No. S065233

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. FLOYD DANIEL SMITH Defendant and Appellant.	(San Bernardino County Sup. Ct. No. FWV08607

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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

HONORABLE JOHN W. KENNEDY

MARY K. McCOMB
State Public Defender
JOSEPH E. CHABOT
Senior Deputy State Public Defender
State Bar No. 104810

1111 Broadway, 10th Floor
Oakland, California 94607
Telephone: (510) 267-3300
Chabot@ospd.ca.gov

Attorneys for Appellant

DEATH PENALTY

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PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. FLOYD DANIEL SMITH, Defendant and Appellant	No. S065233 (San Bernardino County Superior Ct. No. FWV09607)

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XI.

THE PRIOR-MURDER SPECIAL-CIRCUMSTANCE VERDICT SHOULD BE REVERSED DUE TO A LACK OF SUFFICIENT EVIDENCE.

A. Introduction

To prove the special circumstance allegation that defendant Floyd Daniel Smith was previously convicted of murder, the prosecutor introduced two documentary exhibits, and nothing else. The prosecutor presented no testimony and offered no argument to assist the jury in finding evidence in the exhibits of a prior murder conviction.

Upon examination of the two exhibits, it is apparent that no such evidence exists. First, the documentary exhibits were not properly certified

as true and correct copies of the originals, thereby making the credibility of the exhibits highly questionable. Second, although the exhibits referred to a party with the same name as the defendant, the exhibits do not concern the Smith in this case. Third, and perhaps most obvious, the exhibits do not even mention a murder conviction.

Accordingly, based on the two documentary exhibits – the only evidence before the jury – no rational jury could have found beyond a reasonable doubt that Mr. Smith was previously convicted of murder. The prior-murder special-circumstance verdict should be reversed due to a lack of sufficient evidence.

B. Background

On July 15, 1997, the jury found Mr. Smith guilty of the first degree murder of Joshua Rexford and also found true the special circumstance allegation that the murder was committed while lying in wait. (2CT 465, 466.) On July 21, 1997, the court held a separate proceeding to allow the jury to consider the special circumstance allegation that Mr. Smith was previously convicted of murder. (17RT 5564.)

After the prosecutor and defense counsel waived opening statements, the prosecutor moved into evidence exhibit 24 (3SCT3 787-793) and exhibit 63 (4SCT3 1167-1183). Defense counsel did not object to the exhibits, and the court admitted them. (17RT 5566-5567.)[1]

Exhibits 24 and 63, which total 24 pages (3SCT3 787-793; 4SCT3 1167-1183), are described in detail in section C below.

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[1] The exhibits are bound in the Clerk's Third Supplemental Transcript ("SCT3"). Exhibit 24 is in volume 3 at 3SCT3 787-793, and exhibit 63 is in volume 4 at 4SCT3 1167-1183.

The prosecution and the defense rested without calling any witnesses. (17RT 5566.) Both made brief comments to the jury, with neither indicating where evidence of a prior murder conviction might be found in the two exhibits. (17RT 5567.)

The court instructed the jurors with CALJIC No. 8.82 [Special Circumstances -- Murder With Prior Conviction of Murder]. (17RT 5568-5569.) In addition, the court told the jurors twice, that to decide the special circumstance question, their job was to review the two exhibits. (17RT 5570, 5573.)

The jurors deliberated less than a half hour before finding the special circumstance allegation true. (17RT 5574-5575; 2CT 486.)

C. Exhibits 24 and 63

1. Exhibit 24

Exhibit 24 is seven pages, consisting of a one-page cover letter, dated March 3, 1995, and six attached pages. (3SCT3 787-793.) The subject of the letter is "Floyd Daniel Smith, Jr.," YA No. 44591, Sup. Ct. No. CR-22000. It is addressed to the San Bernardino Sheriff's Office, to the attention of Scott Franks, Detective. The letter is signed by Kimberley L. Dornback for Patricia A. Hagan, Supervisor, Master Files, Department of the Youth Authority, State of California. (3SCT3 787.) The following initials appear on the letter's lower left side: "PAH:kld." (*Ibid.*) The letter reads:

> Attached are documents showing the commitment under which we held the above named subject (as prescribed in Section 969b of the Penal Code) which you recently requested. The commitment lists the name of F. Peasley DPD, as counsel for the defendant. Also attached are Order of Discharge, fingerprints, and rap sheet. No photo available.

> This is to certify that I, the undersigned, am the official custodian of all records of all wards committed by the Youth Authority, and that the attached documents are true and correct copies of the records in my custody.

(3SCT3 787.)

Page 788 is a duplicate of 4SCT3 1180, described below.

Page 789 is a July 24, 1992 "Order of Discharge" from the Department of the Youth Authority, Riverside County Superior Court, YA No. 44591, regarding ward, Floyd Daniel Smith, Jr., 1414 N. Riverside Ave., Apt. 125, Rialto, CA 92376. The order states: "Reason: Honorable Discharge No Violation." And it provides: "This Certifies That Floyd Daniel Smith Jr. is hereby discharged from the Youth Authority under Honorable Conditions." The discharge is "By Order of the Youthful Offender Parole Board."

Page 790 is a fingerprint form purporting to show the fingerprints for Floyd Daniel Smith. The form contains a signature of the "person fingerprinted." The following is noted on the form: Date of Birth: 07/20/67. Date Arrested or Received: 1/10/85. Sex: M. Race: Blk. Hgt: 5'11". Wgt: 158. Eyes: Brn. Hair: Blk. Place of Birth: Banning, CA. Your No. 44591. Charge: PC 187/12022.5 Murder, First Degree, Use of Firearm. Final Disposition: CYA Commitment – Riverside County Superior Court. Social Security No. 522-33-9078.

Page 791 appears to be an FBI fingerprint form. It shows the following: Occupation: Student. Residence of Person Fingerprinted: 479 E. Indian School Lane, Banning, CA. Scars: 1/8" scar between eyes, ½" scar right chin. Skin tone: dark. The form has a date stamp for Jan. 17, 1985.

Page 792 appears to be a computer printout to the attention of K Dornback. The printout includes the following notes: Restricted – Do Not Use for Employment, Licensing or Certification Purposes. Floyd Daniel Smith: DOB 7-20-1967. Sex: M. Rac: Black. Hgt:511. Wgt:158. Eye: bro. Hai/blk. POB/CA. Soc/522339078. Inn/CYA-Y044591. Smt/sc R Leg. Mds/sc Between Eyes. Occ/student. Custody/CYA. 1-10-85 Caya Norwalk. Cnt:01. #Y44591. 187 PC – Murder: First Degree – Used Firearm Sen From:Riverside Co; 1-22-91 Dispo:paroled from CYA: Recvd By:capa Youth Authority; 7-24-92 Dispo:discharged.

Page 793 appears to be exhibit 24's cover page, reflecting court exhibit number 24 and grand jury exhibit number 4.

2. Exhibit 63

Exhibit 63 purports to be a certified copy of a Riverside County Superior Court criminal case file concerning "Floyd Daniel Smith." (4SCT3 1166-1183.)

Page 1166 indicates that the exhibit's number is 63.

Page 1167 contains a purported certification, which reads as follows:

> "Each document to which this certificate is attached is certified to be a full, true and correct copy of the original on file and of record in my office."

(4SCT3 1167.) The previous sentence is followed by a stamped name in cursive: *Arthur A. Sims.* (*Ibid.*) The stamped name is followed by: Arthur A. Sims, Clerk, Superior/Municipal Courts, County of Riverside, State of California. Dated: 6-6-95. (*Ibid.*) Next to the sentence purporting to certify each document is a stamp for Superior/Municipal Courts, Riverside County California. Two notations on page 1167 indicate that the certification must be in red to be a certified copy.

Pages 1168-1170 contain the Information in People v. Floyd Daniel Smith, Riverside County Superior Court, Case No. 22000, filed April 9, 1984. In counts I through V, the Information alleges, respectively, attempted robbery, murder under section 187, a second count of attempted robbery, kidnapping, and oral copulation.

Pages 1171-1174 are largely unreadable. Each page has a notation in the lower left corner that reads: "Court Original." (This suggests that the four pages in the possession of the court and the jury were similarly unreadable and were not relied on by the jury.) Pages 1173-1174 appear to be a complaint filed in Case No. 22000 on March 29, 1984.

Page 1175 appears to be an index of proceedings in People v. Floyd Daniel Smith, Municipal Court of Mt. San Jacinto Judicial District, Riverside County, No. 84-5578.

Page 1176 is a Riverside County Superior Court form, Minutes of Superior Court - Criminal, substantially unreadable (including the date), though there is no Court Original notation. At the top center of the form is a box entitled, "Violation of Section(s) (Counts & Degree)." The specific section(s), counts and degree are unreadable.

Page 1177 is a Riverside County Superior Court form, Minutes of Superior Court - Criminal, in People v. Floyd Daniel Smith, CR-22000. It covers the June 18, 1984 arraignment on the Information. The form shows that the defendant pled not guilty and denied the special allegations. At the top center of the form is a box showing the violations alleged in the Information: "Violation of Section(s) (Counts & Degree): 211/213 (12022.5 PC) P.C. (Cts I & III) 187 P.C. (Ct II) 209(b) (12022.5 PC) PC (Ct IV) 288a©) (12022.3(a) PC) P.C. (Ct V)."

Page 1178 is a Riverside County Superior Court form, Minutes of Superior Court - Criminal, in People v. Floyd Daniel Smith, CR-22000. It covers the July 13, 1984 "further proceedings." At the top center of the form is a box showing the violations alleged in the Information: "Violation of Section(s) (Counts & Degree): 211 PC (att) PC (12022.5 PC) (Cts I, III) 187 PC (Ct II) 209(b) PC (12022.5 PC) (Ct IV) 288a(c)) PC (12022.5 PC (Ct V)." The form notes that the not guilty plea to count II was withdrawn, a guilty plea to count II was entered, the court fixed the degree of offense at first degree, and the remaining counts and special allegations were set for dismissal at the pronouncement of judgment on August 3, 1984.

Page 1179 is a Riverside County Superior Court form, Minutes of Superior Court - Criminal, in People v. Floyd Daniel Smith, CR-22000. It covers the August 3, 1984 Hearing on Report of Probation Officer and Pronouncement of Judgment re: Conviction. At the top center of the form is a box that refers to the violations alleged in the Information: "Violation of Section(s) (Counts & Degree): 211 PC (att) (12022.5 PC) (Cts I, III) 187 PC (1 deg) (12022.5 PC) (Ct II) 209(b) PC (12022.5 PC) (Ct IV) 288a(c)) PC (12022.5(a) (Ct V)." A box on the form is checked to indicate the following: "Defendant states there is no legal cause why judgment should not be pronounced." The form further notes as follows:

> IT IS ORDERED: Defendant placed pursuant to 707.2 W&IC. Defendant remanded to custody of the Sheriff. Sheriff is directed to deliver defendant into custody of the California Youth Authority. Defendant to be housed at Juvenile Hall pending transportation to California Youth Authority.

Page 1180 is a Riverside County Superior Court form, Minutes of Superior Court - Criminal, in People v. Floyd Daniel Smith, CR-22000. It

covers the December 4, 1984 Hearing on Report of Probation Officer and Pronouncement of Judgment re: Conviction. At the top center of the form is a box that refers to the violations alleged in the Information: "Violation of Section(s) (Counts & Degree): *211 PC (Att) (12022.5 PC) (Ct I) (Ct III); 187 PC (12022.5 PC) (1st deg) (Ct II); 209(b) PC (12022.5 PC) (Ct IV); 288a©) PC (12022.3(a) PC (Ct V).*" (The italicized words above are handwritten.) A box on the form is checked to indicate the following: "Defendant states there is no legal cause why judgment should not be pronounced." The form further notes as follows:

> IT IS ORDERED: Credit to be given for *425* days served: *Local - 223; PC 4019 - 111; State institution - 91.* Defendant committed to the California Youth Authority, and the Sheriff is directed to deliver said defendant to such reception facility *for a period of time prescribed by law. (25 years to life plus two years*). Plaintiff's motion to dismiss Counts *I, III, IV, & V.* Court determines that defendant is not presently financially able to pay costs of appointed counsel. Factual basis found. *Enhancement as to count I.*

(The italicized words above are handwritten.) Although there are boxes on the form to indicate whether plaintiff's motion to dismiss was granted or denied, no box is checked.

Page 1181 is a Riverside County Superior Court form, Minutes of Superior Court, in People v. Floyd Daniel Smith, CR-22000. It is signed by Judge Howard M. Dabney and dated January 15, 1985. The form is entitled "Correction of Court Order." It shows that the court corrected its order nunc pro tunc to December 4, 1984, by deleting behavioral credits of 11 days. The form notes that the defendant is ordered to pay restitution.

Page 1182 is a Riverside County Superior Court form, Minutes of Superior Court, in People v. Floyd Daniel Smith, CR-22000. It is dated May 18, 1993, and it reads as follows:

> The Defendant having been honorably discharged from the California Youth Authority: IT IS ORDERED: Pursuant to the authority of section 1772 W&IC that defendant's plea be withdrawn, a plea of not guilty entered and the entire matter dismissed nunc pro tunc as of [blank]
> (People vs. Navarro, 7 C. 3d 248.)

Page 1183 is the cover page to a preliminary examination transcript in People v. Floyd Daniel Smith, Case No. 22000.

D. Applicable Law

The law governing sufficiency of the evidence applies to special circumstance findings. (*People v. Jennings* (2010) 50 Cal.4th 616, 638.) In reviewing a claim for sufficiency of the evidence, an appellate court views the evidence in the light most favorable to the verdict to determine whether any rational jury could have found the essential elements of the special circumstance beyond a reasonable doubt. The court reviews the entire record to determine whether it discloses sufficient evidence supporting the verdict. Such evidence must be reasonable, credible, and of solid value. The court does not reweigh the evidence. Instead it presumes in support of the verdict the existence of every fact the jury reasonably could deduce from the evidence. If the circumstances reasonably justify the verdict, reversal is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. (*Id.* at pp. 638-639; *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [under Fourteenth Amendment's Due Process Clause, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any*

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"]; *People v. Staten* (2000) 24 Cal.4th 434, 460 [identical standard to *Jackson* applies under California Constitution].)

Although the test for sufficient evidence is not whether the evidence establishes guilt beyond a reasonable doubt, it must be kept in mind that the prosecution's "burden is a heavy one: 'To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier must therefore have reasonably rejected all that undermines confidence.'" (*People v. Bassett* (1968) 69 Cal.2d 122, 138-139, quoting *People v. Hall* (1964) 62 Cal.2d 104, 112.)

Furthermore, because this is an appeal of a death sentence, this Court has an obligation to scrutinize the law and the facts more closely to determine whether they make Mr. Smith death eligible. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (plur. opn.); see also *Clemons v. Mississippi* (1990) 494 U.S. 738, 749 ["this Court has repeatedly emphasized that meaningful appellate review of death sentences promotes reliability and consistency"]; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 329, fn.2 ["*Woodson's* concern for assuring heightened reliability in the capital sentencing determination 'is as firmly established as any in our Eighth Amendment jurisprudence'"]; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885 ["the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error"].)

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E. Upon Viewing Exhibits 24 and 63 in the Light Most Favorable to the Verdict, No Rational Jury Could Have Found Beyond a Reasonable Doubt That Mr. Smith Was Previously Convicted of Murder.

1. The jury could rely only on the evidence admitted during the separate proceeding, which was limited to exhibits 24 and 63.

Preliminarily, it is important to resolve just what evidence the jury was allowed to consider in deciding the special circumstance allegation. Although the prosecutor told the jurors in his brief argument that they could rely on evidence from the guilt phase (17RT 5567), the prosecutor was mistaken. The jury could rely only on evidence admitted during the special circumstance proceeding to determine whether Mr. Smith was previously convicted of murder.

"Section 190.1 provides that, when a death penalty case involves a prior murder conviction special-circumstance allegation, the truth of that allegation shall be determined in a separate proceeding following a finding of first degree murder by the trier of fact. (*Id.*, subd. (b).)" (*People v. Farnam* (2002) 28 Cal.4th 107, 145; see also *People v. Bivert* (2011) 52 Cal.4th 96, 108 [Penal Code section 190.1 "requires the truth of a prior-murder special-circumstance allegation to be determined in a separate proceeding following the guilt phase"]; *People v. Hinton* (2006) 37 Cal.4th 839, 873 [prior murder special circumstance proved in "separate proceeding"]; CJER, Death Penalty Benchguide: Pretrial and Guilt Phase (2011) § 98.54, p. 98-52 ["When the special circumstance is a prior first or second degree murder conviction, a separate trial is necessary. Pen C § 190.1(b)"]; *id.* at § 98.70, p. 98-60 ["A prior murder conviction is the one special circumstance that must be tried separately from the guilt phase"].)

Consequently, the determination of the truth of the prior-murder special-circumstance allegation "shall be made by the trier of fact on the evidence presented . . . at the hearing held pursuant to Subdivision (b) of Section 190.1." (Pen. Code, § 190.4, subd. (a).)

Although the CALJIC instruction given by the court – CALJIC No. 8.82 – did not expressly limit the jury to the evidence admitted during the special circumstance stage, the court referred the jurors only to exhibits 24 and 63 to decide the truth of the special circumstance allegation: "Your job is to decide whether, *from looking at these documents*, whether he was previously convicted of murder or not. That's your job. That's the special circumstance that's alleged in this phase of the proceedings." (17RT 5570, italics added.) Later, the court reiterated to the jury: "[S]ee if the *records* show that he was convicted of that murder. That is your job." (17RT 5573, italics added.)

CALCRIM No. 750, which pertains to the prior-murder special-circumstance proceeding, forbids a jury from considering any evidence from the guilt phase of the trial. The instruction provides in part as follows: "In deciding whether the People have proved this special circumstance, consider only the evidence presented in this proceeding. Do not consider your verdict or any evidence from the earlier part of the trial." (CALCRIM No. 750, Special Circumstances: Prior Murder Conviction (Pen. Code, § 190.2(a)(2)) – Trial on Prior Murder (Pen. Code, § 190.1(a) & (b)).)

Penal Code section 190.1, cited by CALCRIM No. 750 as its authority, is unchanged since it became effective November 8, 1978. (See Historical Derivation, 2 Deering's Ann. Pen. Code (2008 ed.) foll. § 190.1, p. 43.) Therefore, CALCRIM No. 750 accurately states the law existing at the time of Mr. Smith's July 21, 1997 trial, when juries could only consider

evidence from the special circumstance proceeding itself. (17RT 5564; Cal. Rules of Court, rule 2.1050(a) [CALCRIM instructions are "official instructions" for use in California courts]; rule 2.1050(b) ["The Judicial Council endorses these (CALCRIM) instructions for use and makes every effort to ensure that they accurately state existing law"].)

Consequently, the prosecutor was incorrect in telling the jurors that they could rely on evidence from the guilt phase to determine the truth of the special circumstance allegation. The jury could base its verdict only on the evidence admitted during the special circumstance proceeding, which included exhibits 24 and 63, and nothing else.

2. Relying only on the exhibits, no rational jury could have been reasonably persuaded to a near certainty that the defendant was previously convicted of murder.

A careful review of exhibits 24 and 63 supports three critical findings. First, the exhibits were not properly certified. Second, the exhibits do not identify the defendant in this case. Third, the exhibits do not even mention a prior murder conviction.

a. The exhibits were not properly certified.

Because the exhibits were not properly certified, they lack credibility as true and correct of the originals. (*People v. Jennings*, *supra*, 50 Cal.4th at p. 638 [sufficient evidence]; *People v. Marshall* (1997) 15 Cal.4th 1, 31 ["Evidence is substantial if it is reasonable, credible, and of solid value"].) Therefore, they preclude a confident determination that the defendant was previously convicted of murder. (*People v. Thompson* (1980) 27 Cal.3d 303, 324 [to justify criminal conviction, trier of fact must "'have reasonably rejected all that undermines confidence'"].)

The certification to exhibit 24 is in the letter signed by "Kimberley L. Dornback for Patricia A. Hagen, Supervisor, Master Files." (3SCT3 787.) The letter has the following initials on the lower left side: "PAH:kld." (3SCT3 787.) Thus, it appears that Ms. Dornback was a secretary for "Patricia A. Hagen, Supervisor, Master Files." If Ms. Dornback had the authority to certify copies, then there would be no need for her to sign *for* Ms. Hagen. Moreover, if she had the authority to certify copies, Ms. Dornback would have signed the certification *for* herself. But as the letter provides, "the official custodian of all records of all wards committed to the Youth Authority" was Ms. Hagen, not Ms. Dornback. (3SCT3 787.) Thus, Ms. Dornback had no authority to certify the documents attached to the letter as true and correct copies. Without a legitimate certification, no reasonable jury would rely on exhibit 24 as consisting of true and correct and therefore credible copies of the originals. Exhibit 24 fails to constitute substantial evidence.

Exhibit 63 was also not properly certified as its certificate does not have an original signature. (4SCT3 1167.) Instead, the certificate has a rubber-stamped name in cursive, so it looks like a name typed with a Mistral font, *Arthur A. Sims*. (*Ibid.*) According to the certificate, Arthur A. Sims was the Clerk of the Riverside County Superior/Municipal Courts. (*Ibid.*)

Because exhibit 63's certificate lacks an original signature, there is no evidence that anyone from the Clerk's Office, for example, a deputy clerk, took responsibility for comparing the copies to the originals and determining that they were true and correct copies of the originals. (See Gov. Code, § 7 [power granted to public officer may be exercised by deputy].) Obviously, Mr. Sims does not compare every copy to the original

on file in his office, not in a county the size of Riverside County, so a rubber stamp with his name does not disclose the name of the person, if any, who actually compared the copies to the originals. The need here for an original signature of a responsible party is underscored by the fact that at least four of the pages in exhibit 63 are unreadable. (4SCT3 1171-1174.) Hence, absent an original signature, exhibit 63 was not properly certified, and no reasonable jury would have confidence in the exhibit as containing true, correct and credible copies. (4SCT3 1167.) Exhibit 63 fails to constitute substantial evidence.

b. The exhibits do not identify the defendant.

As indicated, exhibits 24 and 63 were the only evidence admitted during the special circumstance proceeding. Moreover, the prosecutor made no attempt to explain to the jury, whether by way of testimony or argument, how the person mentioned in the exhibits was connected to this case. In any event, after examining the exhibits, no reasonable jury would have sufficient confidence in them to conclude that the exhibits identified the defendant. (*People v. Thompson*, *supra*, 27 Cal.3d 303, 324.)

According to exhibit 24, the Youth Authority had custody of a "Floyd Daniel Smith, Jr." for about seven and a half years. (3SCT3 788-789.) Nevertheless, the Youth Authority's letter indicated that no photo of the "named subject" was included in the Penal Code section 969b packet because none was "available." (3SCT3 787.)[2]

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[2] A photo and fingerprints are taken when an arrestee is booked. (Pen. Code, § 7(21).) And a photo and fingerprints are routinely included in a Penal Code section 969b packet. (See, e.g., *People v. Delgado* (2008) 43 Cal.4th 1059, 1064; *People v. Gibson* (2015) 239 Cal.App.4th 1151, 1155; *People v. Moreno* (2011) 192 Cal.App.4th 692, 707-708; *People v. Ulloa*

(continued...)

The Youth Authority included fingerprints in the packet. (3SCT3 790.) But it offered no explanation why it was unable to provide an easily-obtained photo of an inmate who had been in its custody for seven and a half years, while at the same time it was able to include his fingerprints. Any reasonable jury would require this explanation before accepting at face value the letter's assertion that no photo was available.

Therefore, any reasonable jury, charged with the awesome duty of applying the strictest standard of proof, beyond a reasonable doubt (17RT 5568), would not have confidence that the Youth Authority's packet, which lacked a readily-acquired photo, pertained to the defendant in this case, and not another Mr. Smith. The jury's skepticism would be especially justified given that an affirmative answer to the special-circumstance allegation would make the defendant death-eligible. (Pen. Code, § 190.2, subd. (a)(2).) Consequently, the absence of a photo undermined confidence in the exhibits, making them insufficient evidence of identity. (*People v. Johnson* (1980) 26 Cal.3d 557, 578 [conviction lacks evidentiary support where record fails to disclose "substantial evidence that is, evidence which is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt"].)

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[2](...continued)
(2009) 175 Cal.App.4th 405, 409; *People v. Luna* (2008) 113 Cal.App.4th 395, 397; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1017; but see *People v. Martinez* (2000) 22 Cal.4th 106, 112 [neither photo nor fingerprints included in packet].)

c. The exhibits do not even mention a prior murder conviction.

A review of the exhibits fails to disclose a murder conviction. Hence, no rational jury could have found beyond a reasonable doubt that Mr. Smith suffered a prior murder conviction.

Count II of the April 9, 1994 Information accused Floyd Daniel Smith of murder. (4SCT3 1168-1169.) On July 13, 1984, his previous not guilty plea to count II was withdrawn, he pled guilty instead, and the court fixed the degree of offense at first degree. (4SCT3 1178.) The court scheduled the remaining counts and special allegations for dismissal at the pronouncement of judgment set for August 3, 1984. (*Ibid.*)

Nevertheless, the August 3, 1984 minutes say nothing about a dismissal. (4SCT3 1179.) And though the August 3, 1984 minutes indicate that they are for a "Hearing on . . . Pronouncement of Judgment re: Conviction" (*ibid.*), the minutes do not reflect a pronouncement of judgment for a murder conviction. Instead the minutes state as follows: "IT IS ORDERED: Defendant placed pursuant to 707.2 W&IC. Defendant remanded to custody of the Sheriff. Sheriff is directed to deliver defendant into custody of the California Youth Authority. Defendant to be housed at Juvenile Hall pending transportation to California Youth Authority." (4SCT3 1179.) Thus, the August 3, 1984 minutes make no mention of a murder conviction.

A second hearing on a pronouncement of judgment re: conviction was on held on December 4, 1984. (4SCT3 1178.) Although the December 4, 1984 minutes refer to "Plaintiff's motion to dismiss Counts I, III, IV, & V," they do not indicate whether the motion was granted. Nor do the

minutes show a pronouncement of judgment on a murder conviction. Instead the minutes provide as follows:

> IT IS ORDERED: Credit to be given for *425* days served: *Local - 223; PC 4019 - 111; State institution - 91.* Defendant committed to the California Youth Authority, and the Sheriff is directed to deliver said defendant to such reception facility *for a period of time prescribed by law. (25 years to life plus two years).* Plaintiff's motion to dismiss Counts *I, III, IV, & V.* Court determines that defendant is not presently financially able to pay costs of appointed counsel. Factual basis found. *Enhancement as to count I.*

(3SCT3 788; 4SCT3 1180, italicized words and numbers are handwritten in original.) Although the order refers to "25 years to life plus two years," it does not indicate what this is for.

The December 4, 1984 minutes include a box and a line where the clerk could check the box and fill in the blanks on the line, thereby indicating a sentence had been imposed for a particular count. But the box was not checked, and the blanks were not filled in, so they appear as follows:

> ☐ Sentence imposed as to Count(s) _____ to be served _____ in respect to sentence imposed as to Count _____; and sentence imposed as to Count(s) _____ to be served _____ in respect to any prior incompleted sentence.

(3SCT3 788; 4SCT3 1180.) If the court had imposed a sentence on count II, the murder count, then this might possibly have been an appropriate place in the minutes for the clerk to so indicate. And if the clerk had so stated, then a sentence would have implied a conviction on count II. But nothing was filled in.

The August 3, 1984 minutes and the December 4, 1984 minutes appear to be the crucial minutes to find evidence of a murder conviction. (3SCT3 788; 4SCT3 1178, 1180.) But neither mentions a murder conviction.

Finally, a computer printout sent from the California Youth Authority to the San Bernardino Sheriff's Office mentions "187 PC – Murder: First Degree." (3SCT3 792.) And an FBI fingerprint form for Floyd Daniel Smith notes "Charge PC 187/12022.5 Murder, First Degree, Use of Firearm." (3SCT3 790.) Although these pages might have significance to law enforcement, they would have no significance to a jury of lay persons, not without assistance from an expert witness, the prosecutor, or the court as to their meaning.

On the other hand, there was information in exhibit 63 which any reasonable jury would regard as evidence of an error that the court corrected. On May 18, 1993, the minutes show that the guilty plea was withdrawn, a plea of not guilty was entered, and the entire matter was "dismissed nunc pro tunc as of [blank]." (4SCT3 1182.) The jury received no help as to what nunc pro tunc meant, though literally it means "now for then," an understanding 12 jurors would have likely reached.[3]

Thus, any reasonable jury would interpret the May 18, 1993 minutes to mean that the entire matter was dismissed, effective at an earlier

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[3] According to Wikipedia, The Free Encyclopedia, "Nunc pro tunc is a Latin expression in *common* legal use in the English language. It means now for then. In general, a court ruling nunc pro tunc applies retroactively to correct an earlier ruling." (<https://en.wikipedia.org/wiki/Nunc_pro_tunc> as of March 16, 2017.)

unspecified date, after the named defendant withdrew his guilty plea and the court accepted a not guilty plea.

Another document in exhibit 24 would have explained to any reasonable jury, unfamiliar with the law of juvenile criminal convictions, why the entire matter was dismissed. The "Order of Discharge" shows that Floyd Daniel Smith Jr. received an Honorable Discharge from the California Youth Authority on July 24, 1992. The "Reason" given is "No Violation." (3SCT3 789.) Along with the entry of a not guilty plea, this is evidence that the named defendant was discharged from the Youth Authority and the entire matter was dismissed because there never was a violation, including a murder. (3SCT3 788, 789.)

Accordingly, exhibits 24 and 63 do not provide evidence of a murder conviction, but they do provide evidence of no conviction of any kind.

F. Conclusion

Upon viewing exhibits 24 and 63 in the light most favorable to the special-circumstance verdict, no rational jury could have found beyond a reasonable doubt that defendant Floyd Smith was previously convicted of murder. Under the United States and California Constitutions, the special-circumstance verdict should be reversed.

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XII.

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

In his opening brief, Mr. Smith challenged the California death penalty scheme on grounds that this Court has rejected in previous decisions holding that the California law does not violate the federal Constitution. (AOB 157-171.) Recently, the United States Supreme Court held Florida's death penalty statute unconstitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584 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* provides new support to Mr. Smith's claims in Arguments IX.B.1 and IX.B.3 of his opening brief. (AOB 299-300, 302-304.) In light of *Hurst*, this Court should reconsider its rulings that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14); does not require factual findings within the meaning of *Ring* (*People v. Merriman* (2014) 60 Cal.4th 1, 106); and does not require the jury to find unanimously and beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances before the jury can impose a sentence of death (*People v. Prieto* (2003) 30 Cal.4th 226, 275).

A. Under *Hurst*, Each Fact Necessary to Impose a Death Sentence, Including the Determination That the Aggravating Circumstances Outweigh the Mitigating Circumstances, Must Be Found by a Jury Beyond a Reasonable Doubt.

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

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

(*Ring*, *supra*, 536 U.S. at p. 602, quoting *Apprendi*, *supra*, 530 U.S. at pp. 494, 482-483.) Applying this mandate, the high court invalidated Florida's death penalty statute in *Hurst*. (*Hurst*, *supra*, 136 S.Ct. at pp. 621-624.) The Court restated the core Sixth Amendment principle as it applies to capital sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence of death*." (*Hurst*, *supra*, 136 S.Ct. at p. 619, italics added.) Further, as explained below, in applying this Sixth Amendment principle, *Hurst* made clear that the weighing determination required under the Florida statute was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *id.* 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. (*Id.* 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. (*Id.* at p. 622, citing Fla. Stat. § 921.141(3).) The Court found that these determinations were part of the "necessary factual finding that *Ring* requires." (*Ibid.*)[4]

The questions decided in *Ring* and *Hurst* were narrow. As the Supreme Court explained, "Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." (*Ring, supra*, 536 U.S. at p. 597, fn. 4.) *Hurst* raised the same claim. (See Petitioner's Brief on the Merits, *Hurst v. Florida*, 2015 WL 3523406 at *18 ["Florida's capital sentencing

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[4]The Court in *Hurst* explained:

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

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

scheme violates this [Sixth Amendment] principle because it entrusts to the trial court instead of the jury the task of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty'"].) In each case, the Court decided only the constitutionality of a judge, rather than a jury, finding the existence of an aggravating circumstance. (See *Ring*, *supra*, 536 U.S. at p. 588; *Hurst*, *supra*, 136 S.Ct. at p. 624.)

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*." (*Id.* at p. 619, italics added.) The Court reiterated this fundamental principle throughout the opinion.[5] The Court's language is clear and unqualified. It also is consistent with the established understanding that *Apprendi* and *Ring* apply to each fact essential to imposition of the level of punishment the defendant receives. (See *Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.); *Apprendi*, *supra*, 530 U.S. at p. 494.) The high

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[5]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].

court is assumed to understand the implications of the words it chooses and to mean what it says. (See *Sands v. Morongo Unified School District* (1991) 53 Cal.3d 863, 881-882, fn. 10.)

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

California's death penalty statute violates *Apprendi*, *Ring*, and *Hurst*, although the specific defect is different than those in Arizona's and Florida's laws: in California, although the jury's sentencing verdict must be unanimous (Pen. Code, § 190.4, subd. (b)), California applies no standard of proof to the weighing determination, let alone the constitutional requirement that the finding be made beyond a reasonable doubt. (See *People v. Merriman*, *supra*, 60 Cal.4th at p. 106.) Unlike Arizona and Florida, California requires that the jury, not the judge, make the findings necessary to sentence the defendant to death. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16 [distinguishing California's law from that invalidated in *Hurst* on the grounds that, 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 sentencer makes two additional findings. In each jurisdiction, the sentencer must find the existence of at least one statutorily-delineated circumstance – in California, a special circumstance (Pen. Code, § 190.2) and in Arizona and Florida, an aggravating circumstance (Ariz. Rev. Stat. § 13-703(G); Fla. Stat. § 921.141(3)). This finding alone, however, does not permit the sentencer to impose a death

sentence. The sentencer must make another factual finding: in California that "'the aggravating circumstances outweigh the mitigating circumstances'" (Pen. Code, § 190.3); in Arizona that "'there are no mitigating circumstances sufficiently substantial to call for leniency'" (*Ring, supra*, 536 U.S. at p. 593, quoting Ariz. Rev. Stat. § 13-703(F)); and in Florida, as stated above, "that there are insufficient mitigating circumstances to outweigh aggravating circumstances" (*Hurst, supra*, 136 S.Ct. at p. 622, quoting Fla. Stat. § 921.141(3)).[6]

Although *Hurst* did not decide the standard of proof issue, the Court made clear that the weighing determination was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst, supra*, 136 S.Ct. at p. 622 [in Florida the judge, not the jury, makes the "critical findings necessary to impose the death penalty," including the weighing determination among the facts the sentencer must find "to make a defendant eligible for death"].) The pertinent question is not what the weighing determination is called, but 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

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

jury's guilty verdict?" (*Apprendi*, *supra*, 530 U.S. at p. 494.) So did Justice Scalia in *Ring*:

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

(*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 increases to either life imprisonment without the possibility of parole or death. (Pen. Code, § 190.2, subd. (a).) Without any further jury findings, the maximum punishment the defendant can receive is life imprisonment without the possibility of parole. (See, e.g., *People v. Banks* (2015) 61 Cal.4th 788, 794 [where jury found defendant guilty of first degree murder and found special circumstance true and prosecutor did not seek the death penalty, defendant received "the mandatory lesser sentence for special circumstance murder, life imprisonment without

parole"]; *Sand v. Superior Court* (1983) 34 Cal.3d 567, 572 [where defendant is charged with special-circumstance murder, and the prosecutor announced he would not seek death penalty, defendant, if convicted, will be sentenced to life imprisonment without parole, and therefore prosecution is not a "capital case" within the meaning of 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.[7]

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[7]Justice Sotomayor, the author of the majority opinion in *Hurst*, previously found that *Apprendi* and *Ring* are applicable to a sentencing scheme that requires a finding that the aggravating factors outweigh the mitigating factors before a death sentence may be imposed. 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.).)

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 (revd. on other grounds *sub nom. California v. Brown* (1987) 479 U.S. 538) does not require a different conclusion. In *People v. Brown* (hereafter "*Brown*"), the Court was confronted with a claim that the language "shall impose a sentence of death" violated the Eighth Amendment requirement of individualized sentencing. (*Id.* at pp. 538-539.) As the Court explained:

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

(*Id.* at p. 541, footnotes omitted.)[8]

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

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[8]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.

reject a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979 ["[t]he jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death"].)

In this way, 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 aggravating 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 sentencer finds the aggravating circumstances outweigh the mitigating circumstances, it is authorized, but not mandated, to impose death.

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

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

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

(continued...)

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

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

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

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[9](...continued)

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

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

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

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

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

beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. at p. 602; see *Hurst*, *supra*, 136 S.Ct. at p. 621 [the facts required by *Ring* must be found beyond a reasonable doubt under the due process clause].)[10] Because California applies no standard of proof to the weighing determination, a factfinding by the jury, the California death penalty statute violates this beyond-a-reasonable-doubt mandate at the weighing step of the sentencing process.

The recent decision of the Florida Supreme Court in *Hurst v. State* (October 14, 2016) ___ So.3d ___ [2016 WL 6036978] supports Mr. Smith's claim. On remand following the decision of the United States Supreme Court, the Florida court reviewed whether a unanimous jury verdict was required in a capital sentencing. The court began by looking at the terms 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." (*Id.* at *10; Fla. Stat. (2012) § 921.141(1)-(3).)

Each of these considerations, including the weighing process itself, were described as "elements" that the sentencer must determine, akin to elements of a crime during the guilt phase. (*Hurst v. State*. at *10.) The court emphasized:

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

> *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 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.

(*Id.* at *13.) 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. Aug. 2, 2016, Case No. 39) 2016 WL 4224252 [hereafter "*Rauf*"] also supports Mr. Smith's request that this Court revisit its holdings that the *Apprendi* and *Ring* rule do not apply to California's death penalty statute. *Rauf* held that Delaware's death penalty statute violates the Sixth Amendment under *Hurst*. (*Rauf, supra*, at *1 (*per curiam* opn. of Strine, C.J., Holland, J. and Steitz, J.).) In Delaware, unlike in Florida, the jury's finding of a statutory aggravating circumstance is determinative, not simply advisory. (*Id.* at *18.) Nonetheless, in a 3-to-2 decision, the Delaware Supreme Court answered five certified questions from the superior court and found the state's death penalty statute violates *Hurst*.[11] One reason the

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[11]In addition to the ruling discussed in this brief, the court in *Rauf* also held that the Delaware statute violated *Hurst* because: (1) after the jury finds at least one statutory aggravating circumstance, the "judge alone can increase a defendant's jury authorized punishment of life to a death sentence, based on her own additional factfinding of non-statutory

(continued...)

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 *2; see *id.* at *39 (conc. opn. of Holland, J.).) With regard to this defect, the Delaware Supreme Court explained:

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

(*Ibid.*)

The Delaware court is not alone in reaching this conclusion. Other state supreme courts have recognized that the determination that the aggravating circumstances outweigh the mitigating circumstance, like the finding that an aggravating circumstance exists, comes within the *Apprendi/Ring* rule. (See e.g., *State v. Whitfield*, *supra*, 107 S.W.3d at pp. 257-258; *Woldt v. People*, *supra*, 64 P.3d at pp. 265-266; see also *Woodward v. Alabama*, *supra*, 134 S.Ct. at pp. 410-411 (Sotomayor, J., dissenting from denial of cert.) ["The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors

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[11](...continued)
aggravating circumstances" (*Rauf*, *supra*, at *1-2 (*per curiam* opn.) [addressing Questions 1-2] and at *37-38 (conc. opn. of Holland, J.)); and (2) the jury is not required to find the existence of any aggravating circumstance, statutory or non-statutory, unanimously and beyond a reasonable doubt (*id.* at *2 (*per curiam* opn.) [addressing Question 3] and at *39 (conc. opn. of Holland, J.)).

is . . . [a] factual finding" under Alabama's capital sentencing scheme]; contra, *United States v. Gabrion* (6th Cir. 2013) 719 F.3d 511, 533 (en banc) [concluding that – under *Apprendi* – the determination that the aggravators outweigh the mitigators "is not a finding of fact in support of a particular sentence"]; *Ritchie v. State* (Ind. 2004) 809 N.E.2d 258, 265 [reasoning that the finding that the aggravators outweigh the mitigators is not a finding of fact under *Apprendi* and *Ring*]; *Nunnery v. State* (Nev. 2011) 263 P.3d 235, 251-253 [finding that "the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor" under *Apprendi* and *Ring*].)

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.

DATED: March 16, 2017

Respectfully submitted,

MARY K. McCOMB
State Public Defender

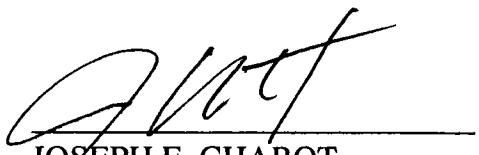
JOSEPH E. CHABOT
Senior Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 36(b)(2))

I, JOSEPH E. CHABOT, am the Senior Deputy State Public Defender, and am appellate counsel for FLOYD DANIEL SMITH in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 10,276 words in length.

DATED: March 16, 2017



JOSEPH E. CHABOT
Attorney for Appellant

DECLARATION OF SERVICE

Re: People v. Floyd Daniel Smith Cal. Supreme Ct. No. S065233
San Bernardino Sup Ct. No. FWV08607

I, Kecia Bailey, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, 10th Floor, Oakland, California 94607; that I served a true copy of the attached:

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed respectively, as follows:

Gil Gonzalez
Deputy Attorney General
600 West Broadway, Suite 1800
San Diego, CA 92101-3702

Mr. Floyd Daniel Smith
P.O. Box K-72700
San Quentin State Prison
San Quentin, CA 94974

Office of the District Attorney
County of San Bernardino
ATTN: Michael A. McDowell
303 West 3rd Street
San Bernardino, CA 92415-0502

Edi M. O. Faal, Esq.
1055 W 7th Street, 21st Floor
Suite 2140
Los Angeles, CA 90017

Clerk of the Court
San Bernardino County Superior Court
247 West Third Street
San Bernardino, CA 92415-0240

Each said envelope was then, on March 16, 2017, sealed and deposited in the United States Mail in Alameda, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Signed on March 16, 2017, at Oakland, California.

KECIA BAILEY