No. 21-6669

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT WALTER SCULLY, *Petitioner*

v.

STATE OF CALIFORNIA, *Respondent*.

ON A PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

(DEATH PENALTY CASE)

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OCTOBER TERM, 2021

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

(DEATH PENALTY CASE)

This case presents the question whether the mandatory weighing of aggravating and mitigating circumstances under the California death penalty statute – a factfinding determination that must be made before the death penalty is a punishment option – violates the Fifth, Sixth, and Fourteenth Amendments where there is no requirement that this determination must be found by a jury beyond a reasonable doubt. Respondent, the State of California, opposes certiorari, asserting that under California law the jury's weighing of aggravating and mitigating

circumstances does not increase the defendant's authorized punishment. Respondent's Brief in Opposition (hereafter BIO) 6.[1]

Respondent argues that once a jury finds unanimously and beyond a reasonable doubt that a defendant has committed first degree murder with a special circumstance, the maximum penalty prescribed by statute is death. BIO 6. As respondent outlines, after a finding of guilt of first degree murder, the default sentence is a prison term of 25 years to life. BIO 4. Then, "if one or more statutorily enumerated special circumstances 'has been found under [California Penal Code] [s]ection 190.4 to be true'" the case proceeds to a second stage where the penalty of death or life imprisonment without parole may be imposed. BIO 4. Respondent argues that because death is the maximum punishment prescribed by the statute in this second stage (the penalty stage), imposing death "once these jury determinations have been made unanimously and beyond a reasonable doubt thus does not violate the Constitution." BIO 6. Respondent maintains that this determination involves a choice between a greater or lesser authorized penalty and not an increase in the maximum potential penalty. BIO 8.

Contrary to respondent's argument, without findings at the second stage, there would be no sentence of death. If a defendant cannot be

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[1] Respondent does not contest the fact that the weighing of aggravating and mitigating circumstances is a factfinding.

sentenced to death without an additional finding, in this case that aggravating factors outweigh mitigating factors, that finding increases the penalty for the crime of capital murder beyond the statutory maximum. Thus, such a finding by the jury in the penalty phase increases the maximum potential penalty. As this Court stated in *Blakely v. Washington*, 542 U.S. 296 (2004): "[T]he relevant [maximum level of punishment] . . . is not the maximum [level of punishment] . . . a [sentencer] . . . may impose after finding additional facts, but the maximum [they] . . . may impose without any additional findings." *Id.* at 303-04 (citing *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000). In California, the maximum the jury may impose without any additional findings in the second stage is life in prison without the possibility of parole. Cal. Penal Code § 190.3.[2] Consequently, a finding that aggravating factors outweigh mitigating factors at the penalty phase increases the maximum potential penalty.

Apprendi, *Ring,* and *Hurst v. Florida*, 577 U.S. 92 (2016), show that the finding that the aggravating circumstances outweigh the mitigating circumstances does not operate as merely a means of aiding the jury in selection of punishment from an already authorized range, as respondent argues. In California, when the jury finds a special circumstance true, it

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[2] All statutory references are to the California Penal Code unless otherwise specified.

finds a capital defendant death eligible and thereby increases the maximum *possible* level of punishment a capital defendant may receive; it does not, however, necessarily increase the maximum level of punishment he or she actually will receive. After a finding on the special circumstances, the level of punishment that a defendant actually receives has yet to be increased from life to death. In fact, as noted, death is not even a possible punishment option at this stage without the additional finding that the aggravating circumstances outweigh the mitigating circumstances. § 190.3.

Because the punishment is higher with this finding than without, the mandatory finding that the aggravating factors outweigh the mitigating factors is essential to the level of punishment that a defendant actually receives. As explained in Justice Scalia's concurrence in *Ring*, Sixth Amendment procedures apply to all findings "essential to [the] imposition of the level of punishment that . . . [a] defendant [actually] receives[.]" 536 U.S. at 610 (Scalia, J., concurring). Because California law does not require that the finding that the aggravators outweigh the mitigators must be made beyond a reasonable doubt, the statute fails to comport with the Sixth Amendment, as interpreted by *Apprendi*, *Ring*, and *Hurst*.

Respondent counters petitioner's reliance on *Hurst* by asserting that under the Florida system considered in *Hurst*, after a jury verdict of

first degree murder, a convicted defendant was not "eligible for death" unless the judge further determined that an enumerated aggravating circumstance existed. BIO 7. Respondent further asserts that in California, by comparison, a defendant is "eligible for a death sentence" only after the jury finds true at least one of the enumerated special circumstances. BIO 7. In *Hurst*, however, the Court uses the terminology "eligible for death" in the Florida system in the sense that there are findings which actually authorize the imposition of the death penalty at the sentencing hearing, and not in the sense that an accused is only potentially facing a death sentence, which is what the special circumstance finding establishes under the California statute. Like the judge's determination in the prior Florida system, under California law it is the jury's determination that the aggravating factors outweigh the mitigating factors that finally authorizes imposition of the death penalty.[3]

Finally, respondent argues that *Kansas v. Carr*, 577 U.S. 108 (2016) forecloses petitioner's argument. BIO 8. *Carr*, however, only dealt with the question of whether this Court's case law required capital

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[3] In 2020, in *State v. Poole*, 297 So. 3d 487 (Fla. 2020), the Florida Supreme Court determined that it had erred in its 2016 opinion in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and "reced[ed]" from its earlier opinion "except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt." *Id.* at 507-08. The Florida court's shift in position does not undermine the authority of this Court's opinion in *Hurst*.

sentencing courts "to affirmatively inform the jury that mitigating circumstances need not be proved beyond a reasonable doubt" – and not whether the finding that the aggravators outweigh the mitigators must be found beyond a reasonable doubt under the Sixth Amendment. *See Carr,* 577 U.S. at 118-19. Indeed, as the *Carr* opinion notes, the instruction in the case "makes clear that both the existence of aggravating circumstances and the conclusion that they outweigh mitigating circumstances must be proved beyond a reasonable doubt." *Carr*, 577 U.S. at 121. Further, *Carr*'s discussion of "whether it is even possible to apply a standard of proof to the mitigating-factor determination" relied primarily on dicta. *See id*. at 119. ("[a]pproaching the question in the abstract, and without reference to our capital-sentencing case law . . .".)

The mandatory weighing of aggravating and mitigating circumstances under the California death penalty statue is a factfinding that serves to increase the maximum punishment for the crime. Since California's death penalty statute does not require that this determination be found by a jury beyond a reasonable doubt, it violates the Fifth, Sixth and Fourteenth Amendments.

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CONCLUSION

Wherefore, petitioner respectfully requests that this Court grant the petition for a writ of certiorari and reverse the judgment of the Supreme Court of California upholding his death sentence.

Dated: February 3, 2022

Respectfully submitted,

MARY K. McCOMB
STATE PUBLIC DEFENDER
FOR THE STATE OF CALIFORNIA

Christina Spaulding

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ON PETITION FOR A WRIT OF CERTIORARI
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CERTIFICATE OF SERVICE

I, Christina A. Spaulding, a member of the Bar of this Court, hereby certify that my business address is 1111 Broadway, Suite 1000, in the County of Alameda and the City of Oakland, California, Telephone (510) 267-3300; that on February 3, 2022, I served, pursuant to Supreme Court Rule 29, one true copy of the **REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** in the above-entitled matter on the following parties by placing same in an envelope addressed as follows:

Robert Walter Scully CDC No. C-46081 CSP-SQ 3-EB-111 San Quentin, CA 94974	Julia Y. Je Deputy Attorney General Office of the Attorney General 455 Golden Gate Avenue, Ste. 11000 San Francisco, CA 94102-7004 (415) 510-3804
Supreme Court of California Attn: April Boelk Automatic Appeals Unit Supervisor 350 McAllister Street, First Floor San Francisco, CA 94102 (415) 865-7000	California Appellate Project 345 California Street, Suite 1400 San Francisco, CA 94104

Each envelope was then sealed and deposited with FedEx at Oakland, California. All persons required to be served have been served.

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

Signed on **February 3, 2021**, at Oakland, CA.

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Date: 2022.02.03 10:50:24 -08'00'

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