IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. BILLY RAY WALDON, ALSO KNOWN AS N.I. SEQUOYAH, Defendant and Appellant.	No. S025520 San Diego Superior Court No. CR82986 Death Penalty Case

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

Honorable David M. Gill, Judge

APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES

Page(s)

STATE CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

STATE STATUTES

TABLE OF AUTHORITIES

Page(s)

COURT RULES

JURY INSTRUCTIONS

OTHER AUTHORITIES

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APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

XXIII
GIVEN THE UNIQUENESS OF THE DEATH PENALTY AND THE NEED FOR HEIGHTENED RELIABILITY OF DEATH JUDGMENTS, THE TRIAL COURT ERRED BY ALLOWING APPELLANT TO REPRESENT HIMSELF AT HIS CAPITAL TRIAL

As discussed in Appellant's Opening Brief (AOB) at page 825, in *People v. Schmeck* (2005) 37 Cal.4th 240 (*Schmeck*), this Court held that "routine" claims that this Court has repeatedly rejected will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.) Because it has been repeatedly rejected, appellant presumes that the following argument falls under the ambit of *Schmeck*. In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenge in order to urge reconsideration and to preserve the claim for federal review. Should the

Court decide to reconsider this claim, appellant requests the right to present further supplemental briefing.

As appellant discussed in Argument XX of the AOB at pages 804-824, the trial court erred by allowing appellant to represent himself throughout his capital trial without determining whether his mental disabilities prevented him from effectively doing so. Appellant urges here that, *regardless* of his mental disabilities, the trial court erred by allowing appellant to represent himself.[1]

In *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*), the United States Supreme Court held that in some circumstances, a criminal defendant must be permitted to conduct his own defense. (*Id.* at pp. 819, 836.) But "*Faretta* itself and later cases have made clear that the right to self-representation is not absolute." (*Indiana v. Edwards* (2008) 554 U.S. 164, 171 (*Edwards*).) Instead, as the Supreme Court noted in both *Edwards* and *Martinez v. Court of Appeal* (2000) 528 U.S. 152 (*Martinez*), "'the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.'" (*Edwards, supra*, 554 U.S. at p. 177, quoting *Martinez, supra*, 528 U.S. at p. 163.) Appellant requests that this Court hold that a capital defendant must be represented by counsel.

The Supreme Court has long acknowledged that, under the Eighth and Fourteenth Amendments to the United States Constitution, death is different. In *Gregg v. Georgia* (1976) 428 U.S. 153 (*Gregg*), for example, the Supreme Court described its prior opinion in *Furman v. Georgia* (1972) 408 U.S. 238, as holding that "the penalty of death is different in kind from

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[1] For the sake of clarity, the instant argument is numbered Argument XXIII and follows Arguments I through XXII, which were raised in the AOB. The two arguments that follow are numbered Arguments XXIV and XXV.

any other punishment imposed under our system of criminal justice," and that "[b]ecause of the uniqueness of the death penalty . . . it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." (*Gregg*, *supra*, 428 U.S. at p.188.) In the years following *Gregg*, "a number of [Supreme Court] decisions relied on the premise that 'death is different' from every other form of punishment to justify rules minimizing the risk of error in capital cases." (*Baze v. Rees* (2008) 553 U.S. 35, 84 (conc. opn. of Stevens, J.), citing *Gardner v. Florida* (1977) 430 U.S. 349, 357-358 [in which the Supreme Court noted that the death penalty "differs dramatically from any other legitimate state action"].) Given the uniqueness of the death penalty, "the Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death. The finality of the death penalty requires a 'greater degree of reliability' when it is imposed." (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9, internal citations omitted; see also *Monge v. California* (1998) 524 U.S. 721, 732 [observing that there is an "acute need for reliability in capital sentencing proceedings"]; *Moody v. Commissioner* (11th Cir. Mar. 16, 2017, No. 15-11809) __ Fed.Appx. __ [2017 WL 1020303] (conc. opn. of Martin, J.) [urging United States Supreme Court to reconsider the applicability of *Faretta* to capital trials].)

To resolve the present claim, this Court must weigh (1) California's interest in ensuring the integrity of its capital trials and death judgments, considered in light of the uniqueness of the death penalty and the special need for reliability in capital cases, against (2) a capital defendant's interest in representing himself. Appellant submits that in the context of a capital case the former always outweighs the latter. Despite holding in *Faretta* that a criminal defendant should be allowed to represent himself in some circumstances, the Supreme Court has also acknowledged the critical

importance of professional representation, particularly in capital cases. In *Strickland v. Washington* (1984) 466 U.S. 668, 685, for example, the Court noted that counsel plays "a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled." (Internal quotation marks omitted.) Because the Supreme Court has "consistently required that capital proceedings be policed at all stages by an *especially* vigilant concern for procedural fairness and the accuracy of factfinding" (*id.* at p. 704, italics added), the right to self-representation must give way when the prosecution seeks death.

Even if this Court rejects appellant's argument that a capital defendant must be represented at all phases of trial, it should conclude that a capital defendant has no right to self-representation at the penalty phase in particular. Because "[t]he status of the accused defendant . . . changes dramatically when a jury returns a guilty verdict" (*Martinez*, *supra*, 528 U.S. at p. 168) and because "[t]he defendant's right to proceed pro se exists in the larger context of the criminal trial designed to determine whether or not a defendant is *guilty of the offense* with which he is charged" (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177-178, fn. 8, italics added), and in light of the due process and heightened reliability requirements of the Eighth and Fourteenth Amendments, defendants must be represented by counsel at the penalty phase of capital trials.[2]

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[2] In *Betterman v. Montana* (2016) __ U.S. __ [136 S.Ct. 1609, 1613] (*Betterman*), the Supreme Court reaffirmed that the scope of Sixth Amendment trial rights may change following conviction. *Betterman* concerned the right to a speedy trial in sentencing proceedings and the Supreme Court explicitly reserved the question of whether the trial right at issue extends to the sentencing phase of a bifurcated capital trial. (*Betterman*, *supra*, 136 S.Ct. at p.

Footnote continued on next page

Appellant acknowledges that this Court has already rejected the claim that California may limit the right to self-representation in the penalty phase of capital cases on the basis that "death is different." Several of those cases, however, predate the Supreme Court's decision in *Edwards*, *supra*, 554 U.S. 164. (*People v. Blair* (2005) 36 Cal.4th 686, 736-740; *People v. Bradford* (1997) 15 Cal.4th 1229, 1364-1365; *People v. Bloom* (1989) 48 Cal.3d 1194, 1222-1223; *People v. Clark* (1990) 50 Cal.3d 583, 617, fn. 26.) Appellant urges that the issue be reconsidered in light of *Edwards*. (But cf. *People v. Taylor* (2009) 47 Cal.4th 850, 864-865 [rejecting, post-*Edwards*, the argument presented here, that the right to self-representation "must give way to the requirements of the Fifth and Eighth Amendments to the federal Constitution that the death penalty be imposed through a fair and reliable procedure"]; *People v. Mickel* (2016) 2 Cal.5th 181, 210 [same].)

Even if appellant's claim is foreclosed by this Court's precedent, appellant raises it here to preserve the issue and to exhaust it for purposes of federal review. (See *Street v. New York* (1969) 394 U.S. 576, 582 [constitutional question must first be presented and ruled upon by highest state court before United States Supreme Court has jurisdiction to rule upon it]; 28 U.S.C. § 2254, subd. (b) [except in limited circumstances, federal habeas relief is unavailable unless "the applicant has exhausted the remedies available in the courts of the State"].)

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p. 1613, fn. 2.) *Betterman* supports the principle that the scope of the Sixth Amendment changes after the jury's verdict at the guilt phase has been returned.

XXIV
THE TRIAL COURT VIOLATED PENAL CODE SECTION 686.1 BY PERMITTING APPELLANT TO REPRESENT HIMSELF AT HIS CAPITAL TRIAL

As with Argument XXIII presented above, appellant presumes that the following argument falls under the ambit of *Schmeck*, *supra*, 37 Cal.4th 240 because it has been previously rejected by this Court. Appellant briefly presents the following challenge in order to urge reconsideration and to preserve this claim for federal review. Should the Court decide to reconsider this claim, appellant requests the right to present further supplemental briefing.

Besides the constitutional issues addressed above in Argument XXIII, the trial court also violated Penal Code section 686.1[3], which requires that "a defendant in a capital case shall be represented in court by counsel at all stages of the preliminary and trial proceedings."

Section 686.1 was adopted in 1972 pursuant to a constitutional amendment. Prior to 1972, article 1, section 13, of the California Constitution guaranteed the right of a criminal defendant to represent himself. (See generally *People v. Sharp* (1972) 7 Cal.3d 448, 463-464 [Appendix].) In order to enact legislation requiring counsel in certain cases, the Constitution had to be amended. (*Ibid.*) The Legislature passed such a constitutional amendment in 1971, deleting the right to self-representation from article 1, section 13. That constitutional amendment was then put to the voters in 1972 as Proposition 3. (*Ibid.*)

The voter pamphlet accompanying that amendment explained that the amendment was "necessary in order to ensure the defendant is fairly advised of his rights during the trial," and to ensure "*a fair trial for every*

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[3] All further statutory references are to the Penal Code unless otherwise indicated.

defendant." (Ballot Pamp., Primary Elec. (June 6, 1972), argument in favor of Prop. 3, p. 8, italics added.) It further stated that "[t]oday's complex legal system leaves no room for the person unschooled in law and criminal procedure. Studies show that the person who represents himself in a serious criminal case is unable *to defend himself adequately.*" (*Ibid.*, italics added.) Thus, concern regarding the right to a fair trial and an adequate defense were animating forces behind the passage of Proposition 3 and, hence, section 686.1. The statute represents "the legislatively stated policy . . . of this state." (*People v. Dent* (2003) 30 Cal.4th 213, 224 (conc. opn. of Chin, J.).)

Our legislature attempted to vindicate the state's special interest in the reliability of death judgments by enacting section 686.1. Unless the statute is constitutionally infirm, it is the law of the land in California. As the Supreme Court made clear in *Edwards*, *supra*, 554 U.S. at p. 177, a state is permitted to restrict self-representation when the integrity of its criminal justice system is at stake. Especially in light of the constitutional requirement of heightened reliability in capital cases, section 686.1 can and must be enforced.

The erroneous deprivation of the right to counsel under state law requires reversal without a showing of prejudice. (*People v. Carter* (1967) 66 Cal.2d 666, 672 [reversing judgment without showing of prejudice where defendant was erroneously permitted to represent himself]; *People v. Robles* (1970) 2 Cal.3d 205, 218-219 [reversing judgment of death without showing of prejudice where defendant was erroneously permitted to represent himself at the penalty phase].) Accordingly, for the reasons stated above, the judgment of conviction, or at minimum appellant's death sentence, must be reversed.

As with Argument XXIII presented above, appellant acknowledges that this Court has already rejected this claim and concluded that section

686.1 may only be applied when *Faretta is not implicated.* (See, e.g., *People v. Mickel, supra,* 2 Cal.5th at pp. 209-210; People v. Johnson (2012) 53 Cal.4th 519, 526; *People v. Clark, supra,* 50 Cal.3d at p. 618, fn. 26.)

Even if appellant's claim is foreclosed by this Court's precedent, appellant raises it here to preserve the issue and to exhaust it for purposes of federal review. (See *Street v. New York, supra,* 394 U.S. at p. 582; 28 U.S.C. § 2254, subd. (b).)

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

In his opening brief, appellant challenged the California death penalty scheme on grounds that this Court has rejected in previous decisions holding that the California law does not violate the federal Constitution. (AOB 825-841.) Recently, the United States Supreme Court held Florida's death penalty statute unconstitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*) because the sentencing judge, not the jury, made a factual finding, the existence of an aggravating circumstance, that is required before the death penalty can be imposed. (*Hurst v. Florida* (2016) ___ U.S. ___ [136 S.Ct. 616, 624] (*Hurst*).) *Hurst* provides new support to appellant's claims in Argument XXI of his opening brief, particularly those presented in subsection C, at pages 828-837. In light of *Hurst*, this Court should reconsider its rulings that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14); does not require factual findings within the meaning of *Ring* (*People v. Merriman* (2014) 60 Cal.4th 1, 106); and does not require the jury to find unanimously and beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances before the jury can impose a sentence of death. (*People v. Prieto* (2003) 30 Cal.4th 226, 275).

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

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

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

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

In Florida, a defendant convicted of capital murder is punished by either life imprisonment or death. (*Hurst*, *supra*, 136 S.Ct. at p. 620, citing Fla. Stat. §§ 782.04(1)(a), 775.082(1).) Under the statute at issue in *Hurst*, after returning its verdict of conviction, the jury rendered an advisory

verdict at the sentencing proceeding, but the judge made the ultimate sentencing determinations. (*Ibid.*) The judge was responsible for finding that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh aggravating circumstances," which were prerequisites for imposing a death sentence. (*Id.* at p. 622, citing Fla. Stat. § 921.141(3).) The Court found that these determinations were part of the "necessary factual finding that *Ring* requires." (*Ibid.*)[4]

The questions decided in *Ring* and *Hurst* were narrow. As the Supreme Court explained, "Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." (*Ring, supra*, 536 U.S. at p. 597, fn. 4.) *Hurst* raised the same claim. (See Petitioner's Brief on the Merits, *Hurst v. Florida*, 2015 WL 3523406 at *18 ["Florida's capital sentencing scheme violates this [Sixth Amendment] principle because it entrusts to the trial court instead of the jury the task of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty'"].) In each case, the Court decided only the constitutionality of a judge, rather than a jury, finding the existence of an aggravating circumstance. (See *Ring, supra*, 536 U.S. at p. 588; *Hurst, supra*, 136 S.Ct. at p. 624.)

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[4] The Court in *Hurst* explained:

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

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

Nevertheless, the seven-justice majority opinion in *Hurst* shows that its holding, like that in *Ring*, is a specific application of a broader Sixth Amendment principle: any fact that is required for a death sentence, but not for the lesser punishment of life imprisonment, must be found by the jury. (*Hurst, supra*, 136 S.Ct. at pp. 619, 622.) At the outset of the opinion, the Court refers not simply to the finding of an aggravating circumstance, but, as noted above, to findings of "each fact *necessary to impose a sentence of death*." (*Hurst, supra*, 136 S.Ct. at p. 619, italics added.) The Court reiterated this fundamental principle throughout the opinion.[5] The Court's language is clear and unqualified. It also is consistent with the established understanding that *Apprendi* and *Ring* apply to each fact essential to imposition of the level of punishment the defendant receives. (See *Ring, supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.); *Apprendi, supra*, 530 U.S. at p. 494.) The high court is assumed to understand the implications of the words it chooses and to mean what it says. (See *Sands v. Morongo Unified School District* (1991) 53 Cal.3d 863, 881-882, fn. 10.)

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[5] See *Hurst, supra*, 136 S.Ct. at p. 621 ["In *Ring*, we concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts *necessary to sentence a defendant to death*," italics added]; *id.* at p. 622 ["Like Arizona at the time of *Ring*, Florida does not require the jury to make *the critical findings necessary to impose the death penalty*," italics added]; *id.* at p. 624 ["Time and subsequent cases have washed away the logic of *Spaziano* [*v. State* (Fla. 1983) 433 So.2d 508] and *Hildwin* [*v. Florida* (1989) 490 U.S. 638]. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is *necessary for imposition of the death penalty*," italics added].

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

California's death penalty statute violates *Apprendi*, *Ring*, and *Hurst*, although the specific defect is different than those in Arizona's and Florida's laws: in California, although the jury's sentencing verdict must be unanimous (Pen. Code, § 190.4, subd. (b)), California applies no standard of proof to the weighing determination, let alone the constitutional requirement that the finding be made beyond a reasonable doubt. (See *People v. Merriman*, *supra*, 60 Cal.4th at p. 106.) Unlike Arizona and Florida, California requires that the jury, not the judge, make the findings necessary to sentence the defendant to death. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16 [distinguishing California's law from that invalidated in *Hurst* on the grounds that in California, unlike in Florida, the jury's "verdict is not merely advisory"].) California's law, however, is similar to the statutes invalidated in Arizona and Florida in ways that are crucial for applying the *Apprendi/Ring/Hurst* principle. In all three states, a death sentence may be imposed only if, after the defendant is convicted of first degree murder, the sentencer makes two additional findings. In each jurisdiction, the sentencer must find the existence of at least one statutorily-delineated circumstance – in California, a special circumstance (Pen. Code, § 190.2) and in Arizona and Florida, an aggravating circumstance (Ariz. Rev. Stat. § 13-703(G); Fla. Stat. § 921.141(3)). This finding alone, however, does not permit the sentencer to impose a death sentence. The sentencer must make another factual finding: in California that "'the aggravating circumstances outweigh the mitigating circumstances'" (Pen. Code, § 190.3); in Arizona that "'there are no mitigating circumstances sufficiently substantial to call for leniency'" (*Ring*, *supra*, 536 U.S. at p. 593, quoting Ariz. Rev. Stat. § 13-703(F)); and in Florida, as stated above,

"that there are insufficient mitigating circumstances to outweigh aggravating circumstances" (*Hurst*, *supra*, 136 S.Ct. at p. 622, quoting Fla. Stat. § 921.141(3)).[6]

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

> [T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.

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

(*Ring*, *supra*, 536 U.S. 584, 610 (conc. opn. of Scalia, J.).) The constitutional question cannot be answered, as this Court has done, by collapsing the weighing finding and the sentence-selection decision into one determination and labeling it "normative" rather than factfinding. (See, e.g., *People v. Karis* (1988) 46 Cal.3d 612, 639-640; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1366.) At bottom, the *Ring* inquiry is one of function.

In California, when a jury convicts a defendant of first degree murder, the maximum punishment is imprisonment for a term of 25 years to life. (Pen. Code, § 190, subd. (a) [cross-referencing §§ 190.1, 190.2, 190.3, 190.4 and 190.5].) When the jury returns a verdict of first degree murder with a true finding of a special circumstance listed in section 190.2, the penalty range increases to either life imprisonment without the possibility of parole or death. (Pen. Code, § 190.2, subd. (a).) Without any further jury findings, the maximum punishment the defendant can receive is life imprisonment without the possibility of parole. (See, e.g., *People v. Banks* (2015) 61 Cal.4th 788, 794 [where jury found defendant guilty of first degree murder and found special circumstance true and prosecutor did not seek the death penalty, defendant received "the mandatory lesser sentence for special circumstance murder, life imprisonment without parole"]; *Sand v. Superior Court* (1983) 34 Cal.3d 567, 572 [where defendant is charged with special-circumstance murder, and the prosecutor announced he would not seek death penalty, defendant, if convicted, will be sentenced to life imprisonment without parole, and therefore prosecution is not a "capital case" within the meaning of section 987.9]; *People v. Ames* (1989) 213 Cal.App.3d 1214, 1217 [life in prison without possibility of parole is the sentence for pleading guilty and admitting the special circumstance where death penalty is eliminated by plea bargain].) Under the statute, a death sentence can be imposed only if the jury, in a separate

proceeding, "concludes that the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code, § 190.3.) Thus, under section 190.3, the weighing finding exposes a defendant to a greater punishment (death) than that authorized by the jury's verdict of first degree murder with a true finding of a special circumstance (life in prison without parole). The weighing determination is therefore a factfinding.[7]

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

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

> Defendant argues, by its use of the term "outweigh" and the mandatory "shall," the statute impermissibly confines the jury to a mechanical balancing of aggravating and mitigating factors . . . Defendant urges that because the statute requires a death judgment if the former "outweigh" the latter under this mechanical formula, the statute strips the jury of its constitutional power to conclude that the totality of

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[7] Justice Sotomayor, the author of the majority opinion in *Hurst*, previously found that *Apprendi* and *Ring* are applicable to a sentencing scheme that requires a finding that the aggravating factors outweigh the mitigating factors before a death sentence may be imposed. "It is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole." (*Woodward v. Alabama* (2013) _ U.S. _ [134 S.Ct. 405, 411] (dis. opn. from denial of certiorari, Sotomayor, J.).)

> constitutionally relevant circumstances does not warrant the death penalty.

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

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

(*Brown*, *supra*, 40 Cal.3d at p. 541, footnotes omitted.)[8]

Under *Brown*, the weighing requirement provides for jury discretion in both the assignment of the weight to be given to the sentencing factors

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

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

In this way, section 190.3 requires the jury to make two determinations. The jury must weigh the aggravating circumstances and the mitigating circumstances. To impose death, the jury must find that the aggravating circumstances outweigh the mitigating circumstances. This is a factfinding under *Ring* and *Hurst*. (See *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 257-258 [finding weighing is *Ring* factfinding]; *Woldt v. People* (Colo. 2003) 64 P.3d 256, 265-266 [same].) The sentencing process, however, does not end there. There is the final step in the sentencing process: the jury selects the sentence it deems appropriate. (See *Brown*, *supra*, 40 Cal.3d at p. 544 ["Nothing in the amended language limits the jury's power to apply those factors as it chooses in deciding whether, under all the relevant circumstances, defendant deserves the punishment of death or life without parole"].) Thus, the jury may reject a death sentence even after it has found that the aggravating circumstances outweigh the mitigation. (*Brown*, *supra*, 40 Cal.3d at p. 540.) This is the "normative" part of the jury's decision. (*Ibid.*)

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

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

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

The standard jury instructions were modified, first in CALJIC No. 8.84.2 and later in CALJIC No. 8.88, to reflect *Brown*'s interpretation of section 190.3.[9] The requirement that the jury must find that the aggravating

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

> In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence (circumstances) is (are) so

Footnote continued on next page

circumstances outweigh the mitigating circumstances remained a precondition for imposing a death sentence. Nevertheless, once this prerequisite finding was made, the jury had discretion to impose either life or death as the punishment it deemed appropriate under all the relevant circumstances. The revised standard jury instructions, CALCRIM, "written in plain English" to "be both legally accurate and understandable to the average juror" (CALCRIM (2006), vol. 1, Preface, p. v.), make clear this two-step process for imposing a death sentence:

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

(CALCRIM No. 766, italics added.) As discussed above, *Hurst*, *supra*, 136 S.Ct. at p. 622, which addressed Florida's statute with its comparable weighing requirement, indicates that the finding that aggravating

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> substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

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

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

circumstances outweigh mitigating circumstances is a factfinding for purposes of *Apprendi* and *Ring*.

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

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

However the weighing determination may be described, it is an "element" or "fact" under *Apprendi*, *Ring* and *Hurst* and must be found by a jury beyond a reasonable doubt. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) As discussed above, *Ring* requires that any finding of fact required to increase a defendant's authorized punishment "must be found by a jury beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. at p. 602; see *Hurst*,

supra, 136 S.Ct. at p. 621 [the facts required by *Ring* must be found beyond a reasonable doubt under the due process clause].)[10] Because California applies no standard of proof to the weighing determination, a factfinding by the jury, the California death penalty statute violates this beyond-a-reasonable-doubt mandate at the weighing step of the sentencing process.

The recent decision of the Delaware Supreme Court in *Rauf v. State* (Del. 2016) 145 A.3d 430 (*Rauf*) supports appellant's request that this Court revisit its holdings that the *Apprendi* and *Ring* rule do not apply to California's death penalty statute. *Rauf* held that Delaware's death penalty statute violates the Sixth Amendment under *Hurst*. (*Rauf, supra*, 145 A.3d at pp. 433-434 (*per curiam* opn. of Strine, C.J.).) In Delaware, unlike in Florida, the jury's finding of a statutory aggravating circumstance is determinative, not simply advisory. (*Rauf, supra,* 145 A.3d at p. 456 (conc. opn. of Strine, C.J.) Nonetheless, in a 3-to-2 decision, the Delaware Supreme Court answered five certified questions from the superior court and found the state's death penalty statute violates *Hurst*.[11] (*Rauf, supra,* 145 A.3d at p. 433.) One reason the court invalidated Delaware's law is relevant here: the jury in Delaware, like the jury in California, is not

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

[11] In addition to the ruling discussed in this brief, the court in *Rauf* also held that the Delaware statute violated *Hurst* because, after the jury finds at least one statutory aggravating circumstance, the "judge alone can increase a defendant's jury authorized punishment of life to a death sentence, based on her own additional factfinding of non-statutory aggravating circumstances." (*Rauf, supra*, 145 A.3d 430, 484 (conc. opn. of Holland, J.).)

required to find that the aggravating circumstances outweigh the mitigating circumstances unanimously and beyond a reasonable doubt. (*Ibid.*; see *id.* at p. 485 (conc. opn. of Holland, J.).) With regard to this defect, the Delaware Supreme Court explained:

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

(*Rauf, supra,* 145 A.3d at p. 486 (conc. opn. of Holland, J.), quotation and fns. omitted.)

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

2011) 263 P.3d 235, 251-253 [finding that "the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor" under *Apprendi* and *Ring*].)

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

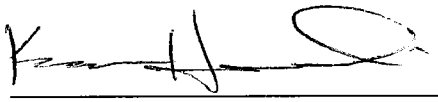
Because in California the factfinding that aggravating circumstances outweigh mitigating circumstances is a necessary predicate for the imposition of the death penalty, *Apprendi*, *Ring* and *Hurst* require that this finding be made by a jury beyond a reasonable doubt. As appellant's jury was not required to make this finding, his death sentence must be reversed.

CONCLUSION

For all the reasons argued above, and in appellant's opening brief, supplemental opening brief, and reply brief, the judgment against appellant must be reversed.

Dated: April 28, 2017

MARY K. McCOMB
State Public Defender



KAREN HAMILTON
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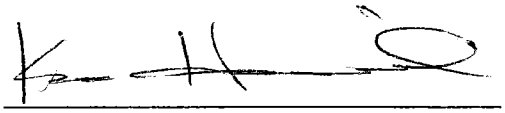
Attorneys for Appellant

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

I am the Senior Deputy State Public Defender and represent appellant, BILLY RAY WALDON, AKA N.I. SEQUOYAH, 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 6,176 words in length.

Dated: April 28, 2017



KAREN HAMILTON
Senior Deputy State Public Defender

DECLARATION OF SERVICE BY MAIL

Case Name: **In re Billy Ray Waldon**
also known as NI Sequoyah
Case Number: **California Supreme Court No. S025520**
Related to Supreme Court No. S232568 and
San Diego County Superior Court No. CR82986

I, the undersigned, declare as follows:

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

APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

by enclosing it in envelopes and

/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;

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

The envelopes were addressed and mailed on **April 28, 2017** as follows:

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As permitted by Policy 4 of the California Supreme Court's *Policies Regarding Cases Arising from Judgments of Death*, counsel intends to complete service on Petitioner by hand-delivering the document(s) within thirty calendar days, after which counsel will notify the Court in writing that service is complete.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **April 28, 2017,** at Oakland, California.

MARSHA GOMEZ