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 REPLY 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

MARY K. McCOMB
State Public Defender

JESSICA K. McGUIRE
Assistant State Public Defender

CRAIG BUCKSER
Deputy State Public Defender
State Bar No. 194613
770 L Street, Suite 1000
Sacramento, California 95814
Email: craig.buckser@ospd.ca.gov
Telephone: (916) 322-2676
Facsimile: (916) 327-0459

Attorneys for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES

Page(s)

STATE CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

CONSTITUTIONAL PROVISIONS

STATE STATUTES

COURT RULES

TABLE OF AUTHORITIES

Page(s)

OTHER AUTHORITIES

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 REPLY BRIEF

I

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

In Appellant's Supplemental Opening Brief, appellant asserted that excluding Seeney's recantation, in addition to constituting state-law evidentiary error and violating appellant's constitutional rights to present a complete defense and to truth in evidence, a fair trial, and reliable guilt and penalty determinations, violated appellant's confrontation rights. (ASOB 3-8.) Respondent argues that appellant forfeited this appellate claim, that there was no infringement of appellant's confrontation rights, and that any error was harmless. (SRB 8-19.) For the reasons discussed below, this Court

should reject respondent's arguments.[1]

As a preliminary manner, appellant would like to call attention to a significant factual misrepresentation that respondent makes in both Respondent's Brief and Supplemental Respondent's Brief. In its Supplemental Respondent's Brief, respondent claims: "Wilson's fingerprints were inside [Andres] Dominguez's cab." (SRB 18, citing 15 RT 4001-4002; see also RB 7.) In the introduction to Appellant's Reply Brief, appellant explained that respondent's representation is false. (ARB 1.) The record unequivocally shows that the fingerprints in Andres Dominguez's taxicab *did not match* appellant's. (15 RT 3997, 4002.) Indeed, no physical evidence linked appellant to any of the crime scenes.

A. This Constitutional Claim Is Cognizable on Appeal

Respondent contends that appellant has forfeited this appellate claim because he did not argue in the court below that excluding the recantation would violate his confrontation rights. (SRB 9.) This Court must reject that contention.

As this Court explained in *People v. Partida* (2005) 37 Cal.4th 428, 435-438, a defendant on appeal may raise constitutional claims asserting that an erroneous legal ruling had the additional consequences of violating his constitutional rights though he did not object on those constitutional grounds at trial. Appellant indisputably argued at trial that the recantation was admissible. (17 RT 4487, 4489-4490, 4497-4498.) Appellant asserts

---

[1] The failure in this brief to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in prior briefing, does not constitute a concession, abandonment, or waiver of the point by appellant. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.) It merely reflects appellant's view that the issue has been adequately presented.

here that the erroneous exclusion of the recantation also violated his confrontation rights.

The two cases respondent cites to support its forfeiture argument, *People v. Gutierrez* (2009) 45 Cal.4th 789 and *People v. Riccardi* (2012) 54 Cal.4th 758, fail to support respondent's contention that appellant forfeited his confrontation claim. In *Gutierrez*, this Court, citing *People v. Partida*, *supra*, ruled that the defendant had not forfeited his confrontation claim:

> We note that although defendant did not raise federal constitutional objections to the admission of his son's testimony at trial, he did not forfeit those claims on appeal. Where "it appears that (1) the appellate claim is the kind that required no trial court action to preserve it, or (2) the new arguments do not invoke facts or legal standards different from those the trial court was asked to apply, but merely assert that the trial court's act or omission, in addition to being wrong for reasons actually presented to that court, had the legal consequence of violating the Constitution[,] . . . defendant's new constitutional arguments are not forfeited on appeal."

(*Gutierrez*, *supra*, 45 Cal.4th at p. 809, alterations in original, quoting *People v. Carasi* (2008) 44 Cal.4th 1263, 1289, fn. 15.) That is precisely appellant's claim here: Appellant asserts that the recantation was admissible under Evidence Code section 1202 and that the trial court's erroneous exclusion of the evidence had the additional legal consequence of violating appellant's confrontation rights.

In *People v. Riccardi*, *supra*, 54 Cal.4th at pp. 801-802, this Court ruled that the defendant had forfeited a confrontation claim; however, that case is distinguishable from this one. In *Riccardi*, this Court cited the general rule that claims not raised at the trial court may not be raised at the first time on appeal and did not consider whether the confrontation claim

fell under the additional-legal-consequence exception to the forfeiture rule that this Court articulated in *People v. Partida*, *supra*, 37 Cal.4th at p. 438. By contrast, in this case appellant argues that his confrontation claim is preserved under the *Partida* exception. As this Court explained in *Partida*, cases finding a claim forfeited under the general forfeiture rule "do not preclude [this Court] from holding that [the] defendant may argue an additional legal consequence of the asserted [state-law evidentiary] error . . . is a violation of" his constitutional rights. (*Ibid.*) Accordingly, *Riccardi* does not support respondent's contention that appellant has forfeited this claim.

B. Excluding the Recantation Violated Appellant's Right to Confront Adverse Witnesses

The trial court violated appellant's right of confrontation when it excluded evidence that would have impeached Seeney's preliminary hearing testimony. Respondent, however, argues that his confrontation right was fully satisfied, because he had the opportunity to cross-examine Seeney at the preliminary hearing. (SRB 9-11.) Respondent is incorrect.

Although respondent concedes that the confrontation clause right encompasses impeachment, it argues that "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." (SRB 11.) Without any supporting authority, respondent suggests that appellant had no concomitant right to introduce evidence that would have impeached Seeney's preliminary hearing testimony, which came to light only *after* the preliminary hearing.

The precedents on which respondent relies in support of its argument fail to address appellant's claim. These precedents stand for the proposition

that the admission of an unavailable witness's prior testimony does not infringe the confrontation clause if the defense had an opportunity to cross-examine that witness at the time of his or her prior testimony, even when subsequent circumstances call into question the prior testimony's reliability. (See *California v. Green* (1970) 399 U.S. 149, 165-168 [holding admission of unavailable witness's preliminary hearing testimony did not violate confrontation clause because defendant had opportunity to cross-examine witness at preliminary hearing]; *People v. Carter* (2005) 36 Cal.4th 1114, 1172-1174 [same]; *People v. Wilson* (2005) 36 Cal.4th 309, 343 [same]; *People v. Zapien* (1993) 4 Cal.4th 929, 975 [same]; *People v. Hollinquest* (2010) 190 Cal.App.4th 1534, 1548-1549 [same].) However, appellant is not arguing that the admission of Seeney's preliminary hearing testimony violated his rights under the confrontation clause, and these cases do not address the question presented in this case, which is whether the trial court violated appellant's right to confront an adverse witness when it excluded impeachment evidence to which the defense had no access when it cross-examined Seeney at the preliminary hearing.

As appellant established in his Supplemental Opening Brief (ASOB 6), cross-examination is not the only method for challenging a witness's credibility. 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.)

In the instant case, because Seeney had not yet recanted his testimony at the time of the preliminary hearing, appellant could not have impeached his inculpatory testimony with that evidence during the preliminary hearing. Thus, because Seeney had been declared unavailable to testify at trial, the only way appellant could adequately confront Seeney — i.e., challenge the credibility of his inculpatory preliminary hearing testimony — was by introducing his subsequent recantation.

The Sixth Circuit Court of Appeals was recently confronted with a materially identical factual scenario. In *Blackston v. Rapelje* (6th Cir. 2015) 780 F.3d 340 (*Blackston*), two prosecution witnesses provided highly incriminating testimony in a murder trial and subsequently recanted their testimony. Following reversal of the defendant's conviction, the case was retried. For reasons irrelevant herein, the recanting witnesses were declared unavailable and their prior testimony was read into the record. The trial judge refused to allow the defendant to introduce the witnesses' recantations to impeach their prior testimony. The Court of Appeals held that the judge's ruling violated the defendant's right of confrontation. The court rejected the state's argument that the confrontation clause only guarantees the right to impeach witnesses through live cross-examination and noted that in *Davis v. Alaska* (1974) 415 U.S. 308, 315, the United States Supreme Court declared that "'[c]onfrontation involves more than being allowed to confront the witness physically.'" (*Blackston*, *supra*, 780 F.3d at p. 358.) The court explained:

In-person cross-examination is obviously possible only where

> the witness is physically available to testify in the courtroom and then elects to do so. Yet the Confrontation Clause applies not only to those witnesses who appear in court, but to *all* who "bear testimony" against the accused.

(*Id.* at p. 352, quoting *Crawford v. Washington*, *supra*, 541 U.S. at p. 51.) The court added that if a defendant could not impeach an unavailable witness's prior testimony at trial with information acquired after the witness testified at the prior proceeding, "[i]t would render many forms of admissible testimonial hearsay immune from challenge, thereby confounding the Confrontation Clause's goal of 'ensuring that convictions will not be based on the charges of . . . unchallengeable [ ] individuals.'" (*Blackston*, *supra*, at p. 352, quoting *Kentucky v. Stincer* (1987) 482 U.S. 730, 751.)

The same constitutional principles apply to the present case. If Seeney had testified at trial, appellant would have had the opportunity to cross-examine Seeney on the recantation of his preliminary hearing testimony. Appellant should not lose the opportunity to impeach Seeney with his recantation because the trial court deemed Seeney an unavailable witness. By excluding evidence of Seeney's recantation, the trial court insulated Seeney's prior testimony from impeachment with information acquired between the preliminary hearing and the trial. That ruling undercut the confrontation clause's goal of preventing convictions based on testimony that is immune from impeachment.

Respondent maintains that even if this Court concludes that appellant's "opportunity to confront and cross-examine Seeney at the preliminary hearing was insufficient to afford [appellant] the protections of the Sixth Amendment" (SRB 12), appellant cannot establish that his Sixth Amendment rights were violated because he cannot show that the

recantation "would have produced a significantly different impression of [the witness's] credibility." (*Ibid*.) But a fair reading of the recantation and Seeney's testimony yields the opposite conclusion.

Specifically, respondent contends that Seeney's relationship with appellant compromised his credibility and that the jury would have perceived the recantation as an attempt to protect his half-brother from his prior inculpatory testimony rather than an "an honest effort to clarify the record or tell the truth." (SRB 12-13.) Respondent contends that the jury would have concluded that Seeney's recantation was fabricated, because Seeney testified that he loved his brother, was emotional and crying when he inculpated his brother, and testified that he initially lied to law enforcement officers about appellant's involvement in the murders out of loyalty to appellant. (SRB 12.) Presumably, respondent argues, had the trial court admitted the recantation into evidence, the prosecution would have urged the jury to reject Seeney's recantation as incredible due to his bias. But the jury could have concluded otherwise.

If the recantation had been admitted into evidence, the jury might well have concluded that Seeney had initially truthfully denied to his interrogators that appellant committed the murders, had changed his story in response to pressure from his interrogators in order to protect himself, and had cried when testifying against appellant at the preliminary hearing because of his angst over falsely implicating his half-brother to save himself. There was ample evidence from which the jury could have concluded that Seeney's recantation, as opposed to his preliminary hearing testimony, was truthful. At the preliminary hearing, Seeney testified that his interrogators placed pressure on him to implicate appellant for the homicides. They threatened that he would spend decades in prison if he did

not cooperate with them, and made it clear that implicating appellant for the homicides constituted cooperation. Seeney testified that the interrogators frightened him. (14 RT 3747-3760.) He went one step further in his recantation and explained that his fear of being held culpable for the homicides induced him to falsely implicate appellant in the offenses. (1 Supp. CT 249.) Seeney indeed provided a plausible explanation for why he changed his story.

Next, respondent claims that the recantation would not have provided a significantly different impression of Seeney's credibility because he testified at the preliminary hearing that his interrogators had browbeaten him and then spent a large portion of the interview with defense counsel and the investigator talking about the interrogations and the pressures he felt during them. (SRB 13-14.) Respondent's argument disregards the crucial difference between the preliminary hearing testimony and the interview.

At the preliminary hearing, Seeney testified that his interrogators frightened him, but did not say that his fear impelled him to testify falsely. During the interview, Seeney explained that he falsely implicated his brother because he feared that he would be sent to prison indefinitely if he did not do so. (1 Supp. CT 242-245.) The fact that Seeney told defense counsel and the investigator the same thing to which he had testified, namely, that he felt pressured by the police to incriminate appellant, bolstered the credibility of his recantation by explaining his motive for falsely incriminating appellant.

Furthermore, although Seeney acknowledged during cross-examination at the preliminary hearing that his interrogators' threats of prosecution and lengthy incarceration frightened him, he made it abundantly

clear when interviewed by defense counsel, Joseph Canty, and the investigator, Ronald Forbush, that he was terrified he would spend years in prison if he did not tell his interrogators what they wanted to hear. He also explained that he merely repeated what the detectives told him they already knew, even if it was not true:

FORBUSH: Did you say anything that wasn't true as the things that you said about Javance?

CANTY: Or did you say some things to make them feel — to satisfy them?

SEENEY: Some of it. Some of it.

CANTY: Like what?

SEENEY: Like he — alright, look. My — I love my brother, man, you know what I'm saying? But what I'm saying is he hurt me when he wasn't around. I'm not saying — *he really didn't tell me a lot of — he didn't really tell me all them things. He didn't really tell me all of them.*

FORBUSH: How did you know what to say?

SEENEY: How did I know what to say?

FORBUSH: To the police.

SEENEY: Because they was — like I tell you they was trying to — they was trying to scare me and stuff.

FORBUSH: Yeah.

SEENEY: They was telling me like you said like thinks that, well, we got this and we know this. That.

FORBUSH: And so if they said that they already knew it, then you just repeated it?

SEENEY: Yeah.

FORBUSH: Is that what you're saying? I don't want to — I don't want to put words in your mouth. I want

to try and find out honestly what happened.

SEENEY: That's what happened. That's what they — that's what they was doing.

FORBUSH: Is some of the stuff that you told them the truth?

SEENEY: Like? Like?

FORBUSH: You know, about like the stuff that they wanted to know about Javance.

FORBUSH:[2] — guns and we're talking about some things that Javance is supposed to have said. You know, he was supposed to have told you about you know, about some of the crimes and, you know, was some of that true or was all of it true or was it not true at all?

SEENEY: Like they told me things that, you know what I'm saying, that I guess they already knew that found out by somebody else and I guess one of the attorneys talked to Phyllis and Phyllis said that Javance that they had a gun and they described it and all this type of stuff so I'm like, you know, I'm like dang, you know? How they know that? You know? So I'm like — and, see, that's what really had me screwed right there. You know? So I was like — the guy just asked me did I see it. 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.

CANTY: So you kind of felt like, well, they know what they want to hear from me and if they don't hear it from me I'm going to be in big trouble?

SEENEY: Right.

(1 Supp. CT 249-251, emphasis added.)

---

[2] The transcript identifies Ronald Forbush as the speaker. It may have been Joseph Canty.

Respondent also cites the fact that the jury was aware of the immunity agreement, under which Seeney would not be prosecuted for residential burglaries if he testified against appellant (RB 14), but this too lent credibility to Seeney's recantation, because it was further evidence of his motive to falsely incriminate appellant.

Respondent mischaracterizes the record by suggesting that the only thing Seeney claimed to have lied to his interrogators about was that he had seen appellant with .44 Magnum revolver, the same type of gun as the murder weapon, a few days before the homicides. (SRB 14-15.) As quoted above and below, Seeney also told the defense team that appellant had not made incriminating admissions regarding the robbery murders.

FORBUSH: Did Javance say that he used any kind of gun like that doing any killings or robberies or anything like that?

SEENEY: No.

FORBUSH: He never did tell you that?

SEENEY: No. No.

(1 Supp. CT 256.)

Respondent also erroneously asserts that Seeney's statements to the defense team concerning the .44 Magnum were largely consistent with his preliminary hearing testimony, and that the only difference between the two was that appellant had not told Seeney that he used a "large gun." (SRB 15.) This, too, misrepresents the record. Seeney denied that appellant had told him that he committed *any* killings or robberies with a gun resembling the murder weapon.[3]

---

[3] Respondent also claims that Seeney told the defense team he was (continued...)

Respondent further argues that "Seeney's inconsistent statement about whether he ever saw a .44 Magnum would not have produced a significantly different impression of his credibility," because the jury already knew that Seeney sometimes lied and sometimes told the truth when he spoke to the police officers, and that his "statements were only credible to the extent they could be corroborated by other evidence." (SRB 15.) This argument should be rejected for two reasons.

First, it ignores the fact that Seeney provided a plausible explanation in the defense interview for why he went from denying knowledge of the crimes to stating that he had seen appellant with the murder weapon and that appellant had told him he robbed and killed the two taxicab drivers. Not only was he terrified by the detectives' threats of lengthy incarceration if he did not incriminate his half-brother, but then in making the incriminating statements, he also simply repeated what the detectives told him they already knew. Had the recantation been admitted into evidence, it would have established that Seeney had a strong motive to lie when he testified that appellant had admitted robbing and killing the two taxicab drivers.

Second, respondent's argument that Seeney's statements were only credible to the extent they were corroborated by other evidence, disregards

---

[3](...continued)
surprised to discover that the police knew about the .44 Magnum, and that he "inferred [Phyllis] Woodruff, his girlfriend, told the police about the gun as they had been together when Wilson showed them the gun." (SRB 15.) It is not clear from the record how Seeney knew Woodruff had told the detectives about seeing the gun when she and Seeney were in the apartment with appellant, although the logical explanation is that the detectives informed him of it. However, as Seeney explains in the interview, upon learning of this, he felt that if he did not go along with that story he would face significant penal consequences. (1 Supp. CT 251.)

the fact that there was no evidence to corroborate Seeney's inculpatory testimony regarding appellant's admissions to the homicides. No other witness testified that appellant had admitted committing these crimes.

In sum, contrary to respondent's assertion, had the jury been able to consider the excluded recantation, it would necessarily have altered the jury's view of the credibility of Seeney's inculpatory preliminary hearing testimony. Not only did the defense interview explain the circumstances under which Seeney felt compelled to falsely incriminate his brother, but by recanting his testimony, Seeney admitted that he lied under oath and thereby subjected himself to prosecution for perjury. Accordingly, the recantation was crucial to impeach the testimony of the prosecution's most important witness, and its exclusion violated appellant's Sixth Amendment right to confront adverse witnesses.

C. The Confrontation Clause Violation Requires Reversal

The violation of appellant's confrontation rights was not harmless. Seeney's testimony regarding appellant's purported admissions was the most incriminating part of both his testimony and the prosecution's case against appellant. During guilt-phase closing arguments, the prosecutor averred that appellant's admissions substituted for the absence of a videotaped confession. (18 RT 4850-4851.) No physical evidence tied appellant to any crime scene,[4] and appellant did not confess any crimes to the police. The key evidence purporting to show that appellant had killed the taxicab drivers was appellant's alleged admissions, to which only Seeney testified.

---

[4] Contrary to respondent's assertion, appellant's fingerprints were not found in any of the taxicabs in this case. (See *ante*, at p. 9.)

Respondent claims, however, that the error was harmless because (1) the recantation was admissible only for impeachment, (2) Seeney's preliminary hearing testimony was corroborated by other evidence, and (3) the jury would have convicted appellant even if Seeney's testimony were completely disregarded because the other evidence demonstrated appellant's guilt. (SRB 15-19.) For the reasons discussed below, this Court should reject each of these arguments.

In this case, there was no practical difference between the admission of the recantation for all purposes or for impeachment only. Admitting the recantation to prove the truth of the matter asserted would have provided evidence that appellant did not admit to killing the taxicab drivers. If the recantation had been admitted for impeachment only, the jury could have rejected Seeney's testimony as incredible and concluded that the record was devoid of credible evidence that appellant had admitted to committing any murders. Crediting Seeney's recantation as substantive evidence or impeachment evidence would have brought the jury to the same conclusion: The record lacked credible evidence that appellant made admissions regarding the homicides. Thus, even if Seeney's statements to the defense team were only admissible to impeach his preliminary hearing testimony, their erroneous exclusion was still highly prejudicial to appellant's defense.

In addition, respondent asserts that any confrontation clause violation was harmless because "several facts from Seeney's preliminary hearing testimony were corroborated by other evidence, demonstrating its truthfulness, and never denied or refuted during the interview." (SRB 16.) Significantly, the record contains no direct corroboration that appellant made admissions to Seeney regarding the homicides. The purported corroboration amounts to nothing more than circumstantial evidence from

which respondent infers appellant's guilt. But the circumstantial evidence could have led the jury to conclude that these crimes were committed by either one or both of the McKinney brothers, rather than by appellant.

There was ample evidence before the jury to support the inference that Brad or Cory McKinney committed the crimes. The McKinney Brothers were Sylvester Seeney's close friends. (14 RT 3642.) Hours after the homicides, Cory McKinney carried Sylvester Seeney's white jacket, which the perpetrator was seen wearing when he shot Victor Henderson, and the cell phone that had been stolen from Andres Dominguez. (14 RT 3592-3595; 17 RT 4601.) One of the calls dialed from Dominguez's cell phone the day after it was stolen was made to Arlene Best, a friend of Cory McKinney's. (16 RT 4209.) In addition Karen Smith testified that Henderson's assailant's right leg dragged on the pavement when the getaway driver attempted to escape the Pomona crime scene prematurely (15 RT 3984-3985), and there was evidence that Cory McKinney had an injured leg. Law enforcement officers found scabs on Cory McKinney's right leg two weeks after the homicides, but observed no injury to appellant's leg upon his arrest eleven days after the crime.[5] (16 RT 4192, 4208; 17 RT 5487-5491.) Tiffany Hooper, who saw appellant and Cory McKinney the morning after the homicides, initially told the police that Cory McKinney, not appellant, had been injured and had told Hooper he had been shot in the leg in Los Angeles. (17 RT 4601.) David and Michelle Sisemore, who lived in Pomona near the scene of the Henderson homicide,

---

[5] Sergeant Robert Dean observed that Cory McKinney had scabs on his right leg two weeks after these incidents, but accepted Cory McKinney's explanation that he had been bitten by a dog and scratched by a cat. (16 RT 4208, 17 RT 4591.)

heard the getaway driver say to the shooter, "Hurry up, Trey." (16 RT 4039, 4055.) Trey was Cory McKinney's nickname. (14 RT 3587-3588.) During the investigation of the homicides, Cory McKinney gave Sergeant Robert Dean approximately five different alibis. (17 RT 4586, 4594; 18 RT 4742-4743.) Cory McKinney was not the only McKinney brother whose guilt could be inferred; Sergeant Dean testified that he had not dismissed Brad McKinney as a suspect in the offenses. (16 RT 4199.)

In addition, evidence suggesting that the McKinney brothers committed the homicides against Dominguez and Henderson implied that one of them perpetrated the robbery of James Richards, because the incidents were similar and appeared to be part of a common plan or scheme.[6] Moreover, law enforcement officers found the gun that was used in the Richards robbery at the McKinney brothers' apartment. (15 RT 3998-4001.)

Respondent, however, asserts that testimony from James Richards, the surviving robbery victim, that the perpetrator's gun jammed corroborates Seeney's testimony that appellant told him that the gun had jammed. (SRB 16.) Although the consistency between Richards's and Seeney's accounts of the incident shows that Seeney knew that the perpetrator's gun had jammed during the robbery, the record reflects that he could have acquired this information from a source other than appellant. Seeney could have known that the gun jammed because Brad or Cody

---

[6] In all three of the incidents involving taxicab drivers, the perpetrator called for a taxicab to take him to a destination, and after being picked up, robbed or killed the driver upon reaching that destination. The incidents involving James Richards and Andres Dominguez occurred at the same poorly lit dead end on Laurel Avenue in Bloomington. (13 RT 3773-3774; 14 RT 3580; 15 RT 3843-3848.)

McKinney had robbed Richards and told Seeney about it.

The record also contained evidence from which a rational jury could alternatively have found that Seeney had robbed Richards. Some of the circumstantial evidence that suggested appellant perpetrated the offenses pointed similarly toward Seeney's guilt. Both Seeney and appellant were familiar with the location in Bloomington where the robbery took place. (14 RT 3729; 21 RT 5674-5681.) The Stater Bros. in San Bernardino in front of which Richards picked up his fare was one block from the hotel where appellant and Seeney's mother lived. Appellant and Seeney were visiting her there together before Richards was dispatched to downtown San Bernardino. (14 RT 3644.) Richards's stolen taxicab was parked a quarter mile from the apartment that appellant and Seeney shared. (16 RT 4151, 4156.)

Respondent also points to the testimony of Karen Smith, who observed part of the incident involving Victor Henderson from her bedroom window in Pomona, as corroboration of Seeney's testimony. Smith testified that the perpetrator wore a knee-length puffy white jacket. (SRB 16-17.) Seeney testified that he had lent appellant his puffy white jacket the afternoon before the homicides; however, when appellant tried on the jacket in court, went down only to his waist. (15 RT 3989; 17 RT 4340; 18 RT 4782.) Because appellant lost weight between the homicides and trial, the jacket would have appeared longer on appellant at the time of trial than in February 2000. (17 RT 4340.)

Respondent further contends that Smith's testimony that she saw the perpetrator's leg drag on the pavement when the getaway driver attempted to flee before he could get into the car corroborated Seeney's testimony that appellant told him his leg had been injured during the Henderson robbery-

murder. (SRB 17; 14 RT 3736; 15 RT 3984-3985.) But, for the reasons discussed above (see *ante*, at pp. 15-21), a rational jury could have concluded that Seeney testified falsely when he said that appellant told him that he had injured his leg while escaping from the crime scene. To reiterate, Seeney's jacket did not fit appellant the way Smith had seen the jacket fit the assailant. The getaway driver called Cory McKinney's nickname to the assailant. Sergeant Dean observed a scab on Cory McKinney's right leg after the homicides, but appellant had no scab, scar, or other remnant of a leg injury when he was arrested eleven days after the homicides. Before she changed her story, Tiffany Hooper said that Cory McKinney, not appellant, had injured his leg on the night of the homicides. (17 RT 4601.) An untied sneaker that fit Cory McKinney but not appellant was found on the street where Victor Henderson had been killed. (17 RT 4334-4335, 4587; 18 RT 4919.) Accordingly, although Smith's testimony provided airtight corroboration that Seeney knew the assailant had injured his leg, her testimony did not establish appellant's identity as the assailant.

In addition, respondent states that Seeney's girlfriend, Phyllis Woodruff, confirmed Seeney's testimony that Woodruff served as the getaway driver for residential burglaries that Seeney and appellant had committed together. (SRB 17.) Although Woodruff corroborated that aspect of Seeney's testimony, the corroboration concerned an undisputed fact and did not bear upon the critical factual controversy of Seeney's testimony — whether appellant had admitted to committing the charged crimes. Thus, Woodruff's corroborating testimony concerning residential burglaries was insufficiently significant to show that Seeney had testified truthfully regarding appellant's purported admissions.

Respondent also contends that the exclusion of Seeney's recantation

was harmless because "the complete discrediting of Seeney would not have altered the outcome" (SRB 17), because appellant's guilt was established by other evidence. (SRB 16-19.) However, respondent overstates the strength of that other evidence and understates how critical Seeney's testimony was to the prosecution's case.

Without Seeney's testimony, it is doubtful that the prosecution would have secured a conviction. As stated above, the prosecutor compared appellant's admissions to a videotaped confession. (18 RT 4850-4851.) Seeney was the only witness who testified that appellant purportedly admitted to robbing and killing Andres Dominguez and Victor Henderson on February 21, 2000.

When arguing that the jury would have convicted appellant even if it had rejected Seeney's testimony (SRB 17-19), respondent misconstrues the record. If the trial court had admitted the recantation into evidence, the evidence would have raised a reasonable doubt regarding appellant's guilt. Without Seeney's testimony, the evidence against appellant was far from overwhelming.

Respondent first argues that Phyllis Woodruff's testimony was largely duplicative of Seeney's testimony. (SRB 17.) As explained in Appellant's Reply Brief (ARB 77-78), this argument misstates the scope of Woodruff's testimony. Woodruff was not present when appellant allegedly told Seeney he committed the homicides, and therefore could not corroborate that appellant had done so. Thus, Woodruff's testimony did not duplicate the most critical portion of Seeney's preliminary hearing testimony.

The areas where Woodruff's testimony duplicated Seeney's testimony fell far short of establishing appellant's guilt of the capital

crimes. Respondent cites the following portions of Woodruff's testimony that echoed Seeney's testimony: (1) appellant told Woodruff and Seeney that he had robbed James Richards and would have shot him in the mouth if the gun had not jammed, (2) appellant showed Woodruff and Seeney the wallet and taxicab that he had stolen from Richards, (3) appellant gave Brad McKinney the gun from that robbery, and (4) appellant admired a .44 Magnum that he and others had stolen in a residential burglary. (SRB 17-18.) The latter two portions of the overlapping testimony were attenuated from whether appellant perpetrated the homicides. This testimony was not remotely as probative of appellant's alleged guilt as Seeney's unduplicated testimony of appellant's purported admissions to killing Dominguez and Henderson. In other words, a rational jury could have harbored reasonable doubts about appellant's guilt of the homicides even if it concluded that appellant had given Brad McKinney the gun used in the Richards robbery and had admired a .44 Magnum at some point during the week that preceded the homicides.

The other areas of overlapping testimony, in which appellant purportedly admitted to robbing and attempting to kill Richards and showed Seeney and Woodruff the stolen wallet and taxicab, also did not definitively establish that appellant committed separate crimes six weeks later. There were sufficient similarities between the Richards incident and the Dominguez and Henderson incidents to suggest a common plan or scheme, but the incidents were not so distinctive to prevent a reasonable juror from concluding that appellant robbed Richards but someone else (perhaps Cory McKinney) killed Dominguez and Henderson. Appellant, Seeney, Woodruff, and the McKinney brothers had committed crimes, including residential burglaries and possession of stolen weapons, together. Evidence

showing that this group committed both the Richards robbery and the subsequent homicides did not prove that the member of the group who had robbed Richards had killed Dominguez and Henderson. Thus, a rational jury could have had a reasonable doubt regarding whether appellant had committed the crimes against Dominguez and Henderson even if it credited Woodruff's testimony regarding the Richards robbery and concluded that appellant had robbed Richards. Indeed, at the first trial, two more jurors voted to convict appellant of the counts related to the Richards robbery than voted to convict appellant of the counts related to the Dominguez and Henderson homicides. (11 RT 2338-2340.)

Moreover, the record contained myriad evidence from which a rational jury could conclude that Woodruff's testimony was not credible. As Seeney's girlfriend, she had a motive to fabricate her testimony to protect Seeney from culpability for the crimes. As discussed above (see *ante*, at p. 25), the record contains evidence from which a jury could reasonably conclude that Seeney had robbed Richards. In addition, in exchange for her testimony, she received immunity for her participation in residential burglaries (14 RT 3655-3656); the immunity provided her with a motive to inculpate appellant. Furthermore, evidence indicated that Woodruff visited or spoke with Seeney several times in jail and therefore had the opportunity to coordinate a common story regarding the Richards robbery. (14 RT 3670-3672.)

As defense counsel argued, because appellant was the outsider in the group of people who committed crimes together, they would have blamed appellant for committing those crimes:

> It is clear that Mr. Wilson, during the days just prior to his arrest, was finding himself in the company of his half brother

> Sylvester Seeney, Phyllis Woodruff, and Brad and Cory McKinney.
>
> Phyllis Woodruff told you he was accepted by the McKinneys because he was a relative of Sylvester Seeney and Sylvester was close friends with the McKinneys. But Mr. Wilson is not on trial for the company he kept. . . . If within this circle of people I have just described there is an odd man out, it is Javance Wilson. If when the heat is on someone has to be blamed and become the sacrificial lamb, it is Javance Wilson.

(18 RT 4890-4891.) A rational jury could have found this argument persuasive and doubted the veracity of Phyllis Woodruff's testimony regarding the Richards robbery.

Respondent contends that appellant also admitted the murders to his then wife, Melody Mansfield. (SRB 18.) Respondent's argument ignores a critical fact: The source of that evidence was Sylvester Seeney. Mansfield neither testified nor provided out-of-court evidence regarding any statements appellant had purportedly made regarding the crimes against the taxicab drivers. Evidence that appellant allegedly made admissions to Mansfield does not render the erroneous exclusion of the recantation harmless — to the contrary, that evidence underscores the significance of Seeney's preliminary hearing testimony in forming the prosecution's guilt-phase case-in-chief. Without Seeney's preliminary hearing testimony, the record would contain no evidence that appellant purportedly admitted to anybody that he had robbed or killed Andres Dominguez or Victor Henderson.

Respondent also claims that appellant stating "it's because of those murders" at the time of his arrest supports its argument that any error was harmless. (SRB 18.) That is not so. Appellant's statement carries no

meaningful inference of guilt because law enforcement officers had already told Melody Mansfield and appellant earlier that day, while Mansfield was driving appellant in her truck, that appellant was suspected of murder. (16 RT 4182; 18 RT 4781.) Accordingly, when appellant mentioned the murders to the arresting officers, he did not reveal a consciousness of guilt; rather, appellant merely stated that he knew why the officers were arresting him.

Respondent further argues that any error was harmless because James Richards identified appellant as the assailant who had robbed him. (SRB 18.) However, several factors cast doubt on the accuracy of that identification. (See AOB, Argument I; ARB, Argument I.) As explained in the original briefing, Richards could not identify appellant in a live lineup. (15 RT 3870.) Richards's observations of the perpetrator were hindered by the dark of night. (18 RT 4781.) Richards initially suspected that Ray Bradford, a person with whom he lived at a drug rehabilitation facility, was the person who had robbed him. (15 RT 3878-3880.) Richards's identification of appellant in a photo array was tainted by undue suggestiveness. Indeed, appellant challenged the accuracy and reliability of Richards's identification at trial. (18 RT 4644-4703.)

Respondent points to evidence that appellant had injured his leg on the night of the homicides as proof of harmlessness. But, as explained in Appellant's Opening Brief (AOB 12-14) and above (see *ante*, at pp. 23, 26), this evidence was called into question, because appellant had no limp or other sign of injury when he was arrested several days after the homicides. (16 RT 4192; 17 RT 4587-4588.) In contrast, Cory McKinney had scabs on his legs two weeks after the incidents. (16 RT 4208; 17 RT 4591.) David and Michelle Sisemore heard the getaway driver called out the name "Trey"

to get the assailant's attention and tell him to hurry; Trey is Cory McKinney's nickname. (14 RT 3599; 16 RT 4039, 4055.) Tiffany Hooper initially said that Cory McKinney told her on the morning after the homicides that he had injured his leg on the preceding night. (17 RT 4601.) These facts suggest that Cory McKinney, not appellant, committed the crimes and injured his leg on February 21, 2000. This third-party-culpability evidence undercuts respondent's harmlessness argument. If the recantation caused the jury to doubt whether appellant had made the purported admissions, evidence that pointed toward Cory McKinney's guilt could have provided the jury with a reasonable doubt that appellant had perpetrated the offenses.

Respondent also argues that ballistics evidence and Andres Dominguez's cell phone records suggest that the same person killed Dominguez and Victor Henderson. (SRB 18.) That evidence does not show harmlessness, however, because the jury could not infer from that evidence that appellant was the person who shot both victims.

As highlighted at the outset of this brief (see *ante*, at p. 9), respondent also claims that the error was harmless because appellant left fingerprints in Dominguez's taxicab. (SRB 18.) But no such evidence exists. No fingerprints found in Dominguez's taxicab matched appellant. (15 RT 3997, 4002.) Simply put, the physical evidence in this case did not connect appellant to the homicides.

Respondent concludes its harmlessness argument by asserting that if the jury had rejected Seeney's entire testimony, "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.'" (SRB 19, quoting *People v. Capistrano* (2014) 59 Cal.4th 830, 873.) This Court should reject

this argument for four fundamental reasons.

First, after Seeney's testimony gets set aside, the evidence of appellant's guilt stands in equipoise. Evidence that a third party had perpetrated the crimes against the taxicab drivers counterbalanced the evidence suggesting that appellant had committed the crimes. The key evidence suggesting guilt included James Richards's identification in a photo array and in court of appellant as the person who had robbed him, Phyllis Woodruff's testimony that appellant told her and Seeney that he had robbed James Richards and showed them the stolen wallet and taxicab, testimony from Woodruff and her father that appellant had borrowed Seeney's white jacket several hours before the homicides, and testimony from Sara Bancroft, Tiffany Hooper, and Kristina Murphy that they had observed appellant limping on the morning after the homicides. On the other hand, evidence suggesting that Cory McKinney was the assailant included David and Michelle Sisemore's testimony that the getaway driver called the assailant "Trey" (Cory McKinney's nickname), the scabs observed on Cory McKinney's leg, Cody McKinney's numerous false alibis that he provided law enforcement officers, Tiffany Hooper's initial statement that Cody McKinney was the person who had injured his leg on the night of the homicides, the omission of any mention of appellant having purportedly injured his leg in Sara Bancroft and Kristina Murphy's initial statements, and Karen Smith's testimony that the puffy white jacket went down to the assailant's knees (the jacket was waist-length when appellant wore it.) Moreover, James Richards's identification of appellant was suspect, due to Richards's inability to identify appellant at a live lineup, his initial belief that Ray Bradford might have robbed him, and the cues Richards received regarding his identification of appellant in a photo array.

A rational jury would have — or, at least, could have — concluded that this conflicting evidence raised a reasonable doubt regarding appellant's alleged guilt.

Second, the guilt-phase closing arguments from both parties demonstrated the significance of Seeney's testimony. The prosecutor asserted that appellant's alleged admissions constituted proof of guilt as powerful as a confession to the police would have been. (18 RT 4850-4851.) In his closing argument, defense counsel argued that Seeney's testimony regarding appellant's alleged admissions and actions comprised most of the material from which the prosecutor, in his summation, inferred appellant's guilt. (18 RT 4892-4893.) The absence of physical evidence implicating appellant in the murders underscored the importance of Seeney's testimony: "[T]he 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.'" (*Blackston*, *supra*, 780 F.3d at p. 355, quoting *Napue v. Illinois* (1959) 360 U.S. 264, 269.) Accordingly, the exclusion of evidence that undercut the credibility of Seeney's prior testimony and statements was prejudicial.

Third, the procedural history of this case shows that this was a close case. In the first trial, the jury hung at its guilt-phase deliberations.[7] (See *People v. Kelley* (1967) 66 Cal.2d 232, 245 [finding hung jury significant]; see also *In re Richards* (2016) 63 Cal.4th 291, 319-321 (conc. opn. by Liu,

[7] The jury at the first trial could not reach a verdict on any count. The jury was split 11-1 in favor of conviction on the counts related to the Richards robbery and 9-3 on the counts pertaining to the Dominguez and Henderson murders. (11 RT 2838-2839.)

J.)); but see *Richards*, at pp. 315-319 (conc. opn. by Corrigan, J.).) At the retrial, the jury deliberated for over a week before it returned a guilt verdict. (See *Parker v. Gladden* (1966) 385 U.S. 363, 365 ["the jurors deliberated for 26 hours, indicating a difference among them"].) During those lengthy deliberations, the jury requested a readback of Seeney's testimony, which implies that the case was close and that Seeney's testimony was important. (See *People v. Avila* (2005) 131 Cal.App.4th 163, 171.)

Fourth, respondent's argument conflicts with the United States Supreme Court's pronouncement that harmless-error analysis considers "whether the guilty verdict actually rendered in this trial was surely unattributable to the error," rather than the outcome of a hypothetical error-free trial. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Respondent's contention that "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'" (SRB 19, quoting *People v. Capistrano*, *supra*, 59 Cal.4th at p. 873) fails to address the harmlessness question that the United States Supreme Court posed in *Sullivan*.

Notwithstanding respondent's arguments to the contrary, Sylvester Seeney's testimony regarding appellant's purported admissions to the crimes against the taxicab drivers contributed to the guilty verdicts in this case. Respondent therefore cannot demonstrate that the violation of appellant's confrontation rights was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.)

//

//

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

In Appellant's Supplemental Opening Brief, appellant argued that if this Court concludes that appellant forfeited his state-law claim, appellant received ineffective assistance of counsel as a result of defense counsel's failure to explicitly cite Evidence Code section 1202 as a basis for admitting the evidence. (ASOP 9-11.) Respondent does not argue that appellant cannot show counsel performed deficiently, but contends that appellant has failed to demonstrate that he received ineffective assistance because he cannot, under the test articulated in *Strickland v. Washington* (1984) 466 U.S. 668, 684, show that counsel's deficient performance was prejudicial. (SRB 19-22.)

Respondent makes a two-fold argument to support its position that appellant cannot demonstrate prejudice. First, respondent avers that the trial court would still have excluded the recantation under Evidence Code section 352 if the court had been aware that the recantation was admissible under Evidence Code section 1202. (SRB 20-21.[8]) Second, respondent reiterates its argument from Argument I that the admission of the recantation would not have altered the outcome in this case. (SRB 21-22.) This Court should reject both arguments.

First of all, it would be speculative to conclude that the trial court would have excluded the evidence under an analysis that it did not

---

[8] In its supplemental brief, respondent disavows its prior position that the recantation was not admissible under section 1202. (SRB 8, fn. 2.)

undertake. Respondent notes that trial court "expressed concern that the statements would be misinterpreted or misused because they were not subject to cross-examination" (SRB 21); however, those comments were a product of the court's misunderstanding of the law. By excluding the recantation because it was not subject to cross-examination, the trial court ascribed too much value to the benefit of cross-examination for evidence admitted for impeachment only. The trial court presumably would not have skewed a balancing test under section 352 if the court had been aware that the recantation was plainly admissible under section 1202. Of course, section 352 is not a vehicle for a trial court to override sections of the Evidence Code with which it disagrees.

Moreover, the recantation could not have properly been excluded under Evidence Code section 352. Although the recantation was admissible for impeachment only, the evidence had substantial probative value because Seeney was a key witness and his credibility was central to the prosecution's case. The court's concerns that the recantation was not trustworthy or would be misused by the jury, on which respondent relies (SRB 21), was not a proper basis for the court to exclude evidence. Even if the court had not believed the recantation to be credible, it would have been improper to exclude it under section 352, because it was the jury's province — not the court's — to determine the credibility of Seeney's prior testimony and recantation. (See *People v. Cudjo* (1993) 6 Cal.4th 585, 610 [explaining legitimate doubts about a witness's credibility do not constitute prejudice under Evidence Code section 352].)

For the reasons discussed in the first claim and in the Claim IV briefing of Appellant's Opening Brief and Appellant's Reply Brief, excluding the recantation was prejudicial. (See *ante*, at pp. 21-35; AOB

195-198; ARB 93-97.) In the opening and reply briefs, appellant already showed that there was a reasonable probability that he would not have been convicted if the trial court had not erroneously excluded the recantation. (AOB 195-198; ARB 93-97, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) In light of the importance of Seeney's testimony regarding appellant's purported admissions and the closeness of this case, it is reasonably probable that the recantation of Seeney's testimony regarding those admissions would have altered the outcome in this case.

//

//

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

Appellant has argued that this Court's previous decisions regarding the constitutionality of California's death penalty scheme, as challenged under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*), should be reconsidered in light of *Hurst v. Florida* (2016) ___ U.S. ___ [136 S.Ct. 616] (*Hurst*). (ASOB 12-28.)

Respondent does not address the substance of appellant's claim, but simply argues that this Court has found that *Hurst* does not affect its previous decisions. (RSB 22-25.) In both of the cases cited by respondent, this Court stated that California's statute was materially different than the former Florida scheme because this state requires a jury verdict before death can be imposed, unlike the advisory opinion that was at issue in Florida. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16; *People v. Jackson* (2016) 1 Cal.5th 269, 374.)

The issue before this Court is not the role of the jury in imposing death, but the factual determinations that must be made. As appellant argued (ASOB 22-23), this Court has construed Florida's sentencing directive to be comparable to California — if the sentencer finds that aggravating circumstances outweigh mitigation, a death sentence is authorized, but not mandated. (*People v. Brown* (1985) 40 Cal.3d 512, 542 (revd. on other grounds *sub nom. California v. Brown* (1987) 479 U.S. 538).)

In the past, this Court distinguished between the findings that are made before death is imposed — the weighing of aggravation and mitigation — and the kind of factual determinations at issue in *Apprendi* and *Ring*. (See, e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 262-263; *People v. Merriman* (2014) 60 Cal.4th 1, 106.) *Hurst* made clear that the weighing decision — "that there are insufficient mitigating circumstances to outweigh aggravating circumstances" — was part of the "necessary factual finding that *Ring* requires*."* (*Hurst*, *supra*, 136 S.Ct. at p. 622, citing former Fla. Stat. § 921.141(3).) The significance of *Hurst* for California, then, is that it brings the weighing process clearly within the ambit of *Ring*.

Both *Rangel* and *Jackson* were decided before the decisions of the Florida Supreme Court in *Hurst v. State* (Fla. 2016) 202 So.3d 40, and the Delaware Supreme Court in *Rauf v. State* (Del. 2016) 145 A.3d 430. Although appellant discussed these cases (ASOB 25-28), respondent does not address either opinion. In Florida, the state supreme court described the sentencing factors, including the weighing process itself, as "elements" that the sentencer must determine, akin to elements of a crime during the guilt phase. (*Hurst v. State*, *supra*, 202 So.3d at pp. 53-54.) The court emphasized that the "critical findings necessary for imposition of a sentence of death" were "on par with elements of a greater offense." (*Id*. at p. 57.) In Delaware, the state supreme court explained that the weighing determination "is a factual finding necessary to impose a death sentence." (*Rauf v. State*, *supra*, 145 A.3d at p. 485 (conc. opn. of Holland, J.).) These cases support appellant's contention that even though the sentencer might have been different between the former Florida scheme and California's death penalty law, the necessary factual findings are similar.

Although this Court has emphasized the normative aspect of a juror's penalty decision to find that California is not bound by *Apprendi* or *Ring*, the weighing determination and the ultimate sentence-selection decision are not a unitary finding. As appellant has argued, they are two distinct determinations. The jury's finding that the aggravating circumstances outweigh the mitigating circumstances is the necessary factual finding that brings the jury to its final normative decision: Is death the appropriate punishment considering all the circumstances? (ASOB 24-25.)

Respondent glosses over the distinction between the jury's two penalty-phase determinations in arguing that *Kansas v. Carr* (2016) __ U.S. __ [136 S. Ct. 633] (*Carr*) "effectively forecloses Wilson's argument that determinations at the penalty phase must be made beyond a reasonable doubt." (SRB 24.) It is true that *Carr* questioned whether the sentence-selection decision is a factual determination to which a standard of proof can meaningfully be applied. (*Carr*, *supra*, 136 S. Ct. at p. 642.) But appellant has not argued otherwise. Appellant's argument pertains to the first part of the jury's penalty determination, concerning the existence of aggravating circumstances and whether they outweigh the mitigating circumstances, not to the second part, i.e., the determination of whether death ultimately ought to be imposed. Contrary to respondent's argument, Carr supports appellant's position because the Supreme Court specifically noted that the determination of whether an aggravating factor exists is "a purely factual determination," and that is a determination for which it is possible to apply a standard of proof. (*Ibid*.)[9]

[9] Accordingly, to the extent this Court has relied on Carr to reject appellant's claim (see *People v. Winbush* (2017) 2 Cal.5th 402, 489; *People v. Williams* (2016) 1 Cal.5th 1166, 1204), appellant requests that this Court (continued...)

Respondent's citation to *People v. Brown* (1988) 46 Cal.3d 432, 456, for the proposition that age may be either an aggravating or a mitigating factor, illustrates appellant's point. (SRB 25.) It is true that under Penal Code section 190.3, subdivision (i), jurors may consider a defendant's age at the time of the offense and this factor is not necessarily aggravating or mitigating. This does not mean, however, that there is no fact finding to be done. It simply means that the jurors must make a factual determination about the existence of aggravating and mitigating factors, including the age of the defendant. (See *People v. Burney* (2009) 47 Cal.4th 203, 260 [jurors must make "certain factual findings in order to consider certain circumstances as aggravating factors"].) The weighing question then asks jurors to determine a second factual issue: do the aggravating circumstances outweigh the mitigating circumstances? It is only when these factual findings are made that the jury can determine whether death is warranted.

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

---

[9](...continued)
reconsider the issue, taking into account appellant's argument presented here and in Appellant's Supplemental Opening Brief, and the analysis in *Hurst v. State*, *supra*, 202 So.3d 40, and *Rauf v. State*, *supra*, 145 A.3d 430.

aggravating circumstances substantially outweigh the mitigating circumstances does not change the factual nature of this inquiry.

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

CONCLUSION

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

Dated: December 21, 2017

Respectfully submitted,
MARY K. McCOMB
State Public Defender

JESSICA K. McGUIRE
Assistant State Public Defender

/s/
CRAIG BUCKSER
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 9,419 words in length.

Dated: December 21, 2017

/s/
CRAIG BUCKSER
Deputy State Public Defender

DECLARATION OF SERVICE

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

I, **Gary Johnston**, 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 REPLY 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 **December 21, 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	

//
//

The following were served the aforementioned document(s) electronically via TrueFiling on **December 21, 2017**:

Meredith S. White, Deputy Attorney General 600 W. Broadway, Suite 1800 San Diego, CA 92101 meredith.white@doj.ca.gov	California Appellate Project 101 Second Street, Suite 600 San Francisco, CA 94105 filing@capsf.org

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **December 21, 2017**, at Sacramento, California.

/s/
GARY JOHNSTON

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. WILSON (JAVANCE MICKEY)**
Case Number: **S118775**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **craig.buckser@ospd.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
SUPPLEMENTAL BRIEF	Appellants Supplemental Reply Brief

Service Recipients:

Person Served	Email Address	Type	Date / Time
Attorney General - San Diego Office Meredith S. White, Deputy Attorney General SDG	meredith.white@doj.ca.gov	e-Service	12-21-2017 11:27:29 AM
eService California Appellate Project California Appellate Project 000000	filing@capsf.org	e-Service	12-21-2017 11:27:29 AM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

12-21-2017
Date

/s/Craig Buckser
Signature

Buckser, Craig (194613)
Last Name, First Name (PNum)

Office of the State Public Defender
Law Firm