No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2022

JUSTIN HEATH THOMAS, Petitioner

v.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

(DEATH PENALTY CASE)

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CAPITAL CASE–NO EXECUTION DATE SET

QUESTION PRESENTED FOR REVIEW

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

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The parties to the proceedings below were Defendant and Petitioner Justin Heath Thomas and Plaintiff and Respondent the People of the State of California.

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PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT.

Petitioner Justin Heath Thomas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Supreme Court on January 26, 2023.

OPINION BELOW

The opinion of the California Supreme Court is reprinted in the Appendix. The citation to the opinion is *People v. Thomas*, 14 Cal.5th 327 (2023)

JURISDICTION

Following a jury trial, petitioner was found guilty of murder. The jury also found true the allegations that petitioner has used a firearm during the murder, committed robbery during the murder, and had a prior murder conviction. 14RT 4022-3023, 3087-3088. The jury fixed the penalty at death. 18RT 3722. On January 26, 2023, the California Supreme Court affirmed in full the judgment of the Superior Court. Appendix A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Federal Constitutional Provisions.

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

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

The Fourteenth Amendment provide in part that no state shall "deprive any person of life, liberty, or property without due process of law . . . ."

2. State Statutory Provisions.

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

STATEMENT OF THE CASE

A. HOW THE FEDERAL QUESTIONS WERE PRESENTED.

The legal issue raised in this petition was first presented to the Riverside County Superior Court in the form of a request for a modification of a jury instruction which would have told the jury the that it had to find the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt in order to impose the death penalty. 17RT 3612-3613. The trial court refused the request. 17RT 1364-1365. The California Supreme Court also rejected this claim. (*People v. Thomas, supra*, 14 Cal.5th at p. 409.)

B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT.

Following a jury trial, petitioner was convicted of the murder of Rafael Noriega. Petitioner and Noriega were drug dealers who did business with each other. Special circumstance allegations of a prior murder conviction and a robbery during the commission of the murder. Appendix A at pp. 1-2. Petitioner presented extensive evidence in mitigation. Petitioner's father exposed him to drug use well before he was a teenager. 16RT 3290-3292. Petitioner was also exposed to alcohol use at an early age. 16RT 3312-3313. Petitioner's mother heavily abused alcohol when she was pregnant with petitioner. 17RT 3466-3467.

Physician Alex Stalcup testified as a defense expert. He was board certified in addiction medicine. 17Rt 3487, 3534. Stalcup explained to the jury how drug use impaired executive function of the brain, resulted in impulsive decisions, and impairs the ability of the user to distinguish right from wrong. 17RT 3489-3490, 3538. Petitioner used methamphetamine which was one of the best examples of how drug used impaired the user's decision making process. 17RT 3492. Petitioner suffered from fetal alcohol syndrome which also impaired his decision making ability. 17RT 3503. Petitioner displayed all the signs of a child born with the gene for addiction. He had one of the worst cases of genetic inheritance of the disease of addiction that Stalcup had ever witnessed. 17RT 3498, 3500, 2517.

Petitioner was convicted and sentenced under California's death penalty law.

It was adopted in 1978 by a ballot initiative. Cal. Penal Code, §§190.1-190.4. Under this scheme, once the defendant has been found guilty of first degree murder, the trier of fact must determine whether one or more of the special circumstances enumerated in section 190.2 are true beyond a reasonable doubt. If a special circumstance is found true, a separate penalty hearing is held to determine whether the sentence will be death or life in prison without the possibility of parole. §§190.2 & 190.3; *Tuilaepa v. California*, 512 US. 967, 975-976 (1994).

At the penalty hearing, the parties may present evidence '"relevant to aggravation, mitigation, and sentence . . . . pursuant to section 190.3 Section 190.3 lists aggravating and mitigating factors the jury must consider. California law defines an aggravating factor as any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. *People v. Steele*, 27 Cal.4th 1230, 1258, fn. 9 (2002). Section 190.3 lists aggravating and mitigating factors the jury must consider.

CALCRIM No. 766 is the standard jury instruction for how the jury should weigh the evidence in deciding whether to impose the death penalty. During the discussion of the penalty phase jury instructions, the defense counsel argued the phrase, "to return the judgment of death you must be persuaded the aggravating both outweigh the mitigating and are so substantial in comparison. . . ." allowed the jury

to impose death when it had not found beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors and thus violated the holding of *Apprendi v. New Jersey* (2000) 530 U.S. 466, and its progeny. 17RT 3613. The defense counsel objected to giving CALCRIM No. 766 without the beyond a reasonable doubt language based on due process, the Sixth Amendment right to a jury determination of the facts, and the Eighth Amendment prohibition against imposition of cruel and unusual punishment. 17RT 3613. The trial court suggested that the defense counsel wanted to add language to the effect of "To return a judgment of death the jury must be persuaded beyond a reasonable doubt . . .", and the defense counsel agreed with that language. (17RT 3614.) The prosecutor argued that the holding of *Apprendi v. New Jersey* did not apply to the jury's weighing process. The trial court agreed and refused to give the defense requested modification. 17RT 3614.

The trial court instructed the jury, “the People are required to prove the defendant's other alleged crimes beyond a reasonable doubt before you may consider them as aggravating factors.” 18RT 3628. The trial court instructed the jury regarding the specific other crimes allegedly committed by Petitioner. 18RT 3635-3636. The jury was told, "if you have a reasonable doubt whether the defendant committed an alleged crime, you must completely disregard any evidence of that crime." 18RT 3636. The trial court instructed the jury with CALCRIM No. 763, which were the factors in aggravation and mitigation the jury was required to consider.

18RT 3644-3646. The trial court then instructed the jury with CALCRIM No. 766, which stated as follows:

> In reaching your decision you must consider, take into account, and be guided by the aggravating and mitigating circumstances. Each of you is free to assign whatever moral or sympathetic value you find appropriate to each individual factor and to all of them together. Do not simply count the number of aggravating and mitigating factors and decide based on the higher number alone. Consider the relative or combined weight of the factors and evaluate them in terms of their relative convincing force on the question of punishment.
>
> Each of you must decide for yourself whether aggravating or mitigating factors exist. You do not all need to agree whether such factors exist. If any juror individually concludes that a factor exists, that juror may give the factor whatever weight he or she believes is appropriate.
>
> 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.

18RT 3647-3648.

During his opening penalty phase argument, the prosecutor exploited the fact that CALCRIM No. 766 did not require the beyond a reasonable doubt standard to be applied to the decision to impose the death penalty. He argued:

> There is no burden of proof as to what your final decision is so I argue once, the defense once, and then you will make your decision. Because there's no burden of proof as to your final decision, I don't make a rebuttal argument.
>
> Now, the standard of proof beyond a reasonable doubt that you've heard the judge read to you applies only in a very limited way. It does not apply to your final decision. It applies to whether you consider aggravating factors, the alleged other crimes that you listed out, the domestic violence, the shanks, the murder of Regina Hartwell. Those must be proved to you beyond a reasonable doubt before you can consider them as aggravating factors.
>
> Now, as to each of these aggravating factors the judge already told you it's not a unanimous decision. You don't all 12 have to agree he committed the possession of a shank in his boxer shorts. If you believe that I've proven that beyond a reasonable doubt, individually you consider that as an aggravating factor. If someone else thought it wasn't proved beyond a reasonable doubt, that other juror would not consider that as an aggravating factor and would disregard that.
>
> So you don't have to come to a unanimous decision on each of the factors. You each make your own decision as to whether that's been proved beyond a reasonable doubt. And then you each make your own decision how much any of the aggravating factors or mitigating factors weigh. What's the value of those factors? You each must make that determination alone individually.

18RT 3650-3651.

The prosecutor then referred again to the "so substantial" standard in CALCRIM No. 766. 18RT 3651. The prosecutor then discussed at length the factors in aggravation and mitigation. 18RT 3652-3662. During jury deliberations, the jury

requested the reading of Stalcup's direct examination and Petitioner's personal written statement. 18RT 3705. The jury had a difficult time reaching a penalty phase verdict. After three days of deliberations, the jury foreman believed that a verdict could not be reached. 18RT 3713; 17CT 4463; 18 CT 4512-4513. The defense counsel requested a mistrial which was denied. 18RT 3716-3719.

The above instructions did not require the jury to : (1) find true beyond a reasonable doubt any particular factor in aggravation; (2) unanimously agree what factors in aggravation were true; (3) find true beyond a reasonable doubt the aggravating factors outweighed the mitigating factors; or (4) conclude beyond a reasonable doubt death was the appropriate penalty. The California Supreme Court considers the determination that aggravating factors outweigh mitigating factors to be a normative, rather than factual, finding. *People v. McKinzie*, 54 Cal.4th 1302, 1366 (2012) ; Appendix at pp. 108-109. It has also concluded a capital sentencing jury as a whole need not agree on the existence of any one aggravating factor. E.g., *People v. Contreras*, 58 Cal.4th 123, 172 (2013). This is true even though the jury must make certain factual findings in order to consider certain circumstances as aggravating factors. E.g., *People v. Prieto*, 30 Cal.4th 226, 263 (2003). The California Supreme Court rejected Petitioner's argument in his direct appeal that the above infirmities rendered the California death penalty scheme unconstitutional. Appendix A at pp. 108-109.

California's death penalty scheme violates the Fifth, Sixth, and Fourteenth Amendments by failing : (1) to require the jury to unanimously find each aggravating factor relied upon, and weighed, to be true beyond a reasonable doubt, and (2) to apply this standard to the factual determination that the factors in aggravation outweigh the factors in mitigation. This Court should grant certiorari to bring the state supreme court presiding over largest death row population in the nation into compliance with the requirements of the United States Constitution.

REASONS FOR GRANTING THE WRIT

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

1. This Court Has Repeatedly Held That Every Fact That Serves To Increase The Statutory Maximum Or The Mandatory Minimum Penalty Of Criminal Punishment Must Rest Upon A Jury Determination That Has Been Found Beyond A Reasonable Doubt.

The Fifth, Sixth and Fourteenth Amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995). Where proof of a particular fact, other than a prior

conviction, exposes the defendant to greater punishment than that available in the absence of such proof, that fact is an element of the crime that the Fifth, Sixth and Fourteenth Amendments require be proven to a jury and found true beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. at 490; see also *Cunningham v. California*, 549 U.S.270, 281-82 (2007); *Blakely v. Washington*, 542 U.S. 292, 301 (2004).

In *Apprendi, supra*, 530 U.S. 466, a noncapital sentencing case, and *Ring v. Arizona*, 536 U.S. 584 (2002) a capital sentencing case, this Court established a bright-line rule: if a factual finding is required to subject the defendant to a greater punishment than that authorized by the jury's verdict, it must be found by the jury beyond a reasonable doubt. *Ring, supra*, 536 U.S. at 589; *Apprendi, supra*, 530 U.S. at 483. As explained in *Ring*: "The dispositive question, we said, "is one not of form, but of effect. 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, supra*, 536 U.S. at 602, quoting *Apprendi, supra*, 530 U.S. at 494, 482-83. Applying this mandate, this Court invalidated Florida's death penalty statute *in Hurst v. Florida*, 577 U.S. 92 (2016). The core Sixth Amendment principle as it applies to capital sentencing statutes was restated: "The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy

Hurst's death sentence on a jury's verdict, not a judge's factfinding." *Hurst*, 577 U.S. at p. 102-103.) Further, as explained below, in applying this Sixth Amendment principle, *Hurst* made clear that the weighing determination required under the Florida statute was an essential part of the sentencer's factfinding within the ambit of *Ring*. See *Hurst*, 577 U.S. at 98-99.

In Florida, a defendant convicted of capital murder is punished by either life imprisonment or death. *Hurst*, 577 US. At p. 93.) Under the statute at issue in *Hurst*, after returning its verdict of conviction, the jury rendered an advisory verdict at the sentencing proceeding, but the judge made the ultimate sentencing determinations. *Hurst*, 577 U.S. 95-96. The judge was responsible for finding that sufficient aggravating circumstances exists and that there are insufficient mitigating circumstances to outweigh aggravating circumstances which were prerequisites for imposing a death sentence. *Id.* at 100, citing former Fla. Stat. §921.141 (3). These determinations were part of the "necessary factual finding that *Ring* requires." *Ibid*. The questions decided in *Ring* and *Hurs*t 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. 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, 577 U.S. 98-103. Nevertheless, the opinion in *Hurs*t shows that, like in *Ring*, a specific application of a broader Sixth Amendment principle necessitates any fact that is required for a death sentence, but not for the lesser punishment of life imprisonment, must be found by the jury. *Hurst*, 577 U.S. 99, 102-103. The decision refers not simply to the finding of an aggravating circumstance, but, as noted above, to findings of "each fact necessary to impose a sentence of death." *Id*. at 99 italics added. This fundamental principle is reiterated throughout the opinion in clear and unqualified language consistent with the established understanding that *Apprend*i and *Ring* apply to each fact essential to the punishment the defendant receives. See *Ring, supra*, 536 U.S. at 610 (Scalia, J., concurring); *Apprendi*, 530 U.S. at 494.

2. California's Death Penalty Statute Violates Hurst By Not Requiring That The Jury's Weighing Determination Be Found Beyond A Reasonable Doubt.

California's death penalty statute violates *Apprendi*, *Ring* and *Hurst*, although the specific defect is different than the defects in the laws of Arizona's and Florida. In California, although the jury's sentencing verdict must be unanimous, but California Penal Code section 190.4, subdivision (b) applies no standard of proof to the weighing determination, let alone the constitutional requirement that the finding be made beyond a reasonable doubt. See *People v. Merriman*, 60 Cal. 4th

1106 (2014).

Unlike Arizona and Florida, California requires that the jury, not the judge, make the findings necessary to sentence the defendant to death. See *People v. Rangel*, 62 Cal.4th 1192, 1235 n.16 (2016) (distinguishing California's law from that invalidated in *Hurst* on the grounds that, unlike Florida, the jury's verdict is not merely advisory). The California sentencing scheme is materially different from that in Florida. *People v. Becerrada*, 2 Cal. 5th 1009, 1038 (2017) California's law, however, is similar to the statutes invalidated in Arizona and Florida in ways that are crucial for applying the *Apprendi/Ring/Hurst* principle. In all three states, a death sentence may be imposed only if, after the defendant is convicted of first degree murder, the sentencer makes two additional findings. In each jurisdiction, the sentencer first must find the existence of at least one statutorily-delineated circumstance - in California, a special circumstance ,Cal. Penal Code§ 190.2. and in Arizona and Florida, an aggravating circumstance. Ariz. Rev. Stat.§ 13-703(G); Fla. Stat.§ 921.141(3). This finding alone, however, does not permit the sentencer to impose a death sentence. The sentencer must make another factual finding: The sentencer in California must determine "the aggravating circumstances outweigh the mitigating circumstances." (Cal. Penal Code§ 190.3.) The sentencer in Arizona must determine 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)). The

sentencer in Florida must determine that there are insufficient mitigating circumstances to outweigh aggravating circumstances. (*Hurst*, 577 U.S. at p. 100.) Although *Hurst* did not decide the standard of proof issue, the Court made clear that the weighing determination was an essential part of the sentencer's factfinding under *Ring*. See *Hurst*, 577 U.S. at p. 99 (in Florida the critical findings necessary to impose the death penalty includes the weighing determination among the facts the sentencer must find before death is imposed). The pertinent question is not what the weighing determination is called, but its consequence. *Apprendi* made this clear: "the relevant inquiry is one not of form, but of effect - does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494. As Justice Scalia explained in *Ring*: "[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives - whether the statute calls them elements of the offense, sentencing factors, or Mary Jane - must be found by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 610 (Scalia, J., concurring).

Decisions of other courts illustrate the factfinding nature of the weighing determination. In *Hurst v. State*, 202 So. 3d 40, 43 (Fla. 2016), the Florida Supreme Court reviewed whether a unanimous jury verdict was required in a capital sentencing, in light of this Court's decision in *Ring*, 536 U.S at 610. Each of the

considerations that must be made before death is imposed, including the determination that aggravation outweighs mitigation, were described as "elements" that the sentencer must determine, akin to elements of a crime during the guilt phase. *Hurst v. State*, 202 So. 3d at 53, 57. There was nothing that separated the capital weighing process from any other finding of fact.

In *Rauf v. State*, 145 A.3d 430, 485 (Del. 2016), the Delaware Supreme Court found that "the weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence." The Missouri Supreme Court has described the determinations that aggravation warrants death, or that mitigation outweighs aggravation, as being findings of fact that a jury must make. *State v. Whitfield*, 107 S.W. 3d 253, 259-60 (Mo. 2003). Similarly, Justice Sotomayor has stated that the statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is a factual finding under Alabama's capital sentencing scheme. *Woodward v. Alabama*, 571 U.S. 1045, 1047-1056 (2013) (Sotomayor, J., dissenting from denial of cert.).

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

concurring) (it does not matter whether the statue labels facts as being elements of the offense, sentencing factors, or Mary Jane). In California, when a jury convicts a defendant of first degree murder, the maximum punishment is imprisonment for a term of 25 years to life. § 190, subd. (a) [cross-referencing§§ 190.1, 190.2, 190.3, 190.4 and 190.5]. When the jury returns a verdict of first degree murder with a true finding of a special circumstance listed in Penal Code section 190.2, the penalty range increases to either life imprisonment without the possibility of parole or death. § 190.2, subd. (a). Without any further jury findings, the maximum punishment the defendant can receive is life imprisonment without the possibility of parole. See, e.g., *People v. Banks*, 61 Cal. 4th 788, 794 (2015) (where jury found defendant guilty of first degree murder and found special circumstance true and prosecutor did not seek the death penalty, defendant received "the mandatory lesser sentence for special circumstance murder, life imprisonment without parole"); *Sand v. Superior Court*, 34 Cal. 3d 567, 572 (1983) (where defendant is charged with special circumstance murder, and the prosecutor announced he would not seek death penalty, defendant, if convicted, will be sentenced to life imprisonment without parole, and therefore prosecution is not a "capital case" within the meaning of Penal Code section 987.9); *People v. Ames*, 213 Cal. App. 3d 1214, 1217 (1989) (life in prison without possibility of parole is the sentence for pleading guilty and admitting the special circumstance where death penalty is eliminated by plea bargain).

Under the California statute, a death sentence can be imposed only if the jury, in a separate proceeding, "concludes that the aggravating circumstances outweigh the mitigating circumstances." §190.3. Thus, the weighing finding exposes a defendant to a greater punishment (death) than that authorized by the jury's verdict of first degree murder with a true finding of a special circumstance (life in prison without parole). The weighing decision is therefore a fact finding determination.

Section 190.3 requires the jury to make two determinations. The jury must weigh the aggravating circumstances and the mitigating circumstances. To impose death, the jury must find that the aggravating circumstances outweigh the mitigating circumstances. As discussed above, this is factfinding under *Ring* and *Hurst*. The sentencing process, however, does not end there. The final step in the sentencing process: the jury selects the sentence it deems appropriate. See *People v. Brown*, 40 Cal.3d 512, 544 (1985) (rev'd. on other grounds sub. nom. *California v. Brown*, 479 U.S. 538 (1987) [nothing in the amended language limits the jury's power to apply those factors as it chooses in deciding whether, under all the relevant circumstances, defendant deserves the punishment of death or life without parole]. Thus, the jury may reject a death sentence even after it has found that the aggravating circumstances outweigh the mitigation. This is the "normative" part of the jury's decision. *Brown*, 40 Cal. 3d at p. 540.

The above understanding of section 190.3 is supported by *Brown* itself. In

construing the "shall impose death" language in the weighing requirement of section 190 .3, the California Supreme Court cited to Florida's death penalty law as a similar "weighing" statute: "[O]nce a defendant is convicted of capital murder, a sentencing hearing proceeds before judge and jury at which evidence bearing on statutory aggravating, and all mitigating, circumstances is adduced. The jury then renders an advisory verdict "[w]hether sufficient mitigating circumstances exist ... which outweigh the aggravating circumstances found to exist; and ... [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." Fla. Stat. (1976-1977 Supp., § 921.141, subd. (2)(b), (c).) The trial judge decides the actual sentence. He may impose death if satisfied in writing "(a) [t]hat sufficient [statutory] aggravating circumstances exist ... and (b) [t]hat there are insufficient mitigating circumstances ... to outweigh the aggravating circumstances." (*Id*., subd. (3).) *Brown*, 40 Cal. 3d at 542. *Brown* therefore construed section 190.3's sentencing directive as comparable to that of Florida - if the sentencer finds the aggravating circumstances outweigh the mitigating circumstances, it is authorized, but not mandated, to impose death.

The standard jury instructions were modified to reflect Brown's interpretation of California Penal Code section 190.3. The requirement that the jury must find that the aggravating circumstances outweigh the mitigating circumstances remained a precondition for imposing a death sentence. Nevertheless, once this prerequisite

finding was made, the jury had discretion to impose either life or death as the punishment it deemed appropriate under all the relevant circumstances. The revised standard jury instructions, California Criminal Jury Instructions (CALCRIM), make clear this two-step process for imposing a death sentence: "To return a judgment of death, each of you must be persuaded that the aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified." CALCRIM No. 766. As discussed above, *Hurst*, which addressed Florida's statute with its comparable weighing requirement, indicates that the finding that aggravating circumstances outweigh mitigating circumstances is a factfinding for purposes of *Apprendi*, *Ring*, and *Hurst*.

3. California Law Is Inconsistent With This Court's Precedents In *Hurst*, *Ring*, *Blakely v. Washington* (2004) 542 U.S. 296, *Cunningham v. California*, 549 U.S. 270, and *Apprendi*.

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

Under the California death penalty scheme, as set forth above, if a defendant is found guilty of first degree murder, and the jury finds that one of the special

circumstances enumerated in section 190.2 is true beyond a reasonable doubt, section 190.3 requires that a separate hearing be held to determine whether the defendant will be sentenced to death or a term of life without the possibility of parole. Upon a true finding of a special circumstance, the mandatory minimum sentence is life without parole. The jury is instructed "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" CALCRIM No. 766; 18RT 3648. Logically, then, petitioner's jury was required to make three findings at the penalty phase before deciding to sentence him to death: (1) an aggravating factor above and beyond the elements of the crime itself was present; (2) the aggravating factors outweighed the mitigating factors; and (3) the aggravating factors were so substantial that they warranted death instead of life without parole. These factual findings exposed petitioner to a greater punishment (death) than he would otherwise receive (life without parole).

Under the principles in *Apprendi, Ring* and *Hurst*, the jury should have been required to make the above findings beyond a reasonable doubt. See John G. Douglass, Confronting Death: *Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967, 2004 (2005) (*Blakely* arguably reaches any factfinding that matters at capital sentencing, including those findings that contribute to the final

selection process.) Nevertheless, the California Supreme Court has repeatedly concluded that California's death penalty scheme permits the trier of fact to impose a sentence of death without finding beyond a reasonable doubt the existence of an aggravating factor under section 190.3, that any aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt, and that the aggravating factors were so substantial that they warranted death instead of life without parole. It reasons "under the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without possibility of parole.' *People v. Anderson*, 25 Cal. 4th 543, 589-90 n.14 (2001). In the state court's view, "facts which bear upon, but do not necessarily determine, which of these two alternative penalties [death or life without parole] is appropriate do not come within the holding of *Apprendi*." *People v. Snow*, 30 Cal. 4th 43, 126 n.32 (2003).

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

> This argument overlooks *Apprendi 's* instruction that the relevant inquiry is one not of form, but of effect. In effect, the required finding [of an aggravated circumstance]

> expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." The Arizona first degree murder statute "authorizes a maximum penalty of death only in a formal sense," for it explicitly cross references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. If Arizona prevailed on its opening argument, *Apprendi* would be reduced to a "meaningless and formalistic" rule of statutory drafting.

Ring, 536 U.S. at 604.

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

The California Supreme Court has justified its position, in part, on the theory that the penalty phase determination in California is normative, not factual, and is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. *People v. Prieto*, 30 Cal. 4th at 275. 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 (2007). The California Supreme Court concluded in *People v. Black*, 35 Cal. 4th 1238, 1254 (2005) that California's Determinate Sentencing Law (DSL) did not run afoul of the bright-line rule set forth in *Blakely* and *Apprendi* because "[t]he judicial factfinding that occurs during [the selection of an upper term sentence] is the same type of judicial factfinding that traditionally has been a part of the sentencing process." *Id.* at 1258. This Court rejected that analysis, finding that circumstances in aggravation under the DSL (1) were factual in nature, and (2) were required for a defendant to receive the upper term. *Cunningham*, 549 U.S. at 288-93. "Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." *Id.* at 293. In sum, while the penalty phase may have a normative aspect it is nonetheless factfinding subject to this Court's jurisprudence in *Hurst*, *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Finally, that this Court has previously upheld portions of the California death penalty scheme. *Tuilaepa v. California*, 512 U.S. 967 (1994). This decision does not insulate that scheme from the principles elucidated in the *Apprendi* line of case. This Court had upheld the Arizona death penalty scheme in *Walton v. Arizona*, 497 U.S. 639 (1990), but *Ring* overruled Walton. This Court's upholding of Florida's capital sentencing scheme in *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v. Florida*, 468 U.S. 447 (1984) did not stop this Court from overruling those decisions in *Hurst*.

4. Decisions from Sister States Cast Doubt on the Constitutionality of the California Death Penalty Scheme.

In *Rauf v. State*, 145 A.3d 5430, (Del. S.Ct. 2016), the Delaware Supreme Court addressed the constitutionality of the Delaware death penalty scheme with the benefit of the opinion in *Hurst v. Florida*. The trial court had certified five questions to the Delaware Supreme Court for resolution. The second question was whether, "if the finding of the existence of any aggravating circumstance, statutory or non-statutory, that has been alleged by the State for weighing in the selection phase of a capital sentencing proceeding must be made by a jury, must the jury make the finding unanimously and beyond a reasonable doubt to comport with federal constitutional standards?" (*Rauf v. State, supra*, 145 A.3d at pp. 433-434.)

The fourth question was "if the finding that the aggravating circumstance found

to exist outweigh the mitigating circumstances found to exist must be made by a jury, must the jury make that finding unanimously and beyond a reasonable doubt to comport with federal constitutional standards." *Id*, at p. 434. The Court answered yes to both questions. *Rauf v. State* was a per curiam opinion joined by three of the five justices of the Delaware Supreme Court. The Court first concluded Delaware's death penalty scheme was unconstitutional under *Hurst v. Florida* because it allowed the trial court judge to make findings of aggravating factors. *Rauf v. State*, 145 A.3d at p. 434.

The concurring by Chief Justice Strine, which was joined by two other justices, addressed the applicability of the beyond a reasonable doubt standard to findings of fact and the weighing of aggravating and mitigating factors. The concurring opinion stated it was "impossible to embrace a reading of *Hurst* that judicially draws a limit to the right to a jury in the death penalty context to having the jury make only the determinations necessary to make the defendant eligible to be sentenced to death by someone else, rather than to make the determination itself that must be made if the defendant is in fact to receive a death sentence." *Rauf v. State*, 145 A.3d at p. 436 [conc. opn. of C.J. Strine]. The concurring opinion was "unable to discern in the Sixth Amendment any dividing line between the decision that someone is eligible for death and the decision that he should in fact die." (*Ibid.*)

The concurring opinion then discussed the nature of the findings required to

impose the death sentence. "[O]ne need look no further than the aggravating and mitigating factors that the U.S. Supreme Court approved for use in making capital sentencing determination to see the factual nature of questions involved and how they came to bear on the issue of what punishment the defendant should suffer." *Rauf v. State*, 145 A.3d at p. 468 [conc. opn. of C.J. Strine]. The Court then cited the definitions of aggravating and mitigating factors. "The core of each of these questions is a factual inquiry that a cross-section of the community is best suited to make." (*Ibid.*) Hence, "the deeper logic of *Apprendi*, *Ring*, and *Hurst* cannot be confined neatly to the death eligibility state of a capital case." *Rauf v. State*, 145 A.3d at pp. 472-473 [conc. opn. of C.J. Strine].

The concurring opinion described as built on "non-bearing foundations" the "judicial opinions [that] have taken the view that it is only those fact findings that make a defendant eligible to receive a death sentence that must be made by a jury." *Rauf v. State, supra*, 145 A.3d at pp. 472-473 [conc. opn. of C.J. Strine]. Hence, "fact finding beyond eligibility are not optional; they must be made and are necessary." (*Id.* at p. 477.) The concurring opinion concluded, "the jury must find any fact that constitutes an aggravating circumstance in the ultimate sentencing phase beyond a reasonable doubt, and whether any determination it makes that a defendant should suffer death because the factors aggravating for that outcome outweigh any mitigating factors, including the jury's own sense of mercy, must be found beyond a

reasonable doubt." *Rauf v. State*, 145 A.3d at p. 481 [conc. opn. of C.J. Strine].

In *Oken v. State*, 378 Md. 179, 269-270 (2003), the Maryland Court of Appeal upheld the constitutionality of the Maryland death penalty statute which required the jury to find by a preponderance of the evidence the aggravating factors outweighed the mitigating factors. Three judges dissented from the majority opinion. The dissenters concluded that *Ring v. Arizona* and *Apprendi v. New Jersey* required the jury to find beyond a reasonable doubt that the factors in aggravation outweighed the factors in mitigation:

> *Ring* describes a substantive element of a capital offense as one which makes an increase in authorized punishment contingent on a finding of fact. Using this description, the substantive elements of capital murder in Maryland are the jury's finding of the aggravating circumstances necessary to support a capital sentence and the fact that the aggravators outweigh the mitigators. It is the latter finding, that aggravators outweigh mitigators, including the determination that death is appropriate, that ultimately authorizes jurors to consider and then to impose a sentence of death. That is, the increase in punishment from life imprisonment to the death penalty is contingent on the factual finding that the aggravators outweigh the mitigators. Under the statute, then, when the jury finds that the aggravating outweigh the mitigating circumstances, the defendant is exposed to an increased potential range of punishment beyond that for a conviction for first degree murder. (Citation omitted.) It is evident by reading § 413 and § 414 that the Legislature intended to base a death sentence on a factual finding, first by mandating that the jury find that the aggravators outweigh the mitigators by a specific burden of proof, i.e., by a preponderance of the evidence, and second, by requiring

> that this Court review that finding for sufficiency of the evidence.
>
> Step three, the balancing of the aggravating and mitigating factors, in my view, is a factual determination. Unless, and until, the jury finds that the aggravating factors outweigh the mitigating factors, the defendant is not eligible for the death penalty. Because it is a factual determination which raises the maximum penalty from life to death, Ring requires that the standard be beyond a reasonable doubt.

Oken v. State, 378 Md. at pp. 278-279 [diss. opn. of J. Raker].

Other states have held that *Ring v. Arizona* and Apprendi v. New Jersey require the jury to find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and death is the appropriate penalty. *State v. Billups*, 2016 Ala. Crim. App. Lexis 39, at p. 23 (Ct. Crim. App. Ala., 2016) ; *State v. Belton* , 2016-Ohio-1581, at p. 59 (S.Ct. Ohio 2016) ; *Woldt v. People*, 64 P.3d 256, 265 (S.Ct. Colo. 2003); *State v. Whitfield* , 107 S.W.3d 253, 259 (S.Ct. Mo. 2003); *Johnson v. State* , 59 P.3d 450, 460 (S.Ct. Nev. 2002); *State v. Rizzo*, 266 Conn. 171, 236 (S.Ct. Conn. 2003); but see *Commonwealth v. Sanchez*, 623 Pa. 253, 323 (Penn. S.Ct. 2013).

5. California, With The Largest Death Row In The Nation, Is An Outlier In Refusing To Apply Ring's Beyond-A-Reasonable Doubt Standard To Factual Findings That Must Be Made Before A Death Sentence Can Be Imposed.

The California Supreme Court has applied its flawed understanding of *Ring, Apprendi* and *Hurst* to its review of the state's numerous death penalty cases. The issue presented here is well-defined and will not benefit from further

development in the California Supreme Court or other state courts. California has approximately 694 prisoners sentenced under a judgment of death as of 2022.[1] California's refusal to require a jury to find aggravating factors and all factual findings that are necessary to impose death using the beyond a reasonable doubt standard has widespread effect on a substantial portion of this country's capital cases.

Second, of the 33 jurisdictions in the nation with the death penalty, including the federal government and the military, the statutes of nearly all provide that aggravating factors must be proven beyond a reasonable doubt. The statutes of several states are silent on the standard of proof by which the state must prove aggravating factors to the trier of fact. However, with the exception of the Oregon Supreme Court, the courts of these jurisdictions have explicitly determined that the trier of fact must find factors in aggravation beyond a reasonable doubt before it may use them to impose a sentence of death. California may be one of only several states that refuse to require factual findings that serve as a prerequisite to death to be made beyond a reasonable doubt before the trier of fact may impose a sentence of death.Certiorari is necessary to bring California, with the largest death row population in the nation, into compliance with the Fifth, Sixth and Fourteenth

[1] https://www.forbes.com/sites/masonbissada/2022/01/31/ california- plans-to-shift- hundreds-of-death-row-inmates-to-other-prisons/?sh=53df28ce4dcf.

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.

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.

April 2, 2023 /S/ John L. Staley