No. S146939

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. LEE SAMUEL CAPERS, Defendant and Appellant.	San Bernardino County Case No. FBA-02684

APPELLANT'S REPLY BRIEF

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

HONORABLE JOHN M. TOMBERLIN

MARY K. McCOMB
State Public Defender

PETER R. SILTEN
State Bar No. 62784
Supervising Deputy State Public Defender

1111 Broadway, 10th Floor
Oakland, CA 94607
Telephone: (510) 267-3300
Facsimile: (510) 452-8712
silten@ospd.ca.gov

Attorneys for Appellant

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INTRODUCTION

In this brief, appellant addresses specific contentions made by respondent that necessitate an answer in order to present the issues fully to this Court. Appellant does not reply to those of respondent's contentions which are adequately addressed in appellant's opening brief. In addition, the absence of a reply by appellant to any particular contention or allegation made by respondent, or to reassert any particular point made in appellant's opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in appellant's opening brief.

ARGUMENT

I.

APPELLANT'S CONVICTIONS AND SENTENCE OF DEATH MUST BE REVERSED BECAUSE THEY REST ENTIRELY ON HIS UNCORROBORATED STATEMENTS TO THE POLICE AND TO THE MARTINS

A. Introduction

Appellant argued in his opening brief that his convictions and death sentence must be reversed because, as conceded by the prosecutor below, the evidence against appellant rests entirely on his uncorroborated statements to the police and the Martins,[1] statements which appellant has demonstrated lack "substantial independent evidence which would tend to establish the[ir] trustworthiness." (*Opper v. United States* (1954) 348 U.S. 84, 93.)

Respondent contends that appellant's argument fails because all the prosecution needed to do at trial was to prove independent of appellant's uncorroborated statements that a crime was committed, which it did as required by the corpus delicti rule. (RB 19 et seq.)[2]

Respondent also contends that substantial independent evidence corroborates appellant's inculpatory statements. (RB 26-28.)

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[1] During a pretrial proceeding, the prosecutor remarked: "I think probably – the whole case comes down to statements made by the defendant." (2RT 272.) At another hearing, he admitted "This case, we do not have any physical evidence tying this defendant to the case." (3RT 432.)

[2] The following abbreviations are used herein: "RB" refers to respondent's brief; "AOB" refers to appellant's opening brief; "CT" refers to the clerk's transcript on appeal; and "RT" refers to the reporter's transcript on appeal.

Not so on both counts.

B. The Corpus Delicti Rule Fails to Adequately Address Appellant's Argument that His Confession Was Uncorroborated and Unreliable

Respondent's contention that the prosecution's evidence satisfied the corpus delicti rule fails to address appellant's actual challenge to his convictions and death sentence based on the demonstrable unreliability of his uncorroborated statements. Indeed, appellant was careful to distinguish the broad corroboration rule upon which he relied from the narrow corpus delicti rule upon which respondent mistakenly focuses. (AOB 48, fn. 12.)

The corpus delicti rule requires only that

> [i]n every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself — i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying exclusively upon the extrajudicial statements, confessions, or admissions of the defendant. [Citations.]

(*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168–1169.)

The corpus delicti rule does nothing to guard against false confessions to actual crimes, which is the very situation present in appellant's case and a common cause of wrongful convictions.[3]

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[3] The Innocence Project recorded that of 349 DNA exonerations, 28% or approximately 98 involved false confessions, and 37 of the 349 exonerees pled guilty to crimes they did not commit. (<http://www.innocenceproject.org/dna-exonerations-in-the-united-states/> [as of March 1, 2017]; see also Robert Kolker, *"I Did It" Why Do People Confess to Crimes They Didn't Commit?* New Yorker (Oct. 3, 2010), <http://nymag.com/news/crimelaw/68715> [as of March 1, 2017] ["In recent years, the use of DNA evidence has allowed experts to identify false

(continued...)

When someone confesses to a crime, the mere proof that a crime was committed, as required by the corpus delicti rule, falls far short of the corroboration needed to reliably determine the person's actual guilt or innocence, or his role in the offense.[4]

Indeed, in the overwhelming majority of cases, like appellant's, the police possess strong evidence that a crime was committed, i.e., the corpus delicti, but that still enables the conviction of innocent persons who have confessed to crimes that have indeed been committed, but not by them. (See, e.g., *People v. LaRosa* (Colo. 2013) 293 P.3d 567; *State v. Mauchley* (Utah 2003) 67 P.3d 477, 483; *State v. Lucas* (1959) 30 N.J. 37, 56,152 A.2d 50, 60.)[5]

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[3](...continued)
confessions in unprecedented and disturbing numbers."].)

And, as noted by Dr. Richard Leo:

Although the number of wrongful convictions continues to mount, the DNA exonerations represent only a small part of the larger problem. For in most criminal cases, there is no DNA evidence available for testing. (Richard A. Leo, *False Confessions: Causes, Consequences, and Implications* (2009) 37 J. Am. Acad. Psychiatry Law 332.)

[4] Examples of persons who have confessed to actual crimes that they did not commit are many. The most notorious include the Lindberg baby kidnaping in 1932 in which more than 200 people confessed to the kidnap and murder of the Lindberg baby; the 1947 killing of Elizabeth Short, who was nicknamed "The Black Dahlia," in which about 60 people confessed to the crime, mostly men, but a few women as well; and more recently the 1996 killing of six-year-old JonBenet Ramsey in which a person by the name of John Mark Karr falsely confessed that he had killed her.

[5] The many shortcomings of the corpus delicti rule have been recognized by a number of states who have abandoned it in favor of a trustworthiness standard. (See, e.g., *State v. Plastow* (S.D. 2015) 873
(continued...)

Thus, it is no answer to appellant's argument that his pretrial statements were too untrustworthy and unreliable to serve as the bases for his conviction and sentence of death for respondent to say that all the prosecution needed to do was to satisfy the requirements of the corpus delicti rule. That rule does nothing to address the gravamen of appellant's argument here.

C. Appellant's Pretrial-Trial Statements are Untrustworthy and Unreliable and Cannot Fairly Serve as a Basis for His Death Sentence

As noted in appellant's opening brief, the *Opper* trustworthiness standard is different from the corpus delicti rule in that it focuses on whether corroborating evidence establishes the trustworthiness or reliability of the confession, whereas the corpus delicti rule focuses on whether corroborating evidence establishes that a crime occurred. (AOB 48, fn. 12; see also *People v. LaRosa*, *supra*, 293 P.3d at p. 573.)

The *Opper* standard requires the prosecution to present "substantial independent evidence which would tend to establish the trustworthiness of the statement." (*Opper v. United States*, *supra*, 348 U.S. at p. 93.). Respondent fails to address appellant's argument that the prosecution

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[5](...continued)
N.W.2d 222, 228-230 [South Dakota]; *People v. LaRosa*, *supra*, 293 P.3d at p. 570 [Colorado]; *State v. Mauchley*, *supra*, 67 P.3d at p. 488 [Utah].) But that standard itself has been criticized as not going far enough in guarding against false confessions. As one commentator noted, the trustworthiness standard is even weaker than the already weak requirement that a confession be corroborated with regard to the corpus delicti rule. (See Boaz Sangero, *Miranda Is Not Enough: A New Justification for Demanding "Strong Corroboration" to a Confession* (2007) 28 Cardozo L. Rev. 2791, 2805.)

presented insufficient evidence to meet the substantial corroboration standard set forth in *Opper*. Rather, respondent offers the non sequitur that *Opper* does not require separate, independent proof of each element of the crime. (RB 25, citing *People v. Alvarez, supra*, 27 Cal.4th at p. 1169, fn. 3.) Appellant never argued that it did.

Respondent's recitation, moreover, of the evidence purportedly corroborating appellant's admissions is marginal as to guilt, and falls far short of the requirements of *Opper* as to penalty.

In this capital case where the sole evidence of the actual extent of appellant's involvement in the charged crimes was his inconsistent and contradictory pretrial statements much more than those statements is needed to establish the actual extent of his involvement.[6] As noted by the Louisiana Supreme Court, "Such guarantees of trustworthiness are particularly necessary in capital cases where the risk of fabrication or inaccuracy [by the defendant] must be viewed with an eye towards the

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[6] As noted in appellant's opening brief, appellant made a total of 10 statements to the police. In his first six statements, he adamantly denied any involvement in the charged crimes. In his seventh and eighth statements, he admitted entering the T-shirt store and helping Bam-Bam (a.k.a. Carlos Loomis) and Wino (a.k.a. Ruben Romero) force the victims inside the store, but denied taking any part in the actual robbing, shooting or the burning of the two victims. In his ninth statement, he said that he was the one who shot the two victims, that Bam-Bam was the one who poured gasoline on the victims and Wino was the one who "lit them on fire." In his tenth and final statement, appellant changed his story yet again and said that Wino was the one who shot the victims and that he (appellant) was the one who poured gasoline on the victims. However, he denied starting the fire. He said that the match he threw on the gasoline went out; he did not see who actually started the fire. (AOB 35-45, 52-53.)

question to be determined by the trier of fact." (*State v. Brooks* (La. 1995) 648 So.2d 366, 376-377.)

In short, even if appellant's jury were to conclude that he was guilty of the charged crimes because he aided and abetted Bam-Bam and Wino in some fashion by acting as a lookout or by forcing the victims inside the store and no more, the jury could still have spared his life if it believed, consistent with the defense theory, that Bam-Bam and Wino, and not appellant, were the ones responsible for murdering and burning the two victims, and that "[appellant's] participation in the commission of the offense was relatively minor." (11RT 2617; Pen. Code, § 190.3, factor (j);[7] CALJIC No 8.85, factor (j); see *Enmund v. Florida* (1982) 458 U.S. 782 [death sentence disproportionate for aider and abettor who did not "kill,

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[7] Penal Code section 190.3, factor (j) is consistent with the requirement found in Penal Code section 190.2 (d), which requires that

> every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aid, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4.

Penal Code section 190.2, subdivision (d) was added by Proposition 115 in order to bring California's death penalty statute into conformity with *Tison v. Arizona* (1987) 481 U.S. 137. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298, fn. 16.)

attempt to kill, or intend that a killing take place or that lethal force will be employed"]; see also *Tison v. Arizona* (1987) 481 U.S. 137.)[8]

In sum, there is no way of knowing with any degree of certainty which of appellant's 10 statements are true and which are false, which were based on personal knowledge and which were based on second-hand information from others. Because the corpus delicti rule does not answer these questions, and the *Opper* trustworthiness test is not satisfied in this case, the death verdict must be reversed as it not supported by sufficient reliable evidence as required by the Eighth and Fourteenth Amendments.

D. Appellant's Inconsistent Statements Fail to Meet the Reliability Demands of the Eighth Amendment and Cannot Be Used as a Basis for the Death Penalty in this Case

Due to the "unique nature of the death penalty," the Eighth Amendment demands "heightened reliability . . . in the determination

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[8] In *Enmund v. Florida*, *supra*, 458 U.S. 782, two people were murdered during the course of a robbery while Enmund was sitting nearby in a car, waiting to help the robbers escape. Enmund was not present during the murders, did not intend that the victims be killed, and had not anticipated that "lethal force would or might be used if necessary to effectuate the robbery or a safe escape." (*Id.* at p. 788.) Both Enmund and his codefendants who had actually committed the murders were sentenced to death. The high Court concluded that a death sentence "is an excessive penalty for the robber who, as such, does not take human life," (*id.* at p. 797), and that the death penalty was a disproportionate penalty for Enmund because he did not "kill, attempt to kill, or intend that a killing take place or that lethal force will be employed" (*ibid*).

In *Tison v. Arizona*, *supra*, 481 U.S. at p. 158, the high Court held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement."

whether the death penalty is appropriate in a particular case." *(Sumner v. Shuman* (1987) 483 U.S. 66, 72.)

That greater reliability is lacking here because, as noted previously, appellant's death sentence rests entirely on his inconsistent and contradictory pretrial statements, statements which bear many of characteristics of a false confession, which is the height of unreliability.[9]

Psychologists Saul Kassim and Lawrence Wrightsman have identified three psychologically distinct types of false confessions. (Kassin, S. & Wrightsman, L. (Eds.), The Psychology of Evidence and Trial Procedures (1985) Sage Publications, London, pp.76-80 [hereafter Kassim & Wrightsman]; see also Richard A. Leo, *supra*, 37 J. Am Acad. Psychiatry Law at pp. 332-343.)

The first type is voluntary false confessions, which are those offered without prompting or pressure typified by the Lindberg baby and the Black Dahlia cases, noted above. Voluntary false confessions can occur as a result of a pathological need for attention or self-punishment, outright delusions, the perception of tangible gain or the desire to protect someone. (Kassim & Wrightsman, *supra*, at pp. 76-77.)

The second type, compliant false confessions, occur in the context of police interrogation where the suspect falsely admits to the crime in the belief that he or she will gain respite from the isolation, fatigue and fear of

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[9] "A false confession is an admission ('I did it') plus a postadmission narrative (a detailed description of how and why the crime occurred) of a crime that the confessor did not commit." (Richard A. Leo, *False Confessions: Causes, Consequences, and Implications, supra,* 37 J. Am Acad. Psychiatry Law at p. 333.)

the interrogation. Police may threaten dire consequences or promise freedom. (Kassim & Wrightsman, *supra*, at pp. 77-78.)

The third type, internalized false confessions, occurs when innocent suspects who manifest certain personality weaknesses come to believe they actually have committed a crime as a result of highly suggestive or coercive interrogation. This happens most frequently with individuals who have some memory lapse for their behavior at the time of the offense, often due to psychosis or drug intoxication. These suspects are typically young, have been abusing alcohol or drugs and manifest diagnosable mental illness or mental retardation. Law enforcement gets the suspect to believe that they have incriminating evidence. The suspect, who does not really remember what occurred, internalizes the police version of the crime. Individuals who give this type of false confession are highly suggestible. (Kassim & Wrightsman, *supra*, at pp. 78-80.)

As shown in appellant's opening brief, features of all three types of false confessions are present in his case. (See AOB 52-58.) First, appellant was the one who approached the police to admit his complicity in the murders (voluntary false confession). Second, many of his statements were made in order to protect his brother, Anthony Leathem (a.k.a. "Eagle"), who the police repeatedly threatened to arrest if appellant did not confess, and to protect himself from being labeled a snitch in prison (voluntary false confession; compliant false confession). Third, appellant was told by the police that being the lookout on the outside of the store was no different than being the lookout on the inside of the store, "[a]nd being outside really kind of makes you look worse than being inside" (32CT 9228-9229), prompting appellant to say that he was inside the store (compliant false confession). Fourth, appellant repeatedly told his interrogators that he had

not slept in the week preceding the date of the charged crimes and was on alcohol and illicit drugs (methamphetamine, cocaine and marijuana) at the time of the murders, that he was off his prescribed medication for some type of unspecified mental illness, and that his memory of the events was faulty (internalized false confession). Fifth, appellant informed his interrogators at the time he spoke to them that he was on some type of "heavy medication" (internalized false confession). Sixth, after telling his interrogators that he was the one responsible for shooting the victims, he recanted and said that Wino was the one who did the shooting. He also said that he was no longer able to identify the people he knew as Bam-Bam and Wino or any of the people who were with him at the time of the charged crimes (voluntary false confession; compliant false confession; internalized false confession).

Appellant's statements thus exemplify the types of voluntary, compliant and internalized false confessions that have resulted in wrongful convictions and death sentences. His pretrial statements are therefore insufficiently reliable to meet the high court's clearly established Eighth Amendment principles demanding heightened reliability and accuracy in capital proceedings.

E. The Trial Evidence Does Not Sufficiently Corroborate Appellant's Statements

As a fallback position, respondent contends that substantial independent evidence corroborates appellant's inculpatory statements. Respondent points to evidence that appellant knew the caliber of the gun used; that the male victim had been gagged using duct tape; and that the female victim's car had been driven away from the crime scene. (RB 26-27.) But all this establishes is that appellant may have been present at

the scene of the crime when the crime occurred or heard details about the crime from one of the actual perpetrators or from someone else; it does not establish that he was the one who shot the male victim or set fire to the female victim.

Respondent also points to the testimony of prosecution witness Ramon Tirado, a person never mentioned in any of appellant's pretrial statements, who testified that approximately a week before the murders appellant, Eagle and two other people whom Tirado did not know visited him to talk about robbing the T-shirt shop, which was near where he lived. (RB 27.) But Tirado's testimony as to appellant's actual participation in that alleged conversation is both inconsistent and far from convincing.

Tirado testified that Eagle was the one doing all of the talking about the T-shirt store and that appellant was not part of that conversation.

Q: At that time did the defendant say anything to you in regard to the T-shirt shop?

A: Well, he didn't but his brother did.

Q: And the defendant was right there with his brother when that was said?

A: No, he wasn't.

. . . .

Q: Did anybody at that time ask you whether you would participate in the robbery?

A: Yes. His brother [Eagle] did.

Q: Okay and what did you say if anything?

A: I said no.

Q: Did the defendant at that time that he was with his brother and talking to you, did he talk to you about jacking the T-shirt business?

A: No. . . .

(8 RT 1775-1776.) However, when asked about his prior statement to law enforcement, Tirado said that appellant also talked to him about robbing the T-shirt store. (8 RT 1777.)

Again, at best, all Tirado's testimony proves is that appellant played some role in the planning of the robbery of the T-shirt store. It does not prove the extent of his involvement, which is the gravamen of the instant argument.

F. Conclusion

For the reasons set forth here and in appellant's opening brief (see AOB 60), appellant's convictions and sentence of death must be reversed.

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II.

APPELLANT WAS DENIED HIS DUE PROCESS RIGHT TO PRESENT THE TESTIMONY OF AMBER RENTERIA THAT SHE HEARD BAM-BAM ADMIT THAT HE AND WINO HAD ROBBED AND BURNED DOWN A STORE ON MAIN STREET

A. Introduction

As discussed in appellant's opening brief, in support of his defense that he was not the one who actually robbed, shot and set fire to either of the two victims, and that his earlier statements to the police in which he claimed no or limited involvement in the charged crimes were true, appellant called Amber Renteria as a witness. Appellant expected her to confirm two statements she made to Detective Leo Griego in which she said that right after the charged crimes in this case she had overheard Bam-Bam admit to another individual ("Midget") his and Wino's involvement in the robbery and burning down of the t-shirt store. She later retracted that statement.

At appellant's trial, she claimed that her retraction exposed her to criminal liability as a possible accessory after the fact (Pen. Code, § 32), presumably based on the notion that her retraction was made to help Bam-Bam and Wino avoid arrest, prosecution and conviction, and on this basis, she asserted her Fifth Amendment right not to be called as a witness. With some reluctance on its part, the trial court upheld her Fifth Amendment privilege and she was excused.

The trial court was operating on the fact that Renteria had retracted her earlier statement within the three-year statute of limitations for accessory liability when in fact, according to a police report prepared by lead Detective Griego, which is contained in the Clerk's Transcript in this

case, Renteria had actually retracted her earlier statement implicating Bam-Bam and Wino shortly after it was made in a letter she had sent to him. (See 1CT 36.) As such, the statute of limitations had long-expired by the time she was called to testify. Strikingly, neither Griego, who was sitting at the prosecutor's side as his designated lead investigator, nor the prosecutor himself brought this important fact to the court's attention; these were facts which they either knew or should have known about. (See fn. 11, *post.*)

Notwithstanding the fact that the trial court's decision excusing Renteria rests on a false premise, namely, that the timing of Renteria's retraction exposed her to possible liability as an accessory after the fact, and was not well-taken for that reason, Renteria's Fifth Amendment privilege against self-incrimination was also not well-taken, as she faced no possible criminal liability as a result of any of her statements regarding Bam-Bam and Wino. (See AOB 70-74.)

Respondent contends that Renteria had a valid right to invoke her Fifth Amendment privilege against self-incrimination. Respondent also contends that the exclusion of her testimony did not result in a deprivation of appellant's due process right to present a defense because it does not exonerate him. (RB 28.) Not so.

As identified by the attorneys below, including Renteria's attorney, based on her retraction of her earlier statements implicating Bam-Bam and Wino, Renteria faced possible prosecution for giving false information to the police, a possible violation of Penal Code section 148.5, which is a misdemeanor, or possible prosecution for a violation of Penal Code section 32, which is a felony. The statute of limitations for a violation of section 148.5 is one year (Pen. Code, § 802), and, as noted previously, three years for a violation of section 32. (Pen. Code, § 801.)

Renteria's first statement implicating Bam-Bam and Wino was made on May 26, 1999, and her second on October 5, 1999. (See 8RT 1711.) According to the representations made to the trial court based on a police report prepared by Detective Griego, Renteria retracted the statements she made to him implicating Bam-Bam and Wino on October 16, 2003.[10] Renteria was called as a witness on June 1, 2006. Based on these particular facts, the statute of limitations for a possible violation of section 148.4 (making a false report of a crime, a misdemeanor) ran on October 5, 2000, and the statute of limitations for a possible violation of section 32 had not yet expired.[11]

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[10] The trial court was told that Renteria had retracted her May and October 1999 statements implicating Bam-Bam and Wino on October 16, 2003, which was within the three-year statute of limitations for being an accessory after the fact. (Pen. Code, § 801.) But in point of fact, Renteria had actually retracted her statements implicating Bam-Bam and Wino several years earlier in a letter she had sent to Detective Griego dated on or about October 29, 1999, and received on November 1, 1999, which was several years after the statute of limitations would have run out on any possible accessory charge. (See 1CT 36; AOB 63-64, fn. 22; see Renteria's four-page letter to Detective Griego, which has been attached to appellant's reply brief as Appendix B, and Detective Griego's November 29, 1999, police report referencing Renteria's retraction letter, which has been attached to appellant's reply brief as Appendix C.)

[11] What is particularly troubling here is that the prosecution team – especially lead Detective Griego, who conducted all of the interviews of Renteria and to whom she wrote the retraction letter – knew or should have known of and disclosed to the trial court the crucial and pivotal fact that Renteria had retracted her statements implicating Bam-Bam and Wino on or about October 29, 1999, long before the statute of limitations had run on any possible violation of Penal Code section 32. (Cf. *Napue v. Illinois* (1959) 360 U.S. 264, 269 ["it is established that a conviction obtained through use of false evidence, known to be such by representatives of the

(continued...)

B. Renteria's Invocation of Her Fifth Amendment Privilege Not to Be a Witness Was Not Well-taken

In support of its contention that Renteria's invocation of her Fifth Amendment right not to testify was appropriate, respondent cites *People v. Seijas* (2005) 36 Cal.4th 291. (RB 32-36.) *Seijas* essentially holds – citing state and federal law – that if a witness asserts that any answer he or she may give might tend to incriminate him/her, the proffered evidence is inadmissible unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege. (*Id.* at p. 305, citing Evid. Code, § 404; *Hoffman v. United States* (1951) 341 U.S. 479, 486.) Under *Seijas*'s liberal interpretation, a witness cannot be forced to make incriminating statements even where an actual prosecution is highly unlikely, as was true in that case. (36 Cal.4th at p. 305.)

Of course, in this case, an actual prosecution was not only unlikely, it was barred legally because the prosecution, by its own admission, had no

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[11](...continued)
State, must fall under the Fourteenth Amendment, (citations). The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. (Citations.)"].) Had the trial court been aware of this key fact, it would have flatly denied Renteria's Fifth Amendment privilege and she would have been required to testify. Whether or not defense counsel was aware of Renteria's retraction letter – and there is some suggestion in the record that he may have been (see fn. 20, *post*) – does not alter the fact that, notwithstanding any possible failings on defense counsel's part, the prosecution team had an independent duty to make sure that the trial court was made aware of Renteria's earlier retraction. (Cf. *Com. of Northern Mariana Islands v. Bowie* (9th Cir.2001) 236 F.3d 1083, 1090 ["The prosecutor's duty to protect the criminal justice system was not discharged in this case simply by ignoring the content of the letter and by turning it over to the defense"].)

basis upon which to charge her for a possible violation of section 32.[12] And that is not all that makes a liberal application of the self-incrimination rule inappropriate in this case. As recognized by the federal courts,

> Witnesses' privileges are inherent barriers to the fact-finding mission of trial courts. They operate to exclude relevant, probative evidence and run counter to the general proposition that each person must present all of the relevant evidence within his or her grasp. For this reason the Supreme Court directed that privileges be construed narrowly.

(*United States v. Tsinnijinnie* (9th Cir. 1979) 601 F.2d 1035, 1038, citing *United States v. Nixon* (1974) 418 U.S. 683, 710 [as exceptions to the general rule of disclosure, privileges "are not lightly created nor construed, for they are in derogation of the search for truth"].) Commentators have similarly noted that,

> [A]ll privileges, in general . . . are inept and clumsy devices to promote the policies they profess to serve, but are extremely effective as stumbling blocks to obstruct the attainment of justice. Accordingly the movement should be toward

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[12] From the prosecution's standpoint, Renteria's statements implicating Bam-Bam and Wino were patently false. As noted by the prosecutor below,

> if we believe that Mrs. [*sic*] Renteria had any credibility whatsoever, we would have used Ms. Renteria's statement to file on Carlos Loomis [Bam-Bam] murder charges. We did not do that. We believe she has no credibility at all. That's important to put on the record.

(9RT 2263-2264.) As such, Renteria's later retraction(s) of those statements (whenever it or they occurred) was, from the prosecution's point of view, simply Renteria correcting a false statement she had previously made to law enforcement. The making of a false statement to the police (Pen. Code, § 148.5) has a one-year statute of limitations which, as recognized by the court and the parties below, had long since expired at the time Renteria was called as a witness at appellant's trial.

> restriction, and not toward expansion, of these mechanisms for concealment of relevant facts.

(McCormick, Evidence (2d ed. Cleary ed. 1972), § 79 at p. 165.)

These concerns are of particular importance in a capital case where the Eighth Amendment's command for heightened reliability may be undermined, as in the case, by an unduly liberal application of the witness self-incrimination privilege. In that *Seijas* was not a capital case, its application here is questionable because the offsetting interest in reliability, that attaches only to death penalty proceedings, was not present in *Seijas*.

It should also be considered that a liberal interpretation of the witness self-incrimination privilege has a more deleterious effect on the defense than the prosecution because only the prosecution has the power to overcome the privilege by granting immunity. (Pen. Code, § 1324.)[13] Again, this disparity is magnified at the penalty stage to the capital defendant's detriment, because at that point the prosecution has no greater burden of proof than the defense – that is, no burden at all. (See, e.g., *People v. Williams* (1988) 44 Cal.3d 883, 960-961 [holding that because the decision whether to sentence a defendant to death is essentially a normative one, the prosecution bears no burden of persuasion in the penalty phase].)

Given the posture and facts in this case it would be a unfair to allow the trial court's ruling to stand in that it deprived appellant of vital mitigating evidence in avoiding a death sentence.

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[13] The prosecution adamantly refused to grant Renteria immunity from prosecution because it did not believe a word she said when she implicated Bam-Bam and Wino in the charged crimes. (See 9RT 2263-2264.)

C. Renteria Was Not Liable for Prosecution as an Accessory After the Fact

Appellant has argued that Renteria's act of retracting her earlier statements failed to satisfy the elements of a possible violation of section 32; therefore, she should not have been allowed to invoke her privilege against self-incrimination. (AOB 70-74.)

Respondent disagrees, accusing appellant of dissecting the elements of that statute. (RB 35.) Appellant submits that his "dissection" of the elements of that statute proves his point that Renteria did not violate section 32.

As respondent notes, quoting CALCRIM 440, in order to prove a violation of section 32, the People are required to prove each of the following four elements:

> 1. Another person, whom I will call the perpetrator, committed a felony;
>
> 2. The defendant knew that the perpetrator had committed a felony or that the perpetrator had been charged with or convicted of a felony;
>
> 3. After the felony had been committed, the defendant either harbored, concealed, or aided the perpetrator;
> AND
>
> 4. When the defendant acted, (he/she) intended that the perpetrator avoid or escape arrest, trial, conviction, or punishment.

(CALCRIM 440 [capitalization of the word "and" in original]; RB 34.)

As appellant argued in his opening brief, none of the elements essential to establish Renteria's liability for a violation of section 32 are present here. (AOB 70-74.).

The first required element is proof that Bam-Bam and/or Wino actually committed a felony. But, other than appellant's statements (and even Renteria's earlier statements implicating Bam-Bam and Wino) there was no evidence that either Bam-Bam or Wino actually committed any of the charged crimes, and, by the prosecutor's own admission at trial, they were never arrested or charged with any of these offenses because the prosecution had no evidence upon which to prosecute either of them. (See 9RT 2263-2264.) As such, the first element is lacking.

In terms of the required scienter element, there is no evidence that Renteria had any actual knowledge as to the person or persons who committed the charged crimes.

There is also no evidence that Renteria ever harbored, concealed or aided either Bam-Bam or Wino. Indeed, her initial statements to Griego, far from aiding Bam-Bam and Wino, implicated them in the charged crimes.

Finally, with respect to the final element, there is no evidence that Renteria's 2003 repudiation of her 1999 statements was made with the specific intent that either Bam-Bam or Wino avoid or escape arrest, trial, conviction or punishment. As held by the court in *People v. Duty* (1969) 269 Cal.App.2d 97:

> [T]he offense [of accessory] is not committed . . . by refusal to give information to the authorities, or by a denial of knowledge motivated by self-interest.

(*Id.* at pp. 103-104, fns. omitted; see also *People v. Plengsangtip* (2007) 148 Cal.App.4th 825, 838 ["a statement that one knows nothing about a crime, even if false, is equivalent to a passive nondisclosure or refusal to give information, which is insufficient to support an accessory charge"].)

In sum, none of the elements essential to establish Renteria's possible liability for violation of section 32 are present here, and the trial court, which was skeptical from the start that Renteria could be charged as an accessory, erred in following the prosecution's lead and concluding otherwise.

D. Renteria's Testimony Would Not Have Been Inadmissible Hearsay

Respondent also contends that if Renteria had been required to testify that it is not clear that her testimony would have been admissible over a state-law hearsay objection. (RB 36-37.) This contention lacks merit for several reasons.

First, the prosecutor never objected to Renteria's proposed testimony on hearsay grounds and cannot do so for the first time on appeal. (See Evid. Code, § 353, subd. (a);[14] *People v. Lazarus* (2015) 238 Cal.App.4th 734, 770, fn. 39 ["Respondent contends on appeal for the first time that the declaration was inadmissible hearsay. Respondent forfeited that objection by failing to raise it in a more timely manner."].)

Second, had the prosecutor objected to Renteria's proposed testimony concerning Bam-Bam's inculpatory statements on hearsay grounds, Renteria's testimony concerning Bam-Bam's statements would

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[14] Evidence Code section 353, subdivision (a) provides:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:
>
> (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion . . .

have been admissible as a declaration against his penal interest, which is an exception to the hearsay rule. (Evid. Code, § 1230.)[15]

On this point, respondent makes much of the fact that Bam-Bam's "statement was not made to law enforcement or any other entity that would expose him to potential penalty, but rather to a fellow gang associate ('Midget') in the presence of a civilian acquaintance (Renteria), both of whom he apparently trusted not to repeat the statement." (RB 37.) But that does not disqualify Bam-Bam's statement as one against his penal interest. Bam-Bam was admitting his involvement in two serious crimes, robbery and arson, and implicating himself in a third, murder. Adding to his statements' trustworthiness was the fact that they were not made in a custodial context or in a context that shifted the blame to another. (See *People v. Arceo* (2011) 195 Cal.App.4th 556, 577.)

Furthermore, there is no requirement that a statement against penal interest has to be made to law enforcement or a similar type of entity. (See, e.g., *People v. Samuels* (2005) 36 Cal.4th 96, 120-121 [statement made to an acquaintance] *People v. Lawley* (2002) 27 Cal.4th 102, 151-154

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[15] Evidence Code section 1230 provides:

> Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

[statements made to a former prison cellmate were properly admitted as statements against penal interest]; *People v. Cervantes* (2004) 118 Cal.App.4th 162, 170 [statement made to a neighbor].)

Third, respondent's contention that the trial court may well have excluded Renteria's testimony on the ground that Bam-Bam "was simply boasting or bragging about the crime to impress 'Midget' and Renteria'" (RB 37) finds no support in the record, nor is that a proper basis for exclusion. (See, e.g., *People v. Arceo*, *supra*, 195 Cal,App.4th at pp. 576-577.)[16]

In sum, Bam-Bam's inculpatory statements would have been admissible at trial and not subject to exclusion as hearsay.

E. Reversal is Required

Respondent contends that "even assuming the trial court violated appellant's due process right to compulsory process by not overriding Renteria's invocation of her privilege against self-incrimination, any error

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[16] In *People v. Arceo*, *supra*, 195 Cal.App.4th 556, the defendant was a gang member who was charged with two murders and with conspiracy to commit those murders. The defendant objected to a witness' testimony that an accomplice made boastful statements about the murders and described how the defendant shot one of the victims when she resisted. (*Id.* at p. 576.) On appeal, the court held that to the extent the accomplice's boastful statements admitting his own involvement implicated the defendant, the statements were declarations against interest and admissible under Evidence Code section 1230. (*Ibid.*) The statements subjected the accomplice to criminal liability, and statements that genuinely and specifically inculpate the declarant provide particularized guarantees of trustworthiness. (*Id.* at p. 576.) Thus, the fact that a declarant believes the criminal acts were worthy of bragging about does not diminish the reality of that declarant's susceptibility to criminal liability. The accomplice's admission of his involvement patently disserved his penal interests. (*Id.* at p. 577.)

was harmless beyond a reasonable doubt" (RB 36) because all it did was corroborate what appellant had told the police, namely, that he had committed the crimes with Bam-Bam and Wino (RB 39). No so.

First, it is worth pointing out that Bam-Bam's statement to Midget does not mention appellant as being involved, only Wino. This corroborates appellant's statement that he just acted as a lookout and that Bam-Bam and Wino were the ones responsible for robbing, killing and burning the two victims.

But even if Renteria's testimony did not exonerate appellant, her testimony, if consistent with her earlier statement's implicating Bam-Bam and Wino in the charged crimes, would have corroborated appellant's earlier statements to the police that Bam-Bam and Wino actively participated in the robbery, and that Bam-Bam, acting on his own, was the one who set the female victim on fire, presumably to cover up evidence that he had raped her, as her pelvic and abdominal areas were severely burned. (See, e.g., 7RT 1586.) Renteria's testimony would have also provided support for defense counsel's argument that appellant's later statements to the police in which he shifted the blame away from Bam-Bam and Wino for the robbing, shooting and burning of the two victims and now claimed full responsibility for those crimes were not true, but made out of fear for his personal safety if it came out that he had informed or snitched on Bam-Bam and Wino.

Moreover, as noted in his opening brief,

> Relieving appellant of direct responsibility for the burning of the two victims would have also provided strong mitigating evidence at the penalty phase by reducing his personal culpability for what the prosecutor argued was the most gruesome, inhumane and evil offense. (10RT 2538.)

> Even the trial court noted that Renteria's statements had "some potential lessening of the responsibility of this offense borne specifically by Mr. Capers." (8RT 1845.)

(AOB 77.)[17]

Respondent has not addressed the penalty phase aspect of appellant's argument, only that Renteria's testimony would not have exonerated appellant.

F. Conclusion

For the reasons set forth in appellant's opening brief and herein, the error in excluding Renteria's testimony was error and reversal of the judgment of death is required.

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[17] Likewise, Penal Code section 190.3, factor (a), instructs the jury that it shall take into account the "circumstances of the crime of which the defendant was convicted in the present proceedings." As noted by this Court, "section 190.3, factor (a) is concerned with those circumstances that make a murder especially aggravated, and therefore make a defendant more culpable and deserving of the ultimate penalty." (*People v. Bunyard* (2009) 45 Cal.4th 836, 859.) Applying this common-sense approach to factor (a), this Court has repeatedly held that where a defendant has acted alone in deciding to kill, that fact is a circumstance of the crime that makes the defendant "more culpable" within the meaning of section 190.3. (See e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 415; see also *People v. Howard* (1992) 1 Cal.4th 1132, 1195 [reiterating aggravating nature of the fact that a defendant acted alone in killing the victim].) Here, in terms of aggravation and appellant's level of culpability for the instant crimes, it makes a big difference who actually killed the victims and who started the fire.

III.

BASED ON THE UNDISPUTED EVIDENCE BEFORE THIS COURT, AMBER RENTERIA HAD NO VALID FIFTH AMENDMENT PRIVILEGE BECAUSE THE STATUTE OF LIMITATIONS FOR VIOLATION OF PENAL CODE SECTION 32 HAD LONG SINCE EXPIRED AT THE TIME SHE WAS SUMMONED AS A WITNESS IN THIS CASE

As noted in his opening brief, the undisputed evidence in this case reveals that Amber Renteria retracted the various statements she made implicating Bam-Bam and Wino in the charged crimes on at least two separate occasions: the first was in a letter she sent to Detective Griego on or about October 29, 1999 (1CT 36; see Argument II, *ante*);[18] and the second was when she was contacted by Detective Griego on October 16, 2003 (see 31CT 8923-8924). The trial court was told only about Renteria's retraction in 2003; no specific mention was made by the parties of her 1999 retraction letter, though appellant's trial counsel did mention that Renteria had attempted to retract her earlier statements implicating Bam-Bam and Wino on two previous occasions. (See fn. 20, *post.*) Had the trial court been told about Renteria's earlier retraction, which is documented in at least two of Detective Griego's police reports (1CT 36; Appendix B [Griego's

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[18] Appellant has attached to his reply brief as Appendix A a copy of Amber Renteria's four-page retraction letter to Detective Griego. This letter was produced by Detective Griego pursuant to a court order stemming from the record correction/record preservation proceedings in the trial court. (See fn. 23, *post.*)

November 29, 1999, police report),[19] it would have denied her invocation of her Fifth Amendment right against self-incrimination.[20]

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[19] Appellant has attached to his reply brief as Appendix B a copy of Detective Griego's November 29, 1999, police report. That report contains the following notation:

> On Friday, 10-29-99, at approximately 1003 hours I received a telephone call at my office from Amber Renteria. I recognized her voice on the telephone. ¶ Renteria told me that she had written out a "statement". Renteria asked if I could come and see her (in Victorville) to get the statement from her. ¶ I told Renteria that she could mail it to me if she wanted to and she told me that she would. ¶ Later, on 11-01-99, I received a letter from Amber Renteria. The letter I received from Renteria consists of four handwritten pages.

(Appendix B.)

[20] Respondent notes that "Capers made no mention of the October 1999 retraction letter, and never once argued below that the statute of limitations started in 1999 rather than 2003." (RB 40.)

Appellant's trial counsel did not specifically mention Renteria's 1999, retraction letter by name or argue that the statute of limitations started running at that time, but he did mention that Renteria attempted to retract her statements inculpating Bam-Bam and Wino "on two previous occasions." (8RT 1718, see also 1717 ["That she has previously attempted to evade repeating that statement on two occasions"], 1718 ["I would like to make a record about her statements, at least two prior occasions of evasiveness, which [her taking the Fifth] is a third pattern. And if the evasiveness is that she made a false police report to the police from the prior two statements, then the Court should make a finding to allow me to introduce her prior statements. This is all a pattern."].) (8RT 1718.) Appellant's trial counsel again mentioned that Renteria had tried to retract her earlier statements on two prior occasions. (8RT 1720.) Inexcusably, appellant's trial counsel failed to tell the court that Renteria's first retraction was made in 1999 and to argue that the statute of limitations started running at that time. Why he failed to do so is a mystery given the fact that he fought tooth and nail at trial trying repeatedly to get Renteria's testimony

(continued...)

Respondent contends that the

> only "undisputed facts" supporting Capers's claim is one sentence – among thousands of pages of discovery – contained in one of Detective Griego's reports that states: "Renteria later (on 10-29-99) sent me a letter at the Barstow Police Department 'retracting' her statements." (1 CT 36.) Had Capers raised this issue below, the prosecution would have been presented with an opportunity to flesh out the precise nature of Renteria's letter and what impact, if any, it would have had on Renteria's ability to invoke her privilege against self-incrimination.

(RB 40.)[21]

That one sentence says it all; there was nothing to "flesh out." A retraction is a retraction,[22] and that is the interpretation Detective Griego, the lead police investigator in this case, gave to the letter he had received from Renteria. (1CT 36.)

The historical fact remains that Renteria's retraction of her earlier statements implicating Loomis and Romero was made in the letter she wrote to Detective Griego on or about October 29 1999,[23] which means that

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[20](...continued)
before appellant's jury, first at the guilt trial and later at the penalty trial. (See 7RT 1697, 1699, 1702-1721, 1798-1838; 9RT 2247-2280.)

[21] Detective Griego also documented Renteria's retraction in at least one other of his reports. (Appendix B.)

[22] A retraction is defined as the "withdrawal of a statement, accusation, or undertaking." (<https://en.oxforddictionaries.com/definition/retraction> [as of March 15, 2017].)

[23] Pursuant to a court order signed by the trial judge in this case (see Appendix C [court order, filed February 14, 2014], which was a product of the record preservation proceedings in the trial court (see CT Supplemental

(continued...)

the three-year statute of limitations for any possible violation of Penal Code section 32 based on that retraction commenced on that date *(People v. Kronemyer* (1987) 189 Cal.App.3d 314, 330-331 [statute of limitations commences when "law enforcement personnel learn of facts which, when investigated with reasonable diligence, would make that person aware a crime had occurred"]), and expired in 2002, long before she was called as a witness at appellant's trial in 2006. It is that fact that is controlling here. The fact that she repeated her earlier retraction in October 2003 did not result in the three-year statute of limitations commencing anew. (See AOB 81.) Again, a retraction is a retraction.

Here, Renteria's court-appointed counsel, prompted by the prosecutor, raised the specter that Renteria faced possible prosecution for a violation of section 32. Yet, as appellant has previously argued, the prosecution team knew or should have known that any such prosecution was barred by the statute of limitations. The same can be said of Renteria's court-appointed counsel who, had he discussed the matter with Renteria, would have learned about the earlier retraction letter and its significance vis-a-vis the running of the statute of limitations in this case.

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[23](...continued)
Two, dated August 7, 2013, at pp. 98-103, 104, 171), Detective Griego provided to appellant's counsel a copy of Amber Renteria's October 29, 1999, four-page letter (Appendix A). Renteria's letter bears the date of October 29, 1999. Written on the envelope and pages one and three of the letter is the handwritten notation "Received at Barstow P.D. 11-01-99 L.G." Written on pages two and four is the notation "Received at the Barstow P.D. 11-01-99 L.G." "L.G." are the initials of Detective Leo Griego. (See, e.g., 1CT 1 [the L and G of Detective Griego's signature are identical to the L and G of his initials].)

As the statute of limitations for violation of Penal Code section 32 had long since expired by the time Renteria was called as a witness on June 1, 2006, she could not be prosecuted for any possible violation of section 32 for having retracted her various statements implicating Loomis and Romero in the charged crimes and therefore she had no Fifth Amendment privilege. (Evid. Code, § 404.) As such, error was committed.

As argued previously, (see Argument II, *ante*), the trial court's erroneous excusal of Renteria denied appellant his right to a fair trial and a reliable penalty verdict in violation of his state and federal constitutional rights and reversal of the entire judgment is required.

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IV.

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 argued that the California death penalty scheme, as interpreted by this Court and applied at appellant's trial, violate the federal Constitution. (AOB at 83-102.) Respondent contends that the Court's prior decisions are correct and should not be reconsidered and appellant's claims should all be rejected consistent with this Court's previous rulings. (RB 41.) After appellant filed his opening brief, and respondent filed its brief, the United States Supreme Court held that Florida's death penalty statute was unconstitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*) 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] [*Hurst*].)[24] *Hurst* supports appellant's argument in Argument IV.C.1 and IV.C.3 of his opening brief that this Court 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

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[24] Appellant's argument here does not alter his claim in the opening brief, but provides additional authority for his argument in IV.C.1 and IV.C.3 of that brief. (AOB 86-88, 89-90.) To the extent this Court disagrees, appellant asks this Court to deem this argument a supplemental brief.

therefore 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). (See AOB at 86-88, 89-90.)

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*, *supra*, 536 U.S. at p. 589; *Apprendi*, *supra*, 530 U.S. at pp. 483-484.) 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 p. 494 and pp. 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 high 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. (*Id.* at p. 620.) The judge was responsible for finding that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh aggravating circumstances," which were prerequisites for imposing a death sentence. (*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.*)[25]

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.

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[25] 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,] at 546 [(Fla. 2005)].

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

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 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 Supreme 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.[26] 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

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[26] See 136 S.Ct. at p. 621 ["In *Ring*, we concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts *necessary to sentence a defendant to death*," [italics added]; *id.* at p. 622 ["Like Arizona at the time of *Ring*, Florida does not require the jury to make *the critical findings necessary to impose the death penalty*," [italics added]; *id.* at p. 624 ["Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is *necessary for imposition of the death penalty*." [italics added].)

imposition of the level of punishment the defendant receives. (See *Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.); *Apprendi*, *supra*, 530 U.S. at p. 494.) The high 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 Fl. Stat. § 921.141(3)).[27]

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

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[27] 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 high 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.

clear: "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (*Apprendi*, *supra*, 530 U.S. 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.[28]

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[28] 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, 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, rev'd 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:

> [D]efendant 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. 544, 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.)[29]

Under *Brown*, the weighing requirement provides for jury discretion in both the assignment of the weight to be given to the sentencing factors and the ultimate choice of punishment. Despite the "shall impose death" language, Penal Code section 190.3, as construed in *Brown*, provides for jury discretion in deciding whether to impose death or life without possibility of parole, i.e. in deciding which punishment is appropriate. The weighing decision may assist the jury in reaching its ultimate determination of whether death is appropriate, but it is a separate, statutorily-mandated finding that precedes the final sentence selection. Thus, once the jury finds that the aggravation outweighs the mitigation, it still retains the discretion to

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[29] 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 aggravation outweighs mitigation. (*Brown*, *supra*, 40 Cal.3d at p. 540.) This is the "normative" part of the jury's decision. (*Ibid.*)

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. § 921.141, subd. (2)(b), (c) (1976-1977 Supp.) .) 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 outweighed 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.[30] The requirement that the jury must find that the

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[30] 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:

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each

(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), volume 1, Preface, at 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 circumstances outweigh mitigating circumstances is a factfinding for purposes of *Apprendi* and *Ring*.

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[30](...continued)
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.

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 1, 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].)[31] 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* (2016) 202 So.3d 40 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 p. 53; Fla. Stat. (2012) § 921.141(1)-(3).)

Each of these considerations, including the weighing process itself, were described as "elements" that the sentencer must determine, akin to elements of a crime during the guilt phase. (*Hurst v. State*, *supra*, 202 So.3d at pp. 53-54.) The court emphasized:

> *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

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[31] 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.

> 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 p. 57.) There was nothing that separated the capital weighing process from any other finding of fact.

The recent decision of the Delaware Supreme Court in *Rauf v. State* (Del. 2016) 145 A.3d 430 [hereafter "*Rauf*"] 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 pp. 432-434 (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 p. 456.) 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*.[32] One reason the court invalidated

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[32] 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 pp. 433-434 (*per curiam* opn.) [addressing Questions 1-2] and at pp. 482-485 (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 p. 434 (*per curiam* opn.) [addressing Question 3]

(continued...)

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 pp. 433-434; see *id.* at pp. 485-487 (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 this conclusion. Other state supreme courts have recognized that the determination that the aggravating circumstances outweigh the mitigating circumstance, like the finding that an aggravating circumstance exists, comes within the *Apprendi/Ring* rule. (See e.g., *State v. Whitfield*, *supra*, 107 S.W.3d at pp. 257-258; *Woldt v. People*, *supra*, 64 P.3d at pp. 265-266; see also *Woodward v Alabama*, *supra*, 134 S.Ct. at pp. 410-411 (Sotomayor, J., dissenting from denial of cert.) ["The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is . . . [a] factual finding" under Alabama's capital sentencing scheme]; contra, *United States v. Gabrion* (6th Cir. 2013) 719

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[32](...continued)
and at pp. 485-487 (conc. opn. of Holland, J.)).

F.3d 511, 533 (en banc) [finding that – under *Apprendi* and *Ring* – the finding 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. As appellant's jury was not required to make this finding, his death sentence must be reversed.

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V.

REVERSAL OF THE JUDGMENT OF CONVICTION AND THE SENTENCE OF DEATH IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT COLLECTIVELY UNDERMINED THE FUNDAMENTAL FAIRNESS OF APPELLANT'S TRIAL AND THE RELIABILITY OF THE RESULTING DEATH JUDGMENT

This issue has been adequately presented and the positions of the parties are fully joined.

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CONCLUSION

For the reasons set forth above, the entire judgment must be reversed.

DATED: March 17, 2017

Respectfully submitted,

MARY K. McCOMB
State Public Defender

PETER R. SILTEN
Supervising Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL
(CALIFORNIA RULES OF COURT, RULE 8.360 (b)(1))

I, Peter Silten, am the attorney assigned to represent appellant 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 approximately 13,686 words in length.

DATED: March 17, 2017

PETER R. SILTEN

APPENDIX A

AMBER RENTERIA
13333 PALM DALE RD
BARSTOW, CA. 92392

TO: DETECTIVE GRIEGO
200 E MOUNTAIN VIEW
BARSTOW, CA. 92311

Received at Barstow P.D.
11-01-99.
LD

92311+2829

Dear Mr. Griego, 10/29/99

This letter is regurding the visit here at ST JOHN OF GOD I am not sure of the exact date but I believe it was Oct. 5. 99.

The statement I made was not true; there was no truth in what I said. I was pretty much scared because I had already told you one thing and didnt know how to tell you the truth I put my self under alot of pressure knowing I lied in the beginning and thinking about this whole ordeal day in day out I just couldnt go on living about this situation.

I am sorry for wasteing your time and effort I just would like you to finish your

Received at Barstow P.O.: 11-01-99 LD.

case and find the truth of the matter.

I really appreciate you taking the time to read and maybe consider my statement.

Thanks again.

Sincerly,

Amber Winters

Received at the Barstow P.D.
11-01-99 . . . LL

Dear Mr. Grego, 10/29/99

I will this letter to confirm that while I was being questioned on the day of MAY, 26, 99 I was not being truthful to your questions, I told you what Cordero and yourself wanted to hear.

I dont know anything about this murder I have been questioned about.

This whole ordeal has been very upsetting to me because of the fact every thing I have stated was not true.

I wouldnt be able to live with my self knowing I have put two lives in a great deal of danger.

Whether you believe me are not that not my concern, my concern is telling the truth in this

Received at Barstow Police: 11-01-99 2D.

case so you can find the truth in your investigation I am not the one to speak to in this matter I would really appreciate it if you would allow me my innocents.

Thank you very much for your time.

Sincerly,
Amber Renteria

Received at the Barstow P.D.
11-01-99 . . . JD

APPENDIX B

I terminated the telephone contact with her at approximately 1647 hours.

INTERVIEW: CONNIE STANDLEY, DEPUTY DISTRICT ATTORNEY:
On Thursday, 10-28-99, at approximately 1649 hours I received a telephone call in my office from Deputy District Attorney Connie Standley.

Standley wanted to know about the investigation involving Carlos Loomis and I told her about it.

I terminated the telephone contact with her at approximately 1653 hours.

INTERVIEW: AMBER RENTERIA:
On Friday, 10-29-99, at approximately 1003 hours I received a telephone call at my office from Amber Renteria. I recognized her voice on the telephone.

Renteria told me that she wanted to tell me that she had written out a "statement". Renteria asked if I could come and see her (in Victorville) to get the statement from her.

I told Renteria that she could mail it to me if she wanted to and she told me that she would.

Later, on 11-01-99, I received a letter from Amber Renteria. The letter I received from Renteria consists of four handwritten pages.

INTERVIEW: WILLIAM MATTY, FORENSIC CRIMINALIST WITH THE SBSO:
On Tuesday, 11-02-99, at approximately 1538 hours I received a "voice mail" message from William Matty, a "Criminalist" with the San Bernardino County Sheriff's Department Scientific Investigations Division. The voice mail message from Matty, reported that Matty had examined the 9 mm cartridge casing, which I had submitted in the Young case. Matty's message continues and says that the 9 mm casing "matches" the "Taurus" 9 mm handgun, which I also submitted and which had been used in a robbery and assault with a deadly weapon incident in which the "S" was Ruben Romero.

DISPOSITION OF REPORT

[ ]Closed by... ( ) arrest ( ) investigation ( ) unfounded ( ) victim declines further action
[ ] Suspended [ ] Follow-up pending [ ] Investigation referred to:

Prepared by:
Detective Leo R.J. Griego, D#8 DATE: 11-29-99 TYPED BY: JFW Sergeant Richard Harpole, S#37

CC: [ ] DA [ ] Probation [ ] Parole [ ] Juvenile [ ] DOJ [ ] Other:

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN BERNARDINO

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. LEE SAMUEL CAPERS, Defendant and Appellant.	San Bernardino County Superior Court No. FBA 06284 (Cal. Supreme Ct. No. S146939) **[PROPOSED] ORDER GRANTING APPELLANT'S REQUEST TO PRESERVE CERTAIN EVIDENCE CONCERNING AMBER RENTERIA-KELSEY**

GOOD CAUSE BEING SHOWN, it is hereby ordered:

That the San Bernardino County District Attorney and the San Bernardino County Police Department preserve any and all letters or other documents written by Amber Renteria (aka Amber Renteria-Kelsey) that are relevant to the investigation and prosecution of appellant or any other suspects for the crimes alleged in this case. The People are also ordered to provide to appellate counsel copies of any and all such letters or other documents, including but not limited to Renteria's letter dated October 29, 1999, that may be relevant in any way to the investigation and prosecution of appellant and others for the crimes alleged in this case.

SO ORDERED.

Dated: ~~January~~ February 4th, 2014

HONORABLE JOHN TOMBERLIN
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO APPELLATE DIVISION 401 N ARROWHEAD AVE SAN BERNARDINO, CA 92415	COURT USE ONLY FILED SUPERIOR COURT COUNTY OF SAN BERNARDINO Appeals Division FEB 11 2014 BY _____ CYNTHIA GOMEZ, DEPUTY
PLAINTIFF(S): PEOPLE OF THE STATE OF CALIFORNIA	
DEFENDANT(S): LEE SAMUEL CAPERS	JUDGE: John M Tomberlin DEPT: V-2
CLERK'S CERTIFICATION OF SERVICE BY MAIL (CCP § 1013A(4))	CASE NUMBER: FBA 06284 S146939

I, Cyndi Gomez, certify that: I am not a party to the above-entitled case; that on the date shown below, I served the following document(s): ORDER GRANTING APPELLANT'S REQUEST TO PRESERVE CERTAIN EVIDENCE CONCERNING AMBER RENTERIA-KELSEY, on the parties shown below by placing a true and correct copy in a separate envelope, addressed as shown below; each envelope was then sealed and, with postage thereon fully prepaid, deposited in the United States Postal Service at San Bernardino, California.

NAME	ADDRESS
STATE PUBLIC DEFENDER PETER SILTEN 1111 BROADWAY, 10TH FLOOR OAKLAND, CA 94607 DISTRICT ATTORNEY STEVE SINFIELD 14455 CIVIC DRIVE VICTORVILLE, CA 92392	ATTORNEY GENERAL DEPARTMENT OF JUSTICE 110 WEST 'A' STREET SAN DIEGO, CA 92392 SUPREME COURT MARY JAMESON 350 McALLISTER STREET, 1ST FLOOR SAN FRANCISCO, CA 94102 DETECTIVE LEO GRIEGO BARSTOW POLICE DEPARTMENT 220 EAST MOUNTAIN VIEW BARSTOW, CA 92311

CHRISTINA M. VOLKERS
Court Executive Officer

Dated: FEBRUARY 11, 2014

By: _____, Deputy
CYNDI GOMEZ

CLERK'S CERTIFICATE OF SERVICE BY MAIL

DECLARATION OF SERVICE BY MAIL

People v. Lee Samuel Capers

Supreme Court No. S146939
Superior Court No. FBA-02684

I, the undersigned, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 1111 Broadway, 10th Floor, Oakland, California, 94607. I served a copy of the following document(s):

APPELLANT'S 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 **March 17, 2017,** as follows:

Robin Derman
Office of the Attorney General
110 West A. St., Suite 1100
San Diego, CA 92101

Lee Samuel Capers, #K-01264
CSP-SQ
1 INF 17
San Quentin, CA 94974

California Appellate Project
101 Second Street Suite 600
San Francisco, CA 94105

Cyndi Gomez
Appeals Division-Criminal
San Bernardino County Sup. Court
247 West Third Street
San Bernardino, CA 92415-0063

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on March 17, 2017, at Oakland, California.

Neva Wandersee