In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **BILLY RAY WALDON a.k.a. N. I. SEQUOYAH,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S025520

San Diego County Superior Court
Case No. CR82986
The Honorable David M. Gill, Judge

SECOND SUPPLEMENTAL RESPONDENT'S BRIEF

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I. THE *FARETTA* DECISION IS CONTROLLING PRECEDENT THAT EXTENDS TO THE GUILT AND PENALTY PHASES OF A CAPITAL TRIAL

Waldon contends that the trial court erred when it permitted him to represent himself during the guilt and penalty phases of trial given the uniqueness of the death penalty and the need for heightened reliability of death judgments. (SSAOB 1-5.)[1] Waldon acknowledges that this Court has rejected the same or similar challenges, but repeats them here for reconsideration by this Court and in order to preserve them for federal review. (See SSAOB 1, citing *People v. Schmeck* (2005) 37 Cal.4th 240.) None of his contentions warrants reconsideration by this Court. Accordingly, the judgment and sentence should be affirmed.

More than forty years ago, in *Faretta v. California* (1975) 422 U.S. 806, 820-821 (*Faretta*), the United States Supreme Court held that a defendant has the right to present his or her own case, and that a court may not compel a defendant to accept court-appointed counsel. This Court subsequently recognized that a capital defendant has the fundamental right of self-representation in California even when faced with a possible death sentence. (*People v. Joseph* (1983) 34 Cal.3d 936, 939.)

Waldon asks this Court to hold that all capital defendants must be represented by counsel during all phases of trial. This Court has explicitly rejected the claim that *Faretta's* right of self-representation should not extend to capital cases. (See e.g., *People v. Taylor* (2009) 47 Cal.4th 850, 8865-866 (*Taylor*); *People v. Blair* (2005) 36 Cal.4th 686, 736-740; see also *People v. Mickel* (2016) 2 Cal.5th 181, 206.)

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[1] "SSAOB" refers to the Second Supplemental Appellant's Opening Brief.

Waldon points to *Indiana v. Edwards* (2008) 554 U.S. 164 (*Edwards*) to support his contention that the right of self representation is not absolute and should not apply in capital cases. (SSAOB at 2.) In *Edwards*, the United States Supreme Court held states may, but need not, limit a defendant's right to self-representation and insist the defendant be represented by counsel at trial "on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented." (*Indiana v. Edwards, supra*, 554 U.S. at p. 174.) As this Court has explained, the *Edwards* court specifically declined to overrule *Faretta v. California* (1975) 422 U.S. 806. (*People v. Johnson* (2012) 53 Cal.4th 519, 531 (*Johnson*).) A criminal defendant still has a constitutional right to represent himself if he "'knowingly and intelligently'" forgoes the traditional benefits associated with the right to counsel. (*Faretta v. California, supra*, 422 U.S. at pp. 819, 835.) Self-representation by defendants who wish it and validly waive the right to counsel remains the norm. (*Johnson, supra*, 53 Cal.4th at p. 531.)

This Court's decision in *Taylor, supra*, 47 Cal.4th 850, another capital case, is instructive. In *Taylor*, the defendant was granted permission to represent himself. (*Id.* at p. 856.) On appeal, the defendant argued that he was mentally incompetent to conduct his own defense and should not have been permitted to do so. (*Ibid.*) Appellant first claimed that defendants should be represented by counsel in all capital cases, or at a minimum, whenever the self-representing defendant's conduct in his or her trial renders it unfair. (*Id.* at p. 865.) This Court rejected defendant's claim stating:

> We addressed and rejected much the same set of claims in *People v. Blair* (2005) 36 Cal.4th 686, 736-740, [], and other cases. We have explained that the autonomy interest motivating the decision in *Faretta*—the principle that for the state to "force a lawyer on a defendant" would impinge on "'that respect for the

> individual which is the lifeblood of the law'" [Citation]—applies at a capital penalty trial as well as in a trial of guilt. [Citation.] This is true even when self-representation at the penalty phase permits the defendant to preclude any investigation and presentation of mitigating evidence. [Citations.] A defendant convicted of a capital crime may legitimately choose a strategy aimed at obtaining a sentence of death rather than one of life imprisonment without the possibility of parole, for some individuals may rationally prefer the former to the latter. [Citation.]
>
> Nor does the likelihood or actuality of a poor performance by a defendant acting in propria persona defeat the federal self-representation right. The *Faretta* court explicitly recognized the probability defendants will be ill-served by waiving counsel and relying on their own "unskilled efforts," but nonetheless held the defendant's choice "must be honored." [Citation.] "The high court, however, has adhered to the principles of *Faretta* even with the understanding that self-representation more often than not results in detriment to the defendant, if not outright unfairness. [Citations.] Under these circumstances, we are not free to hold that the government's interest in ensuring the fairness and integrity of defendant's trial outweighed defendant's right to self-representation." [Citation.]

(*People v. Taylor, supra*, 47 Cal.4th at pp. 865-866, italics added.) Thus, even after *Edwards*, this Court, consistent with *Faretta*, declined to adopt a blanket prohibition on self representation in capital cases.

Waldon further contends that even if this Court rejects his broader argument that a capital defendant must be represented by counsel at all phases of trial, the right of self-representation should not extend to the penalty phase. (SSAOB 4-5.) This Court has repeatedly rejected this contention. (See *People v. Blair, supra*, 36 Cal.4th at pp. 736-740; *People v. Koontz* (2002) 27 Cal.4th 1041, 1073-1074; *People v. Bradford* (1997) 15 Cal.4th 1229, 1364-1365.) "[T]he state's interest in ensuring a reliable penalty determination may not be urged as a basis for denying a capital defendant his fundamental right to control his defense by representing

himself at all stages of the trial." (*People v. Clark* (1990) 50 Cal.3d 583, 618.)

Most recently, this Court again rejected the contention that a capital defendant's *Faretta* rights do not extend to, or are more limited during the penalty phase, explaining that, "[A] capital defendant's right to self-representation may not be limited at the penalty phase." (*People v. Mickel*, *supra*, 2 Cal.5th at p. 209, citing *People v. Blair, supra*, 36 Cal.4th at pp. 737-738, and *People v. Taylor, supra*, 47 Cal.4th at p. 865, ["the autonomy interest motivating the decision in *Faretta* ... applies at a capital penalty trial as well as in a trial of guilt"].))

As this Court has repeatedly held, both before and after *Edwards*, the right of self-representation under *Faretta* applies during all phases of a capital trial. Waldon provides no basis for reconsidering these decisions.

II. IN LIGHT OF THE *FARETTA* DECISION, PENAL CODE SECTION 686.1 CANNOT BE GIVEN EFFECT, THUS THERE WAS NO ERROR UNDER STATE LAW IN ALLOWING WALDON TO REPRESENT HIMSELF

Waldon also contends the trial court violated Penal Code section 686.1 in allowing him to represent himself. (SSAOB 6-8.) Waldon acknowledges that this Court has rejected the same or similar challenges, but repeats them here for reconsideration by this Court and in order to preserve them for federal review. (See SAOB 6, citing *People v. Schmeck, supra*, 37 Cal.4th 240.) He suggests that the statutory provision for counsel in capital cases trumps the constitutional recognition of the right to waive counsel and proceed pro se. This Court has rejected similar claims, finding that the statute conflicts with the holding in *Faretta* and cannot be given effect.

Section 686.1 states:

> Notwithstanding any other provision of law, the defendant in a capital case shall be represented in court by counsel at all stages of the preliminary and trial proceedings.

In *Johnson*, this Court reviewed the interplay between California law and federal precedent, particularly between *Faretta* and section 686.1, and explained that, given the right to self-representation under *Faretta*, section 686.1 cannot be given effect. "Obviously, California law is subject to the United States Constitution, including the Sixth Amendment right to self-representation as established in *Faretta* [citation] and its progeny. Penal Code section 686.1, for example, cannot be given effect." (*Johnson, supra*, 53 Cal.4th at p. 526.) In *Mickel*, this Court again noted that section 686.1 predates *Faretta* and can only be applied where *Faretta* is not implicated. (*Mickel, supra*, 2 Cal.5th at p. 209.) Having so recently reviewed this issue and determined that section 686.1 cannot be given effect when it conflicts with *Faretta*, this Court need not accept appellant's invitation to revisit the subject. The trial court's failure to enforce section 686.1 was not error.

III. *HURST V. FLORIDA* DOES NOT RENDER CALIFORNIA'S DEATH PENALTY STATUTE UNCONSTITUTIONAL

Next, Waldon reiterates that California's death penalty statute and jury instructions violate the federal Constitution. Relying on *Hurst v. Florida* (2016) 577 U.S. __ [136 S.Ct. 616], a recent United States Supreme Court's decision invalidating Florida's capital sentencing scheme, he urges this Court to reconsider decisions holding that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi v. New Jersey* (2000) 530 U.S. 466, does not require factual findings within the meaning of *Ring v. Arizona* (2002) 536 U.S. 584, and does not require the jury to find the aggravating factors outweigh the mitigating factors beyond a reasonable doubt. (SSAOB 9-24.) *Hurst* does not assist appellant because the "California sentencing scheme is materially

different from that in *Florida*." (*People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16; *People v. Becerrada* (2017) 2 Cal.5th 1009, 1038.) Nothing in *Hurst* invalidates or requires this Court to reconsider its earlier decisions.

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

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

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

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

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

As Waldon acknowledges, *Hurst* did not address the standard of proof required for determining the aggravating and mitigating circumstances. (SSAOB 14.) Thus, as this Court noted in *Rangel*, nothing in *Hurst* affects its decision on the standard of proof issue. (*People v. Rangel, supra*, 62 Cal.4th at p. 1235.)

Moreover, the United States Supreme Court's recent decision in *Kansas v. Carr* (2016) 577 U.S.__ [136 S. Ct. 633], effectively forecloses Waldon's argument that determinations at the penalty phase must be made beyond a reasonable doubt. As *Carr* reasoned, it is possible to apply a standard of proof to the "'eligibility phase'" of a capital sentencing proceeding, "because that is a purely factual determination." (*Id.*at p. 642.) In contrast, it is doubtful whether it would even be "possible to apply a standard of proof to the mitigating-factor determination (the so-called 'selection phase' of a capital-sentencing proceeding)," because "[w]hether mitigation exists ... is largely a judgment call (or perhaps a value call): what one juror might consider mitigating another might not." (*Id.*) The same is true of California's aggravating factors at this stage. (See, e.g., *People v. Brown* (1988) 46 Cal.3d 432, 456 [California's sentencing factor

regarding "'[t]he age of the defendant at the time of the crime'" may be either a mitigating or an aggravating factor in the same case: the defendant may argue for age-based mitigation, and the prosecutor may argue for aggravation because the defendant was "'old enough to know better'"].)

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

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

CONCLUSION

For the foregoing reasons, as well as those reasons previously submitted to this Court in respondent's brief and respondent's first supplemental brief, respondent respectfully requests that the judgment be affirmed.

Dated: June 1, 2017

Respectfully submitted,

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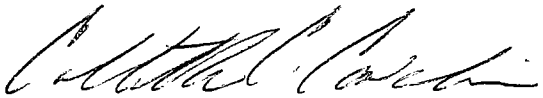

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CERTIFICATE OF COMPLIANCE

I certify that the attached SECOND SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 2,472 words.

Dated: June 1, 2017

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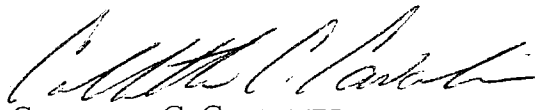

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DECLARATION OF SERVICE BY U.S. MAIL

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I declare:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **June 1, 2017**, at San Diego, California.

Jena Ray
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