
In the Supreme Court of the United States

BRIAN DAVID JOHNSEN,

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

DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

People v. Johnsen, S040704, judgment entered February 1, 2021 (this case below)

In re Johnson, S251043, transferred to Stanislaus County Superior Court January 2, 2020 (state collateral review)

California Court of Appeal, Fifth District

In re Johnsen, F082787, case stayed June 21, 2021 (state collateral review)

Stanislaus County Superior Court:

People v. Johnsen, No. R239682, judgment entered June 14, 1994 (this case below)

In re Johnson, No. 242689, joint motion to stay execution date pending

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STATEMENT

1. Petitioner Brian David Johnsen was convicted and sentenced to death for the 1992 murder of Juanita Bragg in Modesto, California. The trial evidence showed that in 1991 and 1992, Johnsen repeatedly burglarized his neighbor Sylvia Rudy's home, stealing various items. Pet. App. B 2-5. On the weekend of February 28 to March 1, 1992, Rudy was away for the weekend. *Id.* at 5. Her parents Juanita and Leo Bragg, who lived out of the State, were on their way to visit her and arrived while Rudy was still away. *Id.* at 5. The Braggs let themselves in and went to sleep in the guest bedroom. *Id.* at 5-6. Johnsen entered the home and began stabbing the couple with a knife and striking them with a hammer. *Id.* at 5-6, 12-14. Mrs. Bragg died. *Id.* at 6. Mr. Bragg would have died if not for extensive medical intervention; he was left severely disabled. *Id.* at 6-7. Johnsen later called certain associates, asking them to stage a further break-in at Rudy's home, kill certain witnesses, and inculcate a confederate—all to divert attention from himself. *Id.* at 9-11.

At the trial's guilt phase, the jury found Johnsen guilty of first-degree murder and found true beyond a reasonable doubt the special circumstance allegations that Johnsen committed the murder while engaged in the commission of a robbery and a burglary. Pet. App. B 2; *see* Cal. Penal Code §§ 187(a), 190.2(a)(17)(A), (G). The jury also found Johnsen guilty of attempted murder, two counts of robbery, three counts of burglary, and five counts of solicitation

to commit murder. Pet. App. B 2; *see* Cal. Penal Code §§ 664, 187(a), 212.5, 459, 653f.¹

At the penalty phase, the jurors were instructed that, in deciding whether Johnsen 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 aggravating and mitigating circumstances does not mean a mere mechanical counting of factors”; that they 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 of you individually 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.” 26 CT 5851.² The jury returned a verdict of death. Pet. App. B 2.

2. The California Supreme Court affirmed Johnsen’s convictions and death sentence. Pet. App. B 2. As relevant here, the court rejected Johnsen’s claim that California’s capital sentencing scheme is unconstitutional because it does not require findings beyond a reasonable doubt that an aggravating

¹ The jury also found true the allegations that Johnsen committed the murder by personally using a deadly weapon and committed the attempted murder by personally using a deadly weapon in a manner that caused great bodily injury. Pet. App. B 2; *see* Cal. Penal Code §§ 12022(b), 12022.7.

² “CT” refers to the trial court’s Clerk’s Transcript.

circumstance has been proved, that the aggravating factors outweigh the mitigating factors, or that death is the appropriate sentence. *Id.* at 87.

ARGUMENT

Johnsen 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 and that the aggravating factors outweigh those in mitigation. Pet. 10-22. 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

³ See, e.g., *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); *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.

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 and whether any alleged special circumstances are true. 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. *Id.* § 190.4(a), (b). During the guilt phase of Johnsen’s trial, the jury found him

623 (2017); *Johnson v. California*, No. 15-7509, *cert. denied*, 577 U.S. 1158 (2016); *Cunningham v. California*, No. 15-7177, *cert. denied*, 577 U.S. 1123 (2016); *Lucas v. California*, No. 14-9137, *cert. denied*, 575 U.S. 1041 (2015); *Boyce v. California*, No. 14-7581, *cert. denied*, 574 U.S. 1169 (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).

guilty of first-degree murder and found true the robbery-murder and burglary-murder special circumstances. Pet. App. B 2. The jury's findings were unanimous and made under the beyond-a-reasonable-doubt standard. 8 CT 2132, 2140, 2156, 2161, 2165, 2169-2170, 2174, 2180, 2192.

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.* 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. Johnsen contends that the Constitution does not permit him to be sentenced to death unless the jury during the penalty phase found beyond a reasonable doubt the existence of aggravating factors. Pet. 10. That is incorrect.

Johnsen primarily relies (Pet. 11-12) 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); Pet. 14-15 (discussing *McKinney v. Arizona*, 140 S. Ct. 702 (2020)). 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, Johnsen relies on *Hurst v. Florida*, 577 U.S. 92, 94-95, 98, 100, 102 (2016). Pet. 13-14. 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 fact finding.” 577 U.S. at 99.

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, 577 U.S. 108 (2016), effectively forecloses Johnsen’s 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”).

Carr likewise forecloses Johnsen’s argument that the jury’s final weighing of aggravating versus mitigating factors should proceed under the beyond-a-reasonable-doubt standard. Pet. 14-18. 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 Johnsen’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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A handwritten signature in blue ink that reads "A. Kay Lauterbach". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

A. KAY LAUTERBACH

Deputy Attorney General

August 24, 2021

In the Supreme Court of the United States

BRIAN DAVID JOHNSEN, *On Habeas Corpus*,

v.

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CERTIFICATE OF SERVICE BY MAIL

I, A. Kay Lauterbach, Deputy Attorney General, a member of the Bar of this Court hereby certify that on **September 2, 2021**, a copy of the BRIEF IN OPPOSITION in the above-entitled case were mailed, first class postage prepaid to:

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I further certify that all parties required to be served have been served.

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