No. _____

IN THE

Supreme Court of the United States

FRANK C. GONZALEZ,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

CAPITAL CASE

PETITION FOR WRIT OF CERTIORARI

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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 the existence of one or more aggravating circumstances, 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, Frank C. Gonzalez, and Respondent, the People of the State of California.

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PEOPLE OF THE STATE OF CALIFORNIA,

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PETITION FOR WRIT OF CERTIORARI

Petitioner Frank C. Gonzalez 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 of murder 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 A, pp. 1a – 33a, and is reported at *People v. Gonzalez,* 12 Cal.5th 367, 287 Cal. Rptr. 3d 2 (2021).

JURISDICTIONAL STATEMENT

The California Supreme Court entered its judgment on December 21, 2021. This petition is timely filed pursuant to Rule 13 of this Court in that it was filed within ninety (90) days after the final judgment of the California Supreme Court. Petitioner invokes this Court's jurisdiction under 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 wherein the crime may have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 1 of 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…."

II. State Statutory Provisions.

The relevant state statutes, attached as Appendix C, include California Penal Code[1] sections 190, 190.1, 190.2, 190.3, 190.4, and 190.5. *See* Appendix C, pp. 35a-48a.

STATEMENT OF THE CASE

I. California's Death Penalty Law.

Petitioner was convicted and sentenced to death under California's death penalty law, which was adopted by an initiative measure approved in 1978. Cal. Pen. Code, §§ 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

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

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 concludes that "the aggravating circumstances outweigh the mitigating circumstances."[2] *Ibid.* If the trier of fact determines that the

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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.

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 that they could sentence Petitioner to death only if each of them was "persuaded that the aggravating circumstances are so substantial in comparison to the mitigating circumstances that it warrants death instead of life without parole." 4 CT 991-993; 15 RT 3209[3]; 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." 4

(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.

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

[4] In 2006, the California Judicial Council adopted revised jury instructions known as California Criminal Jury Instructions, or "CALCRIM." CALCRIM No. 766 similarly provides in part: "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."

CT 991-993; 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]

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 the existence of one or more aggravating circumstances. *Ibid*. The California Supreme Court has also 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).

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[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 tier 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.

Cal. Pen. Code § 190.3.

By requiring capital sentencing jurors to make the factual determination that at least one or more aggravating factors exist but failing to require that this determination be made beyond a reasonable doubt, California's death penalty scheme violates the Fifth, Sixth and Fourteenth Amendments.

II. Petitioner's Case.

Petitioner, along with co-defendant Justin Flint, was charged with one count of first-degree murder in violation of section 187, the victim being Maria Rosa. In addition, petitioner and Flint were charged with one count of attempted second degree robbery of Ms. Rosa, pursuant to sections 211 and 664. Petitioner and Flint was further charged with one special circumstance: robbery-murder (§ 190.2 (a)(17)). A jury found Petitioner guilty of both counts and found the special circumstance allegation true. 4 CT 945-947; *People v. Gonzalez*, 12 Cal.5th at 372.

At the penalty phase, the prosecution presented evidence of prior criminal acts, including a number of robberies, misconduct during incarceration, and Petitioner's alleged participation in another murder, and also focused on the circumstances of the capital crime and related attempted robbery as well as its impact on the victim's family. *People v. Gonzalez*, 12 Cal.5th at 378-79. In mitigation, the defense presented evidence about

Petitioner's dysfunctional family and childhood. *Id.* at 380-81. The court then instructed the jury in accordance with the statutory sentencing scheme at issue here. 4 CT 989-993; CALJIC No. 8.88. The jury was specifically instructed that:

> 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 individually 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.

4 CT 991-993; 15 RT 3208-3209; CALJIC No. 8.88. The jury returned a verdict of death and on May 8, 2008, the court sentenced Petitioner to death; the judgment of death was entered on May 12, 2008, 42 CT 10728-10730; 16 RT 3368.

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 the existence of one or more aggravating circumstances and that the aggravating circumstances outweigh the mitigating circumstances. In support, Petitioner cited *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002).

The California Supreme Court rejected Petitioner's argument, citing its own prior decisions, and stating:

> The death penalty statute does not lack safeguards to avoid arbitrary and capricious sentencing ...or constitute cruel and unusual punishment on the ground that it does not require either unanimity as to the truth of aggravating circumstances or findings beyond a reasonable doubt that an aggravating circumstance (other than Pen. Code, § 190.3, factor (b) or (c) evidence) has been proved, that the aggravating factors outweighed the mitigating factors, or that death is the appropriate sentence.

People v. Gonzalez, 12 Cal.5th at 416.

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 penalty for the crime. *Cunningham v. California*, 549 U.S. 270, 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*, 577 U.S. 92, 94, 97-102, 136 S.Ct. 616 (2016).

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 of one or more aggravating factors beyond a reasonable doubt — a factual finding necessary to imposition of a death sentence under California's death penalty statute. *See*, *e.g.*, *People v. Banks*, 59 Cal.4th 1113, 1207 (2014); *People v. Manibusan*, 58 Cal.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 543, 589-90, n.14 (2001).

This Court should grant certiorari in order 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 the existence of aggravating factors to a jury beyond a reasonable doubt.

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 the Court stated in *Apprendi*, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494.

In *Ring v. Arizona*, this Court applied the holding of *Apprendi* to Arizona's death penalty scheme, where the maximum punishment for first-degree murder was life imprisonment unless the trial judge found beyond a reasonable doubt that one of ten statutorily enumerated aggravating factors existed. This Court held that the statutory scheme violated the *Apprendi* rule because aggravating factors exposing a capital defendant to the death penalty must be proven to a jury beyond a reasonable doubt. *Ring*, 536 U.S. at 589. In so holding, *Ring* 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).

In Florida, a defendant convicted of capital murder is punished by either life imprisonment or death. *Hurst*, 136 S.Ct. at 620, citing Fla. Stat. sections 782.04(1)(a), 775.082(1). Under the capital sentencing statute invalidated in *Hurst*, former Fla. Stat. sections 782.04(1)(a), 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. *Hurst*, 136 S.Ct. at 622, citing former Fla. Stat. section 921.141(3). This Court found that these

determinations were part of the "necessary factual finding that *Ring* requires"[6] 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. *Hurst*, 136 S.Ct. at 622, 624.

In *McKinney v. Arizona*, ___ U.S. ___, 140 S.Ct. 702, 707 (2020), quoting *Ring*, 536 U.S. at 589, this Court reaffirmed *Ring's* holding that "capital defendants 'are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.'" Although *McKinney* held that *Ring* and *Hurst* do not require jury weighing of aggravating and mitigating circumstances, it affirmed that under those two cases, "a jury must find the aggravating circumstance that makes the defendant death eligible." *McKinney*, 140 S.Ct. at 707. *McKinney* cited, with

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[6] 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. section 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." Section 921.141(3); *see* [*State v.*] *Steele*, 921 So.2d [538,] 546 [(Fla. 2005)].

Hurst, 136 S.Ct. at 622.

approval, *Hurst's* invalidation of Florida's capital sentencing scheme because it impermissibly allowed a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that was necessary for imposition of the death penalty.[7] *McKinney*, 140 S.Ct. at 707.

As discussed in the next section, because California's sentencing scheme requires the jurors to find the existence of at least one aggravating circumstance before it may impose death, the state must require that this factual determination be made beyond a reasonable doubt. Its failure to do so violates the Fifth, Sixth and Fourteenth Amendments.

III. California's Death Penalty Scheme Violates this Court's Precedents by Not Requiring the Jury to Find the Existence of One or More Aggravating Circumstances 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 California law, neither the jury nor the trial court may impose a death sentence based solely upon a verdict of first-degree murder with special circumstances. In

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[7] The judge, not the jury, found the death-eligibility aggravating factors in McKinney's case. *McKinney*, 140 S.Ct. at 708. Although *Ring* and *Hurst* now require this finding to be made by a jury, this Court observed that McKinney's case became final on direct review in 1996, long before *Ring* and *Hurst* were decided and, as held in *Schiro v, Summerlin*, 542 U.S. 348 (2004), *Ring* and *Hurst* do not apply retroactively. *McKinney*, 140 S.Ct. at 708.

order to impose the increased punishment of death, the jury must make an additional finding at the penalty phase, namely – a determination that at least one of the aggravating factors enumerated in section 190.3 exists.

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* section 190.3, Appendix C, pp. 42a-44a. Because the trier of fact can impose a sentence of death only where the aggravating circumstances outweigh the mitigating circumstances, it must find the existence of at least one aggravating factor under section 190.3 before it can impose the death penalty. Thus, 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 the existence of one or more aggravating factors or circumstances. Under the principles set forth in *Apprendi*, *Ring* and *Hurst*, the jury in this case should have been required to make this factual finding beyond a reasonable doubt. They were not.

Because California's factors in aggravation operate as "the functional equivalent of an element of a greater offense," *Apprendi*, 530 U.S. at 494, n.19, the Fifth, Sixth and Fourteenth Amendments require that they be found by the trier of fact beyond a reasonable doubt. Just as the presence of the hate crime enhancement in *Apprendi* elevated the defendant's sentence range beyond the prescribed statutory maximum, the presence of one or more aggravating factors under section 190.3 elevates a defendant's sentence beyond the statutory maximum of life in prison without possibility of parole to a sentence of death. As in *Ring*, the maximum punishment a defendant may receive under California law for first-degree murder with a special circumstance is life imprisonment without possibility of parole; a death sentence is simply unavailable without a finding that at least one enumerated aggravating factor or circumstance under section 190.3 exists. Consequently, as this Court made clear in *Ring*, since it is the existence of factors in aggravation that expose California's capitally-charged defendants to the death penalty, those factors must be proven beyond a reasonable doubt in order to impose a constitutionally valid death sentence. Because California requires no standard of proof as to those factors upon which a death verdict must rest, the imposition of a death sentence under California law violates a defendant's guarantee to proof beyond a reasonable doubt.

Despite the similarities between California's death penalty scheme and the sentencing schemes invalidated in *Apprendi*, *Ring* and *Hurst*,[8] the California Supreme Court has repeatedly held that the federal Constitution does not demand that aggravating factors, other than unadjudicated criminal acts, be proved to a jury beyond a reasonable doubt. *See*, *e.g.*, *People v. Monterroso*, 34 Cal.4th 743, 796 (2004); *People v. Griffin*, 33 Cal.4th at 595; *People v. Brown*, 33 Cal.4th 382, 401-02 (2004); *People v. Prieto*, 30 Cal.4th at 275.

The California Supreme Court has justified its position, in part, on the theory that "the penalty phase determination in California is normative, not factual. It 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. In *People v. Black*, 35 Cal.4th 1238 (2005), the California Supreme Court held 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

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[8] Similar to the capital sentencing scheme at issue in *Hurst*, a defendant convicted of capital murder in California is punished by either life imprisonment or death and before a sentence of death may be imposed, the trier of fact must find the existence of at least one aggravating circumstance.

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." *People v. Black*, 35 Cal.4th 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. This Court held that "[b]ecause 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.

The constitutional question here cannot be avoided by labeling the penalty determination "normative," rather than "factual," as the California court has tried to do. 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 an additional finding at the penalty phase — that one or more aggravating circumstances exist — before a death sentence may be imposed, this finding must be made beyond a reasonable doubt.

IV. California Is an Outlier in Refusing to Apply *Ring's* Beyond-a-Reasonable-Doubt Standard to a Factual Finding 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. Banks*, 59 Cal.4th at 1207; *People v. Manibusan*, 58 Cal.4th at 99; *People v. Griffin*, 33 Cal.4th at 595; *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. Gonzalez*, 12 Cal.5th at 416. 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 January 1, 2022, California, with 692 inmates on death row, had more than one-quarter of the country's total death-row population of 2436. *See Facts About the Death Penalty*, DEATH PENALTY INFORMATION CENTER (last updated Feb. 22, 2022), http://www.deathpenaltyinfo.org/documents/FactSheet.pdf. California's refusal to require the trier of fact to find the existence of one or more aggravating circumstances beyond a reasonable doubt before imposing a sentence of death has violated the constitutional rights of a substantial portion of this country's death row inmates.

Second, of the 29 jurisdictions in the nation with the death penalty, including the federal government and the military, the statutes of 22 states and the federal government provide that aggravating factors must be proved beyond a reasonable doubt.[9] 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.[10] However, with the exception of Oregon's Supreme Court,[11] the Supreme 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 and Oregon are the only two states that refuse to require the state to prove

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[9] *See* Ala. Code 1975 § 13A-5-45(E); Ariz. Rev. Stat. Ann. § 13-751(B); Ark. Code Ann. § 5-4-603; 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.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); Wyo. Stat. § 6-2-102(D)(ii)(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*, 341 Or. 580, 603-606, 148 P.3d 892, 905-06 (2006).

[12] *See State v. Steele*, 921 So.2d 538, 540 (Fla. 2005); *State v. Gardner*, 947 P.2d 630, 647 (Utah 1997); *State v. Brown*, 607 P.2d 261, 273 (Utah 1980).

aggravating factors beyond a reasonable doubt before the jury may impose a sentence of death.

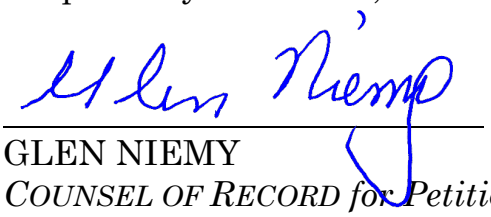
Certiorari is necessary to bring California, with the largest death row population in the nation, into compliance with the Fifth, Sixth, and Fourteenth Amendments by requiring the state to prove beyond a reasonable doubt the existence of one or more aggravating factors, a factual finding that is a prerequisite to the imposition of the death penalty.

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: March 2, 2022

Respectfully submitted,



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