No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LEE SAMUEL CAPERS, *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent*.

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

(DEATH PENALTY CASE)

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CAPITAL CASE

QUESTION PRESENTED

Does California's death penalty scheme violate the requirement under the Fifth, Sixth and Fourteenth Amendments that every fact other than a prior conviction that serves to increase the statutory maximum for the crime must be found by a jury beyond a reasonable doubt?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2019

LEE SAMUEL CAPERS, *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent*.

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

(DEATH PENALTY CASE)

Petitioner Lee Samuel Capers respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of California affirming his conviction of murder, conspiracy, and sentence of death.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were petitioner, Lee Samuel Capers, and Respondent, the People of the State of California.

OPINION BELOW

The California Supreme Court issued an opinion in this case on August 8, 2019, reported as *People v. Capers*, 7 Cal. 5th 989 (2019) (*Capers*). A copy of that opinion is attached as Appendix A. On October 23, 2019, the California Supreme Court issued an order denying rehearing, a copy of which is attached as Appendix B.

JURISDICTION

The California Supreme Court entered its judgment on August 8, 2019 and denied rehearing on October 23, 2019. This Court has jurisdiction pursuant to 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I. Federal Constitutional Provisions

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person . . . shall be deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions the accused shall enjoy the right to [trial] by an impartial jury . . . ."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

II. State Statutory Provisions

The relevant state statutes, attached as Appendix C, include California Penal Code sections 187, 190, 190.1, 190.2, 190.3, 190.4 and 190.5.

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STATEMENT OF THE CASE

I. Introduction

Petitioner was convicted and sentenced under California's death penalty law, adopted by an initiative measure in 1978. Cal. Penal Code §§ 190-190.4.[1] Under this scheme, once the defendant has been found guilty of first degree murder, the trier of fact determines whether any of the special circumstances enumerated in section 190.2 are true beyond a reasonable doubt. If so, a separate penalty phase is held to determine whether the defendant should be sentenced to life imprisonment without possibility of parole or death. §§ 190.2 & 190.3; *Tuilaepa v. California*, 512 U.S. 967, 975-76 (1994).

At the penalty phase, the parties may present evidence "relevant to aggravation, mitigation, and sentence. . . ." § 190.3. Section 190.3 lists the

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[1] All statutory references are to the California Penal Code unless otherwise specified. "RT" refers to the Reporter's Transcript in this case; "CT" refers to the Clerk's Transcript in this case; and "SCT" refers to the Supplemental Clerk's Transcript in this case. The cited portions of the Clerk's and Supplemental Clerk's Transcripts are attached as Appendix D.

aggravating and mitigating factors the jury is to consider.[2]

Consistent with this statutory scheme, the jurors in this case were instructed that they could sentence petitioner to death only if each of them was "persuaded that the aggravating circumstances are so substantial in comparison to the mitigating circumstances that it warrants death instead of life without parole." SCT at 50; CALJIC No. 8.88.[3] The instruction defines an

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[2] This list includes the circumstances of the crime, including any special circumstances found to be true (factor (a)); the presence or absence of criminal activity involving the use or threat of force or violence (factor (b)) or of prior felony convictions (factor (c)); whether the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance (factor (d)); whether the victim was a participant in or consented to the defendant's conduct (factor (e)); whether the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation (factor (f)); whether the defendant acted under extreme duress or the substantial domination of another person (factor (g)); whether 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 or defect, or the effects of intoxication (factor (h)); the defendant's age at the time of the crime (factor (i)); whether the defendant was an accomplice whose participation in the offense was relatively minor (factor (j)); and any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime (factor (k)). § 190.3.

[3] In 2006 the California Judicial Council adopted revised jury instructions known as Judicial Council of California Criminal Jury Instructions, or "CALCRIM." CALCRIM No. 766 provides in part that: "To return a judgment of death, each of you must be persuaded that the aggravating circumstances both

aggravating circumstance as "any fact, condition or event attending the commission of a crime which increases its guilt or enormity or adds to its injurious consequences which is above and beyond the elements of the crime itself." *Id.*; CALJIC No. 8.88; *see* CALCRIM No. 763; *People v. Steele*, 27 Cal. 4th 1230, 1258 (2002).[4]

For prior violent criminal activity and prior felony convictions -- section 190.3 factors (b) and (c) -- the standard of proof is beyond a reasonable doubt. *See People v. Montes*, 58 Cal. 4th 809, 899 (2014). But under California law,

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outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified."

[4] The capital sentencing jury is not instructed in the exact language of the statute, which provides in part:

> After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole. § 190.3.

proof beyond a reasonable doubt is not required for any other sentencing factor; and the prosecutor does not have to establish beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances or that death is the appropriate penalty. *Id.* The state high court has also concluded that a capital sentencing jury as a whole need not agree on the existence of any one aggravating factor. *See, e.g., People v. Contreras*, 58 Cal. 4th 123, 173 (2013). The court deems a juror's determination whether aggravation outweighs mitigation to be a normative conclusion, not a factual finding. *People v. Merriman*, 60 Cal. 4th 1, 106 (2014). This is true even though the jury must make certain factual findings in order to consider specific circumstances as aggravating factors. *See, e.g., People v. Prieto*, 30 Cal. 4th 226, 263 (2003).

The court has since rejected the argument that *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616, 621-24 (2016) dictates a different result, on the grounds that "[t]he California sentencing scheme is materially different from that in Florida." *People v. Rangel*, 62 Cal. 4th 1192, 1235, n. 16 (2016).

By failing to require that the jury unanimously find each aggravator relied upon and weighed to be true beyond a reasonable doubt, California's

death penalty scheme violates the Fifth, Sixth and Fourteenth Amendments, and this Court should grant certiorari to bring the largest death row population in the nation into compliance with the guarantees of the United States Constitution.

II. Procedural History

Petitioner was charged with two counts of first degree murder with the following special circumstances: multiple murder, robbery-murder, and burglary-murder special circumstances. He was further charged with two counts of second degree robbery, arson of property, and felon in possession of a dagger in a penal institution. The jury found petitioner guilty of all counts and found all special allegations true. *Capers*, 7 Cal. 5th at 993-94.

At the penalty phase, the prosecutor focused on the circumstances of the crime and presented evidence of the circumstances of petitioner's prior felony convictions as well as misconduct he committed while she was in custody. *Capers*, 7 Cal. 5th at 1001. In mitigation, the defense presented the testimony of petitioner's biological grandfather, who testified he and his wife adopted and raised petitioner, whom they loved.

The court then instructed the jury in accordance with the statutory

sentencing scheme at issue here. 11RT 2617-2619; 2636-2637 (CALJIC Nos. 8.85 & 8.88). Consistent with California law, the jury that sentenced petitioner to death was not required to find beyond a reasonable doubt that (1) an aggravating factor existed, (2) the aggravating circumstances outweighed the mitigating circumstances, and (3) the aggravating circumstances were so substantial that they warranted death instead of life without parole. The jury returned a verdict of death, and judgment was entered on September 22, 2006. 32CT 9120-9121, 9141-9146.

On direct appeal, petitioner argued that California's death penalty scheme violates the Fifth, Sixth and Fourteenth Amendments, citing *Hurst v. Florida* [577 U.S. ____ (2016)] (*Hurst*), *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002). The California Supreme Court rejected petitioner's claims. *Capers*, 7 Cal. 5th at 1013-14. The court further stated that "[w]e do not find that *Hurst* in any way undermines our previous rulings upholding the constitutionality of our death penalty scheme." *Capers*, 7 Cal.5th at 1014 (internal citations omitted).

REASONS FOR GRANTING THE PETITION

CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER CALIFORNIA'S DEATH PENALTY STATUTE VIOLATES THE CONSTITUTIONAL REQUIREMENT THAT ANY FACT THAT INCREASES THE PENALTY FOR A CRIME MUST BE FOUND BY A JURY BEYOND A REASONABLE DOUBT

I. This Court Has Held That Every Fact That Serves to Increase a Maximum Criminal Penalty Must Be Proven to a Jury Beyond a Reasonable Doubt

The Fifth, Sixth and Fourteenth Amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995). Where proof of a particular fact other than a prior conviction exposes the defendant to greater punishment than that applicable in the absence of such proof, that fact must be proven to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490; *see also Cunningham v. California*, 549 U.S. 270, 281-82 (2007); *Blakely v. Washington*, 542 U.S. 296, 301 (2004). As the Court put it in *Apprendi*, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the

jury's guilty verdict?" *Apprendi*, 530 U.S. at 494. In *Ring*, a capital sentencing case, this Court established a bright-line rule: "If 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*, 536 U.S. at 602 (citing *Apprendi*, 530 U.S. at 494, 482-83).

Applying this mandate, the Court in *Hurst* invalidated Florida's death penalty statute, restating the core Sixth Amendment principle as it applies to capital sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence of death*." *Hurst*, 136 S. Ct. at 619 (emphasis added). And as explained below, *Hurst* makes clear that the weighing determination required under the Florida statute at issue was an essential part of the sentencer's factfinding exercise, within the meaning of *Ring*. *See Hurst*, 136 S. Ct. at 622.

Under the capital sentencing statute invalidated in *Hurst*, former Fla. Stat. § 782.04(1)(a), the jury rendered an advisory verdict at the sentencing proceeding, with the judge then making the ultimate sentencing determination. *Hurst*, 136 S. Ct. at 620 (citing § 775.082(1)). The judge was

responsible for finding that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh aggravating circumstances," which were prerequisites to imposing a sentence of death. *Id.* at 622 (citing former Fla. Stat. § 921.141(3)). These determinations were part of the "necessary factual finding that *Ring* requires." *Id.*[5]

The questions decided in *Ring* and *Hurst* were narrow. "Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." *Ring*, 536 U.S. at 597, n. 4. The petitioner in *Hurst* raised the same claim. *See* Petitioner's Brief on the Merits, *Hurst v. Florida*, 2015 WL 3523406, at *18 (U.S., 2015) (the trial court rather than the jury has the task of making

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[5] As this Court explained:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). The trial court alone must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); *see State v. Steele*, 921 So. 2d 538, 546 (Fla. 2005).

Hurst, 136 S. Ct. at 622.

factual findings necessary to impose death penalty). In each case, this Court decided only the constitutionality of a judge, rather than a jury, determining the existence of an aggravating circumstance. *See Ring*, 536 U.S. at 588; *Hurst*, 136 S. Ct. at 624.

Despite this, *Hurst* shows that the Sixth Amendment requires that any fact that must be established to impose a death sentence, but not the lesser punishment of life imprisonment, must be found by the jury. *Hurst*, 136 S. Ct. at 619, 622. *Hurst* refers not simply to the finding that an aggravating circumstance obtains, but, as noted, to the finding of "each fact *necessary to impose a sentence of death*." *Id.* at 619 (emphasis added).

II. California's Death Penalty Statute Violates *Hurst* by Not Requiring That the Jury's Factual Sentencing Findings Be Made Beyond a Reasonable Doubt

In California, a death sentence cannot be imposed on a defendant who has been convicted at the guilt phase of capital murder unless the jury additionally finds: (1) the existence of one or more aggravating factors; (2) that the aggravating factors outweigh the mitigating factors; and (3) the aggravating factors are so substantial that they warrant death instead of the lesser penalty of life without parole. Under the principles that animate this

Court's decisions in *Apprendi*, *Ring* and *Hurst*, the jury in this case should have been required to make these factual findings beyond a reasonable doubt. *See* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967, 2004 (2005) (*Blakely* arguably reaches "any factfinding that matters at capital sentencing, including those findings that contribute to the final selection process.").

Although California's statute is different from those at issue in *Hurst* and *Ring* in that the jury, not the judge, makes the findings necessary to sentence a defendant to death, California's death penalty statute is similar to the invalidated Arizona and Florida statutes in ways that are key with respect to the *Apprendi/Ring/Hurst* principle. All three statutes provide that a death sentence may be imposed only if, after the defendant is convicted of first degree murder, the sentencer finds, first, the existence of at least one statutory death eligibility circumstance – in California, a "special circumstance," Cal. Penal Code § 190.2, and in Arizona and Florida, an "aggravating circumstance," Ariz. Rev. Stat. § 13-703(G); Fla. Stat. § 921.141(3) – and, second, engages at the selection phase in an assessment of the relative weight or substantiality of aggravating and mitigating

sentencing factors – in California, that "the aggravating circumstances outweigh the mitigating circumstances," Cal. Penal Code § 190.3; in Arizona that "'there are no mitigating circumstances sufficiently substantial to call for leniency,'" *Ring*, 536 U.S. at 593, quoting Ariz. Rev. Stat. § 13-703(F); and in Florida, that "'there are insufficient mitigating circumstances to outweigh aggravating circumstances'" *Hurst*, 136 S. Ct. at 622, quoting Fla. Stat. § 921.141(3).[6]

Although *Hurst* did not address the standard of proof as such, the Court has made clear that weighing sentencing factors is an essentially factual exercise, within the ambit of *Ring*. As the late Justice Scalia explained in *Ring*:

> [T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all *facts* essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, *sentencing factors*, or Mary Jane – must be found by the jury beyond a reasonable

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[6] In *Hurst*, the Court uses the concept of death eligibility to mean that there are findings that actually authorize the imposition of the death penalty, and not in the sense that an accused potentially faces a death sentence at a separate hearing, which is what a "special circumstance" finding establishes under California law. Under California law it is the jury determination that the statutory aggravating factors outweigh the mitigating factors that ultimately authorizes imposition of the death penalty.

doubt.

Ring, 536 U.S. at 610 (Scalia, J., concurring) (emphasis added); *see also Hurst*, 136 S. Ct. at 622 (in Florida "critical findings necessary to impose the death penalty" include weighing facts the sentencer must find before death is imposed).

Other courts have recognized the factfinding nature of the weighing exercise. In *Hurst v. State*, 202 So. 3d 40, 43 (Fla. 2016), the Florida Supreme Court reviewed whether a unanimous jury verdict was required in capital sentencing, in light of this Court's decisions discussed above. The determinations to be made, including whether aggravation outweighed mitigation, were described as "elements," like the elements of a crime itself determined at the guilt phase. *Hurst*, 202 So. 3d at 53, 57.

The Delaware Supreme Court has found that "the weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence." *Rauf v. State*, 145 A.3d 430, 485 (Del. 2016). The Missouri Supreme Court has also described the determination that aggravation warrants death, or that mitigation outweighs aggravation, as a finding of fact that a jury must make. *State v. Whitfield*, 107 S.W.3d 253,

259-60 (Mo. 2003). Similarly, Justice Sotomayor has stated that "the statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is . . . [a] factual finding" under Alabama's capital sentencing scheme. *Woodward v. Alabama*, 571 U.S. 1045, 134 S. Ct. 405, 410-11 (2013) (Sotomayor, J., dissenting from denial of cert.).

Other courts have found to the contrary. *See United States v. Gabrion*, 719 F.3d 511, 533 (6th Cir. 2013) (federal jurisdiction; under *Apprendi*, determination that the aggravating factors outweigh the mitigating factors, "is not a finding of fact in support of a particular sentence"); *Nunnery v. State*, 127 Nev. 749, 773-75 (Nev. 2011) ("the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor"); *Ritchie v. State*, 809 N.E.2d 258, 265-66 (Ind. 2004) (same). This conflict further supports granting certiorari on the issue presented here.

The constitutional question cannot be avoided by labeling the weighing exercise "normative," rather than "factual," as the California court has tried to do. *See, e.g., Merriman*, 60 Cal. 4th at 106; *People v. Karis*, 46 Cal. 3d 612, 639-40 (1988). At bottom, the inquiry is one of function. *See Ring*, 536 U.S. at 610 (Scalia, J., concurring) (all "facts" essential to determination of penalty,

however labeled, must be made by jury).

III. California Is an Outlier in Refusing to Apply *Ring's* Beyond-a-Reasonable-Doubt Standard to Factual Findings That Must Be Made Before a Death Sentence Can Be Imposed

The California Supreme Court has applied its flawed understanding of *Ring*, *Apprendi* and *Hurst* to its review of numerous death penalty cases. The issue presented here is well-defined and will not benefit from further development in the California Supreme Court or other state courts. These facts favor grant of certiorari for two reasons.

First, as of August 23, 2019, California, with 733 inmates on death row, had over one-fourth of the country's total death-row population of 2,673. *See* Death Penalty Information Center, https://files.deathpenaltyinfo.org/documents/pdf/FactSheet.f1566566669.pdf (last visited September 4, 2019). California's refusal to require a jury to make the factual findings necessary to impose the death penalty beyond a reasonable doubt has widespread effect on a substantial portion of this country's capital cases.

Second, of the 31 jurisdictions in the nation with the death penalty,

including the federal government and the military, the statutes of nearly all provide that aggravating factors must be proven beyond a reasonable doubt.[7] The statutes of several states are silent on the standard of proof by which the state must prove aggravating factors to the trier of fact.[8] But with the exception of the Oregon Supreme Court,[9] the courts of these jurisdictions have explicitly determined that the trier of fact must find factors in aggravation beyond a reasonable doubt before it may use them to impose a

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[7] *See* Ala. Code § 13A-5-45(e) (1975); Ariz. Rev. Stat. § 13-751(B); Ark. Code Ann. § 5-4-603(a); Colo. Rev. Stat. Ann. § 18-1.3-1201(1)(d); Del. Code Ann. tit. 11, § 4209(c)(3)a.1; Ga. Code Ann. § 17-10-30(C); Idaho Code Ann. § 19-2515(3)(b); Ind. Code Ann. § 35-50-2-9(a); Kan. Stat. Ann. § 21-6617(e); Ky. Rev. Stat. Ann. § 532.025(3); La. Code Crim. Proc. Ann. art. 905.3; Miss. Code. Ann. § 99-19-103; Mo. Ann. Stat. § 565.032(1); Mont. Code Ann. § 46-18-305; Neb. Rev. Stat. § 29-2520(4)(f); Nev. Rev. Stat. § 175.554(4); N.C. Gen. Stat. § 15A-2000(c)(1); Ohio Rev. Code Ann. § 2929.04(B); Okla. Stat. Ann. tit. 21, § 701.11; 42 Pa. Stat. and Cons. Stat. § 9711(c)(1)(iii); S.C. Code Ann. § 16-3-20(A); S.D. Codified Laws § 23A-27A-5; Tenn. Code Ann. § 39-13-204(f); Tex. Crim. Proc. Code Ann. § 37.071 § (2)(c); Va. Code Ann. § 19.2-264.4(C); Wyo. Stat. Ann. § 6-2-102(D)(i)(A), (E)(i); 18 U.S.C. § 3593(c).

[8] *See* Fla. Stat. § 921.141(1), (2)(a); Or. Rev. Stat. Ann. § 163.150(1)(a); Utah Code Ann. § 76-3-207(2)(a)(iv).

[9] *See State v. Longo*, 148 P.3d 892, 905-06 (Or. 2006).

sentence of death.[10] California may be one of only several states that refuse to do so.

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[10] *See State v. Steele*, 921 So. 2d 538, 540 (Fla. 2005); *State v. Gardner*, 947 P.2d 630, 647 (Utah 1997).

Certiorari is necessary to bring California, with the largest death row population in the nation, into compliance with the Fifth, Sixth and Fourteenth Amendments by requiring the state to prove beyond a reasonable doubt the factual findings that are a prerequisite to the imposition of the death penalty.[11]

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[11] Further, if the factual findings set forth above are the functional equivalents of the elements of an offense to which the Fifth, Sixth, and Fourteenth Amendment rights to trial by jury on proof beyond a reasonable doubt apply, then it follows, contrary to the view of the California Supreme Court, that aggravating circumstances must be found by a jury unanimously. Cal. Const. art. I, § 16 (right to trial by jury guarantees right to unanimous jury verdict in criminal cases); *People v. Maury*, 30 Cal. 4th 342, 440 (2003) (because there is no Sixth Amendment right to jury trial as to aggravating circumstances, there is no right to unanimous jury agreement as to truth of aggravating circumstances); *People v. Wolfe*, 114 Cal. App. 4th 177, 187 (2003) and authorities cited therein (although right to unanimous jury stems from California Constitution, once state requires juror unanimity, federal constitutional right to due process requires that jurors unanimously be convinced beyond a reasonable doubt).

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: January 17, 2020

Respectfully Submitted,

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APPENDIX A:

***People v. Capers*, 7 Cal. 5th 989 (2019)**

California Supreme Court Opinion,

August 8, 2019

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,
Plaintiff and Respondent,
v.
LEE SAMUEL CAPERS,
Defendant and Appellant.

S146939

San Bernardino County Superior Court
FBA06284

August 8, 2019

Justice Chin authored the opinion of the Court, in which Chief Justice Cantil-Sakauye and Justices Corrigan, Liu, Cuéllar, Kruger, and Groban concurred.

PEOPLE v. CAPERS

S146939

Opinion of the Court by Chin, J.

A San Bernardino County jury found defendant Lee Samuel Capers guilty of the first degree murders of Nathaniel Young and Consuelo Patrida Young. (Pen. Code, § 187, subd. (a).)[1] As relevant here, the jury found true multiple murder, robbery-murder, and burglary-murder special circumstances. (§§ 190.2, subds. (a)(3), (a)(17), & (a)(17)(G).) The jury found defendant guilty of two counts of second degree robbery (§ 211), arson of property (§ 451, subd. (d)), and felon in possession of a dagger in a penal institution (§ 4502, subd. (a)). The jury found defendant personally used a deadly weapon—a handgun—within the meaning of section 12022.53, subd. (b). The jury separately tried and found defendant's five prior section 211 robbery convictions to be true.

After a penalty trial, the jury returned a verdict of death.[2] The court denied the automatic motion to modify the verdict and imposed a judgment of death. (§ 190.4, subd. (e).) This appeal

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1 All statutory references are to the Penal Code unless otherwise stated.

2 As to the noncapital count of being a felon in possession of a dagger, defendant was sentenced to 25 years to life. The court stayed the sentences on the remaining noncapital counts.

is automatic. (§ 1239, subd. (b).) We affirm the judgment in its entirety.

I. The Facts

A. Guilt Phase

1. Overview

The evidence showed that on Monday, November 9, 1998, defendant and three accomplices entered the Barstow T-shirt shop owned by married couple Nathaniel and Consuelo Young, robbed the store, shot and killed Nathaniel, and raped and beat Consuelo before killing her. They then set fire to both victims' bodies.

Defendant cross-examined prosecution witnesses, but presented no evidence of his own.

2. Prosecution Evidence

Nathaniel and Consuelo, who had been married for seven years, opened a T-shirt store in Barstow called "T's Galore 'N More" in 1998. Consuelo typically managed the store because Nathaniel worked on the Marine Logistics Base nearby.

Ramon Tirado lived behind the T-shirt shop and had known defendant and defendant's half-brother Anthony Leatham for years. Leatham and two other individuals inquired about the Barstow T-shirt shop that the Youngs owned. He asked Tirado to join them in robbing the store. Tirado declined.

On Monday November 9, 1998, Nathaniel did not arrive for his scheduled shift at the base; he had never missed work without first calling. After he missed work the next day, Margaret Carter, the base's comptroller, became concerned. She called his home and left a message on his answering machine. She then asked a superior what to do about her concern. He told her to call the Barstow Police Department and request a welfare check, which she did.

At the same time Margaret called the Barstow police, two of Nathaniel's colleagues at the base, Loretta Becknall and Nancy Derryberry, went to the T-shirt store to check on him. They could not see inside the store because soot covered the windows. The colleagues notified Margaret that there might have been a fire at the store. Margaret again called Barstow police and also spoke to Bonnie Hulse, an investigative assistant for the Criminal Investigation Division of the Marine Corps. Margaret was told to call the Provost Marshal, who had jurisdiction over the military base. The Provost Marshal's Office notified the Barstow Fire Department.

On Tuesday, November 10, 1998, Barstow Fire Department personnel inspected the victims' T-shirt store for signs of a fire. Salvatore Carrao, the Barstow Fire Department Division Chief, and Fire Engineer Steve Ross noticed heavy black soot on the inside of the store windows. They checked the front door, but it did not open. They checked the back door,

which was unlocked, and Carrao opened it to look inside. He immediately saw two corpses and concluded there had been a fire inside. He closed the door, called law enforcement, and secured the store.

Law enforcement soon arrived. Barstow Police Sergeant Andrew Espinoza and criminalist Randy Beasley entered the building. There they found five .45-caliber bullets and only one bullet casing. They also found a trash can that contained blood, water, and a bloody mop. Taken together, Beasley believed these items strongly suggested that someone had attempted to clean up a crime scene. Beasley found a pair of women's panties in a toilet that had been cut straight across, from one leg hole to the other. Beasley also found a wallet and a purse next to each other. The wallet, which belonged to Nathaniel, contained no money or credit cards. Consuelo's purse also contained a wallet, which, like Nathaniel's held no money. One of the bodies, tentatively identified as Nathaniel's, was stained with blood, and duct tape had been wrapped around its throat and neck. The body was partially burned.

Fire inspection specialist Rita Gay was also on the scene. She believed the fire to have been a "slow burn" that did not immediately flame up but smoldered for a long time. Gay observed soot on the furnishings and floor. She saw the two victims on the floor. The male victim lay prone and had golf clubs laying across his back. The female victim was more

severely burned, such that the left side of her body had been largely consumed by fire. Gay detected the odor of gasoline in close proximity to the bodies. Gay did not examine either victim, but concluded that each had been separately set on fire.

Law enforcement personnel identified the second body as likely belonging to Consuelo. Her body had been largely consumed by the fire; much of her remains consisted of ashes and bones. They also discovered a large amount of blood and two metal golf clubs covered in blood. They noticed human hair on the golf clubs and deemed it to have come from Consuelo's head because she had wavy hair while Nathaniel's was more tightly curled. Catherine Wojcik, a sheriff's department criminalist, later compared the hairs found at the crime scene with the hair of both victims. Wojcik determined that the two hairs found on the golf club were similar to samples of Consuelo's hair, though she could not say definitively that they came from Consuelo. She determined Nathaniel was not the source of the two hairs.

Arson investigators later concluded the perpetrators had started two fires, each originating on the body of the two victims. A thick greasy substance was observed on the floor adjacent to the bodies; investigators concluded it might have been the victims' melted body fat.

Charlene Garcia, Nathaniel's daughter, cleaned out the T-shirt store. She informed the police that Nathaniel's gun was the only item she found missing.

Forensic pathologist and deputy medical examiner Dr. Steven Trenkle performed autopsies on both bodies. He testified that Nathaniel had been shot at least four times, and that his body contained eight entrance and exit wounds and had been moderately charred by fire. One bullet had cut through the brain stem and lodged in the base of the skull, and another went through the neck and severed the first cervical vertebrae underneath the skull. None of the injuries were consistent with having been struck with a metal golf club. Dr. Trenkle concluded Nathaniel died as a result of multiple gunshot wounds to the head, neck, and chest.

Dr. Trenkle explained that Consuelo had suffered extensive blunt force trauma and that her body had been significantly burned. As noted, much of her body had been consumed in the fire. The blunt force trauma had shattered the skull and facial bones. Dr. Trenkle concluded Consuelo died as a result of multiple blunt force head injuries. He could not be certain whether Consuelo was alive when her body was burned.

On November 15, 1998, Barstow Police Officer John Cordero notified Barstow Police Detective Leo Griego that defendant wished to speak with Griego about the T-shirt store murders. Griego spoke with defendant, first at defendant's

residence and later at the Barstow Police Department. Defendant denied involvement in the murders, but said he knew two of the people involved.

Lisa Martin became acquainted with defendant a month after the murders. She let defendant stay at her home. During his stay, defendant mentioned four or five times how he killed a man and woman in Barstow. Defendant described how he personally shot the man, poured gasoline on both victims, and lit them on fire. He told Lisa that the woman begged and screamed for her life and that he thought it was funny. He also told her that he committed the crimes with his younger half-brother, Antonio Leatham (whom he called "Eagle"). Lisa testified that defendant kept the lighter he used to set the victims on fire and showed no remorse for killing them. Leatham also came to Lisa's house at one point and defendant mentioned the murders in front of him. Blake Martin-Ramirez, Lisa's 14-year-old son, testified that he heard defendant describe his role in killing the victims and taking their sports car. About a week after defendant told Lisa about the murders, she called defendant's mother and told her to move him out of the apartment.

Griego's investigation focused on defendant and Leatham as suspects. In January 1999, Griego questioned defendant, who was incarcerated at Chino State Prison. Defendant again denied involvement in the crimes.

In December 1999, Griego collected defendant's biological samples so they could be compared to DNA samples obtained from evidence collected at the crime scene. All the DNA collected at the crime scene was matched to either Consuelo or Nathaniel.

Although defendant had denied involvement in the crimes and only talked about who he thought might have committed the T-shirt store murders, his version of events surrounding the murders changed when he met with detectives Steve Shumway and Ronald Sanfilipo on January 5, 2001. The interview, conducted at the Riverside Police Department, came about because defendant's cellmate in Riverside County Jail told authorities that defendant had discussed a Barstow double-murder where the victims had been burned. Griego watched on a video monitor in an adjoining room. After being read and waiving his *Miranda*[3] rights, defendant explained he had asked to speak to them about the murders because it was "something that ha[d] been weighing [him] down."[4]

After a half-hour's conversation, Griego entered the interview room. Defendant again was read and waived his *Miranda* rights, and he and Griego discussed the crimes for 45

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[3] *Miranda v. Arizona* (1966) 184 U.S. 436 (*Miranda*).

[4] These interviews, in redacted form, were played for the jury during trial and entered into evidence as exhibits. (Exh. 78A-83A.) The jury was also provided with transcripts of the redacted recordings. (Exh. 78B-83B.)

minutes to an hour. Defendant was then transported to the Barstow Police Department where detectives Griego and Keith Libby conducted an interview. During that interview, defendant, who was 24 years old (and nicknamed "Oso") at the time of the murders, explained that he committed the crimes with 15-year-old Carlos Loomis (whom he called "Bam-Bam"), 22-year-old Ruben Romero (whom he called "Wino"), and "another guy " (whom he sometimes called "the other juvenile" or "a 14-year-old kid." Defendant consistently asserted the fourth perpetrator was not his half-brother Leatham.[5] He said Loomis and Romero offered him "an ounce of dope and money if he agreed to act as a lookout" during a robbery. Defendant said he agreed to be a lookout because "he was real bad on dope." Defendant maintained that Romero was in charge, and while they were all waiting around before the robbery, defendant went to Barstow Liquor and purchased a 40-ounce beer, half of which he drank immediately. Once the robbery commenced, Loomis

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[5] Apparently, the police knew that Loomis brought a stolen vehicle to the area, and that Romero had committed a robbery at the Downtown Motel, directly across from the Young's store. Detectives Griego and Espinoza contacted Loomis on February 6, 2001, at the former California Youth Authority facility in Paso Robles, California, and Romero on February 9, 2001, at Ironwood State Prison in Blythe, California. Loomis told Griego that he knew nothing about the Young murders. Griego found two rolls of duct tape at Loomis's house, but the tape did not match the duct tape found at the T-shirt store. Neither Loomis nor Romero nor Leatham was charged with the Young robbery and murders.

and Romero verbally and physically abused the victims and "took the couple out of [defendant's] line of sight." About 10 or 15 minutes later, defendant heard gunshots. Loomis and Romero jumped into a blue or white Camaro and told defendant that they were headed to a Motel 6. Defendant then went back to his mother's house.

Detective Libby then told defendant that telling only "a little bit of the truth" would not be good for him, and that it would be best if he told the "whole truth." Libby also said that if defendant wanted him to believe that Leatham was not involved in the murders, he would have to convince him that he was telling them the "complete truth." Defendant then admitted that he entered the store and forced Consuelo and Nathaniel through the store's back door. Defendant claimed that Loomis hit Consuelo with a stick-like object several times. During the beating, Consuelo was pleading: "Stop please. Don't hurt us. Don't hurt us." According to defendant, Romero shot Consuelo before Loomis raped her while she was barely moving and forced Nathaniel to watch. Defendant said that during the rape, Consuelo had screamed "for a little while." During this same interview, defendant said that he beat Nathaniel a number of times after Nathaniel yelled and screamed to protect his wife.

Defendant also said that Romero then shot a .45-caliber firearm with a taped-up handle an unspecified number of times,

but defendant did not say whom he shot, or how he came into possession of the gun. He said, "I know my guns . . . I've been messing with guns for a long time, [so I] knew the caliber . . . right off the top." Defendant also said, "I didn't pull the trigger; I didn't rape nobody; I didn't set nobody on fire." After the rape, beating, and shooting, defendant said either Romero or Loomis used gasoline and a lighter to set the bodies on fire. When asked, defendant said he could not recall anyone cleaning up the crime scene. He also said that someone, probably Loomis, had gathered up the .45-caliber shell casings.

After completing the robbery and murders, defendant said he and the other perpetrators stole a Camaro parked at the store and drove it to a nearby Motel 6, where they went their separate ways. At the end of the interview, defendant agreed to walk the detectives through the crime scene.

The next day, officers taped defendant's reenactment of the crimes at the T-shirt store. Defendant reiterated what he told officers during the interviews the day before and again admitted to beating Nathaniel. At the conclusion of the reenactment, defendant said, "I'm just as guilty as the man who pulled the trigger and the man who started the fire." Defendant said he felt bad for the victims, that "it wasn't supposed to happen that way to them, you know, but that still isn't going to change the fact that I was actually involved here and it's not going to change the fact, yes, I'm expecting a conviction out of

this and whatever I receive, I deserve, that's it. That's all I got to say." Two weeks later, Griego contacted Leatham to speak with him about the murders before transporting Leatham to the Riverside Police Department so that he could speak with defendant before his arraignment on an unrelated offense.

During a subsequent interview on January 25, 2001, defendant took full responsibility for the crimes. Defendant assured detectives that he was now confessing because he wanted to come clean. He admitted that the crimes happened quickly and that he fired the fatal shots. He subsequently disposed of the murder weapon and the shell casings near some railroad tracks. However, he said Loomis poured the gasoline on the victims, and Romero lit them on fire. He also claimed Leatham stayed outside during the murders and did not do anything. He then stated: "But just so you know, get my little brother involved with this, you know, putting him in custody, you know, I mean, where does [Loomis] and [Romero] fall into this? You know what I mean. It seems like this is just a conspiracy against me and him. Me and my brother you know?" After defendant was asked why he wanted to "take the rap" for everyone, defendant replied, "Just charge me with everything, you know what I mean?" He could not remember who he shot, but he did remember that he shot three rounds. He did not want to tell detectives where he got the gun, fearing that his "whole family would be in jeopardy and everything you know what I mean?"

Detectives Griego and Espinoza interviewed defendant one last time at North Kern State Prison on April 16, 2002. Defendant said he met with the group to plan the robbery. During the robbery, defendant took $100 in cash and the keys to the Camaro from Nathaniel's pocket. He also stole Consuelo's wedding ring, trading it for "dope." Since Nathaniel continued yelling during the robbery, the group bound him with duct tape. Defendant then poured gasoline on the victims to scare them into giving him their money. Defendant changed his story to say that Romero then shot the victims, but defendant used a lighter to set them on fire. He said he dropped a match on them but it "didn't ignite." When asked who started the fire, defendant said, "somebody else could have . . . hit them with a match or something, I don't know. I do remember that when I dropped that match it did not go up." He said he did not want to implicate anyone else because he "can't really identify the individuals with me." He also said he did not feel bad for the victims and their families because he was "gonna have to do prison time."

Detective Dennis Florence testified that a shoot-out involving a man named Jerry Corhn occurred in March 2002. Corhn fired on officers as they pursued him following an attempted narcotics transaction at a restaurant in Barstow. Corhn ultimately died from a self-inflicted gunshot wound to the head. Ballistics testing showed that the .45-caliber firearm recovered from Corhn's vehicle matched bullet casings recovered

from the T-shirt store murders. When Griego showed defendant a photo lineup that included a picture of Corhn, defendant pointed to Corhn's picture and said he knew him because Corhn had purchased a firearm from him when he was staying in Barstow.

3. Defense Evidence

Defendant did not testify at trial, nor did he present any evidence. He did attempt to call one witness, Amber Renteria-Kelsey, but she successfully invoked her Fifth Amendment right against self-incrimination, and the court excused her.

B. Penalty Phase

Lisa Martin and her mother, Penny Bartis, testified that on January 4, 2000, a month after he moved out of Martin's home, defendant returned with two other men and committed a home invasion robbery. Defendant knocked on the door. When Bartis answered, defendant burst into the house. His two accomplices followed and took the victims to a back bedroom. Defendant was armed and threatened to kill Martin and her family. He then stole money and personal property. Martin testified that the robbery lasted several hours, and defendant and his accomplices stole $6,000 cash as well as jewelry, expensive vases, a safe, and important papers. Martin explained that after the robbery defendant called her and told her that her son, who was also present during the robbery, was being watched. She subsequently took her son out of school. Bartis testified that after the robbery, she received four or five

phone calls from defendant asking for Martin. Martin fled to Colorado, leaving her son with Bartis.

Misty Sedillo testified that in 1993, when she was 16 years old, she rode with defendant in a car. Defendant and his friends wanted to shoot at a house, but Misty asked them not to because her brother was playing in the front yard. Later during the ride, defendant pointed a gun at Misty's head.

In September 2002, a deputy sheriff found a homemade shank in defendant's jail cell. Defendant said he feared for his life and that he would not hesitate to use the shank and would make another. He also admitted that for two months he smuggled the shank into court because he planned to stab one of the witnesses who was testifying against him. Another deputy sheriff found a letter defendant tried to mail to elected District Attorney Michael Ramos. In the letter, defendant advised the prosecution to give him the death penalty or else there will be "a lot of blood" on the "County's hands." The prosecution also presented evidence of defendant's 1994 felony conviction for receiving stolen property.

Charlene Garcia, Nathanial's daughter and Consuelo's stepdaughter, testified that her parents' murder had a significant negative impact on her and her family.

Defendant presented the testimony of Albert Capers, his biological grandfather. Capers stated that he and his wife adopted and raised defendant, whom they loved.

II. DISCUSSION

A. Issues Regarding Guilt

1. Alleged Lack of Independent Evidence

Defendant initially contends that his statements to law enforcement about his involvement in the T-shirt store crimes were so inconsistent and contradictory that they could not serve as corroboration of one another. He does not challenge the admission of his statements on *Miranda* grounds. However, he contends that because there was no physical evidence or eyewitness testimony to corroborate the trustworthiness of any one of his various confessions, his conviction must be reversed. Defendant relies on the federal common law corroboration rule intended to prevent errors in convictions based on a witnesses' untrue statement alone. (*Opper v. United States* (1954) 348 U.S. 84, 93.) If applied here, the rule means that defendant's admissions or confessions may not serve as the basis for his conviction absent "substantial independent evidence which would tend to establish the trustworthiness of the [admissions or confessions]." (*Ibid.*) However, as part of the federal common law, we are not bound to follow the federal corroboration rule.

Some state courts follow the federal corroboration rule (see, e.g., *Armstrong v. State* (Alaska 1972) 502 P.2d 440, 447), but California does not. We instead apply the corpus delicti rule, which originally required independent proof of an actual crime before extrajudicial admissions could be admitted as evidence. (See *People v. Alvarez* (2002) 27 Cal.4th 1161, 1169-1170

(*Alvarez*).) The rule derives from California common law. (*Id.* at p. 1173.)

In 1982, Proposition 8 abrogated much of the corpus delicti requirement when it added the Right to Truth-in-Evidence provision to article I of the California Constitution. (Cal. Const., art. I, § 28, subd. (d), added by initiative, Primary Elec. (Jun. 8, 1982), commonly known as Prop. 8 (section 28(d).)[6] As *Alvarez* observed, with certain exceptions, Proposition 8 abolished "all state law restrictions on the *admissibility* of relevant evidence, necessarily including the prong of the corpus delicti rule that bars *introduction* of an accused's out-or-court statements absent independent proof a crime was committed." (*Alvarez, supra*, 27 Cal.4th at p. 1179; see *People v. Ray* (1996) 13 Cal.4th 313, 341.) We cautioned that the pre-2008 version of "section 28(d) did not eliminate the independent-proof rule insofar as that rule prohibits *conviction* where the only evidence that the crime was committed is the defendant's own statements outside of court." (*Alvarez, supra*, 27 Cal.4th at p. 1180.) We noted that the amount of independent evidence required is not great and may be circumstantial with only " 'a slight or prima facie showing' " that permits "an inference of injury, loss, or harm from a criminal agency, after which the defendant's statements may be

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[6] Subdivision (d) of section 28 of article I of the California Constitution was redesignated to be subdivision (f)(2) by voter initiative in 2008. (Prop. 9, as approved by voters, Gen. Elec. (Nov. 5, 2008).)

considered to strengthen the case on all issues." (*Id.* at p. 1181.) *Alvarez* made it clear, however, that the pre-2008 version of "section 28(d) did not affect the rule to the extent it (1) requires an instruction to the jury that no person may be convicted absent evidence of the crime independent of his or her out-of-court statements or (2) allows the defendant, on appeal, directly to attack the sufficiency of the prosecution's independent showing." (*Alvarez, supra*, 27 Cal.4th at p. 1180.)

Even though the prosecution need satisfy only one prong of section 28(d)'s post-Proposition 8 requirement, both prongs of original section 28(d) were met here. Specifically, the record shows that the trial court instructed with CALJIC No. 2.72, which informed the jury that defendant's statements to law enforcement must be supported by independent evidence: "No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any confession or admission made by him outside of this trial. [¶] The identity of the person who is alleged to have committed a crime is not an element of the crime nor is the degree of the crime. The identity or degree of the crime may be established by a confession or admission. [¶] The corpus delicti of a felony-based circumstance need not be proved independently of a defendant's extrajudicial statement." Indeed, defendant's words alone may establish the degree of his crime or his identity as the perpetrator. (*People v. Valencia* (2008) 43 Cal.4th 268, 297; *People v. Ledesma* (2006) 39 Cal.4th 641, 721.) The jury was

also instructed that it was the exclusive judge of the truth of defendant's confessions and admissions; the instruction defined both a confession and an admission and instructed that the jury should view any such statements with caution.

The People's showing of a criminal act, independent of defendant's statements, satisfies the corpus delicti rule. Here, there was substantial independent evidence of "injury, loss, or harm by a criminal agency." (*Alvarez, supra*, 27 Cal.4th at p. 1171.) Defendant told law enforcement that he fired the fatal shots that killed one of the victims, hid the .45-caliber gun and bullet casings, poured gasoline on the victims, and lit them on fire. Much of the physical evidence corroborates defendant's statements, including the victims' burnt bodies, .45-caliber bullets and one bullet casing recovered at the scene of the murders, and the ample physical evidence that the victims were beaten before they were killed. As noted, the autopsy concluded Nathaniel died from gunshot wounds and that Consuelo died from blunt force head injuries.

Defendant, however, contends that his well-documented drug and alcohol abuse render all his recollections fatally suspect. Defendant advances a related argument, namely, that his statements were so contradictory, and his history of drug and alcohol abuse, including during the day of the crimes, is so clear, that none of his statements is trustworthy enough to even warrant corroboration. He notes he gave 10 separate

statements to authorities. He recounts that in his first statements to Griego, he denied all involvement in the crimes. Later he claimed only to be a lookout. Still later, he confessed to pouring gasoline on the victims. Similarly, his description of the perpetrators changed over time and was thus unreliable.

Defendant claims that statements of someone with his history of substance abuse, who admitted to being under the influence of drugs and alcohol at the time of the event in question, do not even evidence minimal indicia of reliability and trustworthiness. Additionally, defendant asserts that when he spoke to law enforcement in 2001, he was on "psychotopic [*sic*] medication."

Defendant also contends that his most inculpatory statements to law enforcement were effectively coerced, and thus even less trustworthy than some of his earlier statements because he was threatened with his half-brother's incarceration if he did not tell them what they wanted to hear. Additionally, he claims that his statements to Martin and Bartis lacked trustworthiness because they were biased against him because he robbed them.

Contrary to defendant's argument, considerations of trustworthiness, whether based on his ability to recall or on other factors, are the exclusive province of the jury. (*People v. Anderson* (2018) 5 Cal.5th 372, 404.) Thus, allowing the jury to

judge the relevant evidence did not violate defendant's due process rights. (*People v. Lopez* (2018) 5 Cal.5th 339, 353-354.)

Initially, we note that defendant presents no evidence that investigators either tainted the evidence or coerced defendant's inculpatory statements. Rather, the jury was presented with ample evidence corroborating defendant's inculpatory statements. In addition to the physical evidence that matched defendant's statements, the jury heard Griego testify that law enforcement purposefully withheld from the public certain information about the crimes—e.g., the caliber of the firearm used, that Nathaniel's cause of death was by a firearm, and that Nathaniel had been bound with duct tape. Defendant's statements contained this same information. Defendant also admitted that he and the others stole Consuelo's Camaro and drove it to a nearby Motel 6. As already noted, the car was found in a Motel 6 parking lot about two miles from the crime scene. In addition, Tirado testified that a week before the murders defendant and his brother spoke with him about robbing the victims' T-shirt shop, and Leatham asked if Tirado wanted to participate in the robbery, but Tirado declined. Although Tirado stated at one point that it was Leatham who did most of the talking about planning to rob the T-shirt store, his statement was consistent with defendant's admission that he and his cohorts planned the robbery.

We conclude the corpus delicti rule was satisfied here and that the jury properly considered all of defendant's independent statements regarding his participation in the robbery and murders. To the extent there was inconsistency among defendant's various statements, the court properly left it to the jury to decide the veracity of each statement. This is true whether defendant characterizes some of his statements as voluntary, internalized (from a susceptible or weak defendant), compliant (occurring during police interrogation), false confessions—or as the product of a memory rendered unreliable by years of substance abuse, by sleep deprivation, or by psychotropic drugs. Similarly, we find, despite defendant's argument to the contrary, that his statements contained sufficient indicia of reliability to satisfy what we have described as the Eighth Amendment's "heightened reliability standards for both guilt and penalty determinations in capital cases." (*People v. Cudjo* (1993) 6 Cal.4th 585, 623.)

2. Alleged Due Process Denial

a. Background

The prosecution's trial theory was that four people were involved in the T-shirt store murders: Defendant, Loomis, Romero, and defendant's half-brother, Leatham. The prosecution's case was that defendant's videotaped confessions supported the theory that defendant was the principal actor who had robbed and set fire to the victims.

To support his defense that he was not responsible for robbing, shooting or burning the victims, defendant sought to present the testimony of Amber Renteria-Kelsey (Renteria) who made two statements to Griego (one on May 26, 1999, and one on October 5, 1999) that she had overheard Loomis admit to another gang member nicknamed "Midget" that he and Romero were involved in robbing and burning down the victims' T-shirt store.

On November 1, 1999, Barstow Police Department received two handwritten letters addressed to Griego from Renteria, asserting that "there was no truth" to the statements she made to the detective during their May 26 and October 5, 1999 interviews. The letters did not mention the names of the perpetrators, or specifically describe the crime. They merely stated that Renteria "was pretty much scared because I had already told you one thing and didn't know how to tell you the truth" but she could not go on lying "about this situation." Another letter was sent to Griego in October 2003, in which Renteria again retracted her statements implicating both men, claiming she was on drugs when she made them, "not in [her] right state of mind," and the statements were not true. She told the detective that "What I told you at first about the two people, Bam-Bam [Loomis] and Wino [Romero] is not true."

During the trial's guilt phase and outside the presence of the jury, defense counsel stated that he intended to call Renteria

as a defense witness. Renteria was in custody for an unrelated case and was present in court. The court appointed supervising deputy public defender Mark Shoup to represent Renteria and to determine if her testimony might tend to incriminate her such that she might assert her Fifth Amendment right to remain silent. Later, when the court asked if Renteria's testimony might expose her to criminal prosecution, Shoup stated that Renteria could be charged with committing a misdemeanor offense for falsely reporting criminal offenses to a peace officer. (See § 148.5 [falsely reporting criminal offenses to a peace officer is misdemeanor offense].)[7] Counsel advised Renteria to assert her Fifth Amendment privilege. The court then noted that the prosecution could offer Renteria transactional immunity. However, the prosecutor indicated that the People were not willing to provide immunity in the case. The court upheld Renteria's privilege invocation after concluding that it could not "force her to make statements that may tend to incriminate her." The court ruled that defendant could not call Renteria as a witness. It explained that its ruling was tentative and that it would allow defense counsel to present points and authorities to support defendant's argument. The court noted that it would

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[7] Initially, Shoup stated that false reporting could be a crime under section 148, which actually makes it a crime to verbally resist arrest; but the court understood him to mean Renteria could be charged under section 148.5 for giving a false report to a police officer.

reopen the issue if it found "something different as far as the testimony of Renteria."

During a subsequent discussion outside the presence of the jury, Shoup conceded that Renteria had no basis to assert her Fifth Amendment privilege for the section 148.5 misdemeanor offense of making the false police report to Griego because the one-year statute of limitations for that offense had run. When the court asked the prosecutor for his view whether there was a felony statute that applied to Renteria's statements, the prosecutor stated that he did not know, but that Renteria might be liable as an accessory under section 32. The court responded: "I don't know how realistic [*sic*] she can be an accessory . . . if her initial statement to [Griego] was that something that pointed suspicion at somebody else. I don't know." Defendant's counsel then asserted that Renteria did not have a valid privilege.

Later, the prosecutor told the court that he had spoken to Shoup, and based on that conversation, he believed Renteria would be susceptible to a section 32 charge if her intent was to protect Loomis. He also noted that he was not sure of her intent because he had never spoken with her. Shoup agreed with the prosecutor's section 32 evaluation and noted that Renteria had exposure to the criminal statute because her last contact with Griego was in October 2003, and that if it was determined she lied in 2003, the three-year statute of limitations for a violation

of section 32 had yet to run. Defense counsel argued that Renteria's statement implicating Loomis and Romero would exonerate defendant. When the court asked the prosecutor to explain how Renteria could make a false statement and still be criminally liable for a section 32 violation, the prosecutor hypothesized: "She could have made up that first statement, but still know that he was involved. If she overheard another conversation that she never told Griego about, and then [lied] to Griego when she talked to him in 2003 to protect Loomis," then she could be liable as an accessory under section 32.

Shoup later interjected, "Just so the record's clear here, the only statements that I see that Amber Renteria [attributes] to Bam-Bam [Loomis] is that Bam-Bam said that he had to get out of town because he and his homie, Wino [Romero], had robbed a place on Main Street and the place burned down. And then, Renteria told me that Bam-Bam had also said that he had to burn the place to get rid of evidence. Those are the only statements that I am aware of. There is nothing in that that exonerates this defendant."

Before the commencement of the penalty phase, Renteria again testified under oath, outside the presence of the jury. She repeated her invocation of her Fifth Amendment privilege. The court stated that it would grant Renteria immunity if it had the power to do so in order to resolve the matter, and again asked the prosecutor if his office would grant the witness immunity.

The prosecutor declined, explaining, "If we believe that Renteria had any credibility whatsoever, we would have used [her] statement to file on Carlos Loomis murder charges. We did not do that. We believe she has no credibility at all. That's important to put on the record." The court observed that the case was different from cases in which false testimony led to an erroneous conviction. (See e.g., *Chambers v. Mississippi* (1973) 410 U.S. 284, 298.) The court then upheld Renteria's Fifth Amendment privilege and dismissed her as a defense witness. It concluded that the three-year statute of limitations for a violation of section 32 had not expired, and that Renteria was potentially exposed to criminal prosecution under section 32 for her statements to Griego that she recanted. During the penalty phase, the court similarly ruled that it would not allow the defense to call Renteria.

b. Discussion

Defendant asserts that Renteria's refusal to testify and thereby admit she lied to Griego about defendant's involvement in the T-shirt store murders denied him his due process right to present a defense under the Sixth Amendment. We disagree.

The state and federal constitutions provide that a criminal defendant has the right "to have compulsory process for obtaining witnesses in his favor." (U.S. Const., 6th Amend.; Cal. Const. art. I, § 15.) The federal compulsory process right is "so fundamental and essential to a fair trial that it is incorporated

in the Due Process Clause of the Fourteenth Amendment," making it applicable to the states. (*Washington v. Texas* (1967) 388 U.S. 14, 17-18 (*Washington*).) Under federal law, a denial of the right to present a defense occurs when the exclusion of the evidence infringes "upon a weighty interest of the accused." (*United States v. Schaefer* (1988) 523 U.S. 303, 308.) A weighty interest of the defendant is infringed when "[t]he exclusions of evidence . . . significantly undermined fundamental elements of the accused's defense." (*Id.* at p. 315.)

Our state compulsory process right "is independently guaranteed by the California Constitution" under article 1, section 15, and is "deemed to be at least as broad and fundamental as the federal" right. (*In re Martin* (1987) 44 Cal.3d 1, 30 (*Martin*).) The government violates a defendant's constitutional right to compulsory process when it interferes with the exercise of a defendant's right to present witnesses on his own behalf. (*Ibid.*) A defendant establishes such interference when he or she demonstrates the prosecution intimidated defense witnesses by telling them they could be prosecuted for any crimes they revealed during their testimony. (*Ibid.*) Defendant must also demonstrate the misconduct was a substantial cause of his witness's refusal to testify. (*Id.* at p. 31.) Defendant additionally "must show at least a reasonable possibility that the witness could have given testimony that would have been both material and favorable." (*Id.* at p. 32.) If

a defendant successfully sustains his burden of demonstrating prejudice, the verdict must be reversed. (*Id.* at p. 51.)

In *Martin*, we held that the defendant successfully demonstrated a compulsory process violation. (*Martin*, *supra*, 44 Cal.3d at p. 42.) There, the prosecutor committed prejudicial misconduct when he informed the defense witness's attorney that if the defense witness testified, he would not get immunity and would be prosecuted if he implicated himself in a crime or committed perjury. (*Id.* at pp. 36-37, 40.) We found substantial causation between the misconduct and the defendant's inability to present witnesses on his own behalf because the witness stated he decided to assert his Fifth Amendment right to remain silent after he learned the prosecutor would not grant him immunity and he had an encounter with a district attorney investigator who threatened arrest and got " 'in his face.' " (*Id.* at p. 37.) *Martin* also held the testimony was reasonably " 'material and favorable' " because the witness's statements contradicted the testimony of another witness adverse to the defendant. (*Id.* at p. 42.)

Defendant claims the prosecutor committed prejudicial misconduct when he told Shoup that Renteria could be charged as an accessory under section 32, and that he would not grant Renteria immunity from prosecution on the ground that her statements and retractions were not credible. (See *ante*, at p. 26; *Martin*, *supra*, 44 Cal.3d at pp. 37.) Defendant would have

us find prejudice because Renteria's proposed testimony was material and favorable to the defense because (1) her testimony would have exonerated him, and (2) the prosecutor's actions were a substantial factor in causing Renteria to invoke her Fifth Amendment privilege.

We find no constitutional violation or prosecutorial misconduct. It was Shoup who initially told the court that his client was exposed to potential misdemeanor criminal liability. The prosecutor told the court that Shoup was in the best position to determine any potential criminal liability. He also agreed with Shoup that Renteria had exposure to criminal liability. Later, in answer to a question from the court, the prosecutor opined that Renteria would be exposed to criminal liability under a different statute (§ 32) than that initially identified by Shoup. Shoup agreed with the prosecutor's assertion. There is also no indication that the prosecutor committed misconduct when he refused to grant the witness immunity. He explained to the court that Renteria had no credibility as a witness. As he pointed out, if she had any credibility, the District Attorney would also have charged Loomis with the murders.

In contrast to the trial court in *Martin*, the court here did not deny defendant the right to "put on the stand a witness who was physically . . . capable of testifying . . . and whose testimony would have been relevant and material to the defense." (*Washington*, *supra*, 388 U.S. at p. 23.) Renteria's testimony

would not have exonerated defendant, or been material to his defense, either by tending to prove he did not commit the crimes charged or by diminishing his involvement. In fact, Renteria's proposed testimony would have reiterated the prosecution's theory, based in part on defendant's admissions, that defendant committed the crimes with Loomis and Romero. Even if her statement had been admitted, she could have been impeached with her subsequent recantation and comments that she was on drugs when she implicated Loomis and Romero in the murders. Renteria's decision not to testify, upheld by the court, did not deny defendant the right to present a defense.

3. Alleged Fifth Amendment Privilege

Apart from asserting a compulsory process violation, defendant also claims the court erred in granting Renteria's Fifth Amendment privilege because the statute of limitations to charge her had run on any violation of section 32 before she was to be called as a witness. Defendant asserts that the statute of limitations started running on a section 32 violation in October 1999, when Renteria sent her first retraction letter to the police and not when she retracted her inconsistent statements in October 2003.

The Attorney General responds that defendant forfeited this argument because he did not raise it in the trial court. Defendant effectively concedes he never raised the claim in the trial court but contends he did not forfeit his claim because it is

based on "undisputed facts" contained in one of Griego's reports that states: "Renteria later (on 10-29-99) sent me a letter at the Barstow Police Department 'retracting' her statements." (See *Williams v. Mariposa County Unified School District* (1978) 82 Cal.App.3d 843, 850 [if facts supporting new contention on appeal are undisputed, court may entertain the contention as a question of law on those facts].) Defendant also contends that although defense counsel might have been aware of Renteria's 1999 retraction letter and yet failed to raise it as a defense to her exposure to criminal liability, the prosecution team, including Griego, "had an independent duty to make sure that the trial court was made aware of Renteria's earlier retraction." Defendant's claims fail. Even if we were to assume that Renteria's testimony would have assisted defendant's defense, and that he did not forfeit his claim regarding the 1999 retraction letter, he has stated no constitutional or prosecutorial violations.

The standards governing defendant's contention that the court erred in granting Renteria's Fifth Amendment assertion are well established. The Fifth Amendment privilege provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." (U.S. Const., 5th Amend.; Cal. Const., art. I, § 15.) The high court has held that the privilege "marks an important advance in the development of our liberty." (*Kastigar v. United States* (1972) 406 U.S. 441, 444.) It "must be accorded liberal construction in favor of the right it was

intended to secure." (*Hoffman v. United States* (1951) 341 U.S. 479, 486 (*Hoffman*).) Recognizing that the trial court must determine whether there is reasonable cause for the privilege to extend to the witness, *Hoffman* left it to the court to determine whether the witness's "silence is justified." (*Ibid.*) *Hoffman* instructed: "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.' " (*Id.* at pp. 486-487.) Our state jurisprudence incorporates the broad *Hoffman* standard. (See *People v. Seijas* (2005) 36 Cal.4th 291, 304 (*Seijas*).)

Our Evidence Code implements the privilege as follows: "Whenever the proffered evidence is claimed to be privileged under Section 940 [privilege against self-incrimination], the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him; and the proffered evidence is inadmissible unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege." (Evid. Code, § 404.)

We conclude that the federal and state constitutions supported the trial court's decision to grant Renteria her Fifth Amendment privilege whether or not the court was aware of the 1999 retraction letter that Renteria had sent to Griego. (See *Seijas, supra,* 36 Cal.4th at p. 304.) On review of a witness's successfully invoking the Fifth Amendment privilege, we look only to see whether it is evident from the "implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." (*Hoffman, supra,* 341 U.S. at pp. 486-487.) In fact, a trial court may deny Fifth Amendment privilege only if it is " 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency' to incriminate." (*Id.* at p. 488, italics omitted.) Our state jurisprudence is equally strong in its protection of the right and holds that the Fifth Amendment does not allow "the court to assess the likelihood of an actual prosecution in deciding whether to permit the privilege." (*Seijas, supra,* 36 Cal.4th at p. 305; see Evid. Code, § 404.)

Renteria and her counsel could reasonably have concluded that Renteria would be subject to criminal prosecution under section 32 for her statements to Griego about what she overheard if compelled to testify. Section 32 subjects a person to criminal liability for aiding a principal in avoiding conviction

or punishment for a crime. Renteria's inconsistent statements could have a tendency to incriminate her because it is possible they could have supported a charge that she sought to help Loomis and Romero in avoiding prosecution of the crimes at issue. (See § 32; Evid. Code, § 404.) We find the court did not err when it granted Renteria her Fifth Amendment privilege. (*Hoffman, supra*, 34 U.S. at p. 488.)

We also find that the prosecution did not engage in misconduct in failing to raise Renteria's 1999 retraction earlier during the trial court's colloquy about Renteria's asserted Fifth Amendment privilege. We have held that "[a] prosecutor's conduct violates the federal Constitution when it infects the trial with such unfairness as to make the resulting conviction a denial of due process. Conduct by a prosecutor that does not rise to this level nevertheless violates California law if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Whalen* (2013) 56 Cal.4th 1, 52.) Even though the statute of limitations had passed on Renteria's initial alleged lie to Detective Griego in 1999, it had not passed when she allegedly lied in her second retraction letter of 2003. Here, there is no indication that the prosecutor's conduct rendered the trial so unfair as to deny defendant due process, or that his silence on the issue misled the court in order to persuade it in violation of California law. (*Ibid.*) The prosecutor thoroughly discussed the effect of Renteria's 2003 statement with the court in the presence of

defendant's counsel as well as Renteria's counsel, as discussed *ante*, at pages 25 to 26. Additionally, the prosecution's theory was based on defendant's own statements that he had committed the crimes with Loomis and Romero. There is simply no indication that awareness of the 1999 retraction letter would have changed the court's decision to grant Renteria's right to silence or would have otherwise infected the trial with such unfairness that defendant's conviction amounted to a denial of due process.

B. Issues Regarding Penalty

1. Constitutionality of California's Death Penalty Statute

Defendant asserts numerous challenges to California's death penalty law that we have repeatedly rejected. We reiterate our previous decisions.

a. Whether Penal Code section 190.2 is impermissibly broad

Defendant asks that we reconsider our well-established holding that "special circumstances listed in section 190.2 that render a murderer eligible for the death penalty, which include felony murder and lying in wait, are not so numerous and broadly interpreted that they fail to narrow the class of death-eligible first degree murderers as required by the Eighth and Fourteenth Amendments." (*People v. Brooks* (2017) 3 Cal.5th 1, 114-115; see *ibid.* [upholding the current version of section 190.2 which is very similar to version defendant was convicted under];

People v. Stanley (1995) 10 Cal.4th 764, 842-843.) We decline to do so.

b. Whether Penal Code section 190.3 is arbitrary and capricious

We have repeatedly rejected the claim that section 190.3, factor (a), which requires the jury to consider as evidence in aggravation the circumstances of the capital crime, arbitrarily and capriciously imposes the death penalty under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (See *Brooks*, *supra*, 3 Cal.5th at p. 115.) We decline defendant's request to review our prior holdings.

c. Whether unanimous jury findings are required

As we have many times held, "[t]he jury's reliance on unadjudicated criminal activity as a factor in aggravation under section 190.3, factor (b), without any requirement that the jury unanimously find that the activity was proved beyond a reasonable doubt, does not deprive a defendant of any federal constitutional rights, including the Sixth Amendment right to trial by jury and the Fourteenth Amendment right to due process." (*Brooks*, *supra*, 3 Cal.5th at p. 115.) We have also held that the federal Constitution does not require unanimous jury findings for imposing the death sentence, nor must the jury agree on the existence on any one aggravating factor. (*People v. Hamilton* (2009) 45 Cal.4th 863, 960.) Defendant contends that

we must reconsider these holdings and others, including *People v. Prieto* (2003) 30 Cal.4th 226, 263 (*Prieto*), in light of *Ring v. Arizona* (2002) 536 U.S. 584, 602 (*Ring*), which followed *Blakely v. Washington* (2004) 542 U.S. 296, 303-205 (and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490), to hold that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt before its decision that death is the appropriate sentence.

Defendant makes the same argument as the defendant made in *Prieto*, that *Ring* undermines our previous holdings that: "(1) the jury need not find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt; (2) the jury need not find each aggravating factor beyond a reasonable doubt; (3) juror unanimity on the aggravating factors is not necessary; and (4) written findings are not required." (*Prieto, supra*, 30 Cal.4th at p. 275.) As we explained in *Prieto*, the jury's penalty determination is normative, not factual, and is "analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Ibid.*)

Defendant also asserts that the high court's decision in *Hurst v. Florida* (2016) 577 U.S. ___ [193 L.Ed 2d 504, 136 S.Ct. 626] (*Hurst*), which invalidated Florida's capital sentencing scheme, also invalidates California's capital sentencing scheme.

Like *Ring*, *Hurst* requires a jury to find each fact necessary to impose the death sentence. (*Ibid.*) Further, defendant claims that *Hurst* makes it clear that our sentencing determination violates the Sixth Amendment because it collapses "the weighing finding and the sentence-selection decision into one determination and labeling it 'normative' rather than factfinding" by a jury beyond a reasonable doubt. It does not. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1235 & fn. 16.) Our cases have consistently rejected similar arguments. (*Ibid.*) The California sentencing scheme is materially different from that in Florida, which, in contrast to our death penalty statutes, mandates that the trial court *alone* must find that sufficient aggravating circumstances outweigh the mitigating circumstances. (*Hurst, supra*, 577 U.S. ___ [136 S.Ct. at p. 622]; see Fla. Stat. § 775.082(1).) Once the jury renders a verdict of death, "our system provides for an automatic motion to modify or reduce this verdict to that of life imprisonment without the possibility of parole. (Pen. Code, § 190.4.) At the point the court rules on this motion, the jury 'has returned a *verdict or finding* imposing the death penalty.' " (*Rangel, supra*, 62 Cal.4th at p. 1235, fn. 16.) We do not find that *Hurst* in any way undermines our previous rulings upholding the constitutionality of our death penalty scheme. (See *People v. Becerrada* (2017) 2 Cal.5th 1009, 1038; see also *People v. Brown* (1985) 40 Cal. 3d 512, 541 [jury may reject death sentence even after it has found aggravation outweighs mitigation].)

d. Validity of California's Death Penalty Jury Instructions

i. Reasonable doubt

Defendant contends that the trial court erred when it did not instruct the jury that the prosecution bore the burden of proof. He argues that his "jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence." Alternatively, defendant asserts that if there is no burden of proof, the jury should have been informed that the prosecution has no burden of proof in capital sentencing.

We have never held that the Sixth and Fourteenth Amendments require a jury instruction regarding the burden of proof in capital sentencing. (See *People v. Williams* (1988) 44 Cal.3d 883, 960.) As the Attorney General observes, the only burden of proof applicable at the penalty phase "relates to aggravating evidence of other crimes under factor (b) [*People v. Foster* (2010) 50 Cal.4th 1301, 1364], and aggravating evidence of prior convictions under factor (c). (See *Williams, supra*, 49 Cal.4th at p. 459.)" Otherwise, our cases do not require that a burden of proof be applied to aggravating evidence. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1319.)

ii. Unanimous agreement on aggravating factors

Defendant contends the trial court violated his rights under the Sixth, Eighth, and Fourteenth Amendments when it failed to instruct the jury that it must unanimously agree on the same factors in aggravation. We have "consistently held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749 (*Taylor*).)

The same is true for prior unadjudicated criminal activity. We have repeatedly rejected claims that the jury's findings of prior unadjudicated crimes must be unanimous in relation to evidence admitted under section 190.3, factor (b). (*People v. Foster* (2010) 50 Cal.4th 1301, 1364-1365.)

iii. Alleged vague instructions

Contrary to defendant's assertion, California's death penalty jury instructions are not unconstitutionally vague, because they provide that a jury "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." (CALJIC No. 8.88, italics added.) The " 'so substantial' " language does not violate the Eighth and Fourteenth Amendments. (*People v. Ghobrial* (2018) 5 Cal.5th 250, 292.)

iv. Requiring written findings

We also decline defendant's request that we reconsider our prior holdings that do not require jurors to submit written findings during a capital case's penalty phase. (*Taylor*, *supra*, 52 Cal.3d at p. 749.)

v. Converse principle instruction

Contrary to defendant's view, it is unnecessary for the trial court to instruct the jury that if it determines mitigation outweighs aggravation, it must return a verdict of life without the possibility of parole. (*People v. Kopatz* (2015) 61 Cal.4th 62, 95 (*Kopatz*).)

vi. Jury Unanimity on mitigation

We continue to reject the contention raised here that a jury must be instructed regarding the standard of proof and the lack of a need for jury unanimity as to mitigating circumstances. (*Kopatz*, *supra*, 61 Cal.4th at p. 95, citing *People v. Streeter* (2012) 54 Cal.4th 205, 268.)

vii. Presumption of life instruction

Consistent with our cases, we affirm the view that the trial court, contrary to defendant's argument, is not required to instruct the jury that the law favors a presumption of life in the penalty phase. (See *People v. Arias* (1996) 13 Cal.4th 92, 190.)

viii. Failure to delete inapplicable sentencing factors

As we held in *People v. Cook* (2006) 39 Cal.4th 566, 618, "[th]e trial court has no obligation to delete from CALJIC No. 8.85 inapplicable mitigating factors." We decline to reconsider our decision as defendant requests.

ix. *Failure to instruct that statutory mitigating factors are relevant solely as potential mitigators*

We also decline to reconsider our conclusion that the jury need not be advised which sentencing factors in CALJIC No. 8.85 are aggravating and which are mitigating. As we have held, the court does not need to define the statutory factors because the "nature of those factors is self-evident within the context of each case." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.)

e. Inter-case Proportionality Review

As we have stated before, neither California's death penalty law nor the federal and state constitutions require inter-case proportionality review. (*People v. Virgin* (2011) 51 Cal.4th 1210, 1289-1290; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.)

f. Equal Protection and California's Capital Sentencing Scheme

Consistent with our precedent, California's capital sentencing scheme does not, as defendant contends, violate the Equal Protection Clause of the federal Constitution because capital defendants and noncapital defendants "are not similarly situated." (*People v. Williams* (2013) 58 Cal.4th 197, 295.) Consequently, it is permissible for noncapital defendants to have more procedural protections than capital defendants.

g. International Law

Contrary to defendant's contention, international law does not prohibit application of the death penalty in the United States. Although the United States is a signatory to the International Covenant on Civil and Political Rights, "it signed the treaty on the express condition '[t]hat the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws' " allowing capital punishment. (*People v. Thompson* (2016) 1 Cal.5th 1043, 1130, citing *People v. Brown* (2004) 33 Cal.4th 382, 403-404.)

2. Alleged Cumulative Error

Defendant contends the alleged errors at trial cumulatively make his trial unfair and hence resulted in a miscarriage of justice, violating due process.

Cumulative error is present when the combined effect of the trial court's errors is prejudicial or harmful to the defendant. (*People v. Winbush* (2017) 2 Cal.5th 402, 487; *People v. Hinton* (2006) 37 Cal.4th 839, 897, 913.) Although a defendant is entitled to a fair trial, he or she is not entitled to "a perfect one." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) Even though the cumulative error rule recognizes the value in the efficient administration of justice, it does not elevate it above the protection of individual rights. (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

We conclude that defendant has not established cumulative error. There are no errors to aggregate. The corpus delicti rule was vindicated, and Renteria's failure to testify did not represent a compulsory process violation. The court also did not err prejudicially in sustaining Renteria's Fifth Amendment privilege. Renteria's proposed testimony had no tendency in fact to lessen defendant's criminal culpability and the jury heard overwhelming evidence of defendant's guilt.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment in its entirety.

CHIN, J.

We Concur:

CANTIL-SAKAUYE, C. J.
CORRIGAN, J.
LIU, J.
CUÉLLAR, J.
KRUGER, J.
GROBAN, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion People v. Capers

Unpublished Opinion
Original Appeal XXX
Original Proceeding
Review Granted
Rehearing Granted

Opinion No. S146939
Date Filed: August 8, 2019

Court: Superior
County: San Bernardino
Judge: John M. Tomberlin

Counsel:

Michael J. Hersek and Mary K. McComb, State Public Defenders, under appointments by the Supreme Court, and Peter R. Silten, Deputy State Public Defender, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Holly D. Wilkens, Robin Urbanski and Donald W. Ostertag, Deputy Attorney General, for Plaintiff and Respondent.

APPENDIX B:

People v. Capers **No. S0146939, California Supreme Court**

Denial of Petition for Rehearing,

October 23, 2019

No. S146939

IN THE SUPREME COURT OF CALIFORNIA

REMITTITUR

TO THE SUPERIOR COURT, COUNTY OF SAN BERNARDINO
Case no. FBA06284

THE PEOPLE,
Plaintiff and Respondent,

v.

LEE SAMUEL CAPERS,
Defendant and Appellant.

I, JORGE E. NAVARRETE, Clerk of the Supreme Court of the State of California, do hereby certify that the attached is a true copy of an original judgment entered in the above-entitled cause on August 8, 2019.

WITNESS MY HAND AND OFFICIAL
SEAL OF THE COURT, OCTOBER 23, 2019

JORGE E. NAVARRETE, Clerk

SEAL

By /s/ April Boelk
DEPUTY

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,
Plaintiff and Respondent,
v.
LEE SAMUEL CAPERS,
Defendant and Appellant.

S146939

San Bernardino County Superior Court
FBA06284

ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING

THE COURT:

The opinion in this matter filed on August, 8, 2019 and appearing at 7 Cal.5th 989, is modified as follows:

1. In the first paragraph on page 1006, delete the third full sentence reading, "Another letter was sent to Griego in October 2003, in which Renteria again retracted her statements implicating both men, claiming she was on drugs when she made them, 'not in [her] right state of mind,' and the statements were not true." As modified, the sentence now reads:

> In an interview with Griego in October 2003, Renteria again retracted her statements implicating both men, claiming she was on drugs when she made them, "not in [her] right state of mind," and the statements were not true.

2. In at the first paragraph on page 1010, delete the sentence reading, "Renteria's decision not to testify, upheld by the court, did not deny defendant the right to present a defense." As modified, the sentence now reads:

> Renteria's decision not to testify, upheld by the court, did not deny defendant the right to present a defense nor his Eighth Amendment right to have the jury hear all mitigating evidence at the penalty phase.

3. In the first full paragraph on page 1012, delete the fourth sentence reading, "Even though the statute of limitations had passed on Renteria's initial alleged lie to Detective Griego in 1999, it had not passed when she allegedly lied in her second retraction letter of 2003." As modified, the sentence now reads:

> Even though the statute of limitations had passed on Renteria's initial alleged lie to Detective Griego in 1999, it had not passed when she allegedly lied in her second retraction of 2003.

These modifications do not affect the judgment.

The petition for rehearing is denied.

APPENDIX C:

California Penal Code sections

187, 190, 190.1, 190.2, 190.3, 190.4, and 190.5

West's Annotated California Codes
Penal Code (Refs & Annos)
Part 1. Of Crimes and Punishments (Refs & Annos)
Title 8. Of Crimes Against the Person
Chapter 1. Homicide (Refs & Annos)

West's Ann.Cal.Penal Code § 187

§ 187. "Murder" defined

Currentness

(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

(b) This section shall not apply to any person who commits an act that results in the death of a fetus if any of the following apply:

(1) The act complied with the Therapeutic Abortion Act, Article 2 (commencing with Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code.

(2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.

(3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.

(c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law.

Credits
(Enacted in 1872. Amended by Stats.1970, c. 1311, p. 2440, § 1; Stats.1996, c. 1023 (S.B.1497), § 385, eff. Sept. 29, 1996.)

Notes of Decisions (4336)

West's Ann. Cal. Penal Code § 187, CA PENAL § 187
Current with urgency legislation through Ch. 161 of the 2019 Reg.Sess. Some statute sections may be more current, see credits for details.

End of Document

West's Annotated California Codes
Penal Code (Refs & Annos)
Part 1. Of Crimes and Punishments (Refs & Annos)
Title 8. Of Crimes Against the Person
Chapter 1. Homicide (Refs & Annos)

West's Ann.Cal.Penal Code § 190

§ 190. Punishment for murder; murder of peace officers; shooting firearm from motor vehicle; release on parole

Effective: March 8, 2000
Currentness

(a) Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Except as provided in subdivision (b), (c), or (d), every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 15 years to life.

(b) Except as provided in subdivision (c), every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 25 years to life if the victim was a peace officer, as defined in subdivision (a) of Section 830.1, subdivision (a), (b), or (c) of Section 830.2, subdivision (a) of Section 830.33, or Section 830.5, who was killed while engaged in the performance of his or her duties, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties.

(c) Every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of life without the possibility of parole if the victim was a peace officer, as defined in subdivision (a) of Section 830.1, subdivision (a), (b), or (c) of Section 830.2, subdivision (a) of Section 830.33, or Section 830.5, who was killed while engaged in the performance of his or her duties, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties, and any of the following facts has been charged and found true:

(1) The defendant specifically intended to kill the peace officer.

(2) The defendant specifically intended to inflict great bodily injury, as defined in Section 12022.7, on a peace officer.

(3) The defendant personally used a dangerous or deadly weapon in the commission of the offense, in violation of subdivision (b) of Section 12022.

(4) The defendant personally used a firearm in the commission of the offense, in violation of Section 12022.5.

(d) Every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 20 years to life if the killing was perpetrated by means of shooting a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict great bodily injury.

(e) Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not apply to reduce any minimum term of a sentence imposed pursuant to this section. A person sentenced pursuant to this section shall not be released on parole prior to serving the minimum term of confinement prescribed by this section.

Credits

(Added by § 2 of Initiative Measure approved Nov. 7, 1978, eff. Nov. 8, 1978. Amended by Stats.1987, c. 1006, § 1, (Prop.67, approved June 7, 1988, eff. June 8, 1988); Stats.1993, c. 609 (S.B.310), § 3, (Prop.179, approved June 7, 1994, eff. June 8, 1994); Stats.1996, c. 598 (S.B.1231), § 1; Stats.1997, c. 413 (A.B.446), § 1, (Prop. 222, approved June 2, 1998, eff. June 3, 1998); Stats.1998, c. 760 (S.B.1690), § 6 (Prop. 19, approved March 7, 2000, eff. March 8, 2000).)

Notes of Decisions (98)

West's Ann. Cal. Penal Code § 190, CA PENAL § 190

Current with urgency legislation through Ch. 161 of the 2019 Reg.Sess. Some statute sections may be more current, see credits for details.

End of Document

West's Annotated California Codes
Penal Code (Refs & Annos)
Part 1. Of Crimes and Punishments (Refs & Annos)
Title 8. Of Crimes Against the Person
Chapter 1. Homicide (Refs & Annos)

West's Ann.Cal.Penal Code § 190.1

§ 190.1. Death penalty cases; procedures

Currentness

A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

(a) The question of the defendant's guilt shall be first determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2 except for a special circumstance charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder in the first or second degree.

(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in Section 190.2 has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such proceedings shall be conducted in accordance with the provisions of Section 190.3 and 190.4.

Credits
(Added by § 4 of Initiative Measure approved Nov. 7, 1978, eff. Nov. 8, 1978.)

Notes of Decisions (237)

West's Ann. Cal. Penal Code § 190.1, CA PENAL § 190.1
Current with urgency legislation through Ch. 161 of the 2019 Reg.Sess. Some statute sections may be more current, see credits for details.

End of Document

West's Annotated California Codes
Penal Code (Refs & Annos)
Part 1. Of Crimes and Punishments (Refs & Annos)
Title 8. Of Crimes Against the Person
Chapter 1. Homicide (Refs & Annos)

West's Ann.Cal.Penal Code § 190.2

§ 190.2. Death penalty or life imprisonment without parole; special circumstances

Effective: January 1, 2019
Currentness

(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was convicted previously of murder in the first or second degree. For the purpose of this paragraph, an offense committed in another jurisdiction, which if committed in California would be punishable as first or second degree murder, shall be deemed murder in the first or second degree.

(3) The defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree.

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden, or concealed in any place, area, dwelling, building, or structure, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect, an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or caused to be mailed or delivered, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.

(7) The victim was a peace officer, as defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer, as defined in the above-enumerated sections,

or a former peace officer under any of those sections, and was intentionally killed in retaliation for the performance of his or her official duties.

(8) The victim was a federal law enforcement officer or agent who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a federal law enforcement officer or agent engaged in the performance of his or her duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his or her official duties.

(9) The victim was a firefighter, as defined in Section 245.1, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a firefighter engaged in the performance of his or her duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding. As used in this paragraph, "juvenile proceeding" means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this or any other state, or of a federal prosecutor's office, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(12) The victim was a judge or former judge of any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(13) The victim was an elected or appointed official or former official of the federal government, or of any local or state government of this or any other state, and the killing was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity. As used in this section, the phrase "especially heinous, atrocious, or cruel, manifesting exceptional depravity" means a conscienceless or pitiless crime that is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim by means of lying in wait.

(16) The victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin.

(17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies:

(A) Robbery in violation of Section 211 or 212.5.

(B) Kidnapping in violation of Section 207, 209, or 209.5.

(C) Rape in violation of Section 261.

(D) Sodomy in violation of Section 286.

(E) The performance of a lewd or lascivious act upon the person of a child under the age of 14 years in violation of Section 288.

(F) Oral copulation in violation of Section 287 or former Section 288a.

(G) Burglary in the first or second degree in violation of Section 460.

(H) Arson in violation of subdivision (b) of Section 451.

(I) Train wrecking in violation of Section 219.

(J) Mayhem in violation of Section 203.

(K) Rape by instrument in violation of Section 289.

(L) Carjacking, as defined in Section 215.

(M) To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder.

(18) The murder was intentional and involved the infliction of torture.

(19) The defendant intentionally killed the victim by the administration of poison.

(20) The victim was a juror in any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(21) The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death. For purposes of this paragraph, "motor vehicle" means any vehicle as defined in Section 415 of the Vehicle Code.

(22) The defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang.

(b) Unless an intent to kill is specifically required under subdivision (a) for a special circumstance enumerated therein, an actual killer, as to whom the special circumstance has been found to be true under Section 190.4, need not have had any intent to kill at the time of the commission of the offense which is the basis of the special circumstance in order to suffer death or confinement in the state prison for life without the possibility of parole.

(c) Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4.

(d) Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4.

The penalty shall be determined as provided in this section and Sections 190.1, 190.3, 190.4, and 190.5.

Credits

(Added by § 6 of Initiative Measure approved Nov. 7, 1978, eff. Nov. 8, 1978. Amended by Stats.1989, c. 1165, § 16, (Prop.114) approved June 5, 1990, eff. June 6, 1990; Initiative Measure (Prop.115), approved June 5, 1990, eff. June 6, 1990; Stats.1995, c. 477 (S.B.32), § 1 (Prop. 195, approved March 26, 1996, eff. March 27, 1996); Stats.1995, c. 478 (S.B.9), § 2 (Prop. 196, approved March 26, 1996, eff. March 27, 1996); Stats.1998, c. 629, § 2 (Prop. 18, approved March 7, 2000, eff. March 8, 2000); Initiative Measure (Prop. 21, § 11, approved March 7, 2000, eff. March 8, 2000); Stats.2018, c. 423 (S.B.1494), § 43, eff. Jan. 1, 2019.)

Editors' Notes

VALIDITY

Terms of subd. (a)(14) of this section ("heinous, atrocious, or cruel" special circumstances) were held unconstitutionally vague in the case of People v. Sanders (1990) 273 Cal.Rptr. 537, 51 Cal.3d 471, 797 P.2d 561, certiorari denied 111 S.Ct. 2249, 114 L.Ed.2d 490, rehearing denied 112 S.Ct. 13, 115 L.Ed.2d 1098.

Notes of Decisions (2668)

West's Ann. Cal. Penal Code § 190.2, CA PENAL § 190.2
Current with urgency legislation through Ch. 161 of the 2019 Reg.Sess. Some statute sections may be more current, see credits for details.

End of Document

West's Annotated California Codes
Penal Code (Refs & Annos)
Part 1. Of Crimes and Punishments (Refs & Annos)
Title 8. Of Crimes Against the Person
Chapter 1. Homicide (Refs & Annos)

West's Ann.Cal.Penal Code § 190.3

§ 190.3. Determination of death penalty or life imprisonment; evidence of aggravating and mitigating circumstances; considerations

Currentness

If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The 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 pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(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 conduct 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 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 or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

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

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

Credits

(Added by § 8 of Initiative Measure approved Nov. 7, 1978, eff. Nov. 8, 1978.)

Notes of Decisions (7804)

West's Ann. Cal. Penal Code § 190.3, CA PENAL § 190.3
Current with urgency legislation through Ch. 161 of the 2019 Reg.Sess. Some statute sections may be more current, see credits for details.

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West's Annotated California Codes
Penal Code (Refs & Annos)
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Title 8. Of Crimes Against the Person
Chapter 1. Homicide (Refs & Annos)

West's Ann.Cal.Penal Code § 190.4

§ 190.4. Special findings on truth of each alleged special circumstance; penalty hearing; application for modification

Currentness

(a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to Subdivision (b) of Section 190.1.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that is not true. [1] The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Whenever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of a separate penalty hearing.

In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach an unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by an unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and in the court's discretion shall either order a new jury impaneled to try the issues the previous jury was unable to reach the unanimous verdict on, or impose a punishment of confinement in state prison for a term of 25 years.

(b) If defendant was convicted by the court sitting without a jury the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

(c) If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

(d) In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial, including any proceeding under a plea of not guilty by reason of insanity pursuant to Section 1026 shall be considered an any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11.[2] In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of the death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the People's appeal pursuant to paragraph (6).

Credits

(Added by § 10 of Initiative Measure approved Nov. 7, 1978, eff. Nov. 8, 1978.)

Notes of Decisions (793)

Footnotes

1 So in copy. Probably should read "...that it is not true."

2 Probably should read "Section 1181".

West's Ann. Cal. Penal Code § 190.4, CA PENAL § 190.4

Current with urgency legislation through Ch. 161 of the 2019 Reg.Sess. Some statute sections may be more current, see credits for details.

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West's Annotated California Codes
Penal Code (Refs & Annos)
Part 1. Of Crimes and Punishments (Refs & Annos)
Title 8. Of Crimes Against the Person
Chapter 1. Homicide (Refs & Annos)

West's Ann.Cal.Penal Code § 190.5

§ 190.5. Penalty for persons under 18; imposition of death penalty prohibited

Currentness

(a) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who is under the age of 18 at the time of the commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

(b) The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life.

(c) The trier of fact shall determine the existence of any special circumstance pursuant to the procedure set forth in Section 190.4.

Credits
(Added by § 12 of Initiative Measure approved Nov. 7, 1978, eff. Nov. 8, 1978. Amended by Initiative Measure (Prop.115), approved June 5, 1990, eff. June 6, 1990.)

Notes of Decisions (88)

West's Ann. Cal. Penal Code § 190.5, CA PENAL § 190.5
Current with urgency legislation through Ch. 161 of the 2019 Reg.Sess. Some statute sections may be more current, see credits for details.

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APPENDIX D:

Cited Excerpts of Clerk's Transcript

Case Number : FBA06284 People vs. LEE CAPERS

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STATEMENT OF REASONS FOR DENIAL OF AUTOMATIC
MOTION TO MODIFY SENTENCE PURS TO 190.4 IS ORDERED
FILED AND A COPY INCORPORATED INTO THE MINUTES.

-

PROCEEDINGS
Court has read and considered Probation Officer's Report.
Defendant waives formal arraignment for pronouncement of judgment and states there is no legal cause why judgment should not now be pronounced.

-

DEFENDANT DOES NOT WISH TO MAKE A STATEMENT.

-

Victim statement given by CHARLENE GARCIA in open court.
Probation is DENIED and sentence is imposed as follows:

-

FINDINGS/ADVISALS:
Court fully advises Defendant of Parole Rights.
(AND RIGHTS REGARDING DEATH PENALTY)
Restitution Fine imposed in sum of $10000.00 pursuant to 1202.4 PC, payable to Restitution Fund to be collected by Department of Corrections.
COURT RESERVES FINDING AS TO 1202.45 RESTITUTION
Pursuant to Section 13350, Vehicle Code, the Court finds a motor vehicle WAS NOT used in the commission of the offense.
Court finds Defendant is NOT able to reimburse the County for attorney fees.
The Court finds that the Defendant does not have the present ability to pay the cost of conducting the pre-sentence investigation and preparing
the report pursuant to Section 1203.1(b) of the Penal Code.
Court retains jurisdiction on issue of restitution pursuant to PC1202.46.
Restitution fine imposed in the sum of $1994.24 pursuant to 1202.4PC, payable to the victim VICTIM COMPENSATION BOARD to be collected by Department of Corrections.
Pursuant to PC296(a)(1) the Sheriff is directed to obtain the required samples from the defendant unless the Sheriff verifies that a PC296 sample has
been previously obtained from the defendant and is currently on file.
Court orders buccal collection of DNA sample pursuant to PC296

-

SENTENCING INFORMATION
As to Count 6 the court imposes the indeterminate sentence of 25 years to Life.
Principal count deemed Count # 6.
As to Count 3, the Court imposes the UPPER term of 5 years and 0 months.

654 PC stay GRANTED on Count(s) 3.
As to allegations A1-12022.53(B)PC in count 3 the court imposes the UPPER term of 10 years and 0 months.
PC654 stay granted as to allegation A1-12022.53(B)PC in Count 3.
As to Count 4, the court imposes the 1/3 midterm, for a total of 1 years and 0 months.
654 PC stay GRANTED on Count(s) 4.
As to allegation A3-12022.53(D)PC in count 4 the court imposes the term of 25 years to life.
PC654 stay granted as to allegation A3-12022.53(D)PC in Count 4.
As to Count 5, the court imposes the 1/3 midterm, for a total of 0 years and 8 months.
654 PC stay GRANTED on Count(s) 5.
-
DEATH SENTENCE
Defendant sentenced to Death on Count(s) 1.
Defendant sentenced to Death on Count(s) 2.
-
Credit for timed served (1621 actual + 0 conduct) for a total of 1621 days.
(COURT FINDS DEFENDANT IS NOT ENTITLED TO RECEIVE GOOD TIME WORK TIME CREDIT)
-
Commitment for Judgment of Death signed by the Court this date.
-
COURT ORDERS A TRANSCRIPT OF TODAY'S PROCEEDINGS BE PREPARED AND PORTION REGARDING FINDINGS AND SENTENCE IS ORDERED INCORPORATED INTO THESE MINUTES (COURT REPORTER FRANCES MACIAS TO PREPARE ORIGINAL AND 4 COPIES)
-
CUSTODY STATUS
Case Custody - State Prison
Defendant remanded to the custody of the Sheriff to be delivered to California Department of Corrections at SAN QUENTIN.
Probation Office notified.
========== MINUTE ORDER END ==========

sentence in Counts 3 and 4 must be stayed under 654.

MR. SINFIELD: I disagree with that because we do have multiple murder enhancements too.

THE COURT: I understand there is more than one special circumstance, and it's not a dual use issue, it is in this Court's view a 654 issue, as the defendant has been found guilty of multiple counts, with multiple circumstances, special circumstances and special allegations having been found to be true.

Mr. Saltalamacchia?

MR. SALTALAMACCHIA: Yes, your Honor.

THE COURT: Did you rise for any occasion?

MR. SALTALAMACCHIA: I believe this is pronouncement of sentencing. As a courtesy to the Court, I do tend to rise

THE COURT: Thank you. Special circumstances and special allegations having been found true.

The Court will review the procedural aspects of Mr. Caper's convictions.

On June 12th, 2006, the jury found defendant guilty of two separate counts of murder in the first degree, in Counts 1 and 2, of the Second Amended Information for the murders of Nathaniel Young and Consuelo Partida Young respectively.

In Counts 3 and 4, the defendant was convicted of robbery of Consuelo Partida Young and Nathaniel Young.

In Count 5, the defendant was convicted of arson, and in Count 6 the defendant was convicted of

being a prisoner in possession of a deadly weapon.

The jury found special circumstances to be true that each murder was committed in the commission of a robbery, and in the commission of a comercial burglary, and further found that the defendant was convicted of more than one offense of murder in the first degree.

The jury also found that the defendant discharged a firearm causing death as alleged in Counts 1 and 4, that is specifically the murder and robbery of Nathaniel Young, and that he personally used a firearm as to Count 3, that is the robbery of Consuelo Partida Young.

On June 29th, 2006, the jury returned its verdict of death, finding all five special circumstances true, having found all five circumstances true.

MR. SINFIELD: Three --

THE COURT: Okay. On June 14th, 2006, Mr. Capers the defendant having waived jury trial on bifurcate issues, the Court found true, special allegations as to Count 6, of at least two prior strikes pursuant to Penal Code Section 667(b) through (i) and 1170.12 (a) through (d).

Pursuant to, excuse me, the Court finds no motor vehicle was involved in or incidental to the commission of this offense, was unable to reimburse any costs or fees. The Court does order that he pay a restitution fine of $10,000 to be collected by the Department of Corrections, and the Court will withhold

further ruling on a separate $10,000 fine, parole revocation fine.

The Court will order restitution to the Victim Compensation Board in the amount of $1,194.29. I will order that collected by the Department of Corrections and reserve jurisdiction over other items of actual restitution.

I will order specimens to be collected pursuant to Penal Code Section 296.

For Count 6, violation of Penal Code Section 48502(a), possession of a deadly weapon by a person confined pursuant to Penal Code Section 667(b) through (i) and 1170.12 (a) through (d), Mr. Capers I sentence you to 25-years-to-life.

As to Count 3, to be fully consecutive to Count 6, I am sentencing you to five years in the State Prison, for violation of Penal Code Section 211 robbery.

I find that circumstances to be aggravated as opposed to mitigated or any other finding. I find that the aggravating circumstances include the entire circumstances surrounding the offense careful planning and careful -- excuse me -- I will leave it to the careful planning and premeditation.

That five years will be followed by a period of ten-years-to-life for having -- and that will be fully consecutive for finding of true of the use of a firearm in violation of Section 12022.53(d).

MR. SINFIELD: That's not ten-years-to-life.

It's just a straight ten years.

THE COURT: Thank you.

I am ordering that total 15 year period to be stayed pursuant to 654. Because of the robbery was a special circumstance used by the jury to arrive at the penalty of death.

As to Count 4, consecutive to the above, I am ordering that you will serve one year in the State Prison, which is 1/3rd the mid-term, for violation of Penal Code Section 211 robbery.

To be consecutive to the above, use of a firearm in violation of Section 12022.53(b), I sentence you to 25-years-to-life, for a total commitment of 26-years-to-life, which I order stayed. This stay and all others are pending final determination in review as to Counts 1 and 2.

Again, the stay is because this robbery was a special circumstance considered by the jury in arriving at its sentence of death.

For Count 5, arson in violation of Section 451(d) of the Penal Code as a felony, I sentence you to 1/3rd the mid-term of eight months to be fully consecutive.

As to Counts 1 and 2, the Court is imposing two separate death verdicts -- two separate death commitments, Mr. Capers; for Count 1, the murder of Nathaniel Young, and for Count 2, the murder of Consuelo Partida Young, special circumstances being found true

with the additional special circumstance, multiple murder, that is a commitment -- a conviction of one count of first degree murder and the second first degree murder which could have been a first or second degree.

Today having denied defendant's motion for automatic stay or to reduce the death verdict of the jury, or either death verdicts of the jury to life without the possibility of parole, Lee Samuel Capers it is therefore the judgment and sentence of this Court and it is hereby ordered adjudged and decreed that for the first degree murder of Nathaniel Young, and separate and independently for the first degree murder of Consuelo Partida Young, that you are to be put to death by the administration of a lethal injection or such other procedure that may be subsequently deemed proper and that to occur within the walls of the State Prison at San Quentin, California, in accordance with Penal Code Section 3605 and that a time is to be affixed by the Court in a subsequent warrant of execution.

You are hereby remanded to the care and custody and control of the San Bernardino County Sheriff, to be delivered by the Sheriff within ten days to the Warden of the State Prison at San Quentin for the execution of this sentence.

You are to be held by the Warden at San Quentin pending a determination of your appeal in this matter which is, of course, automatic.

The Sheriff of San Bernardino County is

therefore commanded to transport Lee Samuel Capers to the State Prison at San Quentin and deliver him to the Warden at that prison.

The Warden at San Quentin is further ordered and commanded to hold Lee Samuel Capers in custody pending final decision on his case on appeal and upon the judgment becoming final to carry into affect the judgment of death of this Court -- the judgment of death in this court at a time and on a date to be hereafter affixed by the order of this Court by a subsequent warrant of execution, and for that to be carried out within the State Prison at San Quentin in the manner and means prescribed by law.

The Court will now sign the commitment of judgment of death in open court dated today's date.

Consecutive to the Court's judgment of death, the Court imposes 25-years-to-life for the finding of true, of the personal discharge of a firearm as found as to Count 1.

Pursuant to Penal Code Section 190.6(a), in People versus Ramirez found at 39 Cal.4th, Page 398, I order this sentence of death to be expeditiously carried out and take precedence and priority over any other matters of consideration on appeal.

The defendant's appeal as stated is automatic pursuant to Penal Code Section 1239.

Counsel, is there anything else?

MR. SALTALAMACCHIA: Yes, your Honor, it just