SUPREME COURT COPY

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| THE PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff and Respondent,<br><br>v.<br><br>CHRISTOPHER HENRIQUEZ,<br>Defendant and Appellant. | CAPITAL CASE<br><br>No. S089311<br><br>Contra Costa County<br>Superior Court<br>No. 961902-4 |

# APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Contra Costa

Honorable Peter Spinetta, Judge



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DEATH PENALTY

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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# APPELLANT'S SUPPLEMENTAL OPENING BRIEF

## INTRODUCTION

In this supplemental brief, appellant provides new support for appellant's claims in Argument XIII As argued below, appellant asserts that California's capital-sentence scheme violates *Hurst v. Florida* (2016) ___ U.S. ___, 136 S.Ct. 616. This argument is numbered to correspond to the argument number in appellant's opening brief.

In addition, this supplemental brief presents a new argument that the $6,000 restitution fine imposed by the trial court was unlawful in violation of *Apprendi v. New Jersey* (2000) 530 U.S. 466 and its progeny. Because this third argument is new, it is numbered XV, which is sequential to the last numbered argument in appellant's opening brief.

## ARGUMENT

## XIII.

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

In his opening brief, appellant challenged the California death penalty scheme on grounds that this Court has rejected in previous decisions holding that the California law does not violate the federal Constitution. (AOB Argument XIII, pages 160-172.) After appellant filed his reply brief on May 19, 2011, the United States Supreme Court held Florida's death penalty statute unconstitutional under *Apprendi v. New Jersey*, *supra*, 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584, because the sentencing judge, not the jury, made a factual finding, the existence of an aggravating circumstance, that is required before the death penalty can be imposed. (*Hurst v. Florida*, *supra*, 136 S.Ct. at p. 624 [hereafter "*Hurst*"].) *Hurst* provides new support to appellant's claims in Argument XIII.D of his opening brief. (AOB 160-170.) In light of *Hurst*, this Court should reconsider its rulings that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14); does not require factual findings within the meaning of *Ring* (*People v. Merriman* (2014) 60 Cal.4th 1, 106); and does not require the jury to find unanimously and beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances

before the jury can impose a sentence of death (*People v. Prieto* (2003) 30 Cal.4th 226, 275).

### A. Under *Hurst*, Each Fact Necessary To Impose A Death Sentence, Including The Determination That The Aggravating Circumstances Outweigh The Mitigating Circumstances, Must Be Found By A Jury Beyond A Reasonable Doubt.

In *Apprendi*, a noncapital sentencing case, and *Ring*, a capital sentencing case, the United States Supreme Court established a bright-line rule: if a factual finding is required to subject the defendant to a greater punishment than that authorized by the jury's verdict, it must be found by the jury beyond a reasonable doubt. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 589 [hereafter "*Ring*"]; *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 483 [hereafter "*Apprendi*"].) As the Court explained in *Ring*:

> The dispositive question, we said, "is one not of form, but of effect." [Citation]. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found, by a jury beyond a reasonable doubt. [Citation].

(*Ring*, *supra*, 536 U.S. at p. 602, quoting *Apprendi*, *supra*, 530 U.S. at pp. 494, 482-483.) Applying this mandate, the high court invalidated Florida's death penalty statute in *Hurst*. (*Hurst*, *supra*, 136 S.Ct. at pp. 621-624.) The Court restated the core Sixth Amendment principle as it applies to capital sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence of death.*" (*Hurst*, *supra*, 136 S.Ct. at p. 619, italics added.) Further, as explained below, in

applying this Sixth Amendment principle, *Hurst* made clear that the weighing determination required under the Florida statute was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst*, *supra*, 136 S.Ct. at p. 622.)

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

The questions decided in *Ring* and *Hurst* were narrow. As the Supreme Court explained, "Ring's claim is tightly delineated: He contends

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[1] The Court in *Hurst* explained:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla.Stat. § 775.082(1) (emphasis added). The trial court alone must find "the facts … [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); see [*State v.*] *Steele*, 921 So.2d [538,] 546 [(Fla. 2005)].

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

only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." (*Ring*, *supra*, 536 U.S. at p. 597, fn. 4.) *Hurst* raised the same claim. (See Petitioner's Brief on the Merits, *Hurst v. Florida*, 2015 WL 3523406 at *18 ["Florida's capital sentencing scheme violates this [Sixth Amendment] principle because it entrusts to the trial court instead of the jury the task of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty'"].) In each case, the Court decided only the constitutionality of a judge, rather than a jury, finding the existence of an aggravating circumstance. (See *Ring*, *supra*, 536 U.S. at p. 588; *Hurst*, *supra*, 136 S.Ct. at p. 624.)

Nevertheless, the seven-justice majority opinion in *Hurst* shows that its holding, like that in *Ring*, is a specific application of a broader Sixth Amendment principle: any fact that is required for a death sentence, but not for the lesser punishment of life imprisonment, must be found by the jury. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) At the outset of the opinion, the Court refers not simply to the finding of an aggravating circumstance, but, as noted above, to findings of "each fact *necessary to impose a sentence of death.*" (*Hurst*, *supra*, 136 S.Ct. at p. 619, italics added.) The Court reiterated this fundamental principle throughout the opinion.[2] The Court's

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

language is clear and unqualified. It also is consistent with the established understanding that *Apprendi* and *Ring* apply to each fact essential to imposition of the level of punishment the defendant receives. (See *Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.); *Apprendi*, *supra*, 530 U.S. at p. 494.) The high court is assumed to understand the implications of the words it chooses and to mean what it says. (See *Sands v. Morongo Unified School District* (1991) 53 Cal.3d 863, 881-882, fn. 10.)

### B. California's Death Penalty Statute Violates *Hurst* By Not Requiring That The Jury's Weighing Determination Be Found Beyond A Reasonable Doubt.

California's death penalty statute violates *Apprendi*, *Ring* and *Hurst*, although the specific defect is different than those in Arizona's and Florida's laws: in California, although the jury's sentencing verdict must be unanimous (Pen. Code, § 190.4, subd. (b)), California applies no standard of proof to the weighing determination, let alone the constitutional requirement that the finding be made beyond a reasonable doubt. (See *People v. Merriman*, *supra*, 60 Cal.4th at p. 106.) Unlike Arizona and Florida, California requires that the jury, not the judge, make the findings necessary to sentence the defendant to death. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16 [distinguishing California's law from that invalidated in *Hurst* on the grounds that, unlike Florida, the jury's "verdict is not merely advisory"].) California's law, however, is similar to the statutes invalidated in Arizona and Florida in ways that are crucial for applying the *Apprendi/Ring/Hurst* principle. In all three states, a death sentence may be imposed only if, after the defendant is convicted of first degree murder, the sentencer makes two additional findings. In each jurisdiction, the sentencer must find the existence of at least one statutorily-delineated circumstance – in California, a special circumstance (Pen. Code, § 190.2) and in Arizona and

Florida, an aggravating circumstance (Ariz. Rev. Stat. § 13-703(G); Fla. Stat. § 921.141(3)). This finding alone, however, does not permit the sentencer to impose a death sentence. The sentencer must make another factual finding: in California, that "'the aggravating circumstances outweigh the mitigating circumstances'" (Pen. Code, § 190.3); in Arizona, that "'there are no mitigating circumstances sufficiently substantial to call for leniency'" (*Ring*, *supra*, 536 U.S. at p. 593, quoting Ariz. Rev. Stat. § 13-703(F)); and in Florida, as stated above, "that there are insufficient mitigating circumstances to outweigh aggravating circumstances" (*Hurst*, *supra*, 136 S.Ct. at p. 622, quoting Fla. Stat. § 921.141(3)).[3]

Although *Hurst* did not decide the standard of proof issue, the Court made clear that the weighing determination was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst*, *supra*, 136 S.Ct. at p. 622 [in Florida the judge, not the jury, makes the "critical findings necessary to impose the death penalty," including the weighing determination among the facts the sentencer must find "to make a defendant eligible for death"].) The pertinent question is not what the weighing determination is called, but what is its consequence. *Apprendi* made this clear: "the relevant inquiry is one not of form, but of effect – does the

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

required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (*Apprendi*, *supra*, 530 U.S. at p. 494.) So did Justice Scalia in *Ring*:

> [T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.

(*Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) The constitutional question cannot be answered, as this Court has done, by collapsing the weighing finding and the sentence-selection decision into one determination and labeling it "normative" rather than factfinding. (See, e.g., *People v. Karis* (1988) 46 Cal.3d 612, 639-640; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1366.) At bottom, the *Ring* inquiry is one of function.

In California, when a jury convicts a defendant of first degree murder, the maximum punishment is imprisonment for a term of 25 years to life. (Pen. Code, § 190, subd. (a) [cross-referencing §§ 190.1, 190.2, 190.3, 190.4 and 190.5].) When the jury returns a verdict of first degree murder with a true finding of a special circumstance listed in Penal Code section 190.2, the penalty range increases to either life imprisonment without the possibility of parole or death. (Pen. Code, § 190.2, subd. (a).) Without any further jury findings, the maximum punishment the defendant can receive is life imprisonment without the possibility of parole. (See, e.g., *People v. Banks* (2015) 61 Cal.4th 788, 794 [where jury found defendant guilty of first degree murder and found special circumstance true and prosecutor did not seek the death penalty, defendant received "the mandatory lesser sentence for special circumstance murder, life imprisonment without parole"]; *Sand v. Superior*

*Court* (1983) 34 Cal.3d 567, 572 [where defendant is charged with special-circumstance murder, and the prosecutor announced he would not seek death penalty, defendant, if convicted, will be sentenced to life imprisonment without parole, and therefore prosecution is not a "capital case" within the meaning of Penal Code section 987.9]; *People v. Ames* (1989) 213 Cal.App.3d 1214, 1217 [life in prison without possibility of parole is the sentence for pleading guilty and admitting the special circumstance where death penalty is eliminated by plea bargain].) Under the statute, a death sentence can be imposed only if the jury, in a separate proceeding, "concludes that the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code, § 190.3.) Thus, under Penal Code section 190.3, the weighing finding exposes a defendant to a greater punishment (death) than that authorized by the jury's verdict of first degree murder with a true finding of a special circumstance (life in prison without parole). The weighing determination is therefore a factfinding.[4]

### C. This Court's Interpretation Of The California Death Penalty Statute In *People v. Brown* Supports The Conclusion That The Jury's Weighing Determination Is A Factfinding Necessary To Impose A Sentence of Death.

This Court's interpretation of Penal Code section 190.3's weighing directive in *People v. Brown* (1985) 40 Cal.3d 512 (revd. on other grounds

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[4] Justice Sotomayor, the author of the majority opinion in *Hurst*, previously found that *Apprendi* and *Ring* are applicable to a sentencing scheme that requires a finding that the aggravating factors outweigh the mitigating factors before a death sentence may be imposed. More importantly here, she has gone on to find that it "is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole." (*Woodward v. Alabama* (2013) ___U.S.___, 134 S.Ct. 405, 410-411 (dis. opn. from denial of certiorari, Sotomayor, J.).)

*sub nom. California v. Brown* (1987) 479 U.S. 538) does not require a different conclusion. In *Brown*, the Court was confronted with a claim that the language "shall impose a sentence of death" violated the Eighth Amendment requirement of individualized sentencing. (*Id.* at pp. 538-539.) As the Court explained:

> Defendant argues, by its use of the term "outweigh" and the mandatory "shall," the statute impermissibly confines the jury to a mechanical balancing of aggravating and mitigating factors .... Defendant urges that because the statute requires a death judgment if the former "outweigh" the latter under this mechanical formula, the statute strips the jury of its constitutional power to conclude that the totality of constitutionally relevant circumstances does not warrant the death penalty.

(*Id.* at p. 538.) The Court recognized that the "the language of the statute, and in particular the words 'shall impose a sentence of death,' leave room for some confusion as to the jury's role" (*id.* at p. 545, fn. 17) and construed this language to avoid violating the federal Constitution (*id.* at p. 540). To that end, the Court explained the weighing provision in Penal Code section 190.3 as follows:

> [T]he reference to "weighing" and the use of the word "shall" in the 1978 law need not be interpreted to limit impermissibly the scope of the jury's ultimate discretion. In this context, the word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor "k" as we have interpreted it. By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require

> any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.

(*People v. Brown*, *supra*, at p. 541, [hereafter "*Brown*"], footnotes omitted.)[5]

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 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

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[5] 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.

factfinding under *Ring* and *Hurst*. (See *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 257-258 [finding weighing is *Ring* factfinding]; *Woldt v. People* (Colo. 2003) 64 P.3d 256, 265-266 [same].) The sentencing process, however, does not end there. There is the final step in the sentencing process: the jury selects the sentence it deems appropriate. (See *Brown, supra*, 40 Cal.3d at p. 544 ["Nothing in the amended language limits the jury's power to apply those factors as it chooses in deciding whether, under all the relevant circumstances, defendant deserves the punishment of death or life without parole"].) Thus, the jury may reject a death sentence even after it has found that the aggravating circumstances outweighs the mitigation. (*Brown, supra*, 40 Cal.3d at p. 540.) This is the "normative" part of the jury's decision. (*Brown, supra*, 40 Cal.3d at p. 540.)

This understanding of Penal Code section 190.3 is supported by *Brown* itself. In construing the "shall impose death" language in the weighing requirement of section 190.3, this Court cited to Florida's death penalty law as a similar "weighing" statute:

> [O]nce a defendant is convicted of capital murder, a sentencing hearing proceeds before judge and jury at which evidence bearing on statutory aggravating, and all mitigating, circumstances is adduced. The jury then renders an advisory verdict "[w]hether sufficient mitigating circumstances exist...which outweigh the aggravating circumstances found to exist; and ... [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." (Fla. Stat. (1976-1977 Supp.) § 921.141, subd. (2)(b), (c).) The trial judge decides the actual sentence. He may impose death if satisfied in writing "(a) [t]hat sufficient [statutory] aggravating circumstances exist ... and (b) [t]hat there are insufficient mitigating circumstances ... to outweigh the aggravating circumstances." (*Id.*, subd. (3).)

(*Brown*, *supra*, 40 Cal.3d at p. 542, italics added.) In *Brown*, the Court construed Penal Code section 190.3's sentencing directive as comparable to that of Florida – if the sentencer finds the aggravating circumstances outweigh the mitigating circumstances, it is authorized, but not mandated, to impose death.

The standard jury instructions were modified, first in CALJIC No. 8.84.2 and later in CALJIC No. 8.88, to reflect *Brown*'s interpretation of section 190.3.[6] The requirement that the jury must find that the aggravating circumstances outweigh the mitigating circumstances remained a

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[6] 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 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.

precondition for imposing a death sentence. Nevertheless, once this prerequisite finding was made, the jury had discretion to impose either life or death as the punishment it deemed appropriate under all the relevant circumstances. The revised standard jury instructions, CALCRIM, "written in plain English" to "be both legally accurate and understandable to the average juror" (CALCRIM (2006), Vol. 1, Preface, p. v.), make clear this two-step process for imposing a death sentence:

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances *both* outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.

(CALCRIM No. 766, italics added.) As discussed above, *Hurst*, *supra*, 136 S.Ct. at p. 622, which addressed Florida's statute with its comparable weighing requirement, indicates that the finding that aggravating circumstances outweigh mitigating circumstances is a factfinding for purposes of *Apprendi* and *Ring*.

### D. This Court Should Reconsider Its Prior Rulings That The Weighing Determination Is Not A Factfinding Under *Ring* And Therefore Does Not Require Proof Beyond A Reasonable Doubt.

This Court has held that the weighing determination – whether aggravating circumstances outweigh the mitigating circumstances – is not a finding of fact, but rather is a "'fundamentally normative assessment...that is outside the scope of *Ring* and *Apprendi*.'" (*People v. Merriman*, *supra*, 60 Cal.4th at p. 106, quoting *People v. Griffin* (2004) 33 Cal.4th 536,

595, citations omitted; accord, *People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263.) Appellant asks the Court to reconsider this ruling because, as shown above, its premise is mistaken. The weighing determination and the ultimate sentence-selection decision are not one unitary decision. They are two distinct determinations. The weighing question asks the jury a "yes" or "no" factual question: do the aggravating circumstances outweigh the mitigating circumstances? An affirmative answer is a necessary precondition – beyond the jury's guilt-phase verdict finding a special circumstance – for imposing a death sentence. The jury's finding that the aggravating circumstances outweigh the mitigating circumstances opens the gate to the jury's final normative decision: is death the appropriate punishment considering all the circumstances?

However, the weighing determination may be described, it is an "element" or "fact" under *Apprendi*, *Ring* and *Hurst* and must be found by a jury beyond a reasonable doubt. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) As discussed above, *Ring* requires that any finding of fact required to increase a defendant's authorized punishment "must be found by a jury beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. at p. 602; see *Hurst*, *supra*, 136 S.Ct. at p. 621 [the facts required by *Ring* must be found beyond a reasonable doubt under the due process clause].)[7] Because California applies no standard of proof to the weighing determination, a factfinding by

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[7] 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.

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 Delaware Supreme Court in *Rauf v. State* (2016) 145 A.3d 430 [hereafter "*Rauf*"] supports Henriquez'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*, 145 A.3d at p. 433 (*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, upon answering five certified questions from the superior court, found that the state's death penalty statute violates *Hurst*.[8] One reason for the court's invalidation of 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 p. 433-434; see *id.* at p. 486 (conc. opn. of

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[8] In addition to the ruling discussed in this brief, the court in *Rauf* also held that the Delaware statute violated *Hurst* because: (1) after the jury finds at least one statutory aggravating circumstance, the "judge alone can increase a defendant's jury authorized punishment of life to a death sentence, based on her own additional factfinding of non-statutory aggravating circumstances" (*Rauf, supra*, at *1-2 (*per curiam* opn.) [addressing Questions 1-2] and at *37-38 (conc. opn. of Holland, J.)); and (2) the jury is not required to find the existence of any aggravating circumstance, statutory or non-statutory, unanimously and beyond a reasonable doubt (*id.* at *2 (*per curiam* opn.) [addressing Question 3] and at *39 (conc. opn. of Holland, J.)).

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 Delaware court is 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 F.3d 511, 533 (en banc) [concluding that – under *Apprendi* – the determination that the aggravators outweigh the mitigators "is not a finding of fact in support of a particular sentence"]; *Ritchie v. State* (Ind. 2004) 809 N.E.2d 258, 265 [reasoning that the finding that the aggravators outweigh the mitigators is not a finding of fact under *Apprendi* and *Ring*]; *Nunnery v. State* (Nev. 2011) 263 P.3d 235, 251-253 [finding that "the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor" under *Apprendi* and *Ring*].)

Because in California the factfinding that aggravating circumstances outweigh mitigating circumstances is a necessary predicate for the imposition of the death penalty, *Apprendi*, *Ring* and *Hurst* require that this finding be made, by a jury and beyond a reasonable doubt.

## XV.

## THE $6,000 RESTITUTION FINE IMPOSED BY THE TRIAL COURT IS UNLAWFUL, IN VIOLATION OF *APPRENDI* AND ITS PROGENY, BECAUSE THE DETERMINATION OF THE AMOUNT OF THE FINE ABOVE THE STATUTORY MINIMUM SHOULD HAVE BEEN MADE BY THE JURY.

On June 2, 2000, the Superior Court for the County of Contra Costa issued its judgment confirming a sentence of death for Mr. Henriquez. (4 CT 1423-1427.) At that sentencing hearing, the trial court also imposed a restitution fine in the amount of $6,000 pursuant to Penal Code section 1202.4.[9] (4 CT 1424; 18 RT 4698.) Appellant submits that the imposition of this fine violates *Apprendi v. New Jersey*, *supra*, 530 U.S. 466 and its progeny because the determination of the amount of the fine above the statutory minimum should have been made by the jury, not the judge.

A restitution fine under section 1202.4 is a penalty. (See *People v. Villalobos* (2012) 54 Cal.4th 177, 185.) It is also punishment. "It is well established that the imposition of restitution fines constitutes punishment, and therefore is subject to the proscriptions of the ex post facto clause and other constitutional provisions. (*People v. Souza* (2012) 54 Cal.4th 80, 143; see also *People v. Hanson* (2000) 23 Cal.4th 356, 361 [Legislature intended restitution fines as a criminal penalty]; *People v. Walker* (1991) 54 Cal.3d

[9] The court also imposed, but stayed, a parole fine of $6,000 pursuant to Penal Code section 1202.45. (CT 1424; RT 4698.)

1013, 1024 ["[a]lthough the purpose of a restitution fine is not punitive, we believe its consequences to the defendant are severe enough that it qualifies as punishment"]; Note, *Victim Restitution in the Criminal Process: A Procedural Analysis* (1984) 97 Harv. L.Rev. 931, 933-934 [restitution has historically been understood as punishment].)

In *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, the United States Supreme Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the proscribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.) Twelve years later, the high court held "that the rule of *Apprendi* applies to the imposition of criminal fines." (*Southern Union Co. v. United States* (2012) 567 U.S. 343, 360.)

In this case, the trial court, not the jury, decided that Mr. Henriquez should pay a restitution fine in the amount of $6,000 – well above the mandatory minimum of $200 allowed by section 1202.4. (4 CT 1424; 18 RT 4698; § 1202.4, subd. (b) ["In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record"].) A restitution fine, being punishment, is part of the penalty for a crime. Because *Apprendi* requires that the jury decide any fact that increases the amount of the fine above the mandatory minimum -- $200 under section 1202.4, subdivision (b)(1) – the trial court committed reversible error by failing to submit the matter to the jury for decision beyond a reasonable doubt. (*Alleyne v. United States* (2013) 570 U.S. ___ [133 S.Ct. 2151, 2158].)

This Court has not decided whether fines imposed under *Apprendi* and its progeny require that a jury determine the amount of a restitution fine

imposed under section 1202.4, subdivision (b) that is above the statutory minimum. In *People v. Kramis* (2012) 209 Cal.App.4th 346, however, the court of appeal held that *Apprendi* and *Southern Union* do not apply to restitution fines imposed under section 1202.4, subdivision (b). (*Id.* at pp. 349-352.) Nevertheless, in light of the United States Supreme Court's decision one year after *Kramis* in *Alleyne v. United States*, *supra*, 133 S.Ct. 2151, *Kramis* was mistaken. *Apprendi* and *Southern Union* do apply to these fines and require that a jury decide the factual bases for imposing a fine greater than the statutory mandatory minimum of $200.

*Kramis* observed that under section 1202.4, subdivision (b), the minimum fine for a felony conviction was $200, and the maximum fine was $10,000. The court concluded that "[i]t is the fact of the conviction that triggers imposition of a section 1202.4, subdivision (b)(1) restitution fine." (*People v. Kramis*, *supra*, 209 Cal.App.4th at pp. 349-350.)

*Kramis* then quoted the following from *Blakely v. Washington* (2004) 542 U.S. 296:

> "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Stated differently, "[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." Therefore, in sentencing a defendant, a judgment may not "inflic[t] punishment that the jury's verdict alone does not allow."

*(People v. Kramis*, *supra*, 209 Cal.App.4th at pp. 350-351, quoting *Blakely*, 542 U.S. at pp. 303-304, citations omitted, brackets by *Kramis*.) *Kramis* next noted that because the trial court in *Southern Union*, and not the jury, made a factual finding as to the number of days the defendant violated the applicable statute, and the amount of the fine was tied to the number of

days, *Apprendi* was violated. (*Id.* at 351.)

Thus, *Kramis* concluded, *Apprendi and Southern Union* did not pertain to the case before it because, in imposing a fine of $10,000 under section 1202.4, subdivision (b), which establishes a minimum fine of $200 and a maximum of $10,000, "the trial court exercises its discretion within a statutory range." (*People v. Kramis*, *supra*, 209 Cal.App.4th at p. 351.) *Kramis* added that "[t]he trial court did not make any factual findings that increased the potential fine beyond what the jury's verdict – the fact of the conviction – allowed." (*Id.* at p. 352.)

As indicated, *Kramis* was decided before *Alleyne v. United States*, *supra*, 133 S.Ct. 2151, which explains where *Kramis* went awry in applying *Apprendi*. *Alleyne* stated:

> The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an "element" or "ingredient" of the charged offense. In *Apprendi*, we held that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed. While *Harris* [*v. United States* (2002) 536 U.S. 545] declined to extend this principle to facts increasing mandatory minimum sentences, *Apprendi's* definition of "elements" necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. *Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.*

(*Alleyne v. United States*, *supra*, 133 S.Ct. at p. 2158, italics added, citations omitted; see also *People v. Nunez* (2013) 57 Cal.4th 1, 39, fn. 6 [*Alleyne* "held that the federal Constitution's Sixth Amendment entitles a defendant to a jury trial, with a beyond-a-reasonable-doubt standard of proof, as to 'any fact that increases the mandatory minimum' sentence for a crime"].) *Kramis*

erred in concluding that a trial court's exercise of sentencing discretion within a statutory range in imposing a restitution fine immunizes that determination from the strictures of *Apprendi* and its progeny, including *Southern Union*. Moreover, a trial court does make the equivalent of factual findings when it considers the enumerated statutory factors, including an ability to pay, in determining the amount of a restitution fine above the statutory minimum.

Here, absent compelling and extraordinary circumstances, section 1202.4, subdivision (b) established a mandatory minimum fine of $200. And under section 1202.4, subdivision (d), various factors may increase that minimum: "(d) In setting the amount of the fine pursuant to subdivision (b) in excess of the two hundred dollar ($200) ... minimum, the court shall consider any relevant factors including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime."

Under *Apprendi* as explicated by *Alleyne*: "Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty." (*Alleyne v. United States*, *supra*, 133 S.Ct. at p. 2158.) Thus, because the jury in this case did not decide the factors described in subdivision (d), the trial court violated *Apprendi* and *Alleyne*.

To clarify its holding, *Alleyne* quoted *Williams v. New York* (1949) 337 U.S. 241, 246, and acknowledged that the factfinding by a jury required by the Sixth Amendment "is distinct from factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law.'" (*Alleyne v. United States*, *supra*, 133 S.Ct. at p. 2161, fn. 2.) In *Williams*, the Court expounded on the sort of facts a trial court relies on to sentence a defendant: "information about the convicted person's past life, health, habits, conduct, and mental and moral propensities." (*Williams v. New York*, *supra*, 337 U.S. at p. 246; see also *Alleyne*, *supra*, 133 S.Ct. at p. 2163 ["'[N]othing in this history suggests that it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing a judgment within the range prescribed by statute,'" quoting *Apprendi*, 530 U.S. at p. 481].) Thus, traditional sentencing facts relating to the offense and the offender remain within the domain of a sentencing judge under *Alleyne*.

But these were not the sort of factors that must be decided under section 1202, subdivision (d). In sentencing a defendant, a trial court has not historically considered such factors as those set forth in subdivision (d), especially "any economic gain derived by the defendant as a result of the crime, [and] the extent to which any other person suffered any losses as a result of the crime." Nor does a court consider pecuniary losses to the victim's dependents, as required by subdivision (d). Under *Alleyne* and *Apprendi*, these factors are for the jury to decide because they increase the statutory mandatory minimum of $200 and do not fall within the traditional ambit of a sentencing judge.

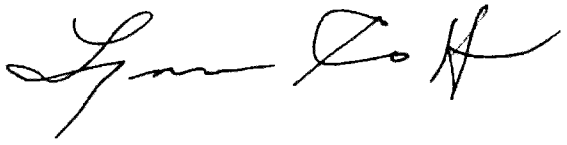
For the reasons stated, the trial court's imposition of a $6,000 restitution, a fine that well exceeded the statutory minimum, was unlawful

## CONCLUSION

For the reasons set forth above in Argument XIII, the judgment must be reversed. For the reasons set forth above in Argument XV, the $6,000 restitution fine imposed by the trial court must be reduced to the statutory minimum of $200.

Dated: August 16, 2017

Respectfully submitted,



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## CERTIFICATION OF WORD COUNT

## (CAL. RULES OF COURT, RULE 8.630(b)(2)

I, Lynne Coffin, hereby certify in accordance with California Rules of Court, rule 8.630(b)(2), that this brief contains 6,534 words as calculated by the Microsoft WORD software in which it was written.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct.

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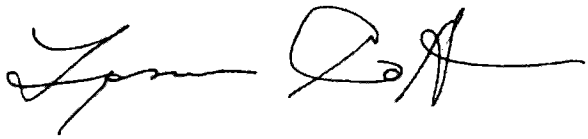
Respectfully submitted,



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**PROOF OF SERVICE**

Re: People v. Christopher Henriquez, No. S089311

**ATTORNEY'S CERTIFICATE OF ELECTRONIC SERVICE AND/OR SERVICE BY MAIL**

(Code Civ. Proc., § 1013a, subd. (2); Cal. Rules of Court, rules 8.71(f) and 8.77)

I, Elba Gisele Martinez, declare:

I am a citizen of the United States, employed in the City and County of San Francisco, I am over the age of 18 years and not a party to this action or cause, my current business address is 101 Second Street, Suite 600, San Francisco, California 94105. My electronic service address is flei@capsf.org and my business address is 101 Second Street, Suite 600, San Francisco, California 94105.

On 8.18.2017, I served the persons and/or entities listed below by the method checked. For those marked "Served Electronically," I transmitted a PDF version of **Appellant's Supplemental Opening Brief** by TrueFiling electronic service or by e-mail to the e-mail service address(es) provided below. Transmission occurred at approximately —X—. For those marked "Served by Mail," I deposited in a mailbox regularly maintained by the United States Postal Service, a copy of the above document in a sealed envelope with postage fully prepaid, addressed as provided below.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 8.18.2017, at San Francisco, California.

Gisela Chyatte