No. 19-7429

In the Supreme Court of the United States

LOUIS MITCHELL, JR.,

Petitioner,

v.

THE 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

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. Mitchell, Jr., No. S147335, judgment entered June 24, 2019 (this case below).

In re Mitchell, Jr., on Habeas Corpus, No. S255655 (pending).

San Bernardino County Superior Court:

People v. Mitchell, Jr., No. FSB051580, judgment entered October 4, 2006 (this case below).

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STATEMENT

1. In 2005, petitioner Louis Mitchell, Jr., accompanied his girlfriend to a used car dealership. Pet. App. A 2. Mitchell returned home, while his girlfriend purchased a car that later broke down. *Id.* at 2-3. Mitchell returned to the dealership with a gun and shot four employees, killing two. *Id.* at 4-6. Mitchell then went to an apartment complex where he shot two more people, one fatally. *Id.* at 7.

2. The State charged Mitchell with, among other things, three counts of first-degree murder and alleged as a special circumstance that Mitchell committed multiple murders. Pet. App. A 1; 64 CT 17087-17091; *see* Cal. Penal Code §§ 187(a), 190.2(a)(2), 664/187(a), 12022.53(d).[1] At the guilt phase of the trial, Mitchell cross-examined the prosecution's witnesses but did not present any other evidence in his defense. The jury convicted Mitchell as charged and found the special circumstance allegation true beyond a reasonable doubt, thereby qualifying him for the death penalty. Pet. App. A 1, 10-11; 65 CT 17366-17368; *see* Cal. Penal Code § 190.2.

At the penalty phase, the trial court instructed the jurors that, in deciding whether Mitchell should be punished by death or life in prison without parole, they were to "consider, take into account and be guided by" the aggravating and mitigating circumstances, if applicable; that the "weighing of aggravating

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

and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale"; 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." 17 RT 3010-3011; 65 CT 17408; *see* CALJIC No. 8.88 (7th ed. 2003). The jury returned verdicts of death on all three murder counts. Pet. App. A 1; 65 CT 17366.

3. The California Supreme Court affirmed the convictions and death judgment. Pet. App. A 1. As is relevant here, the court rejected Mitchell'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 37-38.

ARGUMENT

1. Mitchell 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. 12-25. He further suggests that, under the same constitutional principles, any aggravating factor must be found

unanimously. Pet. 25, fn. 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]

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

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[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 S. Ct. 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*, 135 S. Ct. 1428 (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).

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 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 Mitchell's trial, the jury found him guilty of three counts of first-degree murder, and it found the multiple-murder special circumstance to be true. Pet. App. A 1; 65 CT 17185-17200. The jury's findings were unanimous, and made under the beyond-a-reasonable-doubt standard. 65 CT 17256, 172891, 17285-17286, 17288.

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. Mitchell 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. 12-24. That is incorrect. Mitchell primarily relies (Pet. 12-15) 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, Mitchell relies on *Hurst v. Florida*, 136 S. Ct. 616, 619-622 (2016). Pet. 13-17. 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 true 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 Mitchell's argument (Pet. 12-24) 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 Mitchell's argument that the jury's final weighing of aggravating versus mitigating factors should proceed under the beyond-a-reasonable-doubt standard. Pet. 15-22. 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 Mitchell's argument that such an instruction is required under the Constitution.

c. Mitchell 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. 18. *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]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[3] Similar shortcomings undercut Mitchell's reliance on the opinion dissenting from the denial of certiorari in *Woodward v. Alabama*, 134 S. Ct. 405, 410-411 (2013). Pet. 20-21. 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. *Id.* at 410-411.