No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LOUIS MITCHELL, JR., *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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QUESTION PRESENTED

Does the mandatory weighing of aggravating and mitigating circumstances under the California death penalty statute—a factfinding determination that serves to increase the statutory maximum for the crime—violate the Fifth, Sixth and Fourteenth Amendments where there is no requirement this determination must be found by a jury beyond a reasonable doubt?

RELATED PROCEEDINGS

People v. Louis Mitchell, Jr., Case No. FSB 051580
Superior Court of San Bernardino County (California).
(Trial judgment entered October 4, 2006)

People v. Louis Mitchell, Jr., Case No. S147335
Supreme Court of California
(Direct appeal, decision issued June 24, 2019)

People v. Louis Mitchell, Jr., Case No. S147335
Supreme Court of California
(Petition for rehearing denied August 28, 2019)

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No. _____

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

LOUIS MITCHELL, JR., *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 Louis Mitchell, Jr. 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 and sentence of death.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were petitioner, Louis Mitchell, Jr., and Respondent, the People of the State of California.

OPINION BELOW

The California Supreme Court issued an opinion in this case on June

24, 2019, reported as *People v. Mitchell*, 7 Cal.5th 561 (2019) (hereafter "*Mitchell*"). A copy of that opinion is attached as Appendix A. On August 28, 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 June 24, 2019 and denied rehearing on August 28, 2019. On November 19, 2019, Justice Kagan granted petitioner's application for extension of time within which to file a petition for certiorari in this case to January 25, 2020. A copy of the letter from the Clerk of the Court notifying petitioner of the extension is attached as Appendix C. 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 D, 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 will 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. California law defines an aggravating factor as "any fact, condition or event attending the commission of a crime which increases its guilt or enormity or adds to its injurious

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[1] All statutory references are to the California Penal Code unless otherwise specified. "CT" refers to the Clerk's Transcript. The cited portions of the Clerk's Transcript are attached as Appendix E.

consequences which is above and beyond the elements of the crime itself." California Jury Instruction Criminal (CALJIC) No. 8.88; see *People v. Steele*, 27 Cal.4th 1230 (2002). Section 190.3 lists the aggravating and mitigating factors the jury is to consider.[2] Pursuant to section 190.3, the jury "shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances."

Under this statutory scheme, the trial court instructed the jurors in

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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.

this case that they "shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances" and could sentence petitioner to death only after 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." 65 CT 17408; CALJIC No. 8.88.[3] Both the wording of the statute and the instruction given to the jurors make clear that the jury must not only weigh the aggravating and mitigating circumstances, but determine whether the aggravating circumstances outweigh the mitigating circumstances.

Apart from section 190.3 factors (b) and (c), California's death penalty scheme does not address the burden of proof applicable to the mandatory factfinding – do the aggravating circumstances outweigh the mitigating circumstances or the factual findings that underly the weighing

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[3] In 2006 the California Judicial Council adopted revised jury instructions known as California Jury Instructions (Criminal), 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 outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified."

determination. It is up to the individual juror to believe in the truth or existence of the aggravating factor in this weighing process.[4] The capital sentencing jury is instructed that the standard of proof for prior violent criminal activity and prior felony convictions – section 190.3 factors (b) and (c) – is beyond a reasonable doubt. *See People v. Montes,* 58 Cal.4th 809, 899 (2014). But under California law proof beyond a reasonable doubt is not required for any other sentencing factor. *Id.* Further, the state high court has also concluded that a capital sentencing jury need not agree on the existence of any one aggravating factor or find a factor unanimously. *See, e.g., People v.*

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[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

Contreras, 58 Cal.4th 123 (2013) (juror unanimity not required for any aggravating factor). 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).[5]

By requiring capital sentencing jurors to make the factual determination that aggravation outweighs mitigation but failing to require that the determination be made beyond a reasonable doubt, California's death penalty scheme violates the Fifth, Sixth and Fourteenth Amendments. 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 three counts of first degree murder of Mario Lopez, Patrick Mawikere and Susano Torres. The jury found petitioner

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[5] In this case, the trial court instructed the jury that "[i]t is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that jury may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose." 65 CT 17398; CALJIC NO. 8.87.

guilty of all three counts of murder with special circumstances (multiple murder), and as to the enhancement that in each offense he had personally and intentionally discharged a firearm. *Mitchell*, 7 Cal.5th at 564.

At the penalty phase the prosecutor focused on the circumstances of the crime. *Mitchell*, 7 Cal.5th at 571. The prosecutor also introduced evidence of petitioner's prior conviction for carjacking, petitioner's crimes the day after the shooting, pointing and firing an empty gun in and around the Del Mar complex, and presented victim impact testimony. *Id.* at 571-574. In mitigation, the defense presented evidence regarding Mitchell's family and childhood, his mental health and his PCP use. *Id.* at 576.

The court then instructed the jury in accordance with the statutory sentencing scheme at issue here. 65 CT 17408; CALJIC NO. 8.88. The jury was specifically instructed that:

> In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you 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.

65 CT 17408; CALJIC No. 8.88. The jury returned a verdict of death and judgment was entered on October 4, 2006. 66 CT 17448.

On direct appeal petitioner argued that California's death penalty scheme violates the Fifth, Sixth and Fourteenth Amendments, citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002) and *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616 (2016), arguing that the weighing determination, whether the aggravating circumstances outweigh the mitigating circumstances, is a factfinding that must be found by a jury unanimously and beyond a reasonable doubt. The California Supreme Court rejected petitioner's claims, stating: "[t]he jury need not make findings beyond a reasonable doubt that aggravating factors were present (other than Penal Code section 190.3, factor (b) or (c) evidence), that they outweighed the mitigating factors, or the factors were substantial enough to warrant a judgment of death . . . ." *Mitchell*, 7 Cal.5th at 588 (citations omitted). The court reiterated that "[t]he jury is not required to unanimously find that certain aggravating factors warrant the death penalty under the federal Constitution . . ." *Id.* (citations omitted). Although not addressed in *Mitchell*,

the state high court has since also rejected the argument that *Hurst* 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).

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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. 292, 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." (Citation omitted.) *Ring*, 536 U.S. at 602, quoting *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.[6]

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[6] 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

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 (the trial court rather than the jury has the task of making 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.

Yet *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 of an aggravating

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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.*

circumstance, but as noted, to the finding of "each fact *necessary to impose a sentence of death*." *Id.* at 619 (emphasis added). And *Ring* shows that it does not matter how a state labels the fact, if it increases a defendant's authorized punishment, it must be found by the jury beyond a reasonable doubt. *Ring*, 536 U.S. at 602.

II. California's Death Penalty Statute Violates *Apprendi*, *Ring* and *Hurst* By Not Requiring That The Jury's Factual Sentencing Findings Be Found Beyond A Reasonable Doubt

California's death penalty statute violates *Apprendi*, *Ring* and *Hurst*. In California, although the jury's final sentencing verdict must be unanimous, § 190.4, subd. (b), California does not require that a finding that aggravating circumstances are so substantial in comparison to mitigating circumstances be found beyond a reasonable doubt. While California law requires the jury and not the judge to make the findings necessary to sentence the defendant to death, *see, e.g.*, *People v. Rangel* 62 Cal.4th at 1235, fn. 16 (distinguishing California's law from that invalidated in *Hurst* on the grounds that, unlike Florida, the jury's verdict is not merely advisory), the law in California is similar in other respects to the statutes invalidated in

Arizona and Florida. In all three states, the sentencer must make an additional factual finding before imposing a death sentence: in California that "the aggravating circumstances outweigh the mitigating circumstances" § 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. Ann. § 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).

Under the principles that animate this Court's decisions in *Apprendi*, *Ring* and *Hurst*, the California death penalty statute should require the jury to make these factual findings unanimously and 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 *Hurst* did not address standard of proof as such, and the state high court claims otherwise, this Court has made clear that weighing

sentencing factors is an essentially factual exercise, within the ambit of *Ring*. As 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 doubt.

Ring, 536 U.S. at 610 (Scalia, J., concurring) (emphasis added); *see also Hurst*, 136 S.Ct. at 622 (in Florida the "critical findings necessary to impose the death penalty" include weighing the 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 decision 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 v. State*, 202 So.3d at 53, 57. There was nothing that separated the capital weighing determination from any other

finding of fact.

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* the 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 question cannot be avoided, as the state high court has done, by merely characterizing the weighing factfinding that is a prerequisite to the imposition of a death penalty as "normative" rather than "factual." *See, e.g., People v. Karis*, 46 Cal.3d 612, 639-640 (1988); *People v. McKinzie*, 54 Cal.4th 1302, 1366 (2012). At end, the inquiry is one of function. *See Ring*, 536 U.S. at 610 (Scalia, J., concurring).

In California, when a jury convicts a defendant of first degree murder, the maximum punishment is imprisonment for a term of 25 years to life. §190, subd. (a) (cross-referencing §§ 190.1, 190.2, 190.3, 190.4 and 190.5). When the jury returns a verdict of first degree murder with a true finding of a special circumstance listed in Penal Code section 190.2, the penalty range increases to either life imprisonment without the possibility of parole or death. § 190.2, subd. (a). Without any further jury findings, the maximum punishment the defendant can receive is life imprisonment without the

possibility of parole. *See, e.g., People v. Banks* 61 Cal.4th 788, 794 (2015) (where jury found defendant guilty of first degree murder and found special circumstance true and prosecutor did not seek the death penalty, defendant received "the mandatory lesser sentence for special circumstance murder, life imprisonment without parole"). Under the statute, a death sentence can be imposed only if the jury, in a separate proceeding, "concludes that the aggravating circumstances outweigh the mitigating circumstances." § 190.3. Thus, under Penal Code section 190.3, the weighing finding exposes a defendant to a greater punishment (death) than that authorized by the jury's verdict of first degree murder with a true finding of a special circumstance (life in prison without parole). The weighing determination is therefore a factfinding. Justice Sotomayor, the author of the majority opinion in *Hurst*, previously found that *Apprendi* and *Ring* are applicable to a sentencing scheme that requires a finding that the aggravating factors outweigh the mitigating factors before a death sentence may be imposed. More importantly here, she has gone on to find that it "is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise

receive: death, as opposed to life without parole." *Woodward v. Alabama*, 571 U.S. at 411 (Sotomayor, J., dissenting from denial of cert.).

Although the state high court characterizes the weighing determination as a normative process, this conclusion was made in the context of the state high court being confronted with a claim that the language "shall impose a sentence of death" violated the Eighth Amendment requirement of individualized sentencing and not whether the weighing determination is a factfinding. *People v. Brown*, 40 Cal.3d 512, 538 (1985). According to the state high court in *Brown*, the weighing requirement provides for jury discretion in both the assignment of the weight to be given to the sentencing factors and the ultimate choice of punishment. As construed by *Brown*, section 190.3 provides for jury discretion in deciding which punishment is appropriate. The weighing decision may assist the jury in reaching its ultimate determination of whether death is appropriate, but it is a separate, statutorily-mandated finding that precedes the final sentence selection. Once the jury finds that the aggravation outweighs the mitigation, it still retains the discretion to reject a death sentence. *See, e.g.*, *People v. Duncan*, 53 Cal.3d 955, 979 (1991). Thus,

the jury under California's death statue is required to make two determinations: the jury must determine whether the aggravating circumstances outweigh the mitigating circumstances, then the jury selects the sentence it deems appropriate. The first step is a factfinding, separate and apart from the second step, even though the state high court characterizes both steps as one normative process.[7] As discussed above, *Hurst*, 136 S.Ct. at 622, which addressed Florida's statute with its comparable weighing requirement, indicates that the finding that aggravating circumstances outweigh mitigating circumstances is a factfinding for purposes of *Apprendi* and *Ring*.

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[7] The revised standard jury instructions, CALCRIM, "written in plain English" to "be both legally accurate and understandable to the average juror" (CALCRIM (2006), vol. 1, Preface, p. v.), makes clear this two-step process for imposing a death sentence:

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances *both* outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.

(CALCRIM No. 766, italics added.)

III. California Is An Outlier In Refusing To Apply The 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 October 1, 2018, California, with over 740 inmates on death row, had one-fourth of the country's total death-row population of 2,721. *See* Death Penalty Information Center at http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (last visited January 7, 2020). 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 29 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.[8] 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.[9] But with the exception of the Oregon Supreme Court,[10] the courts of these jurisdictions have explicitly determined that the trier of fact must find factors in

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[8] *See* Ala. Code 1975 § 13A-5-45(e); Ariz. Rev. Stat. Ann. § 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).

[9] *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). Washington's death penalty law does not mention aggravating factors but requires that before imposing a sentence of death the trier of fact must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. Wash. Rev. Code Ann. § 10.95.060(4).

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

aggravation beyond a reasonable doubt before it may use them to impose a sentence of death.[11] California may be one of only several states that refuse to do so.

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.[12]

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

[12] Further, if the factual findings set forth above are the functional equivalents of 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 23, 2020

Respectfully Submitted,
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APPENDIX A:

***People v. Mitchell*, 7 Cal. 5th 561 (2019),**

California Supreme Court Opinion,

June 24, 2019

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,
Plaintiff and Respondent,
v.
LOUIS MITCHELL, JR.,
Defendant and Appellant.

S147335

San Bernardino County Superior Court
FSB051580

June 24, 2019

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

PEOPLE v. MITCHELL

S147335

Opinion of the Court by Liu, J.

A jury in San Bernardino County convicted defendant Louis Mitchell, Jr., of three counts of first degree murder of Mario Lopez, Patrick Mawikere, and Susano Torres (Pen. Code, § 187, subd. (a); all undesignated references are to this code), and three counts of first degree attempted murder of Juan Bizzotto, Jerry Payan, and Armando Torres (§§ 664, 187, subd. (a)), arising from two shootings committed by Mitchell on August 8, 2005. The jury found true special circumstance allegations that Mitchell committed multiple murders and the enhancements that in each offense Mitchell personally and intentionally discharged a firearm. (§§ 190.2, subd. (a)(3), 12022.53, subd. (d).) The jury returned a verdict of death. The trial court then sentenced Mitchell to death for the three counts of conviction of first degree murder and imposed an additional sentence of 150 years to life in prison for the three counts of conviction of first degree attempted murder and the firearm enhancements. This appeal is automatic. (Cal. Const., art. VI, § 11; § 1239, subd. (b).) We affirm the judgment in all respects.

I. FACTS

A. Guilt Phase

1. Prosecution Evidence

(a) Mitchell and Small's Visit to Car Dealership on August 8, 2005

In August of 2005, Mitchell and Dorene Small were living together in an apartment in Rialto, along with Small's five children and three of Mitchell's children. Small had recently been in a car accident and received a settlement from her insurance company. She intended to use the settlement proceeds to buy another car.

On August 8, 2005, after Small picked up the settlement check from her insurance company, she and Mitchell went to California Auto Specialist (CAS), a used car dealership in Colton, to shop for a replacement vehicle. They arrived at CAS between 10:00 and 10:30 in the morning in Small's white Chevrolet Lumina. Small testified that although she owned the Lumina, it was often driven and used by Mitchell.

At first, they were helped by CAS salesman Juan Bizzotto. Because Bizzotto could not speak English well, he referred them to his colleague, Mario Lopez. Ultimately, Lopez helped Small complete paperwork to purchase a used Dodge Durango truck. According to the testimony of another CAS salesman Jerry Payan, it appeared that Mitchell tried to dissuade Small from buying the Durango because he preferred a larger truck. But Small did not like the bigger truck, and her poor credit status prevented her from qualifying for the more expensive truck that Mitchell preferred.

Mitchell left CAS, leaving Small to finalize the car purchase with Lopez on her own. There was conflicting

testimony as to Mitchell's demeanor when he left Small. Payan recalled that Mitchell was angry with her over her choice. Bizzotto, on the other hand, remembered Mitchell acting "fine" during the deal, despite his disagreement with Small's decision.

Small then told Lopez that she needed to cash a check at a bank in order to make the downpayment. Lopez agreed to allow Small to drive the Durango to the bank, and Bizzotto followed Small in a separate car. On the way back to the dealership, the Durango broke down and could not be restarted. They left the Durango on the side of the road for repairs, and Bizzotto drove Small back to the dealership.

Small testified that she was not upset about the breakdown of the Durango, and Bizzotto confirmed in his testimony that Small had reacted calmly. According to Bizzotto, Small went ahead with the purchase of the Durango, even though she had the right to back out of the deal. Small chose to take a loaner car and allow the dealership to fix the Durango. While still at the dealership, Small called home to tell her son Kenrod Bell that she had bought a car but was not coming home with it because it broke down.

When Small arrived home, Mitchell was not there, and she did not see her Chevy Lumina. Small noticed that Mitchell had left his cell phone, which was unusual for him. Small then left for work, arriving there around 2:30 p.m. But she left shortly thereafter because she was not feeling well, and she returned home around 4:00 p.m.

Around 2:00 p.m., Mitchell called Christina Eyre, who at the time of trial was Mitchell's girlfriend. Eyre testified that she and Mitchell had been in a relationship for about two years, including the time that Mitchell was together with Small. Their

conversation lasted less than five minutes. Mitchell mentioned to Eyre that he and Small had been "screwed over" in a car deal; according to Eyre, Mitchell did not say he was mad, but noted that Small had insisted upon buying the defective Durango. Eyre further stated that she heard Romen Williams, also known as "Chromé," and Small's son Bell in the background.

(b) Shooting at the Car Dealership

Between 2:15 p.m. and 2:30 p.m. on August 8, 2005, Payan, Lopez, and Patrick Mawikere were gathered at Payan's desk facing the window overlooking the car lot. They saw Mitchell return to the dealership driving the same white Lumina in which he and Small had arrived earlier that day. Bizzotto, who was on his desk phone talking with his wife at the time, also noticed Mitchell. Bizzotto saw that Mitchell was not alone; he was accompanied in the Lumina by two other people. Bizzotto described the two as African American men between 25 and 35 years of age; they remained in the car as Mitchell entered the dealership.

There were no customers in the dealership at the time. Payan and Bizzotto both testified that they saw Lopez meet Mitchell at the entrance of the dealership office. Mitchell repeatedly asked Lopez where Small was. Lopez replied that Small had left to go to work. Both Payan and Mawikere stood up, intending to assist Lopez. Although Payan was not alarmed by Mitchell's behavior at this time, Bizzotto testified that Mitchell was excited and angry, in contrast to his behavior earlier that day.

Payan then saw Mitchell pull a gun out of his pants pocket and shoot Lopez. Payan testified that Mitchell was looking at Payan while he shot Lopez. When Payan heard a second

gunshot, he ran toward a window looking to escape. Because Mitchell was standing in front of the only exit, Payan decided to escape by jumping through the closed window. Before he crashed through the window, Payan heard two or three more gunshots and was shot in the right arm. Payan landed between two large cars parked outside the office and crouched between them. Mitchell pointed his gun outside the window and shot at him. Payan heard one or two more gunshots, but he was not hit. As he continued to crouch between the two cars, Payan heard another series of gunshots coming from inside the dealership. He also noticed that Mitchell's white Lumina was in front of him, with a man sitting in the front seat. Payan made eye contact with him, and the man exited the Lumina. According to Payan, the man was a tall, thin African American man, perhaps 18 or 19 years old. Payan saw that this man had his hand down by his side, and it looked like he had a gun. Payan then ran across the dealership lot and across the street, seeking help. Payan ultimately caught the attention of an ambulance and was given medical assistance on the street before being transported to a hospital.

Bizzotto testified that he saw Mitchell push Lopez back from the front door of the dealership as Lopez was attempting to escort him outside, pull out a gun, and shoot Lopez in the abdomen. Bizzotto then saw Payan jump through a window while Mitchell shot at Payan. When Mawikere tried to intervene, Bizzotto saw Mitchell point his gun at Mawikere, and Mawikere asked Mitchell not to shoot him. Mitchell then shot Mawikere in the head and turned toward Bizzotto. Bizzotto attempted to hide underneath his desk, and Mitchell started shooting at him. Bizzotto was shot in the right arm and the right thigh. Mitchell fired another seven times at Bizzotto,

causing Bizzotto to suffer shrapnel wounds to his left leg. After he heard two additional shots, the sound of the door opening, and a car being driven away, Bizzotto emerged from underneath his desk. He saw that Lopez was injured and told him to remain calm. He saw that Mawikere had been shot and was unresponsive. Bizzotto instructed his wife, who was still on the phone, to call 911. Bizzotto also called 911 himself.

John Vasquez was driving by the dealership around 2:30 p.m., when he saw Bizzotto come out of the dealership with blood running down his arm. He testified that Bizzotto was staggering and being assisted by another man who was holding his arm up. Vasquez noticed a broken window and thought that Bizzotto had fallen through it, so he stopped to offer help. Bizzotto told Vasquez that he had been shot by two black men and that he feared for his life.

Responding to the 911 calls, officers from the Colton Police Department arrived at CAS at approximately 2:45 p.m. They found that a window in front of the dealership office had been smashed, and there was a trail of blood outside the window leading south toward the street. Officers encountered Bizzotto outside the dealership and saw that he had been shot in the arm. Bizzotto told them that the person responsible was a black man who had been at the dealership earlier that day to buy a black Durango. Inside the office of the dealership, officers found Lopez lying on the floor on his back, near the front door. Lopez was conscious and in pain from two gunshot wounds but able to relate that a lone black man, who had arrived in a white 1997 Chevy Lumina, had shot him. The officers then found Mawikere behind a desk, dead and facedown with a gunshot wound to the

head. Lopez died later that night at the hospital as a result of three gunshot wounds.

The police interviewed Payan and Bizzotto at the hospital where they were being treated for their injuries. Payan was shown photo displays of two suspects. At first, Payan was unable to cooperate because he was under the influence of morphine. Thereafter, Payan identified a photograph of Mitchell as the shooter. Bizzotto was physically unable to talk to the officer who visited him at the hospital. After his discharge from the hospital, Bizzotto was shown a display of six photographs and identified Mitchell's photograph as the person who shot him.

(c) Shooting at the Yellows Apartment Complex

The Yellows was the colloquial name given to an apartment complex in San Bernardino. On August 8, 2005, around 3:00 p.m, Armando Torres was at the complex visiting his mother and his brother Susano Torres. Mitchell had previously lived at the complex and still visited it frequently. Armando and Susano knew Mitchell from around the complex and had not had any problems with him.

On his way to a friend's apartment, Armando saw Susano speaking to Rita Ochoa through the window of her apartment. Armando told Susano that their mother was looking for him. Armando then went to his friend's apartment, where he smoked methamphetamine.

As Armando came out of his friend's apartment, Mitchell walked towards him and said, "Hey devil, let me talk to you," and repeatedly told Armando to "come here." Armando had an unusual tattoo of horns on his head. Armando testified that Mitchell appeared to be upset. Armando asked what Mitchell

wanted, and Mitchell demanded that Armando come to him. Armando refused and Mitchell pulled out a gun and said, "You fucked up." Mitchell shot at Armando at least three times, hitting him once in the leg as a woman managed to pull him inside her apartment and call 911. Armando stated that he heard more shots fired about 30 seconds later.

Susano was joined by his friend Phillip Mancha, and they were talking to Ochoa outside her window when they heard shots. Mancha climbed through Ochoa's window, and he and Ochoa got down on the ground. Susano went to check what was happening and encountered Mitchell. According to the testimony of another resident of the Yellows, Valerie Hernandez, Mitchell shot Susano. He was with Romen Williams, and one of them said something to the effect of "[f]uck that. That's what they get." Hernandez could not see Mitchell's face because it was obscured by the leaves of a tree in her line of sight, but she saw his body and a gun in his hand when the shots were fired. Then after the shots were fired, she saw Mitchell pull down the gun to his side and walk away between the apartments toward the parking area. Mancha testified that he heard Susano getting hit and yelling for help. Ochoa testified that she looked outside and saw Susano on the ground bleeding from the nose. The bullet passed through both of Susano's lungs, and he died shortly thereafter from internal bleeding. Neither Ochoa nor Mancha identified Susano's shooter.

Just before 3:00 p.m., Rosalba Villaneda, Armando's sister-in-law and a resident of the Yellows, heard several gunshots being fired. She testified that about five minutes later, Mitchell walked by them with a gun in his right hand, unaccompanied. Although Villaneda did not know him by name,

she was familiar with Mitchell. Mitchell then entered a car on the passenger side and left the area.

Shortly thereafter, San Bernardino police officers arrived at the Yellows to respond to the incident. Officer James Voss saw a group of people by Torres, who was lying in a dirt area with no pulse. Voss called for medical assistance. A resident of the Yellows then directed Voss to her apartment, where he found Armando on the floor.

(d) Mitchell's Arrest

On the next day, August 9, 2005, Mitchell went to the Del Mar apartment complex in San Bernardino. He was at Tracy Ruff's apartment, where he and another person were smoking marijuana and cigarettes. Suddenly, Mitchell pulled out his gun and fired it into the air six or seven times. Then Mitchell walked out in front of the apartment complex, waving his gun in the air. A nearby resident, Patricia Conger, saw Mitchell pointing his gun at other cars, people, and houses. Around the same time, another nearby resident, James Morrison, was outside his house working on a car and heard several gunshots. He then saw Mitchell waving a gun, so Morrison ran into his house.

Ruff followed Mitchell to the street and saw Mitchell wave his gun in the air and say, "I killed the devil." Ruff told Mitchell that the police were going to come and asked Mitchell to give him the gun. Ruff returned to the apartments and hid the gun in the tire well of a van in the rear parking structure.

Officer Thomas Adams arrived on the scene, and Mitchell immediately started yelling at him. Officer Adams testified that he made numerous commands that Mitchell ignored. Instead of complying, Mitchell kept approaching the officer and said, "My gun is bigger than yours. Fuck it. I'll just take your gun."

Officer Adams then shot Mitchell in the leg to stop him from advancing.

Officer Kevin Jeffery testified that Mitchell was agitated when officers were handcuffing him and in the ambulance on the way to the hospital. During this time, Mitchell told Officer Joshua Cogswell that if he was going to die, the officer was going to go with him. He also told Officer Jeffery, "God would not judge him for killing the devil."

(e) Forensic Evidence

Criminalist Heather Harlacker located one fired cartridge case outside the CAS office building and 10 more fired cartridge cases and bullet fragments inside the building. According to Harlacker's expert testimony, all 11 cartridge casings were from the same nine-millimeter caliber gun. Seven cartridge casings, all nine-millimeter casings of the same brand, and nine bullet fragments were collected at the Yellows. At the Del Mar complex crime scene, a forensic technician recovered a nine-millimeter gun containing an empty magazine concealed in the wheel well of a van, with Mitchell's DNA on it. Criminalist Kerri Heward concluded that six of the seven cartridge casings had definitely been fired from the same nine-millimeter gun retrieved, and the other cartridge probably was. The technician also recovered a second empty nine-millimeter magazine inside the pocket of Mitchell's pants. Furthermore, Heward opined that the casings recovered from the car dealership, the Yellows, and the Del Mar complex were all fired from Mitchell's gun.

2. Defense Evidence

The defense case focused on inconsistencies in the witness's testimony and the lack of scientific evidence. Defense

counsel argued that Payan's account of Lopez's death conflicted with the medical examiner's findings. Counsel challenged the credibility of Armando's testimony on account of the fact that he was under the influence of methamphetamine and his brother was killed, and additionally pointed out inconsistencies in his recitation of the facts. Counsel also challenged Hernandez's recitation of the facts as inconsistent. Finally, defense counsel underscored that the bullets recovered from the victims could not be matched to the casings at the crime scenes and to Mitchell's gun.

B. Penalty Phase

1. Prosecution Evidence in Aggravation

(a) Criminal Activity Involving Force or Violence

(1) July 10, 1998 Carjacking

The prosecution presented evidence that Mitchell was involved in a carjacking on July 10, 1998. Around 5:30 p.m. on that day, Rebecca Davis and Lupe Chavez were parked at a store in San Bernardino, talking to each other. Chavez was in the driver's seat, Davis was in the passenger seat, and Davis's infant daughter was sitting in between them. Davis noticed two black males talking to each other. One of them approached the driver's side, and the other, Mitchell, approached the passenger's side of the car. The man on the driver's side was wearing brass knuckles and told Chavez to get out of the car. When she refused, he pulled her out of the car and she fell to the ground. Mitchell told Davis to get out and get her baby out of the car, and she complied. The men then drove away in the car.

(2) August 9, 2005 Firing of Gun

The prosecution then presented evidence about the events at the Del Mar complex on August 9, 2005. Around 3:00 p.m.,

Mitchell was in the middle of 19th Street with a gun. Brenda Wierenga and David Roark were in a car on the street at the time. Wieranga saw Mitchell pointing a gun at her and ducked under the steering wheel. Mitchell fired the empty gun five to six times at the car's passenger side where Roark was seated. Mitchell made a number of threatening and racially charged statements at Wieranga and Roark, such as: "Hey, anybody want to come out here and fight me? We can get down right now"; "All you whites and Mexicans stay inside"; and "Where is all my n———?" As Wieranga drove the car away, Mitchell said, "See y'all don't want none." Mitchell then pointed his gun at the sky, took out the clip, and pointed it at his head and said, "See, I'll even shoot myself." He also said to himself, "Go back inside. You all need to go back inside. The devil is talking to me."

Armando DeSantiago, who worked for Federal Express, was delivering a package on 19th Street when he heard gunshots. He testified he saw Mitchell in the middle of the street pointing his gun indiscriminately and yelling, "I'm the devil. I'm going to shoot everybody. Just come out wherever you are." Mitchell saw DeSantiago, pointed the gun at him, said, "I'm going to kill you" and to "get out of there"; Mitchell then pulled the trigger three times from a short distance away. In fear, DeSantiago hid behind his truck.

Mitchell then went back inside the apartment complex and came back out. He was followed by Ruff telling him to calm down. Mitchell and Ruff struggled over the gun and finally Mitchell gave it to him. When the officer arrived, Mitchell walked toward the officer, pantomiming that he had a gun in his hand and was firing it. Mitchell said to the officer, "Come on, you're a cop. You're supposed to kill me." Mitchell was arrested

soon thereafter, and he told an officer to remove his handcuffs and said he would "kick his ass."

(b) Victim Impact Evidence

(1) Murder of Mario Lopez

Rene Lopez, one of Mario Lopez's four sons, testified about his father. Rene described Mario as a caring, happy man. He described Mario as "the best mechanic in the world. The best father. The best grandfather." Mario doted on his grandson and loved spending the holidays with Rene's family. He also loved spending time with his wife Cecelia.

Rene traveled to the hospital when he heard Mario was shot and stayed with him until he died. Since his father's death, Rene said there are "times I lose myself" when he goes through bouts of depression. Rene also misses the relationship his father had with his son.

Cecelia Lopez had been Mario's partner for nine years. She described Mario as a family man, always concerned about his children and grandchildren. She described him as a gentleman and very hardworking.

Since his death, Cecelia had to sell their house, move in with her daughter, and give up her two dogs. Cecelia said that what she missed most about Mario was his presence, his caring, and how he looked after her. For example, he used to remind her to take her medication. Furthermore, she testified that her medical problems have gotten worse since Mario was murdered due to high blood pressure and anxiety.

Payan had known Mario Lopez for over five years. He described Mario as always concerned about everybody else. He

missed Mario's advice and encouragement, like when Mario would tell him not to worry about the small things.

(2) Murder of Patrick Mawikere

Several witnesses testified about the impact of Patrick Mawikere's murder on their lives. Patrick's father, John Mawikere, testified about his son. Patrick had an apartment with his brother Sandy, but often visited his parents on his days off. John testified that Patrick loved working and was very generous with his money. Patrick had a lot of friends; more than 1,600 people attended his funeral. Patrick loved to take his niece and nephew out. Patrick and his mother, Mary Mawikere, were very close; they spoke every day. Mary had to go to counseling to cope with Patrick's death. Payan testified that he had known Patrick for two years, and they became friends. He said Patrick was raised very well by his parents, was hard working, and had set a number of goals for himself.

(3) Attempted Murder of Jerry Payan

Prior to being shot, Payan was a very active person. He testified that he has lost some function in his right arm and is still suffering from the injury to his knee. He testified that he was frustrated and angry because he could no longer do things like hug his wife, hold his children, and play sports with his son. Payan's wife, Doris Payan, described the changes in their lifestyle since the shooting. Instead of spending days off taking their son to the amusement park and doing other activities, they spent that time going to therapy. She further testified that Jerry was no longer the calm person he once was; he used to be jovial and joke with people, but he became easily agitated. He was also uneasy at home; he did not feel safe and often worried that he would not be able to protect her if something happened.

(4) Attempted Murder of Juan Bizzotto

When Bizzotto was shot, he had one-year-old twins. He testified that the injury from his gunshot wound severely limited the use of his right hand and arm such that he could no longer lift his children or feed them with his right arm. Furthermore, Bizzotto's mental and emotional health was adversely affected by the shooting. He testified that he had trouble going out in public. Moreover, he was no longer able to work.

(5) Murder of Susano Torres and Attempted Murder of Armando Torres

Rafaela Navarete testified about her sons, Susano and Armando Torres. She testified that Susano loved playing with her grandchildren and that he helped watch them. She said Susano was a happy child who loved to work with his hands; he liked to take things apart and put them back together. Navarete knew Mitchell, as he was friends with her children and would come by and ask for them. She testified that Mitchell even called her "mom." She was angry at Mitchell and did not understand why he killed Susano. As a result of the stress, she had to go to the hospital. Navarete thereafter moved from the Yellows complex. Following Susano's death, she went to the cemetery every day to visit him, where she cried and talked to him.

Sergio Quintero, Susano and Armando's older brother, also testified. At one point, Susano lived with Quintero in Redlands before Susano moved in with their mother. Quintero said Susano was his friend and they spent a lot of time hanging out together.

Beatriz Lopez, Susano's older sister, recalled that Susano was a good child. Whenever she went to their mother's house, Susano was often playing with the kids. She recalled that when she was cooking, Susano would come up from behind her, hug her, and say, "I love you, sis." She said that she misses everything about Susano and that they had a great relationship. She also testified that this last Christmas, her mother did not want to be with the family and instead spent time alone in her room.

Armando Torres testified that he missed Susano's smile, how Susano used to treat him, and the time they spent hanging out together. He said Susano was a nice person and a good kid. Armando had not returned to the Yellows since the shootings because he did not want to remember it. Armando testified that when he thought about his brother, he used drugs to make his thoughts go away. After the shootings, Armando's methamphetamine use became worse; he testified that he kept "messing up," resulting in further arrests. Armando testified that at the time of his testimony, he was in custody for criminal charges relating to an assault, possession of drugs, and possession of a firearm.

2. Mitigation Evidence

(a) Mitchell's Family and Childhood

Mitchell's mother, Kathy Joiner, was 16 years old when she married Mitchell's father, Louis Mitchell, Sr. Mitchell, the first of their three children together, was born in 1970. Mitchell's father returned from service in the Marines in 1971. Mitchell's parents had a tumultuous marriage and separated three times before their divorce in 1975.

Mitchell and his younger brother, Dante Mitchell, were ages six and five, respectively, when their father went to jail. Mitchell's uncle, John Mitchell, and his wife took Mitchell and Dante in and cared for them. They stayed with John for about four and a half months until the state placed them in the foster system. John described Mitchell's father as an "absentee dad," even to this day. John said that Mitchell's parents were both very young and inexperienced, and incapable of raising children. Joiner testified that she failed her son as a mother.

Dante Mitchell testified that when he was eight and Mitchell was ten, they lived with a couple named Matty and Big Jim until they moved back in with their father. Things began to deteriorate from there, and at their father's request, they went back into foster care. They were then returned to their mother in 1979 and, shortly thereafter, removed from her care when she was arrested for alleged child abuse and neglect. The last time Dante had seen Mitchell was on the morning of August 9, 2005. Mitchell came to Dante's house in Los Angeles just before Dante was leaving for work around 8:00 a.m. He told Dante that he looked like Mitchell's children and that he loved him.

Wendy Williams was Mitchell's stepmother but had been separated from Mitchell's father for about 22 years. She testified that Mitchell and Dante had lived with her and Mitchell, Sr., on two occasions for relatively short periods of time when they were younger. She further testified that Mitchell, Sr., had poor parenting skills and that he did not interact with any of his children. Williams last saw Mitchell when he was 17 years old.

Lashona Blue, with whom Mitchell has three children, also testified. Their children were 11-year-old twins Hasan and Amena, and eight-year-old Mustafa. Blue and Mitchell met in 1994 and lived together in Los Angeles for three to four years. She testified that Mitchell loved their children, was a good father, and never abused her in any way. Blue said she had some great times with Mitchell and their children, and that he was never vicious. She stated that her sons were having problems and acting out because of their father's situation.

Mitchell's daughter Amena testified that she loved her father but knew he was in a lot of trouble. She promised she would stay in touch with him and send him letters.

(b) Mitchell's Criminal and Mental Health History

Mitchell was convicted in August 1988 for unlawfully taking a motor vehicle and placed on felony probation. In December 1989, he was convicted of possession of cocaine for sale. He was arrested in March 1990 for possession of cocaine and convicted in August 1990. Mitchell was arrested in August 1992, and ultimately convicted in November 1992 of possession of cocaine base for sale. His probation for the carjacking offense in 1988 was revoked, and he was sentenced to four years in prison. In December 1996, Mitchell was convicted of possession of marijuana for sale and granted probation. He was convicted of possession of PCP in July 2000, sentenced to two years in prison, and released in January 2002. Thereafter, he was arrested again for possession of cocaine base for sale, convicted in December 2002, and sentenced to prison for four years.

Karen Hofmeister of the University of California, San Diego psychiatry department interviewed Mitchell in June 2004 at the California Institute for Men, in advance of Mitchell being

paroled in order to gather information for the Parole Outpatient Clinic. She wrote in her report that Mitchell appeared depressed.

While still incarcerated, Mitchell came under the care of Dr. William Lawrence, who treated Mitchell for depression and prescribed a number of medications for Mitchell while he was in prison, including the antidepressant Wellbutrin. According to Dr. Lawrence's notes, there did not appear to be any change in Mitchell's mood or mental status from July 2004 to February 2005, and his medication did not change. The last time he saw Mitchell was in March 2005; his mental status exam was, according to Dr. Lawrence, "in essence, normal." He had a diagnosis of dysthymia, or persistent depressive disorder, and was on the same dose of Wellbutrin.

Dr. Nuingyu Kim, a psychiatrist for the Department of Corrections and Rehabilitation, met with Mitchell on June 24, 2005, and Mitchell told him that he had stopped taking Wellbutrin. Before the meeting, Dr. Kim read a brief summary of his social background. It stated that Mitchell had a long history of being institutionalized, abused as a child, and a long history of substance abuse, including PCP. Dr. Kim was concerned that Mitchell stopped taking his medication, but Dr. Kim could not force Mitchell to take it. As a result, they agreed that Mitchell would continue to see Dr. Kim once a month in case he needed medication, but then Mitchell did not show up for his next scheduled appointment.

Parole Agent Steven Day supervised Mitchell for a short period of time and said Mitchell appeared compliant with his parole. He testified that during those three months or so, Mitchell never tested positive for any kind of narcotics. The last

time he was tested was two to three days prior to his arrest for the three murders.

(c) Mitchell's PCP Use

After Mitchell's encounter with the police on August 9, 2005, Dr. Jeff Grange treated Mitchell at the hospital for a gunshot wound and psychiatric symptoms. Mitchell arrived in an almost catatonic state and then later exhibited bizarre behavior. Based on this and the events with the paramedics and law enforcement, Mitchell was tested for drugs. A presumptive urine test was positive for PCP and marijuana. It was Dr. Grange's opinion that Mitchell likely had PCP in his system and that he exhibited behavior consistent with being on PCP. An independent laboratory confirmed that Mitchell had PCP in his system.

Felix D'Amico testified as a drug recognition expert. He said that symptoms of PCP appear almost immediately after smoking it and usually peak two to three hours later. He further noted that clinical symptoms continue for up to four to six hours and that behavioral manifestations continue for up to 11 hours. He noted that because PCP is stored in fatty cells and can be released by adrenaline, behavioral manifestations can reoccur even weeks later. Some of the behaviors he has observed in people under the influence of PCP include being agitated or excited, having hallucinations or delusions, and paranoia. Their vital signs (pulse, body temperature, blood pressure) are extremely high. Other symptoms include abnormal eye movements, blank stare, and inability to verbalize. He testified that these symptoms tend to cycle, such that one moment the individual will be calm and another moment something might set them off. He noted that when PCP is used with marijuana,

a user may experience greater impairment in terms of misperception of time, space, and distance, in addition to the possible symptoms from the PCP. Based on his review, D'Amico stated his opinion that Mitchell was under the influence of PCP on August 9, 2005.

Dr. Alan Abrams examined Mitchell and testified as an expert on psychopharmacology. He also reviewed Mitchell's childhood school records and concluded they were consistent with Mitchell growing up in a highly unstable, abusive, and neglectful home. Mitchell and his siblings were in and out of foster care and group homes because of their mother's abuse and neglect and their father's inability to care for them. As a child, Mitchell tested average to above average in intelligence, but his academic performance was poor.

Review of Mitchell's health records disclosed that Mitchell had a psychiatric diagnosis of dysthymia and was prescribed a variety of antidepressants including Remeron, Paxil, Prozac, and Wellbutrin. Dr. Abrams described dysthymic disorder as a type of depression that people experience when they have been unhappy their whole life, but not to the extremes of contemplating suicide or the inability to get out of bed. People so afflicted "have a lowgrade alienation feeling that something is missing, joylessness." He opined that it usually has to do with genetic predisposition and problems in child rearing.

Regarding PCP, Dr. Abrams said the drug is unlike almost any other abused drug because it makes people catatonic, insensible, and excitable. Dr. Abrams stated his opinion that the level of Mitchell's drug test administered at the time of his arrest — PCP in the amount of 11 nanograms per milliliter — indicated Mitchell most likely smoked a substantial amount of

PCP within the 24 to 72 hours before his arrest. Dr. Abrams explained that Mitchell's blood level of PCP and his irrational, violent, senseless, and out-of-control behavior suggested that after noon on August 8, 2005, Mitchell's behavior was strongly influenced by the effects of PCP. Dr. Abrams noted that one side effect of PCP is that it prevents the formation of memories. Dr. Abrams reported that Mitchell told him only that he "was driving around that day" and that he could not remember any involvement in the shootings. Dr. Abrams stated his view that Mitchell was intoxicated at the time of the shootings, but whether he acted with premeditation or malice "would be up for grabs."

II. GUILT PHASE ISSUES

A. CALJIC Nos. 8.71 and 8.72 Instructional Error

1. Background

Mitchell contends that his convictions for first degree murder, with the special circumstance finding, should be reversed because the jury was instructed incorrectly. Mitchell was found death-eligible based on the multiple-murder special circumstance, which required that he be convicted of at least one first degree murder and one second degree murder in the same proceeding. (§ 190.2, subd. (a)(3).) Mitchell was charged with three murders during the two incidents — first the killing of Lopez and Mawikere at CAS, and thereafter the killing of Susano Torres at the Yellows. The prosecution proceeded solely on the theory that all three homicides were premeditated and deliberate first degree murder. That is the only theory of first degree murder on which the jury was instructed.

At the close of the guilt phase, the trial court gave the jury instructions on voluntary manslaughter, first degree murder,

and second degree murder, as the various possible theories of crimes that the evidence at trial supported. The trial court then gave the jury the 1996 revised versions of CALJIC Nos. 8.71 and 8.72. These instructions concern how the jury is to proceed if it finds reasonable doubt with respect to a greater offense.

The given version of CALJIC No. 8.71 reads: "If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree." The trial court appears to have slightly misstated the language of CALJIC No. 8.71 in its oral pronouncement by using the phrase "but you unanimously agree and you have a reasonable doubt" instead of "but you unanimously agree that you have a reasonable doubt." But there does not appear to be any substantive difference between the two formulations that would have affected the outcome. (See *People v. Osband* (1996) 13 Cal.4th 622, 717 ["as long as the court provides the jury with the written instructions to take into the deliberation room, they govern in any conflict with those delivered orally"].)

The given version of CALJIC No. 8.72 reads: "If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder."

Mitchell contends that the 1996 versions are flawed and that these instructions lowered the prosecution's burden of proof

and undermined the proof beyond a reasonable doubt standard, thereby violating his state and federal constitutional rights. Specifically, Mitchell observes that the versions of the instructions required that in order for the jury to return a verdict on the lesser charge, the jury must "unanimously agree that [they] have a reasonable doubt" as to whether the defendant was guilty of the greater charge or lesser charge. Mitchell contends this conveyed to jurors who harbored reasonable doubt that unless the doubt was shared by all of the other jurors, the duty to give the benefit of the doubt did not arise. As such, this conveyed to the jury that first degree murder was the default finding and thus lowered the prosecution's burden of proof by reassigning the benefit of the doubt to the prosecution.

2. Analysis

A claim of instructional error is reviewed de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.) An appellate court reviews the wording of a jury instruction de novo and assesses whether the instruction accurately states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) In reviewing a claim of instructional error, the court must consider whether there is a reasonable likelihood that the trial court's instructions caused the jury to misapply the law in violation of the Constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 & fn. 4; *People v. Lucas* (2014) 60 Cal.4th 153, 287.) The challenged instruction is viewed "in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner." (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.)

Preliminarily, because Mitchell failed to object below, his state law claims asserting error on the instructions have been forfeited. (See *People v. Bolin* (1998) 18 Cal.4th 297, 327.) But failure to object to instructional error will not result in forfeiture if the substantial rights of the defendant are affected. (§ 1259; *People v. Lucas* (2014) 60 Cal.4th 153, 287.) Here, Mitchell claims that the flawed instructions deprived him of due process, and because this would affect his substantial rights if true, his claim is not forfeited.

In support of his claim, Mitchell cites *People v. Moore* (2011) 51 Cal.4th 386, where we stated that "the better practice is not to use the 1996 revised versions of CALJIC Nos. 8.71 and 8.72, as the instructions carry at least some potential for confusing jurors about the role of their individual judgments in deciding between first and second degree murder, and between murder and manslaughter." (*Id.* at p. 411.) However, we expressly did not decide whether other jury instructions, such as CALJIC No. 17.40, dispel any confusion that might arise from CALJIC Nos. 8.71 and 8.72 because the jury in *Moore* had found true burglary-murder and robbery-murder special circumstances and thus had an alternative basis to find that the defendant was guilty of first degree murder. (*Moore*, at p. 412.)

In this case, unlike in *Moore*, the prosecution only relied on the premeditation theory to prove the charge of first degree murder against Mitchell. We hold that the instructions as a whole made clear the role of the juror's individual judgments in deciding between first and second degree murder, and between murder and manslaughter, thereby negating any potential confusion arising from CALJIC Nos. 8.71 and 8.72.

Mitchell's principal complaint is that the instructions' reference to unanimity confused jurors into thinking that even if they had reasonable doubt as to the greater charge in the instruction, they should defer to another juror's finding of no reasonable doubt. We rejected a similar argument in *People v. Salazar* (2016) 63 Cal.4th 214, 246–248 (*Salazar*). The only pertinent difference between *Salazar* and this case is that the trial court in *Salazar* instructed the jury with CALJIC No. 17.10 and omitted CALJIC No. 2.61. But *Salazar* remains relevant and instructive in its determination that "while we have disapproved the unanimity terminology in the 1996 revised versions of CALJIC Nos. 8.71 and 8.72 because of the potential for confusion, the instructions were not erroneous in this case *when considered with the rest of the charge to the jury*." (*Salazar*, at p. 248, italics added.) Mitchell contends that the instructions conveyed that "[i]f just one juror was convinced the homicides were the greater offense, then the other eleven jurors, who did have doubt that it was murder or first degree murder, would have no obligation to vote for the lesser offense." However, the jury was instructed with CALJIC No. 17.40, which made clear that "[t]he People and the defendant are entitled to *the individual opinion of each of you. . . . Each of you must decide the case for yourself*, but do so only after discussing the evidence and the instructions with your fellow jurors." (Italics added.) (See *People v. Buenrostro* (2018) 6 Cal.5th 367, 430 ["In the scenario defendant envisions, a jury's reasonable understanding of the instructions as a whole would result in a hung jury, not a directed verdict for first degree murder"].)

Mitchell's further arguments that CALJIC Nos. 8.71 and 8.72 improperly shifted the burden from the prosecution or set first degree murder as the default finding are similarly

unavailing. With regard to the prosecution's burden of persuasion, the jury was instructed with CALJIC No. 2.61, which made clear that the prosecution must prove beyond a reasonable doubt every element or charge against Mitchell. Also, in addition to CALJIC Nos. 8.71 and 8.72, the jury was instructed with CALJIC No. 8.74, which explains the determinations that the jury must unanimously make in order to render a guilty verdict for first degree murder: "Before you may return a verdict in this case you must agree unanimously not only as to whether the defendant is guilty or not guilty, but also if you should find him guilty of an unlawful killing, you must agree unanimously as to whether he is guilty of murder of the first degree or murder of the second degree or voluntary manslaughter." This instruction makes clear that the jury must unanimously find that the defendant was "guilty of murder of the first degree or murder of the second degree or voluntary manslaughter," without preferring any of the options.

Mitchell argues that these other instructions fail to rectify the potential confusion because CALJIC Nos. 8.71 and 8.72 are the more specific instructions and thus, insofar as there was an inconsistency between CALJIC Nos. 8.71 and 8.72 and other instructions, the jury would have applied CALJIC Nos. 8.71 and 8.72. This is mistaken. Although it is true that CALJIC Nos. 8.71 and 8.72 are more specific in addressing the crimes with which Mitchell was charged, they are not more specific than CALJIC Nos. 17.40, 2.61, and 8.74 in addressing the subject matter at issue.

For each of the possible sources of confusion identified by Mitchell in CALJIC Nos. 8.71 and 8.72, the other jury instructions — CALJIC Nos. 17.40, 2.61, and 8.74 — addressed

those points more specifically: As to any potential confusion about whether each juror was to exercise his or her individual judgment or defer to another juror's judgment on whether there is reasonable doubt that Mitchell committed the greater crime, CALJIC No. 17.40 made clear that jurors are required to exercise their individual judgment in making this determination. CALJIC No. 2.61 more specifically addressed whether the prosecution bore the burden of proving the elements of the greater crimes; it expressly stated that the prosecution bears the burden to prove beyond a reasonable doubt every element or charge against Mitchell. And CALJIC No. 8.74 more specifically addressed whether the jury is to treat first degree murder as the default finding; it explained that the jury must be unanimous in deciding whether the defendant is guilty of first degree murder, second degree murder, or manslaughter, with no default among them. (See *People v. Gomez* (2018) 6 Cal.5th 243, 302 [any juror confusion arising from CALJIC No. 8.71 was remedied by CALJIC Nos. 17.40 and 8.74].)

We find no error in the jury instructions because when they are viewed as a whole, there is no reasonable likelihood that they caused the jury to misapply the law in violation of the Constitution.

B. CALJIC No. 8.73.1 Instructional Error

1. Background

Mitchell next contends that the trial court erred in refusing to instruct the jury pursuant to CALJIC No. 8.73.1. On August 3, 2006, at the guilt phase jury instruction conference, defense counsel requested that the trial court give CALJIC No.

8.73.1. That instruction states: "A hallucination is a perception that has no objective reality. [¶] If the evidence establishes that the perpetrator of an unlawful killing suffered from a hallucination which contributed as a cause of the homicide, you should consider that evidence solely on the issue of whether the perpetrator killed with or without deliberation and premeditation." (CALJIC No. 8.73.1.)

Without immediately deciding the question, the trial court first noted that there was no medical evidence that Mitchell was hallucinating, but that there was evidence that Mitchell was "yelling about shooting the devil" and that Armando Torres had tattoos of horns on his head. The prosecutor argued that because Armando actually had horn tattoos, Mitchell's statements about shooting the devil were not hallucinations. Defense counsel countered that despite the tattoos, Mitchell's statements about shooting the devil did not necessarily refer to Torres. The prosecutor agreed that Mitchell may not have been referring to Armando. The trial court then deferred deciding the issue to hear counsel's arguments on the applicability of *People v. Padilla* (2002) 103 Cal.App.4th 675, a case cited in reference to CALJIC No. 8.73.1.

On August 7, 2006, when the trial court revisited the issue, defense counsel informed the trial court that Mitchell had instructed him "not to present a psychiatric defense or a drug defense" at the guilt phase and that he had decided for tactical reasons not to oppose his client's decision. However, defense counsel stated that he was still requesting that CALJIC No. 8.73.1 be given. The prosecutor maintained that the evidence only arguably showed that Mitchell might have been under the influence of some drug on August 9, 2005, the day after the

charged homicides. Thus, the prosecutor argued that the instruction was irrelevant. The trial court agreed and refused to give the instruction.

Mitchell argues that there was evidence that he was suffering from hallucinations during the shootings of August 8, 2005, evidenced by the fact that he called Armando "devil" and that he was behaving erratically the next day, including making statements that he had killed the devil. Accordingly, he claims that the jury should have been instructed and consequently could have determined that there was no deliberation or premeditation in the homicides. Mitchell claims that the trial court's denial of his requested instruction violated state law and his due process right to a fair trial and a meaningful opportunity to present a defense.

2. Analysis

In general, a trial court must give a requested jury instruction if there is substantial evidence in the record supporting such an instruction. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1008 [so holding with respect to instructions on lesser included offenses].) "In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.' " (*People v. Salas* (2006) 37 Cal.4th 967, 982.) "On appeal, we likewise ask only whether the requested instruction was supported by substantial evidence — evidence that, if believed by a rational jury, would have raised a reasonable doubt as to" an element of the crime in question. (*People v. Mentch* (2008) 45 Cal.4th 274, 288.

Here, there was not sufficient evidence to warrant the trial court giving the requested instruction at the time of the request. Mitchell points to only two facts that could support the requested instruction: (1) that he called Armando Torres "devil" before shooting him; and (2) that he was behaving erratically, possibly under the influence of PCP, on the day after his shooting sprees, including making statements that he had killed the devil. Notably, at the guilt phase, counsel chose not to present a psychiatric or drug defense and did not dispute the trial court's statement that there was no medical evidence of hallucination.

The fact that Mitchell called Armando "devil" does not alone provide sufficient evidence that Mitchell was hallucinating. In using the term "devil," Mitchell may have been referring to Armando because of his horn tattoos. Moreover, although Armando initially testified on direct examination that Mitchell had never called him the devil before, later on redirect Armando stated that Mitchell "always" called him the devil despite Armando telling him not to.

Mitchell's erratic behavior on the day after the shootings also does not show he was suffering from hallucinations. Even assuming Mitchell was under the influence of PCP on August 9, 2005, both parties agree that there is no medical evidence in the record to indicate that he was under the influence on the day of the shootings. Mitchell also presented no evidence that he had suffered hallucinations during any prior use of PCP. Mitchell notes he was "crazily" shooting his gun into the air, screaming about killing the devil and being the devil, and saying that God would not judge him for killing the devil. But Mitchell's indiscriminate shooting into the air does not imply he was

hallucinating, and his usage of the word "devil" does not imply that he was in fact perceiving a "devil" as opposed to simply referring to the concept or referring to Armando by a nickname.

The cases Mitchell relies upon to support this claim offered significantly more compelling evidence that a defendant suffered from hallucinations, including medical evidence. (See *People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437, 1444 [medical evidence showed defendant was diagnosed with major depression with "psychotic features, including delusions," and defendant testified that he suffered specific hallucinations in which he witnessed the victim transforming into the devil]; *People v. Duckett* (1984) 162 Cal.App.3d 1115, 1118 [medical expert testified that defendant suffered from chronic paranoid schizophrenia and that defendant experienced " 'command hallucinations' " in an "acute phase" of his illness at the time of the killing]; *People v. Pennington* (1967) 66 Cal.2d 508, 512 [medical expert testified, in the context of assessing defendant's competence for trial, that defendant was suffering from hallucinations indicative of schizophrenia and stated that "he had observed defendant go into a fit of 'psychotic furor' "].)

It is of course possible that Mitchell was hallucinating, but a mere possibility is not enough. There must be substantial evidence to warrant the instruction. In light of the absence of evidentiary support for Mitchell's argument, coupled with the support for the alternative explanation, we believe no reasonable jury would have credited Mitchell's explanation. The trial court's refusal to instruct the jury with CALJIC No. 8.73.1 did not deny Mitchell his due process rights to a fair trial or a meaningful opportunity to present a defense.

C. Cumulative Error at the Guilt Phase

Because we reject Mitchell's claims of error at the guilt phase, there is no cumulative error requiring reversal of his convictions.

III. Penalty Phase Issues

A. CALJIC No. 2.20 Instructional Error

1. Background

Mitchell contends the trial court erred at the penalty phase by failing to instruct the jury properly on witness credibility. At the jury instructions hearing for the penalty phase, the trial court discussed CALJIC No. 2.20, the jury instruction addressing what jurors may consider in assessing witness credibility. That pattern instruction says: "Every person who testifies under oath [or affirmation] is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness. [¶] In determining the believability of a witness you may consider anything that has a tendency reasonably to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following: [¶] The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness testified; [¶] The ability of the witness to remember or to communicate any matter about which the witness has testified; [¶] The character and quality of that testimony; [¶] The demeanor and manner of the witness while testifying; [¶] The existence or nonexistence of a bias, interest, or other motive; [¶] The existence or nonexistence of any fact testified to by the witness; [¶] The attitude of the witness toward this action or toward the giving of testimony[.][;] [¶] [A statement [previously] made by

the witness that is [consistent] [or] [inconsistent] with [his] [her] testimony][.][;] [¶] [The character of the witness for honesty or truthfulness or their opposites][;] [¶] [An admission by the witness of untruthfulness][;] [¶] [The witness' prior conviction of a felony][;] [¶] [Past criminal conduct of a witness amounting to a misdemeanor][;] [¶] [Whether the witness is testifying under a grant of immunity]." (CALJIC No. 2.20.)

The last six paragraphs of CALJIC No. 2.20 may be omitted based on the evidence presented at trial. In discussion with counsel, the trial court reviewed whether evidence supported the inclusion of any of the six bracketed paragraphs in the instruction. The trial court stated that "no witness had a felony conviction," defense counsel agreed, and the prosecutor remained silent. As a result, the trial court fashioned an instruction, ultimately delivered to the jury, which eliminated the last six paragraphs of the pattern CALJIC No. 2.20 instruction, as well as the reference to "affirmation" in the instruction's introductory paragraph.

It appears that the trial court and the parties failed to recall that witness Armando Torres, who testified for the prosecution at the guilt phase and would testify at the penalty phase, had admitted that he had been convicted of felony robbery. As a result, the penalty phase jury was not instructed that a witness's prior conviction of a felony bore on his credibility, as set forth in CALJIC No. 2.20 and CALJIC No. 2.23. Although the jury did receive the version of CALJIC No. 2.20 containing the language pertaining to felony convictions as well as CALJIC No. 2.23 at the guilt stage, the jury was specifically instructed at the penalty phase to disregard the guilt phase instructions.

Consequently, Mitchell contends the incomplete instructions denied his state and federal constitutional rights to a fair penalty trial, due process, and a fair penalty determination mandating the reversal of his death judgment. We reject this claim, as the error in failing to reinstruct on principles relating to evaluating the credibility of a witness in the penalty phase was harmless beyond a reasonable doubt.

2. Analysis

"A trial court has a sua sponte duty to 'instruct on general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case,' including instructions relevant to evaluating the credibility of witnesses." (*People v. Blacksher* (2011) 52 Cal.4th 769,845–846; see also §§ 1093, subd. (t), 1127.) This duty includes giving correct instructions regarding the credibility of witnesses. As we have stated, "[T]he court should give the substance of CALJIC No. 2.20 in every criminal case, although it may omit factors that are inapplicable under the evidence." (*People v. Horning* (2004) 34 Cal.4th 871, 910.)

As discussed, Mitchell's counsel assented to the trial court's formulation of CALJIC No. 2.20, omitting the bracketed language regarding a witness's prior felony convictions. Therefore, any claim of state law error has been forfeited and has not been preserved for appeal. (*People v. Bolin, supra*, 18 Cal.4th at p. 328.) That said, under section 1259, a reviewing court has the authority to review any question of law involving an instruction if the defendant's substantial rights were affected, notwithstanding a failure to preserve the issue for appeal. Thus, we will consider Mitchell's claim that the

omission of the portion of CALJIC No. 2.20 was constitutional error.

Here, any error in the failure to instruct the jury on the impact of a felony conviction on a witness's credibility was undoubtedly harmless beyond a reasonable doubt. The jury was aware that Armando was a felon, as he testified at the guilt phase that he had a prior felony conviction for robbery. The jury was instructed that it could consider evidence from any phase of the trial, and although the jury was not specifically instructed about the impact of felony convictions on a witness's credibility, the jury was instructed that it could "consider anything that has a tendency reasonably to prove or disprove the truthfulness of the testimony of the witness." Thus, the jury was well appraised of Armando's felony conviction and equipped to assess Armando's credibility in light of his criminal past.

Moreover, the subject of Armando's testimony at the penalty phase was not controversial. Armando testified that he liked his younger brother and missed him. He testified that when he thinks about his brother, he uses drugs to make his thoughts go away, that his methamphetamine use has gotten worse, and that as a result he has ended up in custody. The jury was also made aware that Armando was currently in custody relating to charges involving great bodily injury, drugs, and a firearm. The fact that Armando was a convicted felon at the time of his testimony bore little relevance to the subject of his testimony about how Susano's murder had affected his life. Furthermore, given what the jury knew about Armando's drug use and criminal behavior, the fact that his prior felony conviction was not specifically called to the jury's attention had marginal relevance in negatively impacting Armando's

credibility. Consequently, it is not reasonably possible that the jury would not have returned a death verdict had it been expressly told it could consider Armando's felony conviction in assessing his credibility.

B. Constitutionality of California's Death Penalty Statute

Mitchell raises several constitutional challenges to California's death penalty scheme. We have rejected these claims before, as follows, and we decline to revisit our prior holdings:

"The death penalty law adequately narrows the class of death-eligible defendants." (*People v. Boyce* (2014) 59 Cal.4th 672, 723; *Salazar*, *supra*, 63 Cal.4th at p. 255.)

Consideration of the circumstances of the crime during the penalty phase pursuant to section 190.3, factor (a), does not result in an arbitrary and capricious application of the death penalty and does not violate the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution. (*People v. Winbush* (2017) 2 Cal.5th 402, 489 (*Winbush*); see also *Tuilaepa v. California* (1994) 512 U.S. 967, 976 [§ 190.3, factor (a) does not violate the Eighth Amendment and is not unconstitutionally vague].)

The jury need not make findings beyond a reasonable doubt that aggravating factors were present (other than Penal Code section 190.3, factor (b) or (c) evidence), that they outweighed the mitigating factors, or the factors were substantial enough to warrant a judgment of death under *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Blakely v. Washington* (2004) 542 U.S. 296, *Ring v. Arizona* (2002) 530 U.S. 584, and *Cunningham v. California* (2007) 549 U.S. 270. (See

People v. Merriman (2014) 60 Cal.4th 1, 106; *People v. Griffin* (2004) 33 Cal.4th 1015; *People v. Blair* (2005) 36 Cal.4th 686, 753.)

The federal Constitution does not require the court to instruct the jury that the prosecution has the burden of persuasion regarding the existence of aggravating factors, nor is the court required to instruct the jury that there is no applicable burden of proof. (*People v. Mendoza* (2016) 62 Cal.4th 856, 916; *People v. Lenart* (2004) 32 Cal.4th 1107, 1136–1137; *People v. Holt* (1997) 15 Cal.4th 619, 682–684.)

The jury is not required to unanimously find that certain aggravating factors warrant the death penalty under the federal Constitution, and the equal protection clause does not compel a different result. (*People v. Enraca* (2012) 53 Cal.4th 735, 769; *People v. Casares* (2016) 62 Cal.4th 808, 854.) The court is also not required to instruct the jury that it need not unanimously find particular facts in mitigation. (*People v. Cage* (2015) 62 Cal.4th 256, 293 (*Cage*).)

CALJIC No. 8.88 does not improperly instruct the jury that a verdict of death is required if the factors in aggravation outweigh the factors in mitigation. (*People v. Arias* (1996) 13 Cal.4th 92, 170–171.)

The use of adjectives like "extreme" and "substantial" in the list of mitigating factors in section 190.3 does not act as a barrier to the jury's consideration of mitigating evidence in violation of the federal Constitution. (*People v. McKinnon* (2011) 52 Cal.4th 610, 692; *People v. Avila* (2006) 38 Cal.4th 491, 614–615.)

The court's use of CALJIC No. 8.88, which instructs that jurors must be "persuaded that the aggravating circumstances

are so substantial in comparison with the mitigating circumstances" to warrant a death judgment, is not unconstitutionally vague, appropriately informs jurors, and does not violate the Eighth and Fourteenth Amendments to the federal Constitution. (*People v. Landry* (2016) 2 Cal.5th 52, 122–123 (*Landry*); *People v. Williams* (2016) 1 Cal.5th 1166, 1204–1205.)

The trial court has no obligation to delete from CALJIC No. 8.85 inapplicable mitigating factors, nor must it identify which factors are aggravating and which are mitigating. (*People v. Cook* (2006) 39 Cal.4th 566, 618; *People v. Hillhouse* (2002) 27 Cal.4th 469, 509 ["The aggravating or mitigating nature of the factors is self-evident within the context of each case."].) "We again conclude that the instruction is 'not unconstitutional for failing to inform the jury that: (a) death must be the appropriate penalty, not just a warranted penalty [citation]; (b) [a sentence of life without the possibility of parole] is required, if it finds that the mitigating circumstances outweigh those in aggravation [citation] or that the aggravating circumstances do not outweigh those in mitigation [citation]; (c) [a sentence of life without the possibility of parole] may be imposed even if the aggravating circumstances outweigh those in mitigation [citation]; (d) neither party bears the burden of persuasion on the penalty determination.' " (*Landry*, *supra*, 2 Cal.5th at p. 122.)

"The impact of a defendant's execution on his or her family may not be considered by the jury in mitigation." (*People v. Bennett* (2009) 45 Cal.4th 577, 601; *People v. Smithey* (1999) 20 Cal.4th 936, 1000 [" 'Sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation' "].)

The trial court need not instruct the jury that life without parole was presumed the appropriate sentence; "[t]here is no requirement jurors be instructed there is a ' " 'presumption of life' " ' or that they should presume life imprisonment without the possibility of parole is the appropriate sentence." (*People v. Parker* (2017) 2 Cal.5th 1184, 1233.) And "[j]urors need not make written findings in determining penalty." (*People v. Valdez* (2012) 55 Cal.4th 82, 180.)

The federal Constitution does not require intercase proportionality review among capital cases. (*Winbush*, *supra*, 2 Cal.5th at p. 490; see *Pulley v. Harris* (1984) 465 U.S. 37, 50–51.) "California's death penalty law does not violate equal protection by treating capital and noncapital defendants differently." (*People v. Sánchez* (2016) 63 Cal.4th 411, 488.) California's use of the death penalty does not violate international law, the federal Constitution, or the Eighth Amendment's prohibition against cruel and unusual punishment in light of "evolving standards of decency." (*Cage*, *supra*, 62 Cal.4th at p. 297; see *People v. Zamudio* (2008) 43 Cal.4th 327, 373.)

IV. CUMULATIVE ERROR

Because we have only found one error in the proceeding — at the penalty phase regarding the trial court's failure to instruct the jury that a witness's prior conviction of a felony bore on his credibility — and because we have determined that the error was harmless beyond a reasonable doubt, we find there is no cumulative error requiring reversal of Mitchell's convictions or penalty of death.

CONCLUSION

For the reasons above, we affirm the judgment.

LIU, J.

We Concur:

CANTIL-SAKAUYE, C.J.
CHIN, J.
CORRIGAN, 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. Mitchell

Unpublished Opinion
Original Appeal XXX
Original Proceeding
Review Granted
Rehearing Granted

Opinion No. S147335
Date Filed: June 24, 2019

Court: Superior
County: San Bernardino
Judge: Brian S. McCarville

Counsel:

Michael J. Hersek and Mary K. McComb, State Public Defenders, under appointment by the Supreme Court, Harry Gruber and Maria Morga, Deputy State Public Defenders, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Julie L. Garland, Assistant Attorney General, Holly D. Wilkens and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

APPENDIX B:

***People v. Mitchell*, No. S147335, California Supreme Court**

Order Denying Petition for Rehearing,

August 28, 2019

No. S147335

IN THE SUPREME COURT OF CALIFORNIA

REMITTITUR

TO THE SUPERIOR COURT, COUNTY OF SAN BERNARDINO
Case no. FSB051580

THE PEOPLE,
Plaintiff and Respondent,
v.
LOUIS MITCHELL, JR.,
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 June 24, 2019.

WITNESS MY HAND AND OFFICIAL
SEAL OF THE COURT, AUGUST 28, 2019

JORGE E. NAVARRETE, Clerk

SEAL

By /S/ Larry Blake, Jr.
DEPUTY

S147335

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

LOUIS MITCHELL, JR., Defendant and Appellant.

The petition for rehearing is denied.

CANTIL-SAKAUYE

Chief Justice

APPENDIX C:

Letter of Time to File Petition for Writ of Certiorari

from the Clerk of the Court Notifying Petitioner of the Extension,

November 19, 2019

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

November 19, 2019

Mr. Elias Paul Batchelder
Office of the State Public Defender
1111 Broadway, 10th Floor
Oakland, CA 94131

Re: Louis Mitchell, Jr.
v. California
Application No. 19A561

Dear Mr. Batchelder:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kagan, who on November 19, 2019, extended the time to and including January 25, 2020.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by C. Houghteling

Clara Houghteling
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. Elias Paul Batchelder
Office of the State Public Defender
1111 Broadway, 10th Floor
Oakland, CA 94131

Clerk
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-3600

APPENDIX D:

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)
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 § 190.4

§ 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.

End of Document

APPENDIX E:

Cited Excerpts of Clerk's Transcript

No 20

Evidence has been introduced for the purpose of showing that the defendant committed several incidents of Assault with a Firearm on August 9, 2005. This crime involves the express or implied use of force or violence and the threat of force or violence. Before a juror may consider any criminal activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal activity. A juror may not consider any evidence of any other criminal activity as an aggravating circumstance.

It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

Given: —

Judge

MODIFIED COPY OF 8.87 (SEVENTH EDITION)
PENALTY TRIAL—OTHER CRIMINAL ACTIVITY—PROOF BEYOND A REASONABLE DOUBT

_____ Given

_____ Not Given

_____ Given, as modified

No 30

It is now your duty to determine which of the two penalties, death or imprisonment in the state prison for life without possibility of parole, shall be imposed on the defendant.

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

An aggravating factor is any fact, condition or event attending the commission of a crime which increases its severity or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but maybe considered as an extenuating circumstance in determining the appropriateness of the death penalty.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you 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.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT
MINUTE ORDER

CASE NO: FSB051580 DATE: 10/04/06

CASE TITLE: PEOPLE OF THE STATE OF CALIFORNIA
vs.
LOUIS MITCHELL JR

DEPT: S12 10/04/06 TIME: 8:30 am SENTENCING

CHARGES: 1) 187(A) PC-F, 2) 187(A) PC-F, 3) 187(A) PC-F, 4) 664/187(A) PC-5) 664/187(A) PC-F, 6) 664/187(A) PC-F

JUDGE BRIAN S MCCARVILLE
Clerk ESPERANZA MORTSOLF
Reporter JUDY MORRIS
Bailiff VAL PETERS
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APPEARANCES
Deputy District Attorney CHERYL KERSEY present.
Attorney ALAN SPEARS present.
Defendant present in custody.
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PROCEEDINGS
Defendant committed to State Prison. This is a temporary notice.
Formal packet to follow.
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
9:55
Convene open court. Discussion held re: outbursts by members of the audience; court admonishes audience.
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10:05
People submit on death warrant; defense makes arguments.
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10:08