No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RUBEN PEREZ GOMEZ,
Petitioner,

v.

THE STATE OF CALIFORNIA,
Respondent.

On Petition For Writ Of Certiorari To The
Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

(Death penalty case)

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Question presented

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

Table of contents

Table of authorities

Federal Cases

Federal Constitution

Federal Statutes

State cases

California Constitution

State statutes

Other Authorities

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Petition for writ of certiorari

Petitioner Ruben Perez Gomez respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of California affirming his convictions of murder and sentence of death.

Parties to the proceedings

The parties to the proceedings below were petitioner, Ruben Perez Gomez, and Respondent, the People of the State of California.

Opinions below

On November 29, 2018, the California Supreme Court issued an opinion affirming Mr. Gomez's convictions and death sentence, reported at 6 Cal.5th 243. Appendix ("App.") A.

Mr. Gomez sought rehearing, which the California Supreme Court denied on February 13, 2019. App. B.

Jurisdiction

The California Supreme Court entered its judgment on November 29, 2018, and denied rehearing on February 13, 2019. On May 3, 2019, Justice Kagan granted petitioner's application for extension of time within which to file a petition for certiorari in this case to June 13, 2019. App. 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: "No person . . . shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

II. State Statutory Provisions

The relevant state statutes include California Penal Code sections 187, 190, 190.1, 190.2, 190.3, 190.4, and 190.5. App. D.

Statement of the case

I. Introduction

Petitioner was convicted and sentenced to death under California's death penalty law, 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 determines whether any of the special circumstances enumerated in section 190.2 are true beyond a reasonable doubt. If so, a separate penalty phase is held to determine whether the defendant should be sentenced to life imprisonment without possibility of parole or death. §§ 190.2 & 190.3; *Tuilaepa v. California,* 512 U.S. 967, 975-976 (1994). At the penalty phase, the parties may present evidence "relevant to aggravation, mitigation, and sentence . . . ." § 190.3. Section 190.3 lists the aggravating and mitigating factors the jury is to consider.

Consistent with this statutory scheme, the jurors in this case were instructed that they could sentence petitioner to death only if each of them was "persuaded that the aggravating

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

circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." 31RT 4616-4617; 13CT 3448; [2] California Jury Instructions Criminal (CALJIC) No. 8.88. The instruction defines an aggravating circumstance 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." 31RT 4615; 13CT 3447-3448; CALJIC No. 8.88; see CALCRIM No. 763; *People v. Steele,* 27 Cal.4th 1230, 1258 (2002).[3]

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[2] "CT" refers to the Clerk's Transcript. "RT" refers to the Reporter's Transcript.

[3] The capital sentencing jury is not instructed in the exact language of the statute, which 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.

For prior violent criminal activity and prior felony convictions – section 190.3 factors (b) and (c) – the standard of proof is beyond a reasonable doubt. *See People v. Montes,* 58 Cal.4th 809, 899 (2014). But under California law, proof beyond a reasonable doubt is not required for any other sentencing factor; and the prosecutor does not have to establish beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances or that death is the appropriate penalty. *Ibid.* The state high court has also 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, 173 (2013). The court deems a juror's determination whether aggravation outweighs mitigation to be a normative conclusion, not a factual finding. *People v. Merriman,* 60 Cal.4th 1, 106 (2014). 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).

The California Supreme Court has since rejected the argument that *Hurst v. Florida*, __ U.S. __, 136 S.Ct. 616, 621-624 (2016) dictates a different result, on the grounds that "[t]he

California sentencing scheme is materially different from that in Florida." *People v. Rangel,* 62 Cal.4th 1192, 1235, n. 16 (2016).

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

II. Procedural History.

Petitioner was convicted of four counts of first degree murder; of the kidnapping and robbery of one of the murder victims; and of an unrelated second degree robbery. 3CT 836-844; 29RT 4343-4353. A multiple murder special circumstance was found true, and kidnap and robbery felony-murder circumstances were found true with respect to one victim. 3CT 837, 844; 29RT 4345, 4351. The jury found a firearm allegation true with respect to three of the counts of murder, with respect to the kidnap and robbery counts associated with one of the counts of murder, and

with respect to the unrelated robbery count. 3CT 836-844; 29RT 4343-4353.[4]

At the penalty phase, the prosecutor presented evidence that petitioner had been convicted of 1991 robbery and that he had been convicted of assault by a state prisoner and possession of a deadly weapon by a state prisoner. 30RT 4400-4412, 4429-4430. The prosecution also introduced evidence of several jail incidents occurring before and during trial in this case, including a deputy's testimony that petitioner stabbed him with a jail-made shank. 30RT 4435-4445, 4454-4456, 4460-4467, 4476.

In mitigation, the defense presented testimony by a California Department of Corrections administrator regarding the conditions in which petitioner would be housed if he were sentenced to life without parole. 31RT 4524-4531. The defense also presented the testimony of petitioner's sister, who testified

[4] With respect to one of the murders, the jury found the firearm allegation not true, and it found a robbery felony-murder special circumstance not true. 3CT 840; 29RT 4348-4349. The jury acquitted petitioner of the robbery associated with that murder count. 3CT 841; 29RT 4349. The jury hung with respect to a fifth murder charge. 29RT 4339.

about their family, including petitioner's three children. 31RT 4543-4545.

The court then instructed the jury in accordance with the statutory scheme at issue here. 31RT 4605-4617; 13CT 3444-3448; CALJIC Nos. 8.85 & 8.88. The jury sentenced petitioner to death with respect to two of the murder convictions, and to life without parole with respect two of the murder convictions. 13CT 3423-3429, 3449-3452; 31RT 4625-4629.

On direct appeal, petitioner argued that California's death penalty scheme violates the Fifth, Sixth, and Fourteenth Amendments, citing *Apprendi v. New Jersey,* 530 U.S. 466 (2000) and *Ring v. Arizona,* 536 U.S. 584, 604 (2002). In a letter submitted to the California Supreme Court before oral argument, petitioner cited *Hurst v. Florida,* __ U.S. __, 136 S.Ct. 616 (2016), decided by this Court after the filing of petitioner's reply brief.

The California Supreme Court rejected petitioner's claims, stating: "Nothing in the federal Constitution requires the penalty phase jury to . . . agree unanimously that a particular aggravating circumstance exists; find all aggravating factors proved beyond a reasonable doubt or by a preponderance of the evidence; find that

aggravation outweighs mitigation beyond a reasonable doubt; or conclude beyond a reasonable doubt that death is the appropriate penalty. . . . . Likewise, we have repeatedly held that CALJIC No. 8.88 provides constitutionally sufficient guidance to the jury on the weighing of aggravating and mitigating factors. . . . We have rejected the claim that the instruction unconstitutionally fails to inform the jury that, in order to impose the death penalty, it must find that aggravating circumstances outweigh mitigating ones beyond a reasonable doubt. . . . Under our precedent, the trial court need not and should not instruct the jury as to any burden of proof or persuasion at the penalty phase." *People v. Gomez,* 5 Cal.5th 243, 315-316 (2018) (citations and internal quotation marks omitted); see App. A, pp. 63-64. The court has also rejected the argument that *Hurst v. Florida*, *supra*, 136 S.Ct. 616, dictates a different result. *People v. Rangel,* 62 Cal.4th 1192, 1235 n. 16 (2016).

Petitioner sought rehearing, asking the court to address the application of *Hurst*, to his claim that California's death penalty scheme violates the United States Constitution. The court denied rehearing. App. B.

Reasons for granting the writ

Certiorari should be granted to decide whether California's death penalty statute violates the constitutional requirement that any fact that increases the penalty for a crime must be found by a jury beyond a reasonable doubt.

I. This Court has held that every fact that serves to increase a maximum criminal penalty must be proven to a jury 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 applicable in the absence of such proof, that fact must be proven to a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, *supra*, 530 U.S. at 490; *see also Cunningham v. California*, 549 U.S. 270, 281-282 (2007); *Blakely v. Washington*, 542 U.S. 296, 301 (2004). As the Court put it 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*, 530

U.S. at 494. In *Ring*, 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." *Ring*, 536 U.S. at 602, quoting *Apprendi*, 530 U.S. at 494, 482-483.

Applying this mandate, the Court in *Hurst* 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*, 136 S.Ct. at 619 (emphasis 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*, 136 S.Ct. at 622.

Under the capital sentencing statute invalidated in *Hurst*, former Fla. Stat. §§ 782.04(1)(a), the jury rendered an advisory verdict at the sentencing proceeding, with the judge then making the ultimate sentencing determination. *Hurst*, 136 S.Ct. at 620,

citing 775.082(1). The judge was responsible for finding that "sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the 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.*[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

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[5] 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) (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, 136 S.Ct. at 622.

(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*, 536 U.S. at 588; *Hurst*, 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*, 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 (emphasis added).

II. 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 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. Penal 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" (§ 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 the aggravating circumstances'" (*Hurst*, 136 S.Ct. at 622, quoting Fla. Stat. § 921.141(3)).[6]

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 the late 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

[6] 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.

> Mary Jane – must be found by the jury beyond a reasonable doubt.

Ring, 536 U.S. at 610 (Scalia, J., concurring) (emphasis added); s*ee also Hurst*, 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 53-54, 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 "[t]he 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, 134 S.Ct. 405, 410-411 (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) (federal jurisdiction; 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 tried to do. *See*, *e.g.*, *Merriman*, 60 Cal.4th at 106; *People v. Karis*, 46 Cal.3d 612, 639-40 (1988). At bottom, the

inquiry is one of function. *See Ring*, 536 U.S. at 610 (Scalia, J., concurring) (all "facts" essential to determination of penalty, however labeled, must be made by jury).

III. 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 October 1, 2018, California, with 740 inmates on death row, had over one-fourth of the country's total death-row population of 2,721. *See* Death Penalty Information Center at http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (last visited June 11, 2019). 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 31 jurisdictions in the nation with the death penalty, including the federal government and the military, the statutes of the vast majority provide that aggravating factors must be proven beyond a reasonable doubt.[7] California's statute may be one of the very few that does not.

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 requiring the state to prove beyond a reasonable doubt the factual findings that are a prerequisite to the imposition of the death penalty.[8]

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[7] *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); 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.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).

[8] Further, 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 follows, contrary to

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: June 12, 2019

Respectfully submitted,

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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) (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); see *Ramos v. California,* 139 S.Ct. 1318 (2019) (certiorari granted on question whether to overrule *Apodaca v. Oregon,* 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972), which held that the federal constitution does not require unanimous jury verdicts in state proceedings).