
In the Supreme Court of the United States

FRANK C. GONZALEZ,

Petitioner,

v.

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 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 return a verdict of death, find beyond a reasonable doubt that specific aggravating factors exist.

DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

People v. Gonzalez, No. S163643, judgment entered December 2, 2021
(this case below).

In re Gonzalez on Habeas Corpus, No. S271587 (state collateral review)
(pending).

Los Angeles County Superior Court:

People v. Gonzalez, No. NA071779, judgment entered May 12, 2008 (this
case below).

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STATEMENT

1. On March 28, 2006, petitioner Frank C. Gonzalez shot and killed Los Angeles County Sheriff's Department Deputy Maria Rosa during an attempted robbery outside of her home. Pet. App. 1a-5a. Gonzalez admitted to his girlfriend and sister that he "shot a female police officer" in a "robbery that went wrong." *Id.* at 5a. A DNA sample obtained from the handlebars of a bicycle found next to the victim's body matched Gonzalez's DNA profile, with a conservative estimate identifying a "one in one billion chance that a random person would share the same DNA typing with the sample found on the handlebar." *Id.* at 2a.

The prosecution charged Gonzalez with first degree murder and attempted second degree robbery. Pet. App. 1a; *see* Cal. Penal Code §§ 187(a), 211, 664. The prosecution further alleged the special circumstance that Gonzalez committed the murder while engaged in the commission of an attempted robbery. Pet. App. 1a; *see* Cal. Penal Code § 190.2(a)(17). At the guilt phase of the trial, the jury convicted Gonzalez of first degree murder and found the special circumstance allegation true beyond a reasonable doubt, making Gonzalez eligible for the death penalty. Pet. App. 1a; *see* Cal. Penal Code § 190.2. At the penalty phase of the trial, the trial court instructed the jurors that, in deciding whether Gonzalez should be punished by death or life in prison without parole, they were to "consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances";

that “weighing . . . aggravating and mitigating circumstances does not mean a mere mechanical counting of factors”; that the jurors were “free to assign whatever moral or sympathetic value [they] deem[ed] appropriate to each and all of the various factors”; and that to return a judgment of death, each juror “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.” 15 RT 3208-3209; 4 CT 991-992.¹ The jury unanimously returned a verdict of death and the trial court entered a judgment of death. Pet. App. 1a; 4 CT 945-947, 953-954, 41 CT 10728-10730, 10757-10760.

2. On direct appeal, the California Supreme Court affirmed Gonzalez’s conviction and death sentence. Pet. App. 1a. As relevant here, the court observed that it had repeatedly considered and rejected challenges to California’s capital sentencing scheme identical to those raised by Gonzalez. *Id.* at 32a. The court “decline[d] to reconsider” its prior holdings and rejected Gonzalez’s claim that his death sentence was unconstitutional because the jury was not required to find that an aggravating circumstance had been proved beyond a reasonable doubt. *Id.*

ARGUMENT

Gonzalez argues that California’s death penalty system violated his rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments because

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

state law does not require the penalty-phase jury to find the existence of an aggravating factor beyond a reasonable doubt. Pet. 9-21. 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

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

² See, e.g., *Scully v. California*, No. 21-6669, *cert. denied*, 142 S.Ct. 1153 (2022); *Johnsen v. California*, No. 21-5012, *cert. denied*, 142 S. Ct. 353 (2021); *Vargas v. California*, No. 20-6633, *cert. denied*, 141 S. Ct. 1411 (2021); *Flores v. California*, No. 19-8081, *cert. denied*, 140 S. Ct. 2783 (2020); *Caro v. California*, No. 19-7649, *cert. denied*, 140 S. Ct. 2682 (2020); *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); *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*,

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.” *Id.* § 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. *Id.* § 190.4(a), (b). During the guilt phase of Gonzalez’s trial, the jury found him guilty of first degree murder and it found the robbery-murder special circumstance to be true. Pet. App. 1a; 4 CT 945-947, 953-954. The jury’s findings were unanimous and made under the beyond-a-reasonable-doubt standard. 4 CT 895, 954.

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

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).

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. Gonzalez contends that the Constitution does not permit him to be sentenced to death unless the jury during the penalty phase finds the existence of an aggravating factor beyond a reasonable doubt. Pet. 9-21. That is incorrect. Gonzalez primarily relies (Pet. 11-16) 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, Gonzalez relies on *Hurst v. Florida*, 577 U.S. 92, 94-95, 98, 100 (2016). Pet. 12-13. Under the Florida system considered in *Hurst*, after a jury verdict of first-degree murder, a convicted defendant was not “eligible for death,” 577 U.S. at 99-100, 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,” 577 U.S. at 96 (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.” *Hurst*, 577 U.S. at 99.

In California, however, a defendant is eligible for a death sentence once 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, 577 U.S. 108 (2016), effectively forecloses any argument 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 119. 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”).

And to the extent that Gonzalez argues that the jury’s final weighing of aggravating versus mitigating factors should proceed under the beyond-a-reasonable-doubt standard, *Carr* likewise forecloses that argument that. 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.” 577 U.S. at 119. That reasoning leaves no room for Gonzalez’s argument that such an instruction is required under the Constitution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: April 6, 2022

No. 21-7296

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THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the **Brief in Opposition** contains **2,240** words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 06, 2022
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CERTIFICATE OF SERVICE BY MAIL

I, Eric J. Kohm, Deputy Attorney General, a member of the Bar of this Court hereby certify that on **April 6, 2022**, a copy of the BRIEF IN OPPOSITION in the above-entitled case were mailed, first class postage prepaid to:

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