
In the Supreme Court of the United States

LEE SAMUEL CAPERS,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

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

BRIEF IN OPPOSITION

XAVIER BECERRA

Attorney General of California

MICHAEL J. MONGAN

Solicitor General

LANCE E. WINTERS

Chief Assistant Attorney General

JAMES WILLIAM BILDERBACK II

Senior Assistant Attorney General

RYAN B. MCCARROLL

Deputy Solicitor General

DONALD W. OSTERTAG

Deputy Attorney General

HOLLY D. WILKENS*

Supervising Deputy Attorney General

600 West Broadway, Suite 1800

San Diego, CA 92101

(619) 738-9557

Holly.Wilkens@doj.ca.gov

**Counsel for Record*

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.

DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

People v. Capers, No. S146939, judgment entered October 23, 2019
(this case below).

In re Capers on Habeas Corpus, No. S256752 (pending).

San Diego County Superior Court:

People v. Capers, No. FBA06284, judgment entered September 22,
2006 (this case below).

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STATEMENT

1. In November 1998, petitioner Lee Samuel Capers and three accomplices killed a married couple after entering their store, robbing the store, and raping the wife. Pet. App. A 2. Capers and his accomplices set fire to their victims' bodies and later bragged to others about their crimes. *Id.* at 4-5, 7.

2. The State charged Capers with, among other things, two counts of first-degree murder and alleged as special circumstances that Capers (i) committed multiple murders, (ii) murdered the victims during the commission of a robbery, and (iii) murdered them during the commission of a commercial burglary. Pet. App. A 1; 2 CT 384-387; see Cal. Penal Code §§ 187(a), 190.2(a)(1); 190.2(a)(17)(A); 190.2(a)(17)(G).¹ At the guilt phase of the trial, Capers cross-examined the prosecution's witnesses but did not present any other evidence in his defense. Pet. App. A 2, 14. The jury convicted Capers as charged and found each of the special circumstance allegations true beyond a reasonable doubt, thereby qualifying him for the death penalty. Pet. App. A 1, 14; 31 CT 8978-8991; Cal. Penal Code § 190.2.

At the penalty phase, the trial court instructed the jurors that, in deciding whether Capers should be punished by death or life in prison without parole, they were to "consider, take into account and be guided by" various aggravating

¹ CT refers to the superior court clerk's transcript. RT refers to the superior court reporter's transcript.

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 [they] deem appropriate to each and all of the various factors”; and that to “return a judgment of death, each of [them] 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.” 11 RT 2636-2637. The jury returned verdicts of death on both counts. Pet. App. A 1.

3. The California Supreme Court affirmed the convictions and death judgment. Pet. App. A 1. As is relevant here, the court rejected Capers’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 38-39.

ARGUMENT

1. Capers 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. Pet. 10-21. He further suggests that, under the same constitutional principles, any aggravating factor must be found

unanimously. Pet. 21, n.11. 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

a. A California death sentence depends on a two-stage 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

² See, e.g., *Erskine v. California*, No. 19-6235, *cert. denied*, 140 S. Ct. 602 (2019); *Mendez v. California*, No. 19-5933, *cert. denied*, 140 S. Ct. 471 (2019); *Bell v. California*, No. 19-5394, *cert. denied*, 140 U.S. 294 (2019); *Gomez v. California*, No. 18-9698, *cert. denied*, 140 S. Ct. 120 (2019); *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*, 574 U.S. 1169 (2015); *DeBose v. California*, No. 14-6617, *cert. denied*, 574 U.S. 1051 (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).

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 default sentence is a prison term of 25 years to life. 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.” Cal. Penal Code § 190.2(a). A 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. Cal. Penal Code § 190.4(a), (b). During the guilt phase of Capers’s trial, the jury found him guilty of first-degree murder, and it found the robbery-murder, burglary-murder, and multiple-murder special circumstances to be true. Pet. App. A 1; 31 CT 8978-8991. The jury’s findings were unanimous, under the beyond-a-reasonable-doubt standard. 31 CT 8954, 8958-8960.

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.*

b. Capers contends that the Constitution does not permit him to be sentenced to death unless the jury during the penalty phase unanimously found beyond a reasonable doubt that a particular aggravating factor existed. Pet. 10-21. That is incorrect.

Capers primarily relies (Pet. 10-11) on the Sixth and Fourteenth Amendment rule that, “[i]f a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found, by a jury beyond a reasonable doubt.” *Ring v. Arizona*, 536 U.S. 584, 602 (2002) (applying rule to Arizona death penalty); see also *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). 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 unanimously and beyond a reasonable doubt thus does not violate the Constitution.

In arguing to the contrary, Capers relies on *Hurst v. Florida*, 136 S. Ct. 616, 619-622 (2016). Pet. 11-18. 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, a defendant is eligible for a death sentence only after the jury finds at least one of the special circumstances in California Penal Code Section 190.2(a). 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 Capers’s argument (Pet. 10-21) 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 Capers’s argument that the jury’s final weighing of aggravating versus mitigating factors should proceed under the beyond-a-reasonable-doubt standard. Pet. 15-18. 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 Capers’s argument that such an instruction is required under the Constitution.

c. Capers 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. 16. *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 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 Capers's reliance on the opinion dissenting

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

XAVIER BECERRA

Attorney General of California

MICHAEL J. MONGAN

Solicitor General

LANCE E. WINTERS

Chief Assistant Attorney General

JAMES WILLIAM BILDERBACK II

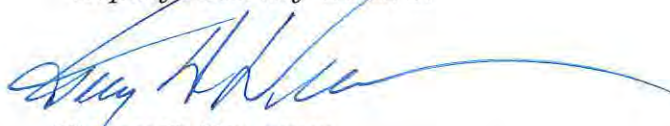
Senior Assistant Attorney General

RYAN B. MCCARROLL

Deputy Solicitor General

DONALD W. OSTERTAG

Deputy Attorney General



HOLLY D. WILKENS

Supervising Deputy Attorney General

February 20, 2020

from the denial of certiorari in *Woodward v. Alabama*, 134 S. Ct. 405, 410-411 (2013). Pet. 17. The statute at issue in *Woodward* 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”). 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 410-411.