
In the Supreme Court of the United States

ROBERT WALTER SCULLY,

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 a California jury that has already found unanimously and beyond a reasonable doubt that the defendant committed first-degree murder under special circumstances that render him eligible for the death penalty must also, in order to render a constitutional verdict of death, find beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances.

DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

People v. Scully, No. S062259, judgment entered May 24, 2021, petition for rehearing denied July 21, 2021 (this case below).

Sonoma County Superior Court:

People v. Scully, No. SCR-22969, judgment entered June 13, 1997 (this case below).

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CONSTITUTIONAL PROVISIONS

United States Constitution

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STATEMENT

1. The State charged petitioner Robert Walter Scully with the first-degree murder of Sonoma County Deputy Sheriff Frank Trejo. Pet. App. A 1. It further alleged that the murder involved “special circumstances”—that Scully had committed the murder for the purpose of avoiding arrest and while engaged in the commission of a robbery, and that he had intentionally killed a peace officer in the performance of the officer’s duties—making him eligible for the death penalty. *Id.*; see Cal. Penal Code §§ 190.2 (a)(5), (a)(7), (a)(17).

The evidence at trial showed that, when Deputy Trejo approached a car in which Scully was riding with Brenda Moore, Scully emerged with a sawed-off shotgun pointed at the deputy. Pet. App. A 2-3. After Moore took Deputy Trejo’s gun and radio, Scully ordered the deputy to kneel down with his hands up. *Id.* at 3. Scully then shot and killed Deputy Trejo with a blast to the face. *Id.* During the course of his escape, Scully—who had been paroled from prison just days earlier—took a family of six hostage at gunpoint in their home. *Id.* at 4-5. The jury found Scully guilty as charged of the murder and also found the special-circumstance allegations true beyond a reasonable doubt. *Id.* at 1.¹

¹ The jury also found Scully guilty of robbery, possession of a short-barreled shotgun, possession of a firearm as a convicted felon, burglary, assault with a firearm, and six counts of false imprisonment. *Id.*; see former Cal. Penal Code §§ 12020 (a), 12021 (a)(1), Cal. Penal Code §§ 211, 459, 245 (a)(2), 210.5, 236.

At the subsequent penalty phase of the trial, the jurors were instructed that, in deciding whether Scully would be punished by death or by 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 [them] 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 Clerk’s Transcript [CT] 5337. The jury returned a verdict of death. Pet. App. A 1.

2. The California Supreme Court unanimously affirmed the convictions and death sentence. Pet. App. A 2. Noting that it had repeatedly considered and rejected challenges such as those raised by Scully, the court rejected his claim that California’s capital sentencing scheme is unconstitutional because it does not require, as a prerequisite to a death verdict, a finding beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors. Pet. App. A 78.

ARGUMENT

Scully 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, as a prerequisite to a death verdict, that the penalty-phase jury find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. Pet. 10-18. This Court has repeatedly denied review in California cases presenting the same and similar questions, and there is no reason for a different result here.²

² See, e.g., *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); *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, 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*,

1. A California death sentence is based 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.

First-degree murder 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).

At the guilt phase of Scully’s trial, the jury found him guilty of first-degree murder and also found true the special-circumstance allegations that he had committed the murder for the purpose of avoiding arrest and while engaged in the commission of a robbery, and that he intentionally had killed a peace officer

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).

engaged in the performance of official duties. Pet. App. A 1. The jury’s findings were unanimous and made under the beyond-a-reasonable-doubt standard. 24 CT 4986-4987.

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 that 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. Scully contends that the Constitution does not permit him to be sentenced to death under the California system unless the jury during the penalty phase finds beyond a reasonable doubt that aggravating factors outweighed mitigating factors. Pet. 13-18. That is incorrect.

Scully primarily relies (Pet. 13-14) 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 death penalty becomes the maximum potential punishment prescribed by statute. *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, Scully relies on *Hurst v. Florida*, 577 U.S. 92, 94-95, 98, 100, 102 (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 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, on which the jury must agree 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 Scully’s argument that the jury’s final weighing of aggravating versus mitigating factors must proceed under the beyond a-reasonable-doubt standard. Pet. 13-18. 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 Scully’s argument that such an instruction is required under the Constitution.³

³ Scully asserts that California is an “outlier” in that it does not require that aggravating factors be proved beyond a reasonable doubt. Pet. 19-20. But the question presented raises a constitutional claim about how a California jury weighs aggravation versus mitigation, not a challenge to how aggravating factors are proved. *See* Pet. ii, 10-18. In any event, this Court has repeatedly denied many previous petitions that have asserted that California’s system is unconstitutional because it does not impose a beyond-a-reasonable-doubt

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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standard for penalty-phase aggravating factors. *See supra* n.2. As explained above, a California jury's separate finding of a special circumstance, unanimously and beyond a reasonable doubt, satisfies *Apprendi*.