IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. WILLIAM LEE WRIGHT Defendant and Appellant.	No. S107900 (Los Angeles Superior Court No. KA048285-01) Death Penalty Case

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

Appeal from Judgment of
The Superior Court of Los Angeles County
The Honorable Norman P. Tarle, Presiding

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INTRODUCTION

In this reply brief, Mr. Wright addresses specific contentions made by respondent, but does not reply to arguments that are adequately addressed in his supplemental opening brief. The failure to address any particular argument, sub-argument, or contention made by respondent, or to reassert any point made in the supplemental opening brief, does not constitute a concession, abandonment, or waiver of the point by Mr. Wright (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046), but reflects his view that the issue has been adequately presented and the positions of the parties fully joined

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12.

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

In his supplemental opening brief Mr. Wright argued that this Court should reconsider its previous decisions regarding the constitutionality of California's death penalty scheme, as challenged under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*), in light of *Hurst v. Florida* (2016) ___ U.S. ___, 136 S.Ct. 616 (*Hurst*). (Supp. AOB at 19-33; see also AOB at 167-182.) In its supplemental response, respondent first mischaracterizes Mr. Wright's claim and then, perhaps not surprisingly, fails to address Mr. Wright's actual claim. Further, rather than respond to Mr. Wright's arguments, respondent simply reiterates the cases that Mr. Wright argues this Court should reconsider. (Supp. RB at 7-12.) Because respondent fails to adequately respond to Mr. Wright's argument, this Court should grant Mr. Wright's claim.

Contrary to respondent's mischaracterization, the focus of Mr. Wright's claim in his supplemental brief is that a jury determination that the aggravating circumstances outweigh the mitigating circumstances is a factual determination necessary for the imposition of a death sentence, and correspondingly, under the Sixth Amendment and the reasoning of the Supreme Court in *Apprendi*, *Ring,* and *Hurst*, must be found beyond a reasonable doubt. (Supp. AOB 20-23). Rather than addressing this argument,

respondent begins its supplemental brief by attempting to narrowly cabin Mr. Wright's argument as focused solely on whether the reasonable doubt standard should apply to each penalty-phase aggravating circumstance. (Supp. RB at 6-8.) This is not Mr. Wright's argument.

Respondent does then turn to the actual argument that Mr. Wright is making, that the weighing determination required by Penal Code Section190.3 is a factual finding requiring proof beyond a reasonable doubt. (Supp RB at 8-10). Respondent primarily reiterates the California cases that Mr. Wright has urged this Court to reconsider. Respondent also mistakenly relies on *Kansas v. Carr* (2016) 577 U.S. ____ [136 S.Ct 633] (*Carr*) for the proposition that the United States Supreme Court "expressed doubt that it was even possible to apply a standard of proof to . . . the weighing determination." (Supp. RB at 9.) As respondent's citation from *Carr* makes clear, the issue the *Carr* Court addressed was whether the Eighth Amendment requires that capital sentencing juries be informed "that mitigating circumstances need not be proven beyond a reasonable doubt." (*Carr*, *supra,* 136 S,Ct at 642.) Simply put, *Carr* is all about mitigation.

To require that the existence or non-existence of mitigation be proven beyond a reasonable doubt does indeed make little sense. Indeed, the 8th Amendment forbids requiring proof beyond a reasonable doubt and unanimity as to mitigation. *McKoy v. North Carolina* (1990) 494 U.S. 433.

But whether the factfinder is certain that death is the appropriate punishment is an entirely different question than the

existence or non-existence of mitigation. The question now before this Court is the degree of certainty that the jury must have that death is the right decision on the "issue," that is, the answer to the question put to the jury as embodied in their verdict. Because the jury's determination as the appropriate penalty is an issue, it is entitled to the protections of the Sixth Amendment. As Mr. Wright has previously explained in his discussion of *Andres v. U.S.*, (1948) 333 U.S. 740, "under *Andres*, if the legislature assigns the jury the task of rendering its verdict on an issue of fact at a trial, even on the issue of penalty, Sixth Amendment protection applies." (Supp. AOB at 38.)

The existence or weight of mitigation discussed in *Carr* is not an "issue" – the trigger for the Sixth Amendment. Each juror gets to decide on their own whether mitigation exists, without any burden of proof, and generally without a requirement of a finding. Mitigation is a completely indescribable thing that exists in the heart of each juror. What is clear is that mitigation is not a question submitted to the jury. However, the ultimate penalty determination *is*, and as such is afforded all the protections of the Sixth Amendment. The Court's comment in *Carr* regarding the weighing process is mere dicta and should not be relied upon to resolve the arguments Mr. Wright has presented to this Court.

Respondent also mischaracterizes Mr. Wright's discussion of *People v. Brown* (1985) 40 Cal.3d 512 (*Brown*), revd. on other grounds sub nom. *California v. Brown* (1987) 479 U.S. 538. Mr. Wright does not rely on *Brown* to, "assert that *Hurst's* invalidation of Florida's capital sentencing scheme is, by implication, an

invalidation of California's capital sentencing scheme because the *Brown* decision found the two schemes to be analogous." (Supp. RB at 11, citing Supp. AOB at 28-20.) Rather, Mr. Wright argued that, under California law as interpreted by this Court in *Brown*, a defendant is not eligible for the death penalty unless and until a jury has made the factual finding that the aggravating factors outweigh the mitigating circumstances. (See Supp. AOB at 26-30.) Thus, both the existence of those aggravating factors and the determination that they outweigh the mitigating circumstances are findings "necessary to impose a sentence of death," which the jury must make unanimously and beyond a reasonable doubt. (*Hurst, supra,* 136 S.Ct. at p. 619.) Respondent fails to respond to this argument.

Respondent also asserts that the Delaware death penalty scheme at issue in *Rauf v. State* (Del. 2016) 145 A.3d 430 (*Rauf*) is distinguishable from California's because "under Delaware law, a jury's choice between a life and death sentence was completely advisory" (Supp. RB at 11.) This is an incomplete description of both the scheme found unconstitutional in *Rauf* and the holding in that case. As Mr. Wright explained in his supplemental opening brief, "[i]n Delaware, unlike Florida, the jury's finding of a statutory aggravating circumstance is determinative, not simply advisory." (Supp. AOB at 32 citing *Rauf, supra,* at p. 456 (per curiam opn.).) That is, under the Delaware scheme, as in California's, the jury's finding is "determinative as to the existence of any statutory aggravating circumstances (i.e. death eligibility factors)." (*Ibid.* (footnote and internal quotations omitted).) Under the Delaware

scheme, after the jury made the initial eligibility finding, its weighing determination and decision on sentence were subject to override by the judge. Following respondent's logic all the Delaware court needed to do to correct the constitutional defect was eliminate that judicial override. The Court in *Rauf* rejected this argument, finding that the existence of any aggravating factors that the jury would consider in the weighing process and the weighing determination itself were subject to the requirements of unanimity and proof beyond a reasonable doubt. (*Id.* at 433-34 (per curium opn.).) In making this finding the Court held that the weighing determination constituted "a factual finding necessary to impose a death sentence." (*Id.* at 485 (conc. opn. of Holland, J.).) Other courts have reached the same conclusion. (See Supp. AOB at 33 and cases cited therein.) Thus, while there are differences between the Delaware and California statutes, those differences are not material to the ultimate question.

For the same reason, this Court's observation that the scheme in *Hurst* is "materially different" from California's (*People v. Rangel* (2016) 62 Cal.4th 1192, 1235, n. 16) is not dispositive of the issue. In *Apprendi,* the United States Supreme Court emphasized that the "relevant inquiry is one not of form, but of effect." (*Apprendi*, *supra*, 530 U.S. at p. 494.) As Justice Scalia later wrote in *Ring*, "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.).) Because a determination that the aggravating factors

outweigh the mitigation is required before the jury can decide to sentence a defendant to death, that determination is subject to the requirements of *Apprendi*, *Ring*, and *Hurst*. Appellant was not sentenced under these standards. His death sentence must be reversed.

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13.

BECAUSE THE CALIFORNIA PENALTY PHASE PROCEEDING IS A TRIAL ON ISSUES OF FACT, STATE AND FEDERAL LAW REQUIRE THAT THE PROPRIETY OF THE SENTENCE OF DEATH AND THE AGGRAVATING FACTORS BE PROVEN BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY

In his supplemental opening brief, Mr. Wright argued that this Court should reconsider its prior decisions (largely based on the Sixth Amendment and now-reversed United States Supreme Court decisions interpreting it) denying basic jury protections of unanimity and proof beyond a reasonable doubt to fundamental questions answered in the penalty phase. (Supp. AOB at 34-72.) This argument focuses primarily on the *state* constitutional right to trial by jury and the debates surrounding its amendment, citing early *state* penal code enactments requiring that "issues of fact" be tried by jury, and early *state* cases, prior to incorporation of the Sixth Amendment. (Cal. Const. art. 1, section 6; Pen. Code, § 1042; Stats. 1850, Ch. 119, § 337, p. 299; *People v. Hall* (1926) 199 Cal. 451, 458 (*Hall*) [right to unanimity applies to penalty decision]; 3 Debates and Proceedings, Cal. Const. Convention of 1879, p. 1175 (statement of Mr. Reddy) [a "fundamental principle of criminal jurisprudence" is that "every man charged with a crime have the benefit of the doubt"].)[1]

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[1] Although Mr. Wright also raised a parallel argument under federal law, it was premised on the conclusion that the questions answered in the penalty phase were "issues of fact" under state law. (Supp. AOB at 37.)

Specifically, Mr. Wright asked that this Court reconsider its prior holdings refusing to require unanimity in finding aggravating circumstances (or at least components thereof) that are themselves prototypical "issues of fact"—because they are accusations that Mr. Wright committed various prior crimes. (See Supp. AOB at 40-45.) Mr. Wright also asked this Court to reconsider its many decisions denying the proof beyond a reasonable doubt burden to the ultimate issue of punishment, because the ultimate issue in any case is also an "issue of fact" as understood at common law. (*Ibid.*)

A. Respondent Has Failed to Address the Merits of Mr. Wright's Claim

Respondent does not address the merits of the above contentions in any meaningful way. Respondent first mischaracterizes Mr. Wright's arguments and then offers as support the very California cases which Mr. Wright has urged this Court to reconsider. (Supp. RB at 123-14.) Respondent's arguments provide no basis to reject Mr. Wright's claim.

Contrary to respondent's assertion, Mr. Wright has not argued that merely because *Hildwin v. Florida* (1989) 480 U.S. 638 (*Hildwin*) and *Spaziano v. Florida* (1984) 469 U.S. 447 (*Spaziano*) have been overruled this Court should reexamine its rule that the Sixth Amendment jury right protections do not apply to the capital penalty phase. (Supp. RB at 12-14.) Rather, Mr. Wright has argued that because this Court has repeatedly relied on *Hildwin* and *Spaziano* to uphold this rule, the fact that both have been overruled provides a compelling reason for this Court to reexamine this rule. (Supp. AOB at 37 and cases cited therein; see Supp RB at 12.)

Despite respondent's avoidance of his arguments, Mr. Wright has provided this Court with substantial reasons to reconsider its prior holdings. Because this Court has explained that the drafters of the state jury right "looked to Blackstone" and other common law sources "not the Sixth Amendment, for a description of the common law right incorporated into the jury trial provision of the 1879 Constitution" (*Price v. Superior Court* (2001), 25 Cal. 4th 1046, 1077), Mr. Wright has provided a detailed historical account in support of his arguments. And because the most basic feature of any common law trial was the "submission of issues of fact to a jury" (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal. 2d 283, 296), Mr. Wright focused on establishing the original meaning of the term "issues of fact." Mr. Wright showed that constitutional jury protections, such as unanimity, extend "to all *issues*—character or degree of the crime, guilt *and punishment*—which are left to the jury." (*Andres v. United States* (1948) 333 U.S. 740, 748 (*Andres*), italics added; *People v. Green* (1956) 47 Cal. 2d 209, 220, quoting *Andres*.)

Respondent does not address these cases or provide a definition of "issues of fact" contrary to the one offered by Mr. Wright. Nor does respondent attempt to resolve the conundrum that the jury protection of unanimity—but not reasonable doubt—has long applied to the jury's ultimate penalty-phase determination, and conversely that reasonable doubt—but not unanimity—extends to a finding regarding the existence of aggravating crimes. (*People v. Hall* (1926) 199 Cal. 451, 456; *Andres*, *supra*, 333 U.S. at p. 748; cf. *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 231 ["jury

unanimity and the standard of proof beyond a reasonable doubt are slices of the same due process pie"].)

Respondent also fails to address Mr. Wright's two central arguments for this Court to reconsider its prior cases holding that this Court's doctrine that jury protections are inapplicable to the penalty phase. First, that those cases are based on flawed dicta from the incorrectly decided, and now overruled, *Spaziano v. Florida* (1984) 468 U.S. 447, overruled by *Hurst v. Florida* (2016) ___ U.S. ___, 136 S.Ct. 616, 624. (See also Supp. AOB at 36-37, 42-43, 49-53.) Second that those cases derive from the historical accident of this Court accepting, without analysis, positions taken by capital defendants. (Supp. AOB at 59-63.)

Respondent's legal analysis of Mr. Wright's claim is limited to two cursory points. First, as discussed above, respondent incorrectly asserts that the overruling of *Hildwin* and *Spaziano* are of "no consequence to California's capital sentencing scheme." (Supp. RB at 12.) Second, after respondent presents an unreasonably limited explanation of the holdings of *People v. Hall* (1926) 199 Cal.451 (*Hall*) and *Andres, supra,* 333 U.S. 740, respondent then argues that these cases do not provide a compelling reason for this Court to revisit its prior holdings.

As to the first assertion, Mr. Wright has explained above how, contrary to how the cases are presented by respondent, the reversal of both *Hildwin* and *Spaziano* very much call into question the arguments underlying this Court's holdings that the protections of the Sixth Amendment right to a jury trial do not apply to the penalty phase of a capital trial.

As to the second assertion, respondent's argument is entirely non-responsive to Mr. Wright's argument. The point is not that the questions presented in *Hall* and *Andres* are the same as those in Mr. Wright's trial. (See Supp. RB at 14-15.) Rather, Mr. Wright has argued that these cases stand for the proposition that if a legislature chooses to create a jury right on the issue of penalty, these trials are subject to the jury trial protections. (Supp. AOB at 45-49.)

Respondent fails to address Mr. Wright's arguments explaining how and why the existence of aggravating factors and the penalty phase determination are issues of fact. (Supp. AOB at 34-44). Respondent instead continues to simply assert that this Court should not revisit its holdings, despite the many changes in the law. (Supp. RB at 12-14.)

B. The Court Should Not Reject This Argument In The Absence Of Substantive Briefing In Opposition To Its Assertions

Mr. Wright has provided a serious, well-researched, and well-reasoned argument that this Court should reconsider its prior decisions in this area in light of subsequent changes in the law and informed by a fuller understanding of California legal history and the common law. Mr. Wright is not merely reasserting legal reasoning that this Court has previously rejected. Rather, he is presenting an argument not previously considered by this Court.

This Court has long expressed the view that appellate counsel "serves both the court and his client by advocating changes in the law if argument can be made supporting change." (*People v. Feggans* (1967) 67 Cal.2d 444, 447–448.) Yet by failing to meaningfully engage with a request to reconsider the law, respondent deprives

this Court of any assistance in evaluating the accuracy or persuasiveness of Mr. Wright's arguments that it should reconsider its holdings. Mr. Wright has presented a substantial claim that merits a meaningful response. Respondent's tactic of ignoring the merits of the claim thus fails to assist this Court in its foremost duty to "say what the law is." (*Marbury v. Madison* (1803) 5 U.S. 137, 177.)

Respondent's failure to address the substance of the claim potentially places this Court in the disfavored position of acting as "backup appellate counsel," which is "not the court's function." (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 546.) Of course, this Court is capable of researching and responding to the merits of Mr. Wright's arguments, even if the issues are not as settled as respondent claims. But the spirit of Government Code section 68081 is that the *parties* brief the arguments and set forth their respective positions, not that the Court raises novel arguments in its opinion without full adversarial briefing. (Gov. Code, § 68081.)

The premise of the adversary system is that the opposing parties will present issues about which there is a controversy and the courts will act as neutral arbiters of those controversies. The presumption is that the opposing parties have a vested interest in best presenting their views and will advance the facts and arguments that entitle them to relief. (*Greenlaw v. United States* (2008) 554 U.S. 237, 243-244.) When a party fails to do this, as respondent has here, it is appropriate for the reviewing court to issue a focus letter to the parties directing briefing on the issue. Mr. Wright submits that rejecting his claim based upon the briefing

currently before the Court would constitute a significant diminution of the adversary system and the Court should not permit it.

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CONCLUSION

For the reasons stated in this brief and in Mr. Wright's opening and reply briefs and supplemental opening brief, the judgment must be reversed.

Dated: August 18, 2020

Respectfully submitted,

Mary K. McComb
State Public Defender

Alison Bernstein
Alison Bernstein
Senior Deputy State Public Defender

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

I, Alison Bernstein, am the Senior Deputy State Public Defender assigned to represent appellant, William Lee Wright, 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 3,086 words in length excluding tables, certificates and attachments.

Dated: August 18, 2020

Alison Bernstein

Alison Bernstein
Senior Deputy State Public Defender

Attorney for Appellant

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Case Number: **Supreme Court Case No. S107900**
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **August 18, 2020**, at Oakland, CA.

/s/ Glenice Fuller

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