

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RANDALL CLARK WALL, *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent*.

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

(DEATH PENALTY CASE – NO EXECUTION DATE SET)

MARY K. McCOMB
State Public Defender for the State of California

ANDREA G. ASARO
Senior Deputy State Public Defender
Counsel of Record

OFFICE OF THE STATE PUBLIC DEFENDER
1111 Broadway, Suite 1000
Oakland, California 94607
andrea.asaro@ospd.ca.gov
Tel: (510) 267-3300
Fax: (510) 452-8712
Counsel for Petitioner
Randall Clark Wall

QUESTION PRESENTED

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

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDINGS.....	1
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....	2
I. Federal Constitutional Provisions	2
II. State Statutory Provisions.....	3
STATEMENT OF THE CASE	3
I. Introduction	3
II. Procedural History	6
REASONS FOR GRANTING THE PETITION	8
CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER CALIFORNIA’S DEATH PENALTY STATUTE VIOLATES THE CONSTITUTIONAL REQUIREMENT THAT ANY FACT THAT INCREASES THE PENALTY FOR A CRIME MUST BE FOUND BY A JURY BEYOND A REASONABLE DOUBT	8
I. This Court Has Held That Every Fact That Serves To Increase A Maximum Criminal Penalty Must Be Proven to a Jury Beyond A Reasonable Doubt.....	8
II. California’s Death Penalty Statute Violates <i>Hurst</i> By Not Requiring That The Jury’s Factual Sentencing Findings Be Made Beyond A Reasonable Doubt.....	11
III. California Is An Outlier In Refusing To Apply <i>Ring</i> ’s Beyond-A-Reasonable- Doubt Standard To Factual Findings That Must Be Made Before A Death Sentence Can Be Imposed.....	15

TABLE OF CONTENTS

CONCLUSION	18
APPENDICES	19
APPENDIX A: <i>People v. Wall</i> , 3 Cal. 5th 1048 (2017), California Supreme Court Opinion, November 13, 2017	19
APPENDIX B: <i>People v. Wall</i> , No. S044693, California Supreme Court Order Denying of Petition for Rehearing, January 24, 2018.....	20
APPENDIX C: Letter of Time to File Petition for Writ of Certiorari from the Clerk of the Court Notifying Petitioner of the Extension, April 10, 2018	21
APPENDIX D: California Penal Code sections 187, 190, 190.1, 190.2, 190.3, 190.4, and 190.5	22
APPENDIX E: Cited Excerpts of Clerk’s Transcript	23

TABLE OF AUTHORITIES

Federal Cases

<i>Apprendi v. New Jersey</i> 530 U.S. 466 (2000).....	7, 9
<i>Blakely v. Washington</i> 542 U.S. 292 (2004).....	9
<i>Cunningham v. California</i> 549 U.S. 270 (2007).....	9
<i>Hurst v. Florida</i> 136 S. Ct. 616 (2016).....	passim
<i>Ring v. Arizona</i> 536 U.S. 584 (2002).....	passim
<i>Tuilaepa v. California</i> 512 U.S. 967 (1994).....	3
<i>United States v. Gabrion</i> 719 F.3d 511 (6th Cir. 2013)	14
<i>United States v. Gaudin</i> 515 U.S. 506 (1995).....	8
<i>Woodward v. Alabama</i> 571 U.S. 1045 (2013).....	14

State Cases

<i>Hurst v. State</i> 202 So. 3d 40 (Fla. 2016).....	14
<i>Nunnery v. State</i> 127 Nev. 749 (Nev. 2011).....	14
<i>People v. Contreras</i> 58 Cal. 4th 123 (2013)	5
<i>People v. Karis</i> 46 Cal. 3d 612 (1988)	15
<i>People v. Maury</i> 30 Cal. 4th 342 (2003)	17

TABLE OF AUTHORITIES

<i>People v. McKinzie</i> 54 Cal. 4th 1302 (2012)	5, 15
<i>People v. Montes</i> 58 Cal. 4th 809 (2014)	5
<i>People v. Rangel</i> 62 Cal. 4th 1192 (2016)	8
<i>People v. Snow</i> 30 Cal. 4th 43 (2003)	7
<i>People v. Steele</i> 27 Cal. 4th 1230 (2002)	5
<i>People v. Wall</i> 3 Cal. 5th 1048 (2017)	passim
<i>People v. Wolfe</i> 114 Cal. App. 4th 177 (2003)	17
<i>Rauf v. State</i> 145 A.3d 430 (Del. 2016)	13
<i>Ritchie v. State</i> 809 N.E.2d 258 (Ind. 2004)	14
<i>State v. Gardner</i> 947 P.2d 630 (Utah 1997)	16
<i>State v. Longo</i> 148 P.3d 892 (Or. 2006)	16
<i>State v. Steele</i> 921 So. 2d 538 (Fla. 2005)	10, 16
<i>State v. Whitfield</i> 107 S.W.3d 253 (Mo. 2003)	14

TABLE OF AUTHORITIES

Federal Constitution

U.S. Const. amends.	V.....	passim
	VI.....	passim
	VI.....	passim
	XIV.....	passim

State Constitution

Cal. Const. art. I, §	16.....	17
-----------------------	---------	----

Federal Statutes

18 U.S.C.A. §	3593(C).....	16
28 U.S.C. §	1257(a).....	2

State Statutes

42 PA. CONS. STAT. §	9711(C)(1)(III).....	16
ALA. CODE 1975 §	13A-5-45(E).....	15
ARIZ. REV. STAT. ANN. §§	13-703(F).....	12
	13-703(G).....	12
	13-751(B).....	15
ARK. CODE ANN. §	5-4-603(A).....	15
CAL. PENAL CODE §§	187.....	2, 20
	190.....	2, 3, 20
	190.1.....	2, 3, 20
	190.2.....	2, 3, 12, 20
	190.3.....	passim
	190.4.....	2, 3, 20
	190.5.....	2, 20
COLO. REV. STAT. ANN. §	18-1.3-1201(1)(D).....	15
DEL. CODE ANN., TIT. 11, §	4209(C)(3)A.1.....	15
FLA. STAT. §§	775.082(1).....	10
	782.04(1)(a).....	9, 10
	921.141(1), (2)(A).....	16
	921.141(3).....	10, 12, 13

TABLE OF AUTHORITIES

GA. CODE ANN. §	17-10-30(C).....	15
IDAHO CODE§	19-2515(3)(B)	15
IND. CODE ANN. §	35-50-2-9(A)	15
K.S.A. §	21-6617(E)	15
KY. REV. STAT. ANN. §	532.025(3).....	15
LA. CODE CRIM. PROC. ANN. ART.	905.3.....	15
MISS. CODE ANN. §	99-19-103	15
MO. REV. STAT. ANN. §	565.032.1(1).....	16
MONT. CODE ANN.	46-18-305	16
N.C. GEN. STAT. §	15A-2000(C)(1)	16
N.H. REV. STAT. ANN. §	630:5-III	16
NEB. REV. STAT. §	29-2520(4)(F).....	16
NEV. REV. STAT. §	175.554(4).....	16
OHIO REV. CODE ANN. §	2929.04(B)	16
OKLA. STAT. ANN., TIT. 21, §	701.11.....	16
ORE. REV. STAT. §	163.150(1)(A)	16
S.C. CODE ANN. §	6-3-20(A)	16
S.D. CODIFIED LAWS ANN. §	23A-27A-5	16
TENN. CODE ANN. §	39-13-204(F).....	16
TEX. CRIM. PROC. CODE ANN. ART. 37.071 §	(2)(C).....	16
UTAH CODE ANN. §	76-3-207(2)(A)(IV).....	16
VA. CODE ANN. §	19.2-264.4(C).....	16
WASH. REV. CODE ANN. §	10.95.060(4).....	16

TABLE OF AUTHORITIES

WYO. STAT. §	6-2-102(D)(I)(A), (E)(I).....	16
Jury Instructions		
CALCRIM No.	763.....	4
	766.....	4
CALJIC No.	8.85.....	7
	8.88.....	4, 7
Other Authorities		
Death Penalty Information Center at http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (last visited June 18, 2018)		15
John G. Douglass, <i>Confronting Death: Sixth Amendment Rights at Capital Sentencing</i> , 105 Colum. L. Rev. 1967 (2005).....		11
Petitioner’s Brief on the Merits, <i>Hurst v. Florida</i> , 2015 WL 3523406		10

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017

RANDALL CLARK WALL, *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent*.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF CALIFORNIA
(DEATH PENALTY CASE – NO EXECUTION DATE SET)

Petitioner Randall Clark Wall respectfully petitions 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.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were petitioner, Randall Clark Wall, and Respondent, the People of the State of California.

OPINION BELOW

The California Supreme Court issued an opinion in this case on November 13, 2017, reported as *People v. Wall*, 3 Cal. 5th 1048 (2017). A copy of that opinion is attached as Appendix A. On January 24, 2018, the California Supreme Court issued an

order denying rehearing, a copy of which is attached as Appendix B.

JURISDICTION

The California Supreme Court entered its judgment on November 13, 2017 and rehearing was denied on January 24, 2018. On April 10, 2018, Justice Kennedy granted petitioner’s application for extension of time within which to file a petition for certiorari in this case to June 22, 2018. A copy of the letter from the Clerk of the Court notifying petitioner of the extension is attached as Appendix C. This Court has jurisdiction pursuant to 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I. Federal Constitutional Provisions

The Fifth Amendment to the United States Constitution provides in pertinent part:

“No person . . . shall be deprived of life, liberty, or property, without due process of law”

The Sixth Amendment to the United States Constitution provides in pertinent part:

“In all criminal prosecutions the accused shall enjoy the right to [trial] by an impartial jury”

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: “No state shall . . . deprive any person of life, liberty, or property, without due process of law”

II. State Statutory Provisions

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

STATEMENT OF THE CASE

I. Introduction

Petitioner was convicted and sentenced under California’s death penalty law, adopted by an initiative measure in 1978. Cal. Penal Code §§ 190-190.4.¹ Under this scheme, once the defendant has been found guilty of first degree murder, the trier of fact determines whether any of the special circumstances enumerated in section 190.2 are true beyond a reasonable doubt. If so, a separate penalty phase is held to determine whether the defendant will be sentenced to life imprisonment without possibility of parole or death. §§ 190.2 & 190.3; *Tuilaepa v. California*, 512 U.S. 967, 975-76 (1994). At the penalty phase, the parties may present evidence “relevant to aggravation, mitigation, and sentence. . . .” § 190.3. Section 190.3 lists the aggravating and mitigating factors the jury is to consider.²

¹ All statutory references are to the California Penal Code unless otherwise specified. “CT” refers to the Clerk’s Transcript. The cited portions of the Clerk’s Transcript are attached as Appendix E.

² This list includes the circumstances of the crime, including any special circumstances found to be true (factor (a)); the presence or absence of criminal activity

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.” California Jury Instructions Criminal (CALJIC) No. 8.88.³ The instruction defines an aggravating circumstance as “any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.” CALJIC No. 8.88; *see* CALCRIM No. 763;

involving the use or threat of force or violence (factor (b)) or of prior felony convictions (factor (c)); whether the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance (factor (d)); whether the victim was a participant in or consented to the defendant’s conduct (factor (e)); whether the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation (factor (f)); whether the defendant acted under extreme duress or the substantial domination of another person (factor (g)); whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication (factor (h)); the defendant’s age at the time of the crime (factor (i)); whether the defendant was an accomplice whose participation in the offense was relatively minor (factor (j)); and any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime (factor (k)). § 190.3.

³ In 2006 the California Judicial Council adopted revised jury instructions known as California Jury Instructions (Criminal), or “CALCRIM.” CALCRIM No. 766 provides in part that: “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.”

People v. Steele, 27 Cal. 4th 1230 (2002).⁴

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. *Wall*, 3 Cal. 5th at 1072-1073. The state high court has also concluded that the jurors do not need to find the existence of any aggravating circumstance unanimously. *See, e.g., People v. Contreras*, 58 Cal. 4th 123 (2013). The court deems a juror’s determination whether aggravation outweighs mitigation to be a normative conclusion, not a factual finding. *People v. McKinzie*, 54 Cal. 4th 1302, 1366 (2012).

⁴ The capital sentencing jury is not instructed in the exact language of the statute, which provides in part:

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

§ 190.3

By failing to require capital sentencing jurors to find unanimously and beyond a reasonable doubt (1) the existence of each aggravating circumstance relied upon, (2) that the aggravating circumstances outweigh the mitigating circumstances, and (3) that the aggravating circumstances are so substantial as to make death the appropriate penalty, California's death penalty scheme violates the Fifth, Sixth and Fourteenth Amendments.

II. Procedural History

Petitioner and a co-defendant were charged with the 1992 murder of an elderly couple in their home. Petitioner pled guilty to two counts of murder with special circumstances (multiple murder, lying in wait and felony murder), and to one count each of robbery and burglary, leaving for trial at the guilt phase only the allegation that he had personally killed each victim, using a dangerous and deadly weapon. *Wall*, 3 Cal. 5th at 1051-1052. The jury found the weapons use allegation true as to one of the two victims. *Id.*

At the penalty phase the prosecutor focused on the circumstances of the crime and played the statement petitioner gave to law enforcement. *Wall*, 3 Cal. 5th at 1056. The prosecutor also introduced evidence of petitioner's two minor prior crimes and presented victim impact testimony. *Id.* at 1056-1057. In mitigation the defense presented evidence regarding the circumstances of the crime, meant to establish that petitioner's codefendant had killed both victims. *Id.* at 1057.

The court then instructed the jury in accordance with the statutory sentencing scheme at issue here. 15 CT 3340-3341, 3350-3351 (CALJIC Nos. 8.85 & 8.88). The jury was specifically instructed that: “There is no requirement that all jurors unanimously agree on any matter offered in mitigation or aggravation. Each juror makes an individual evaluation of each fact or circumstance offered in mitigation or aggravation of penalty.” 15 CT 3343.⁵ The jury returned a verdict of death and judgment was entered January 30, 1995. 16 CT 3413.

On direct appeal petitioner argued that California’s death penalty scheme violates the Fifth, Sixth and Fourteenth Amendments, citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002). The California Supreme Court rejected petitioner’s claims, stating: “Choosing between the death penalty and life imprisonment without possibility of parole is not akin to ‘the usual fact-finding process,’ and therefore ‘instructions associated with the usual fact-finding process – such as burden of proof – are not necessary.’” *Wall*, 3 Cal. 5th at p. 1072 (citation omitted). The court reiterated that it does not “require ‘the prosecution to bear the burden of proof or burden

⁵ The trial court denied petitioner’s counsel’s request that the jury be instructed as follows: (1) that they could not “consider any factor as a basis for imposing the punishment of death” unless they were convinced beyond a reasonable doubt that it is was true; (2) that “[a]ll 12 jurors must agree as to the existence of any aggravating factor before it may be considered . . .”; and (3) that in order to impose a sentence of death all 12 jurors “must be unanimously convinced beyond a reasonable doubt that death is the appropriate punishment for the defendant.” 15 CT 3314.

of persuasion at the penalty phase,”” and ““that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard.”” *Id.* at 1072-1073 (citations omitted); *see also People v. Snow*, 30 Cal. 4th 43, 126 n.32 (2003) (“facts which bear upon, but do not necessarily determine, which of the[] two alternative penalties is appropriate do not come within the holding of *Apprendi*”). The court has since also rejected the argument that *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616, 621-624 (2016) dictates a different result, on the grounds that “[t]he California sentencing scheme is materially different from that in Florida.” *People v. Rangel*, 62 Cal. 4th 1192, 1235, n.16 (2016).

REASONS FOR GRANTING THE PETITION

CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER CALIFORNIA’S DEATH PENALTY STATUTE VIOLATES THE CONSTITUTIONAL REQUIREMENT THAT ANY FACT THAT INCREASES THE PENALTY FOR A CRIME MUST BE FOUND BY A JURY BEYOND A REASONABLE DOUBT

I. This Court Has Held That Every Fact That Serves To Increase A Maximum Criminal Penalty Must Be Proven to a Jury Beyond A Reasonable Doubt

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

defendant to greater punishment than that applicable in the absence of such proof, that fact must be proven to a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, *supra*, 530 U.S. at 490; *see also Cunningham v. California*, 549 U.S. 270, 281-82 (2007); *Blakely v. Washington*, 542 U.S. 292, 301 (2004). As the Court put it in *Apprendi*, “the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?” *Apprendi*, 530 U.S. at 494. In *Ring*, a capital sentencing case, this Court established a bright-line rule: “If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found, by a jury beyond a reasonable doubt. (Citation omitted.) *Ring*, 536 U.S. at 602, quoting *Apprendi*, 530 U.S. at 494, 482-83.

Applying this mandate, the Court in *Hurst* invalidated Florida’s death penalty statute, restating the core Sixth Amendment principle as it applies to capital sentencing statutes: “The Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence of death*.” *Hurst*, 136 S. Ct. at 619 (emphasis added). And as explained below, *Hurst* makes clear that the weighing determination required under the Florida statute at issue was an essential part of the sentencer’s factfinding exercise, within the meaning of *Ring*. *See Hurst*, 136 S. Ct. at 622.

Under the capital sentencing statute invalidated in *Hurst*, former Fla. Stat. §§

782.04(1)(a), the jury rendered an advisory verdict at the sentencing proceeding, with the judge then making the ultimate sentencing determination. *Hurst*, 136 S. Ct. at 620, citing 775.082(1). The judge was responsible for finding that “sufficient aggravating circumstances exist” and “that there are insufficient mitigating circumstances to outweigh aggravating circumstances,” which were prerequisites to imposing a sentence of death. *Id.* at 622, citing former Fla. Stat. § 921.141(3). These determinations were part of the “necessary factual finding that *Ring* requires.” *Id.*⁶

The questions decided in *Ring* and *Hurst* were narrow. “Ring’s claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him.” *Ring*, 536 U.S. at 597 n.4. The petitioner in *Hurst* raised the same claim. *See* Petitioner’s Brief on the Merits, *Hurst v. Florida*, 2015 WL 3523406 at *18 (the trial court rather than the jury has the task of making factual findings necessary to impose death penalty). In each case, this Court

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. § 775.082(1) (emphasis added). The trial court alone must find “the facts . . . [t]hat sufficient aggravating circumstances exist” and “[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.” § 921.141(3); *see* [*State v.*] *Steele*, 921 So.2d [538,] 546 [(Fla. 2005)].

Hurst, 136 S. Ct. at 622.

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. *Hurt* refers not simply to the finding that an aggravating circumstance obtains, but, as noted, to the finding of “each fact *necessary to impose a sentence of death*.” *Id.* at 619 (emphasis added).

II. California’s Death Penalty Statute Violates *Hurst* By Not Requiring That The Jury’s Factual Sentencing Findings Be Made Beyond A Reasonable Doubt

In California, a death sentence can not be imposed on a defendant who has been convicted at the guilt phase of capital murder unless the jury additionally finds: (1) the existence of one or more aggravating factors; (2) that the aggravating factors outweigh the mitigating factors; and (3) the aggravating factors are so substantial that they warrant death instead of the lesser penalty of life without parole. Under the principles that animate this Court’s decisions in *Apprendi*, *Ring* and *Hurst*, the jury in this case should have been required to make these factual findings beyond a reasonable doubt. *See* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967, 2004 (2005) (*Blakely* arguably reaches “any factfinding that

matters at capital sentencing, including those findings that contribute to the final selection process.”).

Although California’s statute is different from those at issue in *Hurst* and *Ring* in that the jury, not the judge, makes the findings necessary to sentence a defendant to death, California’s death penalty statute is similar to the invalidated Arizona and Florida statutes in ways that are key with respect to the *Apprendi/Ring/Hurst* principle. All three statutes provide that a death sentence may be imposed only if, after the defendant is convicted of first degree murder, the sentencer finds, first, the existence of at least one statutory death eligibility circumstance – in California, a “special circumstance” (Cal. Penal Code § 190.2) and in Arizona and Florida, an “aggravating circumstance” (Ariz. Rev. Stat. § 13-703(G); Fla. Stat. § 921.141(3)) – and, second, engages at the selection phase in an assessment of the relative weight or substantiality of aggravating and mitigating sentencing factors – in California, that “the aggravating circumstances outweigh the mitigating circumstances” (§ 190.3); in Arizona that “there are no mitigating circumstances sufficiently substantial to call for leniency” (*Ring*, 536 U.S. at 593, quoting Ariz. Rev. Stat. § 13-703(F)); and in Florida, that “there are insufficient mitigating circumstances to outweigh aggravating circumstances” (*Hurst*, 136 S. Ct. at

622, quoting Fla. Stat. § 921.141(3)).⁷

Although *Hurst* did not address standard of proof as such, the Court has made clear that weighing sentencing factors is an essentially factual exercise, within the ambit of *Ring*. As 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) (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 sentencer must find before death is imposed).

Other courts have recognized the factfinding nature of the weighing exercise. In *Hurst v. State*, 202 So. 3d 40, 43 (Fla. 2016), the Florida Supreme Court reviewed whether a unanimous jury verdict was required in capital sentencing, in light of this Court’s decision discussed above. The determinations to be made, including whether aggravation outweighed mitigation, were described as “elements,” like the elements of a

⁷ In *Hurst*, the Court uses the concept of death eligibility to mean that there are findings that actually authorize the imposition of the death penalty, and not in the sense that an accused potentially faces a death sentence at a separate hearing, which is what a “special circumstance” finding establishes under California law. Under California law it is the jury determination that the statutory aggravating factors outweigh the mitigating factors that ultimately authorizes imposition of the death penalty.

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 sentencing scheme is a factual finding necessary to impose a death sentence.” *Rauf v. State*, 145 A.3d 430, 485 (Del. 2016). The Missouri Supreme Court has also described the determination that aggravation warrants death, or that mitigation outweighs aggravation, as a finding of fact that a jury must make. *State v. Whitfield*, 107 S.W.3d 253, 259-60 (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, 134 S. Ct. 405, 410-11 (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, 773-75 (Nev. 2011) (“the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor”); *Ritchie v. State*, 809 N.E.2d 258, 265-66 (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. 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) (all “facts” essential to determination of penalty, however labeled, must be made by jury).

III. California Is An Outlier In Refusing To Apply *Ring*’s Beyond-A-Reasonable-Doubt Standard To Factual Findings That Must Be Made Before A Death Sentence Can Be Imposed

The California Supreme Court has applied its flawed understanding of *Ring*, *Apprendi* and *Hurst* to its review of numerous death penalty cases. The issue presented here is well defined and will not benefit from further development in the California Supreme Court or other state courts. These facts favor grant of certiorari, for two reasons.

First, as of July 1, 2017, California, with over 746 inmates on death row, had almost one-fourth of the country’s total death-row population of 2,820. *See* Death Penalty Information Center at <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited June 18, 2018). California’s refusal to require a jury to make the factual findings necessary to impose the death penalty beyond a reasonable doubt has widespread effect on a substantial portion of this country’s capital cases.

Second, of the 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.⁸ 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.⁹ But with the exception of the Oregon Supreme Court,¹⁰ 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.¹¹ California may be one of only several states that refuse to do so.

⁸ See ALA. CODE 1975 § 13A-5-45(E); ARIZ. REV. STAT. ANN. § 13-751(B); ARK. CODE ANN. § 5-4-603(A); COLO. REV. STAT. ANN. § 18-1.3-1201(1)(D); DEL. CODE ANN., TIT. 11, § 4209(C)(3)A.1; GA. CODE ANN. § 17-10-30(C); IDAHO CODE § 19-2515(3)(B); IND. CODE ANN. § 35-50-2-9(A); K.S.A. § 21-6617(E); KY. REV. STAT. ANN. § 532.025(3); LA. CODE CRIM. PROC. ANN. ART. 905.3; MISS. CODE ANN. § 99-19-103; MO. REV. STAT. ANN. § 565.032.1(1); MONT. CODE ANN. 46-18-305; NEB. REV. STAT. § 29-2520(4)(F); NEV. REV. STAT. § 175.554(4); N.H. REV. STAT. ANN. § 630:5-III; N.C. GEN. STAT. § 15A-2000(C)(1); OHIO REV. CODE ANN. § 2929.04(B); OKLA. STAT. ANN., TIT. 21, § 701.11; 42 PA. CONS. STAT. § 9711(C)(1)(III); S.C. CODE ANN. § 16-3-20(A); S.D. CODIFIED LAWS ANN. § 23A-27A-5; TENN. CODE ANN. § 39-13-204(F); TEX. CRIM. PROC. CODE ANN. ART. 37.071 § (2)(C); VA. CODE ANN. § 19.2-264.4(C); WYO. STAT. § 6-2-102(D)(I)(A), (E)(I); 18 U.S.C.A. § 3593(C).

⁹ See FLA. STAT. § 921.141(1), (2)(A); ORE. REV. STAT. § 163.150(1)(A); UTAH CODE ANN. § 76-3-207(2)(A)(IV). Washington's death penalty law does not mention aggravating factors, but requires that before imposing a sentence of death the trier of fact must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. WASH. REV. CODE ANN. § 10.95.060(4).

¹⁰ See *State v. Longo*, 148 P.3d 892, 905-06 (Or. 2006).

¹¹ See *State v. Steele*, 921 So. 2d 538, 540 (Fla. 2005); *State v. Gardner*, 947 P.2d 630, 647 (Utah 1997).

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.¹²

¹² Further, if the factual findings set forth above are the functional equivalents of elements of an offense, to which the Fifth, Sixth, and Fourteenth Amendment rights to trial by jury on proof beyond a reasonable doubt apply, then it follows, contrary to 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 the petition for a writ of certiorari and reverse the judgment of the Supreme Court of California upholding his death sentence.

Dated: June 21, 2018

Respectfully Submitted,
MARY K. McCOMB
California State Public Defender

/s/ Andrea Asaro

ANDREA G. ASARO
Senior Deputy State Public Defender
Counsel of Record

1111 Broadway, Suite 1000
Oakland, California 94607
andrea.asaro@ospd.ca.gov
Tel: (510) 267-3300
Fax: (510) 452-8712
Counsel for Petitioner
Randall Clark Wall