

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JULIAN ALEJANDRO MENDEZ, Petitioner,

v.

STATE OF CALIFORNIA, Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE -- NO EXECUTION DATE SET

QUESTION PRESENTED

Whether the California death penalty scheme violates the Fifth, Sixth and Fourteenth Amendments by permitting the trier of fact to impose a sentence of death without finding the existence of aggravating factors beyond a reasonable doubt.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Julian Alejandro Mendez respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of California affirming his conviction and sentence of death.

OPINION BELOW

The California Supreme Court issued an opinion in this case on July 1, 2019, reported as *People v. Mendez*, 7 Cal.5th 680, 443 P.3d 896 (2019). A copy of that opinion is attached as Appendix A.

JURISDICTION

The California Supreme Court entered its judgment on July 1, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY 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.

The Fourteenth Amendment provides in pertinent part: “[N]or shall any state deprive any person of life, liberty, or property, without due process of law”

The relevant California Penal Code provisions, attached as Appendix B, include the following: sections 190, 190.1, 190.2, 190.3, 190.4.

STATEMENT OF THE CASE

A. 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, 190.4.¹ Under the statutory scheme, once the trier of fact has found true one or more special circumstances beyond a reasonable doubt, the court must hold a separate penalty hearing to determine whether the punishment will be death or life imprisonment without possibility of parole. §§ 190.2 (a), 190.3. During the penalty hearing, the parties may present evidence "relevant to aggravation, mitigation, and sentence. . . ." § 190.3.² In determining the appropriate penalty, the trier of fact must consider and be guided by the aggravating and mitigating factors referred to in section 190.3, and impose a sentence of death only if it concludes that "the aggravating circumstances outweigh the mitigating circumstances." *Id.*³ If the trier of fact

1. All statutory references are to the California Penal Code unless otherwise specified. "CT" refers to the Clerk's Transcript of the trial; "RT" refers to the Reporter's Transcript of the trial.

2. California law defines aggravating factors 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. Dyer*, 45 Cal.3d 26, 77, 753 P.2d 1, 32 (1988). Petitioner's jury was so instructed. 8 CT 2296; 27 RT 3338.

3. 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.

Footnote continued on following page . . .

determines that the mitigating circumstances outweigh the aggravating circumstances, it must impose a sentence of life without possibility of parole. *Id.* California's statutory scheme does not address the burden of proof applicable to the circumstances in aggravation or mitigation under section 190.3.

B. Petitioner's case

On September 8, 2004, a jury in Riverside County, California, found Petitioner guilty of two counts of first-degree murder and found true two special circumstances under section 190.2: multiple murders and murder of a witness. §§ 190.2 (a)(3) & (a)(10). 8 CT 2232, 2235, 2237, 2240-2241. On September 24, 2004, the jury sentenced Petitioner to death. 8 CT 2299.

On appeal, Petitioner challenged California's death penalty scheme as violative

- (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
- (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
- (g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.
- (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.
- (I) The age of the defendant at the time of the crime.
- (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
- (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

of the Fifth, Sixth and Fourteenth Amendments because it does not require as a predicate to imposition of a death judgment that a jury find beyond a reasonable doubt the presence of an aggravating circumstance or require the jury to find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. The California Supreme Court rejected Petitioner's argument, citing its own prior decisions. *People v. Mendez*, 7 Cal.5th at 716-717, 443 P.3d at 924.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER CALIFORNIA'S DEATH PENALTY LAW VIOLATES THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS BY PERMITTING THE TRIER OF FACT TO IMPOSE A SENTENCE OF DEATH WITHOUT FINDING THE EXISTENCE OF AGGRAVATING FACTORS BEYOND A REASONABLE DOUBT

A. 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, 127 S.Ct. 856, 864 (2007); *Blakely v. Washington*, 542 U.S. 296, 301, 124 S.Ct. 2531, 2536-37 (2004); *Apprendi v. New Jersey*, 530 U.S. at 490, 120 S.Ct. at 2362-63. 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. 584, 609, 122 S.Ct. 2428, 2443 (2002).

Despite these decisions, the California Supreme Court has repeatedly held that California's death penalty scheme permits the trier of fact to impose a sentence of death without finding the existence of an aggravating factor under section 190.3 beyond a reasonable doubt:

[U]nder 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, 22 P.3d 347, 378, n. 14 (2001). In this case, the state court rejected petitioner's argument that this Court's decision in *Apprendi* and its progeny compels a different result. *People v. Mendez*, 7 Cal.5th at 716-717, 443 P.3d at 924. The state court's decision merits review by this Court because it is inconsistent with decisions from this Court. Thus, this Court should grant certiorari in order to bring California, which has the largest death row in the nation, into compliance with the Fifth, Sixth and Fourteenth Amendments by requiring the state to prove aggravating factors beyond a reasonable doubt as a prerequisite to imposition of the death penalty.

B. California Law Contravenes This Court's Precedents and Must Be Corrected to Avoid Further Constitutional Violations

The 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, 115 S.Ct. 2310, 2313 (1995); see also *Mullaney v. Wilbur*, 421 U.S. 684, 698, 95 S.Ct. 1881, 1889 (1975). Where proof of a particular fact exposes the defendant to greater punishment than that available in the absence of such proof, that fact is an element of the crime which the Fifth and Sixth Amendments require be proven to a jury beyond a reasonable doubt. *Ring v. Arizona*, 536 U.S. at 609, 122 S.Ct. at 2443; *Apprendi v. New Jersey*, 530 U.S. at 490, 120 S.Ct. at 2362. "The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 1072 (1970).

In *Apprendi*, a factual finding under New Jersey's hate crime statute (that the defendant committed the charged offense of possession of a firearm with the purpose to intimidate individuals because of race) increased the statutory maximum penalty from

between five and ten years imprisonment to between ten and twenty years imprisonment. This Court determined that since this factual finding increased defendant's penalty beyond the prescribed statutory maximum, it constituted an element of the offense to be submitted to a jury and proved beyond a reasonable doubt: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. at 490, 120 S.Ct. at 2363, brackets in original, internal quotation marks omitted.

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 v. Arizona*, 536 U.S. at 589, 122 S.Ct. at 2432. Recalling *Apprendi's* admonition that the relevant inquiry "is one not of form, but of effect," *Ring*, 536 U.S. at 602, 122 S.Ct. at 2439, the Court stated the following 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, 122 S.Ct. at 2422. ⁴

The procedure for imposing a death sentence under California's death penalty scheme violates defendants' right to proof beyond a reasonable doubt under the Fifth,

4. This Court's holding in *Ring* did not rest on the heightened protections that the Constitution affords in death penalty cases: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring v. Arizona*, 536 U.S. at 589, 122 S.Ct. at 2432.

Sixth and Fourteenth Amendments. Under sections 190.2(a), 190.3, and 190.4(a), once the trier of fact finds that the defendant committed first-degree murder with 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 possibility of parole. In considering whether to impose the death penalty, the trier of fact must consider a variety of enumerated circumstances or factors in aggravation and mitigation. See § 190.3. Because the trier of fact can impose a sentence of death only where the aggravating circumstances outweigh the mitigating circumstances, it must find at least one aggravating circumstance or factor under section 190.3 before it can impose the death penalty. Thus, in effect, the statute actually requires two separate findings: first, whether there is an aggravating factor present; and second, whether the aggravating factor or factors outweigh the mitigating factors.

Because California's factors in aggravation operate as "the functional equivalent of an element of a greater offense," *Apprendi v. New Jersey*, 530 U.S. at 494, n. 19, 120 S.Ct. at 2365, 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 the California law for first-degree murder with a special circumstance is life imprisonment without possibility of parole; a death sentence is simply not available without a finding that at least one enumerated aggravating factor 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 capital 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 current California law violates a defendant's constitutional guarantee to proof beyond a reasonable doubt.

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 226, 275, 66 P.3d 1123, 1155 (2003). However, that analogy is flawed. 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, 127 S.Ct. 856. In *People v. Black*, 35 Cal.4th 1238, 113 P.3d 534 (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 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, 113 P.3d at 545. 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 v. California*, 549 U.S. at 288-93, 127 S.Ct. at 860-63. 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, 127 S.Ct. at 871 (footnote omitted).

Similarly, the California Supreme Court has disregarded the application of this Court’s precedents to California’s death penalty scheme. That disregard militates in favor of a grant of certiorari for two reasons:

First, as of October 1, 2018, California, with some 740 inmates on death row, had around one-quarter of the country’s total death-row population. See Death Penalty Information Center at <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>. California’s refusal to require the trier of fact to find aggravating factors 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 approximately thirty-four jurisdictions in the nation with a death penalty, the statutes of nearly all provide that aggravating factors must be proven beyond a reasonable doubt. The statutes of several additional states are silent on the standard of proof by which the state must prove aggravating factors to the trier of fact. However, 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. See generally Winbush, *Application of Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000) and *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002) to *State Death Penalty Proceedings*, 110 A.L.R.5th 1 (2011) (collecting state-court cases); Note, *Re-evaluating the Role of the Jury in Capital Cases After Ring v. Arizona*, 59 N.Y.U. ANN. SURV. AM. L. 633 (2004). California may be one of only several states that refuses to require proof of an aggravating factor beyond a reasonable doubt before the trier of fact may impose a sentence of death.

Certiorari is necessary to bring California and its death penalty law in line with the vast majority of other jurisdictions and, more importantly, with this Court's clear pronouncements regarding the requisite standard of proof 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 Petitioner's death sentence.

Dated: September 3, 2019

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