No. 17-6742

In the Supreme Court of the United States

VAENE SIVONGXXAY,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
DONALD DE NICOLA
Deputy Solicitor General
KENNETH N. SOKOLER
Supervising Deputy Attorney General
RYAN B. MCCARROLL
LEWIS A. MARTINEZ*
Deputy Attorneys General
**Counsel of Record*
2550 Mariposa Mall, Room 5090
Fresno, CA 93721
(559) 477-1677
Lewis.Martinez@doj.ca.gov
Counsel for Respondent

CAPITAL CASE

QUESTION PRESENTED

Whether the California Supreme Court misconstrued the totality of the circumstances in determining that the defendant in this case, in choosing to be tried by a judge rather than by a jury, validly waived his right to a jury trial on the charge of capital murder.

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STATEMENT

Petitioner Sivongxxay committed a series of robberies with Oday Mounsaveng in 1996, the last of which resulted in the death of Henry Song. Pet. App. A 2-4. The State charged Sivongxxay and Mounsaveng with capital murder. *Id.* at 2. In particular, the State alleged as a special circumstance, making the murder punishable by death, that the defendants had killed Song while they were engaged in the commission of a robbery within the meaning of California Penal Code section 190.2(a)(17)(A). *Id.* at 1-2.

Prior to trial, the two separately-appointed defense attorneys told the court that their clients wanted to be tried by the court rather than by a jury. Pet. App. A 6-7. During an ensuing colloquy, the court advised Sivongxxay and Mounsaveng that they had a right to a trial "either by a jury of 12 people . . . or in front of judge, acting alone without a jury." *Id.* at 7. The court described the scope of the trial as initially involving the issue of their "guilt beyond a reasonable doubt." *Id.* The court explained that, if the factfinder found them guilty, the case "would then proceed to a penalty phase," at which the factfinder would "make the decision as to the appropriate punishment, which could result in a death penalty sentence." *Id.* The court then asked the defendants, "Do you give up your right to a jury trial and agree that this Court, alone, will make those decisions . . .?" *Id.* Both defendants responded, "Yes." *Id.* The court concluded, "All right. We'll show a jury waiver on all issues . . .." *Id.*

Following a contested bench trial, the court found Sivongxxay guilty of first-degree murder, found the special-circumstance allegation to be true, and found that the appropriate penalty was death. Pet. App. A 1-2.

On direct appeal, the California Supreme Court held that the trial judge had committed error under state law, albeit a harmless error, by taking a "comprehensive" waiver of a jury on all issues without a "separate" waiver as to the special-circumstance allegation. Pet. App. A 14-22. [1] But the court held that there had been no error as a matter of federal constitutional law. The court explained that "a comprehensive jury waiver such as the one entered below" generally applies to "all of the issues in the case." *Id.* at 12 (internal quotation marks omitted). Moreover, so long as a defendant has "an appreciation of the *nature* of the jury trial right and the *consequences* of forgoing this right," there is "no additional constitutional requirement that a defendant be specifically advised of the specific charges, enhancements, allegations, or other issues to which a general jury waiver will apply." *Id.* at 11-12. The court ultimately concluded that Sivongxxay had entered a knowing

[1] The court explained that the state-law error was harmless because there was not a "reasonable probability" that Sivongxxay "would have refused to enter such a waiver and instead would have sought a jury trial for this aspect of his case." Pet. App. A 22. The court noted that, although such a bifurcated proceeding would have been "theoretically possible," the court was not aware of one having ever occurred in practice. *Id.* at 12 n.6. And there was "nothing in the nature of the allegations or the proof at trial that suggests a basis for seeking a decision maker for the special circumstance allegation different from the one who would decide the charged crimes and penalty." *Id.* at 22.

and intelligent waiver based on "not only the colloquy, but also defendant's prior criminal history, other events before and after the waiver was entered, and the fact that defendant was represented by counsel." *Id.* at 12-13 & n.8.

In particular, the court rejected the suggestion that, despite the earlier opportunity to consult with counsel and the subsequent colloquy with the trial judge, Sivongxxay had been ignorant of his right to a jury trial on the special-circumstance allegation. The court observed that counsel had presumably advised Sivongxxay of that right when consulting with him prior to the waiver, because the right had long been recognized as a matter of state statutory law. Pet. App. A 12 n.7; *see* Cal. Penal Code § 190.4. The court also observed that Sivongxxay's colloquy with the trial judge "conveyed that defendant had a right to a jury trial with regard to all issues as to which an adverse determination could expose him to the death penalty—which included the special circumstance allegation—and that with his waiver, defendant would be giving up that right." Pet. App. A 12. The court later reiterated that, although the trial judge "never used the phase 'special circumstance' in its colloquy with defendant, its advisement communicated to defendant that his waiver of a jury trial, if entered, would encompass the determinations that could make him subject to the death penalty as part of a described trial process." *Id.* at 13.

ARGUMENT

Sivongxxay claims that, when he entered his comprehensive waiver of a jury in order to be tried by the court, he did not know that he had a right to a jury trial on the special-circumstance allegation. But he does not identify any division of authority regarding the federal constitutional standards that apply to his claim.[2] His petition seeks little more than further appellate review of what he perceives to be the misapplication of settled rules to the particular facts of his case.

There is no dispute that a criminal defendant has a federal constitutional right to a jury trial on a special-circumstance allegation that makes him eligible for capital punishment. *See Ring* v. *Arizona*, 536 U.S. 584, 609 (2002). Nor is there any dispute that a defendant may waive a jury in order to be tried by a judge, so long as the waiver "is taken with his express, intelligent consent." *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 277-78 (1942); *Patton* v. *United States*, 281 U.S. 276, 312 (1930). This is consistent with the rule defining a waiver as being "an intentional relinquishment or abandonment of

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[2] Sivongxxay notes that the federal circuit courts appear to be divided on the issue of whether they should exercise their supervisorial authority over the district courts to mandate colloquies in addition to the written waivers that are mandated under Fed. R. Crim P. 23. Pet. 9 n.4; *see United States* v. *Robertson*, 45 F.3d 1423, 1432 (10th Cir. 1995); *United States* v. *Martin*, 704 F.2d 267, 275 (6th Cir. 1983). But the present case would not be an appropriate vehicle for considering that issue, because this Court does not exercise supervisorial authority over state courts. *See Early* v. *Packer*, 537 U.S. 3, 10 (2002) (per curiam) (rulings based on this Court's supervisory authority over lower federal courts are not binding on state courts).

a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *see Schneckloth* v. *Bustamonte*, 412 U.S. 218, 237 (1973).

This Court has long held that "whether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case." *Adams* v. *United States*, 317 U.S. at 278. In discussing the circumstances of his particular case, Sivongxxay focuses on the fact that "the trial court's colloquy failed to make any mention of petitioner's right [to] a jury trial for the special circumstance determination." Pet. 9-10; *see* Pet. 11-14. But he fails to identify any authority requiring such a colloquy as a matter of federal constitutional law. *See United States* v. *Lilly*, 536 F.3d 190, 197 (3rd Cir. 2008) (no on-the-record colloquy required under either the Constitution or Fed. R. Crim. P. 23(a)); *United States* v. *Leja*, 448 F.3d 86, 92-96 (1st Cir. 2006) (absence of colloquy does not require reversal where record shows waiver knowingly and intelligently made). And, as the California Supreme Court explained, the colloquy here adequately conveyed that Sivongxxay "had a right to a jury trial with regard to all issues as to which an adverse determination could expose him to the death penalty—which included the special circumstance allegation." Pet. App. A 12; *see id*. at 13. To the extent Sivongxxay challenges this interpretation of the colloquy, that fact-bound contention does not warrant review by this Court.

Sivongxxay separately suggests that the California Supreme Court erred by giving weight to the fact that he had been represented by counsel at the

time of his waiver. Pet. 14-15. He points to the fact that counsel did not affirm on the record that he had informed Sivongxxay of the right to a jury trial on the special-circumstance allegation. But this Court has stated that, when determining the validity of a waiver, it is relevant that the defendant "had the advice of counsel." *Adams*, 317 U.S. at 277; *see United States ex rel. Williams* v. *DeRobertis*, 715 F.2d 11174, 1182 (7th Cir. 1983) (finding relevance in the fact that the defendant was "represented by counsel"). In any event, this case would be a poor vehicle for considering the relevance of counsel, because the colloquy between the trial judge and Sivongxxay was sufficient by itself. Moreover, denying Sivongxxay's request for further review of his claim on direct appeal will not foreclose him from raising a collateral claim of ineffective assistance in the event that counsel gave him inadequate or incorrect advice. *See United States* v. *Lilly*, 536 F.3d at 196; *United States* v. *Reyes-Meza De Polanco*, 422 F.2d 1304, 1305 (9th Cir. 1970).

Sivongxxay also suggests that the California Supreme Court erred by supposedly giving weight to (1) his history with the criminal justice system and (2) his lack of surprise or confusion when the trial court stated that the waiver applied to "all issues." Pet. 15-18. But it appears that the California Supreme Court did not actually consider those circumstances when determining whether Sivongxxay had been aware of the right to a jury trial on the special-circumstance allegation. Rather, the court considered his history with the criminal justice system when determining whether he understood the essential

nature of a jury despite being a "refugee with no formal education and limited English proficiency." Pet. App. A 8-9. The court similarly considered his lack of surprise that the waiver applied to "all issues" when determining "the nature and extent of his waiver," rather than the nature and extent of his knowledge at the time of the waiver. *Id.* at 8 n.2. In any event, the colloquy was sufficient even without regard to his criminal history and lack of surprise or confusion.

Finally, Sivongxxay appears to inject a separate claim into the conclusion of his petition by asking this Court "to mandate that in a capital case on-the-record jury *waivers* must be obtained from the defendant for *each* of the determinations for which he has the right to trial by jury." Pet. 19 (emphasis added). But he fails to identify a division of authority regarding the permissibility of comprehensive waivers as a matter of federal constitutional law. Indeed, as the Ninth Circuit has observed with regard to guilty pleas, a criminal defendant "possesses a great number of rights," and a rule "[r]equiring a specific waiver of every one would only sow the seeds for later collateral attack." *United States* v. *Sherman*, 474 F.2d 303, 305 (9th Cir. 1973).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: January 10, 2018.

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
DONALD DE NICOLA
Deputy Solicitor General
KENNETH N. SOKOLER
Supervising Deputy Attorney General
RYAN B. MCCARROLL
Deputy Attorney General

/s/ Lewis A. Martinez

LEWIS A. MARTINEZ
Deputy Attorney General
Counsel for Respondent

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