No. 20-5734

In the Supreme Court of the United States

ALFRED FLORES III,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO 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 first-degree murder and that the murder involved a special circumstance that renders 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, that the aggravating factors outweigh the mitigating factors, and that the aggravating circumstances are so substantial in comparison to the mitigating circumstances that they warrant death as opposed to life without parole.

DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

People v. Flores, No. S116307, judgment entered May 4, 2020 (this case below).

San Diego County Superior Court:

People v. Flores, No. FVA-015023, judgment entered May 19, 2003 (this case below).

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STATEMENT

1. In March 2001, the bodies of 15-year-old Ricardo Torres, 18-year-old Jason Van Kleef, and 17-year-old Alexander Ayala were discovered in separate locations in San Bernardino County. Pet. App. B 1-3. All of them had been shot to death. *Id*. at 1-3. A police investigation uncovered evidence that Petitioner Alfred Flores III, a member of the El Monte Trece gang, had killed Torres for failing to attend his gang initiation ceremony. *Id*. at 7. Flores then killed Van Kleef and Ayala, who were friends of Torres, to keep them from implicating him. *Id*.

The State charged Flores with three counts of first-degree murder, and alleged as a special circumstance that Flores committed multiple murders. Pet. App. B 1; 3 CT 783-786; *see* Cal. Penal Code §§ 187(a), 190.2(a)(3).[1] At the trial's guilt phase, the jury convicted Flores of the first-degree murders of Torres, Van Kleef, and Ayala, and also found true beyond a reasonable doubt the special circumstance allegation that Flores had committed multiple murders. Pet. App. B 1, 7; 5 CT 1185-1191.

At the trial's penalty phase, the jurors were instructed that, in deciding whether Flores 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 that might apply; that the "weighing of

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[1] "CT" refers to the trial court's Clerk's Transcript.

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 circumstances that it warrants death instead of life without parole." 6 CT 1485-1486, 1553-1554; 23 RT 5092-5094, 5166-5167.[2] The jury returned verdicts of death. Pet. App. B 1.

2. The California Supreme Court affirmed the convictions and death sentence. Pet. App. B 1. As is relevant here, the court rejected Flores's claim that California's capital sentencing scheme is unconstitutional because it does not require findings beyond a reasonable doubt that an aggravating circumstance has been proved, that the aggravating factors outweigh the mitigating factors, or that death is the appropriate sentence. *Id*. at 86.

ARGUMENT

Flores 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, that the aggravating factors outweigh the

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[2] "RT" refers to the Reporter's Transcript.

mitigating factors, and that the aggravating circumstances are so substantial in comparison to the mitigating circumstances that they warrant death instead of life without the possibility of parole. Pet. 12-15. Flores further suggests that, under the same constitutional principles, any aggravating factor must be found unanimously. *Id.* at 6-7. This Court has repeatedly denied review in cases presenting the same or similar questions, and there is no reason for a different result here.[3]

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[3] *See*, *e.g.*, *Mitchell v. California*, No. 19-7429, *cert. denied*, 140 S. Ct. 2535 (2020); *Capers v. California*, No. 19-7379, *cert. denied*, 140 S. Ct. 2532 (2020); *Erskine v. California*, No. 19-6235, *cert. denied*, 140 S. Ct. 602 (2019); *Dalton v. California*, 19-5977, *cert. denied*, 140 S. Ct. 505 (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. 120 (2019); *Gomez v. California*, No. 18-9698, *cert. denied*, 140 S. Ct. 294 (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*

1. 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 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 Flores's trial, the jury found him guilty of first-degree murder, and found true the multiple-murder special circumstance. Pet. App. B 1; 5 CT 1185-1191. The jury's findings were unanimous and made under the beyond-a-reasonable-doubt standard. 4 CT 1121, 1142-1144, 1161.

The second stage of California's death penalty trial process, the penalty phase, proceeds under California Penal Code section 190.3. During the penalty

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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).

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.* The jury need not agree unanimously on the existence of a particular aggravating circumstance, nor must it find the existence of such a circumstance, with the exception of prior unadjudicated violent criminal activity and prior felony convictions, 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. Flores 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. 7. That is incorrect.

Flores primarily relies (Pet. 10) 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, Flores relies on *Hurst v. Florida*, 136 S. Ct. 616, 619-622 (2016). Pet. 10-12. 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 Flores's argument (Pet. 7, 15) 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 Flores's argument that the jury's final weighing of aggravating versus mitigating factors should proceed under the beyond-a-reasonable-doubt standard. Pet. 12-15. 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 Flores's argument that such an instruction is required under the Constitution.

3. Flores 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. 14. *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.[4]

[4] Similar shortcomings undercut Flores's reliance on the opinion dissenting from the denial of certiorari in *Woodward v. Alabama*, 134 S. Ct. 405, 410-411 (2013). Pet. 14. 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.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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