IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CARL DEVON POWELL, Defendant and Appellant.	S043520 **CAPITAL CASE**

APPELLANT POWELL'S OPENING SUPPLEMENTAL BRIEF

Automatic Appeal from the Judgment and Death Sentence
of the Superior Court of the State of California
In and For The County of Sacramento, No. 113126
The Honorable James I. Morris, Presiding

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INTRODUCTION

Appellant's Opening Brief ("AOB") was filed on April 12, 2011. Respondent's Brief ("RB") was filed on May 14, 2012, and Appellant's Reply Brief ("ARB") was filed on November 13, 2013. Nearly five years have passed since the briefing in this case was completed. Appellant now submits this Supplemental Opening Brief to provide this Court with additional authorities supporting arguments raised in the opening brief and to raise new arguments that were not presented in the prior briefing, including arguments that could not previously have been included because they are based on cases and other matters not available when the initial

briefing was completed. Appellant's submission of this brief is not intended to constitute abandonment of any arguments made in his opening and reply briefs.

ARGUMENT

I.

CALIFORNIA STATE LAW AND APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WERE VIOLATED WHEN THE PROSECUTION'S GANG EXPERT RELATED CASE-SPECIFIC TESTIMONIAL HEARSAY TESTIMONY THAT APPELLANT WAS A "MAIN PLAYER" IN THE CRIP GANG.

A. Introduction.

Appellant was an immature, mentally slow, easily-led teenager and a gang wannabe when he met John and Terry Hodges shortly before the charged offenses. (31CCT 9270, 9288; 23RT 8850, 10412, 10431.) The Hodges were brothers who were older and more criminally sophisticated gang members. (30CCT 8967, 8980; 31CCT 9295; 32CCT 9303, 9311, 9314; 25RT 9471-9472; 28RT 10195.) The three were jointly charged with the robbery and capital murder of Keith McDade, the owner of a Kentucky Fried Chicken restaurant where appellant once worked. Appellant was convicted and sentenced to death. The Hodges brothers were granted a mistrial motion during the guilt phase, the charges against them were dismissed, and they vanished from the proceedings.

The heart of appellant's case in mitigation was his argument that he was manipulated and compelled by the Hodges to kill McDade, an act he sorely did not want to commit. (35RT 12542-12548; 36RT 12560-12561.) The prosecution had presented evidence during the guilt phase that Hodges were older, sophisticated gangsters who manipulated and used "youngsters" to commit crimes. (31CCT 9144-9145; 24RT 9015-9017; 25RT 9312-

9324.) John Hodges was described as a manipulator who used "youngsters" to commit crimes for him and Terry Hodges was described as an enforcer who was always armed. (31CCT 9144-9145; 32CCT 9311; 24RT 9015-9017; 25RT 9312-9324; 29RT 10507.) There was testimony that John Hodges admitted planning the robbery, "the youngster" did not want to kill but John gave "the order," and John found "the youngster" easy to manipulate because he was young and inexperienced. (31CCT 9142, 9144-9146, 9153-9156, 9159-9160; 24RT 9009-9010, 9013-9017, 9017-9023; 25RT 9312-9324, 9419-9427, 9450-9451, 9453, 9463, 9472.) There was further testimony regarding Terry Hodges' statements that "the boy" – the shooter – was a "wimp" and "chicken-shit" and "didn't have no heart; Terry "told the dude to kill the motherfucker," told the boy that "big daddy was on the case," and had to jack the boy up to get it over with so they could get out of there. (32CCT 9302-9308, 9311-9312, 9314-9315; 25RT 9491-9495, 9497-2498; 26RT 9827; 27RT 9930, 10032, 10054-10055, 10065; 27RT 10031; 28RT 10195; 29RT 10507.)

During the penalty phase, the trial court permitted the prosecution to elicit, over defense objection, former gang detective Aurich's testimony that he had received information that appellant was a "main player" in the Freeport Crip gang, which he defined as a blatant hardcore gang member, a more sophisticated criminal who would be a leader rather than a follower, and who would commit "gang related type crimes." (33RT 11809.)

In his opening brief and reply briefs, appellant argued that the trial court erred in admitting Detective Aurich's "main player" testimony that appellant was a sophisticated criminal and a gang leader, because of lack of foundation and reliability. As discussed in that briefing, because the detective provided no information regarding the source of his information,

his testimony was not admissible as opinion testimony and instead constituted inadmissible hearsay. And as argued, that testimony, given without adequate explanation or identification of its sources, had little, if any, evidentiary value and thus, the trial court should have excluded it under Evidence Code section 352. Appellant further argued that (1) the error in admitting this inflammatory, unreliable evidence was so egregious as to deny his right to a fair trial and due process in violation of the Fourteenth Amendment; and (2) this unreliable evidence rendered his death sentence arbitrary and unreliable in violation of the Eighth Amendment. (See AOB Argument XXV, at pages 576, 590-593; ARB Argument XXV, at pages 325-343.)

This Court's opinion in *People v. Sanchez* (2016) 63 Cal.4th 665, decided after the briefing was completed in this case, expands these claims by holding that expert testimony implicates state hearsay law and possibly Sixth Amendment confrontation rights. *Sanchez* held that when a prosecution expert witness relates case-specific out-of-court statements to the jury, it constitutes inadmissible hearsay under state law, and to the extent that such statements are testimonial, their admission violates the confrontation clause principles enunciated by the Supreme Court in *Crawford v. Washington* (2004) 541 U.S. 36. (*Id*. at pp. 670-671.) In so holding, this Court explicitly overruled prior case law governing the introduction of expert testimony, reasoning that the long standing "paradigm" that testimony as to the basis of an expert's opinion is not hearsay "is no longer tenable because an expert's testimony *must* be considered for its truth by the jury." (*Sanchez, supra*, at p. 679, italics in original.)

Appellant's arguments should therefore be considered under state hearsay law and the Sixth Amendment's confrontation clause in addition to the state law and constitutional claims that have already been presented.

B. Factual Background.

As noted in appellant's prior briefing, Sacramento Police Detective Ronald Aurich was called to testify to his December 1991 interview of Willie Akens, a suspect in the Kennedy High drive-by shooting. (33RT 11803-11804.) Detective Aurich first, however, established his credentials as a gang expert. The detective testified that although he was currently a detective in the robbery detail, he was a gang detective in 1991. (33RT 11803.) As a gang detective, it was his responsibility to identify those persons involved in gangs, their associates, those involved in gang activity and to identify gang sets. (*Ibid*.) As he explained, he monitored and investigated. He did "probation searches related to any gang related activities, gang members, gang crimes, follow-up investigation, try to identify gang members, arrest gang members, everything dealing with prevention and pro-active gang enforcement." (*Ibid*.)

After discussing his interview of Akens, Detective Aurich was permitted to testify over defense objection that he recognized appellant's name; he had received information that appellant was a Freeport Crip and a "main player:"

> Q. As – as a detective in gangs, did you – did you recognize the name Carl Powell when this – when this shooting came up?
>
> A. Yes, I did.
>
> Q. And how is it that you recognized Carl Powell's name?

A. When that area –

MR. HOLMES (defense counsel): Objection. [¶] Relevance. [¶] And your one of your prior rulings as well.

THE COURT: I will overrule the objection. I'll sustain it as to the form of the question. [¶] Do you want to put a question to the witness concerning reputation? [¶] You may do so.

MR. MAGUIRE (prosecutor): Okay, Your Honor.

THE COURT: But I – otherwise I overrule the objection to that extent.

MR. MAGUIRE: Okay. That's fine.

Q. (BY MR. MAGUIRE): Based on your ten years of work as a detective in gangs were you able to -- were you able to determine what Carl Powell's reputation was in the community for gang activity?"

A. Yes, I was.

Q. And what was Carl Powell's reputation in the community for gang activity as of 1991 – late 1991?

A. The information I was receiving was that he was a Freeport Crip and was a main player.

Q. What do you mean by a main player?

A. Main player – usually categorize gang members into three different levels. [¶] Your wannabes are very – on the peripheral end of the pie. [¶] You're (sic) more associates –

they would hang around gang – known gang members, might be involved in minimal, related hardcore gang activity. [¶] And then your main players are a little more hardcore, gang members who promote their gang, be involved in gang activity, be involved in gang related type crimes, be a little more blatant about who they are and what they do.

Q. Would this be more sophisticated criminals?

A. Yes.

Q. And would they be the kind of people that would be leaders rather than followers?

A. Yes.

(33RT 11809-11810.)

On cross-examination, Detective Aurich admitted that he did not personally know appellant in 1991 or 1992. (33RT 11814.) And the detective had not heard of appellant from others until he began investigating the Kennedy High incident. (33RT 11815.) Although Detective Aurich learned that appellant had no felony convictions, Detective Aurich testified: "That's not uncommon for somebody not to be convicted of a crime just because they are a gang member. Sometimes that goes on for a long time without being convicted."

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C. Detective Aurich Related Case-Specific Testimonial Hearsay In Violation Of State Law And The Sixth Amendment's Confrontation Clause.

1. *People v. Sanchez* Clarified That The Admission Of Case-Specific Hearsay Evidence Related By A Prosecution Expert Is Inadmissible Under State Law And Will Violate The Confrontation Clause When Testimonial.

The admission of expert testimony is governed by state evidence law and the Sixth Amendment's confrontation clause. (*Sanchez*, *supra*, 63 Cal.4th at p. 679.) In *Sanchez*, this Court clarified that the prohibition against the admission of hearsay evidence prohibits an expert witness from relating case-specific facts about which the expert has no independent knowledge in support of his or her opinion. (*Id*. at p. 676.) Under previous law, expert hearsay problems were held "cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth." (*People v. Montiel* (1993) 5 Cal.4th 877, 919.) In *Sanchez*, this Court recognized that this approach "was no longer tenable because an expert's testimony regarding the basis for an opinion *must* be considered for its truth by the jury." (*Sanchez*, *supra*, 63 Cal.4th at p. 679, italics in original.) As this Court explained: "When an expert relies on hearsay to relate case-specific facts, considers the statements as true, and relates them to the jury as a reliable basis for the expert's opinion, it cannot logically be asserted that the hearsay content is not offered for its truth." (*Id*. at p. 682.) *Sanchez* thus held that "the case-specific statements related by the prosecution expert concerning defendant's gang membership constituted inadmissible hearsay under California law." (*Id*. at p. 670.)

Sanchez also clarified the degree to which the rule of *Crawford v. Washington, supra,* 541 U.S. 36, which held that the admission of testimonial hearsay against a criminal defendant violates the Sixth Amendment right to confront and cross-examine witnesses, limits a prosecution expert witness from relating case-specific hearsay. (*Sanchez, supra,* 63 Cal.4th at p. 670.) "If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Id.* at p. 686.)

In light of state hearsay rules and *Crawford, Sanchez* thus set forth the following two-step analysis for addressing the admissibility of a prosecution expert's testimony relating out-of-court statements:

> "The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay,* as the high court defines that term.

(*Sanchez, supra,* 63 Cal.4th at p. 680, italics in original.)

2. <u>Detective Aurich Related Case-Specific Hearsay</u>.

Under the guise of providing general reputation evidence, Detective Aurich testified that "the information I was receiving was that [appellant] was a Freeport Crip and was a main player." (33RT 11809.) As discussed below, this testimony identifying appellant as a gang "main player" did not constitute, and was not admissible, as reputation evidence under the hearsay exception set forth in Evidence Code section 1324. Rather, it was

inadmissible case-specific hearsay testimony relating information the detective solicited from unidentified sources during his investigation of the Kennedy High incident.

Before addressing this hearsay issue, however, appellant will clarify what he is not challenging under *Sanchez*. First, given the other record evidence identifying appellant as a member of the Crip gang, appellant does not challenge, under *Sanchez*, Detective Aurich's hearsay testimony that appellant was a member of the Freeport Crip gang. (See *Sanchez*, *supra*, 63 Cal.4th at p. 686 [expert cannot relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence].)

Second, as noted above, after relating this information identifying appellant as a "main player," Detective Aurich went on, in his role as a gang expert, to explain the various levels or types of gang members – "wannabes," "associates," and "main players." In so doing, he told the jurors that "main players" are (1) hardcore gang members who commit gang related crimes and (2) more sophisticated criminals who would be leaders rather than followers. (33RT 11809.) In *Sanchez*, this Court stated that its decision did not call into question "the traditional latitude granted to experts to describe background information and knowledge in the area of his expertise." (*Sanchez*, *supra*, 63 Cal.4th at p. 685; see also *id* at p. 698 [Defendant raises no confrontation claim against detective's background testimony, based on his area of expertise, about general gang behavior or descriptions of the gang's conduct and its territory, which was relevant and admissible evidence as to the gang's history and general operations.]; *accord*, *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1175; *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1247.) Appellant thus does not

challenge, under *Sanchez*, Detective Aurich's testimony defining the term "main player." However, without his testimony relating hearsay identification of appellant as a "main player," the detective's testimony defining that term would have had no relevance; and thus would have been inadmissible under Evidence Code section 350. (See Evid. Code, §350 ["No evidence is admissible except relevant evidence."].)

Appellant does challenge, under *Sanchez*, Detective Aurich's testimony identifying appellant as a "main player" based on information he received from unidentified sources. First, Detective Aurich's testimony constituted hearsay evidence which he presented to be true. Evidence Code section 1200(a) provides that hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. As stated in *Sanchez*: "[A] hearsay statement is one in which a person makes a factual assertion out of court and the proponent seeks to rely on the statement to prove that assertion is true." (*Sanchez*, *supra*, 63 Cal.4th at p. 674.) Here, Detective Aurich's testimony that appellant was a "main player" rested solely on out-of-court statements -- information he had received from others. Detective Aurich presented this fact as true and admitted that he had no personal knowledge of it. (See 33RT 11814 [Detective Aurich did not personally know of appellant in 1991 or 1992 and had not heard of him until he began investigating the Kennedy High incident.].) This testimony thus constituted hearsay evidence.

Second, the testimony clearly related case-specific hearsay, as it related to "the particular events and participants alleged to have been involved in the case being tried." (*Sanchez*, *supra*, at p. 676.) Thus, like any other hearsay, Detective Aurich's "main player" testimony was

inadmissible unless it fell within a hearsay exception. (*Sanchez*, *supra*, 63 Cal.4th at p. 684.)

3. Detective Aurich's Testimony That Appellant Was A "Main Player" Did Not Constitute, And Was Not Admissible As, Reputation Evidence.

Upon prompting by the trial court, the prosecution attempted to elicit Detective Aurich's "main player" testimony under Evidence Code section 1324's hearsay's exception for reputation evidence. (See 33RT 11809 ["Based on your ten years of work as a detective in gangs were you able to – were you able to determine what Carl Powell's reputation was in the community for gang activity?"].) And, on appeal, the State continues to argue that Detective Aurich was merely testifying to appellant's reputation in the community. (RB 274.) Notably, although the detective attempted to couch his response as reputation evidence, clearly his answer -- "[t]he information I received was that he was a Freeport Crip and was a main player" -- was nothing more than the relaying of out-of-court statements, or rank hearsay. More importantly, as demonstrated in appellant's reply brief, this testimony did not constitute, and was not admissible, as reputation evidence, because reputation evidence must be provided by witnesses who know the individual's reputation, not by witnesses conducting an inquiry. (See ARB 336-343[1]; see, e.g., *Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734, 736, 738-739 [Police officers' testimony that they investigated plaintiff's reputation and their investigation disclosed that he was reputed to be a bookmaker and gambler should have been excluded as incompetent hearsay, because "[t]he testimony was not given by persons who knew the

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[1] Rather than duplicate that argument here, appellant incorporates by reference section 2 of Reply Argument XXV(B)(2).

defendant's reputation, but by witnesses who inquired of others as to the defendant's reputation."].)

Here, Detective's Aurich's testimony that appellant was a "main player" was not based on his own knowledge of appellant's reputation in the community, but based on his investigations as a gang detective. Detective Aurich testified that he did not personally know appellant but when he investigated the Kennedy High incident, he obtained information from others that appellant was a Freeport Crip and a "main player." (33RT 11809-11810, 11814-11815.) Thus, Detective Aurich, who was not, himself, a member of the gang community, obviously learned this information by questioning other individuals during his investigation of the Kennedy High incident. As an outsider, the detective was not competent to offer reputation evidence. Instead, his testimony was nothing more than hearsay relating solicited information from unidentifiable sources.

Accordingly, Detective Aurich's "main player" testimony did not did not constitute, and was not admissible as, reputation evidence.

4. <u>Detective Aurich's Testimony That Appellant Was A "Main Player" Was Testimonial</u>.

The next step in the analysis is to determine whether Detective Aurich's "main player" testimony was testimonial hearsay. In *Sanchez*, this Court noted that throughout its evolution of the *Crawford* doctrine, the Supreme Court has offered various formulations of what makes a statement testimonial but has yet to provide a definition of that term of art upon which a majority of justices agree. (*Sanchez, supra,* 63 Cal.4th at p. 687.) Yet, as observed by this Court, a majority of the Supreme Court in *Davis v. Washington* (2006) 547 U.S. 813 and its companion case, *Hammon v. Indiana* (No. 05–5705), *Michigan v. Bryant* (2011) 562 U.S. 344, and *Ohio*

v. Clark (2015) 576 U.S. ——, 135 S.Ct. 2173, 192 L.Ed.2d 306, adopted the distinguishing principle of primary purpose. (*Id*. at pp. 687-689, 693-694.) Under this analysis, testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements, on the other hand, are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial. (*Sanchez*, *supra*, 63 Cal.4th at p. 689.) In conducting its analysis whether the statements at issue in *Sanchez* were testimonial, this Court stated:

> When the People offer statements about a completed crime, made to an investigating officer by a nontestifying witness, *Crawford* teaches those hearsay statements are generally testimonial unless they are made in the context of an ongoing emergency as in *Davis* and *Bryant*, or for some primary purpose other than preserving facts for use at trial. Further, testimonial statements do not become less so simply because an officer summarizes a verbatim statement or compiles the descriptions of multiple witnesses.

(*Id*. at p. 694.)

Here, although Detective Aurich did not identify the hearsay sources for the information he received that appellant was a "main player," he made clear that he obtained that information while investigating the completed crimes during the Kennedy High incident. Detective Sanchez testified that he was investigating the shooting near Kennedy High and as part of that investigation, he interviewed, and then arrested, appellant's friend Willie Akens, who had been identified as a suspect. (33RT 11804-11805.) According to Detective Aurich, Akens told him that appellant did the shooting. (33RT 11806.) The detective further testified that "the information [he] was receiving was that [appellant] was a Freeport Crip and was a main player," but admitted on cross-examination that he had not

heard of appellant from others until he began investigating the Kennedy High crimes. (33RT 11815.) When defense counsel asked whether he was talking about appellant's "reputation" "that he "knew of now," Detective Aurich corrected counsel and responded: "His reputation while investigating this incident stemming from the bus stop and the school." (*Ibid*.) This testimony thus established that while investigating those completed crimes, Detective Sanchez sought information about appellant which could potentially be used to prosecute him for those crimes.

This information about appellant which Detective Aurich obtained during his investigation of completed crimes was thus testimonial. The primary purpose of obtaining this information was to assist in a police investigation. (*Sanchez, supra,* 63 Cal.4th at pp. 688-689.) And the information was not obtained in the context of an ongoing emergency.

Examination of the analysis in *Sanchez* supports this claim. There, a gang expert relied on the following hearsay to support his testimony: police reports documenting the defendant's prior misconduct and contacts with police while in the company of gang members, a "STEP notice"[2] issued to appellant documenting his association with gang members, and field investigation ("FI") cards[3] reflecting a police contact with defendant while

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[2] As explained in *Sanchez,* officers issue "STEP notices" to individuals associating with known gang members. The purpose of such notices is to both provide and gather information. (*People v. Sanchez, supra,* 63 Cal.4th at p. 672.)

[3] *Sanchez* explained that officers prepare small report forms called field identification or "FI" cards that record an officer's contact with an individual. The form contains personal information, the date and time of

he was in the company of a known gang member. (*Sanchez, supra*, at pp. 672, 696-697.) This Court found that the police reports were testimonial because they "relate[d] hearsay information gathered during an official investigation of a completed crime" and were not "made in the context of an ongoing emergency ... or for some other primary purpose." (*Id*. at p. 694.) *Sanchez* also held that the STEP notices relied upon by the expert during his testimony were testimonial, because the sworn information recording defendant's biographical information, whom he was with, and statements he made, was retained by the police and gathered to document gang affiliation for future evidentiary use. (*Id*. at pp. 696-697.) Finally, *Sanchez* noted the record did not reveal enough of the circumstances surrounding the preparation of the FI cards to determine whether or not it was testimonial in nature, but "[i]f the card was produced in the course of an ongoing criminal investigation, it would be more akin to a police report, rendering it testimonial." (*Id*. at p. 697.)

Here, although the source of the hearsay was not identified, Detective Aurich was clear that he obtained the information in the course of an ongoing criminal investigation. Accordingly, this hearsay painting appellant as a "main player' gang member should be found to be testimonial.

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contact, associates, nicknames, etc. (*People v. Sanchez*, *supra*, 63 Cal.4th at p. 672.)

D. Detective Aurich's Testimony Violated State Law and the Violated Confrontation Clause.

As demonstrated above, Detective Aurich's related case-specific hearsay that appellant was a "main player" – a statement which he considered and represented to be true. Because the detective had no independent knowledge of that statement and because it did not fall under any recognized hearsay exception, the admission of this testimony violated state hearsay law under the principles set forth in *Sanchez*. Furthermore, this hearsay was testimonial and because there was no showing that the declarant was unavailable to testify and appellant had a previous opportunity to cross-examine the witness or forfeited that right through wrongdoing, its admission violated the Sixth Amendment's Confrontation Clause. (*Sanchez*, *supra*, 63 Cal.4th at p. 686.)

E. This Confrontation Claim Has Not Been Forfeited.

Appellant objected to the admission of Detective Aurich's testimony that appellant was a "main player" on grounds of relevance and "one of [the trial court's] prior rulings as well." (33RT 11809.) In its Respondent's Brief, the State acknowledged that defense counsel was referring to the trial court's prior ruling on the admissibility of gang evidence, but argued that counsel did not specifically object on grounds of hearsay or Detective Aurich's lack of personal knowledge, nor did he specifically invoke Evidence Code section 352. (RB 273-274.) Thus, the State urged this Court to find that appellant has forfeited his challenge to Detective Aurich's testimony. (*Ibid*.)

In his reply, appellant addressed respondent's forfeiture contentions and argued that examination of appellant's objections to admission of gang evidence and the court's prior rulings demonstrates that respondent is

wrong. As the record established, and as demonstrated in the reply brief, appellant adamantly objected to admission of any evidence of his gang membership, involvement, or activities during both phases of the trial on relevance and foundational (including hearsay) grounds. The record also demonstrated the trial court's understanding that appellant was objecting on 352 grounds to the introduction of any gang evidence. (ARB 326-336.)

Appellant acknowledges that appellant did not object to Detective Aurich's "main player" testimony on the ground that it related case-specific hearsay, as prohibited by this Court in *Sanchez*. However, when there is a dramatic shift in the law, such as this Court's decision in *Sanchez* represents, appellant's failure to so specifically object does not waive the issue or prevent this Court from reviewing the claim. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4 [failure to object is excusable where counsel could not have anticipated change in law and an objection would have been futile based on the rule of law]; *People v. Meraz*, *supra*, 6 Cal.App.5th at p. 1177, fn. 7 [rejecting respondent's argument that appellants forfeited claim of *Sanchez* error for failure to object on confrontation clause grounds at trial: "Any objection would likely have been futile because the trial court was bound to follow pre-*Sanchez* decisions holding expert 'basis' evidence does not violate the confrontation clause."].) Because *Sanchez* represents a decisive "paradigm shift" for this Court, any failure to object below on the specific *Sanchez*/confrontation grounds raised here should not prevent this Court from reviewing the instant claim.

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F. The Erroneous Admission of Detective Aurich's Case-Specific Hearsay Testimony Was Prejudicial.

Federal constitutional violations require reversal unless respondent, as the party benefiting from the violation, proves them harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Admission of evidence in violation of a defendant's confrontation rights is thus subject to the harmless-beyond-a-reasonable-doubt standard of *Chapman*. (See *Sanchez*, *supra*, 63 Cal.4th at p. 699 [finding it could not conclude that erroneous admission of testimonial hearsay was harmless beyond a reasonable doubt].) Where a trial involves errors of both federal constitutional magnitude and state law, courts may consider the cumulative effect of errors under the federal standard. (See, e.g., *People v. Woods* (2006) 146 Cal.App.4th 106, 117.) State law errors require that the judgment be reversed where there exists a reasonable probability - or a "reasonable chance" – that the result of the trial would have been different absent the hearsay evidence. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) However, when assessing the prejudicial effect of state-law errors at the penalty phase of a capital trial, this Court must determine whether there is a "reasonable possibility" such errors affected the verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 447.)

Appellant has argued in the opening brief that the erroneous admission of Detective Aurich's "main player" testimony violated appellant's Fourteenth Amendment right to due process and the Eighth Amendment. (AOB 594.) And here, appellant has demonstrated that the error also violated his Sixth Amendment right to confrontation. Thus, prejudice must be assessed under *Chapman's* "beyond a reasonable doubt" standard.

However, even if this Court concludes that Detective Aurich's hearsay testimony was not testimonial or that its erroneous admission did not violate appellant's due process or Eighth Amendment rights, the prejudice analysis is the same, for this Court has "explained that '*Brown's* "reasonable possibility" standard and *Chapman's* "reasonable doubt" test ... are the same in substance and effect.'" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 961, quoting from *People v. Ashmus* (1991) 54 Cal.3d 932, 990.) Because a death verdict must be unanimous, reversal is required under the state penalty phase prejudice standard if there is a reasonable possibility that even a single juror *might* have reached a different decision absent the error. (*People v. Ashmus, supra*, 54 Cal.3d at p. 984 ["we must ascertain how a hypothetical 'reasonable juror' would have, or at least could have, been affected"].) Accordingly, under either the *Chapman* standard or the *Brown* standard, the State must demonstrate beyond a reasonable doubt that the erroneous admission of the evidence could not have affected at least one juror's penalty decision.

In his opening and reply briefs, appellant has demonstrated why the prosecution cannot meet this standard in this case and incorporates those arguments here. (AOB 593-598; ARB 345-354.) Without repeating those exhaustive arguments, appellant summarizes below the essential reasons why this error was not harmless. But first, it is important to review the State's own explanation of how the prosecutor used this evidence at the penalty phase:

> The prosecutor argued that appellant was a well-respected gang member – a leader. (35RT 12473.) The prosecutor noted Detective Aurich's testimony that appellant was a main player: a more hard-core gang member, a more sophisticated criminal, a leader. (35RT 12473-12475.) The prosecutor stated that the defense would try to portray appellant as an easily manipulated follower; but that was not what the evidence showed. (35RT 12475; see also 35RT 12476.)

> Thus, the prosecutor used the evidence that appellant was a main player to rebut the anticipated defense argument that appellant was naïve and criminally unsophisticated. The prosecutor also used the photo to argue that appellant did not need to be afraid of the Hodgeses: appellant had access to guns and he had Crip buddies. (36RT 12607.) In short, the prosecutor properly used the photo and the "main player" testimony to refute the defense's story that appellant was naïve, criminally unsophisticated, and scared of the Hodgeses.[4]

(RB 277.) Given this backdrop, these are the reasons why this error was not harmless.

First, Detective Aurich's unsubstantiated testimony painted appellant as a hardcore gang member who was a leader, not a follower. He defined "main player" as a blatant gang member who commits "gang related type crimes" (33RT 11810) and when reminded by defense counsel that appellant had no felony convictions, testified: "That's not uncommon for somebody not to be convicted of a crime just because they are a gang member. Sometimes that goes on for a long time without being convicted." (*Id*. at p. 11814.) As discussed in the opening brief, gang evidence, in and of itself, preys on jurors' fears and is highly prejudicial. (See AOB 299-301 and cases cited therein.) Here, the detective magnified that prejudice by suggesting that appellant's lack of record did not mean he had not been committing gang-related crimes. This testimony thus not only introduced unsubstantiated inflammatory evidence but also impacted the jury's consideration of significant mitigation – appellant's lack of prior felony convictions – by suggesting appellant may well have been committing other crimes despite the lack of official convictions. (See, e.g., *People v.*

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[4] Respondent also argued that the prosecutor implicitly used the photo and the "main player" testimony to impeach Akens's evasive testimony on the issue of whether appellant was a Freeport Crip. (RB 277.)

Williams (1988) 44 Cal.3d 883, 904 [evidence suggesting the commission of uncharged crimes is "inherently prejudicial" and involves the risk of serious prejudice]; accord, *People v. Thompson* (1980) 27 Cal.3d 303, 318.) As recognized by this Court, the absence of prior felony convictions is a significant mitigating circumstance in a capital case, where the accused frequently has an extensive criminal past. (*People v. Crandell* (1988) 46 Cal.3d 833, 884, abrogated on other grounds by *People v. Crayton* (2002) 28 Cal.4th 346.) Detective Aurich's testimony, however, cast aspersion on that mitigating circumstance.

Second, as readily acknowledged by respondent, the prosecutor used Detective Aurich's hearsay testimony to rebut one of the mainstays of appellant's case in mitigation – that appellant was manipulated and coerced by the Hodges to shoot McDade. (RB 277.) This error allowed the prosecutor to effectively rebut mitigation evidence elicited from a respected mental health expert that appellant was quite vulnerable to manipulation and coercion by the Hodges's brothers on the basis of rank, unreliable hearsay which should never have been admitted. Here again, this error skewed the jury's penalty evaluation in two respects: (1) it introduced inflammatory aggravating gang evidence; and (2) it fatally distorted the jury's consideration of significant mitigation. As a result, appellant's jury was precluded from fully considering appellant's mitigating evidence and from exercising its discretion in determining his penalty in violation of the Eighth Amendment.

Third, the importance of Detective Aurich's "main player" gang testimony was evidenced by the prosecutor's repeated attempts to introduce the evidence and by his use of the evidence during argument to attack appellant's case in mitigation. (See AOB 595-596.) The prosecutor's "actions demonstrate just how critical the State believed the erroneously

admitted evidence to be." (*Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1131; accord, *Johnson v. Mississippi* (1988) 486 U.S. 578, 586 [Prosecutor's reliance in summation on erroneously admitted aggravating evidence was critical factor in finding error prejudicial]; *People v. Hernandez* (2003) 30 Cal.4th 835, 877, disapproved of on another ground by *People v. Riccardi* (2012) 54 Cal.4th 758 [same].)

Fourth, respondent's harmless error argument[5] based solely on the circumstances of the capital offense and the Kennedy High incident ignores the defense case in mitigation and offers little assistance in assessing the impact of this error. (See ARB 348-349, citing *Holmes v. South Carolina* (2006) 547 U.S. 319, 331 ["by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side . . . ."].)

Finally, the Court cannot presume that the jury would have voted to impose the death sentence in this case even in the absence of this improperly-admitted evidence. As explained by this Court in *People v. Hines*:

> We cannot determine if *other* evidence before the jury would neutralize the impact of an error and uphold a verdict. Such factors as the grotesque nature of the crime, the certainty of guilt, or the arrogant behavior of the defendant may conceivably have assured the death penalty despite any error. Yet who can say that these very factors might not have demonstrated to a particular juror that a defendant, although legally sane, acted under the demands of some

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[5] In its respondent's brief, the State argued that admission of Detective Aurich's "main player" testimony and the photograph of appellant and Akens pointing guns at each other was harmless, because the circumstances of the capital crime and appellant's involvement as a shooter in the Kennedy High incident constituted strong aggravating evidence. (See RB 276-278.)

> inner compulsion and should not die? We are unable to ascertain whether an error which is not purely insubstantial would cause a different result; we lack the criteria for objective judgment.

(*People v. Hines* (1964) 61 Cal.2d 164, 169, disapproved of on other grounds by *People v. Murtishaw* (1981) 29 Cal.3d 733.)

The State has pointed to various circumstances of the capital crime and factor (b) evidence which it contends are particularly aggravating. (RB 278.) But, respondent incorrectly asks this Court to focus on the strength of that evidence and make a comparison which, as a matter of federal constitutional law, can be made only by a jury which hears all the evidence, not by an appellate court. The decision whether to sentence a defendant to death or to life without the possibility of parole is a normative decision, which requires jurors to make individual determinations based on their own understanding of the penalty factors and their own moral assessment of the evidence. The jury's sentencing decision is a discretionary, fact-specific determination (see *Tuilaepa v. California* (1994) 512 U.S. 967, 974), which requires the personal moral judgment of each juror. (*People v. (Albert) Brown* (1985) 40 Cal.3d 512, 541, revd. on other grounds in *McKoy v. North Carolina* (1987) 494 U.S. 433, 442-443.) In a death penalty case, "individual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.'" (*McCleskey v. Kemp* (1987) 481 U.S. 279, 311, internal citation omitted.) Different jurors will have different interpretations of and assign different weights to the same evidence. (*United States v. Shapiro* (9th Cir. 1982) 669 F.2d 593, 603.) As recognized by this Court in *People v. Hamilton* (in discussing the state-law "reasonable possibility" harmless error standard):

> [I]n determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or the other by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence, the misconduct and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a "reasonable probability" that a different result would have been reached in the absence of error. If only one of the twelve jurors was swayed by the inadmissible evidence or error, then, in the absence of that evidence or error, the death penalty would not have been imposed. What may affect one juror might not affect another. The facts that the evidence of guilt is overwhelming, as here, or that the crime involved was, as here, particularly revolting, are not controlling. This being so it necessarily follows that any substantial error occurring during the penalty phase of the trial, that results in the death penalty, since it reasonably may have swayed a juror, must be deemed to have been prejudicial.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-37, overruled on other grounds by *People v. Morse* (1964) 60 Cal.2d 631.)

As argued in appellant's reply brief, respondent's assertion that the circumstances of the crimes – the capital crime and the Kennedy High threat and drive-by shooting – were alone so aggravating that they made the death verdict a foregone conclusion and rendered harmless any error in admitting additional aggravating evidence, is a gross overstatement of the evidence, an equally gross oversimplification of the penalty decision the jurors were called upon to make, and unsupported by the case law of either this Court or the federal courts. (See ARB 350-351, and cases cited therein.) As demonstrated by the numerous case cited and described in the reply brief, far more egregious aggravation has been found *insufficient* to

render penalty phase errors harmless, even under *Strickland*'s[6] standard for prejudice, a more stringent standard than either the *Brown* or *Chapman* standards. (See ARB 351-352, and cases cited therein.)

Moreover, respondent's invitation to the Court to find this error harmless by simply assessing the strength of the evidence violates *Chapman*. *Chapman* requires an inquiry into the impact this error has had on the jury, regardless of the weight of the evidence. As explained by the United States Supreme Court in *Sullivan v. Louisiana*:

> [T]he question [*Chapman*] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. [Citation.] Harmless-error review looks, we have said, to the basis on which "the jury actually rested its verdict." [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.

(*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, emphasis in original; see also *People v. Sims* (1993) 5 Cal.4th 405, 476 (dis. opn. of Mosk, J.), quoting *Chapman v. California, supra,* 386 U.S. at p. 23 ["By its very terms, *Chapman* precludes a court from finding harmlessness based simply "upon [its own] view of "overwhelming evidence."""].) "To say that an error did not contribute to the verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question ...." (*Yates v. Evatt* (1991) 500 U.S. 391, 403, disapproved of on other grounds by *Estelle v. McGuire* (1991) 502 U.S. 62.)

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[6] *Strickland v. Washington* (1984) 466 U.S. 668.

In this case, the admission of Detective Aurich's "main player" testimony cannot be held harmless beyond a reasonable doubt. To be sure, as with any capital crime and aggravating factor (b) evidence, the jurors could well have found the circumstances of both to be aggravating. But that evidence did not, and could not, render "unimportant" the wrongful admission of inflammatory aggravating gang evidence that, in and of itself, was highly prejudicial, and which also fatally distorted the jury's consideration of significant mitigation – appellant's lack of prior felony record and defense expert testimony that appellant was quite vulnerable to manipulation and coercion by the Hodges's brothers. As a result of this error, the jury was precluded from fully considering appellant's mitigating evidence and from exercising its discretion in determining his penalty in violation of the Eighth Amendment. (*Lockett v. Ohio* (1978) 438 U.S. 586, 608; *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233 [The jury in a capital sentencing proceeding must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future, and a jury may be improperly precluded from doing so not only as a result of the instructions it is given, but also as a result of prosecutorial argument.].)

Given that this testimony struck both at the public's fears about gangs and crime and appellant's central mitigating theme that he was used and coerced by the sophisticated, manipulative Hodges brothers to commit a crime he did not want to do, this error cannot be deemed harmless. The State has not, and cannot, demonstrate that this evidence and the prosecutor's use of it to appeal to the juror's fears could not have affected

at least one juror's decision to sentence appellant to death. Appellant's death judgment should be reversed.

II.

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO TELL THE JURORS IN HIS OPENING STATEMENT THAT APPELLANT WOULD TESTIFY AND THEN RECOUNTING HOW APPELLANT WOULD TESTIFY, BASED ON AN ACCOUNT FURNISHED FROM DEFENSE COUNSEL WHICH INCLUDED AN ADMISSION THAT APPELLANT KILLED MCDADE.

A. Introduction.

In his opening and reply briefs, appellant argued that the court erred in denying his mistrial motion after the prosecutor told the jurors in his opening statement that appellant would testify and described what appellant would say, but appellant did not testify as promised by the prosecutor. As argued in those pleadings, the prosecutor's unfulfilled promise of appellant's testimony constituted prosecutorial misconduct.[7] (See AOB 76-148; ARB 3-50.)

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[7] In Argument I, appellant argued that the prosecutor's false promise of appellant's testimony invited the jurors to draw an adverse inference from appellant's silence in violation of the Fifth Amendment privilege against self-incrimination and introduced before the jurors highly damaging considerations which were extraneous to the properly presented evidence, in violation of the Due Process Clause. Appellant further argued this error may arguably be attributed to a combination of acts and omissions by the prosecutor, defense counsel and the trial court. Defense counsel told the prosecutor that appellant would testify for the prosecution (2RT 1018-1023) and furnished the prosecutor with a summary of appellant's anticipated testimony. (15RT 6267; 29CCT 8486). The prosecutor obtained pre-approval from the trial court for his opening statement by emphasizing that the defense had assured him appellant would testify. (14RT 5950; 15RT 6266, 6270-6271, 6280-6281.) The prosecutor then

Appellant presents the instant claim to clarify why the trial court, and not just the prosecutor, committed error in this instance. As discussed below, the court erred in permitting prosecutorial disclosure of appellant's anticipated testimony, because the court could not rely on defense counsel's assurances that appellant would testify. The law is clear that appellant's right to claim the privilege against self-incrimination and remain silent belonged to appellant alone, not his counsel, and the court was constitutionally required to respect and protect appellant's unconditional right to take refuge in that privilege. This is especially true in this case, where key representations made by lead counsel were made in appellant's absence. (See Argument XI at AOB 331-342 and ARB 155-164.) As a result, the trial court's ruling was legal error which infringed appellant's right to a jury trial verdict untainted by the prosecutor's comment on his exercise of his right to remain silent and deprived appellant of a fair trial in violation of the Due Process Clause.

B. <u>Factual Summary</u>.

Appellant's lead defense counsel Ron Castro chose to present as a defense to appellant's capital murder and robbery charges that appellant acted under duress from his two codefendants, John and Terry Hodges.

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made the tactical choice to inform jurors in his opening statement not only that appellant would testify but to also detail appellant's testimony even though he knew he risked mistrials if appellant asserted his right to silence. (14RT 5965, 15RT 6343-6346.) The trial court treated appellant as any other anticipated witness despite appellant's unequivocal right to assert the privilege against self-incrimination and the tremendous ramifications of whether or not he took the stand. Regardless of who was to blame for the prosecutor's unfilled promise of appellant's testimony, appellant argued, the end result was the deprivation of a fair trial in violation of the Due Process Clause. (See AOB 76-148; ARB 3-50.)

Castro desired that appellant testify in support of the defense and took the unprecedented step of making appellant available as a witness for the prosecution even though the prosecutor offered appellant no consideration and still sought to convict him of capital crimes and put him to death. (2RT 1018-1023, 14RT 5953-5956, 31RT 11340.) Counsel even gave the prosecutor appellant's statement, which was otherwise privileged attorney-client communication, concerning his expected testimony. (15RT 6267; 29CCT 8486.) Castro assured the prosecutor several times that appellant would testify for the State. (15RT 6266.) Indeed, at one pretrial conference, Castro announced that appellant would testify "whenever I tell him to," including as a witness for the prosecution. (2RT 1019.)

There was, of course, no guarantee that appellant would actually testify and despite the firmness of Castro's assurances, everyone in the courtroom – the court, the prosecutor, and all defense counsel – recognized the impossibility of making such a guarantee. (2RT 1021-1022, 1062, 1104; 6RT 2349; 14RT 5911, 5938; see also RB 20-22.) When Castro first announced that appellant would testify, the following exchange occurred:

> MR. MACIAS[8]: … I don't see how he'll take the stand during the prosecutor's case in chief –
>
> MR. SHERRIFF: Or at any time.
>
> MR. MACIAS: Or at any time.
>
> MR. HOLMES: Because that's his final decision at any time. He couldn't give you a guarantee.
>
> THE COURT: I don't feel that any of us should operate with an understanding that something is guaranteed, as far as who is

[8] Julian Macias was John Hodges' counsel and James Sherriff was Terry Hodges' counsel. Brad Holmes was appellant's *Keenan* counsel.

> going to waive their privilege against self-incrimination and who's going to testify. I think – I think we need to assess the case, apart from what you would hope and expect out of one of the defendants, any one of the defendants as far as what the strength of the D.A.'s case is.

(2RT 1022.)

Appellant's *Keenan* counsel, Brad Holmes, also emphasized the point that there was no guarantee, although it was at odds with Castro's assurances: "that's [appellant's] final decision at any time. He couldn't give you a guarantee." (2RT 1022.) Even Castro, despite his bluster, had to ultimately acknowledge that, "in the arena of human affairs," there was no "ironclad guarantee" that appellant would testify. (4RT 1787-1788.)

The trial court was not only aware that there was no guarantee but doubtful that appellant would actually testify for the State. When the prosecutor observed that Castro had told him appellant was willing to testify for the State, the court responded incredulously, "even though you're seeking to put him in the gas chambers, he's ready, willing and able to testify for you; is what your understanding is?" (2RT 1022.)

The trial court and counsel also recognized that the prosecutor risked mistrials if he outlined appellant's anticipated testimony in his opening statement but appellant exercised his right to remain silent. Both Hodges' attorneys and appellant's attorneys warned the trial court that if the prosecutor failed to deliver on a promise that appellant would testify, they would be prejudiced and would be entitled to mistrials. (4RT 1788; 14RT 5934-5935, 5938, 5949-5953, 5959, 5966.) The court recognized the risk and the dilemma it posed:

> MR. HOLMES: … The thing we have to remember here is Mr. Powell himself is the one that that is in control up to the very last minute if he wants to get on the stand or not.

> And I think where somebody is setting themselves up for a couple of mistrials here if he in fact doesn't testify. He's already got up and told both juries what he's going to say.
>
> THE COURT: Well, that's what I've already I thought indicated. … [¶] The prosecutor runs a risk that – if he gets up and in front of the juries – both juries he details what Carl Powell's going to say and Carl Powell doesn't take the stand --
>
> MR. HOLMES: Right.
>
> THE COURT: -- when it comes time to do so or at any time before the D.A. rests his case, then we have that dilemma.

(14RT 5934-5935.)

Thus, the trial court and all parties clearly understood that whether appellant would testify or remain silent remained uncertain until appellant actually took the stand or the trial ended and there was no way to guarantee that he would do so. They also recognized the risk of mistrial. Yet, the prosecutor decided he would call appellant as a state witness in his case-in-chief (14RT 6095), and sought guidance and permission to mention appellant's anticipated testimony in his opening statement. (14RT 5950; 15RT 6266, 6270-6271, 6280-6281.) Counsel for the Hodges objected to the prosecutor's request; appellant's counsel did not join. (14RT 5938, 5950-5953, 5966; 15RT 6267-6268, 6272.) Codefendants' counsel argued that because "no counsel … in the universe can … know that a defendant … is going to testify," the prosecutor "should not be allowed to build in error" (15RT 6272), and contended that the trial court should preclude the prosecutor from mentioning appellant's anticipated testimony unless it first obtained appellant's *personal* assurance that he planned to testify. (15RT 6267-6268.) The trial court declined to question appellant personally. (15RT 6268.) Based on Castro's assurances that appellant would testify,

the trial court ruled that the prosecutor could reference appellant's expected testimony in his opening statement. (14RT 5950; 15RT 6266, 6270-6271, 6280-6281.)

The prosecutor then told the jurors in his opening statement that appellant would testify and summarized his anticipated testimony, including an admission that appellant killed McDade. (15RT 6343-6346.) In the end, appellant relied on his Fifth Amendment right not to incriminate himself and did not testify. (2CT 518; 29RT 10702; 30RT 10805, 10816.) He was ultimately convicted of all charges and sentenced to death.

Appellant moved for a mistrial, arguing that the prosecutor's opening statement detailing his anticipated testimony, coupled with his exercise of his privilege against self-incrimination, was equivalent to adverse prosecutorial comment on appellant's exercise of his right to remain silent. (30RT 10818-10829, 10834-10838; 2CT 521-527.) The trial court denied that motion. (30RT 10837-10838.)

C. The Court Erred In Permitting Prosecutorial Disclosure Of Appellant's Anticipated Testimony, Because The Court Could Not Rely On Defense Counsel's Assurance To The Prosecutor That Appellant Would Testify; Appellant's Right To Claim The Privilege Against Self-Incrimination And Remain Silent Belonged To Appellant Alone, Not His Counsel.

The trial court erred in granting the prosecutor's request that he be allowed to tell the jurors in his opening statement that appellant would testify and what appellant would testify to. Everyone recognized that there was no guarantee that appellant would testify and the court expressed personal doubt that he would actually do so. And everyone recognized that if the prosecutor outlined appellant's anticipated testimony in his opening statement but appellant exercised his right to remain silent, mistrial motions would be in order. Both Hodges' attorneys and appellant's attorneys

warned the Court that if the prosecutor failed to deliver on a promise that appellant would testify, they would be prejudiced and would be entitled to mistrials. Yet, despite this knowledge and its own doubt, the Court declined to question appellant personally about whether he would testify and based on Castro's assurance that appellant would do so, permitted the prosecutor to disclose the information during his opening statement.

This was error, because the court could not rely on defense counsel's assurances to the prosecutor. The law is well settled that a criminal defendant has an absolute federal constitutional right to either testify or claim the privilege against self-incrimination, and that right belongs to the defendant alone, not his counsel. The defendant, not counsel, has the ultimate say over what course to take, and counsel cannot compel a criminal defendant to waive his right to remain silent and testify. A defendant may assert this right even over his attorney's express objection. (*Rock v. Arkansas* (1987) 483 U.S. 44, 49-53.) Further, a defendant may wait to see how the evidence develops before making a final decision about whether to testify or remain silent. (*Brooks v. Tennessee* (1972) 406 U.S. 605.) The trial court was constitutionally required to respect and protect appellant's unconditional right to take refuge in the privilege against self-incrimination. (See, e.g., *People v. Collie* (1981) 30 Cal.3d 43, 56 ["Although the lower courts do not share our final authority, their responsibility for protecting constitutional rights is no less central to their judicial role."]; *Miller v. Fenton* (1985) 474 U.S. 104, 117 ["We reiterate our confidence that state judges, no less than their federal counterparts, will properly discharge their duty to protect the constitutional rights of criminal defendants."].)

Thus, the trial court erred in permitting the prosecutor to tell the jurors that appellant would testify and to relay statements furnished by

defense counsel, including an admission that appellant killed McDade. As discussed in the next section, that error, which had serious consequences for the jury's consideration of appellant's guilt phase defense and penalty phase case in mitigation, was prejudicial.

D. This Error Was Prejudicial and Requires Reversal of Appellant's Conviction and Sentence of Death.

As discussed in appellant's opening and reply briefs, the trial court's erroneous ruling permitting this disclosure had serious consequences resulting in prejudicial error. Appellant incorporates those arguments here. (See AOB 126-148; ARB 33-50.) First, obviously, it allowed the prosecutor to tell the jurors that appellant would testify to killing McDade. But the damage was even more than that. The prosecutor's comments not only set up an expectation that appellant would testify, but that he would testify to highly significant and dramatic circumstances that were a defense to the capital charges. When that testimony never materialized, appellant's jurors were left with the devastating impression that appellant's claim of killing under duress and lack of involvement in the robbery was a sham. This impermissibly burdened appellant's exercise of his privilege against self-incrimination. Appellant's anticipated testimony was closely related to the mental state defense appellant ultimately presented at the guilt phase, and it bore directly on his efforts to raise lingering doubt in mitigation at the penalty phase. The damaging extraneous consideration that the prosecutor's broken promise invited severely undermined appellant's defense as to both guilt and penalty and resulted in a fundamentally unfair trial. As aptly recognized by the First Circuit:

> When a jury is promised that it will hear the defendant's story from the defendant's own lips, and the defendant then reneges, common sense suggests that the course of trial may be profoundly altered. A

> broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it was made."

(*Ouber v. Guarino* (1st Cir. 2002) 293 F.3d 19, 28). Consequently, the judgment must be reversed in its entirety.

III.

APPELLANT'S DEATH SENTENCE IS UNCONSTITUTIONALLY ARBITRARY AND DISPROPORTIONATE IN LIGHT OF HIS INTELLECTUAL DEFICIENCIES AND YOUTH.

A. Introduction.

In light of appellant's intellectual deficiencies and youth, the imposition of the death penalty in this case constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments and article I, section 17 of the California Constitution.

The Eighth Amendment prohibition against "cruel and unusual punishments" is interpreted by assessing the "'evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." (*Roper v. Simmons* (2005) 543 U.S. 551, 560-561, quoting *Trop v. Dulles* (1958) 356 U.S. 86, 100-101 (plur. opn.).) Applying this principle, the United States Supreme Court has held that certain conditions, particularly conditions that significantly limit or impair the mental and psychological processes of a defendant's mind, prohibit the application of the death penalty to a person possessing the conditions. These conditions include intellectual disability/mental retardation, *Atkins v. Virginia* (2002) 536 U.S. 304, as well as childhood/immaturity, *Roper v. Simmons*, *supra*.

Appellant was only eighteen years old at the time of the offense and borderline intellectually disabled. In combination, his intellectual deficiencies and youth constitute the functional equivalent of these other

conditions. In combination, appellant's youth and intellectual deficiencies substantially lessened his culpability such that his death sentence is disproportionate to his diminished moral blameworthiness. To impose a sentence of death under these circumstances would thus constitute cruel and unusual punishment in violation of the Eighth Amendment. This court should thus vacate the death sentence imposed in this case.

B. The Death Penalty Cannot Be Imposed On Youthful And Intellectually Disabled Offenders, Because They Possess Cognitive Deficits That Limit Their Reasoning, Judgment, And Control Of Their Impulses, Such That The Goals Of Retribution And Deterrence Can Never Be Served By Executing Them.

"Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." (*Roper v. Simmons*, *supra*, 543 U.S. at p. 568, citing *Atkins v. Virginia*, *supra*, 536 U.S. at p. 319.) In *Roper* and subsequent cases involving juvenile offenders, as well as in *Atkins*, the Supreme Court recognized that deficits in reasoning, judgment and impulse control -- deficits that both juveniles and the intellectually disabled possess -- necessarily affect the degree to which they can be held morally culpable for their actions. Essentially, offenders who possess these deficits "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct," for which the death penalty is reserved. (*Atkins*, *supra*, 536 U.S. at p. 306; *see also id.* at p. 319 ["If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution."]; *Roper*, *supra*, 543 U.S. at p. 570 ["The susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult."].)

Offenders in both categories, juvenile offenders under the age of 18 and the intellectually disabled, possess cognitive deficits that limit their "reasoning, judgment, and control of their impulses," such that the penological goals of retribution and deterrence of capital crimes can never be served by executing them. (*Atkins*, *supra*, 536 U.S. at p. 306; see also *Roper*, *supra*, 543 U.S. at pp. 569-575.) And, because execution of juvenile and intellectually disabled offenders would not serve either of the penological aims of the death penalty, the Eighth Amendment prohibits their execution. (See *Hall v. Florida* (2014) 134 S.Ct. 1986, 1992-1993, 188 L.Ed.2d 1007.)

In a trio of cases involving juvenile offenders, the Supreme Court discussed the substantial differences between children and adults which lessen their moral culpability and preclude applying traditional concepts of deterrence, retribution and punishment to juveniles.

In *Roper v. Simmons*, *supra*, 543 U.S. 551, the Supreme Court held that the death penalty could not be imposed on defendants who were under the age of eighteen at the time of the crime. In reaching this result, the Court noted that as compared to adults, teenagers have "[a] lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures"; and their character "is not as well formed." (*Id*. at pp. 569-570.) Based on these basic differences, the Court concluded that "it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles…." (*Id*. at p. 571.) This was "of special concern" to the Court precisely because "the same characteristics that render juveniles less culpable than adults suggest as well that the juveniles will be less susceptible to deterrence." (*Ibid*.) The Court noted what every parent knows – "the likelihood that the teenage offender has made … [a] cost-

benefit analysis … is so remote as to be virtually nonexistent." (*Id*. at p. 572.) The Court concluded: "The susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult." (*Id*. at p. 570.)

In *Graham v. Florida* (2010) 560 U.S. 48, the Court again recognized that traditional concepts of deterrence do not apply to juveniles. There, the Court addressed the question of whether juveniles could receive a life without parole term for a non-homicide offense. The Court cited scientific studies of adolescent brain structure and functioning which again confirmed the daily experience of parents everywhere that teenagers are still undeveloped personalities, labile and situation-dependent, impulse-driven, peer-sensitive, and largely lacking in the mechanisms of self-control which almost all of them will gain later in life. Because "their characters are 'not as well formed,'" the Court found that "it would be misguided to equate the failings of a minor with those of an adult." (*Graham v. Florida*, *supra*, 560 U.S. at p. 68.) The Court held that deterrence did not justify a life without parole sentence because – in contrast to adults – "juveniles' lack of maturity and underdeveloped sense of responsibility … often result in impetuous and ill-considered actions and decisions…." (*Id*. at p. 72.)

In the third case, *Miller v. Alabama* (2012) 567 U.S. 460, the Court again addressed the concept of deterrence in connection with juveniles. There, the Supreme Court addressed the question of whether a life without parole term imposed on a juvenile constituted cruel and unusual punishment even for a homicide. Ultimately, the Court "[did] not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles …." (*Miller*, *supra*, 567 U.S. at p. 479.) Instead, the Court reversed the life without parole terms imposed in both of the cases before it by finding that the

schemes under which they were imposed were improperly mandatory. (*Id.* at p. 465.)

But in reaching this more limited decision, the Court fully embraced the view of deterrence expressed in both *Roper* and *Graham*. As it had in both *Roper* and *Graham*, the Court recognized that because of the "immaturity, recklessness and impetuosity" with which juveniles act, they are less likely than adults to consider consequences and, as such, deterrence cannot justify imposing a life with parole term on a juvenile. (*Id*. at pp. 472-473.)

In *Atkins v. Virginia*, *supra*, 536 U.S. 304, the Supreme Court embraced similar views of deterrence in categorically banning imposition of the death penalty on the intellectually disabled. There, the Court observed:

> Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information…. Thus, executing the mentally retarded will not measurably further the goal of deterrence.

(*Id*. at p. 320.) Because the Court was not "persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty, it concluded that such punishment was excessive and violated the Eighth Amendment's evolving standards of decency." (*Id*. at p. 321.)

In sum, this Supreme Court jurisprudence establishes that (1) certain offenders, such as individuals under the age of 18 and the intellectually disabled, possess cognitive deficits that limit their reasoning, judgment, and control of their impulses, such that the goals of retribution and deterrence

can never be served by executing them (*Atkins*, *supra*, 536 U.S. at p. 306; see also *Roper*, *supra*, 543 U.S. at pp. 569-575); and (2) the Eighth Amendment prohibits execution of such individuals because it serves neither of the penological aims of the death penalty: retribution and deterrence of capital crimes. (See *Hall v. Florida*, *supra*, 134 S.Ct. at pp. 1992-1993.)

C. Appellant Possessed The Same Deficits Of Reason, Judgment, Impulse Control, And Interpersonal Relations That Remove A Person From The Set Of "Worst Offenders" Whose "Extreme Culpability" Make Death An Available Punishment.

At the time of his crime, appellant possessed the same type of impairments that the Supreme Court has identified as reducing one's moral culpability and ability to engage in a deliberative, "cold calculus" in contemplating criminal actions. (*See Gregg v. Georgia* (1976) 428 U.S. 153, 186.) In addition to his young age -- only 18 years of age at the time of the offense, the results of I.Q. and personality testing established that he had diminished intellectual capacity, thus lessening his "moral culpability and hence the retributive value of the punishment." (*See Hall*, *supra*, 134 S. Ct. at p. 1993.) According to that testing, appellant's full-scale I.Q. was 75, falling just below the fourth percentile; thus, his intellectual abilities were below 96% of the population in this country. (34RT 12002, 12006-12007.) Appellant was diagnosed as borderline intellectually disabled on the basis of that I.Q. score. (34RT 12032.)

In addition, personality testing showed that appellant had high levels of paranoia and suffered from symptoms of schizophrenia, as well as high anxiety. (34RT 12021-12022, 12024-12030.) Testing also revealed that appellant had difficulty reading, further illustrating his intellectual deficiency. A defense expert determined that appellant's reading ability

was not adequate for him to read test questions so the doctor had to read most of the questions to appellant to ensure his understanding. (34RT 12008-12010.) The testing required a minimum sixth-grade reading level and the expert concluded that appellant read at a third or possibly fourth-grade level, fifth-grade level at best. (34RT 12008-12009, 12018.) Similarly, during his police interview, appellant admitted that although he could understand English "pretty good," he had difficulty with reading. (30CCT 8974.)

Appellant's intellectual disabilities were further evidenced by his school performance. Understanding and retaining information came harder for him than for normal students. (34RT 11962.) Appellant failed to graduate high school. He repeated both the 2nd and 8th grades; he was 17 years old in 10th grade. Appellant failed many classes, passing only the easy ones.[9] (34RT 11960-11962.) The defense expert believed that appellant qualified for, and had probably been placed in, special education classes. (34RT 12136, 12139-12140.) He would have placed appellant in special education if given the chance. (35RT 12136.)

Although appellant was 18 years of age, his brain functioned at a level equivalent to a juvenile. Appellant was more comfortable around younger children than people his own age. (35RT 12320-12321.) Appellant also struggled to understand the consequences of his actions. For example, despite leaving his job at KFC because of the thefts, appellant repeatedly asked the McDades to rehire him. (32RT 11594.) With no intention to rehire appellant, Keith McDade repeatedly told appellant they were full and to check back later. (32RT 11544-11545, 11569, 11595-11596.) Appellant

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[9] Appellant's grades at Kennedy High School were very poor – mostly "D's" and "F's," except for a "B" in P.E. (34RT 12136; see 45CCT 13410-13413 [Def. Penalty Phase Ex. P-A, appellant's school transcripts].)

did not get the message; he continued to ask for his job over and over. (32RT 11582-11583.)

Due to his youth and intellectual deficiencies, appellant was susceptible to manipulation by older individuals whose approval he sought. (34RT 12071, 12083, 12114.) Additionally, he would likely gravitate to a follower position, rather than leader, because his intellectual abilities and capacity for thinking would be at the bottom of most groups. (34RT 12033.)

Due to his youth and intellectual deficiency, appellant lacked the capacity to engage "in the kind of cost-benefit analysis that attaches any weight to the possibility of execution" prior to the murder. (*Roper v. Simmons*, *supra*, 543 U.S. at pp. 561-562.) Appellant was not capable of abstract thinking or complex or advanced planning. (34RT 12032.) Appellant would tend to live his life on a moment-to-moment basis. (*Ibid*.) As observed by the mother of one of his friends, appellant was mentally slow and his behavior indicated that he did not realize the gravity of what he had done. (31CCT 9263, 9265-9266, 9269, 9291; 28RT 10412, 10431.) All of this evidence demonstrated that, at the time of the offense, appellant lacked the ability to engage in a deliberative, "cold calculus" in contemplating criminal actions.

In sum, appellant possessed the same deficits of reason, judgment, impulse control, and interpersonal relations that remove a person from the set of "worst offenders" whose "extreme culpability" make death an available punishment.

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D. In Combination, Appellant's Youth And Intellectual Deficiencies Substantially Lessened His Culpability Such That His Death Sentence Is Disproportionate To His Diminished Moral Blameworthiness And Thus Violative Of The Eighth Amendment.

Appellant's diminished culpability due to the combination of his youth and intellectual deficiencies removes him from the narrow category of those offenders "whose extreme culpability makes them 'the most deserving of execution.'" (*See Roper*, *supra*, 543 U.S. at 568.) The obvious fact that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18" (*id.* at p. 574), is all the more pronounced for an offender, like appellant, who is incapable of abstract thinking or complex planning, lives his life on a moment-to-moment basis, and is borderline intellectually disabled.

There are no legitimate penological reasons for imposing a death sentence on a teenage offender like appellant who was chronologically 18 years old at the time of the offense, but nevertheless possessed the very same characteristic vulnerabilities and weaknesses as offenders under the age of 18 who are categorically exempt from capital punishment. Together, *Atkins* and *Roper* stand for the principle that it is cruel and unusual, by evolving standards of decency, to execute someone who is over 18, but whose brain functions at a level equivalent to a juvenile. That is the case here where although he was 18 years of age, appellant's intellectual disabilities resulted in his functioning at a much younger age.

In *Hall*, the Supreme Court acknowledged that arbitrary numerical cut-offs for application of a categorical ban against capital punishment can themselves be unconstitutional if they fail to include all persons who can fairly demonstrate, with reliable scientific evidence, that they share the condition that is addressed with the categorical ban. (*Hall*, *supra*, 134 S.Ct.

at pp. 1993-2001.) In *Eddings v. Oklahoma* (1982) 455 U.S. 104, 116, the Supreme Court indicated that courts reviewing a death sentence imposed on a young defendant should focus on more than the defendant's chronological age. In doing so, the Court recognized that "just as the chronological age of a minor is itself a relevant mitigating factor of great weight, *so must the background and mental and emotional development of youthful defendant be duly considered in sentencing.*" (*Ibid*., emphasis added.)

The consensus of medical professionals is also relevant to Eighth Amendment jurisprudence. (See *Hall*, *supra*, 134 S.Ct. at p. 2000.) Setting 18 years as the line for who is mature enough for the death penalty, regardless of other factors affecting a person's neurodevelopment, makes little scientific sense. "[T]here is little empirical evidence to support age 18, the current legal age of majority, as an accurate marker of adult capacities." (Sara B. Johnson, Robert W. Blum & Jay N. Giedd, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45[3] J. Adolesc. Heath 216, 217 (2009), http://dx.doi.org/10.1016/j.jadohealth.2009.05.016.) Furthermore, reliable scientific evidence demonstrates that the human brain does not stop maturing until the mid-twenties. (*Id*. at p. 216.) "The emotional balance of young people under the age of 21 is unstable and this instability reduces their responsibility, and … in some cases may even amount to a form of mental disorder…." (Brief of Human Rights Committee of the Bar of England and Wales et al. as Amici Curiae Supporting Respondents at p. 11, *Roper v. Simmons*, *supra*, 543 U.S. 551.)

Moreover, appellant's chronological age is not an adequate reflection of his capacity. The same concerns that led to categorical exemptions from the death penalty for the mentally disabled and for juveniles apply to an offender like appellant who, mentally and

emotionally, had not yet become a fully functioning adult at the time of offense. Imposition of the death penalty for an offender like appellant presents a distinct Eighth Amendment violation. To conclude that the execution of juveniles is unconstitutional on account of inherent limitations of the juvenile mind – and then decline to extend this same protection from execution to an individual like appellant whose mind is the functional equivalent of a juvenile – would undermine the obvious intent of the Supreme Court in affording constitutional protection in *Atkins* and the *Roper* line of cases.

Ultimately, while the consequence of the *Atkins* and *Roper* decisions was to establish a categorical ban on executing certain classes of individuals, the rationale driving those decisions was to bring the imposition of capital punishment in line with a properly individualized assessment of moral culpability. Deficits in reasoning, judgment, and impulse control -- deficits which both juveniles and the intellectually disabled possess through no fault of their own -- necessarily affect the degree to which they can be held morally culpable for their actions. To execute an individual whose age is just above the 18-year cutoff required to prohibit his execution under *Atkins*, but who -- in actual maturity and intellectual functioning -- has the brain deficits equal to those protected under *Roper* and *Atkins*, is exactly the arbitrary line-drawing forbidden by *Hall*. Appellant is so similarly situated to those classes of offenders ineligible for execution under *Atkins* and *Roper* that this Court should conclude a death sentence is unwarranted here. Notably, the trial court, in reviewing appellant's death sentence under 190.3, subdivision (e), refused to consider appellant's youth as a mitigating circumstance (36RT 12690; see AOB Argument XXX at pages 645-647), making it all the more imperative that this Court consider it here.

E. Conclusion.

In conclusion, the combination of appellant's youth and intellectual deficiencies substantially lessened his culpability such that his death sentence is disproportionate to his diminished moral blameworthiness. To impose a sentence of death under these circumstances would thus constitute cruel and unusual punishment in violation of the Eighth Amendment. This court should thus vacate the death sentence imposed in this case.

IV.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

In Argument XXXI(C)(1) of his opening brief, appellant argued that the California death penalty scheme, as interpreted by this Court and applied at appellant's trial, violates the federal constitution. (AOB 659-669.) Appellant provides both additional authority in support of one aspect of that claim and an additional argument in support.

First, pursuant to *People v. Schmeck* (2005) 37 Cal.4th 240[10], and in accordance with this Court's own practice in decisions filed since then[11],

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[10] In *Schmeck*, this Court authorized capital appellants to preserve often-raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (*Schmeck, supra*, 37 Cal.4th at p. 304.)

[11] See, e.g., *People v. Johnson* (2015) 60 Cal.4th 966, 997; *People v. Adams* (2014) 60 Cal.4th 541, 579-582; *People v. Contreras* (2013) 58 Cal.4th 123, 172-173; *People v. Homick* (2012) 55 Cal.4th 816, 902-904; *People v.*

appellant identifies an additional systemic and previously rejected claim relating to the California death penalty scheme that require reversal of his death sentence: In allowing the sentencer to consider, and impose a sentence of death on the basis of, criminal conduct committed by appellant when a child, California's Death Penalty Statute, as interpreted by this Court, violates the Eighth Amendment's proscription of cruel and unusual punishment. This Court has interpreted Penal Code section 190.3, subdivisions (b) and (c), to permit the sentence to consider juvenile convictions and criminal conduct committed by a defendant when a child (see, e.g., *People v. Pride* (1992) 3 Cal.4th 195, 256-257 [no bar on the use of juvenile convictions under Pen. Code, § 190.3(c)]; *People v. Cox* (1991) 53 Cal.3d 618, 689 [for prior criminal acts evidence under section 190.3(b) to serve the identified purpose, it does not matter if the prior acts were committed when the defendant was a child or adult]), and has repeatedly rejected the argument that *Roper v. Simmons*, *supra*, 543 U.S. 551, precludes consideration of juvenile convictions and criminal conduct in penalty phase aggravation. (See *People v. Bivert* (2011) 52 Cal.4th 96, 123; *People v. Lee* (2011) 51 Cal.4th 620, 648-649; *People v. Taylor* (2010) 48 Cal.4th 574, 653-654; *People v. Bramit* (2009) 46 Cal.4th 1221, 1239; *People v. Rices* (2017) 4 Cal.5th 49, 86-87.) Appellant submits that these decisions should be reconsidered because they are inconsistent with the principles set forth by the Supreme Court in *People v. Roper*, *supra*; *Graham v. Florida*, *supra*, 560 U.S. 48; and *Miller v. Alabama*, *supra*, 567

Eubanks (2011) 53 Cal.4th 110, 152-152; *People v. Taylor* (2010) 48 Cal.4th 574, 661-663; *People v. Ervine* (2009) 47 Cal.4th 745, 810-811.

U.S. 460. (See Argument III, *supra*.) In this case, the prosecution presented evidence in aggravation of a crime of violence that appellant committed in October of 1990, when he was 17 years old. (32RT 11543, 11580, 11636-11640, 33RT 11782.) Appellant submits that consideration of, and reliance on that evidence to impose a sentence of death violated his rights under the Eighth Amendment.

Second, appellant presents additional authority in support of his Argument XXXI(C)(1). After appellant filed his opening and reply briefs, 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] [hereafter "*Hurst*"].) *Hurst* supports appellant's argument in Argument XXXI(C)(1) of his opening brief that this Court 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*, and therefore 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).[12] (See AOB 659-669.)

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[12] Appellant's argument here does not alter his claim in the opening brief, but provides additional authority for his argument in XXXI(C)(1). (See AOB 659-669.)

A. Under *Hurst*, Each Fact Necessary To Impose A Death Sentence, Including The Determination That The Aggravating Circumstance(s) 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 v. Arizona*, *supra*, 536 U.S. at p. 589; *Apprendi v. New Jersey*, *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 p. 494 and pp. 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 high 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. (*Hurst*, *supra*, 136 S.Ct. at p. 620.) 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. (*Hurst, supra,* 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*.)[13]

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

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[13] 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.)

circumstance necessary for imposition of the death penalty'"].) In each case, the Supreme 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.)

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.[14] 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

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[14] See 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* and *Hildwin*. 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].)

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.)

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* (2014) 60 Cal.4th 1, 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, unlike 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 sentence makes two additional findings. In each jurisdiction, the sentence 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 sentence to impose a death sentence. The sentence must make another factual finding: in California that "'the aggravating circumstances outweigh

the mitigating circumstance'" (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 Fl. Stat. § 921.141(3)).[15]

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 sentence 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: "the 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. p. 494.) So did Justice Scalia in *Ring*:

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[15] 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 aggravating factors outweigh the mitigating factors that finally authorizes imposition of the death penalty.

> [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.

(*Ring*, *supra*, 536 U.S. at p. 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 Penal Code section 190.2, the penalty range increase 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 Penal Code 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 Penal Code 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.[16]

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 Penal Code section 190.3's weighing directive in *People v. Brown* (1985) 40 Cal.3d 512, rev'd on other grounds

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[16] 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. More importantly here, she has gone on to find that 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, 410-411, 187 L.Ed.2d 449] (dis. opn. from denial of certiorari, Sotomayor, J.).)

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. (*Brown, supra,* 40 Cal.3d 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 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 Penal Code 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.

(*People v. Brown*, *supra*, at p. 541, [hereafter "*Brown*"], footnotes omitted.)[17]

Under *Brown*, the weighing requirement provides for jury discretion in both the assignment of the weight to be given to the sentencing factors and the ultimate choice of punishment. Despite the "shall impose death" language, Penal Code 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,

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[17] In *Boyde v. California* (1990) 494 U.S. 370, 377, 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.

that the aggravating evidence is not comparatively substantial enough to warrant death."].)

In this way, Penal Code 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 aggravation circumstances outweighs the mitigation. (*Brown*, *supra*, 40 Cal.3d at p. 540.) This is the "normative" part of the jury's decision. (*Brown*, *supra*, 40 Cal.3d at p. 540.)

This understanding of Penal Code 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 Penal Code section 190.3's sentencing directive as comparable to that of Florida – if the sentence finds the aggravating circumstances outweighed 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.[18] The requirement that the jury must find that the

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[18] 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 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

aggravating 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) Volume 1, Preface, at 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 page 622, which addressed Florida's statute with its comparable weighing requirement, indicates that the finding that aggravating circumstances outweigh mitigating circumstances is a factfinding for purposes of *Apprendi* and *Ring*.

> 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.

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 1, 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].)[19] 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 Florida Supreme Court in *Hurst v. State* (2016) 202 So.3d 40, supports appellant's claim. On remand following the decision of the United State Supreme Court, the Florida court reviewed whether a unanimous jury verdict was required in capital sentencing. The court began by looking at the rems of the statute, 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." (*Hurst v. State, supra,* at p. 53; Fla. Stat. (2012) § 921.141(1)-(3).) Each of these considerations, including the weighing process itself, were described as "elements" that the sentence must determine, akin to elements of a crime during the guilt phase. (*Hurst v. State, supra,* 202 So.3d at p. 53.) The court emphasized:

> *Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a

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[19] 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.

> sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

(*Hurst v. State*, *supra*, 202 So.3d at p. 57.) There was nothing that separated the capital weighing process from any other finding of fact.

The recent decision of the Delaware Supreme Court in *Rauf v. State* (Del. 2016) 145 A.3d 430 ("*Rauf*") further supports appellant's request that this Court revisit its holdings that the *Apprendi* and *Ring* rules do not apply to California's death penalty statute. *Rauf* held that Delaware's death penalty statute violates the Sixth Amendment under *Hurst*. In Delaware, unlike in Florida, the jury's finding of a statutory aggravating circumstance is determinative, not simply advisory. (*Id*. at p. 457.) 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*. (*Id*. at pp. 433-434 (per curiam opn.).)

One reason the court invalidated Delaware's law is relevant here: the jury in Delaware, like the jury in California, is not required to find that the aggravating circumstances outweigh the mitigating circumstances unanimously and beyond a reasonable doubt. (*Id*. at pp. 436 (per curiam opn.), 485-486 (conc. opn. of Holland, J.).) With regard to this defect:

> 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.

(*Id*. at p. 485 (conc. opn. of Holland, J.), footnotes omitted.)

The Florida and Delaware courts are not alone in reaching this conclusion. Other state supreme courts have recognized that the determination that the aggravating circumstances outweigh the mitigating circumstance, like 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 (Sotomayor, J., dissenting from denial of cert.) ["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) [finding that – under *Apprendi* and *Ring* – the finding 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*].)

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 and beyond a reasonable doubt. As appellant's jury was not required to make this finding, his death sentence must be reversed.

CONCLUSION

For the reasons set forth above and in appellant's opening and reply brief, appellant respectfully requests this Court to reverse both the convictions and sentence of death in this case.

Dated: May 12, 2018

Respectfully submitted,

/s/ Neoma Kenwood
NEOMA KENWOOD
Attorney for Appellant
CARL DEVON POWELL

CERTIFICATION OF WORD COUNT
PURSUANT TO RULE 8.630(b)(2)

I, Neoma Kenwood, am the attorney appointed to represent appellant Carl Powell in this automatic appeal. I conducted a word count of this reply brief using computer software. On the basis of that computer-generated word count, I certify that this brief, exclusive of the table of contents, the proof of service, and this certificate, contains 18,319 words.

I declare under the penalty of perjury that the foregoing is true and correct, and that this certificate was executed on May 11, 2018, at San Francisco, California.

/s/ Neoma Kenwood

NEOMA KENWOOD

PEOPLE V. CARL DEVON POWELL, Automatic Appeal No. S043520

Sacramento County Superior Ct. No. 113126

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STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I declare as follows:

I, NEOMA KENWOOD, am over the age of 18 years, and not a party to the within action; my business address is P.M.B. #414, 1569 Solano Avenue, Berkeley, CA 94707.

On May 11, I served a true and correct copy of the attached

APPELLANT'S OPENING SUPPLEMENTAL BRIEF

on the interested parties or counsel for interested parties named below, by placing a true copy enclosed in a sealed envelope, with postage fully prepaid, in an official depository under the care and control of the United States Postal Service:

CARL DEVON POWELL, #J-43000
CSP-SQ
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San Quentin, CA 94974
[Appellant]

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(For delivery to the Hon. James I. Morris)
Sacramento County Superior Court
720 Ninth Street, Room 101
Sacramento, CA 95814-1398

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April Boelk, Automatic Appeals Supervisor

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350 McAllister Street
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I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct and that this declaration was executed on May 11, 2018, at San Francisco, California.

/s/ Neoma Kenwood
NEOMA KENWOOD

STATE OF CALIFORNIA
Supreme Court of California

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Kenwood, Neoma (101805)
Last Name, First Name (PNum)

Law Office of Neoma Kenwood

Law Firm