No. 06-1714 JUN 26 2007

In the Supreme Court of the United States

STEVEN M. BELL

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 435 (1986), whether in establishing a prima facie case of discrimination, if comparative analysis evidence is presented that would support an inference of discrimination the California Supreme Court's refusal to perform such an analysis violated petitioner's constitutional rights to due process, equal protection, right to a fair and impartial jury, and a reliable determination of his death sentence.

2. In light of this Court's decision in *Cunningham v. California*, 127 S.Ct. 856 (2007), whether California's death penalty law violates the Fifth, Sixth, Eighth and Fourteenth Amendments by permitting the trier of fact to impose a sentence of death without unanimously finding the existence of aggravating factors beyond a reasonable doubt.

LIST OF PARTIES

The names of all parties appear in the caption on the cover page.

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STATUTES

Petitioner, Steven M. Bell, prays that this Court issue a Writ of Certiorari to review the opinion and judgment of the Supreme Court of California entered on March 28, 2007.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of California, affirming Petitioner's convictions and death sentences, is reported as *People v. Bell*, 40 Cal.4th 582, 54 Cal.Rptr.3d 453, 151 P.3d 292 (2007), and is attached hereto at A-1. The opinion of the California Supreme Court, filed March 28, 2007, denying a Petition for Rehearing is reported at 2007 Cal. LEXIS 3091 (Cal., Mar. 28, 2007), and attached hereto at A-55.

STATEMENT OF JURISDICTION

The California Supreme Court filed its opinion on February 15, 2007. Petitioner filed a timely petition for rehearing on March 1, 2007. On March 28, 2007 the court issued an order denying the petition for rehearing. This Petition for Writ of Certiorari is being filed within 90 days of the California Supreme Court's March 28, 2007 order denying the petition for rehearing, as required by Supreme Court Rules 13.1 and 13.3. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

A. Federal Constitutional Provisions

Fifth Amendment: "No person shall ... be deprived of life, liberty, or property, without due process of law ..."

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... 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."

Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Fourteenth Amendment: "No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. State Statutory Provisions

Relevant California Penal Code sections, which are attached at A-56, include the following: §§ 190, 190.1, 190.2, 190.3, 190.4.

STATEMENT OF THE CASE

In an information filed August 12, 1992, defendant was charged with murder (count 1: Pen. Code § 187, sub. (a)); with an allegation of personal use of a deadly weapon (§ 12022, subd. (b)) and special circumstance allegations of murder in the commission of robbery and burglary (§ 190.2, sub. (a)(17)); residential robbery (count 2: §§211,212.5) with personal use and great bodily injury allegations (§§12022, sub. (b), 12022.7); and residential burglary (count 3: §§459, 460) with personal use and great bodily injury allegations (§§ 12022, subd. (b), 12022.7). The burglary charge, its accompanying allegations, and the burglary-murder special-circumstance allegation were dismissed before trial on defendant's motion under section 995.

During voir dire, the defense raised three motions pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986) and *People v. Wheeler*, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978) claiming the prosecutor had used peremptory challenges to deliberately exclude African-American Women, people of Filipino origin or decent, and lesbians. (24 R.T. 1500,1506, 1511, 1528; 26 R.T. 1734-1735, 1743-1744; 7 C.T. 1644.)[1]

[1] "R.T." refers to the Reporter's Transcript and "C.T." to the Clerk's Transcript of Petitioner's Trial, with the volume number preceding and the page number following the abbreviation.

The trial court denied the *Batson/Wheeler* motions on the ground that the defense had failed to establish the requisite prima facie case. (24 R.T. 1502; 26 R.T. 1753, 1755, 1759; 61 R.T. 4629-4630.)

During pretrial proceedings, at the start of the penalty phase, and again in his motion for a new trial, petitioner moved to prohibit the imposition of the death penalty. (14 R.T. 409; 43 R.T. 3522; 61 R.T. 4620; 2 C.T. 293; 4 C.T. 717.) Petitioner argued that California's Death Penalty Law ("DPL") was unconstitutional because it permits arbitrary and capricious imposition of the death penalty. (14 R.T. 409; 2 C.T. 295-296.) The trial court denied petitioner's motion on the ground that the California Supreme Court had previously rejected these arguments. (14 R.T. 410, 420; 43 R.T. 3523; 61 R.T. 4633-4634.)

On November 22, 1993, the jury found defendant guilty of first degree murder and robbery, and found true the robbery-murder special-circumstance allegation and the allegations of personal use of a deadly weapon and infliction of great bodily injury. (42 R.T. 3500-3502; 8 C.T. 1835-1839.)

On December 17, 1993, the jury returned a verdict of death. (54 R.T. 4501; 8 C.T. 1865.) On March 4, 1994, having denied the automatic motion to reduce the penalty and defendant's motion for a new trial (61 R.T. 4634, 4650), the trial court sentenced defendant to death for special circumstance felony-murder (Cal. Penal Code §§ 187, 211/190.2 subd. (a)(17)) in count 1. 61 R.T. 4656. On February 15, 2007, the California Supreme Court rendered its decision on direct appeal. The court affirmed the conviction in all counts as well as the judgment of death and on March 1, 2007, petitioner filed a timely petition for

rehearing. On Mach 28, 2007, the California Supreme Court denied rehearing.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO ENABLE THIS COURT TO CLARIFY WHAT EVIDENCE A COURT MUST CONSIDER IN DETERMINING WHETHER A "REASONABLE INFERENCE" OF DISCRIMINATION WAS ESTABLISHED UNDER THE FIRST STEP OF *BATSON*.

Defense Counsel objected to the removal of six jurors based on impermissible group bias. Defense counsel first established each prospective juror was a member of a cognizable group, and offered the following evidence in support of his claim: the prosecutor struck all or most of a group, that there was no apparent reason to challenge the prospective jurors other than their membership in the group, comparative analysis evidence, and offered to supplement his arguments with statistical information. The California Supreme Court refused to conduct a comparative analysis at the prima facie step. Although, this Court has clearly stated that a "reasonable inference" is a lower threshold than a "strong likelihood", the California Supreme Court fails to embrace the meaning of a "reasonable inference," and refused to evaluate "all relevant circumstances" in order to determine whether a reasonable inference was established. Therefore, it is necessary for this Court to address what constitutes a "reasonable inference" and what evidence is permissible to establish such under the first step of *Batson v. Kentucky*, *supra*, 476 U.S. 79.

Under *Batson v. Kentucky*, 476 U.S. at 84-85, a prosecutor is precluded from using peremptory challenges to

strike prospective jurors based on group bias.[2] A *Batson* motion involves a three-step process: (1) the proponent must establish a prima facie case of purposeful discrimination; (2) if a prima facie case is shown, the prosecutor must offer a race-neutral explanation for the peremptory challenges at issue; and (3) the court must determine whether the proffered justifications are legitimate or sham, i.e., whether the proponent has met his burden of proving purposeful discrimination. *Id.* at 96-98. Petitioner's case focuses on the first step.

In order to establish a prima facie case of discrimination the proponent must: (1) establish that the persons excluded are members of a cognizable group; and (2) point to circumstances supporting a reasonable inference that such persons are being challenged because of their membership in the group, rather than because of any specific bias. *Wade v. Terhune*, 202 F.3d 1190, 1195 (9th Cir. 2000). Under *Batson*, a prima facie showing is one that supports a "reasonable inference" of systematic exclusion of a cognizable group. *Batson v. Kentucky*, *supra*, 476 U.S. at p. 93. This Court has specifically rejected a requirement that the objecting party show either a "strong likelihood" or that it is "more likely than not" that the other party's peremptory challenges, if unexplained, were based on impermissible group bias. *Johnson v. California*, 545 U.S. 162, 162 L.Ed.2d 129, 125 S.Ct. 2410 (2005).

This Court held that a defendant satisfies the sufficiency requirement of *Batson's* first step by producing evidence merely sufficient to permit the trial judge to draw an inference of discrimination. *Johnson v. California*, *supra*,

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[2] Bias against "members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds." *People v. Wheeler*, 22Cal.3d 258, 276-277 (1978).

545 U.S. at p. _, 162 L.Ed.2d at p. 135. Thus, "the threshold for a making a prima facie *Batson* claim is quite low[.]" *Boyd v. Newland*, 455 F.3d 897, 903 (9th Cir. 2006). This Court defined "inference" as "a conclusion reached by considering other facts and deducing logical consequence from them." *Johnson v. California, supra*, 545 U.S. at _, fn. 4, 162 L.Ed.2d at p. 138, citing Black's Law Dictionary 781 (7th ed. 1999).

In *Batson* this Court stated that a court should consider "all relevant circumstances" in drawing an inference. *Batson v. Kentucky, supra*, 476 U.S. at pp. 96-97. Petitioner supplied the state courts with comparative analysis evidence, but the California Supreme Court refused to conduct a comparative analysis stating:

> *Miller-El v. Dretke, supra*, 545 U.S. at pages 241–252, does not mandate comparative juror analysis in these circumstances. As we have previously explained, *Miller-El* arose at the third stage of a *Wheeler-Batson* inquiry, "after the trial court has found a prima facie showing of group bias, the burden has shifted to the prosecution, and the prosecutor has stated his or her reasons for the challenges in question." (*People v. Gray* (2005) 37 Cal.4th 168, 189 [33 Cal. Rptr. 3d 451, 118 P.3d 496].) The high court did not consider whether appellate comparative juror analysis is required "when the objector has failed to make a prima facie showing of discrimination." (Ibid.) A fortiori, Miller-El does not mandate comparative juror analysis in a first-stage *Wheeler-Batson* case when neither the trial court nor the reviewing courts have been presented with the prosecutor's reasons or

have hypothesized any possible reasons." *People v. Bell*, 40 Cal. 4th 582, 601 (Cal. 2007).

Contrary to the California Supreme Court's ruling *Batson* supports the use of comparative juror analysis. See *Miller-El v. Dretke*, 545 U.S. 231, __, 125 S. Ct. 2317, 2325-2338, 162 L.Ed2d 196, 213-228 (2005). Furthermore, a comparative juror analysis may be conducted even when the trial court has concluded that the defendant failed to make a prima facie case. (*Boyd v. Newland, supra*, 455 F.3d at p. 907.)

In petitioner's case, defense counsel made three motions under *People v. Wheeler*, 22 Cal.3d 258 (1978) and *Batson v. Kentucky*, 476 U.S. 79 (1986), claiming the prosecutor had used peremptory challenges to deliberately exclude African–American women, Filipino-Americans, and lesbians. A consideration of the relevant circumstances establishes evidence sufficient to make a prima facie case under the "inference" standard.

The first set of *Batson/Wheeler* objections came in response to the prosecutor's use of peremptory strikes against two African–American women, Gwendolyn J. and Lisa J.-S. Initially, defense counsel established African-American women are a cognizable group.[3] (24 R.T. p. 1505-1506; 26 R.T. p. 1734-1735, 1749; 61 R.T. 4616-4618; 7 C.T. 1645.) This group may be distinguished from African-Americans in general. *People v. Motton*, 39 Cal.3d 596, 605, 217 Cal.Rptr. 416, 704 P.2d 176 (1985). Therefore, it is not evidence of nondiscrimatory purpose that the prosecutor did not challenge African American males. The prosecutor

[3] The trial court acknowledged that African-American women were a cognizable group. (26 R.T. 1751-1753; 61 R.T. 4627.)

struck two of the three African-American women on the panel, and was interrupted and admonished by the court prior to the possibility of exercising a challenge to the third. (26 R.T. 1741.) Defense counsel pointed out that Gwendolyn J.'s and Lisa J.-S.'s questionnaires "were fairly identical [to others who had not been challenged], in that they were nondescript, and their oral voir dire had nothing to indicate really anything to show a bias either way. Neither of them were controversial in any manner..." (26 R.T. 1736.)

Neither Gwendolyn J. nor Lisa J-S. provided indicators that would make them likely to be challenged for reasons other than race. Neither professed negative experiences with law enforcement or bias towards any type of witness. Neither offered equivocal, incomplete or negative views on the death penalty. Even the trial court expressed that "it makes no sense for the people to exclude the cognizable group, of which the victim's mother was a member." (61 R.T. 4628-4629.) Although, the trial court engaged in the very kind of stereotyping prohibited by *Batson/Wheeler* – assuming that African-American women would identify with a trial participant based solely on like race – the trial court's acknowledgement lent credence to defense counsel's argument that there was no nondiscriminatory reason to strike Gwendolyn J. or Lisa J.-S. Fairly reviewing the record, the totality of relevant facts establish an inference of discriminatory purpose in the challenges of Gwendolyn J. and Lisa J.-S.

The second set of *Batson/Wheeler* objections came in response to the prosecutor's use of peremptory strikes against two women defense counsel identified as lesbians, Francene B. and Lynne W. (24 R.T. 1500, 1528.) In response the trial court asked, "What's your factual basis for that?" (24 R.T. 1501, 1528-1529.) Defense counsel informed the court of the numerous reasons that supported

the fact that Francene B. and Lynne W. were lesbians including: physical appearance, participation in marches and rallies in support of gays and lesbians in the military and feminist issues, and employment in non-traditional jobs. (21 R.T. 1059, 1072; 22 R.T. 1219-1221; 24 R.T. 1501-1502, 1528; 11 C.T. 2377, 2380, 2511.) In doing so, defense counsel also highlighted the fact that there were no other discernable reasons for their exclusion. (24 R.T. 1502.) The trial court denied the objection in both instances, stating "[t]here is no factual basis" for concluding that these prospective jurors were lesbians. (24 R.T. 1502, 1528.) The trial court was mistaken that such a showing was required.

In determining whether a *Batson/Wheeler* error has occurred, it is perception of membership in the group, not actual membership, which counts. "[I]t is unnecessary to establish the true racial identity of the challenged jurors; discrimination is more often based on appearances than verified racial descent, and a showing that the prosecutor was systematically excusing persons who appear to be Black would establish a prima facie case under *Wheeler*." *People v. Motton*, 39 Cal.3d 596, 604, 217 Cal. Rptr. 416, 420-421, 704 P.2d 176, 180 (1985). The court's reasoning in *Motton* should apply to all cognizable groups. California has recognized sexual orientation as a cognizable group. Under Cal. Code Civ. Proc. § 231.5 (2006), "a party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds."[4] The real question was whether the prosecutor had stereotyped Francene B. and Lynne W. as lesbians and had peremptorily challenged them on that basis. Without denial from the

[4] California added sexual orientation as a cognizable group in *People v. Garcia,* 77 Cal.App.4th 1269, 92 Cal.Rptr.2d 339 (2000).

prosecutor, the record establishes that the two women qualified at least as being a member of a cognizable class. Additionally, no other lesbian women were identified as being present on the panel of prospective jurors. Therefore, with the minimum record available, it appeared the prosecutor was systematically excluding lesbians.

Though a pattern of exclusion is not required to make a prima facie case, as the California Supreme Court recognized in P*eople v. Avila,* 38 Cal.4th 491, 549, 43 Cal.Rptr.3d 1, 133 P.3d 1076 (2006), a "'pattern of systematic exclusion' of a particular cognizable group from the venire raises an inference of purposeful discrimination, and that when such systematic exclusion occurs, everyone (the defendant, the excluded jurors, and the community) is harmed 'because the public confidence in the fairness of our system of justice is undermined.'" Quoting, *People v. Gore,* 18 Cal.App.4th 692, 22 Cal.Rptr.2d 435 (1993), and citing *Batson, supra,* 476 U.S. at p. 94, 106 S.Ct. 1712 ["Proof of systematic exclusion from the venire raises an inference of purposeful discrimination because the 'result bespeaks discrimination.'"].

The third set of *Batson/Wheeler* objections was in response to the prosecutor's use of peremptory strikes against two Filipino-Americans, Saldy P. and Charles B. (24 R.T. 1511; 26 R.T. 1743-1744, 1749; 7 C.T. 1644-1645.) The trial court acknowledged that Asian-Americans were a cognizable group.[5] (61 R.T. 4629.) Defense counsel noted that there had not been any other [than Saldy P. and Charles B.] "readily identifiable Asian-Americans." (26 R.T. 1749.) There was no disagreement with this observation. Thus, the record is that the only two Asian-American jurors on the panel were peremptorily stricken by the prosecutor. P*eople*

[5] As are Filipino-Americans. (*United States v. Murillo,* 288 F.3d 1126, 1131 (9th Cir. 2002).)

v. Avila, supra, 38 Cal.4th at p. 549; see also P*eople v. Guerra*, 37 Cal.4th 1067, 1102, 40 Cal.Rptr.3d 118, 129 P.3d 321, (2006), citing to *Johnson v. California*, 545 U.S. 162, 125 S.Ct. at pp. 2414, 2419 (2005) [the removal of all three African-American prospective jurors established a prima facie case]. Defense counsel further offered to supplement the charge of systematic exclusion by providing statistical data of the comparative population of Filipino-Americans in San Diego County. (26 R.T. 1744-1746.)

Additionally, Saldy P.'s and Charles B.'s questionnaires and oral voir dire were otherwise indistinguishable from those whom the prosecutor had not challenged. Of more cognizable significance, the record also includes that Charles B. was a 21 year-old married man with a young son. (13 R.T. 3034.) The fact that Charles B. was a parent of a young son, and thus might identify with the young victim and his mother, raises an inference that the prosecutor's challenge of Charles B. must have been discriminatory, because it is otherwise inexplicable. In fact, the only potentially equivocal response given by Charles B. was that, although he believed in the death penalty, he generally preferred life without the possibility of parole. (25 C.T. 1653; 13 C.T. 3044.) However, seated Juror No. 12 similarly indicated that she "perhaps" would choose life without the possibility of parole because of the finality of death. (23 R.T. 1380-1381.) Viewed fairly, and in totality, the record establishes an inference of discriminatory purpose in the challenges of Saldy P. and Charles B. As the foregoing arguments show, the record does not suggest grounds upon which the prosecutor might reasonably have challenged each of the prospective jurors in question.

The significance of the rights implicated and the prevalence of *Batson* claims is testament to the necessity for this Court's guidance. Moreover, given the fact that this is a capital case, the Court's resolution of these issues is

especially important to ensure the heightened reliability required in such cases. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Stewart, J., plur. opn.).

II. CERTIORARI SHOULD BE GRANTED TO ENABLE THIS COURT TO CLARIFY THAT CALIFORNIA CAPITAL JURORS MUST UNANIMOUSLY AGREE BEYOND A REASONABLE DOUBT ON THE FACTS CONSTITUTING THE AGGRAVATING CIRCUMSTANCES THAT THESE FACTORS OUTWEIGHED ANY MITIGATING CIRCUMSTANCES AND THAT DEATH IS THE APPROPRIATE PUNISHMENT.

A. Introduction.

As this Court has repeatedly made clear, any fact that increases the penalty for a crime beyond the proscribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. See e.g., *Blakley v. Washington*, 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The Court has specifically applied this constitutional mandate in the death penalty context as related to the finding of aggravating factors necessary for the imposition of the death penalty. See *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

Despite the Court's clear authority in this area, California, with the largest death row in the nation has repeatedly decided that its death penalty law does not offend the Fifth or Fourteenth Amendments to the extent that it permits a trier of fact to impose a sentence of death without finding the existence of factors in aggravation beyond a

reasonable doubt. See, e.g., *People v. Huggins*, 38 Cal.4th 175, 250-251, 131 P.3d 995, 41 Cal.Rptr.3d 593. In light of California's position, certiorari is appropriate in this case to redress the constitutional violations suffered by hundreds of California death-row inmates during their penalty phase proceedings which resulted in sentences of death. Because this case is an ideal one for resolving the important question presented, this Court should grant certiorari and hold that California's DPL violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the extent it permits the imposition of the death penalty in the absence of a unanimous finding that the state proved aggravating factors against the defendant beyond a reasonable doubt.

B. California's DPL

The trial court's instructions to the jury comported with California's DPL. The People of California adopted the state's death penalty law ("DPL") through an initiative measure approved in 1978. (See e.g., Cal. Penal Code §§ 190, 190.1.) The DPL subjects a defendant to the death penalty after he has suffered a first degree murder conviction with at least one special circumstance. (Cal. Penal Code §§ 190.2(a), 190.3.) Once the trier of fact has found that one or more special circumstances exist, the court must hold a separate hearing to determine whether the defendant's punishment will be death or life imprisonment without the possibility of parole. (Cal. Penal Code § 190.2(a), 190.3, 190.4(a).) During the penalty hearing, the parties may present evidence "as to any matter relevant to aggravation, mitigation, and sentence...."[6] (Cal. Penal Code § 190.3.) In turn, the DPL provides that in determining the appropriate penalty, the trier of fact must take the following factors into

[6] In California, aggravating factors are defined 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, 246 Cal.Rptr. 209 (1988); CALJIC No. 8.88.

account, if relevant:

(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.

(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 was 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.

Cal. Penal Code § 190.3.

The trier of fact "shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in" section 190.3, and impose a sentence of death only if it concludes that "the aggravating circumstances outweigh the mitigating circumstances." *Ibid.* If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances, it must impose a sentence of life without the possibility of parole. *Ibid.*

Except for proof of unadjudicated criminal acts under factor (b), the DPL does not require that any aggravating factors be proven beyond a reasonable doubt. See, CALJIC 8.86, 8.87, 8.88; *People v. Brown* 33 Cal.4th 382, 401-402 (2004); *People v. Prieto* 30 Cal.4th 226, 275 (2003). Further, the DPL does not require juror unanimity regarding any aggravating circumstances used in the weighing process and any finding that such circumstances substantially outweigh the mitigating factors. CALJIC 8.86, 8.87

This Court should grant certiorari to hold that jurors must unanimously agree beyond a reasonable doubt on the facts that constitute the aggravating circumstances; that the aggravating circumstances outweigh any mitigating circumstances and that death is the appropriate punishment. Moreover, trial courts must give an appropriate instruction to that effect.

C. California Law Directly Contravenes This Court's Precedents And Must Be Corrected to Avoid Further Constitutional Violations.

1. The Failure to Require Aggravating Factors Be Proved Beyond A Reasonable Doubt Violated Petitioner's Fifth, Sixth, And Fourteenth Amendment Rights.

Other than the single prior criminal act evidence presented under DPL factor (b), the jury was not required to find any aggravating fact proven beyond a reasonable doubt. However, 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. Guadin,* 515 U.S. 506, 509-510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); see also *Mullaney v. Wilbur,* 421 U.S. 684, 698 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *In re Winship,* 397 U.S. 358, 363-364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). 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 to be proven to a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Mullaney v. Wilbur,* 421 U.S. 684, 698, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *Specht v. Patterson*, 386 U.S. 605, 607, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967).

> 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. The standard provides concrete substance for the presumption of innocence -

> - that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." (Citation omitted.) ..."[A] person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." (Citation omitted.)

In re Winship, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); see also *Addington v. Texas,* 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) ["the interests of the [criminal] defendant are of such magnitude that historically ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment."].

In *Apprendi*, a factual finding under New Jersey's hate crime statute that defendant committed the charged possession of a firearm offense 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. The 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. *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 490-492. As the Court held: "[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." *Id.* at p. 490 (emphasis supplied), quoting *Jones v. United States,* 526 U.S. 227, 252-253, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999).

In *Ring*, the Court applied the holding of *Apprendi* to Arizona's death penalty law. Under that law, 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. The Court held that Arizona's death penalty regime violated the rule announced in *Apprendi* since 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. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Recalling *Apprendi's* admonition that the relevant inquiry "'is one not of form, but of effect,'" 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.[7] *Ring v. Arizona, supra,* 536 U.S. at p. 602, quoting *Apprendi v. New Jersey, supra,* 530 U.S. at p. 494; see also *Blakely v. Washington,* 542 U.S. 296, 305, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) [invalidating Washington state's sentencing scheme to the extent it permitted judges to impose a sentence above the "standard range" or statutory maximum authorized by the jury's verdict by finding the existence of an aggravating factor by a preponderance of the evidence.].

The procedure for imposing a death sentence under

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[7] The 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, supra,* 536 U.S. at p. 589.

California's DPL violates defendants' due process right to proof beyond a reasonable doubt. Under California Penal Code §§ 190.2(a), 190.3, and 190.4(a), once the trier of fact has found 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 death sentence or a term of life without the possibility of parole. In considering whether to impose the death penalty, the trier of fact must consider a variety of enumerated circumstances in aggravation and mitigation. See Cal. Penal Code § 190.3. Since the trier of fact can only impose a sentence of death where the aggravating circumstances outweigh the mitigating circumstances, it must first find at least one factor in aggravation before imposing death. *Ibid.*

Pursuant to *Apprendi* and *Ring*, because the DPL's factors in aggravation operate as "the functional equivalent of an element of a greater offense," the Fifth and Fourteenth Amendments require that they be found by the trier of fact beyond a reasonable doubt. *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494, n. 19. Thus, just as the presence of the hate crime enhancement in *Apprendi* elevated defendant's sentence range beyond the prescribed statutory maximum, the presence of aggravating factors under the DPL elevate a defendant's sentence beyond the statutory maximum of life in prison to a sentence of death. Similarly, as in *Ring*, the maximum punishment a defendant may receive under the DPL for first degree murder with a special circumstance is life imprisonment; a death sentence is unavailable without a finding that at least one statutorily enumerated aggravating factor exists. Consequently, as the Court made clear in *Ring*, since it is the existence of factors in aggravation which 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 no standard of proof is required as to those factors upon which a death verdict must rest, the imposition of a death sentence under the DPL -- as in this case -- violates defendant's constitutional guarantee to proof beyond a reasonable doubt.

Despite the similarities between the DPL and the sentencing schemes invalidated in *Apprendi* and *Ring*, the California Supreme Court has repeatedly held that aggravating factors, other than unadjudicated criminal acts, need not be proven beyond a reasonable doubt. See, e.g., *People v. Brown,* 33 Cal.4th 382, 401-402, 93 P.3d 244, 15 Cal.Rptr. 3d 624 (2004); *People v. Prieto,* 30 Cal.4th 226, 275, 66 P.3d 1123, 133 Cal.Rptr.2d 18 (2003). The court has justified its position under 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."[8] *People v. Prieto*, *supra*, 30 Cal.4th at p. 275. In accord with the California Supreme Court's precedents in this area, the trial court in this case refused to instruct the jury that it could only consider a factor in aggravation if it found that the evidence established the existence of the factor beyond a reasonable doubt. (17 R.T. 2809-2810; 5 C.T. 1294-1307; 6 C.T. 1565-1664.)

California stands alone in refusing to require the state

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[8] The court in *Black* found that neither *Ring* nor *Blakely* rendered California's Determinate Sentencing Law unconstitutional 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 part of the sentencing process." *People v. Black,* 35 Cal.4th 1238, 1258, 113 P.3d 534, 29 Cal.Rptr.3d 740 (2005). Subsequently the United States Supreme Court held California's Determinate Sentencing Law unconstitutional in *Cunningham v. California,* 127 S.Ct. 856, 2007 U.S. LEXIS 1324 (2007).

to prove aggravating factors beyond a reasonable doubt before the trier of fact may impose a death sentence. Of the 37 jurisdictions in the nation with a death penalty, the statutes of 30 states and the federal system specifically provide that such aggravating factors must be proven beyond a reasonable doubt.[9] The statutes of four additional states contemplate the introduction of evidence in aggravation, but are silent on the standard of proof by which the state must prove this evidence to the tier of fact.[10] However, with the exception of Oregon's Supreme Court, which has not yet faced the issue, the supreme courts of these jurisdictions have explicitly determined that the trier of fact must find factors in aggravation beyond a reasonable doubt before using them to impose a sentence of death.[11]

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[9] See Ala. Code § 13A-5-45(e); Ariz. Rev. Stat. Ann. § 13-703(B); Ark. Code Ann. § 5-4-603; Colo. Rev. Stat. § 18-1.3-1201(1)(d); Del. Code Ann., Tit. 11 § 4209(c)(3)a.1; Ga. Code Ann. § 17-10-30(c); Idaho Code §19-2515(3)(b); Ind. Code Ann. § 35-50-2-9(a); Ill. Comp. Stat., Ch. 720, § 5/9-1(f); Ky. Rev. Stat. Ann. § 532-025(3); La. Code Crim. Proc. Ann. art.905.3; Md. Crim. Law Code Ann. § 46-18-305; Mo. Rev. Stat. Ann. § 565-032.1(1); Neb. Rev. Stat. § 29-2520(4)(f); New. Rev. Stat. § 175-554(4); N.H. Rev. Stat. Ann. § 630:5-iii; N.J. Stat. Ann. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3; N.C. Gen. Stat. § 15A-2000(c)(1); Ohio Rev. Code Ann. § 2929-04(B); Okla. Stat. Ann., Tit. 21, § 701.11; 42 Pa. Cons. Stat. § 9711 (c)(1)(iii); S.C. Code Ann. § 16-3-20(A); S.D. Codified Laws Ann. § 23A-27A-5; Tenn. Code Ann. § 39-13-204(f); Tex. Crim. Proc. Code Ann. § 37.071(c); Va. Code Ann. § 19.2-264.4(C); Wyo. Stat. § 6-2-102(d)(i)(A), (e)(i); 18 U.S.C.A. § 3593(c).

[10] See Conn. Gen. Stat. § 53a-46a(c); Fla. Stat. § 921-141(1), (2)(a); Ore. Rev. Stat. § 163-150(1)(a); Utah Code Ann. § 76-3-207(2)(a)(iv). Washington state'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). New York declared its death penalty statute unconstitutional in 2004, *People v. LaValle*, 3 N.Y.3d 88, 783 N.Y.S.2d 485, 817 N.E.2d 341 (N.Y. 2004), and had not since revived it.

[11] See *State v. Rizzo*, 226 Conn. 171, 180, 833 A.2d 363, 375 (Conn. 2003); *State v. Steele*, 921 So.2d 538, 540 (Fla. 2005); *State v. Gardner*,

2. The Failure to Require Juror Unanimity As To What Facts Were True And Sufficiently Aggravating To Support A Vote For Death Violated the Fifth, Sixth, Eighth, and Fourteenth Amendments.

In its recent decisions holding the Sixth Amendment jury-trial right applicable to sentencing findings, this Court has noted that unanimity is one of the bedrock requirements underlying the Sixth Amendment right:

> "[T]o guard against a spirit of oppression and tyranny on the part of the rulers," and "as the great bulwark if [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the **unanimous** suffrage of twelve of [the defendant's] equals and neighbours...." 4 W. Blackstone, Commentaries on the Law of England 343 (1769).

(*Apprendi v. New Jersey*, *supra*, 530 U.S. at 477 (emphasis added; brackets in original). Accord *Blakely v. Washington,* 542 U.S. 296, 313, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). See also *People v. Griffin,* 33 Cal.4th 536, 594-595, 15 Cal.Rptr.3d 743, 93 P.3d. 344 (2004) ["In *Apprendi*, the court held that the Fourteenth Amendment's due process clause requires the state to submit to a jury, and prove beyond a reasonable doubt to the jury's **unanimous** satisfaction, every fact, other than a prior conviction, that

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947 P.2d 630, 647 (UT 2002); *State v. Brown*, 607 P.2d 261, 273 (UT 1980).

increases the punishment for a crime beyond the maximum otherwise prescribed under state law"; emphasis added].) As the Court explained in *Apprendi*, where a sentencing factor authorizes a punishment beyond the maximum authorized for the underlying offense, "it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." (*Id.* at p. 494, fn. 19.)

Relying on *Walton v. Arizona,* 497 U.S. 639, 647-649, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), this Court excepted its holding in *Apprendi* from capital sentencing schemes that required judges to find specific aggravating factors after a jury found the defendant guilty of a capital crime. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 496.) Subsequently in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), this Court overruled *Walton* to the extent that it allowed a sentencing judge, sitting without a jury, to make factual findings necessary for imposition of a death sentence. (*Id.* at p. 2443.) *Ring* further held that *Apprendi* was fully applicable to all such findings whether labeled "sentencing factors" or "elements" and whether made at the guilt or penalty phases of trial. (*Ibid.*)

The California Supreme Court has rejected the applicability of *Apprendi* and *Ring* to California's death penalty law on the ground that, after the jury has found any special circumstance allegations true beyond a reasonable doubt, "death is no more than a prescribed statutory maximum for the offense." *People v. Prieto,* 30 Cal.4th 226, 263 133 Cal.Rptr.2d 18, 66 P.3d 1123 (2003), quoting *People v. Anderson,* 25 Cal.4th 543, 589, fn. 14, 106 Cal.Rptr.2d 575, 22 P.3d 347 (2001), emphasis deleted; *People v. Snow,* 30 Cal.4th 43, 126, fn. 32, 132 Cal.Rptr.2d 271, 65 P.3d 749 (2003).

However, in *Cunningham v. California,* 127 S.Ct. 856, 860, 2007 U.S. LEXIS 1324 (2007), this Court ruled: "[T]he relevant 'statutory maximum,'" this Court has clarified, "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." Citing to *Blakely v. Washington* 542 U.S. 296, 303-304, 124 S.Ct. 2531; 159 L.Ed.2d 403 (2004), (emphasis in original).) Therefore, the California's Supreme Court's finding that death is the prescribed maximum under the DPL is constitutionally incorrect.

In Cunningham, this Court was addressing California's determinate sentencing law ("DSL"). Pursuant to the DSL, the sentencer (in *Cunningham,* the court) was obliged to sentence Cunningham to a prescribed middle term, unless the judge found one or more additional "circumstances in aggravation."[12] In *Cunningham* the judge found six aggravating facts and one mitigating fact. Therefore, the judge sentenced Cunningham to the upper term. The California Court of Appeals affirmed. The California Supreme Court denied review. This Court reversed the appeals' judgment because the upper term was the result of additional fact-finding by the judge, which violated Cunningham's right to a jury trial. (*Cunningham v. California, supra,* 127 S.Ct. at p. 860.)

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[12] The applicable DSL provision, California Penal Code section 1170, subdivision (b), states: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Court rules adopted to implement the DSL define "circumstances in aggravation" as facts that justify the upper term. (Cal. Rule of Court, Rule 4.405(d).) Those facts must be established by a preponderance of the evidence. (Cal. Rule of Court, Rule 4.420(b), n. 6.)

Cunningham is apposite to the case at bar. In petitioner's case the jury's guilt-phase verdict left the jurors with two possible penalties, death or life without the possibility of parole. In order to sentence petitioner to death the jurors were required to find that aggravating circumstances substantially outweighed mitigating circumstances. (CALJIC 8.88.) An aggravating factor or circumstance was defined 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." (CALJIC 8.88, emphasis added.) Therefore, unless additional facts were found by the jury that substantially outweighed the mitigating facts, the prescribed sentence was life without parole.

Cunningham was merely the logical extension of *Apprendi.* A sentence of death under the DPL is the "functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494, fn. 19. Likewise, *Apprendi* is the logical extension of *Blakely*. Life without the possibility of parole was the "statutory maximum" sentence because it was the maximum sentence that could be imposed based on the jury's verdict alone. *Blakely v. Washington*, *supra*, 542 U.S. at p. 303.

D. This Case Presents An Excellent Vehicle for Considering The Question Presented.

At least two aspects of this case make it an excellent vehicle for deciding whether California's DPL violates the Fifth and Fourteenth Amendments by permitting the trier of fact to impose a death sentence without having found aggravating factors beyond a reasonable doubt. First, the case is on direct review from the California Supreme Court and petitioner unambiguously presented the federal

constitutional claim to that court, which denied the claim on its merits. Thus, there is no procedural impediment to this Court's considering the question presented.

Second, there is every reason to believe that the constitutional violation was not harmless. The failure to require jury unanimity as to aggravating factors, including the circumstances of the crime, before they can be used in the weighing process and unanimity as to their conclusion that aggravators substantially outweigh mitigators is reversible per se. *Ring v. Arizona*, *supra*, 122 S.Ct. 2443; *Sullivan v. Louisiana*, 508 U.S. 275, 279-281, 113 S.Ct. 2078, 124 L.Ed.2d 182 ["misdescription of the burden of proof ... vitiates all the jury findings"].

Alternatively, without written findings as to which factors the jury relied upon the State cannot show beyond a reasonable doubt that the error did not contribute to the penalty verdict. *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). It also cannot be found that the error had "no effect" on the jury's sentencing determination and this met "the standard of reliability that the Eighth Amendment requires." *Caldwell v. Mississippi,* 472 U.S. 320, 341, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (plur. opn. of Marshall, J.). Further, the state supreme court squarely rejected petitioner's claim on the merits, without any finding of harmless error. *People v. Bell*, *supra*, 40 Cal.4th at p. 620-621. Consequently, this Court should grant the Petition for Writ of Certiorari.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

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