No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH ADAM MORA, *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent*.

_____

ON A PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

(DEATH PENALTY CASE)

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CAPITAL CASE – NO EXECUTION DATE SET

QUESTION PRESENTED

Does the California death penalty scheme violate the requirement under the Fifth, Sixth and Fourteenth Amendments that any fact, other than a prior conviction, that serves to increase the statutory maximum for the crime must be found by a jury beyond a reasonable doubt?

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OCTOBER TERM, 2018

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ON A PETITION FOR A WRIT OF CERTIORARI
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(DEATH PENALTY CASE)

Petitioner, Joseph Adam Mora, respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of the State of California affirming his conviction and sentence of death.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were petitioner, Joseph Adam Mora, and Respondent, the People of the State of California.

OPINION BELOW

The California Supreme Court issued an opinion in this case on July 2, 2018, reported as *People v. Mora and Rangel*, 5 Cal. 5th 442 (2018) (hereafter "*Mora*"). A copy of that opinion is attached as Appendix A. Rehearing was denied on August 22, 2018. A copy of the order denying rehearing is attached as Appendix B.

JURISDICTION

The California Supreme Court entered its judgment on July 2, 2018. On November 6, 2018, Justice Kagan granted petitioner's application for extension of time within which to file a petition for certiorari in this case to January 19, 2019. A copy of the letter from the Clerk of the Court notifying petitioner of the extension is attached as Appendix C. This Court has jurisdiction pursuant to 28 U.S.C. section 1257(a).

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."

The Sixth Amendment provides in pertinent part: "In all criminal prosecutions the accused shall enjoy the right to [trial] by an impartial jury . . . ."

The Fourteenth Amendment provides in pertinent part: No state shall "deprive any person of life, liberty, or property, without due process of law . . . ."

II. State Statutory Provisions

The relevant statutes, attached as Appendix D, include the following: California Penal Code sections 187, 190, 190.1, 190.2, 190.3, 190.4 and 190.5.

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STATEMENT OF THE CASE

I. Introduction

Petitioner was convicted and sentenced under California's death penalty law, which was adopted by an initiative measure in 1978. Cal. Penal Code §§ 190-190.4.[1] Under this scheme, once the defendant has been found guilty of first degree murder, the trier of fact must determine whether one or more of the special circumstances enumerated in section 190.2 are true beyond a reasonable doubt. If a special circumstance is found to be true, a separate penalty hearing is held to determine whether the punishment will be death or life imprisonment without possibility of parole. §§ 190.2 & 190.3; *Tuilaepa v. California*, 512 U.S. 967, 975-76 (1994).

At the penalty hearing, the parties may present evidence "relevant to aggravation, mitigation, and sentence. . . ." § 190.3. California law defines an aggravating factor 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." California Jury Instruction Criminal (CALJIC) No. 8.88; see *People v. Steele*, 27 Cal. 4th 1230 (2002). Section 190.3 sets forth a list of

[1] All statutory references are to the California Penal Code unless otherwise specified. "CT" refers to the Clerk's Transcript of the trial, and "RT" refers to the Reporter's Transcript of the trial.

aggravating and mitigating factors that the jury must consider.[2] The jury is instructed that it may impose a sentence of death only if it is "persuaded that the aggravating circumstances are so substantial in comparison to the mitigating circumstances that it warrants death instead of life without parole." CALJIC No. 8.88.[3] Apart from section

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[2] This list includes the circumstances of the crime, including any special circumstances found to be true (factor (a)); the presence or absence of criminal activity involving the use or threat of force or violence (factor (b)) or prior felony convictions by the defendant (factor (c)); whether the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance (factor (d)); whether the victim was a participant in or consented to the defendant's conduct (factor (e)); whether the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct (factor (f)); whether the defendant acted under extreme duress or under the substantial domination of another person (factor (g)); whether 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 (factor (h)); the defendant's age at the time of the crime (factor (i)); whether the defendant was an accomplice whose participation in the offense was relatively minor (factor (j)); and any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime (factor (k)). § 190.3; *see Tuilaepa*, 512 U.S. at 969 n.*.

[3] The capital sentencing jury is not instructed in the exact language of the statute. Section 190.3 provides, in part:

> After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

190.3, factors (b) and (c),[4] California's death penalty scheme does not address the burden of proof applicable to these factual determinations. The California Supreme Court specifically considers the determination that aggravation outweighs mitigation to be a normative, rather than factual, finding. *People v. McKinzie*, 54 Cal. 4th 1302, 1366 (2012). Additionally, the state court has concluded that a capital sentencing jury as a whole need not agree on the existence of any one aggravating factor. See, e.g., *People v. Contreras*, 58 Cal. 4th 123 (2013) [juror unanimity not required for any aggravating factor]. This is true even though the jury must make certain factual findings in order to consider certain circumstances as aggravating factors. See, e.g., *People v. Prieto*, 30 Cal. 4th 226, 263 (2003).

By failing to require that the jury unanimously find each aggravator relied upon and weighed to be true beyond a reasonable doubt, and applying this standard to the factual determination that aggravation outweighs mitigation, California's death penalty scheme violates the Fifth, Sixth and Fourteenth Amendments. This Court should grant certiorari to bring the largest death row population in the nation into compliance with the guarantees of the United States Constitution.

[4] The capital sentencing jury is instructed that the standard of proof as to factors (b) and (c) is beyond a reasonable doubt. See *People v. Montes*, 58 Cal. 4th 809, 899 (2014).

II. Procedural History

In this case, a jury found petitioner guilty of the attempted robberies and murders of Andres Encinas and Antonio Urrutia, with the special circumstances of multiple murder and murder in the commission of robbery or attempted robbery. *Mora*, 5 Cal. 5th at 451.

At petitioner's penalty trial, the prosecutor relied on the circumstances of the crime and presented victim impact evidence, and misconduct while in the county jail. *Mora*, 5 Cal. 5th at 458-60. In mitigation, petitioner offered testimony from his family about his difficult childhood. *Mora*, 5 Cal. 5th at 462-63.

Petitioner's jury was instructed in conformity with the principles set forth in the preceding section. 5 CT 1194-95; 20 RT 3176-77 (CALJIC No. 8.85); 4 CT 1211; 21 RT 3294-96) (CALJIC No. 8.88). Consistent with California law, the jury that sentenced petitioner to death was not required to find beyond a reasonable doubt that (1) an aggravating factor existed, (2) the aggravating circumstances outweighed the mitigating circumstances, and (3) the aggravating circumstances were so substantial that they warranted death instead of life without parole. After being instructed, the jury returned a death verdict. 5 CT 1222.

In his direct appeal from the judgment of death, petitioner alleged California's death penalty scheme violates the Fifth, Sixth and Fourteenth Amendments because it does not require as a predicate to imposition of a death judgment that a jury find beyond a

reasonable doubt that an aggravating factor existed, the aggravating factors outweigh the mitigating factors, and the aggravating factors are so substantial that they warrant death instead of life without parole. Petitioner cited *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (*Apprendi*), and *Ring v. Arizona*, 536 U.S. 584 (2002) (*Ring*) in support of his challenge. The California Supreme Court rejected petitioner's claims, stating:

> 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 federal constitutional requirement that the jury make written findings regarding factors in aggravation. . . . . [¶] "During the penalty phase, the jury may consider a defendant's unadjudicated criminal activity and need not unanimously agree beyond a reasonable doubt that such criminal activity occurred." [¶] We have consistently concluded there is no burden of proof at the penalty phase. The trial court is under no obligation to instruct the jury that neither party bears the burden of proof.

Mora, 5 Cal.5th at 519 (internal citations omitted).

The California Supreme Court has also rejected the argument that *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616, 621-624 (2016) (*Hurst*) dictates a different result, finding that "[t]he California sentencing scheme is materially different from that in Florida." *People v. Rangel*, 62 Cal. 4th 1192, 1235 n. 16 (2016).

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REASONS FOR GRANTING THE PETITION

CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER CALIFORNIA'S DEATH PENALTY SCHEME VIOLATES THE CONSTITUTIONAL REQUIREMENT THAT ANY FACT, OTHER THAN A PRIOR CONVICTION, THAT SERVES TO INCREASE THE STATUTORY MAXIMUM OR MINIMUM PENALTY FOR A CRIME MUST BE FOUND BY A JURY BEYOND A REASONABLE DOUBT

I. This Court Has Repeatedly Held That Every Fact That Serves To Increase The Statutory Maximum Or The Mandatory Minimum Penalty Of Criminal Punishment Must Rest Upon A Jury Determination That Has Been Found 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). Where proof of a particular fact, other than a prior conviction, exposes the defendant to greater punishment than that available in the absence of such proof, that fact is an element of the crime that the Fifth, Sixth and Fourteenth Amendments require be proven to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490; see also *Cunningham v. California*, 549 U.S. 270, 281-82 (2007); *Blakely v. Washington*, 542 U.S. 292, 301 (2004).

In *Apprendi*, a noncapital sentencing case, and *Ring*, a capital sentencing case, this 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*, 536 U.S. at 589; *Apprendi*, 530 U.S. at 483. As explained in *Ring*:

> The dispositive question, we said, "is one not of form, but of effect." (Citation omitted.) 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, 536 U.S. at 602, quoting *Apprendi*, 530 U.S. at 494, 482-83. Applying this mandate, this Court invalidated Florida's death penalty statute in *Hurst*, 136 S.Ct. 616. The core Sixth Amendment principle as it applies to capital sentencing statutes was restated: "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence of death*." *Hurst*, 136 S.Ct. at 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*, 136 S.Ct. at 622.

In Florida, a defendant convicted of capital murder is punished by either life imprisonment or death. *Hurst*, 136 S.Ct. at 620, citing former Fla. Stat. §§ 782.04(1)(a), 775.082(1). Under the statute at issue in *Hurst*, after returning its verdict of conviction, the jury rendered an advisory verdict at the sentencing proceeding, but the judge made the ultimate sentencing determinations. *Hurst*, 136 S.Ct. at 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. *Id.* at 622, citing former Fla. Stat. § 921.141(3). These determinations were part of the "necessary factual finding that *Ring* requires." *Ibid.*[5]

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*, 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 for imposition of the 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*, 536 U.S. at 588; *Hurst*, 136 S.Ct. at 624.

Nevertheless, the opinion in *Hurst* shows that, like in *Ring*, a specific application of a broader Sixth Amendment principle necessitates any fact that is required for a death sentence, but not for the lesser punishment of life imprisonment, must be found by the

[5] As this Court explained in *Hurst*, 136 S.Ct. at 622:

[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)].

jury. *Hurst*, 136 S.Ct. at 619, 622. The decision 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*." *Id*. at 619, italics added. This fundamental principle is reiterated throughout the opinion in clear and unqualified language which 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*, 536 U.S. at 610 (Scalia, J., concurring); *Apprendi*, 530 U.S. at 494.

II. 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, § 190.4(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*, 60 Cal. 4th 1,106 (2014).

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*, 62 Cal. 4th at 1235 n.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 (Cal. Penal 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'" (Cal. Penal Code § 190.3); in Arizona that "'there are no mitigating circumstances sufficiently substantial to call for leniency'" (*Ring*, 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*, 136 S.Ct. at 622, quoting Fla. Stat. § 921.141(3)).[6]

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

[6] 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*, 136 S.Ct. at 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 determination that the aggravating factors outweigh the mitigating factors that finally authorizes imposition of the death penalty.

the ambit of *Ring*. *See Hurst*, 136 S.Ct. at 622 (in Florida the "critical findings necessary to impose the death penalty" includes the weighing determination among the facts the sentencer must find before death is imposed). The pertinent question is not what the weighing determination is called, but its consequence. *Apprendi* made this clear: "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494. 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, 536 U.S. at 610 (Scalia, J., concurring).

The decisions of other courts illustrate the factfinding nature of the weighing determination. In *Hurst v. State*, 202 So. 3d 40, 43 (Fla. 2016), the Florida Supreme Court reviewed whether a unanimous jury verdict was required in a capital sentencing, in light of this Court's decision discussed above. Each of the considerations that must be made before death is imposed, including the determination that aggravation outweighs mitigation, were described as "elements" that the sentencer must determine, akin to elements of a crime during the guilt phase. *Hurst v. State*, 202 So. 3d at 53, 57. There was nothing that separated the capital weighing process from any other finding of fact.

The Delaware Supreme Court 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 described the determinations that aggravation warrants death, or that mitigation outweighs aggravation, as being findings of fact that a jury must make. *State v. Whitfield*, 107 S.W. 3d 253, 259-60 (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*, ___ U.S. ___, 134 S.Ct. 405, 410-11 (2013) (Sotomayor, J., dissenting from denial of cert.).[7]

The constitutional question therefore cannot be avoided, as the California court has done, by collapsing the weighing finding that is a prerequisite to the imposition of a death penalty and labeling it "normative" rather than "factual." See, e.g., *People v. Karis*, 46 Cal. 3d 612, 639-40 (1988); *McKinzie*, 54 Cal. 4th at 1366. At bottom, the inquiry is one of function. *See Ring*, 536 U.S. at 610 (Scalia, J., concurring) (it does not matter whether

[7] 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 aggravators outweigh the mitigators "is not a finding of fact in support of a particular sentence"); *Ritchie v. State*, 809 N.E. 2d 258, 265-66 (Ind. 2004) (the finding that the aggravators outweigh the mitigators is not a finding of fact under *Apprendi* and *Ring*); *Nunnery v. State*, 127 Nev. 749, 773-75 (2011) ("the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor" under *Apprendi* and *Ring*). This difference makes granting certiorari on the issue presented in this case particularly important.

the statue labels facts as being "elements of the offense, sentencing factors, or Mary Jane").

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. § 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. § 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*, 61 Cal. 4th 788, 794 (2015) (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*, 34 Cal. 3d 567, 572 (1983) (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*, 213 Cal. App. 3d 1214, 1217 (1989) (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." § 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 decision is therefore a factfinding determination.

Essentially, 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. As discussed above, this is a factfinding under *Ring* and *Hurst*. 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 *People v. Brown*, 40 Cal. 3d 512, 544 (1985) (*rev'd. on other grounds sub. nom. California v. Brown*, 479 U.S. 538 (1987) ["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 outweigh the mitigation. This is the "normative" part of the jury's decision. *Brown*, 40 Cal. 3d at 540.

This understanding of section 190.3 is supported by *Brown* itself. In construing the "shall impose death" language in the weighing requirement of section 190.3, the supreme 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, 40 Cal. 3d at 542, italics added. *Brown* therefore construed 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 California Penal Code section 190.3.[8] The requirement that the jury must find that the aggravating circumstances

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[8] 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

(continued...)

outweigh the mitigating circumstances remained a precondition for imposing a death sentence. Nevertheless, once this prerequisite finding was made, the jury had discretion to impose either life or death as the punishment it deemed appropriate under all the relevant circumstances. The revised standard jury instructions, California Criminal Jury Instructions (CALCRIM), "written in plain English" to "be both legally accurate and understandable to the average juror" (CALCRIM, vol. 1, Preface, p. v. (2006)), 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.

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[8](...continued)

> 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.

CALCRIM No. 766, emphasis added. As discussed above, *Hurst*, 136 S.Ct. at 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*.

III. California Law Is Inconsistent With This Court's Precedents In *Hurst*, *Ring* And *Apprendi*

The question presented here is whether a capital sentencing jury must make factual findings required to impose a death sentence under the beyond-a-reasonable-doubt standard. *Hurst*, *Ring* and *Apprendi* make clear that those findings must be made under that standard. The California Supreme Court erroneously has concluded otherwise.

Under the California death penalty scheme, as set forth above, if a defendant is found guilty of first degree murder, and the jury finds that one of the special circumstances enumerated in section 190.2 is true beyond a reasonable doubt, section 190.3 requires that a separate hearing be held to determine whether the defendant will be sentenced to death or a term of life without the possibility of parole. Upon a true finding of a special circumstance, the mandatory minimum sentence is life without parole. The jury is instructed that it may impose a sentence of death only if it is "persuaded that the aggravating circumstances are so substantial in comparison to the mitigating circumstances that it [sic] warrants death instead of life without parole." CALJIC 8.88.

Logically, then, petitioner's jury was required to make three findings at the penalty phase before deciding to sentence him to death: (1) an aggravating factor above and beyond the elements of the crime itself was present; (2) the aggravating factors outweighed the mitigating factors; and (3) the aggravating factors were so substantial that they warranted death instead of life without parole. These factual findings exposed petitioner to a greater punishment (death) than he would otherwise receive (life without parole). Under the principles that animated this Court's decisions in *Apprendi*, *Ring* and *Hurst*, the jury should have been required to make these 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.").

Nevertheless, the California Supreme Court has repeatedly concluded that California's death penalty scheme permits the trier of fact to impose a sentence of death without finding the existence of an aggravating factor under section 190.3 beyond a reasonable doubt, that any aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt, and that the aggravating factors were so substantial that they warranted death instead of life without parole. It reasons as follows:

> [U]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the

> prescribed statutory maximum for the offense; the only alternative is life imprisonment without possibility of parole.

People v. Anderson, 25 Cal. 4th 543, 589-90 n.14 (2001). In the state court's view, "facts which bear upon, but do not necessarily determine, which of these two alternative penalties [death or life without parole] is appropriate do not come within the holding of *Apprendi*." *People v. Snow*, 30 Cal. 4th 43, 126 n.32 (2003). That same reasoning was applied to petitioner's case.

The Attorney General of Arizona made a similar argument about the Arizona statute invalidated in *Ring v. Arizona*, when it argued that the defendant was sentenced within the range of punishment authorized by the jury verdict. This Court dispatched that contention as follows:

> This argument overlooks *Apprendi's* instruction that "the relevant inquiry is one not of form, but of effect." In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." The Arizona first degree murder statute "authorizes a maximum penalty of death only in a formal sense," for it explicitly cross references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. If Arizona prevailed on its opening argument, *Apprendi* would be reduced to a "meaningless and formalistic" rule of statutory drafting.

Ring, 536 U.S. at 604 (citations omitted, brackets in original).

Just as the presence of the hate crime enhancement in *Apprendi* elevated the defendant's sentence range beyond the prescribed statutory maximum, in California the three factual findings the jury must make at the penalty phase increase the punishment

that may be imposed on the defendant. As in *Ring*, the maximum punishment a defendant may receive under the California law for first degree murder with a special circumstance is life without parole; a death sentence is simply not available without a finding that (1) at least one enumerated aggravating factor under section 190.3 exists; (2) the aggravating factors outweigh the mitigating factors; and (3) the aggravating factors are so substantial that they warrant death instead of life without parole. Because California requires no standard of proof as to the factual findings upon which a death verdict rests, the imposition of a death sentence under current California law violates a defendant's constitutional guarantee to proof beyond a reasonable doubt of all facts that serve to increase the penalty.

The California Supreme Court has justified its position, in part, on the theory that "the penalty phase determination in California is normative, not factual," and is therefore "analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." *People v. Prieto*, 30 Cal. 4th at 275. However, that analogy is unavailing. The discretion afforded under California law to sentencing judges in noncapital cases came under this Court's scrutiny in *Cunningham v. California*, 549 U.S. 270. The California Supreme Court, in *People v. Black*, 35 Cal. 4th 1238, 1254 (2005), had concluded that California's Determinate Sentencing Law (DSL) did not run afoul of the bright-line rule set forth in *Blakely* and *Apprendi* because "[t]he judicial factfinding that occurs during [the selection of an upper term sentence] is the same type

of judicial factfinding that traditionally has been a part of the sentencing process." *Id*. at 1258. This Court rejected that analysis, finding that circumstances in aggravation under the DSL (1) were factual in nature, and (2) were required for a defendant to receive the upper term. *Cunningham*, 549 U.S. at 288-93. "Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." *Id*. at 293 (footnote omitted). In sum, while the penalty phase may have a "normative"apect, it is nonetheless a factfinding subject to the requirements of *Hurst*, *Apprendi* and *Ring*.

Finally, that this Court has previously upheld portions of the California death penalty scheme (*see Tuilaepa*, 512 U.S. 967) does not insulate that scheme from the principles elucidated in *Apprendi*. The Arizona death penalty scheme before this Court in *Ring* had been upheld in *Walton v. Arizona*, 497 U.S. 639 (1990). *Ring* overruled *Walton* and demonstrates that the principles elucidated in *Apprendi* can invalidate capital-sentencing schemes that have been previously upheld. Similarly, that this Court upheld Florida's capital sentencing scheme in *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v. Florida*, 468 U.S. 447 (1984) did not bar the application of the Sixth Amendment in *Hurst*. *Hurst*, 136 S.Ct. at 623-24.

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IV. California, With The Largest Death Row In The Nation, 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 the state's 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 militate in favor of a 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 2,738. See Death Penalty Information Center at https://deathpenaltyinfo.org/documents/FactSheet.pdf (last visited January 11, 2019). California's refusal to require a jury to find aggravating factors and all factual findings that are necessary to impose death using the beyond a reasonable doubt standard has widespread effect on a substantial portion of this country's capital cases.

Second, of the 32 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.[9] The statutes of several states are

[9] See Ala. Code 1975 § 13A-5-45(e); Ariz. Rev. Stat. Ann. § 13-751(B); Ark. Code Ann. § 5-4-603(a); Colo. Rev. Stat. Ann. § 18-1.3-1201(1)(d); Del. Code Ann., Tit. 11, § 4209(c)(3)a.1; Ga. Code Ann. § 17-10-30(c); Idaho Code § 19-2515(3)(b); Ind. Code Ann. § (continued...)

silent on the standard of proof by which the state must prove aggravating factors to the trier of fact.[10] However, with the exception of the Oregon Supreme Court,[11] 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.[12] California may be one of only several states that refuse to require that factual findings that serve as a prerequisite to death be made beyond a reasonable doubt before the trier of fact may impose a sentence of death.

Certiorari is necessary to bring California, with the largest death row population in the nation, into compliance with the Fifth, Sixth and Fourteenth Amendments by

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[9](...continued)
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)(1); Ohio Rev. Code Ann. § 2929.04(B); Okla. Stat. Ann., Tit. 21, § 701.11; 42 Pa. Cons. Stat. § 9711(c)(1)(iii); S.C. 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).

[10] See Fla. Stat. § 921.141(1), (2)(a); Ore. Rev. Stat. § 163.150(1)(a); Utah Code Ann. § 76-3-207(2)(a)(iv).

[11] See *State v. Longo*, 148 P.3d 892, 905-06 (Or. 2006).

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

requiring the state to prove beyond a reasonable doubt the factual findings that are a prerequisite to the imposition of the death penalty.[13]

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[13] Furthermore, if the factual findings set forth above are the functional equivalents of elements of an offense to which the Fifth, Sixth, and Fourteenth Amendment rights to trial by jury on proof beyond a reasonable doubt apply, then it necessarily follows, contrary to the view of the California Supreme Court, that aggravating circumstances must be found by a unanimous jury beyond a reasonable doubt. 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 juror unanimity, federal constitutional right to due process requires that jurors unanimously be convinced beyond a reasonable doubt).

CONCLUSION

Wherefore, petitioner respectfully requests that this Court grant the petition for a writ of certiorari and reverse the judgment of the Supreme Court of California upholding his death sentence.

Dated: January 16, 2019

Respectfully Submitted,

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