

ORIGINAL

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT WALTER SCULLY, *Petitioner*

v.

STATE OF CALIFORNIA, *Respondent.*

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

(DEATH PENALTY CASE)

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CAPITAL CASE

QUESTION PRESENTED

Does the mandatory weighing of aggravating and mitigating circumstances under the California death penalty statute—a factfinding determination that serves to increase the statutory maximum for the crime—violate the Fifth, Sixth and Fourteenth Amendments where there is no requirement this determination must be found by a jury beyond a reasonable doubt?

STATEMENT OF RELATED PROCEEDINGS

People v. Robert Walter Scully, Case No. SCR-22969
Superior Court of Sonoma County (California).
(Trial judgment entered June 13, 1997)

People v. Robert Walter Scully, Case No. S062259
Supreme Court of California
(Direct appeal, decision issue date May 24, 2021)

People v. Robert Walter Scully, Case No. S062259
Supreme Court of California
(Petition for rehearing denied July 21, 2021)

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2021

ROBERT WALTER SCULLY, *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)

Petitioner Robert Walter Scully 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, Robert Walter Scully, and respondent, the People of the State of California.

OPINION BELOW

The California Supreme Court issued an opinion in this case on May 24, 2021, reported as *People v. Scully*, 11 Cal. 5th 542 (2021). A copy of the published opinion is attached as Appendix A. On July 21, 2021, the California Supreme Court issued an

order modifying its opinion and denying the petition for rehearing. A copy of that order is attached as Appendix B.

JURISDICTION

The California Supreme Court entered its judgment on May 24, 2021 and denied a timely filed petition for rehearing on July 21, 2021. On October 13, 2021, Justice Kagan granted petitioner's application for extension of time within which to file a petition for certiorari in this case to December 18, 2021. 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 under 28 U.S.C. § 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.

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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. California law defines an aggravating factor as "any fact, condition or event attending the commission of a crime which increases its severity or enormity or adds to its injurious consequences which is above and beyond the elements of the crime itself." California Jury Instruction Criminal (CALJIC) No. 8.88; see *People v. Steele*, 27 Cal. 4th 1230 (2002). Section 190.3 lists the aggravating and mitigating factors the jury is to consider.² Pursuant to section 190.3, the jury "shall

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

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 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

impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances.”

Under this statutory scheme, the trial court instructed the jurors in this case that they “shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances” and could sentence petitioner to death only after each of them was “persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.” 128RT 19875-19876; CALJIC No. 8.88.³ Both the wording of the statute and the instruction given to the jurors make clear that the jury must not only weigh the aggravating and mitigating circumstances, but determine whether the aggravating circumstances outweigh the mitigating circumstances.

Apart from section 190.3 factors (b) and (c)—prior violent criminal activity and prior felony convictions—California’s death penalty scheme does not address the burden of proof applicable to the mandatory factfinding. For section 190.3 factors (b) and (c) the

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.”

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; 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. *Id.* It is up to the individual juror to believe in the truth or existence of the aggravating factor in the weighing process.⁴ Further, the state high court has also concluded that a capital sentencing jury need not agree on the existence of any one aggravating factor or find a factor unanimously. *See, e.g., People v. Contreras*, 58 Cal. 4th 123 (2013) (juror unanimity not required for any aggravating factor); *but see People v. McDaniel*, 12 Cal. 5th 97, 157, 159-60, 175 (2021) (Liu, J. concurring) (stating, “There is a serious question whether our capital sentencing scheme is unconstitutional in light of *Apprendi*” and the Sixth Amendment because California does not require that the jury find at least one single aggravating factor beyond a reasonable doubt.). This is true even though the jury must

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.

Cal. Penal Code § 190.3

make certain factual findings in order to consider specific circumstances as aggravating factors. *See, e.g., People v. Prieto*, 30 Cal. 4th 226, 263 (2003).⁵

By requiring capital sentencing jurors to make the factual determination that aggravation outweighs mitigation but failing to require that the determination be made beyond a reasonable doubt, California's death penalty scheme violates the Fifth, Sixth and Fourteenth Amendments. 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.

II. PROCEDURAL HISTORY

Petitioner was charged the first degree murder of Sonoma County Deputy Sheriff Frank Trejo and other offenses. The jury found petitioner guilty of the murder with special circumstances (murder for the purpose of avoiding arrest; murder while engaged in the commission of a robbery; intentionally killing a peace officer in the performance of his duties). The jury also convicted petitioner of several non-capital offenses (false imprisonment of six people taken hostage; burglary; robbery; assault with a firearm; various firearm possession charges). The jury found true arming and personal use of a firearm allegations, as well as prior serious felony convictions, prior strike convictions, and prior prison term allegations. *Scully*, 11 Cal. 5th at 556, 560.

⁵ In this case, the trial court instructed the jury, with respect to 190.3, subdivision (b), relating to other criminal activity, that "[i]t is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose." 128RT 19862; CALJIC No. 8.87.

At the penalty phase, the prosecutor's case in aggravation included evidence regarding petitioner's prior violent criminal history (including rape, armed robberies, and assaults on other inmates) and victim impact testimony. *Scully*, 11 Cal. 5th at 562-63. In mitigation, the defense presented evidence of the effects of petitioner's childhood and background on his behavior and the psychological effects of having been incarcerated for nearly 13 years in the Security Housing Unit (SHU) or in solitary confinement. *Id.* at 563.

The court then instructed the jury in accordance with the statutory sentencing scheme at issue here. 128RT 19874-19876; CALJIC No. 8.88. In conformity with California law, petitioner's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. 128RT 19874-19876. The jury was specifically instructed:

In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. ¶ To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

128RT 19875-19876; CALJIC No. 8.88.

The jury returned a verdict of death and judgment was entered on June 13, 1997. 26CT 5440-5447.

On direct appeal petitioner argued that the Sixth and Fourteenth Amendments, as interpreted in *Blakely v. Washington*, 542 U.S. 296 (2004), *Ring v. Arizona*, 536 U.S. 584, 604 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000), require that any

fact that is used to support an increased sentence (other than a prior conviction) be submitted to the jury and proved beyond a reasonable doubt. Petitioner argued that in order to impose the death penalty, his jury had to make several factual findings: that aggravating factors were present; that the aggravating factors outweighed the mitigating factors; and that the aggravating factors were so substantial as to make death an appropriate punishment. 26CT 5337; 128RT 19874-19876; CALJIC 8.88. Because these additional findings were required before the jury could impose the death sentence, *Blakely*, *Ring*, and *Apprendi* required that each of these findings be made beyond a reasonable doubt. Petitioner urged the court to reconsider its holdings that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi*, does not require factual findings, and is not required by this Court's jurisprudence to impose a reasonable doubt standard on California's capital penalty phase proceedings, so that California's death penalty scheme will comport with the constitutional principles set forth. Appellant's Opening Brief at 583-86, *People v. Scully*, 11 Cal. 5th 542 (Cal. Sup. Ct. No. S062259).

The California Supreme Court, noting it had "repeatedly considered and rejected such challenges," "decline[d] to reconsider" its prior conclusions. *Scully*, 11 Cal. 5th at 610. It rejected petitioner's claims, stating: "The death penalty statute does not yield arbitrary and capricious sentencing because jurors need not find beyond a reasonable doubt that an aggravating factor (other than evidence under section 190.3, factor (b) or (c)) has been proved [citations omitted]. We have held that the high court's recent decisions interpreting the Sixth Amendment's jury trial rights do not alter our

conclusions.” *Id.* at 610-611 (citing *People v. Rangel*, 62 Cal. 4th 1192, 1235 (2016); *McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 577 U.S. 92 (2016)). The court reiterated its position that the federal constitution does not require that the penalty phase jury make unanimous findings “regarding the existence of particular aggravating factors” [citations omitted] or “findings beyond the existence of aggravating factors other than section 190.3, factors (b) and (c).” *Scully*, 11 Cal. 5th at 611 (citation omitted).

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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*, 530 U.S. at 490; *see also Cunningham v. California*, 549 U.S. 270, 281-82 (2007); *Blakely v. Washington*, 542 U.S. at 301. 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.” *Ring*, 536 U.S. at 602, quoting *Apprendi*, 530 U.S. at 482-83 (citation omitted).

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*, 577 U.S. at 94 (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*, 577 U.S. at 99-100.⁶

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*, (No. 14-7505), 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 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. at 102.

⁶ 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*, 577 U.S. at 95, citing § 775.082(1). The judge was responsible for finding that "sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh aggravating circumstances," which were prerequisites to imposing a sentence of death. *Id.* at 100, citing former Fla. Stat. § 921.141(3). These determinations were part of the "necessary factual finding that *Ring* requires." *Id.*

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*, 577 U.S. at 94, 99. *Hurst* refers not simply to the finding of an aggravating circumstance, but as noted, to the finding of “each fact *necessary to impose a sentence of death*.” *Id.* at 94 (emphasis added). And *Ring* shows that it does not matter how a state labels the fact; if it increases a defendant’s authorized punishment, it must be found by the jury beyond a reasonable doubt. *Ring*, 536 U.S. at 602.

II. CALIFORNIA’S DEATH PENALTY STATUTE VIOLATES *APPRENDI*, *RING* AND *HURST* BY NOT REQUIRING THAT THE JURY’S FACTUAL SENTENCING FINDINGS BE FOUND BEYOND A REASONABLE DOUBT

California’s death penalty statute violates *Apprendi*, *Ring* and *Hurst*. In California, although the jury’s final sentencing verdict must be unanimous, § 190.4, subd. (b), California does not require that a finding that aggravating circumstances are so substantial in comparison to mitigating circumstances be found beyond a reasonable doubt. While California law requires the jury and not the judge to make the findings necessary to sentence the defendant to death, *see, e.g., People v. Rangel*, 62 Cal. 4th at 1235 n. 16 (distinguishing California’s law from that invalidated in *Hurst* on the grounds that, unlike Florida, the jury’s verdict is not merely advisory), the law in California is similar in other respects to the statutes invalidated in Arizona and Florida. Under all three statutes, the sentencer must make an additional factual finding before imposing a death sentence: in California’s 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. Ann. § 13-703(F); and in Florida’s, “[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances” *Hurst*, 577 U.S. at 100, quoting Fla. Stat. § 921.141(3).

Under the principles that animate this Court’s decisions in *Apprendi*, *Ring* and *Hurst*, the California death penalty statute should require the jury to make these factual findings unanimously and 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 *Hurst* did not address standard of proof as such, and the state high court claims otherwise, this 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*, 577 U.S. at 98-99 (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 not been uniform in their application of this Court’s jurisprudence on this subject. Some have recognized the factfinding nature of the weighing exercise. 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 "[t]he 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.).

The Florida Supreme Court, in *Hurst v. State*, 202 So. 3d 40, 43 (Fla. 2016), 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 crime itself, determined at the guilt phase. *Hurst v. State*, 202 So. 3d at 53, 57. There was nothing that separated the capital weighing determination from any other finding of fact. However, in 2020, in *State v. Poole*, 297 So. 3d 487 (Fla. 2020), the Florida Supreme Court determined that it had erred in its 2016 opinion in *Hurst v. State*, declaring in a per curiam opinion, "[W]e recede from *Hurst v. State* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt." *Id.* at 507-08. When a jury has found one or more "eligibility" factors, there is no state or federal constitutional mandate that the jury make the selection finding or recommend a sentence of death. *Id.* at 503.

Other courts similarly have failed to recognize the fact-finding nature of the weighing exercise. *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*, 263 P.3d 235, 253 (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 question cannot be avoided, as the state high court has done, by merely characterizing the weighing factfinding that is a prerequisite to the imposition of a death penalty as “normative” rather than “factual.” *See, e.g., People v. Karis*, 46 Cal. 3d 612, 639-40 (1988); *People v. McKinzie*, 54 Cal. 4th 1302, 1366 (2012). At end, the inquiry is one of function. *See Ring*, 536 U.S. at 610 (Scalia, J., concurring).

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”). Under the 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, under Penal Code section 190.3, 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 determination is therefore a factfinding. Justice Sotomayor, the author of the majority opinion in *Hurst*, previously found that *Apprendi* and *Ring* are applicable to a sentencing scheme that requires a finding that the aggravating factors outweigh the mitigating factors before a death sentence may be imposed. More importantly here, she has gone on to find that it “is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole.” *Woodward v. Alabama*, 134 S. Ct. at 411 (Sotomayor, J., dissenting from denial of cert.).

Although the state high court characterizes the weighing determination as a normative process, this conclusion was made in the context of the state high court being confronted with a claim that the language “‘shall’ impose a sentence of death” violated the Eighth Amendment requirement of individualized sentencing and not whether the weighing determination is a factfinding. *People v. Brown*, 40 Cal. 3d 512, 538 (1985). According to the state high court in *Brown*, the weighing requirement provides for jury discretion in both the assignment of the weight to be given to the sentencing factors and

the ultimate choice of punishment. As construed by *Brown*, section 190.3 provides for jury discretion in deciding which punishment is appropriate. The weighing decision may assist the jury in reaching its ultimate determination of whether death is appropriate, but it is a separate, statutorily-mandated finding that precedes the final sentence selection. Once the jury finds that the aggravation outweighs the mitigation, it still retains the discretion to reject a death sentence. *See, e.g., People v. Duncan*, 53 Cal. 3d 955, 979 (1991). Thus, the jury under California's death statute is required to make two determinations: the jury must determine whether the aggravating circumstances outweigh the mitigating circumstances, then the jury selects the sentence it deems appropriate. The first step is a factfinding, separate and apart from the second step, even though the state high court characterizes both steps as one normative process.⁷ As discussed above, *Hurst*, 577 U.S. at 99-100, 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* and *Ring*.

⁷ The revised standard jury instructions, CALCRIM, "written in plain English" to "be both legally accurate and understandable to the average juror" (CALCRIM (2006), vol. 1, Preface, p. v.), makes 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, italics added.

III. CALIFORNIA IS AN OUTLIER IN REFUSING TO APPLY THE 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 April 1, 2021, California, with 704 inmates on death row, had over one-fourth of the country's total death-row population of 2,504. *See Facts about the Death Penalty*, Death Penalty Information Center at <https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf> (last visited December 15, 2021). 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 29 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

⁸ See Ala. Code 1975 § 13A-5-45(e); Ariz. Rev. Stat. Ann. § 13-751(B); Ark. Code Ann. § 5-4-603(a); Fla. Stat. § 921.141(2)(a); Ga. Code Ann. § 17-10-30(C); Idaho Code Ann. § 19-2515(3)(b); Ind. Code Ann. § 35-50-2-9(A); Kan. Stat. Ann. § 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. Ann. Stat. § 565.032(1); Mont. Code Ann. § 46-18-305; Neb. Rev. Stat. § 29-2520(4)(f); Nev. Rev. Stat. § 175.554(4); N.C. Gen. Stat. § 15A-2000(c)(1); Ohio Rev. Code Ann. § 2929.04(B); Okla. Stat. Ann. tit. 21, § 701.11; 42 Pa. Stat. and Cons. Stat. § 9711(c)(1)(iii); S.C. Code Ann. § 16-3-20(A); S.D. Codified Laws § 23A-27A-5; Tenn. Code

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.

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

Ann. § 39-13-204(f); Tex. Crim. Proc. Code Ann. § 37.071 § (2)(c); Wyo. Stat. Ann. § 6-2-102(d)(i)(A), (e)(i); 18 U.S.C. § 3593(c).

⁹ See Or. Rev. Stat. Ann. § 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).

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: December 16, 2021

Respectfully submitted,

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