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)

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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

HONORABLE NANCY BROWN, JUDGE

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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

In his opening brief, appellant contended that during his first and second trials, the trial court improperly permitted experts to use testimonial hearsay in violation of the confrontation clause of the Sixth Amendment. (AOB 229-256.) Appellant's supplemental brief expanded this argument and raised state law claims in light of this Court's recent opinion in *People v. Sanchez* (2016) 63 Cal.4th 665, which found that when experts relate case-specific facts that are not based on their personal knowledge, the statements are hearsay. (ASOB 1-22.[1])

A. The Issues Raised By Appellant Are Not Forfeited

Respondent generally argues that appellant has forfeited his claims for failure to object to the expert testimony at trial. (RSB 15.) Appellant objected on hearsay grounds to the admission into evidence of the Field Identification ("FI") card and the General Report Evaluation and Tracking ("GREAT") database printout during the first trial (21 RT 2708-2710) but did not make a separate objection to the expert testimony during either of his trials. He had no basis for doing so. At the time of appellant's trial, experts were allowed to use hearsay as a basis for their opinion. (See *People v. Montiel* (1993) 5 Cal.4th 877, 919 [statements related by experts are not hearsay because they are being used to establish an opinion rather than for their truth]; *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].)

In *Sanchez*, this Court rejected its former reasoning and found that case-specific facts used by an expert are hearsay:

> When an expert is not testifying in the form of a proper hypothetical question and no other evidence of the case-specific facts presented has or will be admitted, there is no denying that such facts are being considered by the expert, and offered to the jury, as true.

(*People v. Sanchez*, *supra*, 63 Cal.4th at p. 684.) As hearsay, such facts may not be used by an expert unless there is an exception to the hearsay rule. (*Id.* at p. 686.) Accordingly, *Sanchez* created a significant change in

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[1] "ASOB" refers to appellant's supplemental opening brief. "RSB" refers to respondent's supplemental brief.

the law and provides a basis for relief that was not present at the time of trial. This Court should therefore find that waiver does not apply and consider appellant's 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].)

B. The Gang Experts In The First Trial Related Hearsay In Violation Of State And Federal Law

1. The Testimony of Deputy MacArthur

Appellant's supplemental brief argued that in the first trial Deputy MacArthur improperly related hearsay from the FI card and the gang database printout to opine that appellant was an active gang member. (ASOB 2-12.) Respondent acknowledges Deputy MacArthur's testimony "about the portion of an FI card prepared by other officers" was case-specific hearsay under *Sanchez*. (RSB 16.) Respondent maintains, however, that the bulk of MacArthur's testimony consisted of his personal knowledge and admissible opinions. (RB 16-17.) The issue, then, is not whether there was error, but if the error was prejudicial in light of the other evidence discussed by MacArthur.[2]

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[2] Respondent's brief discusses appellant's first and second trials as part of a single argument and cites to both as support for the same statement. (See RSB 16-17.) Appellant's supplemental brief divided his claims into that affecting his first trial (ASOB 2-12) and his second trial (ASOB 12-16) because the charges against appellant, MacArthur's testimony, and other facts at issue differed in the two trials. For instance, at the first trial MacArthur did not remember any details about his interview with appellant. (17 RT 2082-2083.) At the second trial, he testified about admissions that appellant made during the interview. (40 RT 5134-5135.) These facts affect different claims involving different trials. Respondent does not explain how MacArthur's testimony at the second trial affects

(continued...)

It is important to focus on why the gang evidence was introduced – it was not simply to show that appellant had been a member of a street gang, but that he was an active gang member when the crime was committed. (17 RT 2048 [prosecutor offers gang experts to prove motive and intent].) As the prosecutor told the jurors, they needed to decide whether or not appellant was "a hardcore member back in 1991." (24 RT 3018.) The FI card and database printout were important evidence used to establish this. Indeed, the GREAT database specifically identified appellant as an "ACTIVE" gang member. (Peo. Exh. Nos. 22 & 24; 1 CT Supp.II 212-214.)

Respondent emphasizes that MacArthur had "*personally* interviewed, photographed and completed an FI card on appellant" in 1989. (RSB 16, citing 17 RT 2040-2041, 2073, 2082, italics in original.) This does not mean that information in the card about appellant's gang status was not hearsay. The card was first prepared in 1984 and included allegations that appellant was a member of the Nine Deuce Bishops Blood street gang, and that his moniker was "Ant Dog." (17 RT 2040-2043.) MacArthur did not know who put this critical information on the original card. (17 RT 2073, 2080.)

MacArthur testified that he interviewed and photographed appellant when he updated the FI card in 1989. (17 RT 2073.) He added certain information to the card, including the name of appellant's parole officer, appellant's driver's license number, and that there was a "Stella" tattoo on appellant's wrist, but none of this information related to appellant's gang

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[2] (...continued)
issues raised concerning the first trial. The two trials should be considered separately.

status. (17 RT 2073, 2080-2083.) His only contact with appellant came at that time and MacArthur could not recall any specific aspect of his interview with appellant. (17 RT 2082-2083.) Another officer updated the information in 1991. (17 RT 2083.) MacArthur's testimony in the first trial did not establish that he had personal knowledge of case-specific facts, as required by *Sanchez*. (*People v. Sanchez*, *supra*, 63 Cal.4th at p. 676.)

Similarly, MacArthur did not know who prepared the information about appellant that was entered into the gang database. (17 RT 2092.) This information was crucial. Once a person was entered into this system, there was no standard procedure to purge the data of people who were no longer active in a gang. (17 RT 2091-2092.) MacArthur testified that he would regard a person as an active gang member based solely upon information recorded in the database. (17 RT 2092, 2095.)

Respondent overstates the importance of MacArthur's testimony about other gang evidence when used to determine whether appellant was a gang member at the time of the crime. (RSB 16-17.) MacArthur testified that he knew appellant was affiliated with the Nine Bishop Blood or Eastside Bishops, but his statement did not elaborate further and the information appears to have been taken directly from the FI card and database since it was given in the context of his testimony about these documents. (17 RT 2043.) As appellant has acknowledged (ASOB 4), MacArthur 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.) Some – but not all – of appellant's writings substituted the letter "C" with "K," which is a common practice of Blood members. (17 CT 2062, 2116-2118.) Other writings and drawings contained references to the moniker "Ant Dog" and street gangs. (17 RT 2062-2064.)

MacArthur also testified that appellant used the numbers 9-2 in some of his filings in the trial court, which were associated with the 9 Deuce Bishops. (17 RT 2079.)

None of this material was linked to any date that would establish that appellant was an active gang member at the time of the crime. MacArthur did not know when the writing was made. (17 RT 2095.) Other than a single prison drawing that contained the date 1988, there was no indication about the dates of any material in the album of drawings and writing that was used against appellant. (17 RT 2096.) MacArthur also conceded that some of the writing could be interpreted in ways other than gang references.[3] (17 RT 2098-2100, 2123, 2130-2131.) Standing alone, this information would not have proven that appellant was an active gang member at the time of the crime.

Although respondent acknowledged that portions of MacArthur's testimony about the FI card was case-specific hearsay under *Sanchez*, respondent downplays this by contending that "[a]lthough Deputy MacArthur did describe the contents of appellant's FI card and gang database file" he did not convey any particular hearsay or tell the jurors that appellant was a gang member simply because the documents said that. (RSB 18.) The relevant contents of the FI card and database were hearsay, and both documents were introduced through MacArthur's testimony and

[3] Some of the writing discussed by MacArthur similarly refers to prison gangs rather than the street gangs at issue here. (See 17 RT 2064-2065, 2068 [writing identified as referring to prison gang, which MacArthur believed was more important to the author than street gangs].) Respondent also notes that appellant "proposed to stipulate that he was a gang member." (RB 17, fn. 3.) Appellant's proposed stipulation referred to a prison gang. (17 RT 2053.)

erroneously admitted into evidence. (ASOB 7; 21 RT 2708-2711.) MacArthur used the FI card to inform the jurors that appellant's gang moniker was "Ant Dog." (17 RT 2040-2041.) He stated that appellant was a member of the "Nine Bishop Blood" or "Eastside Bishops" street gang (17 RT 2043), which had been documented on the FI card and database. A significant part of MacArthur's testimony described how deputies gathered information that was entered on FI cards and how the information was maintained in a database of purported gang members. (See 17 RT 2038-2041, 2073-2074, 2079; AOB 230-231 [summarizing MacArthur's testimony].) The GREAT printout was the only evidence to specifically describe appellant as an "ACTIVE" gang member. (Peo. Exh. No. 22; 1 CT Supp.II 212-214.)

The information from the card and database that alleged that appellant was an active gang member had been compiled through official investigation. Once this status was ascribed to a person, it would remain with them until an officer learned otherwise. (17 RT 2091-2902.) The information from the FI card and database therefore was enough to brand appellant and convince MacArthur that he was an active gang member. (17 RT 2092.) Jurors undoubtedly gave MacArthur's opinion – and the hearsay that he used initially to identify appellant as an active gang member – great weight.

2. The Testimony of Lieutenant Wright

During the first trial, Lieutenant Wright generally testified about street gangs in Compton, and tensions between various Compton gangs and their cliques and sects. (20 RT 2573-2579.) Wright also stated that he had unidentified "information" that appellant may belong to the 9 Deuce Bishops and that he affiliated with another gang. (20 RT 2579-2580.)

Appellant has argued that Wright's statement lacked any foundation and was improper hearsay. (ASOB 8.)

Respondent relies on Wright's testimony on re-direct examination that discussed particular pieces of gang evidence that strengthened his opinion that appellant was an active gang member. (RSB 17.) This evidence did not unequivocally establish that appellant was an active gang member at the time of the crime. Wright told the jurors that the writings found in an album seized in appellant's home referred to the United Blood Nation (UBN), a prison gang composed of "Blood sets." Wright read portions of the prison-gang poetry to the jurors. Like MacArthur, Wright did not explain how the undated prison gang material meant that appellant was an active street gang member. (20 RT 2600-2603.) Wright also testified about appellant's "C.K." tattoo (20 RT 2598), but acknowledged that tattoos did not necessarily mean that a person was an active gang member, because they are hard to remove. (20 RT 2604.) Respondent cites a hypothetical given to Wright based upon an incident in court where appellant allegedly mouthed threatening words in response to the term "cuz." (RB 17, citing 20 RT 2602-2603.) Wright stated that this also corroborated his opinion that appellant was a hardcore gang member.[4/] (20 RT 2063.)

The evidence discussed by Wright may have corroborated his opinion, but that opinion was based on unidentified information that he had

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[4/] At the preliminary hearing, Officer Gibson testified that after appellant's counsel asked Benjamin Jones what would happen if someone addressed the wrong person as "cuz," appellant mouthed the words, "And I would kill them, fuck you." (19 RT 2376-2377.) Gibson acknowledged that she had not been trained in lip reading. (19 RT 2378-2379.)

first obtained that alleged that appellant was a gang member. (20 RT 5079-5080.) That information was the prism through which Wright viewed the evidence in this case and affected his beliefs and the juror's consideration of the evidence.

3. The GREAT Printout and the FI Card Violated the Confrontation Clause

Appellant's opening brief argued that the database printout and FI card used in this case were testimonial hearsay under the confrontation clause. (AOB 233-241.) Appellant's supplemental brief contended that this Court's decision in *Sanchez* supported this claim. (ASOB 8-9, citing *People v. Sanchez, supra*, 63 Cal.4th at pp. 694-698.) Although respondent maintains that MacArthur's and Wright's opinions did not implicate the confrontation clause (RSB 18-19), appellant's claim focuses on the documents themselves, which were used by MacArthur during his testimony and admitted into evidence.[5] (21 RT 2708-2711.)

Respondent argues that appellant's Sixth Amendment claim fails because "the record does not establish that the circumstances surrounding any underlying admissions were testimonial for the purposes of the confrontation clause." (RSB 19.) Respondent faults appellant for not developing the record to establish his claim of error. (RSB 19, citing *People v. Ochoa* (2017) 7 Cal.App.5th 575, 586, fn. 7 [record undeveloped due to defendant's failure to object after several cases had developed the meaning of testimonial hearsay].) In contrast to *Ochoa*, this case was tried in 1994, ten years before the United States Supreme Court based its confrontation clause analysis on testimonial hearsay. (See *Crawford v.*

[5] Appellant has not argued that Lieutenant Wright used these documents.

Washington (2004) 541 U.S. 36, 51, 68-69.) Appellant cannot be faulted for not foreseeing this change in the law and developing the record accordingly. (See ARB 100-101 [confrontation clause claim not forfeited for failure to object].) However, the nature of the documents establishes that they were testimonial hearsay. (ASOB 9.)

In *Sanchez*, three different types of documents were used in a gang expert's testimony: police reports, "STEP Notices" that were issued to individuals associating with known gang members, and field investigation cards. (*People v. Sanchez, supra*, 63 Cal.4th at pp. 672-673.) 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.)

Respondent contends that there is no indication that the FI card and database were prepared during the course of a criminal investigation. (RSB 20.) To the contrary, MacArthur testified that the cards were prepared by officers working with "Operation Safe Streets," which is a unit designed to handle "all gang related cases." (17 RT 2038.) The database is a county wide system that links all the police stations together in order to record or retrieve gang identification and information. (17 RT 2039.) There is no question that gang cases cited by MacArthur were part of criminal investigations, and that the information documented by the FI cards were transferred to the GREAT database for that purpose. (17 RT 2039-2040.) Moreover, the FI cards are gathered during police investigations – the 1989 information that was added to appellant's FI card was taken following an arrest, and it was further updated after appellant's arrest in 1991. (17 RT 2041, 2082, 2083.) The FI card, then, was similar to the kind of information documented in police reports and the database printout provided the type of information that was entered into the STEP notices and found to be testimonial in *Sanchez*. This Court should accordingly find that the FI card and database printout at issue here were testimonial hearsay. (*People v. Sanchez, supra*, 63 Cal.4th at p. 697.)

4. The Errors Were Prejudicial

Appellant argued that the errors in his first trial were prejudicial under either state or federal standards. (ASOB 10-12.) Respondent generally relies on the arguments made in the respondent's first brief to argue that any error was harmless. (RSB 20-21, citing RB 219-224.[6])
Since appellant has already responded to those arguments. (ARB 114-116), no further response is necessary here.

The one additional argument that respondent now advances is the testimony from Michael Patterson, the arresting officer in 1991. (RSB 20.) According to Patterson, appellant said that his nickname was Ant Dog, and that he was a member of the Nine Deuce Bishops street gang. Patterson

[6] Respondent's Brief, pages 222-224, specifically discussed prejudice. Respondent's Brief, pages 219-221, focused on whether admission of the FI card and database printout violated the confrontation clause.

also noticed the letters "CK" tattooed on appellant's earlobe, which he took to mean "Crip Killer." (16 RT 1948-1949.[7])

Deputy MacArthur did not rely on Patterson's testimony when he offered his opinion about appellant's gang status. Similarly, Lieutenant Wright did not cite to Patterson's testimony when he stated that he had information that appellant was a gang member. These experts, rather than Patterson, were used to establish motive and intent. (17 RT 2048.) Patterson's testimony did not lessen the importance of the FI card, database printout, and unidentified hearsay that were related to the jurors through the gang experts.

Jurors would have interpreted the evidence in this case through the lens provided in the hearsay documents, including the database printout that specifically labeled appellant as an "ACTIVE" street-gang member. (Peo. Exh. No. 22; 1 CT Supp.II 212-214.) These documents lent credence to both the testimony of the gang experts and became the lynchpin that was used to establish motive in this case. This Court should find that this information was critical to the prosecutor's case, which rendered it prejudicial under both state (*People v. Watson* (1956) 46 Cal.2d 818, 836) and federal (*Chapman v. California* (1967) 383 U.S. 18, 24) standards.

C. The Gang Expert In The Second Trial Relied On Hearsay In Violation Of State Law

Appellant has argued that the FI card and GREAT database printout were testimonial hearsay as used in his second trial. (AOB 250-256.) Appellant's supplemental opening brief argued that under state law, they were improperly used by Deputy MacArthur and erroneously admitted into

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[7] During the second trial, Patterson did not testify about this admission. (41 RT 5269-5275.)

evidence. (ASOB 12-16.) Respondent does not address this claim as a separate argument, but refers to MacArthur's testimony during the second trial in contending that his opinion was based on matters within his own knowledge, apart from hearsay. (RSB 16-17.)

At the second trial, MacArthur based his opinion about appellant's active gang status on his contact with appellant and the information in the GREAT system printout. (ASOB 13; 40 RT 5138.) As appellant has acknowledged, MacArthur changed his testimony in the second trial and was able to remember that appellant personally told him about his gang membership when the FI card was updated in 1989.[8] (ASOB 12; 40 RT 5134-5135.) MacArthur believed appellant's tattoo supported this opinion (40 RT 5138); that appellant's writings was "indicative" of a Blood gang member (40 RT 5144-5146); and that certain evidence led him to believe that appellant never stopped being a gang member (41 RT 5128).

MacArthur also testified at length about both the FI card and the database information. (40 RT 5133-5138.) He explained that the FI card was first prepared in 1984, that the information was entered into the GREAT system, and that appellant remained identified as an active gang member on this basis until officers learned otherwise. (40 RT 5197-5198.) As one of the primary components of the information used by MacArthur to regard appellant as an active gang member (40 RT 5138), the 1984 information on the FI card and the subsequent database printout was important to his opinion. That both documents were admitted into evidence further increased their significance as part of the prosecutor's case. (Peo.

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[8] At the first trial, MacArthur could not remember any of the specific details of his interview with appellant and did not claim that appellant made any admissions to him. (17 RT 2082-2083.)

Exh. No. 38 [FI card]; Peo. Exh. No. 39 [database printout]; 41 RT 5517.) Indeed, the prosecutor used the database printout both to establish appellant's active gang involvement and to bolster the testimony of Paul Torrez, an important witness in the second trial. (43 RT 5667-5668.) This Court should find that the use of the documents during appellant's second trial was prejudicial under state and federal standards. (ASOB 15-16.[9])

D. Sergeant Riggs Improperly Used Appellant's Rap Sheet To Support His Opinion About Appellant's Propensity For Violence

Appellant has argued that during appellant's first trial, Sergeant Riggs improperly used appellant's rap sheet to opine that appellant had a propensity for violence. In his opening brief, appellant argued that the rap sheet constituted testimonial hearsay in violation of the confrontation clause. (AOB 241-248.) Appellant's supplemental opening brief argued that it also violated state hearsay law under *People v. Sanchez, supra*, 63 Cal.4th at pp. 684-685. (ASOB 16-22.)

Respondent argues that this claim should be forfeited because appellant did not object to the testimony as hearsay. (RSB 24.) As discussed above, appellant had no basis to object at the time of his trial. Under the former law, an expert could relate hearsay to support an opinion. (See *People v. Gardeley, supra*, 14 Cal.4th at pp. 619-620.) In *Sanchez*, this Court rejected its former reasoning and found that an expert may not relate case-specific hearsay to jurors unless there is an exception that allows the information to be used. (*People v. Sanchez, supra*, 63 Cal.4th at p. 686.) Accordingly, this Court should find that waiver does not apply and

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[9] Because respondent's supplemental brief does not address prejudice at the second trial, no further reply is necessary here.

consider appellant's claim. (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].)

Respondent relies on this Court's decision in *People v. Martinez* (2000) 22 Cal.4th 106, 137, to argue that the rap sheet here could be used as a public record under Evidence Code section 1280. (RSB 25-27.) Appellant has asked this Court to reconsider its opinion in *Martinez* since California law does not require information in a rap sheet to be recorded at or near the time of the event, as required under Evidence Code section 1280, subdivision (b). (ASOB 18-20.) Respondent does not address the statutory framework governing the legal duty to record information into a database, except to note that the statutes at issue have not changed in any material way from the time that *Martinez* was decided. Even if the statutes remain unchanged, they are simply too vague to establish a legal duty to record information in a timely manner. (*People v. Martinez*, *supra*, 22 Cal.4th at pp. 142-143 (dis. opn. of Werdegar, J.).)

Moreover, the presumption of admissibility under Evidence Code section 1280 should still not be applied in this case. Unlike the detailed record at issue in *Martinez*, there was nothing here to establish that the information was entered in a timely or reliable manner. (See *People v. Martinez*, *supra*, 22 Cal.4th at pp. 120-121; ASOB 20-21.)

Respondent argues that "appellant's complaints" about the rap sheet come too late since the trial court's ruling on admissibility implies "whatever finding of fact is prerequisite" to its decision. (RSB 27, quoting *People v. Martinez*, *supra*, 22 Cal.4th at p. 120; *People v. Williams* (1997) 16 Cal.4th 153, 196.) Here, however, there was no finding – express or implied – that the rap sheet could be admitted under an exception to the hearsay rule. The trial court permitted Sergeant Riggs to read the rap sheet to the jurors, but it was not otherwise admitted into evidence. Similarly, respondent faults appellant for not presenting evidence to show that the information did not meet the standards required by Evidence Code section 1280 (RB 26), but since the document was not introduced into evidence, and an expert was permitted to relate hearsay at the time of appellant's trial, he had no basis to challenge whether the rap sheet met the requirements for the public record exception.

Through an objection and cross-examination, appellant disputed the accuracy of some of Riggs's testimony about the rap sheet. (21 RT 2689, 2691-2692.) It is also apparent from the record in both trials that separate arrests that were cited by Riggs from his understanding of the rap sheet were actually for the same case. (Compare 21 RT 2690 [Riggs], 41 RT 5217 [MacArthur].) Thus, the rap sheet here did not meet the legislative goal of providing a clear and accurate record of criminal offenses. (ASOB 21.) There is nothing to indicate that the rap sheet information was either timely or reliable. Accordingly, it should not be afforded the presumption of admissibility applied in *Martinez*.

Respondent relies on his previous brief to argue that any error is harmless. (RSB 27.) Appellant has responded to those contentions and there is no need to repeat these arguments here. (ARB 89-94, 115-116.) Sergeant Riggs opined that appellant had a tendency towards violence. The record he cited, including prior arrests and uncharged criminal conduct, was extremely prejudicial. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404; *People v. Williams* (2009) 170 Cal.App.4th 587, 609-610.) It would have had a great impact upon the jurors. Given the closeness of this case and the degree of prejudice inherent in appellant's history of arrests and prison offenses, it is reasonably probable that the hearsay led to appellant's conviction. Reversal is required. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

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

Appellant has argued that this Court's previous decisions regarding the constitutionality of California's death penalty scheme, as challenged under *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584, should be reconsidered in light of *Hurst v. Florida* (2016) ___ U.S. ___ [136 S.Ct. 616].) (ASOB 23-40.)

Respondent does not address the substance of appellant's claim, but simply argues that this Court has found that *Hurst* does not affect its previous decisions. (RSB 28-29.) In both of the cases cited by respondent, this Court stated that California's statute was materially different than the former Florida scheme because this state requires a jury verdict before death can be imposed, unlike the advisory opinion that was at issue in Florida. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16; *People v. Jackson* (2016) 1 Cal.5th 269, 374.)

The issue before this Court is not the role of the jury in imposing death, but the factual determinations that must be made. As appellant argued (ASOB 34), this Court has construed Florida's sentencing directive to be comparable to California – if the sentencer finds that aggravating circumstances outweigh mitigation, a death sentence is authorized, but not mandated. (*People v. Brown* (1985) 40 Cal.3d 512, 542.)

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

Both *Rangel* and *Jackson* were decided before the decisions of the Florida Supreme Court in *Hurst v. State* (Fla. 2016) 202 So.3d 40, and the Delaware Supreme Court in *Rauf v. State* (Del. 2016) 145 A.3d 430. Although appellant discussed these cases (ASOB 37-39), respondent does not address either opinion. In Florida, the state supreme court described the sentencing factors, including the weighing process itself, as "elements" that the sentencer must determine, akin to elements of a crime during the guilt phase. (*Hurst v. State*, *supra*, 202 So.3d at pp. 53-54.) The court emphasized that the "critical findings necessary for imposition of a sentence of death" were "on par with elements of a greater offense." (*Id.* at p. 57.) In Delaware, the state supreme court explained that the weighing determination "is a factual finding necessary to impose a death sentence." (*Rauf v. State*, *supra*, 145 A.3d at p. 485.) These cases support appellant's contention that even though the sentencer might have been different between the former Florida scheme and California's death penalty law, the necessary factual findings are similar.

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

CONCLUSION

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

DATED: April 4, 2017

Respectfully submitted,

MARY K. McCOMB
State Public Defender

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

I, ARNOLD ERICKSON, am the Senior 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 4,963 words in length.

DATED: April 4, 2017

ARNOLD ERICKSON
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Anthony G. Bankston* No. S044739
(Los Angeles Co. Sup. Ct. No. VA007955)

I, Randy Pagaduan, 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 REPLY 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 **April 5, 2017**, as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Signed on **April 5, 2017**, at Oakland, California.

DECLARANT