No. 06-1714

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN M. BELL, *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent.*

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

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether, in determining whether Petitioner established a prima facie case of group bias under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the California Supreme Court was required to engage in comparative juror analysis for the first time on appeal, when the California Supreme Court, applying United States Supreme Court precedent, carefully considered all relevant factors bearing on its *Batson* inquiry, but found that on the particular record before it, any attempt at comparative juror analysis would have amounted to pure speculation.

2. Whether California's procedures for death penalty eligibility and selection comply with the requirement in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and its progeny, that any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

LIST OF PARTIES

Petitioner Steven M. Bell is a California state prisoner incarcerated under a judgment of death at the California State Prison at San Quentin, California.

Respondent is the People of the State of California.

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IN THE SUPREME COURT OF THE UNITED STATES

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OPINION OR JUDGMENT BELOW

The California Supreme Court opinion in *People v. Bell*, 40 Cal. 4th 582, 151 P.3d 292, 54 Cal. Rptr. 3d 453 (2007) ("*Bell*"). (Pet. App., at A1-A54.)

The California Supreme Court affirmed Petitioner's conviction and death sentence on February 15, 2007. *Bell*, at 586, 622. (Pet. App., at A-1, A-54.) Petitioner's petition for rehearing was denied on March 28, 2007. (Pet. App., at A55.)

STATEMENT OF JURISDICTION

Petitioner filed a Petition for Writ of Certiorari before this Court on June 26, 2007, which was docketed on June 27, 2007. Petitioner asserts jurisdiction under 28 U.S.C. § 1257 and rules 13.1 and 13.3 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner relies on the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These provisions are set forth in the Petition for Writ of Certiorari at pages 1-2. Sections 190, 190.1, 190.2, 190.3 and 190.4 of the California Penal Code are reproduced in Petitioner's Appendix. (Pet. App., at A56-A70.)

STATEMENT OF THE CASE

On March 7, 1994, Petitioner Steven M. Bell was sentenced to death, after a California jury found him guilty of one count of first degree murder, one count of first degree robbery, and found as true allegations of personal use of a deadly weapon, personal infliction of great bodily injury, and a robbery-murder special circumstance pursuant to California Penal Code section 190.2(a)(17)(A). The California Supreme Court affirmed the judgment on February 15, 2007, and denied a petition for rehearing on March 28, 2007. (Pet. App., at A1-A54, A55.)

STATEMENT OF FACTS

In 1992, Petitioner was living with his girlfriend and her eleven-year-old son, Joey Anderson, in San Diego. After obtaining a government relief check and spending it all on crack cocaine, Petitioner returned to his girlfriend's house planning to steal the television set and stereo, so he could sell them to buy more crack cocaine. When Joey unexpectedly came home from school early that day, Petitioner stabbed and stomped Joey to death as Joey was watching television in his mother's bedroom. Petitioner then took the television set and stereo, and sold them for drugs. Petitioner left Joey's body behind for his mother to find when she returned home from work. Petitioner was arrested the following morning, and later in the day, agreed to be interviewed and voluntarily confessed to killing Joey. *Bell*, 40 Cal. 4th at 586-87. (Pet. App., at A1-A3.)

REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD BE DENIED ON PETITIONER'S *BATSON* CLAIM BECAUSE THE CALIFORNIA SUPREME COURT'S DECISION IS CONSISTENT WITH THIS COURT'S JURISPRUDENCE, THERE IS NO NEED FOR FURTHER GUIDANCE FROM THIS COURT, THERE IS NO CONFLICT IN THE LAW, AND THE CALIFORNIA SUPREME COURT'S RULING WAS BASED ON THE PARTICULAR FACTS OF THIS CASE

Petitioner asks this Court to grant certiorari to review the California Supreme Court's decision which found Petitioner had not demonstrated a prima facie case, under *Batson v. Kentucky*, 476 U.S. 79 ("*Batson*"), that the prosecutor impermissibly challenged six jurors because of group bias. Petitioner contends that guidance is needed from this Court as to whether "comparative juror analysis" (i.e., a comparison of seated jurors to those who were excused) is an appropriate consideration at the first stage of a *Batson* inquiry. Petitioner further contends that the California Supreme Court erred when it concluded Petitioner did not meet his initial burden under *Batson*. (Pet. at 4-11.)

Respondent disagrees. Certiorari should be denied because Petitioner has failed to raise an important federal question. Instead, Petitioner is attempting to use certiorari review to reargue the California Supreme Court's application of this Court's precedent to his particular case. Moreover, there is no need for additional clarification from this Court on the issue of comparative juror analysis, nor is there a conflict in need of resolution. Finally, this case is not an appropriate one for this Court to further evaluate the issue of comparative juror analysis, even if it is inclined to do so.

In *Batson*, this Court held that the Equal Protection and Due Process Clauses preclude a prosecutor from challenging prospective jurors because of race, or on the assumption that jurors of a particular race will be more sympathetic to the defense. *Batson*, 476 U.S. at 92-

93.[1/] This Court set forth a three-part test for determining whether peremptory challenges were constitutionally impermissible: (1) the moving party must make a prima facie showing the jurors were excluded because of group bias; (2) once a prima facie case is made, the burden shifts to the opposing party to provide a group-neutral explanation for the challenges; and (3) the trial court determines whether the moving party has carried his burden of proving purposeful discrimination. *Id.* at 93-94.

In *Johnson v. California*, 545 U.S. 162, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005) ("*Johnson*"), this Court held that California's prima facie case standard, that the moving party show a "strong likelihood" of group bias, or that challenges were "more likely than not" based on group bias, was too high. Rather, the proper standard was whether "the totality of the relevant facts gives rise to an inference of group bias." *Johnson*, at 168 (quoting *Batson*, at 93-94).

In his appeal to the California Supreme Court, Petitioner alleged error in the trial court's denial of his *Batson* motion for failure to establish a prima facie case as to six prospective jurors: two African-American women, two men who he thought might be Filipino-Americans, and two women he perceived were lesbians. After briefing was complete, this Court issued its decision in *Johnson*. Thereafter, before oral argument, the California Supreme Court requested supplemental briefs from the parties concerning the effect of *Johnson* on Petitioner's *Batson* claim.

In its opinion, the California Supreme Court assumed for purposes of its analysis that the trial court here used an improper

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1. This Court subsequently applied *Batson*'s anti-discrimination rule to the use of peremptory challenges by criminal defendants, *Georgia v. McCollum*, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992), by private litigants in civil cases, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991), and by prosecutors where the defendant and the excluded juror(s) are of different races, *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991); and has held that equal protection principles prohibit excusing jurors because of gender. *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994). Constitutionally impermissible peremptory challenges are referred to herein as challenges based on group bias.

standard, i.e., "strong likelihood," in finding no prima facie case. *Bell*, 40 Cal. 4th at 596. (Pet. App., at A16.) The California Supreme Court stated that it would thus independently review the record, apply the standard in *Johnson*, and resolve the legal question of whether the record supported an inference the prosecutor excused a juror for a constitutionally impermissible basis. *Bell*, 40 Cal. 4th at 597. (Pet. App., at A16.)

The California Supreme Court stated that courts should consider all information in the record in determining whether there was a prima facie case. By way of example, the California Supreme Court set forth several considerations which this Court, lower federal courts and California state courts have found are important in making this determination: (1) whether the prosecutor struck more or all members of the identified group from the venire; (2) whether the only characteristic shared by the challenged jurors was their membership in the group while in all other respects they were as heterogenous as the entire pool of prospective jurors; (3) whether the prosecutor's voir dire of the challenged jurors was particularly desultory or non-existent; and (4) whether the defendant was member of the group allegedly excluded from the jury while the victim was a member of the group to which a majority of the remaining seated jurors belong. *Bell*, 40 Cal. 4th at 597. (Pet. App., at A17.)

The California Supreme Court then thoroughly examined the record in Petitioner's case in light of these settled legal principles. The California Supreme Court found that the facts of Petitioner's case did not support an inference of discrimination under *Johnson* as to any of the six prospective jurors about which Petitioner complained. *Bell*, 40 Cal. 4th at 597-600. (Pet. App., at A18-A22.)

In his instant Petition for Certiorari, Petitioner repeats verbatim the arguments he made in the California Supreme Court. Petitioner advances his interpretation of the facts regarding the jurors under consideration, and asserts that the trial court was wrong to find lack of a prima facie case. Petitioner expresses his disagreement with the ruling to the contrary by the California Supreme Court. (Pet. 7-11.) Petitioner's dispute with the California Supreme Court's application of settled legal principles and with its factual findings does not justify certiorari review. United States Supreme Court Rules, rule 10.

Petitioner contends that a grant of certiorari is appropriate because the California Supreme Court failed to evaluate all relevant circumstances when it rejected his *Batson* claim. (Pet. at 4.)

Specifically, Petitioner claims the California Supreme Court "refused" to engage in comparative juror analysis and that the California Supreme Court's decision conflicts with the Ninth Circuit's decision in *Boyd v. Newland*, 455 F.3d 897 (9th Cir. 2006) ("*Boyd*"). Petitioner argues that *Miller-El v. Dretke*, 545 U.S. 231, 162 L. Ed. 2d 196, 125 S. Ct. 2317 (2005), which concerned comparative analysis at the *third* stage of a *Batson* inquiry, allows such evidence to be introduced at the first stage, and that the California Supreme Court erred in "refusing" to consider such evidence. (Pet. at 4-7.)

Petitioner mis-characterizes the California Supreme Court's holding. The California Supreme Court did not categorically foreclose the possibility of comparative juror analysis, as Petitioner asserts. (Pet. at 6.) The California Supreme Court merely stated that comparative analysis was not *required* at the first stage of the *Batson* inquiry, when no such analysis was ever done in the trial court. *Bell*, 40 Cal. 4th at 601. (Pet. App., at A22-A23.)

The holding of the California Supreme Court is not inconsistent with the Ninth Circuit's decision in *Boyd*. The issue in *Boyd* was whether a California Court of Appeal acted unreasonably when it upheld the trial court's denial of a defendant's *Batson* motion for lack of a prima facie case, without providing the indigent defendant with a transcript of the entire voir dire proceedings for purposes of appeal. *Boyd*, 455 F.3d at 900. The Ninth Circuit held that a transcript was necessary, and remanded the case to the California state courts with directions to give the transcript to the parties and reconsider the merits of the alleged *Batson* error. *Id.* at 908-09.

In its discussion of why the transcript was important, the Ninth Circuit noted that to review a ruling on a *Batson* motion, an appellate court had to examine the totality of the relevant facts. *Boyd*, 455 F.3d at 904-05. The Ninth Circuit stated that in appropriate cases, such analysis *may* include comparative juror analysis. *Id.* at 906. The Ninth Circuit was careful to point out its agreement with California state courts on the necessity, or lack thereof, of comparative juror analysis, explaining, "Like the various California courts to address the issue, we do not hold that comparative juror analysis *always* is compelled at the appellate level." *Id.* (emphasis in original) (citing *People v. Ward*, 36 Cal. 4th 186, 114 P.3d 717, 30 Cal. Rptr. 3d 464 (2005)). An analogous holding was reached in Petitioner's case, i.e., that comparative analysis was not *required*. *Bell*, 40 Cal. 4th at 601.

(Pet. App. at A22-A23.)

Moreover, like the Ninth Circuit in *Boyd*, the California Supreme Court noted that an evaluation of the trial court's finding of no prima facie case necessitated a review of all relevant information in the appellate record. *Bell*, 40 Cal. 4th at 597. (Pet. App., at A17.) The California Supreme Court simply found that here, comparative juror analysis was not a relevant consideration, because statements by Petitioner's counsel at the time of the *Batson* motion that the challenged jurors were "nondescript," "not controversial," or "as about as neutral as any juror" were too vague and general to engage in a comparative analysis between these jurors and those who were seated as to other unspecified criteria. *Bell*, 40 Cal. 4th at 601. (Pet. App., at A23-A24.) Because the California Supreme Court based its decision on the particular facts of Petitioner's case, i.e., lack of any comparative analysis at trial which would provide a means to engage in such analysis on appeal, this case would not provide a good vehicle for certiorari. For this reason, too, certiorari should be denied.

II.

CERTIORARI SHOULD BE DENIED ON PETITIONER'S *APPRENDI* CLAIM BECAUSE THE CALIFORNIA SUPREME COURT'S DECISION FINDING CALIFORNIA'S DEATH PENALTY ELIGIBILITY AND SELECTION PROCEDURES CONSTITUTIONAL DOES NOT INVOLVE AN IMPORTANT FEDERAL QUESTION AND IS CONSISTENT WITH THIS COURT'S ESTABLISHED JURISPRUDENCE

Petitioner asserts that certiorari is necessary because California law does not require penalty phase jurors to unanimously agree beyond a reasonable doubt: (1) on the facts that constitute aggravating factors; and (2) that the aggravating factors substantially outweigh the mitigating factors. Petitioner argues that by failing to impose these requirements, California violates *Apprendi v. New Jersey*, 530 U.S. 466 ("*Apprendi*"), and its progeny, namely *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) ("*Ring*"), *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) ("*Blakely*") and *Cunningham v. California*, 549 U.S. __, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007) ("*Cunningham*").

(Pet. 12-26.)

Certiorari should be denied. The California Supreme Court's decision upholding California's death penalty eligibility and selection procedures comports with *Apprendi*. Eligibility for the death penalty is determined in the guilt phase by a unanimous jury finding of guilt of first degree murder and the existence of a special circumstance by proof beyond a reasonable doubt. The subsequent penalty selection phase, involving traditional sentencing considerations and no burden of proof (with the exception of proof of other crimes evidence), does not increase the defendant's authorized punishment.

In *Apprendi*, this Court found unconstitutional a New Jersey statute allowing for imposition of a "hate crime" enhancement without a jury finding. This Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Apprendi*, 530 U.S. at 490.

Ring extended the *Apprendi* decision to capital cases. In *Ring*, this Court invalidated Arizona's capital sentencing scheme because death could be imposed only after the judge, sitting as the sentencer without a jury, found at least one specifically enumerated aggravating factor to be true. *Ring*, 536 U.S. at 592-93. In reaching its conclusion, this Court explained:

> [I]f 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.] A defendant may not be "expose[d] to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." [Citations.]

Ring, 536 U.S. at 602 (emphasis added) (quoting *Apprendi*, 502 U.S. at 482-83).

In *Blakely*, this Court held that a Washington state trial court violated the defendant's Sixth Amendment right to a jury trial when it sentenced him to a ninety-month "exceptional sentence," which was thirty-seven months beyond the crime's "standard range" of forty-nine to fifty-three months under Washington state law, based on a finding by the court that the defendant had acted with deliberate

cruelty in committing the crime. This Court reasoned that fifty-three months was the statutory maximum for *Apprendi* purposes. Because no jury found beyond a reasonable doubt the fact supporting the trial court's upward departure from the fifty-three-month statutory maximum, the defendant was denied his right to a jury trial. *Blakely*, 542 U.S. at 298-305.

In *Cunningham*, this Court held that California's procedure for selecting upper term sentences under its Determinate Sentencing Law ("DSL"), like the exceptional sentence provisions at issue in *Blakely*, violated the defendant's Sixth and Fourteenth Amendment right to a jury trial, because the DSL "assigns to the trial judge, not to the jury, the authority to find the facts that expose a defendant to an elevated 'upper term' sentence." *Cunningham*, 127 S. Ct. at 860. This Court found that because imposition of an aggravated term required additional fact finding by a judge, the middle term was the "statutory maximum" under the DSL. *Id.* at 860, 868.

California's death penalty procedures satisfy the requirements of *Apprendi*, *Ring*, *Blakely* and *Cunningham*. In California, not all defendants convicted of first degree murder are subject to the death penalty. Instead, "a defendant in California is *eligible for the death penalty* when the jury finds him guilty of first-degree murder and finds one of the § 190.2 special circumstances true." *Tuilaepa v. California*, 512 U.S. 967, 975, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994) (emphasis added); accord, *Brown v. Sanders*, 546 U.S. 212, 220, 126 S. Ct. 884, 163 L. Ed. 2d 723 (2006); *Bell*, 40 Cal. 4th at 620 (Pet. App., at A52). Accordingly, the special circumstances listed in California Penal Code section 190.2 are the "functional equivalent of an element of a greater offense" which must be found true by a jury beyond a reasonable doubt. *Ring*, 536 U.S. at 609, citing *Apprendi*, 530 U.S. at 494 n.19.

In a California death penalty case, all determinations necessary to make the defendant eligible for death (crime, degree, and special circumstance) are made by the jury unanimously and beyond a reasonable doubt at the guilt phase. *Bell*, 40 Cal. 4th at 620 (Pet. App., at A52); *People v. Anderson*, 25 Cal. 4th 543, 589 n.14, 22 P.3d 347, 106 Cal. Rptr. 2d 575 (2001). Here, the jury made all factual findings, unanimously and beyond a reasonable doubt, that rendered Petitioner eligible for the death penalty. Specifically, the jury found Petitioner guilty of first degree murder and found as true a robbery-murder special circumstance. *Bell*, 40 Cal. 4th at 594.

(Pet. App., at A12.) Accordingly, the California Supreme Court's rejection of Petitioner's argument does not conflict with this Court's decisions in *Apprendi*, *Ring*, *Blakely* or *Cunningham*.

In arguing that California's death penalty law is infirm, Petitioner confuses the term "aggravating circumstance" as used in *Ring*, which he seems to equate with "aggravating circumstances" in a special sense in California Penal Code section 190.3. (Pet. at 18-21, 23.) In fact, the "special circumstances" in California Penal Code section 190.2, which must be proven to a jury beyond a reasonable doubt, are the facts that are equivalent to "aggravating circumstances" in this Court's *Ring* jurisprudence. *See Tuilaepa v. California*, 512 U.S. at 971-76.

This Court's restatement of the holding of *Ring* in *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003) compels this conclusion:

> In *Ring v. Arizona*, 535 U.S. 584 . . . , we held that aggravating circumstances that make a defendant eligible for the death penalty 'operate as 'the functional equivalent of an element of a greater offense.' That is to say, for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of "murder" is a distinct, lesser included offense of "murder plus one or more aggravating circumstances": Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum *permissible* sentence to death. Accordingly, we held that the Sixth Amendment requires that a jury, and not a judge, find the existence of any aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt. *Id.* at 608-609[.]

Sattazahn v. Pennsylvania, 537 U.S. at 111. (Emphasis added.)

As *Sattazahn*'s discussion of *Ring* makes clear, what *Ring* referred to as a "aggravating circumstance" is what California calls a "special circumstance," i.e., that which authorizes an increase in the maximum permissible sentence to death. As noted, in a California death penalty case, once the jury has unanimously determined beyond a reasonable doubt that a first-degree murder under special circumstances has been committed, there is no further factual question which must be resolved before death can be imposed.

Tuilaepa v. California, 512 U.S. at 975; Cal. Penal Code § 190.2.

Once the jury determines a defendant is eligible for the death penalty, the nature of the proceedings fundamentally changes. At the penalty phase, there are no specified factual determinations to make as such, only a normative, moral evaluation of the offense and the offender based on the considerations listed in California Penal Code section 190.3. *Bell*, 40 Cal. 4th at 621 (Pet. App., at A-51); *People v. Lewis & Oliver*, 39 Cal. 4th 970, 1067, 140 P.3d 775, 47 Cal. Rptr. 3d 467 (2006); Cal. Penal Code § 190.3. Thus, penalty phase jurors, including the ones in Petitioner's case, are instructed:

> [Y]ou shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances[.] . . . . 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.

California Criminal Jury Instructions ("CALJIC") No. 8.88; 52 RT 4411-4412.

At no point is the penalty jury instructed that any additional factual finding is necessary to impose death.

As the California Supreme Court explained in rejecting an *Apprendi/Ring* claim like Petitioner's:

> Under the law of this state, all of the facts that increase the punishment for murder of the first degree -- beyond the otherwise prescribed maximum of life imprisonment with possibility of parole to either life imprisonment without possibility of parole or death -- already have been submitted to a jury (and proved beyond a reasonable doubt to the jury's unanimous satisfaction) in connection with at least one special circumstance, prior to the commencement of the penalty phase. (*See* § 190.2.)

People v. Griffin, 33 Cal. 4th 536, 595, 93 P. 3d 344, 15 Cal. Rptr. 3d 743 (2004).

Consequently, no further facts need to be proved at the penalty phase in order to increase the punishment to either death of life without the possibility of parole as both are proscribed as possible penalties. *People v. Griffin*, 33 Cal. 4th at 595. While at the penalty phase the choice between the two proscribed sentences depends on a determination as to which penalty is more appropriate, which in turn depends on a determination of whether the evidence in aggravation substantially outweighs that in mitigation, "the ultimate determination of the appropriateness of the penalty and the subordinate determination of the balance of evidence of aggravation and mitigation do not entail the finding of facts that can increase the punishment for murder of the first degree beyond the maximum otherwise prescribed." *People v. Griffin*, 33 Cal. 4th at 595. Furthermore, "those determinations do not amount to the finding of facts, but rather constitute a single fundamentally normative assessment [citations] that is outside the scope of *Ring* and *Apprendi*." *Id.*

The California Supreme Court's holding in this regard is entirely consistent with this Court's precedent. The penalty-phase task of assessing aggravating and mitigating factors falling within the traditional scope of capital sentencing, which inform the choice between a greater and a lesser penalty, does not raise the ceiling of the sentencing range available. *Jones v. United States*, 526 U.S. 227, 251, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999). As this Court observed in another case interpreting *Apprendi*, not "'every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution.'" *Harris v. United States*, 536 U.S. 545, 558, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002) (plurality opinion) (quoting *Jones*, 526 U.S. at 248). Thus, "factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments." *Harris v. United States*, 536 U.S. at 558; *see United States v. Watts*, 519 U.S. 148, 156, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997) (per curiam); *Nichols v. United States*, 511 U.S. 738, 747, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994); *Williams v. New York*, 337 U.S. 241, 246, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949). Because *Apprendi*, *Ring*, *Blakely*, and *Cunningham* apply only to those factual determinations that raise the ceiling of the sentencing range available, *Harris* and *Jones* confirm that California's penalty

phase procedures are not constitutionally infirm.

In short, both this Court and the California Supreme Court have held that under California law, death is an available punishment upon conviction of first degree murder under special circumstances. *Tuilaepa v. California*, 512 U.S. at 974; *People v. Prieto*, 30 Cal. 4th 226, 262-63, 66 P.3d 1123, 133 Cal. Rptr. 2d 18 (2003). Nothing in *Apprendi*, *Ring*, *Blakely*, or *Cunningham* suggest that the constitutional safeguards discussed therein apply at the penalty selection phase, where jurors are deciding whether the evidence in aggravation and mitigation warrants imposition of the already-authorized death penalty. Accordingly, there is no basis for this Court to grant certiorari.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that certiorari be denied.

Dated: July 18, 2007

Respectfully submitted,

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