No. 18-5375

In the Supreme Court of the United States

CHRISTOPHER HENRIQUEZ,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether the Constitution requires that a California jury that has already found unanimously and beyond a reasonable doubt that the defendant committed an offense whose special characteristics render the crime eligible for the death penalty must also, in order to render a verdict of death, find unanimously and beyond a reasonable doubt that specific aggravating factors exist and that they outweigh mitigating factors.

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STATEMENT

1. In July 1996, petitioner Christopher Henriquez learned that his wife, Carmen, had been telling friends and family that he planned to rob banks. Pet. App. A2-3. Henriquez was "irritated and angry," and told at least one other person that he wanted to kill Carmen "because she doesn't listen" and would "not stop talking." *Id.* at A3. At the end of July, Henriquez and an accomplice robbed two San Francisco banks of a combined total of $188,451. *Id.*

A few days later, Henriquez took Carmen, their two-year-old daughter Zuri, and other family members to Disneyland. Pet. App. A1, A3. Upon their return, Carmen told a family member that "things are very bad right now." *Id.* at A4. Henriquez was angry "because she was talking about [his] business." *Id.*; *accord id.* at A5. Carmen left the house to cash a check. *Id.* at A6. Henriquez later told police that while Carmen was away he led Zuri to her bed and either suffocated her with her pillow or struck her multiple times in the face and head with a hammer, or both. *Id.* at A5-6. When Carmen returned home, he started to "beat[] her," and put a plastic bag over her face and "kept it there until she was dead." *Id.* at A6. Carmen was approximately eight-months pregnant at the time of her death. *Id.* Henriquez dragged Carmen's body to Zuri's room and left her. *Id.* The next day, Henriquez told his mother that he had killed Carmen and Zuri and had robbed a bank. *Id.* at A4-5. His mother reported the crimes to police and told them that Henriquez might have gone to New York. *Id.* at A5.

Police found Carmen's body lying face down in a pool of blood. Pet. App. A5. Her wrists and ankles were bound and there was a plastic bag near her mouth. *Id*. She had been manually strangled and kicked repeatedly in the face. *Id*. They found Zuri's body wrapped up in a blanket inside a large box nearby. *Id*. She suffered skull fractures caused by at least two blows and had also been strangled. *Id*. Cuts and scrapes to her face were consistent with being hit by the clawed end of a hammer. *Id*. Henriquez was arrested as he got off a plane at New York's La Guardia Airport. *Id*. at A6.

On October 10, 1996, a Contra Costa County grand jury indicted Henriquez for the first-degree murders of Carmen and Zuri, with enhancements for personal use of a deadly or dangerous weapon, and the second-degree murder of the eight-month-old fetus Carmen carried. Pet. App. A1-2, A6; Cal. Penal Code §§ 187(a), 189, 12022(b)(1). The indictment alleged, as a "special circumstance" making him eligible for a death sentence, that Henriquez had committed multiple murders. Pet. App. A2.

Henriquez stipulated at trial: "1. that he killed each of the alleged victims. 2. that each and all of the killings were unlawful. 3. that each and all of the killings were done with malice aforethought. 4. that each and all of the killings were done willfully." Pet. App. A2. He argued, however, that the killings were rage-induced, and committed without premeditation. *Id*. The jury convicted Henriquez of all charges, and found true all the enhancements and the multiple-murder special circumstance allegation. *Id*.

At the penalty phase, the prosecutor presented victim impact evidence, and evidence relating to uncharged bank robberies, other additional robberies, and another attempted robbery and murder beyond the evidence presented at the guilt phase. Pet. App. A8-9. Henriquez presented evidence of an abusive and neglectful childhood, expert evidence of an untreated psychiatric disorder, testimony from friends and family about his kindness, "exemplary" behavior, and loving attitude, and evidence of remorse. *Id*. at A9-11.

Jurors were instructed that, in selecting the appropriate punishment, they were to "consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances"; that the "weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of the factors"; that the jurors were "free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors"; and that 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 possibility of parole." 17 RT 4454-4455. The jury returned a verdict of death. Pet. App. A2.

2. On direct appeal, the California Supreme Court unanimously affirmed Henriquez's conviction and death sentence. Pet. App. A1, A60. As relevant here, the court rejected Henriquez's claim that California's capital sentencing scheme is unconstitutional because the jury is not required, before

reaching a death verdict, to find unanimously and beyond a reasonable doubt that an aggravating circumstance exists, that aggravating circumstances outweigh mitigating circumstances, and that death is the appropriate penalty. *See id.* at A55-56. The court noted that it had repeatedly rejected such claims in the past, that its conclusions were not altered by the reasoning of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and similar cases, and that "[u]nlike the guilt determination, 'the sentencing function is inherently moral and normative, not factual' and, hence, not susceptible to a burden-of-proof quantification." *Id.*

ARGUMENT

Henriquez argues that California's death penalty system violates the right to due process guaranteed by the Fifth and Fourteenth Amendments, and the right to a jury trial guaranteed by the Sixth Amendment, because state law does not require the penalty-phase jury to find beyond a reasonable doubt that an aggravating factor exists and that aggravation outweighs any mitigating factors. Pet. 6-16. In a footnote at the end of the petition, he also suggests that, under the same constitutional principles, aggravating factors must be found unanimously. *Id.* at 16 n.9. This Court has repeatedly denied review in cases presenting the same or similar questions, and there is no reason for a different result here.[1]

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[1] *See, e.g.*, *Brooks v. California*, No. 17-6237, *cert. denied*, 138 S. Ct. 516 (2017); *Becerrada v. California*, No. 17-5287, *cert. denied*, 138 S. Ct. 242 (2017);

1. A California death sentence depends on a two-step process prescribed by California Penal Code sections 190.1 through 190.9. The first stage involves determining whether the defendant committed first-degree murder. That crime carries three potential penalties under California law: a prison term of 25 years to life with the possibility of parole, a prison term of life without the possibility of parole, or death. Cal. Penal Code § 190(a). The penalties of death or life without parole may be imposed only if one or more statutorily enumerated special circumstances "has been found under Section 190.4 to be true." *Id.* § 190.2(a). The defendant is entitled to a jury determination of such a special circumstance, and the jury's finding of a special circumstance must be made unanimously and beyond a reasonable doubt. *Id.* § 190.4(a), (b). During the first stage of Henriquez's trial, the jury found him

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Thompson v. California, No. 17-5069, *cert. denied*, 138 S. Ct. 201 (2017); *Landry v. California*, No. 16-9001, *cert. denied*, 138 S. Ct. 79 (2017); *Mickel v. California*, No. 16-7840, *cert. denied*, 137 S. Ct. 2214 (2017); *Jackson v. California*, No. 16-7744, *cert. denied*, 137 S. Ct. 1440 (2017); *Rangel v. California*, No. 16-5912, *cert. denied*, 137 S. Ct. 623 (2017); *Johnson v. California*, No. 15-7509, *cert. denied*, 136 S. Ct. 1206 (2016); *Cunningham v. California*, No. 15-7177, *cert. denied*, 136 S. Ct. 989 (2016); *Lucas v. California*, No. 14-9137, *cert. denied*, 135 S. Ct. 2384 (2015); *Boyce v. California*, No. 14-7581, *cert. denied*, 135 S. Ct. 1428 (2015); *DeBose v. California*, No. 14-6617, *cert. denied*, 135 S. Ct. 760 (2014); *Blacksher v. California*, No. 11-7741, *cert. denied*, 565 U.S. 1209 (2012); *Taylor v. California*, No. 10-6299, *cert. denied*, 562 U.S. 1013 (2010); *Bramit v. California*, No. 09-6735, *cert. denied*, 558 U.S. 1031 (2009); *Morgan v. California*, No. 07-9024, *cert. denied*, 552 U.S. 1286 (2008); *Cook v. California*, No. 07-5690, *cert. denied*, 552 U.S. 976 (2007); *Huggins v. California*, No. 06-6060, *cert. denied*, 549 U.S. 998 (2006); *Harrison v. California*, No. 05-5232, *cert. denied*, 546 U.S. 890 (2005); *Smith v. California*, No. 03-6862, *cert. denied*, 540 U.S. 1163 (2004); *Prieto v. California*, No. 03-6422, *cert. denied*, 540 U.S. 1008 (2003).

guilty of two counts of first-degree murder and also found true the special circumstance allegation that he had committed multiple murders. Pet. App. A1-2. The jury's findings were made unanimously and beyond a reasonable doubt. 13 RT 3221-3222, 3232-3238, 3241-3244, 3287-3291.

The second stage of California's death penalty process proceeds under California Penal Code section 190.3. The jury hears evidence during a penalty trial, allowing it to consider evidence "as to any matter relevant to aggravation, mitigation, and sentence, including but not limited to" certain specified topics. Cal. Penal Code § 190.3. "In determining the penalty," the jury must "take into account any" of a list of specified factors "if relevant"—including "[a]ny . . . circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." *Id.* With the exception of prior unadjudicated violent criminal activity and prior felony convictions, the jury need not agree unanimously on the existence of a particular aggravating circumstance, or find the existence of such a circumstance beyond a reasonable doubt. *See People v. Romero & Self*, 62 Cal. 4th 1, 56 (2015); *People v. Gonzales & Soliz*, 52 Cal. 4th 254, 328 (2011). If the jury "concludes that the aggravating circumstances outweigh the mitigating circumstances," then it "shall impose a sentence of death." Cal. Penal Code § 190.3. If it "determines that the mitigating circumstances outweigh the aggravating circumstances," then it "shall impose a sentence of confinement in state prison for a term of life without the possibility of parole." *Id.*

2. Henriquez contends that he could not be constitutionally sentenced to death unless the jury during the penalty phase found, unanimously and beyond a reasonable doubt, that a particular aggravating factor existed and that the aggravating circumstances outweighed those in mitigation. Pet. 6-7, 11-12, 16 n.9. That is incorrect.

Henriquez primarily relies on the Sixth and Fourteenth Amendment rule that, "[o]ther 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; *see also Ring v. Arizona*, 536 U.S. 584 (2002) (applying rule to Arizona death penalty); Pet. 8-9, 11-12. He equates penalty-phase factors in aggravation with elements of a greater offense. Pet. 6-7, 11-12, 16 n.9. But under California law, once a jury finds unanimously and beyond a reasonable doubt that a defendant has committed first-degree murder with a special circumstance, the maximum potential penalty prescribed by statute is death. *See People v. Prince*, 40 Cal. 4th 1179, 1297-1298 (2007); *see generally Tuilaepa v. California*, 512 U.S. 967, 975 (1994) (a California defendant becomes "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"). Imposing that maximum penalty on a defendant once these jury determinations have been made thus does not violate the Constitution.

In arguing to the contrary, Henriquez relies on *Hurst v. Florida*, 136 S. Ct. 616, 619-622 (2016). Pet. 10. Under the Florida system considered in *Hurst*, after a jury verdict of first-degree murder, a convicted defendant was not "eligible for death" (136 S. Ct. at 622), unless the judge further determined that an enumerated "aggravating circumstance[ ] exist[ed]" (Fla. Stat. § 921.141(3)). The judge was thus tasked with making the "'findings upon which the sentence of death [was] based'" (136 S. Ct. at 622 (quoting Fla. Stat. § 921.141(3)))—determinations that were essentially questions of fact (*see id.* § 921.141(5) (listing aggravating circumstances, such as whether the crime was committed with a purpose of pecuniary gain)). This Court held that Florida's system thus suffered from the same constitutional flaw that Arizona's had in *Ring*: "The maximum punishment" a defendant could receive without judge-made findings "was life in prison without parole," and the judge "increased" that punishment "based on [the judge's] own factfinding." 136 S. Ct. at 621.

In California, however, what makes a person eligible for a death sentence is the jury's determination that at least one of the special circumstances in Penal Code section 190.2(a) is present. That determination, which the jury must agree on unanimously and beyond a reasonable doubt, is how California fulfills the "constitutionally necessary function" of "circumscrib[ing] the class of persons eligible for the death penalty." *Zant v. Stephens*, 462 U.S. 862, 878 (1983).

The jury's subsequent consideration of aggravating and mitigating factors at the penalty phase fulfills a different function: that of providing an "individualized determination . . . at the selection stage" of who among the eligible defendants deserves the death penalty. *Zant*, 462 U.S. at 879; *see People v. Moon*, 37 Cal. 4th 1, 40 (2005) ("The penalty jury's principal task is the moral endeavor of deciding whether the death sentence should be imposed on a defendant who has already been determined to be 'death eligible' as a result of the findings and verdict at the guilt phase."). Such a determination involves a choice between a greater or lesser authorized penalty—not any increase in the maximum potential penalty. *See Jones v. United States*, 526 U.S. 227, 249 (1999).

Kansas v. Carr, 136 S. Ct. 633 (2016), effectively forecloses Henriquez's argument (Pet. 12) that determinations concerning the existence of aggravating or mitigating factors at this final selection stage must be made beyond a reasonable doubt. As *Carr* reasoned, it is possible to apply a standard of proof to the "'eligibility phase'" of a capital sentencing proceeding, "because that is a purely factual determination." 136 S. Ct. at 642. In contrast, it is doubtful whether it would even be "possible to apply a standard of proof to the mitigating factor determination (the so-called 'selection phase' of a capital-sentencing proceeding)," because "[w]hether mitigation exists . . . is largely a judgment call (or perhaps a value call): what one juror might consider mitigating another might not." *Id.*; *see also*, *e.g.*, *People v. Brown*, 46 Cal. 3d

432, 456 (1988) (California's sentencing factor regarding "'[t]he age of a defendant at the time of the crime'" may be either a mitigating or an aggravating factor in the same case: the defendant may argue for age-based mitigation, and the prosecutor may argue for aggravation because the defendant was "'old enough to know better'").

Carr likewise forecloses Henriquez's argument (Pet. 12) that the jury's final weighing of aggravating versus mitigating circumstances should proceed under the beyond-a-reasonable-doubt standard. In *Carr*, this Court observed that "the ultimate question of whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy," and "[i]t would mean nothing . . . to tell the jury that the defendants must deserve mercy beyond a reasonable doubt." 136 S. Ct. at 642. That reasoning leaves no room for Henriquez's argument that the Constitution requires such determinations to be made beyond a reasonable doubt.

CONCLUSION

The petition for a writ of certiorari should be denied.

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