No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL LEON BELL,

Petitioner,

vs.

STATE OF CALIFORNIA

Respondent.

On Petition for Writ of Certiorari to
the Supreme Court of the State of California, No. S080056

PETITION FOR WRIT OF CERTIORARI

IN A CAPITAL CASE

MELISSA HILL
Counsel of Record
Member of the Bar of the
United States Supreme Court

Post Office Box 2758
Corrales, New Mexico 87048
Telephone: (505) 898-2977
Email: hill71218@gmail.com

Counsel for Petitioner Michael Leon Bell

CAPITAL CASE—NO EXECUTION DATE SET

QUESTION PRESENTED

Does California's death penalty scheme, which permits the trier of fact to impose a sentence of death without finding beyond a reasonable doubt (1) the existence of one or more aggravating circumstances, (2) that aggravating circumstances outweigh mitigating circumstances, and (3) that the aggravating circumstances are so substantial that they warrant death instead of life, 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 penalty for a crime must be found by a jury beyond a reasonable doubt.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the California Supreme Court were Petitioner, Michael Leon Bell, and Respondent, the People of the State of California.

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OTHERS

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL LEON BELL,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

IN A DEATH PENALTY CASE

Petitioner, Michael Leon Bell, respectfully petitions this Court 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.

OPINION BELOW

The opinion of the Supreme Court of the State of California, which is the subject of this petition, is attached as Appendix B, and is reported at *People v. Bell*, 7 Cal.5th 70 (2019).

JURISDICTION

The California Supreme Court entered its judgment affirming the convictions and death judgment on May 2, 2019. A Petition for Rehearing was not filed.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS 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* 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 where the crime shall 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.

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, nor deny to any person within its jurisdiction the equal protection of the laws."

II. California Statutory Provisions:

California Penal Code §§ 190, 190.1, 190.2, 190.3, and 190.4. Copies of the cited California statutes are attached as Appendix C.[1]

STATEMENT OF THE CASE

I. The Statutory Scheme.

Petitioner was convicted and sentenced to death under California's death penalty law, which was adopted by an initiative measure approved in 1978. Sections 190, 190.1, 190.2, 190.3 and 190.4. Under that statutory scheme, once the defendant has been found guilty of first degree murder, the trier of fact must determine whether any of the special circumstances enumerated in section 190.2 are true beyond a reasonable doubt. If so, the court must hold a separate penalty hearing to determine whether the punishment will be death or life imprisonment without the possibility of parole. Sections 190.2(a), 190.3, and 190.4; *Tuilaepa v. California*, 512 U.S. 967, 975-976 (1994). During the penalty hearing, the parties may present evidence "as to any matter relevant to aggravation, mitigation, and sentence . . . ." Section 190.3. In determining the appropriate penalty, the trier of fact must consider and be guided by the aggravating and mitigating factors referred to in section 190.3 and may impose a sentence of death only if it

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

concludes that "the aggravating circumstances outweigh the mitigating circumstances."[2] *Ibid.* If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances, it must impose a sentence of life without the possibility of parole. *Ibid.*

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

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[2] The following are the aggravating and mitigating factors set forth in section 190.3
(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 affects 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.

comparison to the mitigating circumstances that it warrants death instead of life without parole." 18 RT[3] 3815; California Jury Instructions Criminal (CALJIC) No. 8.88.[4] That 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. 18 RT 3814; CALJIC No. 8.88; see CALCRIM No. 763: *People v. Dyer*, 45 Cal.3d 26, 77 (1988); *People v. Steele*, 27 Cal.4th 1230, 1258 (2002).[5]

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[3] "RT" refers to the original Reporter's Transcript.

[4] In 2006, the California Judicial Council adopted revised jury instructions known as the California Jury Instructions (Criminal) or "CALCRIM." CALCRIM No. 766 provides in relevant part: "Determine which penalty is appropriate and justified by considering all the evidence and the totality of any aggravating and mitigating circumstances. Even without mitigating circumstances, you may decide that the aggravating circumstances are not substantial enough to warrant death. 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."

[5] The capital sentencing jury is not instructed in the exact language of the statute, which provides in pertinent 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

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 California Supreme Court has concluded that a capital sentencing jury as a whole need not agree, and therefore need not be unanimous, regarding the existence of any one aggravating factor. See *People v. Contreras*, 58 Cal.4th 123, 173 (2013). That 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 Florida." *People v. Rangel*, 62 Cal.4th

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> 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. Section 190.3.

1192, 1235, n. 16 (2016); see also, *People v. Dalton*, 7 Cal.5th 166, 267 (2019).

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.

II. Petitioner's Case.

Petitioner was charged with robbing and murdering the clerk of a convenience store, using a firearm. 1 CT[6] 189-193. On the date of the robbery in January 1997, Petitioner was 26 years of age. 5 CT 1290. On April 1, 1999, following a jury trial in Modesto, California, the jury found Petitioner guilty of first degree murder and robbery and found true special circumstances under section 190.2 of murder during the commission of a robbery and burglary (§190.2(a)(17)(A) & (G)). 4 CT 997-1000; 15 RT 2668-2670. Petitioner was additionally found guilty of shooting at an occupied vehicle and possession of a firearm by an ex-felon. 4 CT 997-1000; 15 RT 2668-2670.

At the penalty phase, the prosecutor presented victim impact evidence, which included testimony by several of the murder victim's family members and friends, and a video clip of the murder victim's recent wedding. As circumstances-of-the-crime evidence, the prosecutor played excerpts from a surveillance videotape of the robbery in which the sounds of the victim dying could be heard. 14 RT 2755-2765; 17 RT 3511-3514; 18 RT 3754.

[6] "CT" refers to the original Clerk's Transcript in the case.

In aggravation, the prosecution also presented evidence of prior convictions and unadjudicated prior assaults committed by Petitioner against his ex-wife and several others, a prior instance of evading and resisting arrest for drunk driving, his possession of cutting instruments, "shanks," while in jail, and testimony about an incident in the courtroom in which Petitioner became so upset by his mother's crying during the penalty phase that he had to be restrained. 14 RT 2765-2769, 2783-2828; 15 RT 2968-3015, 3028-3038; 16 RT 3369-3394; 17 RT 3405-3429, 3450-3474; see also, *People v. Bell*, 7 Cal.5th at 82-84, 86-87.

In mitigation, Petitioner presented lay and expert testimony about his deprived childhood, the adverse physical and psychological effects of Petitioner's having been born prematurely and kept in a hospital incubator for two months without human contact, of his untreated hyperactivity and behavioral problems as a child, and his serious cognitive deficits and brain dysfunction that persisted into adulthood. 15 RT 3043-3070; 16 RT 3125-3207; 16 RT 3296-3361. An expert also testified in defense regarding the conditions of confinement in California prisons for persons sentenced to life without the possibility of parole. 14 RT 2836-2857; see also *People v. Bell*, 7 Cal.5th at 84-87.

The trial court instructed the jury in accordance with the statutory sentencing scheme at issue here. 4 CT 1146-1148, 1221-1224; 1151-1153,18

RT 3678, 3690-3695, 3814-3816; former CALJIC Nos. 8.85 & 8.88. The jury returned a verdict of death on April 19, 1999. 5 CT 1231; 19 RT 3837. Petitioner was sentenced to death on June 18, 1999. 19 RT 3890-3891; 5 CT 1280-1283.

On appeal, Petitioner challenged California's death penalty scheme as violative of the Fifth, Sixth and Fourteenth Amendments because it does not require as a predicate to imposition of a death judgment that the jury unanimously find beyond a reasonable doubt (1) the existence of one or more aggravating circumstances, (2) that the aggravating circumstances outweigh the mitigating circumstances, or (3) that death is the appropriate penalty. In support of this argument, Petitioner cited *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002).[7] The California Supreme Court summarily rejected Petitioner's argument, citing its own prior decisions, as well this Court's decisions in *Apprendi*, *Ring*, and *Hurst*:

> The death penalty is not unconstitutional for failing to require "findings beyond a reasonable doubt that an aggravating circumstance (other than Pen. Code, § 190.3, factor (b) or factor (c) evidence) has been proved, that the aggravating factors outweighed the mitigating factors, or that death is the appropriate sentence." (*People v. Rangel* (2016) 62 Cal.4th 1192, 1235 [200 Cal. Rptr. 3d 265, 367 P.3d 649]; see [*People v. Winbush*] 2 Cal.5th 402, 489 [2017]; *People v. Clark* (2016) 63 Cal.4th 522, 643–644 [203 Cal. Rptr. 3d 407, 372 P.3d 811].) "This conclusion is

[7] *Hurst v. Florida*, __ U.S. __, 136 S.Ct. at 621-624 (2016) was decided after all briefs on appeal had been submitted in Petitioner's case; but it is referred to in the California Supreme Court's decision in this case and thus was considered. *People v. Bell*, 7 Cal.5th at 131.

> not altered by the decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L. Ed. 2d 435] (*Apprendi*), *Ring v. Arizona* (2002) 536 U.S. 584 [153 L. Ed. 2d 556, 122 S. Ct. 2428], and *Hurst v. Florida* (2016) 577 U.S. ___ [193 L.Ed.2d 504, 136 S.Ct. 616] (*Hurst*)." (*People v. Henriquez* (2017) 4 Cal.5th 1, 45 [226 Cal. Rptr. 3d 69, 406 P.3d 748] (*Henriquez*).)

People v. Bell, 7 Cal.5th at 130-131.

REASONS FOR GRANTING THE PETITION

CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER CALIFORNIA'S DEATH PENALTY SCHEME 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. Introduction.

This Court has repeatedly held that the Fifth, Sixth and Fourteenth Amendments require any fact other than a prior conviction be proven to a jury beyond a reasonable doubt if the existence of that fact serves to increase the statutory maximum for the crime. *Cunningham v. California*, 549 U.S. 2770, 281-82 (2007); *Blakely v. Washington*, 542 U.S. 296, 301 (2004); *Apprendi v. New Jersey*, 530 U.S. at 490. In capital cases, this constitutional mandate has been applied to the finding of aggravating factors necessary for imposition of the death penalty. See *Ring v. Arizona*, 536 U.S. at 609; see also *Hurst v. Florida*, 136 S.Ct. at 619, 621.

Despite the clarity of this Court's decisions in this area of the law, the California Supreme Court has repeatedly held that California's death penalty scheme permits the trier of fact—the jury—to impose a sentence of death without finding the existence aggravating factors beyond a reasonable doubt and without finding that aggravating factors outweigh mitigating factors beyond a reasonable doubt—two factual findings necessary to impose a death sentence under California's death penalty statute. See, e.g., *People v. Jones*, 3

Cal.5th 583, 618-619 (2017); *People v. Simon*, 1 Cal.5th 98, 149 (2016); *People v. Banks*, 59 Cal.4th 1113, 1207 (2014); *People v. Manibusan*, 58 Cal.App.4th 40, 99 (2013); *People v. Griffin*, 33 Cal.4th 536, 595 (2004); *People v. Prieto*, 30 Cal.4th 226 (2003); *People v. Anderson*, 25 Cal.4th 589-90 (2001).

II. 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); see also *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Where proof of a particular fact exposes the defendant to greater punishment than that available in the absence of such proof, that fact must be proven to a jury beyond a reasonable doubt. *Ring v. Arizona*, 536 U.S. at 609; *Apprendi v. New Jersey*, 530 U.S. at 490; *Cunningham v. California*, 549 U.S. at 281-282; *Blakely v. Washington*, 542 U.S. at 301. As this 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*, 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, citing *Apprendi*, 530 U.S. at 494, 482-483; see also *Blakely*, 542 U.S. at 305 (invalidating Washington state's sentencing scheme to the extent it permitted judges to impose an "exceptional sentence"– i.e., a sentence above the "standard range" or statutory maximum authorized by the jury's verdict– based upon a finding of "substantial and compelling reasons").

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.

In Florida, a defendant convicted of capital murder is punished by either life imprisonment or death. *Hurst*, 136 S.Ct. at 620, citing Fla. Stats. §§ 782.04(1)(a), 775.082(1). Under the capital sentencing statute invalidated in *Hurst*, former Florida Statutes, § 782.04(1)(a), and § 775.082(1), the jury rendered an advisory verdict at the sentencing proceeding, but the judge

made the ultimate sentencing determinations. *Hurst*, 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 are prerequisites for imposing a death sentence. 136 S.Ct. at 622, citing former Fla. Stat. § 921.141(3). This Court found that these determinations were part of the "necessary factual finding that *Ring* requires" [8] and held that Florida's death penalty statute was unconstitutional under *Apprendi* and *Ring*, because the sentencing judge, not the jury, made a factual finding, the existence of an aggravating circumstance, that was required before the death penalty could be imposed. 136 S.Ct. at 622, 624.

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*

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[8] As this Court explained:

> As described above and by the Florida Supreme Court, 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." 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)].

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 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.

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).

III. California's Death Penalty Scheme Violates this Court's Precedents by Not Requiring that All of the Jury's Factual Sentencing Findings Be Made Beyond a Reasonable Doubt.

The procedure for imposing a death sentence under California's death penalty scheme violates the defendant's right to proof beyond a reasonable doubt under the Fifth, Sixth and Fourteenth Amendments. Under sections 190.2(a), 190.3, and 190.4(a), once the trier of fact finds that the defendant committed first-degree murder with a true finding for at least one special circumstance, the court must hold a separate penalty phase hearing to

determine whether the defendant will receive a sentence of death or a term of life without the possibility of parole. In considering whether to impose the death penalty, the trier of fact must consider a variety of enumerated circumstances of factors in aggravation and mitigation. See §190.3. In California, a death sentence cannot be imposed on a defendant who has been convicted at the guilt phase of a capital trial 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) that the aggravating factors are so substantial that they warrant death instead of the lesser penalty of life without the possibility of parole. Under the principles set forth in *Apprendi*, *Ring* and *Hurst*, the jury in Bell's case should have been required to make these factual findings beyond a reasonable doubt. They were not.

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 makes two additional findings. First, the sentencer must find 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)). Second, the sentencer must engage at the selection stage 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. 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 the Florida statute invalidated in *Hurst*, that "'there are insufficient mitigating circumstances to outweigh aggravating circumstances'" (*Hurst*, 136 S.Ct. at 622, quoting Fla. Stat. § 921.141(3)).[9]

Although *Hurst* did not address the standard of proof as such, this 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*:

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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. See *Hurst*, 136 S.Ct. at 625, citing *Ring v. Arizona*, 536 U.S. at 592-593. 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.

> [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 a jury beyond a reasonable doubt.

(*Ring*, 536 at 610 (Scalia, J., concurring) (emphasis added); see also *Hurst*, 136 S.Ct. at 622 (in Florida, the "critical findings necessary to impose the death penalty" include weighing the facts the sentence 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 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 Sotomayer 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, 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.*, *People v. Merriman*, 60 Cal.4th at 106; *People v. Karis*, 46 Cal.3d 612, 639-640 (1988). The bottom line is that 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 the jury). Because the California statute requires the jury to make three additional findings—(1) the existence of one or more aggravating factors; (2) that the aggravating factors outweigh the mitigating factors; and (3) that the

aggravating factors are so substantial that they warrant death instead of the lesser penalty of life without the possibility of parole—before a death sentence may be imposed, these findings must be made beyond a reasonable doubt.

IV. 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. See, e.g., *People v. Jones*, 3 Cal.5th at 618-619; *People v. Simon*, 1 Cal.5th at 149; *People v. Monterroso*, 34 Cal.4th 743, 796 (2004); *People v. Griffin*, 33 Cal.4th at 595; *People v. Brown*, 33 Cal.4th 382, 401-402 (2004); *People v. Prieto*, 30 Cal.4th at 275; *People v. Anderson*, 25 Cal.4th at 589-90, n. 14. That court again so held in this case. *People v. Bell,* 7 Cal.5th at 130-31. The issue presented here is well-defined and will not benefit from further development in the California Supreme Court or any other state courts. These factors favor grant of certiorari, for two reasons.

First, as of July 1, 2018, California, with 740 inmates on death row, had more than one-fourth (27%) 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 July 22, 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 death row inmates.[10]

Second, of the 33 jurisdictions in the nation with the death penalty, including the federal government and the military, the statutes of 26 states and the federal government provide that aggravating factors must be proved beyond a reasonable doubt.[11] The statutes of three additional states contemplate the introduction of evidence in aggravation, but are silent on the standard of proof by which the state must prove this evidence to the trier of fact. With the exception of the Oregon Supreme Court,[12] the supreme courts of these jurisdictions have explicitly determined that the trier of fact must

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[10] On March 13, 2019, California Governor Gavin Newsome issued Executive Order N-09-19, establishing an indefinite moratorium on executions in the state. Executions could resume, however, as soon as Governor Newsome leaves office, and a new lethal injection protocol is adopted.

[11] See Ala. Code 1975 § 13A-5-45(E); Ariz. Rev. Stat. Ann. § 13-751(B); Ark. Code Ann. § 5-4-603; Colo. Rev. Stat. Ann. § 18-L.3-1201(1)(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.L(1); Mont. Code Ann. § 46-18-305; 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. § 37.071, Sec. (2)(C); Va. Code Ann. § 19.2-264.4(C); Wyo. Stat. § 6-2-102(D)(ii)(A), (E)(I); 18 U.S.C.A. § 3593(C).

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

find factors in aggravation beyond a reasonable doubt before it may use them to impose a sentence of death.[13] California and Oregon are the only two states that refuse to require the state to prove aggravating factors beyond a reasonable doubt before the jury 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 requiring the state to prove beyond a reasonable doubt the factual findings that are a prerequisite to the imposition of the death penalty.[14]

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[13] See *State v. Longo*, 341 Or. 580, 603-606, 148 P.3d 892, 905-06 (2006).

[14] 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 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 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 his petition for a writ of certiorari and reverse the judgment of the Supreme Court of California upholding Petitioner's death sentence.

Dated: July 25, 2019

Respectfully submitted,

Melissa Hill
Attorney of Record for Petitioner
Michael Leon Bell
P.O. Box 2758
Corrales, NM 87048
Phone: (505) 898-2977
Email: hill71218@gmail.com