

No. 19-7429

IN THE SUPREME COURT OF THE UNITED STATES

LOUIS MITCHELL, JR., *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent*.

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

**REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

(DEATH PENALTY CASE)

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This case presents the question of whether the mandatory weighing of aggravating and mitigating circumstances under the California death penalty statute—a factfinding determination that must be made before the death penalty is a punishment option—violates the Fifth, Sixth and Fourteenth Amendments where there is no requirement this determination must be found by a jury beyond a reasonable doubt. Respondent, the State of California, opposes certiorari on the ground that under California law, the jury's weighing of aggravating and mitigating circumstances does not increase the defendant's authorized punishment.¹

The State argues that 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. Brief in Opposition (hereafter “BIO”) at 6. As the State outlines, after a finding of guilt of first degree murder, the default sentence is a prison term of 25 years to life. BIO at 4. Then, if one or more statutorily enumerated special circumstances “has been found under [California Penal Code] [s]ection 190.4 to be true” the case proceeds to a second stage where the penalty of death or life imprisonment without parole may be imposed. BIO at 4. The State argues that because death is the maximum punishment prescribed by the statute in this second stage (the penalty phase), imposing death “once these jury determinations have been made unanimously and beyond a

¹ The State does not contest that the weighing of aggravating and mitigating circumstances is a factfinding.

reasonable doubt thus does not violate the Constitution.” BIO at 6. The State reasons that this determination involves a choice between a greater or lesser authorized penalty and not an increase in the maximum potential penalty. BIO at 7.

Contrary to the State’s argument, without findings at the second stage, there would be no sentence of death. If a defendant cannot be sentenced to death without an additional finding, in this case that aggravating factors outweigh mitigating factors, that finding increases the penalty for the crime of capital murder beyond the prescribed statutory maximum. Thus, the jury’s finding in the penalty phase increases the maximum potential penalty. As this Court stated in *Blakely v. Washington*, 542 U.S. 296 (2004): “the relevant [maximum level of punishment] . . . is not the maximum [level of punishment] . . . a [sentencer] . . . may impose after finding additional facts, but the maximum [they] . . . may impose without any additional findings.” *Id.* at 303 (citing *Ring v. Arizona*, 536 U.S. 584 (2002)); *Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000). In California, the maximum the jury may impose without any additional findings in the second stage is life in prison without the possibility of parole. As such, a finding that aggravating factors outweigh mitigating factors at the penalty phase increases the maximum potential penalty.

Apprendi, *Ring*, and *Hurst v. Florida*, 136 S.Ct. 616 (2016), show that the finding that the aggravating circumstances outweigh the mitigating circumstances does not operate as merely a means of aiding the jury in selection of a punishment from an already authorized range, as the State argues. In California, when the jury finds a special circumstance true, it finds a capital defendant death eligible and thereby increases the maximum

possible level of punishment a capital defendant may receive; it does not, however, necessarily increase the maximum level of punishment he or she actually will receive. This is because, while a jury's finding as to death-eligibility puts the possibility of a death sentence on the table, it does not guarantee that a capital defendant will be sentenced to death. After a finding on the special circumstances, the level of punishment that a defendant actually receives has yet to be increased from life to death. In fact, death is not even a possible punishment option at this stage without the additional finding that the aggravating circumstances outweigh the mitigating circumstances. CAL. PENAL CODE § 190.3.

Because the punishment is higher with this finding than without, the mandatory finding that the aggravating factors outweigh the mitigating factors is thus essential to the level of punishment that a defendant actually receives. According to Justice Scalia's concurrence in *Ring*, Sixth Amendment procedures apply to all findings "essential to [the] imposition of the level of punishment that . . . [a] defendant [actually] receives[.]" 536 U.S. at 610 (Scalia, J., concurring). Since California law does not require that the finding that the aggravators outweigh the mitigators must be made beyond a reasonable doubt, the statute fails to comport with the Sixth Amendment, as interpreted by *Apprendi*, *Ring* and *Hurst*.

The State counters Mitchell's reliance on *Hurst* by asserting that under the Florida system considered in *Hurst*, after a jury verdict of first degree murder, a convicted defendant was not "eligible for death" unless the judge further determined that an enumerated aggravating circumstance existed. BIO at 6. The State further asserts that in California, by comparison, a

defendant is “eligible for a death sentence” only after the jury finds true at least one of the enumerated special circumstances. BIO at 7. In *Hurst*, the Court uses the terminology “eligible for death” in the Florida system in the sense that there are findings which actually authorize the imposition of the death penalty at the sentencing hearing, and not in the sense that an accused is only potentially facing a death sentence, which is what the special circumstance finding establishes under the California statute. Like the judge’s determination in the prior Florida system, under California law it is the jury’s determination that the aggravating factors outweigh the mitigating factors that finally authorizes imposition of the death penalty.²

In Florida, the state supreme court described the sentencing factors, including the weighing process itself, as “elements” that the sentencer must determine, akin to elements of a crime during the guilt phase. *Hurst v. State*, 202 So.3d 40, 53-54 (2016). The court emphasized that the “critical findings necessary for imposition of a sentence of death” were “on par with elements of a greater offense.” *Id.* at 57. Even though the sentencer might have been different between the former Florida scheme and California’s death penalty statute, the necessary factual findings (weighing aggravating and mitigating circumstances) are similar and therefore, California too should require the findings be made beyond a reasonable doubt.

Finally, the State argues that *Kansas v. Carr*, 136 S.Ct. 633 (2016) forecloses Mitchell’s argument. BIO at 7-8. *Carr*, however, only dealt with the

² The California Supreme Court has construed Florida’s sentencing directive to be comparable to California – if the sentencer finds that aggravating circumstances outweigh mitigation, a death sentence is authorized, but not mandated. *People v. Brown*, 40 Cal.3d 512, 542 (1985).

question of “whether [the Eighth Amendment requires capital-sentencing courts] . . . to apply a standard of proof to the mitigating-factor determination”—and not whether the finding that the aggravators outweigh the mitigators must be done beyond a reasonable doubt under the Sixth Amendment. *See Carr*, 136 S.Ct. at 642. Moreover, *Carr’s* analysis of this point relied purely on dicta. *See id.* (“[a]pproaching the question in the abstract, and without reference to our capital-sentencing case law”.)

The mandatory weighing of aggravating and mitigating circumstances under the California death penalty statute is a factfinding that serves to increase the maximum punishment for the crime. Since California’s death penalty statute does not require that this determination be found by a jury beyond a reasonable doubt, it violates the Fifth, Sixth and Fourteenth Amendments.

CONCLUSION

Wherefore, Mitchell respectfully requests that this Court grant the petition for a writ of certiorari and reverse the judgment of the Supreme Court of California upholding his death sentence.

Dated: March 4, 2020

Respectfully Submitted,
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