

# SUPREME COURT COPY

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November 22, 2016

**SENT VIA OVERNIGHT COURIER MAIL**

Jorge E. Navarette  
Supreme Court Clerk/Administrator  
Supreme Court of the State of California  
350 McAllister Street, Room 1295  
San Francisco, California 94102-4797

**SUPREME COURT  
FILED**

**NOV 23 2016**

**Jorge Navarrete Clerk**

**Deputy**

Re: ***People v. Sivongxay***  
California Supreme Court, Case No. S078895  
Oral Argument Hearing – 12/6/16 at 1:30 p.m.

Dear Mr. Navarette:

Pursuant to rules 8.520(d) and 8.630(d) of the California Rules of Court, respondent respectfully brings to this Court's attention the following authorities that were not available in time to be included in respondent's brief on the merits and to which counsel might refer at oral argument.

**A. The following cases are relevant to the issue that this Court raised in its supplemental briefing order filed on January 14, 2015, regarding whether automatic reversal of a special-circumstance finding is compelled if the trial court fails to obtain the defendant's separate waiver of his right to a jury determination of the special circumstance allegation:**

*People v. Blackburn* (2015) 61 Cal.4th 1113.

In *Blackburn*, the trial court did not advise the mentally disordered offender (MDO) defendant of his statutory right to a jury trial, did not obtain the MDO defendant's personal waiver of that right, and did not find substantial evidence that the defendant lacked the capacity to make a knowing and intelligent waiver of the jury trial right. This Court held that the trial

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court's procedure violated the defendant's rights under Penal Code section 2972, subdivision (a). (*Id.* at pp. 1130-1131.) This Court further held that the erroneous denial of a jury trial in this context was a "miscarriage of justice" within the meaning of the California Constitution, article VI, section 13, requiring reversal without inquiry into the strength of the evidence. (*Id.* at pp. 1132-1133.) This Court distinguished, inter alia, *People v. Epps* (2001) 25 Cal.4th 19, in which the failure to provide a defendant a jury trial on prior conviction allegations was found harmless when the evidence of the prior convictions was uncontradicted. (*Blackburn*, at pp. 1135-1136.)

*Hurst v. State* (Oct. 14, 2016, No. SC12-1947) \_\_ So.3d \_\_ [2016 Fla.LEXIS 2305] (*Hurst II*).<sup>1</sup>

In *Hurst v. Florida* (2016) \_\_ U.S. \_\_ [136 S.Ct. 616, 619] (*Hurst I*) the United States Supreme Court found Florida's capital sentencing scheme unconstitutional to the extent it failed to require the jury rather than the judge to find the facts necessary to impose the death penalty—the jury's advisory recommendation for death was not sufficient. On remand, the Florida Supreme Court rejected the defendant's assertion that the error was structural, and examined whether the error was harmless beyond a reasonable doubt. (*Hurst II*, at \*63-68.) On the facts of the case before it, the *Hurst* court found the error to be not harmless. (*Id.* at \*71.)

**B. The following cases are relevant to appellant's assertion that his jury trial waiver was inadequate because the record did not affirmatively show he was aware that a jury would have to be impartial and that its verdict would have to be unanimous. (AOB 39-42, 44):**

*People v. Doyle* (Nov. 10, 2016, E064557) \_\_ Cal.App.5th \_\_ [2016 Cal.App.LEXIS 971].

In *Doyle*, defense counsel indicated the defendant wished to waive his right to a jury trial. (*Id.* at \*7.) The trial court stated that the burden of proof would remain the same whether the trial was a jury trial or court trial, and stated that the defendant's other constitutional rights would remain the same. (*Id.* at \*8.) On appeal, Division Two of the Fourth Appellate District

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<sup>1</sup> The opinion contains a notice that it is not final until time expires to file a rehearing motion, and, if filed, determined.

held that the jury trial waiver was adequate. In particular, the court held that the failure to advise the defendant that the jury would be comprised of 12 jurors who must unanimously find guilt did not render the waiver inadequate. (*Id.* at \*11-\*13.)

*People v. Cunningham* (2015) 61 Cal.4th 609.

In *Cunningham*, this Court held that the defendant made a knowing, voluntary, and intelligent waiver of his right to a guilt phase jury trial where the defendant indicated he understood (1) he had an absolute right to a jury trial in the guilt and penalty phases of the trial; (2) the jury could not return a guilty verdict if any one of 12 jurors was not convinced he was guilty; (3) if he waived a jury trial, instead of 12 people deciding his guilt or innocence the judge alone would make that decision; and (4) it could be easier for the prosecution to convince one person, as opposed to 12, that the defendant was guilty. This Court rejected claims that the defendant's limited in-transit shackling improperly coerced his jury trial waiver. (*Id.* at pp. 635-637.)

**C. The following case is relevant to the issue of whether appellant's escape from a prison camp before the present offenses was properly admitted as a circumstance of the capital crime (see AOB 75-86):**

*People v. Cordova* (2015) 62 Cal.4th 104.

In *Cordova*, a capital case involving the sexual abuse and murder of an eight-year-old girl, the trial court properly admitted evidence of sex crimes committed after the capital offense not involving force or violence or threats to use force or violence. (*Id.* at pp. 109, 140-141.) The evidence was relevant to show the defendant's propensity to commit sex offenses against young children, which helped the jury understand the circumstances of the capital offense, and was also relevant to rebut mitigation evidence as to the defendant's good character, including evidence that he was a "nice, kind" person towards his nieces. (*Id.* at p. 141.)

Jorge E. Navarette, Supreme Court Clerk/Administrator  
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Your assistance in bringing this letter to the attention of the Court is greatly appreciated.

Sincerely,

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

LEWIS A. MARTINEZ  
Deputy Attorney General

For KAMALA D. HARRIS  
Attorney General

LAM/dpy

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**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: ***People v. Sivongxxay***  
Case No.: **S078895**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

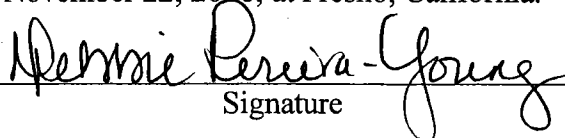
On November 22, 2016, I served the attached **Attorney General Letter to California Supreme Court Clerk re Oral Argument Hearing** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 2550 Mariposa Mall, Room 5090, Fresno, California 93721, addressed as follows:

Douglas G. Ward  
Attorney at Law  
350 Bay Street, PMB #199  
San Francisco, CA 94133  
**Representing appellant, SIVONGXXAY**

Peter R. Silten  
Supervising Deputy State Public Defender  
Office of the Public Defender  
1111 Broadway, 10th Floor  
Oakland, CA 94607  
**Representing Appellant, SIVONGXXAY**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 22, 2016, at Fresno, California.

Debbie Pereira-Young  
\_\_\_\_\_  
Declarant

  
\_\_\_\_\_  
Signature