SUPREME COURT OF THE UNITED STATES

NOS. 93–5131 AND 93–5161

PAUL PALALAUA TUILAEPA, PETITIONER
93–5131 *v.*
CALIFORNIA

WILLIAM ARNOLD PROCTOR, PETITIONER
93–5161 *v.*
CALIFORNIA

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

[June 30, 1994]

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see *Callins* v. *Collins*, 510 U. S. ___, ___ (1994), I would vacate petitioners' death sentences. Even if I did not hold this view, I would find that the three challenged factors do not withstand a meaningful vagueness analysis because "as a practical matter [they] fail to guide the sentencer's discretion." *Stringer* v. *Black*, 503 U. S. ___, ___ (1992).

The California capital punishment scheme does more than simply direct the sentencing jurors' attention to certain subject matters. It lists 11 factors and authorizes the jury to treat any of them as aggravating circumstances to be placed on death's side of the scale. Jurors are instructed that they "*shall* impose a death sentence if [they] conclude that the aggravating circumstances outweigh the mitigating circumstances." Cal. Penal Code §190.3 (West 1988). Despite the critical—even decisive—

role these factors play in the determination of who actually receives the death penalty, jurors are given no guidance in how to consider them. We have stated: "A vague aggravating factor used in the weighing process . . . creates the risk that the jury will treat the defendant as more deserving than he might otherwise be by relying upon the existence of an illusory circumstance." *Stringer*, 503 U. S., at ___ (emphasis added).

The majority introduces a novel distinction between "propositional" and "nonpropositional" aggravating circumstances. *Ante*, at 7. The majority acknowledges that the "distinction between the two is not always clear," *ante*, at 7; I find it largely illusory. The Court suggests, but does not make explicit, that propositional factors are those that "require a yes or a no answer to a specific question," while nonpropositional factors are those that "only poin[t] the sentencer to a subject matter." *Ibid.* Presumably, then, asking the jury whether the whether "the murder was especially heinous, atrocious, or cruel," would be a propositional aggravator, while directing the sentencer to "the presence of absence of any especial heinousness, atrocity, or cruelty" would be a nonpropositional factor. I am at a loss to see how the mere rephrasing does anything more to channel or guide jury discretion. Nor does this propositional/nonpropositional distinction appear to play any role in the Court's decision. The Court nowhere discloses specifically where the line is drawn, on which side of it the three challenged factors fall, and what relevance, if any, this distinction should have to the Court's future vagueness analysis.[1]

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[1]Nor does it matter for Eighth Amendment purposes that California uses one set of factors (the §190.2 "special circumstances") to determine eligibility and another set (the §190.3 "relevant factors") in the weighing or selection process. Whether an aggravator is used for narrowing or for weighing or for both, it cannot be impermissibly vague. See *Arave* v. *Creech*, 507 U. S. ___ (1993) (vagueness analysis applied to aggravating factor, even though remaining aggravating factor made defendant death eligible); *Sochor* v. *Florida*, 504 U. S. ___ (1992) (same); *Walton* v. *Arizona*, 497 U. S. 639 (1990) (same). The Court recognizes as much by subjecting the challenged factors to a vagueness analysis.

The more relevant distinction is not how an aggravating factor is presented, but what the sentencer is told to do with it. Where, as in Georgia, “aggravating factors as such have no specific function in the jury's decision whether a defendant who has been found to be eligible for the death penalty should receive it under all the circumstances of the case," *Stringer*, ___ U. S., at ___, we have not subjected aggravating circumstances to a vagueness analysis. See *Zant* v. *Stephens*, 462 U. S. 863, 873–874 (1983). In California, by contrast, where the sentencer is instructed to weigh the aggravating and mitigating circumstances, a vague aggravator creates the risk of an arbitrary thumb on death's side of the scale, so we analyze aggravators for clarity, objectivity, and principled guidance. See *Maynard* v. *Cartwright*, 486 U. S. 356 (1988); *Godfrey* v. *Georgia*, 446 U. S. 420 (1980); see also *Pensinger* v. *California*, ___ U. S. ___ (1991) (O'CONNOR, J., dissenting from denial of certiorari) (observing that California, like Mississippi, “requires its juries to weigh aggravating and mitigating circumstances"); *Stringer*, *supra*, at ___ (difference between “nonweighing" states like Georgia and “weighing" states like California is “not one of `semantics'") (citation omitted).

Each of the challenged California factors “leave[s] the sentencer without sufficient guidance for determining the presence or absence of the factor." *Espinosa* v. *Florida*, 505 U. S. ___ (1992). Each of of the three—circumstances of the crime, age, and prior criminal activity— has been exploited to convince jurors that that just about anything is aggravating.

Prosecutors have argued, and jurors are free to find, that “circumstances of the crime” constitutes an aggravating factor because the defendant killed the victim for some purportedly aggravating motive, such

as money,[2] or because the defendant killed the victim for no motive at all;[3] because the defendant killed in cold blood,[4] or in hot blood;[5] because the defendant attempted to conceal his crime,[6] or made no attempt to conceal it;[7] because the defendant made the victim endure the terror of anticipating a violent death,[8] or because the defendant killed without any warning;[9] and because the defendant had a prior relationship with the victim,[10] or because the victim was a complete stranger.[11] Similarly, prosecutors have argued, and juries are free to find, that the age of the victim was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly;[12] or that the method of killing was aggravating, because the victim was strangled, bludgeoned, shot, stabbed, or consumed

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[2] *People* v. *Howard*, Cal. S. Ct. No. S004452, RT 6772.

[3] *People* v. *Edwards*, Cal. S. Ct. No. S004755, RT 10544.

[4] *People* v. *Visciotti*, Cal. S. Ct. No. S004597, RT 3296–3297.

[5] *People* v. *Jennings*, Cal. S. Ct. No. S004754, RT 6755.

[6] *People* v. *Benson*, Cal. S. Ct. No. S004763, RT 1141.

[7] *Morales*, *supra*, RT 3093.

[8] *People* v. *Webb*, Cal. S. Ct. No. S006938, RT 5302.

[9] *People* v. *Freeman*, *supra*, RT 3711.

[10] *People* v. *Padilla*, Cal. S. Ct. No. S0144964, RT 4604.

[11] *People* v. *Anderson*, Cal. S. Ct. No. S004385, RT 3168–3169.

[12] *People* v. *Deere*, Cal. S. Ct. No. S004722, RT 155–156 (victims were 2 and 6); *People* v. *Bonin*, Cal. S. Ct. No. S004565 RT, 10075 (victims were adolescents); *People* v. *Carpenter*, Cal. S. Ct. No. S004654, RT 16752 (victim was 20); *People* v. *Phillips*, 41 Cal. 3d 29, 63, 711 P. 2d 423, 444 (1985) (26–year-old victim was "in the prime of his life"); *People* v. *Melton*, Cal. S. Ct. No. S004518, RT 4376 (victim was 77).

by fire;[13] or that the location of the killing was an aggravating factor, because the victim was killed in her own home, in a public bar, in a city park, or in a remote location.[14] In short, because neither the California Legislature nor the California courts ever have articulated a limiting construction of this term, prosecutors have been permitted to use the "circumstances of the crime" as an aggravating factor to embrace the entire spectrum of facts present in virtually every homicide—something this Court condemned in *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). See *Maynard* v. *Cartwright*, 486 U. S., at 363 (the Court "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty").[15]

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[13] *People* v. *Clair*, Cal. S. Ct. No. S004789, RT 2474–2475 (strangulation); *People* v. *Kipp*, Cal. S. Ct. No. S004784, RT 2246 (strangulation); *People* v. *Fauber*, Cal. S. Ct. No. S005868, RT 5546 (use of an axe); *People* v. *Benson*, Cal. S. Ct. No. S004763, RT 1149 (use of a hammer); *People* v. *Cain*, Cal. S. Ct. No. S006544, RT 6786–6787 (use of a club); *People* v. *Jackson*, Cal. S. Ct. No. S010723, RT 8075–8076 (use of a gun); *People* v. *Reilly*, Cal. S. Ct. No. S004607, RT 14040 (stabbing); *People* v. *Scott*, Cal. S. Ct. No. S010334, RT 847 (fire).

[14] *People* v. *Anderson*, Cal. S. Ct. No. S004385, RT 3167–3168 (victim's home); *People* v. *Freeman*, Cal. S. Ct. No. S004787, RT 3674, 3710–3711 (public bar); *People* v. *Ashmus*, Cal. S. Ct. No. S004723, RT 7340–7341 (city park); *People* v. *Carpenter*, Cal. S. Ct. No. S004654, RT 16749–16750 (forested area); *People* v. *Comtois*, Cal. S. Ct. No. S017116, RT 2970 (remote, isolated location).

[15] Although we have required that jurors be allowed to consider "*as a mitigating factor*, any aspect of a defendant's character or record and any circumstances of

The defendant's age as a factor, applied inconsistently and erratically, similarly fails to channel the jurors' discretion. In practice, prosecutors and trial judges have applied this factor to defendants of virtually every age: in their teens, twenties, thirties, forties, and fifties at the time of the crime.[16] Far from applying any narrowing construction, the California Supreme Court has described age as a "metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty." *People* v. *Lucky*, 45 Cal. 3d 259, 302, 753 P. 2d 1052, 1080 (1988), cert. denied, 488 U. S. 1034 (1989).

Nor do jurors find meaningful guidance from "the

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the offense that the defendant proffers as a basis for a sentence less than death," *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (emphasis in original), we have never approved such unrestricted consideration of a circumstance in aggravation. Similarly, while we approved the Georgia capital sentencing scheme, which permits jurors to consider all the circumstances of the offense and the offender, we did so in the context of a system in which aggravators performed no function beyond the elegibility decision. See *Zant* v. *Stephens*, 462 U. S., at 873–874.

[16]See, *e.g.*, *People* v. *Williams*, Cal. S. Ct. No. S004522, RT 1041 (teens); *People* v. *Avena*, Cal. S. Ct. No. S004422, RT 2611–2612 (teens); *People* v. *Bean*, 46 Cal. 3d 919, 952, n. 18, 760 P. 2d 996, 1017, n. 18 (1988) (age 20); *People* v. *Coleman*, 48 Cal. 3d 112, 153–154, 768 P. 2d 32, 55–56 (1989) (age 22), cert. denied, 494 U. S. 1038 (1990); *People* v. *Gonzalez*, 51 Cal. 3d 1179, 1233, 800 P. 2d 1159, 1187 (1990) (age 31), cert. denied, ___ U. S. ___ (1991); *People* v. *McLain*, 46 Cal. 3d 97, 111–112, 757 P. 2d 569, 576–577 (1988) (age 41), cert. denied, 489 U. S. 1072 (1989); *People* v. *Douglas*, 50 Cal. 3d 468, 538, 788 P. 2d 640, ___ (1990) (age 56), cert. denied, 498 U. S. 1110 (1991).

presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence." Although the California Supreme Court has held that "criminal" is "limited to conduct *that violates a penal statute*," *People* v. *Wright*, 52 Cal. 3d 367, 425, 802 P. 2d 221, 259 (1990) (emphasis in original), and that "force or violence" excludes violence to property, *People* v. *Boyd*, 38 Cal. 3d 762, 700 P. 2d 782 (1985), that court has not required such an instruction, and petitioner Tuilaepa's jurors were not so instructed. This left the prosecution free to introduce evidence of "trivial incidents of misconduct and ill temper," *People* v. *Boyd*, 38 Cal. 3d, at 774, 700 P. 2d, at 791, and left the jury free to find an aggravator on that basis.[17]

No less a danger is that jurors—or even judges—will treat the mere absence of a mitigator as an aggravator, transforming a neutral or factually irrelevant factor into an illusory aggravator.[18]

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[17]Even with the limiting construction, "prior criminal activity involving force or violence" is far more open-ended than factors invalidated by other state courts as vague or subjective. See, *e.g.*, *Arnold* v. *State*, 224 S. E. 2d 386 (Ga. 1976) (invalidating aggravating circumstance that the "murder was committed by a person who has a substantial history of serious assaultive convictions"); *State* v. *David*, 468 So. 2d 1126, 1129–1130 (La. 1985) (invalidating aggravating circumstance of "significant" history of criminal conduct).

[18]Judges, as well as juries, have fallen into this trap. See, *e.g.*, *People* v. *Kaurish*, 52 Cal. 3d 648, 717, 802 P. 2d 278, 316 (1990) (trial judge concluded that factor (h), dealing with a defendant's impaired capacity to appreciate the criminality of his actions, was an aggravating factor because defendant did not have diminished capacity or other impairment), cert. denied, ___ U. S. ___ (1991); *People* v. *Hamilton*, 48 Cal. 3d 1142, 1186, 774 P. 2d 739, 757 (1989) (trial court concluded that 10 of 11 factors

Although the California Supreme Court has ruled that certain of the factors can serve only as mitigators,[19] it has not required that the jury be so instructed. See, *e.g.*, *People* v. *Raley*, 2 Cal. 4th 870, 919, 830 P. 2d 712, 744–745 (1992), cert. denied, ___ U. S. ___ (1993). Nor has that court restricted jury instructions to those aggravating factors that are factually relevant to the case.[20] Clearly, some of the mitigating

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were aggravating, including factors (d)-(h) and (j)), cert. denied, 494 U. S. 1039 (1990).

[19]The factors that can serve only as mitigators are:

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal act or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease and defect, or the affects of intoxication.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

Cal. Penal Code §190.3; see also Brief Amicus Curiae of California Appellate Project 22–24, and nn. 47, 48, and cases cited therein.

[20]Although the trial judge at petitioner Tuilaepa's trial instructed the jury on only those factors that were

circumstances are so unusual that treating their absence as an aggravating circumstance would make them applicable to virtually all murderers. See *People* v. *Davenport*, 41 Cal. 3d 247, 289, 710 P. 2d 841, 888 (1985) (most murder cases present the absence of the mitigating circumstances of moral justification and victim participation). An aggravating factor that exists in nearly every capital case fails to fulfill its purpose of guiding the jury in distinguishing "those who deserve capital punishment from those who do not." *Arave* v. *Creech*, 507 U. S. ___, ___ (1993). Moreover, a process creating the risk that the absence of mitigation will count as aggravation artificially inflates the number of aggravating factors the jury weighs, "creat[ing] the possibility not only of randomness but of bias in favor of death." *Ibid.*

In short, open-ended factors and a lack of guidance to regularize the jurors' application of these factors create a system in which, as a practical matter, improper arguments can be made in the courtroom and credited in the jury room. I am at a loss to see how these challenged factors furnish the "`clear and objective standards' that provide `specific and detailed guidance,' and that `make rationally reviewable the process for imposing a sentence of death.'" *Walton* v. *Arizona*, 497 U. S. 639, 651 (1990) (SCALIA, J., concurring in part and dissenting in part), quoting *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) (footnotes omitted).

One of the greatest evils of leaving jurors with largely unguided discretion is the risk that this

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factually relevant, the jury at petitioner Proctor's trial was instructed on all of the factors in §190.3. The prosecutor argued that nine of the 11 factors were aggravating. *Proctor* v. *California*, No. 93–5161, RT 1476–1481, 1532–1534.

discretion will be exercised on the basis of constitutionally impermissible considerations—-primary among them, race. Racial prejudice is “the paradigmatic capricious and irrational sentencing factor.” *Graham* v. *Connor*, 506 U. S. ___, ___ (1993) (THOMAS, J., concurring). In part to diminish the danger that a sentencer will “attach[] the `aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process,” *Zant* v. *Stephens*, 462 U. S. 862, 885 (1983), this Court has required that a sentencer's discretion be curbed and informed by “clear and objective standards.” *Gregg* v. *Georgia*, 428 U. S. 153, 198 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.) (citation omitted).

Because the “circumstances of the crime” factor lacks clarity and objectivity, it poses an unacceptable risk that a sentencer will succumb to either overt or subtle racial impulses or appeals. This risk is not merely theoretical. For far too many jurors, the most important “circumstances of the crime” are the race of the victim or the defendant. See *McCleskey* v. *Kemp*, 481 U. S. 279, 320 (1987) (Brennan, J., dissenting); see also General Accounting Office, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities (Feb. 1990) (surveying and synthesizing studies and finding a “remarkably consistent” conclusion that the race of the victim influenced the likelihood of being charged with capital murder or receiving the death penalty in 82% of cases), reprinted at 136 Cong. Rec. S6889 (May 24, 1990).

The California capital sentencing scheme does little to minimize this risk. The “circumstances of the crime” factor may be weighed in aggravation in addition to the applicable special circumstances. Cal. Penal Code §190.3 (the trier of fact shall take into account “[t]he circumstances of the crime of which the defendant was convicted in the present

proceeding *and* the existence of any special circumstances found to be true") (emphasis added). The special circumstances themselves encompass many of the factors generally recognized as aggravating, including multiple-murder convictions; commission of the murder in relation to another felony; the "especially heinous, atrocious, or cruel" nature of the murder; and the relevant identity of the victim (as a law enforcement officer, a witness to a crime, a judge, a prosecutor, or a public official). The statute, therefore, invites the jurors to speculate about, and give aggravating weight to, unspecified circumstances apart from these.

Nor has the California Supreme Court attempted to limit or guide this ranging inquiry. Far from it. That court has concluded that the "circumstances of the crime" factor extends beyond "merely the immediate temporal and spatial circumstances of the crime," *People* v. *Edwards*, 54 Cal. 3d 787, 833, 819 P. 2d 436, 465 (1991), and leaves "the sentencer free to evaluate the evidence in accordance with his or her own subjective values," *People* v. *Tuilaepa*, 4 Cal. 4th 569, 595, 842 P. 2d 1142, 1158 (1992). The court has even warned that it has not yet "explore[d] the outer reaches of the evidence admissible as a circumstance of the crime." *People* v. *Edwards*, 54 Cal. 3d, at 835, 819 P. 2d, at 467. Thus, the "unique opportunity for racial prejudice to operate but remain undetected," *Turner* v. *Murray*, 476 U. S. 28, 35 (1986), exists unchecked in the California capital sentencing scheme. This does not instill confidence in the jury's decision to impose the death penalty on petitioner Tuilaepa, who is Samoan, and whose victim was white.

Although the Court today rejects a well-founded facial challenge to three of the 11 factors that permit California jurors to select from among capital

defendants those who will receive the death penalty, it has not given the California system a clean bill of health. Its unwillingness to conclude that these factors are valid on their face leaves the door open to a challenge to the application of one of these factors in such a way that the risk of arbitrariness is realized.[21] The cases before us, for example, do not clearly present a situation in which the absence of a mitigator was treated as an aggravator.

Additionally, the Court's opinion says nothing about the constitutional adequacy of California's eligibility process, which subjects a defendant to the death penalty if he is convicted of first-degree murder and the jury finds the existence of one "special circumstance."[22] By creating nearly 20 such special circumstances, California creates an extraordinarily large death pool. Because petitioners mount no challenge to these circumstances, the Court is not called on to determine that they collectively perform sufficient, meaningful narrowing. See *Zant* v. *Stephens*, 462 U. S. 862 (1983).

Of particular significance, the Court's consideration

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[21]Such a challenge would require something more than merely pointing to others who committed similar offenses and did not receive the death penalty, *Lewis* v. *Jeffers*, 497 U. S. 764 (1990), but it is not hard to imagine more pronounced erratic outcomes.

[22]The special circumstances include premeditated and deliberate murder; felony murder based on nine felonies; the infliction of torture; that the murder was especially heinous, atrocious or cruel; that the victim was killed because of his race, religion, or ethnic origin; and the identity of the victim, including that he was a peace officer, a federal law enforcement officer, a firefighter, a witness to a crime, a prosecutor or assistant prosecutor, a former or current local, state or federal judge, or an elected or appointed local, state, or federal official. Cal. Penal Code §190.2.

of a small slice of one component of the California scheme says nothing about the interaction of the various components—the statutory definition of first-degree murder, the special circumstances, the relevant factors, the statutorily required weighing of aggravating and mitigating factors, and the availability of judicial review, but not appellate proportionality review—and whether their end result satisfies the Eighth Amendment's commands. The Court's treatment today of the relevant factors as “selection factors” alone rests on the assumption, not tested, that the special circumstances perform all of the constitutionally required narrowing for eligibility. Should that assumption prove false, it would further undermine the Court's approval today of these relevant factors.

Similarly, in *Pulley* v. *Harris*, 465 U. S. 37, 51 (1984), the Court's conclusion that the California capital sentencing scheme was not “so lacking in other checks on arbitrariness that it would not pass muster without comparative proportionality review” was based in part on an understanding that the application of the relevant factors “`provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'” thereby “`guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'” *Ibid.*, quoting *Harris* v. *Pulley*, 692 F. 2d 1189, 1194 (CA9 1982). As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in *Pulley* v. *Harris*.

In summary, the Court isolates one part of a complex scheme and says that, assuming that all the other parts are doing their job, this one passes muster. But the crucial question, and one the Court will need to face, is how the parts are working together to determine with rationality and fairness who is exposed to the death penalty and who

receives it.

For two decades now, the Court has professed a commitment to guiding sentencers' discretion so as to "minimize the risk of wholly arbitrary and capricious action," *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.), and to achieve principled distinctions between those who receive the death penalty and those who do not, see, *e.g.*, *Espinosa* v. *Florida*, 505 U. S. ___ (1992); *Shell* v. *Mississippi*, 498 U. S. 1 (1990); *Maynard* v. *Cartwright*, 486 U. S. 356 (1988). The Court's approval today of these California relevant factors calls into question the continued strength of that commitment. I respectfully dissent.