
In the Supreme Court of the United States

CARL DEVON POWELL,

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 January 1992, petitioner Carl Powell killed his former employer, Keith McDade, by shooting him in the head at point-blank range. Pet. App. B
2. Powell also took money from McDade. *Id.*

The State charged Powell with the murder and robbery of McDade. 29CCT 8468-8469.¹ The State also alleged a special circumstance that made Powell eligible for the death penalty: he murdered McDade during a robbery. 29CCT 8469; Cal. Penal Code § 190.2(a)(17). At the trial’s guilt phase, the jury found Powell guilty of first-degree murder and robbery and found the special circumstance allegation true. 2CT 594; 3CT 619, 673-684.

At the trial’s penalty phase, the jurors were instructed that, in deciding whether Powell would be punished by death or life in prison without parole, they were to “consider, take into account and be guided by” various aggravating and mitigating circumstances, if applicable; 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

¹ “CT” refers to the trial court Clerk’s Transcript. “CCT” refers to the Clerk’s Corrected Transcript.

circumstances that it warrants death instead of life without parole.” 3CT 742-743, 772-773. The jury returned a verdict of death. Pet. App. B 1.

2. On direct appeal, the California Supreme Court affirmed the judgment and death sentence. Pet. App. B 1, 77. As relevant here, the court rejected Powell’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 factor has been proved and that aggravating factors outweigh mitigating factors. *Id.* at 75. The court explained that it had consistently rejected such claims and that its conclusions were not altered by *Hurst v. Florida*, 136 S.Ct. 616 (2016). Pet. App. B 74, 75 & n.36.

ARGUMENT

Powell argues that California’s capital-sentencing scheme violates 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 find beyond a reasonable doubt that an aggravating factor exists and that the factors in aggravation outweigh the factors in mitigation. Pet. 9-21. In a footnote at the end of the petition, he suggests that, under the same constitutional principles, any aggravating factor must be found unanimously. *Id.* at 21 n.12. 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 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

² See, e.g., *Case v. California*, No. 18-7457, *cert. denied*, 139 S. Ct. 1342 (2019); *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).

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 Powell’s trial, the jury found Powell guilty of first-degree murder and found the robbery-murder special circumstance to be true. 3CT 606, 616-619, 673-674, 679-680. The guilt-phase findings were made unanimously and under the beyond-a-reasonable-doubt standard. 2CT 594; 3CT 645.

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. Powell contends that he could not be constitutionally sentenced to death unless the jury during the penalty phase found, beyond a reasonable doubt, that a particular aggravating factor existed and that the aggravating factors outweighed those in mitigation. Pet. 15-19. That is incorrect.

Powell primarily relies (Pet. 9-12) 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 thus does not violate the Constitution.

In arguing to the contrary, Powell relies on *Hurst v. Florida*, 136 S. Ct. 616, 619-622 (2016). Pet. 12-14. 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 a defendant eligible for a death sentence is the jury’s determination that at least one of the special circumstances in California Penal Code section 190.2(a) is present. That determination, which the jury must agree on unanimously and beyond a reasonable doubt, is 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, 249 (1999).

Kansas v. Carr, 136 S. Ct. 633 (2016), effectively forecloses Powell’s argument (Pet. 10-14) 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 Powell’s argument that the jury’s final weighing of aggravating versus mitigating factors should proceed under the beyond-a-reasonable-doubt standard. Pet. 15-19. 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 Powell’s argument that such an instruction is required under the Constitution.

3. Powell 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. 17. *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 Powell’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. 17-18. 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

Powell also relies on the Florida Supreme Court’s decision in *Hurst v. State*, 202 So. 3d 40, 57 (Fla. 2016). Pet. 17. *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 than 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. The Florida Supreme Court’s decision in *Hurst* thus provides no reason for further review.

mitigating factors. 134 S. Ct. at 410-411. 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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