1999) 20 Cal.4th 546, 623–24 (*Hart*), citing *Strickland v. Washington* (1984) 466 U.S. 668, 684 [104 S.Ct. 2052, 80 L.Ed.2d 674] (*Strickland*).)

A defendant bears the burden of affirmatively proving prejudice from the record. (*Strickland, supra*, at p. 693; *Fosselman, supra*, 33 Cal.3d at pp. 583–584; *Hart, supra*, 20 Cal.4th at pp. 623-624.) "It is not enough for the

defendant to show that the errors had some conceivable effect on the outcome of the proceeding.... The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, *supra*, 466 U.S. at pp. 693, 694, see also *People v. Ledesma* (1987) 43 Cal.3d 171, 217–18.) Specifically, with respect to a challenge to a conviction, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." (*Strickland*, *supra*, 466 U.S. at p. 695; *Ledesma*, *supra*, 43 Cal.3d at p. 218.)

In ruling on a claim of ineffective assistance of counsel, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland*, *supra*, 466 U.S. at p. 697; see also *People v. Carrasco* (2014) 59 Cal.4th 924, 982.)

Wilson cannot carry his burden of showing a reasonable probability of a more favorable outcome if only his trial counsel had cited to Evidence Code section 1202 in support of his request to impeach Seeney with his defense interview. Because the absence of prejudice is clear from the record, this court need not determine if counsel's failure to cite section 1202 constitutes deficient performance under the Sixth Amendment. (*In re Alvernaz* (1992) 2 Cal.4th 924, 945 [declining to determine whether petitioner established deficient performance because petitioner "failed to sustain his burden on the issue of prejudice."].)

At the outset, even if the trial court had understood the interview was admissible under section 1202, it still had the discretion to exclude it

pursuant to section 352, if the "probative value [was] substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create substantial danger of undue prejudice, confusing the issues, or of misleading the jury." (§ 352.) The trial court had serious reservations about the trustworthiness of Seeney's statements during the interview. (17 RT 4490-4491.) Further, the court expressed concern that the statements would be misinterpreted or misused because they were not subject to cross-examination. (17 RT 4498.) These concerns, coupled with the limited utility of the statements (i.e. for impeachment only), and their minimal probative value in terms of their bearing on Seeney's credibility (see Section I, *ante*), the trial court could have excluded the statements pursuant to section 352, even had defense counsel made note of their admissibility under section 1202. In such a situation, there could be no possibility defense counsel's error could have resulted in a different outcome because the evidence would still have been excluded.

But, even assuming a citation to section 1202 would have tipped the scales in Wilson's favor and convinced the trial court to admit the evidence, the admission of the interview transcript would still not have resulted in a more favorable outcome for Wilson. As explained in the Respondent's Brief, (RB 75-77), Seeney's interview was not credible and a reasonable jury would have disregarded the interview in light of the context in which it was given – i.e. an interview with his brother's defense team on the eve of trial after he had made statements incriminating his brother. Further, contrary to Wilson's characterization of the interview, Seeney's statements are not a wholesale "recantation" of his preliminary hearing testimony. As explained above, Seeney gave an inconsistent statement on one incriminating fact—that he had seen Wilson with the .44 Magnum. Even that statement was preceded by statements that seem to confirm he had seen Wilson with the gun, consistent with his preliminary hearing testimony.

Further, as explained above, the error was harmless under the *Chapman* standard requiring Respondent to show the record demonstrates harmlessness beyond a reasonable doubt. (See Section I, *ante*.) Under the *Strickland* prejudice standard, Wilson must show a reasonable probability he would have received a more favorable outcome had the error not occurred. For the same reasons the record shows the error was harmless beyond a reasonable doubt, it shows there is no reasonable probability of a more favorable outcome absent the error. To reiterate briefly, Woodruff's testimony was "largely consistent" with Seeney's, and the important facts from Seeney's preliminary hearing testimony were corroborated by other testimony and physical evidence, demonstrating the truthfulness of Seeney's testimony. Even if the jury rejected Seeney's testimony entirely, the other evidence shows there is no reasonable probability Wilson would have received a more favorable result; The admission of Seeney's interview statements would not have given rise to a reasonable doubt as to Wilson's guilt. Wilson's ineffective assistance of counsel claim should be rejected.

III. THE HIGH COURT'S DECISION IN *HURST V. FLORIDA* DOES NOT INVALIDATE CALIFORNIA'S DEATH PENALTY SENTENCING SCHEME

Next, Wilson reiterates that California's death penalty statute and jury instructions violate the federal Constitution. (Supp. AOB 11.) Relying on *Hurst v. Florida* (2016) 577 U.S. __ [136 S.Ct. 616; 193 L.Ed.2d 504] (*Hurst*), a recent United States Supreme Court's decision invalidating Florida's capital sentencing scheme, he urges this Court to reconsider decisions holding that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348; 147 L.Ed.2d 435], does not require factual findings within the meaning of *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428; 153 L.Ed.2d 556], and does not require the jury to unanimously

find the aggravating factors outweigh the mitigating factors beyond a reasonable doubt. (Supp. AOB 11-28.) *Hurst* does not assist Wilson because the "California sentencing scheme is materially different from that in *Florida*." (*People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16 (*Rangel*); *People v. Becerrada* (2017) 2 Cal.5th 1009, 1038.) Nothing in *Hurst* invalidates or requires this Court to reconsider its earlier decisions.

Under Florida's capital sentencing scheme, the maximum sentence a capital defendant could receive on the basis of a conviction alone was life imprisonment. A Florida trial court, however, had the authority to impose a death sentence if the jury rendered an "advisory sentence" of death and the court found sufficient aggravating circumstances existed. The United States Supreme Court held that this sentencing scheme violated *Ring v. Arizona* (2002) 536 U.S. 584, because the jury made an advisory verdict while the judge made the ultimate factual determinations necessary to sentence a defendant to death. (*Hurst, supra*, 136 S.Ct. at pp. 621-622.) *Hurst* merely reiterates that juries, not judges, must "find each fact necessary to impose a sentence of death." (*Id.* at p. 619.)

In contrast, there are no judicial fact-findings in California's death penalty scheme that could enhance a defendant's sentence beyond the prescribed range. In the recent *Rangel* decision, this Court discussed *Hurst* and distinguished California's capital case sentencing scheme from Florida's now-invalidated scheme:

> [A] [California] jury weighs the aggravating and mitigating circumstances and reaches a unanimous penalty verdict that "impose[s] a sentence of death" or life imprisonment without the possibility of parole. (Pen. Code §§ 190.3, 190.4.) Unlike Florida, this verdict is not merely "advisory." (*Hurst* at p. 622.) If the jury reaches a verdict of death, our system provides for an automatic motion to modify or reduce this verdict to that of life imprisonment without the possibility of parole. (Pen. Code § 190.4.) At the point the court rules on this motion, the jury "has returned a verdict or *finding* imposing the death penalty." (Pen.

> Code § 190.4, *italics added.*) The trial court simply determines "whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented." (Pen. Code § 190.4.)

(*Rangel, supra*, 62 Cal.4th at p. 1235, fn. 16; accord, *People v. Jackson* (2016) 1 Cal.5th 269, 374.)

So unlike *Hurst*, Wilson's death sentence was based on a jury's factual findings, and the jury's verdict was not merely "advisory." (*Hurst, supra*, 136 S.Ct. at p. 622; *Rangel, supra*, 62 Cal.4th at p. 1235, fn. 16.) The principles of *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona, supra*, 536 U.S. 584 are thus inapplicable to California's capital sentencing scheme. (*Rangel, supra*, 62 Cal.4th at p. 1235.) Because judges play *no* fact-finding role in California's capital punishment scheme, *Hurst* does not render California's death penalty statute unconstitutional. (*Ibid.*)

As Wilson acknowledges, *Hurst* did not address the standard of proof required for determining the aggravating and mitigating circumstances. (Supp. AOB 16.) Thus, as this Court noted in *Rangel*, nothing in *Hurst* affects its decision on the standard of proof issue. (*Rangel, supra*, 62 Cal.4th at p. 1235.)

Moreover, the United States Supreme Court's recent decision in *Kansas v. Carr* (2016) 577 U.S.__ [136 S. Ct. 633; 193 L.Ed.2d 535] (*Carr*), effectively forecloses Wilson's argument that determinations at the penalty phase must be made beyond a reasonable doubt. As *Carr* reasoned, it is possible to apply a standard of proof to the "'eligibility phase'" of a capital sentencing proceeding, "because that is a purely factual determination." (136 S.Ct. at p. 642.) In contrast, it is doubtful whether it would even be "possible to apply a standard of proof to the mitigating-factor determination (the so-called 'selection phase' of a capital-sentencing proceeding)," because "[w]hether mitigation exists ... is largely a judgment call (or perhaps a value call): what one juror might consider mitigating

another might not." (*Id.*) The same is true of California's aggravating factors at this stage. (See, e.g., *People v. Brown* (1988) 46 Cal.3d 432, 456 [California's sentencing factor regarding "'[t]he age of the defendant at the time of the crime'" may be either a mitigating or an aggravating factor in the same case: the defendant may argue for age-based mitigation, and the prosecutor may argue for aggravation because the defendant was "'old enough to know better'"].)

The decision in *Carr* likewise forecloses Wilson's argument that the jury's weighing of aggravating versus mitigating circumstances should proceed under the beyond a reasonable doubt standard: "[T]he ultimate question of whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy," and "[i]t would mean nothing ... to tell the jury that the defendants must deserve mercy beyond a reasonable doubt." (*Carr*, 136 S. Ct. at p. 642.) Wilson asks for a standard that, the Supreme Court has observed, would not be capable of intelligent application in most cases.

In recent cases, this Court has relied in part on *Carr* in rejecting claims that the beyond a reasonable doubt standard should apply to the penalty phase determination. (*People v. Delgado* (2017) 2 Cal.5th 544, 591; *People v. Winbush* (2017) 2 Cal.5th 402, 489; *People v. Williams* (2016) 1 Cal.5th 1166, 1204; *People v. Jackson* (2016) 1 Cal.5th 269, 373; *People v. Rangel, supra*, 62 Cal.4th 1192, 1234; *People v. Casares* (2016) 62 Cal.4th 808, 854.) As this Court explained, "[T]rial courts should not instruct on any burden of proof or persuasion at the penalty phase because sentencing is an inherently moral and normative function, and not a factual one amenable to burden of proof calculations." (*People v. Winbush, supra*, 2 Cal.5th 402, 489, citing *Carr, supra*, at p. 642.) For all these reasons, this Court should reject Wilson's argument to the contrary.

CONCLUSION

For the reasons stated above, Respondent respectfully requests this Court reject the claims raised in Appellant's Supplemental Opening Brief.

Dated: June 14, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 5,814 words.

Dated: June 14, 2017

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Wilson**
No.: **S118775**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 14, 2017, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 14, 2017, at San Diego, California.

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Signature

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