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

MARY K. McCOMB
State Public Defender

KAREN HAMILTON
State Bar No. 171974
Senior Deputy State Public Defender
E-mail: hamilton@ospd.ca.gov
770 L Street, Suite 1000
Sacramento, California 95814
Telephone: (916) 322-2676
Facsimile: (916) 327-0459

Attorneys for Appellant

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

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

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

---

[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]

---

[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"].)

\\

\\

\\

---

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*

---

[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).)

\\

\\

\\

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).

\\

\\

\\

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.)

---

[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.)

\\

\\

\\

---

[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.

---

[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.