

SUPREME COURT COPY COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ANTHONY G. BANKSTON

Defendant and Appellant.

Cal. Supreme Ct. No.
S044739

(Los Angeles County
Superior Ct. No.
VA007955)

SUPREME COURT
FILED

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APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Jorge Navarrete Clerk

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, Los Angeles County

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DEATH PENALTY

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APPELLANT'S SUPPLEMENTAL OPENING BRIEF

I.

**THE TRIAL COURT ERRONEOUSLY ALLOWED
THE PROSECUTOR TO USE INADMISSIBLE
HEARSAY TO PROVE APPELLANT'S ALLEGED
GANG MEMBERSHIP AND BAD CHARACTER IN
VIOLATION OF BOTH STATE AND FEDERAL LAW**

Appellant has contended that during his first and second trials, the trial court improperly permitted street gang experts to testify – based on their use of testimonial hearsay – that he was an active gang member at the time of the charged offenses. Appellant also argued that his rap sheet, which was read to the jury at both trials, was testimonial hearsay. These errors violated the confrontation clause of the Sixth Amendment. (AOB 229-256.)

This Court's recent opinion in *People v. Sanchez* (2016) 63 Cal.4th 665, expands these claims by holding that expert testimony also implicates state hearsay law:

When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate testimonial hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing.

(*Id.* at p. 686.) Appellant's arguments should therefore be considered under state hearsay law in addition to the constitutional claim that has already been presented.

A. The Gang Experts in the First Trial Relied on Hearsay in Violation of State and Federal Law

During his first trial, appellant was charged with two separate murders and other counts relating to three shootings.^{1/} The prosecution alleged that the charged shootings were the result of rivalry between the Crips and Blood street gangs. In order to support this theory, two gang experts testified that they believed that appellant was an active gang member. Both experts relied on case-specific information that was outside of their personal knowledge or experience.

^{1/} Jurors ultimately found appellant guilty of the first degree murder of Benson Jones and charges associated with that crime (counts two, three, and five), but could not reach a verdict as to the murder of Enrique Sanchez and other counts that had been alleged against appellant (counts one, four, and six). (3 CT 664-665.)

Los Angeles County Deputy Sheriff Alexander MacArthur explained that his "Operation Safe Streets" unit maintained a database of purported gang members, called the General Report Evaluation and Tracking System ("GREAT"). Deputies gathered information by talking to gang members on the street or interviewing suspects after an arrest. The information was placed on a Field Identification ("FI") card. The GREAT system recorded the information as it was generated through an FI card or when an old card was updated.^{2/} (17 RT 2038-2040.) MacArthur was not a patrol deputy when the system was created and information about appellant became part of the database. He could only assume that whoever was working in the unit at that time believed that appellant was an active gang member. (17 RT 2092.)

MacArthur testified that someone other than himself prepared a FI card in 1984 that identified appellant as a member of the Nine Bishop Blood or Eastside Bishops gangs who used the moniker "Ant Dog." (17 RT 2040-2043.) MacArthur did not know who prepared the original card. (17 RT 2073, 2080.) His only contact with appellant came in 1989 when he updated the picture of appellant on the card and added certain information to it, including the name of appellant's parole officer, his driver's license number, and a "Stella" tattoo on appellant's wrist. (17 RT 2073, 2080-2083.) The contact took place after appellant was arrested for possession of a firearm, but MacArthur did not remember any specific details about it. (17 RT 2082-2083.)

^{2/} The GREAT system was first put into place in 1987 and 1988. At that point, someone at each sheriff's station transferred the information from all the FI cards to the GREAT database. (17 RT 2088-2089.)

There was no particular criteria or length of time between police contacts for a person to be considered as an inactive gang member. (17 RT 2093.) MacArthur believed that a person who is listed as an active gang member remained so unless he found out otherwise. (17 RT 2092.)

MacArthur also testified that appellant had a “C.K.” tattoo on his earlobe and that the initials stood for “Crip Killer” among gang members. (17 RT 2041, 2086-2087.) The tattoo is listed in the GREAT database printout and indicated that appellant was a “hardcore” gang member. (17 RT 2079, 2118.) Moreover, some – but not all – of appellant’s writings substituted the word “C” with “K,” which is a common practice of blood members. (17 CT 2062, 2116-2118.) Other writings and drawings contained references to “Ant Dog” and street gangs. (17 RT 2062-2064.) MacArthur did not know when all the writing was made. (17 RT 2095.) He also conceded that some of the writing could be interpreted in ways other than gang references. (17 RT 2098-2100, 2123, 2130-2131.)

Compton Police Lieutenant Reginald Wright testified about Compton street gangs. He stated that he “ha[d] information” that appellant was a member of the Nine Deuce Bishops street gang and was affiliated with the CV 70 gang. (20 RT 2579-2580.) The sources of his information were not identified.

At the close of the prosecutor’s case, the prosecutor moved that his exhibits be admitted into evidence. Over appellant’s hearsay objections, the trial court admitted the FI card (People’s Exhibit No. 39) and the GREAT system printout (People’s Exhibit No. 22) into evidence. (21 RT 2708-2711; 1 CT Supp. II 212-214.)

1. The FI card and GREAT printout were hearsay under state law

Although appellant did not object to the testimony at trial, he raised a hearsay objection to the introduction of the FI card and GREAT printout during his first trial. On appeal, appellant described MacArthur's use of the documents as multiple hearsay (AOB 236) and testimonial hearsay (AOB 230), but did not raise a separate hearsay claim under state law. Such a claim was precluded by decisions that allowed experts to testify about case-specific hearsay that formed the basis for their opinion. (*In re Fields* (1990) 51 Cal.3d 1063, 1070; *People v. Gardeley* (1996) 14 Cal.4th 605, 619-620 [allowing gang expert to testify about material gathered by colleagues and other law enforcement agencies].) Indeed, respondent's brief addressed state evidentiary law and argued that hearsay was permissible under *Gardeley*. (RB 218.) This equation changed after *Sanchez*, which repudiated these decisions and found that a gang expert relied on inadmissible hearsay when he testified about case-specific facts that supported his opinion.^{3/} (*People v. Sanchez, supra*, 63 Cal.4th at p. 684.)

Under the previous law, hearsay problems were held "cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth." (*People v. Montiel* (1993) 5 Cal.4th 877, 919.) In *Sanchez*, this Court recognized that the approach "was no longer tenable because an expert's testimony

³ Appellant's failure to object to the testimony does not waive the issue or prevent this Court from reviewing the claim. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4 [failure to object excusable because counsel could not have anticipated change in law or if an objection would have been futile based on the rule of law].)

regarding the basis for an opinion *must* be considered for its truth by the jury.” (*People v. Sanchez, supra*, 63 Cal.4th at p. 679.) As this Court explained: “When an expert relies on hearsay to provide case-specific facts, considers the statements as true, and relates them to the jury as a reliable basis for the expert’s opinion, it cannot logically be asserted that the hearsay content is not offered for its truth.” (*Id.* at p. 682.) Accordingly, hearsay problems cannot be avoided by giving a limiting instruction that tells a juror not to consider such facts for their truth. “If an expert testifies to case-specific out-of-court statements to explain the basis for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay.” (*Id.* at p. 684.)

In the present case, the FI card and the GREAT printout were out of court statements offered to prove that appellant was an active gang member. The documents were used by MacArthur as the primary basis for his opinion and admitted into evidence. There is no question that they were hearsay. (Evid. Code, § 1200.) Respondent has argued that “the trial court “repeatedly instructed” the jury that the information relied upon by expert witnesses was admitted only to explain the witness’s opinion and was not received for its truth.” (RB 223, citing 6 RT 1555-1556, 1558.)⁴ Even assuming that such an instruction was given, it could not have resolved the

⁴ Respondent’s citation is in error. The instructions are not found in the volume indicated and the pages listed make no mention of expert witnesses. Appellant is not aware of any limiting instruction given by the trial court, other than that pertaining to the testimony of Sgt. Riggs. (3 CT 585.) Since the documents themselves were received into evidence (21 RT 2708-2711), there is no question that jurors would have considered them for their truth.

hearsay issue because the information could only have been used for its truth. (*People v. Sanchez, supra*, 63 Cal.4th at pp. 684-685.)

Like any other hearsay, the documents relied upon by MacArthur were inadmissible unless there was a hearsay exception. (*People v. Sanchez, supra*, 63 Cal.4th at p. 684.) In some circumstances, police records may be admissible under the business records exemption to the hearsay rule (Evid. Code, § 1271; *People v. Ferguson* (1982) 129 Cal.App.3d 1014, 1024), but as appellant objected, a proper foundation must be established. (21 RT 2708-2709, 2709-2710.) This foundation requires that the custodian or other qualified witness testify to the mode of its preparation and the sources that were used so that trustworthiness is established. (Evid. Code, § 1271, subds. (b), (c).) Here, MacArthur did not know who prepared the original field identification card that identified appellant as a gang member, nor did he have any specific knowledge about the information identified in the GREAT printout. He did know the sources of the information that was used at that time. (17 RT 2073.) Without an adequate foundation having been established, the trial court erred in allowing MacArthur to use the FI card and database printout for their truth and abused its discretion when it admitted the documents over appellant's hearsay objection. (*People v. Ferguson, supra*, 129 Cal.App.3d at p. 1024 [police reports properly excluded as hearsay without foundation to establish the mode of its preparation, the sources of information and method and time of preparation]; *People v. Hernandez* (1997) 55 Cal.App.4th 225, 240 [police reports inadmissible under business records exception to hearsay rule because they were based on observations of witnesses with "no official duty to observe and report the relevant facts"].)

Lieutenant Wright also testified as a gang expert, citing unidentified information that appellant was a gang member. (20 RT 2579-2580.) Wright did not provide any further details about this information. He did not establish any basis that this statement came from his personal knowledge. Under these circumstances, the statement lacked any foundation and was hearsay under state law. (*People v. Sanchez, supra*, 63 Cal.4th at p. 686.) The gang experts erroneously used hearsay to establish case-specific facts.

2. The use of the GREAT printout and the FI card violated the confrontation clause

Appellant has argued that the use of the FI card and the database printout was testimonial hearsay that violated appellant's federal constitutional rights under the confrontation clause. (AOB 233-241.) This Court's decision in *Sanchez* supports his claim.

In *Sanchez*, a gang expert relied upon hearsay to support his testimony: police reports documenting prior misconduct, "STEP notices" that were issued to individuals associating with known gang members, and field investigation cards to document that the defendant was a gang member. (*People v. Sanchez, supra*, 63 Cal.4th at p. 672.) This Court found that the police reports were testimonial hearsay because they contained case-specific information gathered by other officers during an official investigation of a completed crime. (*Id.* at p. 694.) The STEP reports were also testimonial because the sworn information was retained by the police and gathered to document gang affiliation for criminal cases. (*Id.* at pp. 696-697.) This Court did not determine whether the FI card was testimonial, but noted that if the card was prepared for a criminal

investigation, it would be akin to a police report and subject to the demands of the confrontation clause. (*Id.* at p. 698.)

Here, the GREAT printout contained information about appellant's alleged active gang membership and arrests. This information was collected for the purpose of prosecuting gang members. As MacArthur testified, the basic purpose of his unit was to handle all gang-related cases, and to gather information about gang activities for investigative purposes. (17 RT 2038-2039.) As with the STEP notice at issue in *Sanchez*, the underlying information was prepared for use with criminal investigation and alleged specific criminal behavior. It should accordingly be found to be testimonial. (*People v. Sanchez, supra*, 63 Cal.4th at pp. 696-697, citing *Bullcoming v. New Mexico* (2011) 564 U.S. 647, 652-655.)

The circumstances of the FI card were not established since MacArthur did not know who prepared the original report. The nature of the card, however, indicates that it was meant to establish facts that could be used in a criminal case. The 1984 documentation records appellant's alleged gang status and his moniker. The 1989 update by MacArthur added that appellant was on parole and included a photograph of appellant that is similar to a mug shot, holding a sign that lists his alleged gang affiliation and moniker. (People's Exhibit No. 38; 1 Supp. CT II 212.) The card undoubtedly was prepared to gather information that could be used in a criminal investigation and trial. As with the STEP notices at issue in *Sanchez*, the information provided on the card was testimonial hearsay that was not permissible under the federal constitution. (*People v. Sanchez, supra*, 63 Cal.4th at p. 697.)

3. The Errors Were Prejudicial

Appellant has argued that errors involving testimonial hearsay were prejudicial under federal constitutional standards. (AOB 248-250.) Appellant incorporates these arguments here, and for much the same reasons, this Court should find that the hearsay issues raised in light of *Sanchez* were prejudicial under state law.

This was a close case. Appellant argued that he was misidentified and the jurors could not reach a verdict on at least one count from each of the charged incidents. Although appellant was convicted of the murder of Benson Jones and the attempted murder of Benjamin Jones, evidence of his guilt was far from compelling. The primary evidence against appellant came from the eyewitness testimony of Linda and Benjamin Jones. As appellant has established, Linda changed her initial description to better match appellant. (AOB 212-213, 248.) Benjamin also made inconsistent statements about the shooter. As a member of a gang, he had a strong bias against appellant and his untruthfulness about that undercut his credibility. (AOB 214, 249.)

In this context, the prosecutor's theory about gang involvement formed the lynchpin of his case. (See, e.g., 23 RT 2930-2934, 2949-2950, 2972-2972; 24 RT 3017-3018 [prosecutor's closing argument emphasizing gang membership].) Indeed, the prosecutor could not have put the issue any more directly to the jurors than when he argued: "You need to decide whether or not Mr. Bankston is, in fact, a hardcore member back in 1991. And if you do find that, what effect is that? Well, of course, that goes to the motive." (24 RT 3018.) Motive became the basis for determining that appellant was the shooter:

Based on the fact of his gang affiliation, which can be utilized not to prove that Mr. Bankston is a person of bad character or propensity to commit crimes, but [the] court is going to instruct you that gang evidence has been admitted to show motive, intent, or bias. Is motive important? Court's going to tell you with an instruction: the presence of motive tends to indicate guilt; the absence of motive, of course, logically tends to show innocence. The question you have to ask yourself: does Mr. Bankston have a motive to go into the heart of the Compton Chicano gang and shoot at two individuals?

(23 RT 2931-2932.) The answer to this question determined appellant's fate at trial and was the reason why the prosecutor brought in two gang experts to establish that appellant was an active gang member.

The FI card and the database printout were critical to the prosecutor's case. They were the key documents that identified appellant as an active gang member and formed the basis for MacArthur's opinion about appellant's status. MacArthur did not suggest that other factors independently established that appellant was a street gang member at the time of the charged offense. Indeed, MacArthur testified that he would regard appellant as an active gang member based solely on the initial identification made in these documents. (17 RT 2092.) Given their importance to appellant's trial, it is reasonably probable that the errors in using and admitting the card and the database printout led to appellant's conviction under state evidentiary standards. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The errors in admitting hearsay also implicated federal constitutional standards by rendering the trial fundamentally unfair in violation of due process under the 14th Amendment. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 [due process requires fundamental fairness]; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1385, [erroneous admission of evidence rendered

trial fundamentally unfair in violation of the due process clause].) As discussed above, the gang expert testimony was an important part of the prosecutor's case – the FI card and database printout provided the key evidence to establish that appellant was an active gang member. The effect of the error was to introduce prejudicial material into appellant's trial through gang experts to establish motive, intent, and identity. This violated fundamental fairness. Such an error cannot be shown to be harmless beyond a reasonable doubt. Reversal is required. (*Chapman v. California* (1967) 383 U.S. 18, 24.)

B. The Gang Expert In the Second Trial Relied on Hearsay in Violation of State Law

After the jurors could not reach a verdict in regard to some of the charges against appellant, he was retried for the murder of Enrique Sanchez, an assault against Linda Jones, and the attempted murder of Earnest Johnson. The prosecutor again called Deputy MacArthur who testified that appellant was an active gang member. (40 RT 5127, 5136, 5190.) As respondent states, this testimony was similar to that given in the first trial. (RB 216.)

MacArthur testified that FI cards document contacts between law enforcement officers and gang members. (40 RT 5133.) Appellant's FI card lists his gang affiliation and moniker. The card was first prepared in 1984 and had been updated by MacArthur in 1989. In 1989, appellant told MacArthur that his name was Ant Dog and that he was from the Nine Deuces Bishop gang. (40 RT 5134-5135.)

MacArthur also testified that the GREAT database printout allowed officers to track gang members throughout Los Angeles County by recording specific information relating to their gang involvement. (40 RT

5135-5136.) Appellant's printout provided information about his gang status, his name, his nickname within the gang, and his arrests or contact with law enforcement. (40 RT 5136, 5190-5191.) Once the database identifies a person as being an active gang member, he will be considered to be such until officers learn otherwise. (40 RT 5197-5198.)

MacArthur based his opinion about appellant's active gang status on his contact with appellant and the GREAT system printout. (40 RT 5138.) He also believed that appellant's tattoos and style of writing supported this conclusion. (40 RT 5138, 5144-5146.) In response to the prosecutor's hypothetical question, MacArthur stated that the 1989 FI card, a 1991 witness identification of appellant as being a gang member, and a 1994 photograph showing appellant with a gang handkerchief led him to believe that appellant never stopped being a gang member. (41 RT 5218.)

Appellant has argued that the FI card and database were testimonial hearsay in violation of his constitutional rights under the confrontation clause of the Sixth Amendment. (AOB 250-256.) As discussed above, both the FI card and the GREAT database printout were also hearsay under state law.^{5/} (*People v. Sanchez, supra*, 63 Cal.4th at p. 686.) There was no testimony about the initial identification in the FI card and the database

^{5/} Appellant did not object to MacArthur's testimony on hearsay grounds when the F.I. Card (People's Exhibit No. 38) and database printout (People's Exhibit No. 39) were admitted into evidence. (41 RT 5517.) In light of the trial court's ruling in the first trial that admitted the documents over appellant's hearsay objection, and the subsequent change of law under *Sanchez*, this Court should review the present claims without requiring an objection. (See *People v. Welch* (1993) 5 Cal.4th 228, 237-238 [objection not required if it would have been futile to make one]; *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4 [failure to object excusable if counsel could not have anticipated change in law].)

printout to establish how or when the information was obtained and entered into the reports. There was no hearsay exception. (*People v. Ferguson, supra*, 129 Cal.App.3d at p. 1024 [police reports properly excluded as hearsay without foundation to establish the mode of its preparation, the sources of information and method and time of preparation]; *People v. Hernandez, supra*, 55 Cal.App.4th at p. 240 [police reports inadmissible under business records exception to hearsay rule because they were based on observations of witnesses with “no official duty to observe and report the relevant facts”].)

The documents were a critical part of MacArthur’s testimony. Appellant’s identification as a gang member was first made through the 1984 field identification card that was incorporated into the GREAT system. The database printout specifically identified appellant as an “active” gang member. (People’s Exhibit No. 39, 1 CT Supp. II 214.) As MacArthur testified, this identification alone was enough to convince him that appellant was an active gang member (40 RT 5197-5198) and it became the prism through which he viewed all the evidence. His personal contact with appellant and other factors only served to reinforce the opinion that was formed through the initial identification.

As in the first trial, this evidence constituted a key portion of the prosecutor’s case to establish the theory of the case. The prosecutor’s closing argument tied the allegations of appellant’s active gang membership to motive:

You'll hear an instruction saying that if you have motive, you can use that as showing towards the guilt of the individual. We have the defendant being an associate of CV 70. We have the area being the C.C.G. area. We know that the two are rivals. We also know that he says he put some work in for the

gang. And we know that there had been shootings back and forth. We have a motive as to why Mr. Bankston would do this shooting.

(43 RT 5618-5619.) The prosecutor returned to this theme by arguing that appellant's gang status gave him a motive. (43 RT 5623.) The field identification card was the first evidence that the prosecutor used to show that appellant was an active gang member. (43 RT 5626-5627.) Although the prosecutor cited other evidence of gangs, it was the testimony of the gang expert that tied the case together, relying in large part upon the database printout and the initial identification of appellant as a member of the gang. The prosecutor used the database printout against appellant, both as evidence of his active gang involvement and to bolster the testimony of Paul Torrez, who had been impeached after claiming that appellant admitted committing the shooting. (43 RT 5667-5668.)

The second trial was a close case. One of the witnesses against appellant, Florentino Melendez, had been unable to identify appellant as the shooter until the second trial. Two other witnesses, Catalina Franco and Maria Lopez, did not identify appellant. Torrez was thoroughly impeached with contradictory statements and questions about his credibility since the police had supplied important details about the crime. (AOB 225-227, 253-254.) Given this, the gang expert's use of the the FI card and database printout – and their eventual introduction into evidence – prejudiced appellant by bolstering the prosecutor's case with allegations about the nature and extent of appellant's gang involvement. Under state law standards, reversal is required because it is reasonably probable that the error affected the verdict. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

The error in admitting the evidence also rendered the trial fundamentally unfair under federal due process standards. (*Estelle v. McGuire*, *supra*, (1991) 502 U.S. at p. 72; *McKinney v. Rees*, *supra*, 993 F.2d at p. 1385.) It introduced prejudicial hearsay into appellant's trial that could not help but affect the jurors' understanding of the case and their verdict. Under federal constitutional standards, the error cannot be shown to be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 383 U.S. 18, 24.)

C. Sergeant Riggs Improperly Used Appellant's Rap Sheet to Support His Opinion about Appellant's Propensity for Violence

During appellant's first trial, Sergeant Daryl Riggs, the lead investigator in this case, opined that appellant had a propensity for violence. In support of this opinion, Riggs relied on "specific detentions" contained in appellant's four-page rap sheet. (21 RT 2685.) He identified the document as being a "C.I.I. document" or "rap sheet" but did not testify about its source, its means of preparation, when the information was recorded, or how the information was obtained. (21 RT 2683-2684.) Over appellant's objection, Riggs read the entire rap sheet to the jurors, which recorded all of appellant's arrests from 1980 to 1990.

Riggs testified that on December 5, 1980, when appellant was a minor, he allegedly possessed a loaded weapon with live ammunition at school, a public place; on November 23, 1983, appellant was detained on suspicion of robbery and for carrying a loaded firearm in a public place and he was convicted for carrying the firearm; on March 12, 1985, appellant allegedly committed an assault with a firearm, and was later convicted of that offense and sentenced to three years in prison; on November 2, 1985,

appellant was detained for allegedly possessing a weapon in prison; on June 19, 1986, appellant was detained for an alleged assault on a prisoner in a correctional facility; on September 28, 1987, appellant was detained for what Riggs described as “a weapon, a tear gas offense, in prison” that allegedly led to a four year term; on November 28, 1988, appellant was detained for an alleged assault by a prisoner in prison; on October 28, 1989, appellant was detained for allegedly possessing a firearm; and on January 10, 1990, appellant was allegedly detained for carrying a concealed firearm in a public place and for being a felon in possession of a firearm; on January 26, 1990 appellant was alleged to be a felon possessing a firearm in prison. (21 RT 2685-2690.) Riggs described the rap sheet as being “unusual” since it involved crimes with weapons and violence, but no theft or drug offenses. (20 RT 2691.) On cross-examination, Riggs acknowledged that the abstract of judgment for the 1987 offense showed a two-year term rather than the four years that Riggs had alleged. (21 RT 2692.) The jurors were instructed that the statements in the rap sheet were admitted as the basis for Riggs’s opinion rather than their truth. (3 CT 585.)

Appellant has argued that use of the rap sheet constituted testimonial hearsay in violation of the confrontation clause. (AOB 241-248.) In light of *Sanchez*, this Court should find that the use of the rap sheet also violated state hearsay law. (*People v. Sanchez, supra*, 63 Cal.4th at pp. 684-685.) There is no question that the rap sheet was used for the truth to document various arrests and to establish criminal misconduct. The allegations within the rap sheet were introduced as facts meant to support Riggs’s opinion about appellant’s dangerousness. The rap sheet was “necessarily considered by the jury for [its] truth, thus rendering [it] hearsay.” (*People v.*

Sanchez, supra, 63 Cal.4th at p. 684.) The limiting instruction given in this case cannot cure the error.⁶ (*Ibid.*)

Rap sheets contain multiple levels of hearsay. (*People v. Morris* (2008) 166 Cal.App.4th 363, 372.) Some rap sheets, however, have been found to be admissible through the public records exception to the hearsay rule. (*People v. Morris, supra*, 166 Cal.App.4th at p. 367; *People v. Martinez* (2000) 22 Cal.4th 106, 137.) Under this exception, a record must be prepared “at the time of the act, condition, or event” and the sources of information and the method of preparation must indicate its trustworthiness. (Evid. Code, § 1280, subds. (b), (c),

In *Martinez*, this Court found that the trial court did not abuse its discretion during a bench trial when admitting a CLETS (California Law Enforcement Telecommunication System) rap sheet and a Los Angeles County criminal information printout into evidence as official records to prove the fact of the defendant’s prior convictions. (*People v. Martinez, supra*, 22 Cal.4th at p. 134.) In reaching this conclusion, this Court noted that the testifying witness presented detailed information about how rap sheets are prepared and the care that was taken to ensure that the information pertained to the defendant. (*Id.* at pp. 120-121.) This Court also found that the trial court could take judicial notice of statutes that require law enforcement agencies to compile and report criminal history information.

⁶ Appellant did not object on hearsay grounds to this testimony. However, in light of the change in law, an objection is not required for this court to review the matter on appeal. (See *People v. Sandoval, supra*, 41 Cal.4th at p. 837, fn. 4 [failure to object excusable because counsel could not have anticipated change in law or if an objection would have been futile based on the rule of law].)

This Court noted that the CLETS database system was enacted into law in 1965 to provide that the Department of Justice “shall maintain a statewide telecommunications system of communication for the use of law enforcement agencies.” (*People v. Martinez, supra*, 22 Cal.4th at p. 124, citing Gov. Code, § 15152.) In addition, the legislature has recognized the importance of providing accurate and complete criminal offender record information so that law enforcement agencies and the courts may obtain speedy access to arrest history and the final disposition of cases. (*People v. Martinez, supra*, 22 Cal.4th at p. 127, citing Pen. Code, § 13100.) Law enforcement agencies therefore must provide daily reports of certain specified misdemeanors and felonies to the Department of Justice. (*People v. Martinez, supra*, 22 Cal.4th at p. 122, citing Pen. Code, § 11107.) They must also report arrests to the Department. (*People v. Martinez, supra*, 22 Cal.4th at p. 123, citing Pen. Code, § 13150.) Dispositions following an arrest must be reported within 30 days. (*People v. Martinez, supra*, 22 Cal.4th at p. 122, citing Pen. Code, § 11115.) Since officials are presumed to perform their duty (Evid. Code, § 664), this Court reasoned that the statutes established the timeliness and reliability of the rap sheets. (*People v. Martinez, supra*, 22 Cal.4th at pp. 121-131 [CLETS rap sheet]; 134-138 [county records].)

This Court should reconsider the statutory basis underlying the *Martinez* opinion.⁷ The temporal duty to record information “at or near the

⁷ *Martinez* reviewed whether the trial court abused its discretion when admitting documents into evidence. (*People v. Martinez, supra*, 22 Cal.4th at p. 127.) Since the witness here simply read the rap sheet to the jury without it being admitted into evidence, and the use of hearsay to support an expert’s opinion was allowed at the time, the trial court did not
(continued...)

time of the event” is a necessary condition to a document being used as an official record. (Evid. Code, § 1280, subd. (b).) As this Court acknowledged in *Martinez*, the statutes do not provide specific time frames for entering information into the CLETS database. (*People v. Martinez, supra*, 2 Cal.4th at p. 127.) In particular, Penal Code section 13100 contains a legislative finding that law enforcement agencies need accurate and reasonably complete information but does not impose a legal duty to enter the information within a short period of receipt. Similarly, the duty of law enforcement agencies to report arrests under Penal Code section 13150 imposes no time frame on either the law enforcement agency or the Department of Justice. Penal Code section 11107 simply provides for daily reports of certain felonies and misdemeanors without specifying that the information is to be recorded into an individual’s record of criminal offenses. Penal Code section 11150 establishes a time frame for reporting the disposition of a case, rather than the arrests at issue here. The statutes are too vague to establish a legal duty to record information into a database in a timely manner as required by Evidence Code section 1280. (*People v. Martinez, supra*, 22 Cal.4th at pp. 142-143 (dis. opn. of Werdegarr, J.).)

There is nothing here to independently establish that the information was entered in a timely or reliable manner. Unlike the detailed testimony given in *Martinez*, Riggs testified only that the document was a “C.I.I.” rap sheet without further explaining how the information was obtained or the

¹ (...continued)

make any findings to support its admission as an official record. This Court should therefore review the issue de novo. (See *People v. Bell* (2007) 40 Cal.4th 582, 597 [independent review of the record when trial court does not make necessary factual findings].)

care that was used to ensure it was accurate. (21 RT 2684.) Moreover, the rap sheet here was not offered to prove convictions, but to demonstrate appellant's propensity for violence, primarily through his arrests. Even if a rap sheet may be used to prove the fact of a conviction, it does not mean that the conduct at issue has been reliably reported – particularly when the arrest did not lead to a conviction and the disposition is otherwise unknown, despite the mandate for law enforcement agencies to report dispositions under Penal Code section 11150. (21 RT 2685-2690 [Riggs testifying about detentions without referencing dispositions].)

It has been noted that law enforcement collects rap sheet information from a variety of sources and the documents are not as reliable as other records. (1 Jefferson, Cal. Evidence Benchbook (4th ed. 2016), § 5.13.) These concerns were borne out here since the interpretation of the rap sheet varied to some degree in the two trials. Riggs cited separate arrests in 1989 and 1990. (21 RT 2690.) In the second trial, Deputy MacArthur reviewed the rap sheet and believed that the arrests were for the same case, with different dates listed. (41 RT 5217.) Appellant objected to the accuracy of some of Riggs's testimony and on cross-examination Riggs acknowledged that a 1987 offense carried a two year term in the abstract of judgment, rather than the four years cited by Riggs when he testified from the rap sheet. (21 RT 2689, 2692.) It is apparent that the rap sheet used here did not meet the legislative goal of providing a uniform and accurate record of criminal offenses. (See Pen. Code, § 3100, subd. (e).) Accordingly, this Court should find that the rap sheet was used without the necessary foundations of timeliness and reliability sufficient to justify a hearsay exception.

Appellant has demonstrated that the confrontation clause errors involving the rap sheet, in conjunction with the F.I. card and database printout, were prejudicial under federal standards. (AOB 248-250.) In a separate argument, he established that the rap sheet alone was prejudicial under state and federal law by introducing inflammatory information about appellant's history and propensity for criminal conduct and violence. (AOB 191-228.) For the same reasons, under *Sanchez*, this Court should now find that Riggs's testimony about the rap sheet was prejudicial under state law.

Sergeant Riggs opined that appellant had a tendency for violence. The sole basis for his opinion was the rap sheet, which was used to allege that appellant had been arrested multiple times for violent offenses, including assaults and possession of weapons in prison. (21 RT 2685-2690.) Evidence of prior arrests and uncharged criminal conduct is extremely prejudicial. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404; *People v. Williams* (2009) 170 Cal.App.4th 587, 609-610.) Riggs's opinion based upon this evidence would therefore have a great impact upon jurors and invite them to discount conflicting evidence and convict appellant because of his alleged propensity for violence. As appellant has demonstrated in his opening brief, given the closeness of the case and the degree of prejudice inherent in appellant's history of arrests and prison offenses, it is reasonably probable that the error led to appellant's conviction. (AOB 212-215.) Reversal is required. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

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II.

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 opening brief, appellant 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 379-396.) 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 appellant's claims in Arguments XIII.B.1 and XIII.B.3 of his opening brief. (AOB 381-383, 385-387.) 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 *Hurst, supra*, 136 S.Ct. at p. 622.)

In Florida, a defendant convicted of capital murder is punished by either life imprisonment or death. (*Hurst, supra*, 136 S.Ct. at p. 620, citing Fla. Stat. §§ 782.04(1)(a), 775.082(1).) Under the statute at issue in *Hurst*, after returning its verdict of conviction, the jury rendered an advisory verdict at the sentencing proceeding, but the judge made the ultimate sentencing determinations. (*Hurst, supra*, at p. 620.) The judge was responsible for finding that “sufficient aggravating circumstances exist” and “that there are insufficient mitigating circumstances to outweigh aggravating circumstances,” which were prerequisites for imposing a death sentence. (*Hurst, supra*, at p. 622, citing Fla. Stat. § 921.141(3).) The Court found that these determinations were part of the “necessary factual finding that *Ring* requires.” (*Ibid.*)^{8/}

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

⁸ 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*.” (*Hurst*, *supra*, 136 S.Ct. at p. 619, italics added.) The Court reiterated this fundamental principle throughout the opinion.² 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

² See *id.* 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].

U.S. at p. 494.) The high 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)).¹⁰

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 what is its consequence. *Apprendi* made this clear: “the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that

¹⁰ As *Hurst* made clear, “the Florida sentencing statute does not make a defendant eligible for death until ‘findings by the court that such person shall be punished by death.’” (*Hurst, supra*, 136 S.Ct. at p. 622, citation and italics omitted.) In *Hurst*, the Court uses the concept of death penalty eligibility in the sense that there are findings which actually authorize the imposition of the death penalty in the sentencing hearing, and not in the sense that an accused is only potentially facing a death sentence, which is what the special circumstance finding establishes under the California statute. For *Hurst* purposes, under California law it is the jury determination that the aggravating factors outweigh the mitigating factors that finally authorizes imposition of the death penalty.

authorized by the 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.^{11/}

¹¹ 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 *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, the Court explained the weighing provision in Penal Code section 190.3 as follows:

[T]he reference to "weighing" and the use of the word "shall" in the 1978 law need not be interpreted to limit impermissibly the scope of the jury's ultimate discretion. In this context, the word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a

mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor "k" as we have interpreted it. By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case. (*People v. Brown, supra*, at p. 541, [hereafter "*Brown*"], footnotes omitted.)^{12/}

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

^{12/} 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.^{13/} The requirement that the jury must find that the

¹³ 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...)

aggravating circumstances outweigh the mitigating circumstances remained a precondition for imposing a death sentence. Nevertheless, once this prerequisite finding was made, the jury had discretion to impose either life or death as the punishment it deemed appropriate under all the relevant circumstances. The revised standard jury instructions, CALCRIM, “written in plain English” to “be both legally accurate and understandable to the average juror” (CALCRIM (2006), 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

¹³ (...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.) Appellant asks the Court to reconsider this ruling because, as shown above, its premise is mistaken. The weighing determination and the ultimate sentence-selection decision are not one unitary decision. They are two distinct determinations. The weighing question asks the jury a “yes” or “no” factual question: do the aggravating circumstances outweigh the mitigating circumstances? An affirmative answer is a necessary precondition – beyond the jury’s guilt-phase verdict finding a special circumstance – for imposing a death sentence. The jury’s finding that the aggravating circumstances outweigh the mitigating circumstances opens the gate to the jury’s final normative decision: is death the appropriate punishment considering all the circumstances?

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

beyond a reasonable doubt.” (*Ring, supra*, 536 U.S. at p. 602; see *Hurst, supra*, 136 S.Ct. at p. 621 [the facts required by *Ring* must be found beyond a reasonable doubt under the due process clause].)^{14/} 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* (Fla., Oct. 14, 2016, No. SC12-1947) [2016 WL 6036978] supports appellant’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, was described as “elements” that the sentencer must determine, akin to elements of a crime during the guilt phase. (*Hurst v. State, supra*, at *10.) The court emphasized:

¹⁴ 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 Delaware Supreme Court’s decision in *Rauf v. State* (Del., Aug. 2, 2016, No. 39) [2016 WL 4224252] [hereafter “*Rauf*”] also supports appellant’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*.^{15/} One reason the court

^{15/} 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 aggravating circumstances” (*Rauf, supra*, at *1-2 (*per curiam* opn.))

(continued...)

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 Florida and Delaware courts are not alone in reaching the conclusion that the weighing process is a factual determination. 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

¹⁵ (...continued)

[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.)).

defendant's crime outweigh the mitigating factors is . . . [a] factual finding" under Alabama's capital sentencing scheme]; contra, *United States v. Gabrion* (6th Cir. 2013) 719 F.3d 511, 533 (en banc) [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. Since appellant was not sentenced under this standard, the death verdict must be reversed.

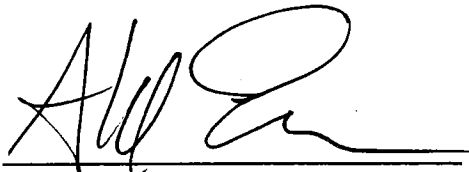
CONCLUSION

For all the reasons argued above, and in appellant's opening and reply briefs, the judgment against appellant must be reversed.

DATED: October 31, 2016

Respectfully submitted,

MARY K. McCOMB
State Public Defender

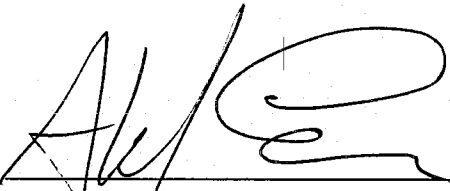
A handwritten signature in black ink, appearing to read 'Arnold Erickson', written over a horizontal line.

ARNOLD ERICKSON
Senior Deputy State Public Defender

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, Rule 8.630(b)(2))

I, ARNOLD ERICKSON, am the Deputy State Public Defender assigned to represent appellant ANTHONY G. BANKSTON, in this automatic appeal. I conducted 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, excluding tables and certificates is 11,248 words in length.

DATED: October 31, 2016


ARNOLD ERICKSON
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Anthony G. Bankston*

Cal. Supreme Ct. No. S044739
(Los Angeles Co. Sup. Ct. No. VA007955)

I, Marcus Thomas, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, 10th Floor, Oakland, California 94607. On this day, I served a copy of the following document(s):

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

by enclosing it in envelopes and

- / / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
- / X / **placing** the envelopes for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed on **November 1, 2016**, as follows:

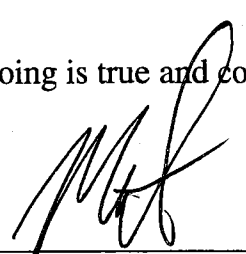
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I declare under penalty of perjury that the foregoing is true and correct. Signed on **November 1, 2016**, at Oakland, California.



DECLARANT

