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 REPLY BRIEF

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

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APPELLANT'S SUPPLEMENTAL REPLY BRIEF

In this reply to respondent's supplemental brief, appellant Floyd Daniel Smith replies to contentions by respondent that necessitate an answer in order to present the issues fully to this Court. Mr. Smith does not reply to arguments that are adequately addressed in his supplemental opening brief. The absence of a reply to any particular argument, sub-argument or allegation made by respondent, or of a reassertion of any particular point made in the supplemental opening brief, does not constitute a concession, abandonment or waiver of the point by Mr. Smith (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects his view that the issue has been adequately presented and the positions of the parties fully joined.

XI.

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

In his supplemental opening brief, Mr. Smith demonstrated that the evidence was insufficient to support the jury's prior-murder special-circumstance verdict. Respondent attempts to establish the contrary in Respondent's Supplemental Brief ("RSB"). Respondent's attempt should be rejected.

A. Respondent Misstates the Special Circumstance.

From the very first paragraph of respondent's brief, it is apparent that respondent misunderstands what constitutes a prior murder special circumstance under Penal Code section 190.2, subdivision (a)(2).[1]

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[1] All further statutory references are to the Penal Code unless otherwise (continued...)

According to respondent, Mr. Smith raised the following issue in his supplemental opening brief: "whether sufficient evidence supports the jury's finding that appellant committed a prior murder." (RSB 6.) This is not the issue Mr. Smith raised. The jury found that Mr. Smith "ha[d] previously been *convicted* of murder" (2CT 486, italics added) because section 190.2, subdivision (a)(2) defines the special circumstance as follows: "The defendant was *convicted* previously of murder in the first or second degree." (Italics added.) Therefore, the issue is whether there was sufficient evidence of a prior murder conviction. (Appellant's Supplemental Opening Brief ("ASOB") 2.)

B. The Jury Could Rely Only on the Evidence Admitted During the Separate Proceeding, Which Was Limited to Exhibits 24 and 63.

Despite Mr. Smith's showing that the jury could only consider the evidence admitted during the separate proceeding held under section 190.1, subdivision (b) (ASOB 11-13), respondent claims that the jury could also consider the evidence admitted during the preceding trial (RSB 8). Respondent is mistaken.

Respondent contends that in order to find a prior murder special circumstance, "the jury should look to the evidence presented at the trial *and* at the separate proceeding under Penal Code section 190.1, subdivision (b) . . . . (Pen. Code, § 190.4, subd. (a).)." (RSB 8, italics added.) Despite respondent's use of the conjunctive "and," the authority respondent cites – section 190.4, subdivision (a) – uses the disjunctive "or." Thus, section 190.4, subdivision (a) provides in part: "The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial *or* at the hearing held pursuant to

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[1](...continued)
indicated.

Subdivision (b) of Section 190.1." (Italics added.) Hence, Mr. Smith's jury should have looked only to the evidence presented at the hearing held under section 190.1, subdivision (b).

Next, respondent cites section 190.4, subdivision (d), and contends that "a jury in any subsequent phase of a capital trial 'shall . . . consider' evidence presented at a prior phase of the trial, so long as the jury at the subsequent phase is the same jury from the prior phase." (RSB 8.) Respondent misconstrues the meaning of section 190.4, subdivision (d).

Section 190.4, subdivision (d) provides in full: "In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial, including any proceeding under a plea of not guilty by reason of insanity pursuant to Section 1026 shall be considered at any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase." This Court construed the meaning of subdivision (d) over 20 years ago: "Penal Code section 190.4, subdivision (d), declares in substance that, if the trier of fact at the *penalty phase* is the same as that at the *guilt phase*, it must consider the guilt phase evidence." (*People v. Alvarez* (1996) 14 Cal.4th 155, 242-243, italics added.) Thus, because the jury in this case was the same jury for both the guilt and the penalty phase, subdivision (d) merely means that Mr. Smith's jury was required to consider evidence from the guilt phase, including evidence from the prior murder proceeding held under section 190.1, subdivision (b), to determine the penalty.

Finally, respondent cites *People v. Farnam* (2002) 28 Cal.4th 107, which actually supports Mr. Smith's view. (RSB 8.) *Farnam* explained that one purpose of the separate proceeding authorized by section 190.1, subdivision (b) was as follows: "It is undisputed that section 190.1(b)'s provision for a separate proceeding is intended for the benefit of capital

defendants charged with a prior murder conviction special-circumstance allegation. In essence, the statute recognizes that evidence of such a conviction may potentially have an inflammatory effect on jurors who are asked to determine a defendant's guilt or innocence on a current charge of murder." (*Id.* at p. 146.)

The separate proceeding serves a related purpose. Just as evidence of a prior murder conviction may potentially inflame jurors in determining guilt of the current murder charge, the converse is at least as true. Evidence of the current murder charge may potentially inflame jurors when they consider the truth of the prior-murder-conviction allegation. Therefore, as CALCRIM No. 750 instructs, in deciding whether the prosecution has proved the prior murder special circumstance, the jury may "consider only the evidence presented in this proceeding" and may not consider "any evidence from the earlier part of the trial."

C. Mr. Smith Acknowledged His Guilty Plea to Murder, Which Was Later Withdrawn.

Respondent contends that Mr. Smith pled guilty to first degree murder with a firearm in 1984. (RSB 9.) Mr. Smith acknowledged in his supplemental opening brief that he pled guilty to the murder charge, count II. (ASOB 17.) The guilty plea was later withdrawn, and a plea of not guilty was entered. (4SCT3 1182.)

Respondent repeatedly refers to evidence in the record that preceded the separate prior-murder special-circumstance proceeding. (RSB 9-10.) As shown above in section B and in the supplemental opening brief (ASOB 11-13), the jury was not permitted to consider any evidence admitted before the separate proceeding. (ASOB 11.)

Respondent contends that the jury found Mr. Smith committed murder and a rational jury could so find. (RSB 9-10.) As shown above in section A, commission of a prior murder is not the issue.

Finally, respondent refers to evidence that was not admitted during any part of the trial. For example, respondent states that the effect of the discharge order "was a standard expungement of a juvenile record merely relieving Smith of the 'penalties and disabilities' from the conviction." (RSB 10.) The issue here is whether sufficient evidence was admitted during the separate prior-murder special-circumstance proceeding to support the jury's verdict. Whatever effect the discharge order had – and there was no mention below of "penalties and disabilities" – it was irrelevant to the jury's decision.

D. The Records Were Not Properly Certified.

In his supplemental opening brief, Mr. Smith demonstrated that exhibits 24 and 63 were not the certified documents they purported to be – the certification to exhibit 24 was not signed by a person with the authority to certify the documents, and the certification to exhibit 63 does not have an original signature. (ASOB 14.) Hence, the exhibits failed to constitute substantial evidence. (ASOB 14-15.)

Respondent disagrees and asserts that Mr. Smith's argument is better understood as an evidentiary objection, which he forfeited. (RSB 11.) Respondent misses the point. Mr. Smith is not complaining here that the exhibits were inadmissible because they were not authenticated. His complaint is at all times that the evidence, which consisted only of exhibits 24 and 63, was insufficient to support the jury's verdict. And one reason the evidence was insufficient was that the exhibits did not constitute substantial evidence, "which is reasonable, credible, and of solid value." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The exhibits lacked credibility as correct copies of the originals because the certificates were improper, not signed by a person with authority in the case of Exhibit 24, and not signed by anyone in the case of Exhibit 63. Hence, lacking

substantial evidence, the jury's verdict cannot stand.

1. Exhibit 24

Nevertheless, respondent contends that the exhibits were properly certified. (RSB 11.) With respect to exhibit 24, respondent claims that Ms. Dornback was Ms. Hagen's deputy and therefore had the authority to exercise Ms. Hagen's power to certify exhibit 24. (RSB 13.) But there is no evidence in the record that Ms. Dornback was a deputy, let alone Ms. Hagen's deputy. And were she a deputy, it would have been a simple matter for her to state so in her letter, but she did not. (3SCT3 787.)

Respondent cites *Himmelmann v. Hoadley* (1872) 44 Cal. 213, for the proposition that "a deputy may certify public records – even where that deputy is not identified as such in the records – where the official document is made in the name of the principal, the word 'Deputy' is not made part of the signature, the certificate bears an official stamp, and the signature is genuine." (*Id.* at pp. 225-226; RSB 13.) Critical to *Himmelmann's* rule was the fact that the law allowed the Superintendent of Streets and Highways to appoint deputies, and the law also authorized deputies to perform the duties of the Superintendent under the Superintendent's direction. (*Ibid.*)

There was no evidence that the law allowed Ms. Hagen to appoint deputies or it authorized any such deputies to perform Ms. Hagen's duties. Moreover, *Himmelmann* not only took judicial notice that the person who signed the certificate, J. Donnelly, was a Deputy Superintendent, it also took judicial notice that Donnelly's signature was genuine. (*Id.* at p. 226 ["as the Court will take notice that Donnelly was a Deputy Superintendent, and that his signature is genuine, the certificate will be regarded as sufficient"].) There is no basis for taking judicial notice of Ms. Dornback as a deputy or the genuineness of her signature. *Himmelmann* is inapposite.

Finally, respondent cites Evidence Code section 664 (official duty regularly performed) as providing an excuse for Ms. Dornback's improper certification. (RSB 13.) Assuming for the sake of argument that this statute applies, it was no substitute for a proper certification. In *American Contractors Indemnity v. County of Orange* (2005) 130 Cal.App.4th 579, the court clerk signed a certificate of service by mail of a Notice of Forfeiture, but the certificate omitted the addresses for two of the parties. The court found that although there was an evidentiary presumption under Evidence Code section 664 that the clerk regularly performed his or her duties, the presumption did not relieve the clerk of complying with the requirement that the certificate of mailing must include the addresses of the persons served. (*Id.* at p. 583.)

Similarly, section 969b, the authority cited by Ms. Dornback, requires that "copies [must be] certified by the official custodian of such records." Ms. Dornback's letter says that "the official custodian of all records of all wards committed to the Youth Authority" is "Patricia A. Hagen, Supervisor, Master Files." (3SCT3 787.) Like the clerk's certificate in *American Contractors Indemnity*, the certificate here is inadequate because the statutory requirement was not satisfied, given that the official custodian (Ms. Hagen) did not certify the copies, in violation of section 969b. Evidence Code section 664 is not a substitute for this requirement.

2. Exhibit 63

Respondent next claims that Exhibit 63 was properly certified even though the certificate does not contain an original signature. Instead the certificate has a name in cursive that was applied by a rubber stamp. (RSB 14.)

First, respondent argues that there was no evidence a rubber stamp

was used. The evidence was the stamped name, itself, in that it looks like a rubber stamped name in cursive. (4SCT3 1167; exh. 63.) In any case, the point is not that a rubber stamp was used. The point is that the signature is not an original, handwritten signature, and no rational jury would find otherwise. Without an original manual signature, the certificate is not valid.

Respondent contends, however, that an original signature was not required. (RSB 14-15.) Respondent cites two cases in support. In *Williams v. McDonald* (1881) 58 Cal. 527, an action for the foreclosure of a street assessment, the Clerk of the Board of Supervisors used and adopted a printed signature for all resolutions, instead of manually signing each one. After the resolution in question was adopted by the Board, the Clerk published it in newspapers. The law said the resolution was to be "signed by the clerk." The issue was whether a printed signature adopted by the Clerk satisfied the law. This Court said that it did. (*Id.* at p. 529.)

According to the second decision cited by respondent, *Ligare v. California Southern Railroad Co.* (1888) 76 Cal. 610, "[t]he sole question in this case is as to the sufficiency of a service of summons by publication to sustain a judgment by default in a proceeding to condemn land." (*Id.* at p. 611.) A subsidiary issue was whether the summons was valid. The summons was not signed, though a statute required that it should be signed by the clerk. This Court found the summons sufficient because "the affixing by the clerk of the seal of the court to a form to which was appended his printed name was an adoption of the printed signature which for the purpose in hand was sufficient." (*Ibid.*)

Thus, in both cases, a printed signature was adopted by a person with the authority to do so, in place of his original signature, and this Court found the printed signature valid as a result.

Here, however, there was no evidence that Arthur A. Sims, the Clerk

of the Riverside County Superior/Municipal Courts (4SCT3 1167), adopted a printed or stamped signature in place of an original signature for certifying copies of the original records in his office. Hence, both *Williams v. McDonald* and *Ligare v. California Southern Railroad Co.* are inapt.

Furthermore, under Evidence Code 1530, subdivision (a)(2), a court record may be "certified as a correct copy . . . by a public employee, or a deputy of a public employee, having the legal custody of the writing." As a self-authenticated document that is presumptively reliable, standing alone the certified copy may be sufficient to prove a prior conviction. (*People v. Skiles* (2011) 51 Cal.4th 1178, 1186, citing Evid. Code, §§ 1530, 452.5, subd. (b); see also Evid. Code, §§ 1531, 1532.)

Thus, Evidence Code 1530, subdivision (a)(2) provides that the court record may be certified by a public employee, such as the Clerk of the Riverside County Superior/Municipal Courts, or a deputy clerk. As the Law Revision Commission Comment to Evidence Code section 1530 notes, "the certificate affixed to a certified copy must state that the copy is a correct copy of the original [and] must be signed by the certifying officer." Therefore, either Mr. Sims or a deputy clerk should have manually signed the certificate certifying that Exhibit 63 consisted of correct copies of the originals on file in the Clerk's Office. That this did not occur means that Exhibit 63 was not properly certified.

E. Exhibits 24 and 63 Constitute Insufficient Evidence That Mr. Smith Was the Person Identified in the Documents.

In claiming that there was sufficient evidence in the record identifying Mr. Smith, respondent relies on evidence admitted before the separate proceeding held to determine the truth of the prior-murder special-circumstance allegation. (RSB 15.) As shown above in section B, the jury was not permitted to rely on evidence admitted before the separate proceeding.

Respondent also cites the doctrine of idem sonans. (RSB 16.) That doctrine, not mentioned by this Court for over 80 years (*Fidelity Appraisal Co. v. Federal Appraisal Co.* (1933) 217 Cal. 307, 317), is only applicable where the name of the person sought to be identified is inaccurately written. (*Orr v. Byers* (1988) 198 Cal.App.3d 666, 669.) There is no allegation in this case that Mr. Smith's name was inaccurately written. The doctrine of idem sonans is inapplicable.

Respondent also cites *People v. Mendoza* (1986) 183 Cal.App.3d 390, 401, for the proposition that in the absence of countervailing evidence, "identity of a person may be presumed, or inferred, from identity of name." (RSB 16.) Respondent's citation to *Mendoza* shows that respondent omitted other "Citations." One omitted citation was *People v. Luckett* (1969) 1 Cal.App.3d 248, which noted:

> The presumption formerly contained in subdivision 25 of section 1963 of the Code of Civil Procedure was not continued in the Evidence Code. The Legislative Committee Comment gives the following reason: "Subdivision 25. Despite subdivision 25, the California courts have refused to apply the presumption of identity of person from identity of name when the name is common. E.G., *People v. Wong Sang Lung*, 3 Cal.App. 221, 224, 84 Pac 843, 845 (1906). The matter should be left to inference, for the strength of the inference will depend in particular cases on whether the name is common or unusual."

(*Id.* at p. 253; see 7 Cal. Law Rev. Com. Rep. (1965) p. 1314; 1 Witkin, Cal. Evidence (5th ed. 2012) Circumstantial Evidence, § 135 ["identity of name is a circumstance from which an inference may be drawn, the strength of which will depend on how unusual the name is"].)

Given that the defendant's last name is Smith, one of the most common in this country, a very weak inference of identity, if any, may be drawn, but no presumption may be employed.

Respondent next offers specific evidence from Exhibit 24 that identifies Floyd Daniel Smith, such as race, height, weight, and hair and eye color. (RSB 16-17.) Respondent argues that taking this evidence into account along with the name, Floyd Daniel Smith, permitted a rational jury to conclude that the defendant was the person described in Exhibit 24. (RSB 17.)

Respondent, however, fails to connect this evidence from Exhibit 24 to the defendant. That is, there is no evidence in the record that the defendant was 5 feet 11 inches tall, 158 pounds, with brown eyes and black hair. (3 3SCT 790.) If respondent intended to rely on a physical description of the defendant, then it was incumbent on the prosecutor to describe the defendant for the record. The prosecutor failed to do so.

Accordingly, because the jury was not permitted to rely on any evidence from the earlier part of the trial in determining the truth of the prior-murder special-circumstance allegation, the only evidence of identity was the similarity in names. And because Smith is an extremely common name, at most a very weak inference may be drawn. Any such inference is insufficient to establish identity.

F. Exhibits 24 and 63 Constitute Insufficient Evidence That Mr. Smith Was Previously Convicted of Murder.

In response to Mr. Smith's showing that Exhibits 24 and 63 do not mention a murder conviction even one time (ASOB 17), respondent makes the wild and baseless claim that the exhibits mention a conviction for first degree murder *at least six times*. (RSB 17-19.) In so claiming, respondent proceeds as if the jury were made up of 12 lawyers with a background in criminal law, lawyers who would recognize a "rap sheet" and an "intake fingerprint form," without the papers labeled as such. (RSB 17.) More important, respondent assumes that each of the 12 jurors possessed knowledge about a subject that was never brought up during the hearing,

"[t]he policy and purpose of expungement." (RSB 19.)

Respondent further seems to contend that the December 4, 1984 minutes show a first degree murder conviction because "conviction" and "187PC (12022.5 PC) (1st deg) (Ct II)" appear at the top of the form. (4SCT3 1180.) These same references, however, also appear at the top of the August 3, 1984 minutes. (4SCT3 1179.) Using respondent's apparent reasoning would mean that the court convicted Floyd Daniel Smith of first degree murder on August 3, 1984, and then again on December 4, 1984. But as the order from each date shows, the court did not find a first degree murder conviction on either date. (4SCT3 1179, 1180.)

In determining whether there was sufficient evidence of a conviction, this Court is required to resolve the question "in the light of the Whole record," that is, the entire picture put before the jury in the separate hearing. (*People v. Johnson*, *supra*, 26 Cal.3d at p. 577.) Nevertheless, despite the 25 pages presented by the prosecution to the jury (3SCT3 787-793; 4SCT3 1166-1183), the essential pages can be reduced to these eight:

On April 9, 1984, Floyd Daniel Smith was charged with five counts: attempted robbery with a firearm, murder, another attempted robbery, kidnapping, and oral copulation. (4SCT3 1168-1170.)

On June 18, 1984, the defendant pled not guilty and denied the special allegations. (4SCT3 1177.)

On July 13, 1984, Smith pled guilty to the murder count. (4SCT3 1178.)

On December 4, 1984, he was sentenced to "25 years plus 2 years enhancement as to count I" and was committed to the Youth Authority. None of the five counts was dismissed. And the minute order does not state that the court convicted the defendant of murder. (4SCT3 1180.)

On July 24, 1992, Smith was discharged from the Youth Authority. The Order of Discharge provides: "Reason: Honorable Discharge No Violation." (3SCT3 789.)

On May 18, 1993, the court ordered the defendant's plea withdrawn, a plea of not guilty entered, and the entire matter dismissed nunc pro tunc. (4SCT3 1182.)

The December 4, 1984 minute order suggests that the defendant was sentenced only on count I, attempted robbery with a firearm. Although most of the December 4, 1984 minute order is typed, the punishment is typed and handwritten as follows: "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* *." Because there was no space to finish the handwritten matter, the clerk used an asterisk to indicate that the remainder of the parenthetical phrase was completed at the bottom of the page as follows: "**enhancement as to count I*)." Therefore the parenthetical phrase reads in whole:

(25 years to life plus two years enhancement as to count I). (4SCT3 1180.)

The only count expressly referenced in the sentence is count I. Therefore, the entire sentence to be served at the Youth Authority appears to be based solely on count I, attempted robbery with a firearm. Although the punishment for an attempted robbery with a firearm cannot be as much as 25 years to life plus two years enhancement (§§ 211/664/12022.5), no evidence was presented to the jury on this issue. Therefore, the only evidence of a *conviction* in the December 4, 1984 minutes was for a violation of count I. The minutes show no conviction on count II for murder.

The July 24, 1992 Order of Discharge indicates that there was "No

Violation," and Floyd Daniel Smith was discharged. The jurors were not told about the policy and purpose of expungement. They were given no explicit explanation how a person could receive a sentence of 25 years to life, only to have it reduced to seven and a half years.

Instead, the jurors were told, by virtue of the May 18, 1993 order, that 10 months after Floyd Daniel Smith was discharged, the court ordered his guilty plea withdrawn, a plea of not guilty entered, and the entire matter dismissed. (4SCT3 1182.) No rational jury could ignore this order. And if any jurors believed in error that a murder conviction had resulted from the guilty plea, even though there was no showing of a murder conviction, then these jurors had every reason to doubt that the murder conviction survived the withdrawal of the guilty plea, the entry of a not guilty plea, and the dismissal of the entire action. Hence, no rational jury could be confident that any murder conviction was not made void ab initio as a result of the May 18, 1993 order. (*People v. Thompson* (1980) 27 Cal.3d 303, 324 [to justify criminal conviction, jury must "'have reasonably rejected all that undermines confidence'"]; see *People v. Superior Court (Flores)* (1989) 214 Cal.App.3d 127, 136 [court may dismiss criminal action after conviction has been entered; "defendant stands as if he had never been prosecuted for the charged offense"].)

G. Conclusion

The prior-murder special-circumstance verdict should be vacated for each of the following reasons:

Because each certificate was improper, there was no evidence that the exhibits contained correct copies of the originals. Therefore, the record did not disclose substantial evidence, that is, evidence which is reasonable, credible, and of solid value such that a reasonable trier of fact could find the prior murder special circumstance beyond a reasonable doubt.

Exhibits 24 and 63 contain insufficient evidence that Mr. Smith was the person identified in the documents.

The December 4, 1984 minute order did not establish sufficient evidence of a murder conviction, especially after taking into account the court's sentence, 25 years to life plus two years enhancement as to count I, which made no mention of count II, the murder charge.

The evidence was insufficient to support a prior-murder special-circumstance verdict, particularly in light of the court's order withdrawing the defendant's guilty plea, entering his plea of not guilty, and dismissing the entire matter.

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.

Mr. Smith has argued that this Court's previous decisions regarding the constitutionality of California's death penalty scheme, as challenged under *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584, should be reconsidered in light of *Hurst v. Florida* (2016) ___ U.S. ___ [136 S.Ct. 616].) (ASOB 21-38.)

Respondent does not address the substance of Mr. Smith's claim, but simply argues that this Court has found that *Hurst* does not affect its previous decisions. (RSB 20-21.) In both of the cases cited by respondent, this Court stated that California's statute was materially different than the former Florida scheme because this state requires a jury verdict before death can be imposed, unlike the advisory opinion that was at issue in Florida. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16; *People v. Jackson* (2016) 1 Cal.5th 269, 374.)

The issue before this Court is not the role of the jury in imposing

death, but the factual determinations that must be made. As Mr. Smith argued (ASOB 32), this Court has construed Florida's sentencing directive to be comparable to California – if the sentencer finds that aggravating circumstances outweigh mitigation, a death sentence is authorized, but not mandated. (*People v. Brown* (1985) 40 Cal.3d 512, 542.)

In the past, this Court distinguished between the findings that are made before death is imposed – the weighing of aggravation and mitigation – and the kind of factual determinations at issue in *Apprendi* and *Ring*. (See, e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 262-263; *People v. Merriman* (2014) 60 Cal.4th 1, 106.) *Hurst* made clear that the weighing decision – "that there are insufficient mitigating circumstances to outweigh aggravating circumstances" – was part of the "necessary factual finding that *Ring* requires." (*Hurst v. Florida*, *supra*, 136 S.Ct. at p. 622, citing former Fla. Stat. § 921.141(3).) The significance of *Hurst* for California, then, is that it brings the weighing process clearly within the ambit of *Ring*.

Both *Rangel* and *Jackson* were decided before the decisions of the Florida Supreme Court in *Hurst v. State* (Fla. 2016) 202 So.3d 40, and the Delaware Supreme Court in *Rauf v. State* (Del. 2016) 145 A.3d 430. Although Mr. Smith discussed these cases (ASOB 36-38), respondent does not address either opinion. In Florida, the state supreme court described the sentencing factors, including the weighing process itself, as "elements" that the sentencer must determine, akin to elements of a crime during the guilt phase. (*Hurst v. State*, *supra*, 202 So.3d at pp. 53-54.) The court emphasized that the "critical findings necessary for imposition of a sentence of death" were "on par with elements of a greater offense." (*Id.* at p. 57.) In Delaware, the state supreme court explained that the weighing determination "is a factual finding necessary to impose a death sentence." (*Rauf v. State*, *supra*, 145 A.3d at p. 485.) These cases support Mr. Smith's

contention that even though the sentencer might have been different between the former Florida scheme and California's death penalty law, the necessary factual findings are similar.

The determination that aggravating circumstances outweigh mitigation is a necessary predicate to the imposition of the death penalty and one that must be made beyond a reasonable doubt. Mr. Smith was not sentenced under these standards. His death sentence must be reversed.

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CONCLUSION

For the reasons argued above, and in Mr. Smith's supplemental opening brief, the prior-murder special-circumstance verdict and the death sentence must be reversed.

DATED: July 20, 2017

Respectfully submitted,

MARY K. McCOMB
State Public Defender

JOSEPH E. CHABOT
Senior Deputy State Public Defender

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(2))

I, Joseph E. Chabot, am the Senior Deputy State Public Defender assigned to represent appellant, Floyd Daniel Smith, in this automatic appeal. I counted the words in this brief with the computer program used to prepare the brief and certify that it is 4,866 words, excluding the tables and certificates.

Dated: July 20, 2017

Joseph E. Chabot

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 REPLY BRIEF

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

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Each said envelope was then, on July 20, 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 July 20, 2017, at Oakland, California.

KECIA BAILEY