No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

RUBEN RANGEL
Petitioner

v.

STATE OF CALIFORNIA
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

(DEATH PENALTY CASE - NO EXECUTION DATE SET)

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QUESTIONS PRESENTED (Rule 14.1(a))

As this Court has explained, the Eighth Amendment requires *both* that a State limit the class of death-eligible defendants to avoid arbitrariness, *and* that it allow individualized discretion in selecting which members of this narrow class will actually be sentenced to death. *See, e.g., Tuilaepa v. California,* 512 U.S. 967, 972 (1994). States must comply with both requirements. See *Kansas v. Marsh*, 548 U.S. 163, 173-174, 126 S.Ct. 2516, 165 L.Ed.2s 429 (2006), citing *Furman v. Georgia*, 408 U.S., 408 U.S. 238, 92 S.Ct 2726, 33 L.Ed.2d 346 (1972) and *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

The questions presented in this petition address the failure of California's death penalty scheme to comply with these constitutional demands.

1. Does California's death penalty statute violate the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to meaningfully narrow the class of death-eligible murders?

2. Does California's death penalty scheme, which imposes no burden of proof on capital sentencing decisions, violate the requirement under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution that every fact that serves to increase the statutory maximum for the crime must be found by a jury beyond a reasonable doubt?

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IN THE SUPREME COURT OF THE UNITED STATES

RUBEN RANGEL, Petitioner

v.

THE STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT

DEATH PENALTY CASE

Petitioner Ruben Rangel respectfully asks that a writ of certiorari issue to review the judgment and opinion of the California Supreme Court affirming his conviction and sentence of death.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were petitioner, Ruben Rangel, and respondent, the People fo the State of California.

OPINION BELOW

The Supreme Court of California issued an opinion in this case on July 2, 2018, reported as *People v. Joseph Adam Mora and Ruben Rangel*, 5 Cal.5th 442, 235 Cal.Rptr.3d 92, 420 P.3d 902 1255 (2018). A copy of that opinion is attached hereto as Appendix A. On August 22, 2018, the Supreme Court of California issued an order denying petitioner's

request for rehearing and modifying the opinion. A copy of that order is attached hereto as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). Petitioner's timely petition for rehearing and/or modification of the opinion was denied on August 22, 2018.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I. Federal Constitutional Provisions

The Fifth Amendment to the United States Constitution provides in pertinent part that no person shall be deprived of liberty without "due process of law." U.S. Const. Amend. V.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime may have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. U.S. Const. Amend. VI.

The Eighth Amendment to the United States Constitution provides in pertinent part that no cruel and unusual punishment should be inflicted. U.S. Const. Amend. VIII.

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. Amend. XIV.

II. State Statutory Provisions

The relevant California Penal Code sections, which are attached as Appendix C, include the following: California Penal Code sections 190, 190.1, 190.2, 190.3, 190.4.[1]

STATEMENT OF THE CASE

I. Introduction

Petitioner was convicted and sentenced under California's death penalty law, adopted by an initiative measure approved in 1978. Cal. Pen. Code §§ 190-190.4. Under this scheme, a person is eligible for the death penalty if one or more special circumstances have been alleged and found true by the trier of fact. Section 190.2 provides that "[t]he penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without possibility of parole if one or more of" the delineated special circumstances has been found under Section 190.4 to be true. At the time of the offense charged, the statute contained 32 special circumstances, it is now up to 33. Cal. Pen. Code § 190.2.[2] The California Supreme Court has repeatedly held that: "Section 190.2 is not impermissibly broad in violation of the Fifth, Sixth, Eighth, or Fourteenth Amendments to the Unites States Constitution for failing to narrow the class of death-eligible murders." *People v. Mora, supra*, 5 Cal.5th at 518-19, citing *People v. Simon,* 1 Cal.5th 98, 150 (2016).

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[1] All statutory references are to the California Penal Code unless otherwise specified.

[2] Although California Penal Code § 190.2(a) lists 22 special circumstances, on of which (felony-murder) has 12 enumerated sub-parts. (Cal. Pen. Code § 190.2(a)(17).

Once the trier of fact has found that one or more special circumstances exist, the court must hold a separate penalty hearing to determine whether the punishment will be death or life imprisonment without possibility of parole. Cal. Pen. Code §§ 190.2(a), 190.3, 190.4; *Tuilaepa v. California*, 512 U.S. 967, 975-976 (1994). At that hearing, the parties may present evidence "as to any matter relevant to aggravation, mitigation, and sentence. . . ."[3] Cal. Pen. Code § 190.3. Section 190.3 lists the aggravating and mitigating factors the jury is to consider.[4] The trier of fact "shall consider, take into account and be guided by the

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[3] In California, aggravating factors are defined as "any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." *People v. Dyer*, 45 Cal.3d 26, 77, 246 Cal.Rptr. 209, 240, 753 P.2d 1, 32 (1988); California Jury Instruction Criminal (CALJIC) No. 8.88. Petitioner's jury was so instructed.

[4] Pen. Code § 190.3. Section 190.3 provides that in determining the appropriate penalty, the trier of fact must take the following factors into account, if relevant: (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1; (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence; (c) The presence or absence of any prior felony conviction; (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance; (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act; (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct; (g) Whether or not defendant acted under extreme duress or under the substantial domination of another person; (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication; (i) The age of the defendant at the time of the crime; (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor; (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime. Cal. Pen. Code § 190.3.

aggravating and mitigating circumstances referred to in" Section 190.3, and impose a sentence of death only if it concludes that "the aggravating circumstances outweigh the mitigating circumstances." *Ibid*. If it determines that the mitigating circumstances outweigh the aggravating circumstances, it must impose a sentence of life without possibility of parole. *Ibid*. No provisions of California's statutory scheme address the burden of proof applicable to establishing factors in aggravation or mitigation at a capital trial. Under California law, proof beyond a reasonable doubt is not required for any sentencing factors except prior violent criminal activity and prior felony convictions – section 190.3 factors (b) and (c). See *People v. Montes*, 58 Cal.4th 809, 899 (2014).

The California Supreme Court has repeatedly held that: The death penalty statutory scheme is not unconstitutional for failing to require the jury find beyond a reasonable doubt that aggravating factors outweigh mitigating factors; California's death penalty statutory scheme does not run afoul of *Apprendi* and its progeny for failing to so require; there is no burden of proof at the penalty phase; and the trial court is under no obligation to instruct the jury that neither party bears the burden of proof. *People v. Mora, supra*, 5 Cal. 5th at 519, citing *People v. Simon, supra*, 1 Cal.5th at 149, *People v. Gamache*, 48 Cal.4th 347, 406, 106 Cal.Rptr.3d 771, 227 P.3d 342 (2010), and *People v. Leonard*, 40 Cal.4th 1370, 1429, 58 Cal.Rptr.3d 368, 157 P.3d 973 (2007).

II. Procedural History

On February 5, 1999, a California jury convicted petitioner and his co-defendant of first degree murder and attempted second degree robbery, with the special circumstances of multiple murder and felony murder, i.e., that the murder occurred in the course of an attempted robbery. Pen. Code § 190.2, subd. (a)(3), (a)(17)(iii). At the penalty phase, the prosecutor focused on a single 1995 arrest for auto burglary, threats and vandalism and

victim impact testimony as "circumstances of the crime" evidence. On February 18, 1999, the jury fixed the defendants' punishment at death and the trial court subsequently imposed the death sentence. 5CT 1221, 1224; 45CT 11896A-11913. 11923.[5]

On direct appeal, petitioner argued, *inter alia*, that California's death penalty statute is unconstitutional because it is impermissibly broad for failing to genuinely narrow the class of first degree murderers eligible for the death penalty. Petitioner also challenged California's death penalty scheme as unconstitutional because it does not require as a predicate to imposition of a death judgment that a jury find beyond a reasonable doubt the presence of all aggravating circumstances, citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002) and *Hurst v. Florida,* 577 U.S. ___, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). The California Supreme Court rejected petitioner's challenges, based on its own prior decisions denying similar claims made in past cases. Appendix A, *People v. Mora, supra,* 5 Cal.5th at 518-19.

[5] "CT" refers to the Clerk's Transcript of petitioner's trial. "RT" refers to the Reporter's Transcript of petitioner's trial.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER CALIFORNIA'S DEATH PENALTY LAW VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS FOR FAILURE TO ADEQUATELY NARROW THE CLASS OF DEATH-ELIGIBLE MURDERS.

A. Introduction

Petitioner argued below that California's death penalty scheme was impermissibly broad and did not contain sufficient safeguards to avoid arbitrary and capricious sentencing. Appellant further argued that California's practice forbidding intercase proportionality review lead to unreliable verdicts of death and was thus unconstitutional. The California Supreme Court held, as it has in the past, that "Section 190.2 is not impermissibly broad in violation of the Fifth, Sixth, Eighth, or Fourteenth Amendments for failing to narrow the class of death eligible murders. (*Simon, supra*, 1 Cal.5th at p. 149.)" Appendix A, *People v. Mora, supra,* 5 Cal.5th at 518-519.

B. Since California' Death Penalty Statute Does Not Genuinely Narrow the Class of Death-Eligible Murders it is Unconstitutionally Overbroad.

In 1972, this Court struck down the death penalty acknowledging the arbitrariness inherent in state capital sentencing schemes. *Furman v. Georgia* 408 U.S. 238, 251 (1972). The Court noted that to meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. *Id*. at 313 (conc. opn. of White, J.) In 1976, this Court reinstated the death penalty by requiring states to carefully draft statutes that would " ensure[] ... the sentencing authority is given adequate information and guidance." *Gregg v. Georgia* 428 U.S. 123, 195 (1976). In 1980, this Court ruled that murder can be punished by death only if it involves a *narrow and precise* aggravating factor. *Godfrey v. Georgia*, 446 U.S.

420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).[6] Since then, this Court has affirmed that meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. *Lowenfield v. Phelps*, 484 U.S. 231, 242-246 (1988)(upholding Louisiana's narrow statutory definition of capital murder); see also *Zant v. Stephens*, 462 U.S. 862, 878 (1982).

In recent years, this Court has stepped in and itself narrowed the scope of the death penalty, abolishing it for juveniles and the intellectually disabled. *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002). Since then, this Court has continually reaffirmed that "[c]apital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and those whose extreme culpability makes them the most deserving of execution." *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (internal quotation marks omitted).) This is so because "decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment," and the imposition of death penalty should be confined to the "worst of crimes." *Kennedy* at 435, 447.

However, aggravating factors for seeking capital punishment of murder still vary greatly among death penalty states. For example, California has thirty-three such factor, while New Hampshire only has seven. Unlike New Hampshire, California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty and did not do so at the time of petitioner's case. In 1997, at the time of the offense charged against petitioner, California Penal Code section 190.2(a) contained 21 special circumstances and 13 different categories of felonies under the felony-murder enhancement

[6] Currently, twenty states have abolished the death penalty. Eleven of which have done so since 1980 for a myriad of public policy and constitutional reasons.

provision which made a first-degree murder death eligible. Cal. Pen. Code § 190.2,(a)(17). Thus, the statute promulgated 35 different types of first degree murder qualifying for capital punishment. A study published in 1997 pointed out that the statute was overly broad by making 87% of first-degree murders death-eligible through the use of statutory aggravating factors.

> "In California, Steven Shatz and Nina Rivkind (1997) found that 87% of all first-degree murders between 1988 and 1992 were factually death-eligible largely a result of two particularly overbroad aggravators in the state: the "lay in wait" and "felony was committed during the course of murder" statutes. According to Shatz and Rivkind, one or more of the "felony and murder" aggravating circumstances was found in 74 percent of all death judgment cases during the course of their study (1997, 1330)."

F. Baumgartner et al., Deadly Justice: A Statistical Portrait of the Death Penalty 91, 93, 108, Table 5.1 (2018), citing Shatz & Rivkind, The California Death Penalty Scheme Requiem for Furman? (1997) 72 N.Y.U.L.Rev. 1283. Since the effective dates of the study, i.e., 1988-1992, California's death penalty statute has been amended twice more (in 1996 and in 2000) adding additional aggravating factors, making even more first-degree murders death eligible. Cal. Pen. Code § 190.2 (a)(21), (22). Currently, there are thirty-three special circumstances that make first degree murder a death-eligible offense. Cal.Pen. Code § 190.2(a); see Shatz et al., *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 Cardozo L.Rev. 1227 (2013); see also Shatz et al., *Chivalry is not Dead: Murder, Gender, and the Death Penalty*, 27 Berkeley J. Gen., Law & Justice 64 (2012).

Given the large number of special circumstances, California's statutory scheme fails to narrow the class of first degree murderers for whom the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. In fact, the high number of aggravating factors in California has been criticized for giving prosecutors too much discretion in choosing cases where they believe capital punishment is warranted. In

2008, the California Commission on the Fair Administration of Justice[7] proposed that the legislature reduce the aggravating factors in California from twenty-two to five (multiple murders, torture murder, murder of a police officer, murder committed in jail, and murder related to another felony). However, the California Supreme Court routinely rejects challenges to the statute's lack of meaningful narrowing. See e.g., *People v. Stanley,* 10 Cal.4th 764, 842-843 (1995).

Because the numerous special circumstances in California encompass virtually all first degree murders, the statute is so overbroad that it fails to circumscribe the class of persons eligible for the death penalty. Thus, the statutory scheme is so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (See *Shatz & Rivkind, The California Death penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U.L. Rev. 1283; Shatz, *The Eighth Amendment, the Death penalty, and Ordinary Robbery-Burglary Murderers: A California case Study* (2007) 59 Fla.L.Rev. 719.

Four Justices of this Court, documenting this flaw, have called for the Court to reexamine the constitutionality of overly broad state statutes that cast such a wide net as to make the imposition of the death penalty in their states arbitrary ands capricious. See *Glossip v. Gross*, 135 S.Ct. 2726, 2755 (2015) (Breyer, J., joined by Ginsburg, J., dissenting); *Hidalgo v. Arizona*, 138 S.Ct. 1054 (2018)(Breyer J., joined by Ginsburg, J., Sotomayor, J., Kagan

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[7] The CCFAJ was comprised of a diverse group of prosecutors, defenders, law enforcement, legislators, legal scholars and law professors who through studies, reports and public meetings, examined and recommended ways to provide safeguards and make improvements in the way the California criminal justice system functions. California Commission on the Fair Administration of Justice "California Commission on the Fair Administration of Justice Final Report" (2008). *Northern California Innocence Project Publications*. Book 1. http://digitalcommons.law.scu.edu/ncippubs/1.

J.)(memorandum respecting the denial of certiorari); *Jordan v. Mississippi*, 138 S.Ct. 2567, 2570-2571 (2018) Breyer J.)(dissenting from denial of certiorari).

This Court should grant certiorari to declare California's death penalty scheme unconstitutional for failure to meaningfully narrow the class of crimes for which a person can be put to death.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER CALIFORNIA'S DEATH PENALTY LAW VIOLATES THE CONSTITUTIONAL REQUIREMENT THAT ANY FACT THAT INCREASES THE PENALTY FOR A CRIME MUST BE FOUND BY A JURY BEYOND A REASONABLE DOUBT.

A. This Court Has Held That Every Fact The Serves to Increase a Maximum Criminal Penalty Must Be Proven Beyond a Reasonable Doubt.

The Fifth, Sixth, and Fourteenth Amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995); see also *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975); *In re Winship*, 397 U.S. 358, 363-364 (1970). These pronouncements are closely aligned with the Eighth Amendment's reliability requirements. U.S. Const. Amend, VIII. Where proof of a particular fact, other than a prior conviction, exposes the defendant to greater punishment than that applicable in the absence of such proof, that fact is an element of the crime which the Fifth and Sixth Amendments require to be proved to a jury beyond a reasonable doubt. *Apprendi*, *supra*, 530 U.S. at 490; see also *Cunningham v. California*, 549 U.S. 270, 281-282 (2007); *Blakely v. Washington,* 542 U.S. 292, 301 (2004). As the Court stated in *Apprendi*, "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 v. New Jersey, supra*, 530 U.S. at 494. In *Ring v. Arizona*, 536 U.S. 584 (2002), a capital sentencing case, this Court

established a bright-line rule: “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 omitted.) *Ring v. Arizona, supra*, 536 U.S. at 602, quoting *Apprendi v. New Jersey, supra,* 530 U.S. at 494, 482-483.

Applying this mandate, the Court in *Hurst v. Florida*, 577 U.S. __, 136 S.Ct. 616, 619 (2016) invalidated Florida's death penalty statute, restating 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 v. Florida, supra*, 136 S.Ct. at 619, italics added. And as explained below, *Hurst* makes clear that the weighing determination required under the Florida statute at issue was an essential part of the sentencer' s factfinding exercise, within the meaning of *Ring*. See *Hurst v. Florida, supra*, 136 S.Ct. at 622.

Under the capital sentencing statute invalidated in *Hurst*, former Fla. Stat. §§ 782.04(l)(a), the jury rendered an advisory verdict at the sentencing proceeding, with the judge then making the ultimate sentencing determination. *Hurst v. Florida, supra*, 136 S.Ct. at 620, citing 775.082(1). 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 to imposing a sentence of death. Id. at 622, citing former Fla. Stat. § 921.141 (3). These determinations were part of the "necessary factual finding that *Ring* requires."*Id*.[8]

[8] As this Court 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), italics 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 v. Florida,*

The questions decided in *Ring* and *Hurst* were narrow. "*Ring's* claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." *Ring v.Arizona, supra* , 536 U.S. at 597 n.4. The petitioner in *Hurst* raised the same claim. See Petitioner's Brief on the Merits, *Hurst v. Florida*, 2015 WL 3523406 at *18 (the trial court rather than the jury has the task of making factual findings necessary to impose death penalty). In each case, this Court decided only the constitutionality of a judge, rather than a jury, determining the existence of an aggravating circumstance. See *Ring v. Arizona, supra* , 536 U.S. at 588; *Hurst v. Florida, supra*, 136 S. Ct. at 624.

Yet *Hurst* shows that the Sixth Amendment requires that any fact that must be established to impose a death sentence, but not the lesser punishment of life imprisonment, must be found by the jury. *Hurst v. Florida, supra*, 136 S. Ct. at 619, 622. *Hurst* refers not simply to the finding that an aggravating circumstance obtains but, as noted, to the finding of "each fact necessary to impose a sentence of death." *Id*. at 619, italics added.

B. California's Death Penalty Statute Violates Hurst By Not Requiring That The Jury's Factual Sentencing Findings Be Made Beyond A Reasonable Doubt.

In California, a death sentence cannot be imposed on a defendant who has been convicted at the guilt phase of capital murder unless the jury additionally finds: (1) the existence of one or more aggravating factors; (2) that the aggravating factors outweigh the mitigating factors; and (3) the aggravating factors are so substantial that they warrant death instead of the lesser penalty of life without parole. Under the principles that animate this Court's decisions in Apprendi, Ring and Hurst, the jury in this case should have been required

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supra, 136 S. Ct. at 622.

to make these factual findings beyond a reasonable doubt. See John G. Douglass, Confronting Death: Sixth Amendment Rights at Capital Sentencing, 105 Colum. L. Rev. 1967, 2004 (2005) (Blakely arguably reaches "any factfinding that matters at capital sentencing, including those findings that contribute to the final selection process.").

Although California's statute is different from those at issue in *Hurst* and *Ring* in that the jury, not the judge, makes the findings necessary to sentence a defendant to death, California's death penalty statute is similar to the invalidated Arizona and Florida statutes in ways that are key with respect to the Apprendi/Ring/Hurst principle. All three statutes provide that a death sentence may be imposed only if, after the defendant is convicted of first degree murder, the sentencer finds, first, the existence of at least one statutory death eligibility circumstance--in California, a "special circumstance" (Cal. Pen. Code, § 190.2) and in Arizona and Florida, an "aggravating circumstance" (Ariz. Rev. Stat. § 13-703(G); Fla. Stat. § 921.141(3))-and, second, engages at the selection phase in an assessment of the relative weight or substantiality of aggravating and mitigating sentencing factors-in California, that "'the aggravating circumstances outweigh the mitigating circumstances'" (Cal. Pen. Code, § 190.3); in Arizona that "'there are no mitigating circumstances sufficiently substantial to call for leniency'" (*Ring v. Arizona, supra*, 536 U.S. at 593, quoting Ariz. Rev. Stat. § 13-703(F)); and in Florida, that "there are insufficient mitigating circumstances to outweigh aggravating circumstances" *Hurst v. Florida, supra*, 136 S. Ct. at 622, quoting Fla. Stat. § 921.141(3).[9]

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[9] In *Hurst*, the Court uses the concept of death eligibility to mean that there are findings that actually authorize the imposition of the death penalty, and not in the sense that an accused potentially faces a death sentence at a separate hearing, which is what a "special circumstance" finding establishes under California law. Under California law it is the jury determination that the statutory aggravating factors outweigh the mitigating factors that ultimately authorizes imposition of the death penalty.

Although *Hurst* did not address standard of proof as such, the Court has made clear that weighing sentencing factors is an essentially factual exercise, within the ambit of *Ring*. As Justice Scalia explained 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 v. Arizona, supra, 536 U.S. at 610 (Scalia, J., concurring), italics added; see also *Hurst v. Florida, supra*, 136 S. Ct. at 622 (in Florida the "critical findings necessary to impose the death penalty" include weighing the facts the sentencer must find before death is imposed).

Other courts have recognized the factfinding nature of the weighing exercise. *In Hurst v. State*, 202 So.3d 40, 43 (Fla. 2016), the Florida Supreme Court reviewed whether a unanimous jury verdict was required in capital sentencing, in light of this Court's decision discussed above. The determinations to be made, including whether aggravation outweighed mitigation, were described as "elements," like the elements of a crime itself, determined at the guilt phase. *Hurst v. State*, 202 So.3d at 53, 57.

The Delaware Supreme Court has found that "the weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence." *Rauf v. State*, 145 A.3d 430, 485 (Del. 2016). The Missouri Supreme Court has also described the determination that aggravation warrants death, or that mitigation outweighs aggravation, as a finding of fact that a jury must make. State v. Whitfield, 107 S.W.3d 253, 259-260 (Mo. 2003).Similarly, Justice Sotomayor has stated that "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. *Woodward v. Alabama*, 571 U.S. 1045 (2013) (Sotomayor, J., dissenting from denial of cert.).

Other courts have found to the contrary. See *United States v. Gabrion*, 719 F.3d 511, 533 (6th Cir. 2013) (under *Apprendi* the determination that the aggravating factors outweigh the mitigating factors "is not a finding of fact in support of a particular sentence"); *Nunnery v. State*, 127 Nev. 749, 773-775 (Nev. 2011) ("the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor"); *Ritchie v. State*, 809 N.E.2d 258, 265-266 (Ind. 2004) (same). This conflict further supports granting certiorari on the issue presented here.

The constitutional question cannot be avoided by labeling the weighing exercise "normative, " rather than "factual," as the California court has done repeatedly. See, e.g., *People v. Karis*, 46 Cal.3d 612, 639-640 (1988); *People v. McKinzie, supra*, 54 Cal.4th at 1366. At bottom, the inquiry is one of function. See *Ring v. Arizona, supra*, 536 U.S. at 610 (Scalia, J., concurring) (all "facts" essential to determination of penalty, however labeled, must be made by [a] jury). As the Court stated in *Apprendi*, "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 v. New Jersey, supra*, 530 U.S. at 494. If so, then the required finding must have been made by the jury beyond a reasonable doubt.

C. California Is An Outlier In Refusing To Apply *Ring's* Beyond-A-Reasonable-Doubt Standard To Factual Findings That Must Be Made Before A Death Sentence Can Be Imposed.

The California Supreme Court has applied its flawed understanding of *Ring*, *Apprendi* and *Hurst* to its review of numerous death penalty cases. The issue presented here is well defined and will not benefit from further development in the California Supreme Court or other state courts. These facts favor grant of certiorari, for two reasons. First, as of April 1, 2018, California, with 740 inmates on death row, had almost one-fourth of the country's total death-row population of 2,743. See Death Penalty Information Center at http://www.

deathpenaltyinfo.org/documents/FactSheet. pdf (updated Sept. 28, 2018). California's refusal to require a jury to make the factual findings necessary to impose the death penalty beyond a reasonable doubt has widespread effect on a substantial portion of this country's capital cases. Second, of the 33 jurisdictions in the nation with the death penalty, including the federal government and the military, the statutes of nearly all provide that aggravating factors must be proven beyond a reasonable doubt.[10]

The statutes of several states are silent on the standard of proof by which the state must prove aggravating factors to the trier of fact.[11] But with the exception of the Oregon Supreme Court,[12] the courts of these jurisdictions have explicitly determined that the trier of fact must find factors in aggravation beyond a reasonable doubt before it may use them to impose a sentence of death.[13] California is one of only a few states that has refused to do so.

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10 See Ala. Code 1975 § 13a-5-45(e); Ariz. Rev. Stat. Ann. § 13-75l(b); Ark. Code Ann. § 5-4-603(a); Colo. Rev. Stat. Ann. §18-1.3-120 l (l)(D); Del. Code Ann., Tit. 11, § 4209(c) (3)A.l; Ga. Code Ann. § 17-10-30(c); Idaho Code § 19-2515(3)(B); Ind. Code Ann. § 35-50-2-9(a); K.S.A. § 21-6617(e); Ky. Rev. Stat. Ann. § 532.025(3); La. Code Crim. Proc. Ann. Art. 905.3; Miss. Code Ann. § 99-19-103; Mo. Rev. Stat. Ann. § 565.032.1(1); Mont. Code Ann. 46-18-305; Neb. Rev. Stat. § 29-2520(4)(F); Nev. Rev. Stat. § 175.554(4); N.H. Rev. Stat. Ann. § 630:5-iii; N.C. Gen. Stat. § 15a-2000(c)(l); Ohio Rev. Code Ann. § 2929.04(b); Okla. Stat. Ann., Tit. 21, § 701.11; 42 Pa. Cons. Stat. § 9711(c)(l)(iii); S.D. Code Ann. § 16-3-20(a); S.D. Codified Laws Ann. § 23a-27a-5; Tenn. Code Ann. § 39- 13-204(f); Tex. Crim. Proc. Code Ann. Art. 37.071 § (2)(C); Va. Code Ann. § 19.2-264.4(c); Wyo. Stat. § 6-2-102(d)(I)(A), (E)(I); 18 U.S.C.A. § 3593(c).

11 See Fla. Stat. § 921.141(1), (2)(A); Ore. Rev. Stat. § 163.150(1)(A); Utah Code Ann. § 76-3-207(2)(A)(IV). Washington's death penalty law does not mention aggravating factors, but requires that before imposing a sentence of death the trier of fact must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. Wash. Rev. Code Ann. § 10.95.060(4).

12 See *State v. Longo*, 148 P.3d 892, 905-906 (Or. 2006).

13 See *State v. Steele*, 921 So. 2d 538, 540 (Fla. 2005); *State v. Gardner*, 947 P.2d 630, 647 (Utah 1997).

Certiorari is necessary to bring California, with the largest death row population in the nation, into compliance with the Fifth, Sixth, Eighth and Fourteenth Amendments by requiring the state to prove beyond a reasonable doubt the factual findings that are a prerequisite to the imposition of the death penalty.[14]

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

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Respectfully submitted,

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[14] Further, if the factual findings set forth above are the functional equivalents of elements of an offense, to which the Fifth, Sixth, Eighth, and Fourteenth Amendment rights to trial by jury on proof beyond a reasonable doubt apply, then it follows, contrary to the view of the California Supreme Court, that aggravating circumstances must be found by a jury unanimously. Cal. Const. art. I, § 16 (right to trial by jury guarantees right to unanimous jury verdict in criminal cases); *People v. Maury*, 30 Cal.4th 342, 440 (2003)(because there is no Sixth Amendment right to jury trial as to aggravating circumstances, there is no right to unanimous jury agreement as to truth of aggravating circumstances); *People v. Wolfe*, 114 Cal.App.4th 177, 187 (2003) and authorities cited therein (although right to unanimous jury stems from California Constitution, once state requires that jurors unanimously be convince beyond a reasonable doubt.)