No. 19-5645

In the Supreme Court of the United States

THOMAS POTTS,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Petitioner Thomas Potts was convicted of two murders, robbery, and grand theft. With respect to the murders, the jury determined that the State had proven that Potts committed multiple murder and that he committed each murder in connection with a robbery. Each special circumstance made Potts eligible for the death penalty, and Potts was sentenced to death. At the guilt phase of Potts's trial, the jury was given a then-prevalent unofficial model instruction. The instruction cautioned that a defendant's possession of recently stolen property is insufficient, without further corroboration, to permit an inference that the defendant is guilty of a charged robbery or theft, but that the corroboration needed to overcome that prohibition may be slight. The question presented is:

Whether the instruction violated Potts's right to due process.

DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

People v. Potts, No. S072161, judgment entered March 28, 2019 (this case below).

In re Thomas Potts on Habeas Corpus, No. S252867 (pending).

Kings County Superior Court:

People v. Potts, No. 97CM2167, judgment entered July 23, 1998 (this case below).

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STATEMENT

1.a. On August 5, 1997, Fred and Shirley Jenks were found dead in their home in Hanford, California. Pet. App. 2. Fred Jenks's body was on the floor in a pool of blood. *Id.* Shirley Jenks's body was in the master bedroom. *Id.* Dr. Armand Dollinger testified that Fred and Shirley Jenks appeared to have been attacked with a knife and a hatchet. *Id.* at 2, 4.

Multiple pieces of jewelry had been taken from the master bedroom. Pet. App. 3. Near Fred's body was a small metallic pin, of the type used to connect a watch band to a watch. *Id.* at. 2. A watch with a missing pin and partially detached band was located under Fred's body. *Id.* at 2, 10. Bloody shoeprints bore a "Nike" imprint. *Id.* at 2. There were no signs of forced-entry. *Id.* at 3.

Petitioner Thomas Potts worked as a part-time handyman and house cleaner. Pet. App. 5. Fred Jenks was one of his clients. *Id.* Several witnesses testified that Potts owned a hatchet that he used for construction work. *Id.* One of those witnesses was Potts's friend and former roommate, Diana Williams. She also testified that the watch Potts wore every day had a pin that tended to become detached. *Id.* at 6. And she testified that Potts owned a pair of Nike shoes that she had given to him. *Id.*

The prosecution and defense agreed that the Jenkses were likely killed on August 4, sometime after 1:00 p.m. Pet. App. 7. Williams testified that on Friday August 1, she had given Potts the money from his Social Security check, which listed Williams as payee and typically arrived the first of each month.

Id. at 6. But on Monday August 4, when Williams and Potts went grocery shopping together, Potts told Williams that he had no money because he had lost it all at a casino. *Id.* at 6-7. A local liquor store owner testified that Potts would customarily pay the tab on his charge account at the liquor store on the first of every month. *Id.* at 6. On August 1, however, Potts had not paid his $140 tab; instead, he had promised the owner to pay it the following Monday or Tuesday. *Id.* Pawn shop records established that on August 5, the day after the murders, Potts visited a local pawnshop and pawned a particular ring and pendant. *Id.* at 7. Shirley Jenks's sister testified that those items had belonged to her sister. *Id.* A witness told police that on August 5, the day after the killings, he had given Potts a ride first to the area of the pawnshop and then to a casino. *Id.*

When police searched Potts's apartment on August 6, they did not find any evidence connected to the crimes. Pet. App. 8. Potts voluntarily accompanied officers to the police station and answered questions. *Id.* When asked about his hatchet, he said he thought he had lost it in a recent move. *Id.* That evening, however, Williams noticed that Potts did not have his watch. *Id.* at 9. That was unusual; ordinarily, she said, "he never goes anywhere without his watch." *Id.*

After discovering Potts's pawn slips, officers arrested him on August 7. Pet. App. 9-10. An officer noticed a possible blood spot on Potts's glasses. *Id.* at 9. Testing revealed a mixture of Potts's and Fred Jenks's DNA. *Id.* When

Williams was asked to look at the watch found at the crime scene, she identified it as belonging to Potts. *Id.* at 10.

b. Potts was charged with the first-degree murders of Fred and Shirley Jenks and with robbery. Pet. App. 1; *see* Cal. Penal Code §§ 187(a), 211. With respect to the murders, the State alleged that Potts had committed multiple murder and that he had committed each murder in the course of a robbery. Pet. App. 1. Under California law, these are special circumstances that render a defendant eligible for the death penalty. *See* Cal. Penal Code § 190.2(a)(3), (17). In addition to the charges involving the Jenkses, Potts was also charged with grand theft, under California Penal Code § 487(a), for stealing and pawning the property of a different client, Viola Bettencourt, on another day. Pet. App. 1, 10.[1]

As relevant here, the trial court included, in the final jury instructions at the guilt phase, an unofficial but then-prevalent cautionary instruction restricting jurors' ability to make inferences from a defendant's possession of stolen property. The instruction, known as CALJIC No. 2.15, stated:

> If you find that a defendant was in conscious possession of recently stolen property, the fact of that possession is not by itself

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[1] Bettencourt testified that Potts had cleaned her house in June 1997. Pet. App. 10. The day before the cleaning, Bettencourt had taken off a ring and placed it in a container on her dresser. *Id.* The day after Potts's cleaning, she noticed that the ring was gone. *Id.* Pawn shop records suggested that Potts had pawned her ring at 3:00 p.m. the day he cleaned her house; then he paid to reclaim the ring a few days later and re-pawned it at another shop for more money. *Id.* at 10-11.

> sufficient to permit an inference that the defendant is guilty of the crimes of robbery and grand theft. Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight and need not by itself be sufficient to warrant an inference of guilt.
>
> As corroboration you may consider the attributes of possession, time, place, and manner that the defendant had … an opportunity to commit the crimes charged, the defendant's conduct, a false account of how he acquired possession of the stolen property, and any other evidence which tends to connect the defendant with the crime charged.

11 RT 2338-2339; 9 CT 2663.[2]

The jury found Potts guilty as charged on all four counts, and found the robbery-murder and multiple-murder special circumstances to be true beyond a reasonable doubt. Pet. App. 1. Either special circumstance rendered Potts eligible for the death penalty. *See* Cal. Penal Code § 190.2(a).

At the trial's penalty phase, the jury heard evidence about sexual assaults and other prior crimes committed by Potts. Pet. App. 12-13, 15. Evidence suggested that Shirley Jenks's corpse had injuries consistent with forced penetration, although it was not clear whether those injuries had occurred

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[2] CT refers to the trial court's Clerk's Transcript. RT refers to the Reporter's Transcript. At the time of Potts's trial, CALJIC instructions, prepared by a committee established by the Los Angeles County Superior Court, were in wide use as unofficial pattern instructions. *See generally* Witkin, et al., 5 California Criminal Law § 701 (4th ed. 2019). In 2005, however, the Judicial Council of California adopted a new set of model instructions, known as the CALCRIM instructions, as "official" instructions whose use is "strongly encouraged" by court rules. Cal. R. Ct. 2.1050; *see also* Cal. R. Ct. 2.1055. The CALCRIM instructions include a new and differently phrased instruction on inferences from the possession of stolen property. *See* p. 12 n.10, *infra* (discussing new instruction).

before her death or shortly afterwards. *Id.* at 13. The jury found that death was the appropriate penalty for each murder. Pet. App. 1; 10 CT 2884, 2898-2899.

2. The California Supreme Court affirmed the convictions and death sentences. Pet. App. 1.[3] As relevant here, the court reasoned that CALJIC No. 2.15, which "'permits—but does not require—jurors to infer guilt of burglary, robbery, or theft from the possession of stolen property plus some corroborating evidence,'" "'does not violate due process or reduce the burden of proof.'" *Id.* at 43 (quoting *People v. Grimes*, 1 Cal.5th 698, 730 (2016)).

ARGUMENT

1. The constitutional rules governing inferences in criminal trials are well settled. A State may not employ an evidentiary presumption that relieves the State of its burden to prove every element of a crime beyond a reasonable doubt. *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979). A "permissive inference"—*i.e.*, one which "leaves the trier of fact free to credit or reject the inference," *County Court of Ulster County, N.Y. v. Allen*, 442 U.S. 140, 157 (1979)—is unlikely to cause that problem. Such an inference generally "does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred

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[3] Another portion of Potts's sentence—a four-year prison term based on the victims' advanced age—was reversed, because the court determined that the relevant enhancement statute did not apply to charges of murder. Pet. App. 1, 62, 74.

based on the predicate facts proved." *Francis v. Franklin*, 471 U.S. 307, 314 (1985). A permissive inference "affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." *County Court of Ulster County*, 442 U.S. at 157; *see also Tot v. United States*, 319 U.S. 463, 467-468 (1943) (statutory presumption "cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, [or] if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience").

The application of CALJIC No. 2.15 in Potts's case satisfied these principles. First, the instruction left the jury free to decide for itself whether Potts had actually possessed jewelry stolen in the crime. *See* 11 RT 2338 ("*If* you find that a defendant was in conscious possession of recently stolen property…." (emphasis added)). Second, there is an obvious "connection … in 'common experience,'" *County Court of Ulster County,* 412 U.S. at 171, between possession of stolen property and a taking of that property which occurred soon before. *Cf. Barnes v. United States*, 412 U.S. 837, 843 (1973) ("[f]or centuries courts have instructed juries that an inference of guilty knowledge may be drawn from the fact of unexplained possession of stolen goods"). Finally, it cannot be said that "under the facts of [this] case, there [was] no rational way the trier could make the connection." *County Court of Ulster County*, 412 U.S. at 157. The Jenkses were killed, and their jewelry taken, when Potts was in

urgent need of money. The day after the crime, Potts pawned two pieces of the stolen jewelry then went to a casino. *See* p. 2, *supra*. One victim's DNA was found in the blood on Potts's glasses, and Potts's watch was found under that victim's body. *See* pp. 2-3, *supra*.

Nor did the instruction undermine the Due Process Clause's reasonable-doubt standard more generally. As the California Supreme Court has observed, "CALJIC No. 2.15 [does] not directly or indirectly address the burden of proof." *People v. Prieto*, 30 Cal.4th 226, 248 (2003). Nor does anything in the instruction "absolve[] the prosecution of its burden of establishing guilt beyond a reasonable doubt." *Id.* If anything, as the California Supreme Court recognized, the instruction functions in a way that is "'generally favorable to defendants.'" Pet. App. 43 (quoting *People v. Gamache*, 48 Cal.4th 347, 375 (2010)). Here, it forbade the jury from drawing an inference against Potts unless the jury found corroborating evidence. That did not violate this Court's rulings on permissive inferences.

In any event, as this Court has explained, even if "a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption that relieves the State of its burden of persuasion on an element of an offense," those words would have to be "considered in the context of the charge as a whole." *Franklin*, 471 U.S. at 315; *see also* 11 RT 2333 (instructing jurors that they must "consider the instructions as a whole and each in light of all the others"). Potts's jury was told each element of each

crime, 11 RT 2348-2349, 2357-2358, 2360, and was instructed that any failure to "prove beyond a reasonable doubt every essential element of the charge" must result in an acquittal, *id.* at 2341-2342; *see also id.* (instructing that the defendant may rely on the state of the evidence and upon the prosecution's failure "to prove beyond a reasonable doubt every essential element of the charge against him"); *id.* at 2353 (if there is "reasonable doubt as to whether a special circumstance is true, you must find it to be not true"). Those instructions were reinforced by others, throughout the final charge, that left no doubt about the prosecution's burden to prove every element of each crime and special circumstance beyond a reasonable doubt.[4]

2. Potts, who states that judicial opinions "in this area [are] difficult to find," Pet. 20, cites several decisions as upholding instructions similar to the

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[4] *See, e.g.*, 11 RT 2352 (if the jury is convinced "beyond a reasonable doubt" that the defendant committed murder but has a reasonable doubt about whether the murder was of the first or second degree, the jury must return a verdict fixing the murder as of the second degree); *id.* at 2359 (if there is "reasonable doubt whether the robbery is of the first or second degree, you must find it to be of the second degree"); *id.* at 2336-2337 ("before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt"); *id.* at 2355 ("before an inference essential to establish a special circumstance may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which that inference necessarily rests must be proved beyond a reasonable doubt"). Indeed, jurors were instructed as early as voir dire that "the defendant may not be convicted of any offense charged against him unless all 12 jurors are convinced beyond a reasonable doubt of his guilt." 2 RT 373-374; *see also id.* at 436-437, 486-487, 491.

instruction in this case, *see id.* at 20-22. He argues, however, that other decisions disagree with that approach. *Id.* at 22-25. Potts's cases, however, do not establish any disagreement.[5] Instead, they reflect two requirements that are consistent with the decision below: Inferences from stolen property must be tied to crimes which feature the taking of property as an element, and the instructions as a whole must correctly convey the prosecution's burden of proof.

People v. Carter, 522 F.2d 666 (D.C. Cir. 1975), reflects the first point. *Carter* disapproved of an instruction telling jurors that the defendant's possession of stolen property could be used to infer that the defendant was "'guilty of the crimes charged.'" *Id.* at 679. "The vice in the instruction" was that "those words," *id.*, permitted inferences as to charges that did not involve the taking of property, such as arson, possession of a Molotov cocktail, and second degree burglary while armed with a Molotov cocktail, *see id.* at 679-680. Potts's instruction permitted the jury to make a connection only between stolen property and charges that involved the taking of that property: "robbery and grand theft." 11 RT 2338-2339. *Carter*'s concern is not implicated.

Potts's other cases largely reflect the second point. *Pendergrast v. United States*, 416 F.2d 776 (D.C. Cir. 1969), expressed concern that a particular

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[5] *See, e.g.,* Pet. 24 (citing *State v. Foust*, 482 S.W.3d 20 (Tenn. Crim. App. 2015)). *Foust* recounted that Tennessee's Supreme Court has "cited with approval a selection of the California Pattern Instructions" regarding possession of recently stolen property. 482 S.W.3d at 54 (citing *State v. James*, 315 S.W.3d 440 (Tenn. 2010)). The California instruction that *James* approved of is the one given in Potts's case. *See James*, 315 S.W.3d at 454 n.13.

instruction on recently stolen property, in isolation, might have implied that the defendant had the burden to persuade jurors that he had acquired the property innocently. *Id.* at 789. But *Pendergrast* rejected the defendant's constitutional challenge because "when we look to the rest of the charge, we find full instructions on the presumption of innocence, the Government's comprehensive burden of proof beyond a reasonable doubt, and the jury's complete freedom to reject the inference despite the establishment of its prerequisites." *Id.* at 789-790.[6] Similarly, *People v. Hampton*, 758 P.2d 1344, 1354-1355 (Colo. 1988), rejected a challenge to a stolen property instruction where jurors were reminded that "'[y]ou must, of course, find each and every element of each of the crimes charged, including identity, in order to find the Defendant guilty.'"[7] And under *People v. Baskerville*, 60 N.Y.2d 374 (1983), if jurors "find that defendant had possession of recently stolen property," they may "infer that defendant was guilty of a crime and must then weigh the evidence before them to determine whether it establishes beyond a reasonable

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[6] Potts (Pet. 23) observes that the instruction in his case does not match a lengthy model instruction that was appended to the *Pendergrast* opinion. *Pendergrast* did not, however, identify any particular aspect of its model instruction as constitutionally required. 416 F.2d at 790-791.

[7] Although the instruction at issue concerned only an inference about taking property (without mentioning other elements of the charged robbery), *Hampton* did not hold that that feature was essential to the instruction's constitutionality. *See* 758 P.2d at 1354 (applying Colorado precedent that advised as to "better procedure[s]" but did not rely on due process grounds).

doubt that the defendant participated in the theft of the property or received it after it was stolen with knowledge of the fact." *Id.* at 383.[8]

These cases raise no conflict with the decision below. Potts's jury was repeatedly cautioned that it could not convict the defendant of any crime or special circumstance unless the prosecution proved all the elements of that crime or special circumstance beyond a reasonable doubt. *See* pp. 7-8, *supra*. As this Court's precedents reflect, that admonition need not be repeated in every instruction, so long as it is adequately conveyed in the instructions as a whole. *See* p. 7, *supra*.[9]

3. In any event, if there were disagreement over the precise formulation required for a permissive inference instruction regarding possession of recently stolen property, this case would be a poor vehicle in which to address the issue.

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[8] It is not clear the extent to which *Baskerville*'s holdings reflect federal constitutional requirements, as opposed to general state-law principles that a defendant is "entitled to have his position submitted to the jury under proper instructions in light of all the evidence." 60 N.Y.2d at 384.

[9] Potts (Pet. 23) also cites the statement, in *State v. Hickson*, 25 N.C. App. 619, 621 (1975), that "if and when it is established that there was an armed robbery in which property was stolen, then the possession of such recently stolen property raises a presumption of fact that the possessor is guilty of the armed robbery." *Hickson*'s brief discussion does not make clear whether that statement reflects any constitutional ruling. In any event, the instruction here would raise no doubt under *Hickson*'s requirements, since Potts's jury was instructed that "before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt." 11 RT 2336-2337; *see also id.* at 2355 (similar instruction regarding inference used to establish special circumstances).

The instruction challenged by Potts permitted the drawing of an inference only as to the charges of "robbery and grand theft." 11 RT 2338. It contained no reference to the murder charges for which Potts was sentenced to death. The instruction's reference to the robbery charge could be seen as overlapping with the robbery-murder special circumstance that was one basis making Potts eligible for the death penalty upon his convictions for murder. But the jury also found beyond a reasonable doubt that the prosecution had proven another special circumstance—multiple murder—that independently made Potts eligible for that sentence. Beyond that, although the California Supreme Court ruled on Potts's challenge once he raised it on appeal, Potts did not object to the instruction at trial. Pet. 4. And as Potts acknowledges (Pet. 25), the unofficial California instruction given in Potts's case was superseded years ago by a different, official jury instruction.[10] See p. 4 n.2, *supra*. That makes the issue in this case of little importance going forward.

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[10] The new instruction, CALCRIM No. 376, concludes with an express admonition to "[r]emember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt."

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: October 18, 2019

Respectfully submitted

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