No. 18-7516

In the Supreme Court of the United States

JOSEPH ADAM MORA,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS 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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CONSTITUTIONAL PROVISIONS

STATEMENT

1. In August 1997, petitioner Joseph Mora and codefendant Ruben Rangel, both armed with firearms, approached an occupied vehicle parked on the street. Pet. App. A 2-5. They demanded wallets from the driver, Andy Encinas, and the front passenger, Anthony Urrutia, then shot them to death. *Id.*[1]

The State charged Rangel and Mora with the murders and attempted robberies of Encinas and Urrutia. Pet. App. A 1-2. The State also alleged the murders were committed under two special circumstances that would make Rangel and Mora eligible for the death penalty: that they had committed multiple murders and that the murders were committed in the commission of robbery. *Id.* at 2; *see* Cal. Penal Code §§ 190.2, 190.4. At the guilt phase of the trial, the jury convicted Rangel and Mora of the first-degree murders and attempted second-degree robberies of both victims, and found both special-circumstance allegations true beyond a reasonable doubt. Pet. App. A 2.

At the trial's penalty phase, the jurors were instructed that, in deciding whether each defendant should receive a sentence of death or a sentence of life in prison without the possibility of parole, they were to "consider, take into account, and be guided by the applicable factors of aggravating and mitigating

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[1] Rangel has filed a separate petition for certiorari, which raises as one of the claims the same issue as the question presented in the current petition. *See Rangel v. California*, No. 18-6818. In this brief, RT refers to the trial court Reporter's Transcript.

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." 21 RT 3294-3296. The jury returned verdicts of death. Pet. App. A 2.

2. The California Supreme Court affirmed the convictions and death sentences. Pet. App. A 1, 41. Mora raised over thirty claims and subclaims of error, only one of which is relevant here. Specifically, Mora argued that California's capital sentencing system is unconstitutional because the penalty-phase jury is not instructed to employ the beyond-a-reasonable-doubt standard in determining that an aggravating circumstance exists, that aggravating circumstances outweigh mitigating circumstances, and that death is the appropriate penalty. *Id.* at 41. The court rejected Mora's argument based on its prior decisions. *Id.*

ARGUMENT

Mora argues that California's death penalty system violated his right to due process guaranteed by the Fifth and Fourteenth Amendments, and his right to a jury trial guaranteed by the Sixth Amendment, because state law does not require the penalty-phase jury to unanimously find beyond a

reasonable doubt that an aggravating factor exists and that the factors in aggravation outweigh the factors in mitigation. Pet. 8-26. This Court has repeatedly denied review in cases presenting the same or similar questions, and there is no reason for a different result here.[2]

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, the guilt phase, 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

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[2] *See*, *e.g.*, *Penunuri v. California*, No. 18-6262, *cert. denied*, 139 S. Ct. 644 (2018); *Henriquez v. California*, No. 18-5375, *cert. denied*, 139 S. Ct. 261 (2018); *Wall v. California*, No. 17-9525, *cert. denied*, 139 S. Ct. 187 (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).

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 guilt phase of Mora's trial, the jury found him guilty of two counts of first-degree murder and also found true the special circumstance allegations that he committed multiple murders and that the murder was committed during the course of robbery. Pet. App. A 2. The guilt-phase findings were made unanimously under the beyond-a-reasonable-doubt standard. 15 RT 2459-2462.

The second stage of California's death penalty trial process, the penalty phase, proceeds under California Penal Code Section 190.3. During the penalty phase, the jury hears evidence which it is allowed to consider "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. Mora 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 aggravating factors existed and that the aggravating circumstances outweighed those in mitigation. Pet. 20-23. That is incorrect.

Mora primarily relies (Pet. 11) 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). 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 does not violate the Constitution.

In arguing to the contrary, Mora relies on *Hurst v. Florida*, 136 S. Ct. 616, 619-622 (2016). Pet. 9-13. 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* Fla. Stat. § 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 murderer eligible for a death sentence is the jury's determination that the murder is of the first degree, and

that at least one of the special circumstances in California Penal Code Section 190.2(a) is present. Those determinations, which the jury must agree on unanimously and beyond a reasonable doubt, are part of 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, 251 (1999) (finding of aggravating facts in context of capital sentencing is a choice between a greater and a lesser penalty, not a process of raising the sentencing range's ceiling).

Kansas v. Carr, 136 S. Ct. 633 (2016), effectively forecloses Mora's argument that determinations concerning the existence of aggravating or mitigating factors at the penalty-selection phase 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*, *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 Mora'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 Mora's argument that such an instruction is required under the Constitution. Pet. 16-19.

3. Mora points to the Delaware Supreme Court's fractured decision in *Rauf v. State*, 145 A.3d 430 (Del. 2016), as a reason for this Court to consider whether the beyond-a-reasonable-doubt standard should apply at California's selection stage. Pet. 14. *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 the

Delaware Supreme Court would have reached the same result if it had been analyzing California's quite different statute.[3]

[3] Similar shortcomings undercut Mora'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. 14. The statutes at issue in *Woodward* and *Whitfield* allowed a judge to 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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