No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OMAR CEBRERO,
Petitioner,

v.

ROSEMARY NDOH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the state court's determination that there was sufficient evidence to support the jury's special circumstance finding that Petitioner was a "major participant" in the underlying felony, which authorized Petitioner's life sentence for his felony-murder conviction, conflicts with this Court's sufficiency-of-the-evidence standard in *Jackson v. Virginia*, 443 U.S. 307 (1979)?

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Petitioner, Omar Cebrero, respectfully prays for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

On April 29, 2021, the Ninth Circuit affirmed the district court's denial of Petitioner's habeas petition, filed pursuant to 28 U.S.C. § 2254, challenging his state conviction for kidnapping and felony murder. *See* App. A. It held, relevant here, that the California Court of Appeals did not unreasonably determine that there was sufficient evidence to support the felony-murder special circumstance finding that Petitioner was a major participant in the kidnapping. *Id.* at 4-5.

On June 10, 2021, the Ninth Circuit denied Petitioner's request for rehearing. *See* App. B.

JURISDICTION

Petitioner filed a habeas petition under 28 U.S.C. § 2254, in the United States District Court for the Eastern District of California, challenging his California conviction. The district court had original subject matter jurisdiction under 28 U.S.C. § 2241(d).

The United States Court of Appeals for the Ninth Circuit granted a certificate of appealability, and then reviewed the judgment under 28 U.S.C. §§ 1291 and 2253(a). The Ninth Circuit denied a petition for rehearing on June 10, 2021.

This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

28 U.S.C. § 2254

21 U.S.C. § 2254 provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

I. Petitioner is convicted at trial of California aggravated kidnapping and felony murder with a special circumstance.

Petitioner Omar Cebrero was convicted of first degree felony murder and kidnaping to commit extortion. As part of its verdict, the jury found true the special circumstance that the murder was committed in the course of a kidnaping, which authorized a life sentence. *See* Cal. Penal Code § 190.2(a)(17)(B) (2001). Petitioner was sentenced to life without the possibility of parole for the murder, and a stayed life sentence for the kidnaping charge.

Petitioner's conviction was based on his limited participation in the murder of Rosa Avina. Ms. Avina had asked him for a ride early one morning because she needed to sell a pound of marijuana. The marijuana belonged to Petitioner's friend, Ronolfo Ortega, and after Ms. Avina sold the drugs, she was going to give a small part of the proceeds to Petitioner to repay a debt she owed him. Petitioner gave her a ride, but couldn't wait while she completed the sale because he had a job interview, so he left her at the house around 10 a.m.

Later that afternoon, Petitioner was hanging out at Ortega's house when Ortega came home and announced that Ms. Avina had "ripped him off" and didn't want to pay him back for the marijuana that she'd sold. Ortega's brother then called another man, asking if he knew of anyone who could do "a favor" for him. Ortega's brother then left the house to meet up with the other man—Petitioner stayed behind.

It turned out that while Petitioner stayed behind, Ortega and a group of other men kidnaped Ms. Avina at gunpoint, bound her arms and legs, and covered her mouth with tape. They planned to rough her up and demand their money back. Meanwhile, Ortega's brother asked Petitioner if he could borrow his car, saying that he needed to run an errand. Petitioner—not knowing that the men had other plans—agreed. The men used Petitioner's car in their kidnapping, and placed Ms. Avina in the car's trunk.

While Petitioner was still home—not with the group of men—the men drove Ms. Avina around town in the trunk Petitioner's car, while they smoked methamphetamine and talked about what they were planning to do.

Later that night, Ortega's brother returned home, where Petitioner was. Petitioner asked after his car, and learned that it had been used to kidnap Ms. Avina. Ortega and his brother pressed Petitioner to take a walk with them, where they met up with the rest of the group of men, and showed Petitioner his car with Ms. Avina in the trunk. Petitioner protested, saying it was "messed up," and asking what was going on. But the leader of the group, a man named Luis Valencia, told Petitioner to "Shut up, mother fucker!" He threatened Petitioner that if he said anything, the same thing that Valencia was planning to do to Ms. Avina would also happen to Petitioner.

The group then hung around for a bit, discussing what to do with Ms. Avina, who would not tell them what she had done with the marijuana, and had not repaid Ortega. Valencia then made up his mind about what to do, silently grabbing a bottle and filling it with gasoline.

Petitioner hung back from the group, reluctant to join them as they talked by the car. He was hesitating and acting nervous. Only after Valencia yelled something at Petitioner and grabbed him by the arm did Petitioner join the group and get into the backseat of the car.

Valencia then drove off, with Ortega's brother in the front seat, Petitioner in the back seat, and Ms. Avina in the trunk. Valencia drove to a field, and after all of the men helped take Ms. Avina out of the trunk, Valencia poured gasoline on her and lit her on fire. Petitioner stayed by the car. He did not assist Ms. Avina, and instead left with the others.

Evidence of all of this was presented at trial, leading to Petitioner's conviction and the jury's finding of the felony-murder special circumstance that he was a major participant who acted with reckless indifference in the kidnapping. Cal. Penal Code §190.2(d).

II. Petitioner challenges his conviction on direct appeal.

Petitioner appealed his conviction, raising several claims, including that there was insufficient evidence to support the special circumstance finding. Regarding the special circumstance finding, the court held that Petitioner was a major participant: he "set the whole ordeal in motion" by driving Ms. Avina to sell the marijuana, the group had used his car in the kidnapping, he was present for the killing, and he didn't object or help Ms. Avina. The California Supreme Court then denied his petition for review.

III. Petitioner challenges his conviction in state and federal habeas proceedings.

After his conviction was final on direct appeal, Petitioner filed a habeas petition in the state superior court. The court denied the petition, finding that the issues were "essentially the same issues that were already raised and rejected on direct appeal." Thereafter, the California Court of Appeal and the California Supreme Court both silently denied his petitions.

In federal district court, Petitioner filed a petition for a writ of habeas corpus, under 28 U.S.C. § 2254, arguing, in part, that there was insufficient evidence to support the felony-murder special circumstance. In deciding this claim, the district court held that Petitioner was a major participant because he initially transported Ms. Avina, she owed him money, his car was used in the kidnaping, he was one of three people present when Ms. Avina was burned, he helped remove her from the car, and he left with the other participants.

IV. The Ninth Circuit affirms the district court's denial of habeas relief.

Petitioner appealed to the Ninth Circuit, arguing, inter alia, that there was insufficient evidence, under *Jackson v. Virginia*, 443 U.S. 307 (1979), to support the jury's special circumstance finding that he was a major participant in the kidnapping. He argued that California's "major participant" standard, *see* Cal. Penal Code § 190.2(d) (2001), was "designed to codify the holding of *Tison v. Arizona*, (481 U.S. 137 (1987))," *People v. Banks*, 61 Cal. 4th 788, 794, 799 (2015). And the state court's

failure to compare Petitioner's conduct to the Tison brothers' conduct was an unreasonable application of clearly established federal law.

The Ninth Circuit disagreed, upholding the district court's denial of the habeas petition. *See* App. A at 5-6. It pointed to Petitioner's financial stake in the outcome, his suspicion that Valencia could kill Ms. Avina, his presence during the planning stages of the kidnapping, the fact that he allowed the others to use his car, and that he watched the others burn Ms. Avina and did not assist her. *Id.* at 6. It found that the California state court's decision was not a clearly unreasonable application of *Jackson*'s sufficiency-of-the-evidence standard. *Id.*

Petitioner filed a Petition for Rehearing, which the Ninth Circuit denied without comment. *See* App. B.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's decision, holding there was sufficient evidence supporting the jury's special circumstance finding that authorized Petitioner's life sentence, conflicts with this Court's decision in *Jackson v. Virginia*.

Before the Ninth Circuit, and in his state and federal habeas petitions, Petitioner challenged the sufficiency of the evidence supporting the special circumstance allegation. Because he was convicted of California felony murder as an aider or abettor, the prosecution had to prove the special circumstance that he "acted with reckless indifference to human life while acting as a major participant in the underlying felony." Cal. Penal Code § 190.2(d) (2001). The California Supreme Court

has explained that section 190.2 was "designed to codify the holding of *Tison v. Arizona*." *People v. Banks*, 61 Cal. 4th 788 (2015).

In *Tison v. Arizona*, this Court established the constitutionally required level of culpability for a non-killer charged with death-eligible felony murder. 481 U.S. 137 (1987). The Court held that it was constitutionally permissible to impose the death penalty for felony murder where there was "major participation in the felony committed, combined with reckless indifference to human life." *Id.* at 158. Later, this Court characterized *Tison*'s holding as requiring "active" and "substantial" involvement to qualify as a major participant. *See Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008).

In *Tison*, three brothers helped their father and his cellmate escape from prison. Both were convicted murderers, and their father was serving a life sentence for murdering a prison guard during a previous escape attempt. 481 U.S. at 139. The brothers "assembled a large arsenal of weapons" and entered the prison, where they armed their father and his cellmate. *Id.* The group escaped, and later flagged down a passing family to steal their car. *Id.* at 140. One of the brothers flagged down the car and the rest of the group ambushed the family, robbing them and stealing their car. *Id.* The Tisons' father then unexpectedly murdered the family while his sons were some distance away, getting water for the victims. *Id.* at 141. Several days later, the Tisons were captured in a shootout with police. *Id.*

The brothers argued that imposing the death penalty violated the Eighth Amendment because they had not intended to kill. *Id.* at 143-44. The Court disagreed,

finding that being major participants—as the Tison brothers were—and acting with reckless indifference to human life was constitutionally sufficient for the death penalty. *Id.* at 158.

The California Supreme Court, in *People v. Banks*, analyzed *Tison*, and noted that to satisfy section 190.2(d)'s standard, a state court needed to examine "the defendant's *personal* role in the crimes leading to the victim's death and weigh the defendant's individual responsibility for the loss of life"—"not just his or her vicarious responsibility for the underlying crime." 61 Cal. 4th at 801. To comply with *Tison*'s constitutional standards, "a defendant's personal involvement must be substantial," "greater than the actions of an ordinary aider and abettor," and the defendant must be "actively involved" in the stages of the crime. *Id.* at 802. Simply participating in "integral" conduct was insufficient for major participation. *Id.* at 803. Instead, the Court reasoned that several considerations were relevant:

> the defendant's role in planning the crime, whether the defendant supplied the weapons, whether the defendant had any awareness of the particular danger of the crime, whether the defendant was present at the scene, whether he was in a position to prevent it, whether his action or inaction played a role in the death, and what the defendant did after the use of lethal force.

Id.

Keeping *Tison*, and the codification of *Tison*'s standards in section 190.2(d) in mind here, the state court unreasonably applied *Tison*'s standards in Petitioner's case, in a way that resulted in a decision that is contrary to this Court's decision in *Jackson v. Virginia* regarding the standard for a sufficiency-

of-the-evidence claim. Accordingly, the Court should grant the Petition. *See* Sup. Ct. R. 10(c).

Specifically, Petitioner argued in state court that the evidence was insufficient under *Tison*, but the state court disagreed. It never compared Petitioner's actions to the Tisons' actions. Instead, it determined that Petitioner's "participation could not be considered anything other than major" solely by comparing his actions to a "hypothetical" getaway driver and concluding that his "actions far exceeded those of the hypothetical defendant."

But this analysis is an unreasonable application of *Tison*—and therefore resulted in decision that was contrary to *Jackson*'s sufficiency standard. *Tison* was not about a hypothetical getaway driver. Instead, *Tison* addressed the "midrange felony-murder cases" where the conduct falls between two extremes—the uninvolved getaway driver who is not present at the murder scene (and whose culpability is constitutionally insufficient for a death sentence), and the "felony murderer who actually killed, attempted to kill, or intended to kill" (and for whom the death penalty is constitutionally permissible). *See Tison*, 481 U.S. at 150-55. The Court noted that the Tisons' conduct—which fell in the "midrange" between these extremes—constituted "major participation" sufficient to impose the death penalty for felony murder because the Tisons were "actively involved in every element" of the underlying felony. *Id.* at 157-58.

The Tisons "brought an arsenal of lethal weapons" into prison and "handed them over to two convicted murderers," one of whom they "knew had killed a prison

guard in the course of a previous escape attempt." *Id.* at 151. After the escape they flagged down a family and then entrusted the family's fate to the "known killers they had previously armed;" they robbed the family and then guarded them at gunpoint; they watched the murderers kill the family and helped the killers escape, and they engaged in a "gun battle with the police in the final showdown." *Id.* at 151. This participation was "anything but minor," *id.* at 152, and served as a guide for the type of "midrange" involvement that was sufficiently culpable for the death penalty.

The state court unreasonably applied this standard to Petitioner's conduct. His conduct was far from the "active," "substantial" involvement *Tison* required for "midrange" felony-murder participants. *See Kennedy*, 554 U.S. at 421 (*Tison* requires "active," "substantial" involvement). The state court noted that Petitioner was "present" for some of the planning, had a monetary stake in the marijuana, "allowed" the others to use his car, helped removed Ms. Avina from the car, "watched" the murder, and left with the murderers. But aside from removing Ms. Avina from the car, none of this conduct was "active" or "substantial"—it consists of being present while others undertake criminal or violent acts, or allowing others to commit a crime.

Unlike the Tisons, Petitioner at most stood by while others planned and carried out Ms. Avina's kidnaping and murder. He was not present when the group planned Ms. Avina's kidnaping. When Petitioner was brought into the scheme, he was unaware of what exactly was going on. Unlike in *Tison*, murder was not even contemplated when the others initially planned the crime, as the initial plan was to get the marijuana back and maybe rough up Ms. Avina, not kill her. Also unlike in

Tison, Petitioner was not present when the others kidnaped Ms. Avina, and did not obtain any weapons nor the gasoline. *See Tison*, 481 U.S. at 139 (Tisons supplied murderers with "a large ice chest filled with guns"). And he did not undertake a single act on his own, but only followed Valencia's orders. In fact, he was reluctant to be even minimally involved and appeared "nervous" to be there.

This conduct does not even "approach[] that of the Tison brothers, who helped [two convicted murderers] escape from prison. Murder was not just a hypothetical result of the Tison brothers' plan; they knew their father had murdered a prison guard during a previous prison escape." *See Dickens v. Ryan*, 740 F.3d 1302, 1341 (9th Cir. 2014) (Christen, J., dissenting in part). The Tisons not only helped two murderers escape from prison but they also actively participated in "a crime spree that progressed from a jailbreak to robbery, kidnaping, and the murder of four members of an innocent family." *Id.* They flagged down the family and robbed them, and one brother even admitted that he would have been personally willing to kill. *Tison*, 481 U.S. at 144. Petitioner's passive conduct in standing by or watching did not come close to the Tisons' substantial and significant involvement in every step of the crime.

In contrast to the Tison brothers, Petitioner's passive conduct is similar to that of a typical getaway driver who participates in the planning and then drives the car carrying the murderers—the type of participant the *Tison* Court said is *not* a major participant. *See* 481 U.S. at 149-50 (citing *Enmund v. Florida*, 458 U.S. 782 (1982)). Indeed, Petitioner's conduct was arguably more minor than a getaway driver's since

he didn't act as a driver but instead allowed others to use his car—and without knowing the plan to kidnap Ms. Avina.

Because the state court concluded that Petitioner's passive conduct was "major" under *Tison* while ignoring *Tison*'s facts, and refused to consider Petitioner's conduct in relation to the "major participant" Tison brothers, the state court unreasonably applied *Tison* to the facts of the case.

Importantly, and relevant to this Petition, the state court's determination resulted in a decision that conflicts with this Court's decision in *Jackson v. Virginia*, 443 U.S. 307 (1979). *See* Sup. Ct. R. 10(c). The standard for a sufficiency claim on habeas review is whether, after viewing the evidence in the light most favorable to the prosecution, "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." 443 U.S. 307, 319-24 (1979).

Here, no rational trier of fact could have found beyond a reasonable doubt that Petitioner was a major participant and therefore guilty of the special circumstance. His conduct did not come close to *Tison*'s active, substantial, and sustained standard of participation in a crime that escalated from prison escape to murder. *See Kennedy*, 554 U.S. at 421. He allowed his car to be used, watched as others made plans and attacked Ms. Avina, and did not intervene to stop the crime. The only conduct that came close to "active" participation was when, after multiple threats from Valencia, he assisted others in removing Ms. Avina from the car. But this was one non-passive act during a multi-part, detailed crime that occurred over a dozen hours and involved several participants who had much more substantial roles than Petitioner. He had

no role in planning the crime, nor did he actively undertake any part of the crime, unlike the Tison brothers. On this evidence, no rational trier of fact could have found beyond a reasonable doubt that Petitioner was a major participant.

The state court's contrary conclusion, which the Ninth Circuit did not disturb in its decision on appeal, contradicts this Court's decision in *Jackson* regarding the standard for the constitutional level of evidence required for a conviction. *See* Sup. Ct. R. 10(c). The Court should grant the Petition.

V. Petitioner's case presents an ideal vehicle to address this issue because the claim was preserved and squarely addressed below.

The Court should grant the Petition for the reasons argued, because the Ninth Circuit's decision conflicts with a relevant decision of this Court. *See id.*

Additionally, prudential concerns weigh in favor of granting the Petition. First, the issue was preserved and ruled on by the district court in adjudicating Petitioner's habeas petition, and squarely addressed by the Ninth Circuit. *See* App. A at 5-6. Moreover, finding that the state court's determination conflicts with *Jackson*'s sufficiency standard would make a difference in the outcome. It would mean the Ninth Circuit would remand to the district court with instructions to grant the writ.

Second, though this Petition is essentially a request for error correction, Petitioner is serving a life sentence without the opportunity for parole—for a crime he committed when he was just a teenager. The evidence was constitutionally insufficient to support the jury's finding that authorized this life sentence, and he is thus serving an unjust life sentence. Correcting this error will therefore not only

affect the outcome in this case, but also ensure that justice is served by correcting an error that improperly requires Petitioner to spend the entirety of his young life in prison.

CONCLUSION

This Court should grant the writ.

Date: September 8, 2021

Respectfully submitted,

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