

No. 17-9525

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 SUPREME COURT OF THE STATE OF CALIFORNIA

(DEATH PENALTY CASE)

**REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI	1
ARGUMENT	1
CONCLUSION	6

TABLE OF AUTHORITIES

Page

FEDERAL CASES

<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	5
<i>Hurst v. Florida</i> , ___ U.S. ___, 136 S. Ct. 616 (2016)	1, 2, 3, 6
<i>Kansas v. Carr</i> , 136 S. Ct. 633 (2016)	3, 4, 5
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002)	1, 5

STATE CASES

<i>Hurst v. State</i> , 202 So. 3d 40 (Fla. 2016)	5
<i>People v. Merriman</i> , 60 Cal. 4th 1 (2014)	4
<i>Rauf v. State</i> , 145 A.3d 430 (Del. 2016)	4, 5
<i>State v. Whitfield</i> , 107 S.W.3d 253 (Mo. 2003)	4

STATE STATUTES

Cal. Penal Code § 190.2	2
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JURY INSTRUCTIONS

CALCRIM No. 766	4
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ARGUMENT

Under the Sixth Amendment “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 v. Arizona*, 536 U.S. 584, 602 (2002). This Court has also made clear that the determination of whether a death sentence could be imposed after finding “[t]hat there are insufficient mitigating circumstances to outweigh aggravating circumstances” is a part of the “necessary factual finding that *Ring* requires.” *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616, 622 (2016).

Petitioner has argued that California’s death penalty law violates these principles. In California, 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 California Penal Code section 190.2 are true beyond a reasonable doubt. If a special circumstance is found to be true, a separate penalty hearing is held to determine whether the punishment will be death or life imprisonment without possibility of parole. A jury may impose a sentence of death only if it is persuaded that the aggravating circumstances are so substantial in comparison to the mitigating circumstances that it warrants death instead of life without parole. With the exception of prior unadjudicated violent criminal activity and prior felony convictions, this scheme does not address the burden of proof applicable to these factual determinations nor is the jury required to agree on the existence of any one aggravating factor. Pet. 5. By failing to require that the jury unanimously find each aggravator relied upon and weighed to be true beyond a reasonable doubt, California's death penalty scheme violates the Fifth, Sixth and Fourteenth Amendments.

Respondent contends that once a jury finds unanimously and beyond a reasonable doubt that a defendant has committed first-degree murder with a special circumstance, the maximum potential penalty prescribed by statute is death and imposing that maximum penalty on a defendant does not violate the Fifth and Sixth Amendments because it does not increase in the maximum potential penalty.¹ Brief in Opp. 6.

¹ Respondent notes that certiorari has been denied in several California cases presenting similar issues before this Court. Brief in Opp. at 4 & n.1. The same was true, however, of Florida cases that raised the *Ring* issue that was finally resolved in *Hurst*. In opposing certiorari in *Hurst*, Florida cited 17 cases where this Court had denied review in
(continued...)

This view of California's death penalty scheme ignores the crucial distinction between a potential penalty and the imposition of a sentence of death. The maximum punishment for first degree murder in California is imprisonment for a term of 25 years to life. When a true finding of a special circumstance is found, the penalty range increases to either life imprisonment without the possibility of parole or death. Without any further jury findings, the maximum punishment the defendant can receive is life imprisonment without the possibility of parole. It is only where the jury, in a separate proceeding, concludes that the aggravating circumstances outweigh the mitigating circumstances that a defendant can receive a death sentence. Thus, it is the weighing finding that 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 factfinding determination which is subject to constitutional protections. *Hurst v. Florida*, 136 S. Ct. at 621-24; Pet. 9-11.

Respondent also contends *Kansas v. Carr*, 136 S. Ct. 633 (2016), effectively forecloses petitioner's argument because theoretically it would not be possible to apply a standard of proof to questions of mitigation. Brief in Opp. 8, citing *Carr*, 136 S. Ct. at 642 ["it is doubtful whether it would even be possible to apply a standard of proof to the mitigating-factor determination" and "the ultimate question of whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy," and

¹ (...continued)

petitions that had raised the same claim. See Brief in Opposition to Petition for Writ of Certiorari at 16, n.3, *Hurst v. Florida*, 136 S. Ct. 616 (No. 14-7505).

“[i]t would mean nothing . . . to tell the jury that the defendants must deserve mercy beyond a reasonable doubt”].

Carr does not foreclose petitioner’s argument, however, because the narrow issue in that case was whether the jury instruction at issue made it constitutionally necessary to instruct jurors that mitigating evidence need not be proved beyond a reasonable doubt. *Carr*, 136 S. Ct. at 642. Justice Scalia found the instruction in that case “makes clear that both the existence of aggravating circumstances and the conclusion that they outweigh mitigating circumstances must be proved beyond a reasonable doubt.” *Id.* at 643. The jurors were instructed, “The State has the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances found to exist.” *Id.* In contrast, in California, the revised standard jury instructions fail to instruct the jurors with a similar burden of proof. Instead, California jurors are told: “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. Thus, California 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 1, 106 (2014).

Respondent contends that the holding in *Rauf v. State*, 145 A.3d 430 (Del. 2016), and the similar holding in *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003), is unavailing

because of the failure of those decisions to discuss the opinion in *Carr*. Brief in Opp. 10. However, the holding of *Rauf* that a determination as to the relative weight of aggravating and mitigating standards in the application of Delaware’s death penalty must be made beyond a reasonable doubt is clear. *Rauf*, 145 A.3d at 434 (per curiam). As explained in *Ring*:

The dispositive question, we said, “is one not of form, but of effect.” [Citation]. 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].

Ring, 536 U.S. at 602, quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494, 482-83 (2000).

Respondent also argues that the decision of the Florida Supreme Court in *Hurst v. State*, 202 So. 3d 40, 43 (Fla. 2016) does not recognize a right to a beyond-a-reasonable-doubt determination of anything other than the existence of aggravating factors, which are the equivalent of the special circumstances that a California jury finds when determining eligibility for a death sentence. Brief in Opp. 11. In that case, however, the Florida Supreme Court reviewed whether a unanimous jury verdict was required in a capital sentencing. Each of the findings 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. Weighing, then, is a factual

determination that *Ring* requires to be made by a unanimous jury beyond a reasonable doubt. *Hurst v. Florida*, 136 S. Ct. at 622.

California fails to afford its defendants the protections that this Court has recognized to be necessary to the capital sentencing process. Certiorari should be granted to resolve this issue and bring California into compliance with what the Constitution requires.

CONCLUSION

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 a unanimous finding beyond a reasonable doubt of the existence of an aggravating factor. By failing to require that the jury unanimously find each aggravator relied upon and weighed to be true beyond a reasonable doubt, California's death penalty scheme violates the Fifth, Sixth and Fourteenth Amendments.

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This Court should grant certiorari to bring the largest death row population in the nation into compliance with the guarantees of the United States Constitution.

Dated: July 27, 2018

Respectfully Submitted,
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