No. 18-6262

In the Supreme Court of the United States

RICHARD PENUNURI,

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, unanimously find beyond a reasonable doubt that specific aggravating factors exist and that they outweigh mitigating factors.

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STATEMENT

1. In October 1997, petitioner Richard Penunuri, acting with fellow gang members, shot and killed Brian Molina and Michael Murillo. Pet. App. A1-A7. From December 1997 through January 1999, while awaiting trial in jail, Penunuri made several phone calls to other gang members in which he expressed his fear that Jaime Castillo, a gang member who was present on the night of the shooting, was going to talk to the police. Pet. App. A7-A8. Over the course of these phone calls, Penunuri made it clear that he wanted Castillo to be killed. *Id*. at A8. On January 14, 1999, several gang members drove Castillo into the San Gabriel Mountains and killed him. *Id*.

The State charged Penunuri with the first-degree murders of Molina, Murillo, and Castillo, and conspiracy to murder Castillo. Pet. App. A1. The State also alleged two "special circumstances" making Penunuri eligible for the death penalty: that he had committed multiple murders and that one of the murders was committed to prevent a witness from testifying. *Id*. At the guilt phase of the trial, the jury convicted Penunuri of all the charges and found true both of the special-circumstance allegations. *Id*.

After the presentation of evidence at the subsequent penalty phase of the trial, the jurors were instructed that, in selecting whether Penunuri would be punished by death or life imprisonment without parole, 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 factors"; that they

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 parole." 30 RT 4467-4469. The jury returned a verdict of death. Pet. App. A1.

2. On direct appeal, the California Supreme Court affirmed Penunuri's conviction and death sentence. Pet. App. A2, A61. As relevant here, the court rejected Penunuri's claim that California's capital sentencing scheme is unconstitutional because the jury is not required, before reaching a death verdict, to find beyond a reasonable doubt that an aggravating circumstance exists, that aggravating circumstances outweigh mitigating circumstances, and that death is the appropriate penalty. *Id*. at A58. The court noted that it had repeatedly rejected such claims in the past and that its conclusions were not altered by the reasoning of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 530 U.S. 466 (2002), *Blakely v. Washington*, 542 U.S. 296 (2004), and *Cunningham v. California*, 549 U.S. 270 (2007). *Id*.

ARGUMENT

Penunuri 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 unanimously and beyond a reasonable doubt that an aggravating factor exists and that aggravation

outweighs any mitigating factors. Pet. 7-14. 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 14 n.10. 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]

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

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[1] *See*, *e.g.*, *Henriquez v. California*, No. 18-5375, *cert. denied*, 2018 WL 3611046 (Oct. 1, 2018); *Wall v. California*, No. 17-9525, *cert. denied*, 2018 WL 3146718 (Oct. 1, 2018); *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); *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).

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 Penunuri's trial, the jury found him guilty of three counts of first-degree murder and also found true the special circumstance allegations that he committed multiple murders and that one of the murders was committed for the purpose of preventing a witness from testifying. Pet. App. A1. The jury was unanimous and its findings were made beyond a reasonable doubt. 30 RT 4511-4515.

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*, 62 Cal. 4th 1, 56 (2015); *People v. Gonzales*, 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. Penunuri 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. 7-14. That is incorrect.

Penunuri 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 v. New Jersey*, 530 U.S. 466, 490 (2000); *see also Ring v. Arizona*, 536 U.S. 584 (2002) (applying rule to Arizona death penalty). Pet. 7-9. 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, Penunuri relies on *Hurst v. Florida*, 136 S. Ct. 616, 619-622 (2016). Pet. 8-13. 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 reached 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 Penunuri's argument 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." *Id*. 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 the 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 Penunuri's argument 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 Penunuri's argument that such an instruction is required under the Constitution. Pet. 9-14.

3. Penunuri points to the Delaware Supreme Court's fractured decision in *Rauf v. State*, 145 A.3d 430 (Del. 2016), as reason for this Court to consider whether the beyond-a-reasonable-doubt standard should apply at California's

selection stage. Pet. 12. *Rauf*'s various opinions hold that a determination as to the relative weight of aggravating and mitigating factors in the application of Delaware's death penalty must be made beyond a reasonable doubt. *See* 145 A.3d at 434 (per curiam); *id.* at 481-482 (Strine, J., concurring); *id.* at 487 (Holland, J., concurring); *but see id.* at 487 (Valihura, J., dissenting). The rationale of those opinions is not clear, and they notably fail to cite or discuss this Court's reasoning on the issue in *Carr*. In any event, the most notable feature of the Delaware law invalidated in *Rauf* was that the jury's choice between a life sentence and death was completely advisory: the judge could impose a sentence of death even if all jurors recommended against it, as long as the jury had unanimously found the existence of a single aggravating factor. *See* Del. Code tit. 11, § 4209(c)(3), (d)(1); *Rauf*, 145 A.3d at 457 (Strine, J., concurring) (under Delaware law the judge "has the final say in deciding whether a capital defendant is sentenced to death and need not give any particular weight to the jury's view"). Under California law, the death penalty may be imposed only if the jury has unanimously voted for death. *See* Cal Penal Code § 190.3. It is by no means clear from the opinions in *Rauf* that that court would have reached the same result if it had considered California's quite different statute.[2]

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[2] Similar shortcomings undercut petitioner's reliance on the opinion dissenting from the denial of certiorari in *Woodward v. Alabama*, 134 S. Ct. 405, 410-411 (2013), and on *State v. Whitfield*, 107 S.W. 3d 253 (Mo. 2003). Pet. 12. The statutes at issue in *Woodward* and *Whitfield* allowed a judge to

Penunuri also relies on the Florida Supreme Court's decision in *Hurst v. State*, 202 So. 3d 40, 57 (Fla. 2016). Pet. 11. *Hurst* holds that a death sentence under Florida law may not be constitutionally imposed unless the jury "unanimously and expressly find[s] all the aggravating factors that were proven beyond a reasonable doubt, unanimously find[s] that the aggravating factors are sufficient to impose death, unanimously find[s] that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend[s] a sentence of death." 202 So. 3d at 57. By its own terms, the decision does not recognize a right to a beyond-a-reasonable-doubt determination of anything other the existence of aggravating factors—the Florida-law equivalent of the special circumstances that a California jury already finds beyond a reasonable doubt under California law when determining eligibility for a death sentence. *See* pp. 3-4, *supra*. The Florida Supreme Court's decision in *Hurst* thus provides no reason for further review of the California Supreme Court's decision here.

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impose the death penalty even where the jurors voted against it. *See Woodward*, 134 S. Ct. at 406, 410-412 (jury's decision as to whether the defendant should be executed was merely an "advisory verdict"); *Whitfield*, 107 S.W. 3d at 261-262 (judge imposed death sentence after jurors voted 11-1 for life imprisonment). The *Woodward* dissent suggests that a trial judge's view should not replace that of the jury—not that the death penalty may not be imposed without the jury finding beyond a reasonable doubt that aggravating factors outweigh mitigating factors. 134 S. Ct. at 10-11. To whatever extent *Whitfield* held that the beyond-a-reasonable doubt standard should apply to aggravating and mitigating factors, that ruling has been superseded by this Court's analysis in *Carr*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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