IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

NO._____

ARTHUR LEE LEWIS, Petitioner

vs.

STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO
THE CALIFORNIA COURT OF APPEAL
Second Appellate District

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QUESTION PRESENTED FOR REVIEW

Review is requested to determine whether a sentence within the prescribed statutory range but inconsistent with the jury's verdict complies with the Sixth Amendment jury trial guarantee or the Due Process right to the presumption of innocence and proof beyond a reasonable doubt

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PETITION FOR CERTIORARI

Petitioner, ARTHUR LEE LEWIS, respectfully petitions for a writ of certiorari to review the judgement of the California Court of Appeal, Second Appellate District, Division Five affirming his conviction & sentence in the Superior Court of Los Angeles County, California.

OPINIONS BELOW

The reported opinion of the California Court of Appeal, Second Appellate District appears as Appendix A.

The order of the California Supreme Court dismissing the petition for review appears as Appendix B.

JURISDICTIONAL STATEMENT

The judgement of the California Court of Appeal, Second Appellate District was entered on 14 April 2021. A timely petition for review was filed on 24 May 2021. The petition was denied on 30 June 2012 . The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257, subd. (a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

United States Constitution, Fourteenth Amendment, Section One:

"... No State ... shall abridge the privileges and immunities of citizens of

the United States; nor shall any State deprive a person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. "

FEDERAL STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257, sub. (a):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

RELATED CALIFORNIA STATUTES

(Please see Appendix C)

RELATED CALIFORNIA RULES OF COURT

(Please see Appendix C)

STATEMENT OF CASE

Petitioner, ARTHUR LEE LEWIS, and his brother Eric Roberts, were charged with the murder of one Trevoon Brown (Pen. Code, § 187, subd.(a)), in association and/or for the benefit of a gang (Pen. Code, § 186.22, subds. (b)(1) and (b)(5).) (CT 258.) Petitioner was also charged with a weapon enhancement (Pen. Code, § 12022.53, subds. (b), (c) and (d) and (e)(1)). (Ibid.)[1] By jury verdict, petitioner's brother was acquitted and the gang enhancement was found not true as to both defendants. (CT 573.) Petitioner was convicted of voluntary manslaughter and the weapons enhancement was found true. (CT 573, 577.) Petitioner was sentenced, *inter alia,* to the upper term on both the charge and the gun enhancement for a total of 21 years, with 782 days pre-sentence credits. (CT 608; RT 5703.) Timely notice of appeal was filed on 28 October 2019. (CT 610.)

On appeal, petitioner argued, *inter alia,* that his upper term sentence violated his Sixth Amendment right to a jury determination on all facts punished, as well as his Fourteenth Amendment Due Process rights to proof beyond a reasonable doubt of all facts punished. On 14 April 2021, the Court of Appeal affirmed the judgement and sentence. A petition for rehearing, correcting certain facts and requesting the court reach and rule on the Due Process claim was denied. On 30 June 2021 petitioner's petition for review by the California Supreme Court was also denied.

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1 The enhancement also originally charged against Roberts was dismissed on prosecution motion. (CT 449.)

STATEMENT OF FACTS

Alighting from a Los Angeles Metro train, at the Compton Station, petitioner and Roberts became involved in a sudden fight with various other men of roughly the same age, during which petitioner, concededly, pulled out a gun and shot one Travoon Brown. All people thereupon scattered. (Exhibit No. 6, CT 304; RT 4244.) Brown was taken to hospital where he was pronounced dead. (RT 2828.) An autopsy showed that a single gunshot wound had pierced Brown's lung before "tumbling" down and coming to rest in the lower back. (RT 3312.) The gun was never found. (RT 3113.)

The key evidence in the case was Exhibit 6, a security video of the confrontation. (CT 304; RT 4244.) That video showed petitioner and his brother, Eric Roberts, exiting through the turn styles, at which point Roberts turned left and walked over to a man seated on a bench outside the station perimeter. Roberts testified that he recognized the man as an old high-school, football buddy and that he went over to say hello. (RT 4245, 4247-4248.) Roberts then walked back in the direction to where petitioner had remained standing in front of the turn styles. At that point, Roberts was accosted by two or three larger men, one of whom was Travoon Brown. Roberts testified that Brown attempted to shake him down and that he threw a punch at Brown in response. (RT 4249-4255.)

Simultaneously with Robert's engagement with Brown, petitioner turned and started walking towards his brother. (Exhibit 6.) As he did, he was violently hit in the head, from behind, by a running assailant in a red hat. (Exhibit 6; RT

4257-4259.) Petitioner stumbled forward. Unfortunately, a post obscures whatever occurred next; however, within seconds everyone is seen to scatter. (Exhibit 6.)

The sole independent witness to the shooting, Ricardo Ramos, testified that immediately before the fight he heard someone say "PJ Watts" and "Grape Street." (RT 3028-3029, 3033, 3034.) Ramos noticed the young man, who was eventually shot, "right in the middle of [the commotion]." (RT 3023.) He did not have a weapon on him. (RT 3024.) Ramos testified that "[t]he young man that was shot. He was the one who threw the first punch." (RT 3024.) It landed "in the back of the person that he was aiming for. In the back of his head. (RT 3024.) Ramos did not know if the person who was shot was wearing a hat. (RT 3036.) Ramos also did not remember what color clothes the person who hit petitioner was wearing; "but I know the guy that got shot threw the first punch." (RT 3042.)[2] After the first punch, "hands just started flying." (RT 3025.) The scuffle lasted about "two or three seconds" before Ramos heard the "pop" of a gun. (RT 3024.) Brown turned around and started running toward Ramos, with a "fear of death in his face." (RT 3025-3026.) At trial, petitioner admitted intending to fire a shot at Brown; however, he claimed self-defense. (CT 322; RT 308.)

Although petitioner and Roberts are each gang members they belong to different gangs that have never collaborated and may in fact have been hostile to

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2 Ramos was plainly confused as to the identity of the person who hit petitioner from behind. The video shows indisputably that it was not Brown but someone in a red hat that had emerged from behind. The video earlier showed the same man in a red hat standing in the far background.

one another. (RT 2901, 2868, 2881-2882; 3361.) Petitioner was a *Grape Street* member and Roberts was affiliated with the *Swans*. (RT 2868, 2901.) No gang claims the area around the Compton metro station. (RT 3354-3355.)

To prove a gang-related scheme, the prosecution introduced evidence of a verbal altercation on the train between petitioner and his brother and other youths who supposedly claimed rival gang status. However, none of these other youths were involved in the altercation at the station; nor was their particular gang membership established.

Under the rubric of proving "intent," the prosecution (over defense objection) was allowed to introduce 187 pages of evidence of a previous, planned gang shooting in which petitioner was involved as a decoy driver. (RT 303; RT 3421-3442; 3602-3664; 3664-3745, 3749-3757; 3757-3772.) According to the prosecution the prior episode showed that petitioner's "intent is informed by what he has done in the past, *who* he is" (RT 317) and that "they did it because: because they're gangsters, ... [t]hat's all it is." (RT 4543.)

REASONS FOR GRANTING WRIT

I
REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER A SENTENCE WITHIN THE PRESCRIBED STATUTORY RANGE BUT INCONSISTENT WITH THE JURY'S VERDICT COMPLIES WITH THE SIXTH AMENDMENT JURY TRIAL GUARANTEE OR THE DUE PROCESS RIGHT TO THE PRESUMPTION OF INNOCENCE AND PROOF BEYOND A REASONABLE DOUBT.

In *Apprendi v. New Jersey* (2000) 540 U.S. 466, this Court held that: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id*, at p. 490 [italics added].) Subsequently, in *Blakely v. Washington* (2004) 542 U. S. 296, the Court made clear "that the `statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely,* at p. 303; *United States v. Booker* (2005) 543 U.S. 220, 228.) Thus, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Booker, supra,* at p. 231; *Apprendi, supra,* at p. at 490.) For these purposes it is irrelevant how the State labels the fact punished. (*Ring v. Arizona* (2002) 536 U.S. 584, 602.) In general and subject to the requirement of a jury finding, any term within the statutory maximum is allowed to the trial judge's discretion in accordance with applicable state rules. (*Oregon* v. *Ice* (2009) 555 U. S. 160, 169-172 [state and common law judicial sentencing discretion].)

As indicated, the trial judge in this case sentenced petitioner to the maximum statutory terms for voluntary manslaughter and for the related

weapons enhancement. (CT 608; RT 5723.) In allocuting the reason for his sentence, the trial judge stated that he disagreed with the jury's lesser offense verdict and that the crime was "clearly" second degree murder because petitioner and Roberts had jointly sought to provoke the fatal confrontation. (RT 5721.) This petition therefore raises the question of whether in imposing *any* term, even one within the statutory range, the sentencing judge can take into consideration conduct of which defendants have been acquitted. [3]

In affirming the judgement below, the Second District Court of Appeal relied[4] on *People v. Towne* (2008) 44 Cal.4th 63 which is taken to have held that, in imposing a sentence the trial court "is not prohibited from considering evidence

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3 The Court of Appeal initially stated that appellant had forfeited the *Apprendi* issue but nevertheless exercised its prerogative under Pen. Code, §§ 1259, 1469 to reach the issue on its merits. However, there was no forfeiture. In limine, the trial court granted petitioner's request that any objections would be deemed to be made on both state and federal constitutional grounds. (CT 317; RT 28.) Although counsel did not mention "*Apprendi*" by name at sentencing the *substance* of his objection (quoted *infra*, pg. 43) was that the jury had aquitted Roberts and found against the charge of murder and the gang enhancement. In this day and age, any objection on the ground that the jury had *not* found some fact, necessarily implicates an *Apprendi* objection to any reasonably informed attorney or judge. Under state law, where "it appears that (1) the appellate claim is the kind that required no trial court action to preserve it, or (2) the new arguments do not invoke facts or legal standards different from those the trial court was asked to apply, but merely assert that the trial court's act or omission, in addition to being wrong for reasons actually presented to that court, had the legal consequence of violating the Constitution[,] . . . defendant's new constitutional arguments are not forfeited on appeal." (*People v. Gutierrez* (2009) 45 Cal.4th 789, 809.)

4 Opinion, pg. 24

underlying charges of which a defendant has been acquitted." (*Id*., at p. 71.)[5] As noted in *Towne, supra,* at page 87, federal circuit courts have uniformly held that a sentencing court may consider conduct underlying an acquitted charge without offending a defendant's constitutional rights, so long as the conduct is proved by a preponderance of the evidence and the imposed sentence falls within the statutory range for the offense of conviction. [6]

Nevertheless, this unanimous accord has been vigorously criticized, *viz.*: Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can be Done About It*, 49 Suffolk Univ L Rev 1, 25 (2016) (quoting other

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5 Appellant argued below that *Towne* was fatally distinguishable in that the fact of Towne's recidivist history (*id* at p. 73) was a single aggravating factor that existed totally apart from whatever other verdict-hostile inferences the trial court may have espoused. *Towne* itself stated: "*Because* in the present case *other aggravating factors* rendered defendant eligible for the upper term, the judge's consideration of evidence of conduct underlying counts of which defendant was acquitted, in selecting the sentence, did not implicate defendant's constitutional rights to a jury trial *or* to proof beyond a reasonable doubt." (*Id*., at p. 87 [italics added].) Thus the wide-ranging constitutional disquisition in *Towne* was *obiter dicta* in any event. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176 [rule of case only co-extensive with the facts presented]; *Central Green Co. v. United States* (2001) 531 U.S. 425,431[dicta is anything not essential to the ratio decidendi of the case]; *Apprendi, supra,* 489 fn. 14 [same].)

6 See, e.g., *United States v. Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006), abrogated in part on other grounds as stated in *United States v. Nagell*, 911 F.3d 23, 31 n. 8 (1st Cir. 2018); *United States v. Vaughn,* 430 F.3d 518, 525-27 (2d Cir. 2005); *United States v. Hayward,* 177 F. App'x 214, 215 (3d Cir. 2006); *United States v. Ashworth*, 139 F. App'x 525, 527 (4th Cir. 2007); *United States v. Farias*, 469 F.3d 393, 399-400 (5th Cir. 2006); *United States v. White*, 551 F.3d 381, 383-84 (6th Cir. 2008); *United States v. Price*, 418 F.3d 771, 787-88 (7th Cir. 2005); *United States v. High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States v. Mercado*, 474 F.3d 654, 655-56 (9th Cir. 2007); *United States v. Magallanez*, 408 F.3d 672, 684-85 (10th Cir. 2005); *United States v. Duncan*, 400 F.3d 1297, 1304-05 (11th Cir. 2005); *United States v. Dorcely*, 454 F.3d 366, 371 (D.C. Cir. 2006)

sources for the proposition that "[t]he use of acquitted conduct has been characterized as, among other things, 'Kafka-esque, repugnant, uniquely malevolent, and pernicious[,]' 'mak[ing] no sense as a matter of law or logic,' and . . . a 'perver[sion] of our system of justice,' as well as 'bizarre' and 'reminiscent of *Alice in Wonderland*' "); Ngov, *Judicial Nullification of Juries: The Use of Acquitted Conduct at Sentencing*, 76 Tenn L Rev 235, 261 (2009) ("the jury is essentially ignored when it disagrees with the prosecution. This outcome is nonsensical and in contravention of the thrust of recent Supreme Court jurisprudence."); Beutler, *A Look at the Use of Acquitted Conduct at Sentencing*, 88 J Crim L & Criminology 809, 809 (1998) (observing that "[t]he use of acquitted conduct in sentencing raises due process and double jeopardy concerns that deserved far more careful analysis than they received" in *Watts*[7] and noting "the fundamental differences between uncharged and acquitted conduct which trigger these constitutional concerns". Judicial dissents have also been registered. "I strongly believe this precedent is incorrect, and that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment." (*United States v. Faust* (11th Cir. 2006) 456 F.3d 1342, 1349, diss. Barkett, C.J.).] "[A]llowing courts at sentencing 'to *materially* increase the length of imprisonment' based on conduct for which the jury acquitted the defendant guts the role of the jury in preserving individual liberty and preventing oppression by the government." (*United States v Brown*,

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7 *United States v. Watts* (1997) 519 U.S. 148.

(CA DC, 2018) 892 F3d 385, 408 (Kavanaugh, J., dissenting in part) [italics added].)

In line with these criticisms, it is petitioner's contention that, irrespective of whether a sentence is within the statutory maximum, allowing the sentencing judge to factor into consideration conduct of which the defendant has been acquitted completely nullifies the jury's constitutional function as "circuit-breaker." (*Blakely v. Washington*, *supra,* 542 U.S. at pp. 306-307.)

Due to the happenstance factual posture in which cases arrive at this Court, *Apprendi* contextualized the issue before it as one which focuses on what a jury's verdict *authorizes* -- the answer being: a sentence within the legislated statutory range. (*Alleyne v. United States* (2013) 570 U.S. 99, 112 [within minimum to maxim statutory range].) This Court's subsequent *Apprendi* jurisprudence has accepted this context as its premise. (Ibid.) Under this approach, a jury's verdict functions as the equivalent of a patent or warrant for judicial discretion, the only limit being the statutorily authorized sentence range. However, the other recognized function of the jury is not simply to authorize but to prohibit. "{Apprendi's] animating principle is the preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense." (*Oregon v. Ice, supra,* 555 U.S. , at p. 168; *Apprendi, supra,* at p. 477.) Here, the jury acts as the People's tribune. The jury was not instituted simply to authorize but "to guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties." (2 J. Story, *Commentaries on the Constitution of the United States* 540-541 (4th ed. 1873). As stated by

Justice Scalia writing for the majority in *Blakely,*

> "The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish." (*Id, supra,* 452 U.S., at p. 307.)

But when a trial judge can consider conduct of which the jury has been expressly acquitted, that is precisely the relegation that has occurred. "The very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury." (*Blakely, supra,* at p. 308; *United States v. Booker, supra,* 543 U.S., at pp. 238-239 [re. judicial despotism].) In this regard it is appropriate to note the Jacobite practice of sequestering juries until they had produced the verdict desired by the Crown. This practice was made infamous by *Bushell's Case* (1670) 124 Eng.Rep. 1006 [6 Howell's State Trials 999] in which Justice Howel refused to accept a displeasing result and told the jury it would "not be dismissed till we have a verdict that the court will accept." When the jury ultimately returned with an acquittal, Howel locked them up along with the defendant, William Penn, who later absconded to America.[8] On appeal, the jury was set free, Chief Justice Vaughn holding that *the jury must be independently and indisputably responsible for its verdict free from any threats from the court.* (See *Estes v. Texas* (1965) 381 U.S. 532, 558 [conc. Opn.

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8 Penn's guilt was incontestable; there was no question that he was preaching politically incorrect doctrines on a street corner, which constituted a clear and present danger to the Established Church, the peace and dignity of the realm, etc., etc.. Those were the "real facts" (cf *Blakely, supra,* at p. 424, diss. O'Connor, J.) of the case.

Warren, C.J.; *Sparf & Hansen v. United States* (1895) 156 U.S. 51, 119-120 [diss. Gray, J.].)

It is from *Bushell's* case that our concept of jury independence is derived. "[I]n the reigns of the latter sovereigns of the Stuart family, a different rule prevailed, that a jury in such case might be discharged *for the purpose of having better evidence against him at a future day*; and this power was exercised for the benefit of the crown only; but it is a doctrine so abhorrent to every principle of safety and security that it ought not to receive the least countenance in the courts of this country." (*Arizona v. Washington*, (1978) 434 U.S. 497, 508, fn 23, [italics added].) There is no meaningful distinction between discharging a jury in order to receive "better" evidence at a later time and ignoring a jury's verdict entirely in order, in the ensuing minute, to find "better" facts, always of course to the benefit of the successor in interest to the Crown.

The flaw in *Apprendi* jurisprudence, as currently formulated, is that it views the jury's verdict only in terms of its *positive* authorization; i.e., asking what a jury's verdict *allows*. The answer, of course, is the "maximum" sentence provided by statutory law. (See e.g. *Cunningham v. California* (2007) 549 U.S. 270, at p. xxx.*) But the entire purpose of the jury system is not only to *authorize* but also to *prohibit*. It does not serve as a "circuit breaker" (*Blakely, supra,* at p. 307) if its verdict does not also "cut-off" or constrain judicial action. Under *Towne* and the prevailing federal circuit court rule (fn. 6, *ante*), the trial judge need hardly discharge or lock up the jury. It can more efficiently simply disregard the *constraint* of the jury's verdict, as was done in this case. It is hardly an answer to

say, as *Towne* did, that the effect of the jury verdict can be ignored because the trial judge can find the facts by a lesser standard! (*Towne, supra,* at p. 87.) This curious logic was anticipatorily criticized by Justice Scalia,

> "In JUSTICE BREYER'S bureaucratic realm of perfect equity, by contrast, the facts that determine the length of sentence to which the defendant is exposed will be determined to exist (on a more-likely-than-not basis) by a single employee of the State. (*Apprendi, supra,* at p. 498.)

In our system, case law does not evolve a priori and systematically. Thus, *Apprendi* contextualized the constitutional issue in light of the facts presented in that case; i.e. a sentence in excess of the statutory maximum. That is fine as far as it goes, but it only presented half the picture, the half that asks what a verdict of *guilty* authorizes. The other half of what juries do -- surprisingly -- is to acquit. It makes no sense to ask what an acquittal authorizes; the question that must be asked is what an *acquittal* prohibits the state from doing. That is the meaning of breaking a circuit.

The prevailing rule that a trial judge is allowed to ignore a verdict of acquittal is based on *United States v. Watts*, *supra*, 519 U.S. 148, which held that a verdict of acquittal does not determine any fact. (*Id*., at p. 157; *United States v Horne*, 474 F3d 1004, 1006 (CA 7, 2007) [citing *McMillan* and *Watts*]; *United States v Dorcely*, 372 US App DC 170, 175-177 [rejecting both due- process and Sixth Amendment arguments, citing *McMillan* and *Watts*]; *United States v Faust*, *supra,* 456 F3d. at pp. 1347-1348 (CA 11, 2006) [finding no Sixth Amendment violation, discussing *Watts]*; *United States v Boney*, (DC Cir. 1992) 977 F2d 624, 635 [due process, collecting cases]; *In re Coley* (2012) 55 Cal.4th 524, 557 [same].)

Petitioner submits that *Watts* is a crumbling rock on which to base any *Apprendi* jurisprudence. The substantive majority of this Court in *Booker* recognized this stating, "The issue we confront today simply was not presented in *Watts*." (*Booker, supra,* at p. 240.) It was not presented because *Watts* concerned the *procedural* guarantee of the Double Jeopardy Clause, whereas *Apprendi* issues concern *substantive* requirements in sentencing.

The notion that a verdict of acquittal means nothing substantive was unanimously rejected in *Sealfon v. United States* (1948) 332 U.S. 575, where this Court held that Double Jeopardy operated to preclude re-litigation of an *issue* "which was necessarily adjudicated in the former trial." (*Id.,* at p. 580 [italics added]; see also *Ashe v. Swenson* (1970) 397 U.S. 436, 445-447 [applying rule].) Although the second indictment in *Sealfon* had charged a nominally different of offense, this Court found that "the basic facts in each trial were identical... [and]... the core of the prosecutor's case was in each case the same." (*Id.,* at p. 580.) This Court held that the prior verdict "operates to conclude those matters in issue which have been determined by a previous verdict, even though the offenses be different." (*Id.,* at p. 578.) Whether it does so as "*res judicata*" or "double jeopardy" or *sub nom "autrefois acquit,"* the underlying legal fact is that a verdict of acquittal has *substantive* effect on the use or relitigation of facts. It does not mean 'go ahead try again, under a lesser standard of proof.' (See e.g. *Towne, supra,* at p. 87.) *Sealfon* a completely undercuts *Watts'* premise. A verdict of acquittal is not simply a procedural bar against retrial of the "same offense," it serves as a conclusive substantive determination of the factual issues adjudica-

ted. Cases relying on *Watts* for the proposition that a verdict of acquittal presents no constraint on post-verdict judicial fact-finding are not persuasive. There was simply no way that the Court could have considered the effect and consistency of its holding with *Apprendi* jurisprudence. [9]

Moreover, if the *Watt's* premise is applied to the facts of this case, then it must be concluded that, as to petitioner, the jury's not true finding on the gang enhancement left only a *tabula raza* with respect to any substantive issue of fact. Not being found culpable of conduct which was gang-related, petitioner stood innocent at bar of those charges. Since petitioner never waived a jury trial as to that enhancement it was inconsistent (to put it mildly) with petitioner's Sixth Amendment jury trial rights and with his Due Process right to proof beyond a reasonable a doubt of all criminal charges. (*In re Winship* (1967) 397 U.S. 358, 362.) The logic (if that is what it is) that because a jury failed to find beyond a reasonable doubt the existence of a punishable fact, the trial judge can go ahead and find that fact by under the lesser preponderance standard cannot be squared with the constitutional starting points. (*People v. Beck* (2019)504 Mich. 605, 627 [939 N.W.2d 213] *cert. denied* 140 S. Ct. 1243 (2020) ["conduct that is protected by the presumption of innocence may not be evaluated using the preponderance-of-the-evidence standard without violating due process"]; see also *State v. Marley*,

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9 *"Watts*, in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument. It is unsurprising that we failed to consider fully the issues presented to us in these cases." (*Booker, supra,* at p. 240, fn 4.)

321 N.C. 415, 425, [364 S.E.2d 133] (1988) ["due process and fundamental fairness precluded the trial court from aggravating defendant's second degree murder sentence with the single element—premeditation and deliberation—which, in this case, distinguished first degree murder after the jury had acquitted defendant of first degree murder"].)

McMillan v. Pennsylvania (1986) 477 U.S. 79 has fared no better. In *Alleyne v. United States*, *supra*, 570 U.S. 99, this Court overruled *Harris v United States* (2002) 536 U.S. 545, which had held held that judicial fact-finding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment. (*Alleyne*, at pp. 103, 107.) Noting that "the logic of *Apprendi* prompted questions about the continuing vitality, if not validity, of *McMillan*'s holding that facts found to increase the mandatory minimum sentence are sentencing factors and not elements of the crime" (*Alleyne*, at p. 106), this Court ruled that "*Apprendi*'s definition of "elements" necessarily includes not only facts that increase the ceiling, but also those that increase the floor." (*Alleyne,* at p. 108.)

Lastly, the syllogism that a judge may disregard the jury's findings because it only needs to find facts by a preponderance of the evidence contravenes the entire purpose of the institution of the jury. The jury was not instituted to preserve proof beyond a reasonable doubt but "as the great bulwark of [our] civil and political liberties." (2 J. Story, *Commentaries, supra,* 540-541 (4th ed. 1873).) It is the institution of a jury trial that, in and of itself, constitutes the safeguard against judicial arbitrariness or subservience to the state. The requirement of proof beyond a reasonable doubt represents an additional

safeguard by requiring the executive branch to come up with something more than reasonable sounding suspicions. But it simply does not follow that because juries must find the substantive facts of a crime beyond a reasonable doubt, the judge is free to make contrary findings on a preponderance standard. Although this logic would have delighted the Stuarts it would have baffled the Founders..

Thus, petitioner submits that *Apprendi's* "statutory maximum" rule needs to reassessed -- not in the sense of being wrong but to ask whether it is constitutionally *sufficient* to preserve the role of the jury as "circuitbreaker."

The facts of this case illustrate how the current rule allows judge to effectively nullify jury verdicts thereby reducing the jury to an elaborate but empty formality. In the present case, the trial judge's discretion was exercised in accord with applicable law as interpreted by *Towne, supra,* 44 Cal.4th 63. Following this Court's ruling in *Cunningham v. California, supra,* 549 U.S. 270, California's Legislature amended its sentencing provisions so as to remove the presumptive applicability of a specified mid-term sentence. Thenceforth, "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court." (Pen. Code, § 1170, subd. (b).) The trial court must individualize its sentence choice to the particular circumstances of the case; and, as directed by the Legislature, the Judicial Council has promulgated rules to guide these choices. (*People v. Wright* (1982) 30 Cal.3d 705, 709-710; Pen. Code, §§ 1170, subd. (a)(2), 1170.3; Cal. of Rules of Court, rules 4.401-4.423.) "The statutes and sentencing rules generally require the court to state `reasons' for its

discretionary choices on the record at the time of sentencing *People v. Minder* (1996) 46 Cal.App.4th 1784, 1791.) "In exercising his or her discretion in selecting one of the three authorized terms of imprisonment referred to in section 1170(b), the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. (C.R.C., rule 4.420, subd.(b).) However, under California law, any single aggravating factor by itself is *sufficient* to justify an upper term, regardless of countervailing mitigating circumstances. (*People v. Osband* (1996) 13 Cal.4th 622, 728; *Towne, supra,* at p. 75.)

At sentencing, the prosecution urged the imposition of the upper term on the charge and on the surviving gun enhancement on the grounds that: (1) the crime involved great violence, callousness and lack of remorse; (2) the victim was particularly vulnerable; (3) "[t]he the manner in which the crime was carried out indicated planning and sophistication in that defendant and Roberts 'sought to provoke gang members on the train' and ... when 'individuals' at the station responded to petitioner and Robert's 'challenges,' defendant 'kicked off the safety' of his weapon; and, (4) defendant had engaged in conduct which was a danger to society as indicated by (1)-(3) above and in that "he also participated in series of shootings in August 2016." (CT 581-582.)

Defense counsel filed a sentencing memorandum specifically disputing each and every one of the prosecution's argued circumstances in aggravation. (CT 584, 587-588.) The memorandum asserted that petitioner had only traffic-related incidents on his adult record and that petitioner's prior performance on

probation, mandatory had been satisfactory. (CT 588.) Counsel disputed that the victim had been "vulnerable" and argued that the video showed that "defendant had been viciously attacked and knocked to the ground by another rival gang member .... [and] only pulled his weapon and fired in self defense." (CT 587.) In asking the court to strike the firearm enhancement and impose the low term, trial counsel concluded: "Clearly, this was a spur of the moment incident that occurred because of the provocation of the decedent and his associates *the jury so found.* The *jury necessarily then found* that there was no planning sophistication or professionalism." (CT 587-588 [italics added].)

The trial judge sentenced petitioner to the upper term on both the enhancement and underlying charge. (CT 608; RT 5723.) After indicating that it agreed with most of what the prosecution had argued in its sentencing memorandum,[10] the court stated that "the factors in aggravation greatly outweigh the factors in mitigation, *in that* Mr. Brown was unarmed, that he was not the cause of, but his death was the effect of yourself and your actions *and your brother's actions*." (RT 5723 [italics added].) The court continued, "I disagree with the jury's verdict also. I think that, clearly, this was a murder. The way I saw it, it was a murder in the second degree. All right. With a gun used. .... I listened to this evidence. I listened to the People's arguments. I thought it was very clear that you [petitioner] should have been convicted of murder. All right. And I can't do

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10 "I do agree with the People . . . . I may not agree 100 percent with what the People said, as far as where I think it does with this, but I do think they are correct." (RT 5721.)

anything about that. That's what the jury saw, and I respect that, and we all have to accept that." (RT 5721-5723.)

But the court did not respect that. It totally disregarded the jury's verdict explicitly stating that, in its own opinion, petitioner was guilty of murder. As if this were not explicit enough, the trial judge specified, "I do agree with the People. Mr. Lewis, you put yourself in this position. I think that the evidence was absolutely overwhelming that you *and your brother* went there, and you caused this to happen. This was not a situation where you were just minding your own business and stepped off the train and something happened. It was you who intervened. It was you who caused this. And when I say you, I'm talking about you *and* your brother." (RT 5721 [italics added].) These court findings were completely incompatible with the jury's verdicts as to each defendant.

As previously indicated (fn. 5 , *ante*), in *Towne*, *supra*, 44 Cal.4th 63, apart from the trial judge's stated disagreement with the jury's verdict, there had existed one independently aggravating factor to justify an upper term sentence. (*Id* at p. 73.) In the present case no such independent aggravating factor existed. The prosecution's so-called aggravating factors were mostly redundant characterizations of the nature of the crime. However, those factors included an explicit rejection of the jury's acquittal of Roberts and its not true finding on the gang enhancement (factor #3). The one factor the trial judge evidently did not agree with was the prosecution's allegation of uncharged "prior shootings"

which had not even been tried at the time of sentencing. [11] Thus, this case presents the stark situation where a trial judge simply nullifies a verdict that it found "unacceptable" and substituted his own *truth* of the matter as the basis for sentencing. Petitioner submits that such a procedure reduces the jury to a formalistic husk and is incompatible with the Sixth Amendment.

CONCLUSION

For the foregoing reasons, petitioner therefore respectfully requests that his petition for certiorari be granted.

Word Count Certification

The undersigned counsel certifies under penalty of perjury that the word count for this brief is: 5, 875 words, excluding cover, tables and appendices.

Dated: 22 September 2021

Respectfully submitted

Kieran D. C. Manjarrez
Attorney for Petitioner

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11 Assuming the trial judge *had* relied on that aggravating factor, the case would involve a situation where a lesser verdict and acquittal served as a "mere preliminary" (*Blakely, supra,* at p. 307) for a bench trial under a preponderance standard on charges which the court had earlier refused to consolidate for trial

APPENDIX A

Filed 4/15/21 P. v. Lewis CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ARTHUR LEE LEWIS, Defendant and Appellant.	B302108 (Los Angeles County Super. Ct. No. TA144866)

APPEAL from a judgment of the Superior Court of Los Angeles County, Patrick Connolly, Judge. Affirmed.

Kieran D. C. Manjarrez, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, Michael R. Johnsen,

Supervising Deputy Attorney General, David W. Williams, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Arthur Lee Lewis and co-defendant Eric Roberts were charged with the murder of Trevon Brown. (Pen. Code, § 187, subd. (a).)[1] It was alleged that defendants personally used and/or discharged a firearm causing great bodily injury or death (§ 12022.53, subds. (b), (c), (d) & (e)(1)), in association with, or for the benefit of, a criminal street gang (§ 186.22, subds. (b)(1) & (b)(5)).

At the close of the prosecution's case-in-chief, the personal use of a weapon charge was stricken as to Roberts. The jury acquitted Roberts of the murder, and convicted Lewis of the lesser offense of voluntary manslaughter. (§ 192.) It found true the weapons allegation against Lewis (§ 12022.5, subd. (a)), but found the gang allegation not true.

The trial court imposed the high term of 11 years for voluntary manslaughter and the high term of 10 years for the weapon enhancement, sentencing Lewis to a total of 21 years in prison.

On appeal, Lewis contends that the trial court (1) abused its discretion by admitting evidence of a past gang crimes, in violation of his constitutional right to due process, and (2) erred when it considered evidence contrary to the

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

jury's "verdict of acquittal" when imposing the high terms at sentencing, in violation of his constitutional rights.

We affirm the trial court's judgment.

FACTS

On December 3, 2017, brothers Lewis and Roberts rode the light rail from Long Beach to Compton. When the brothers got off the train, they asked several people which gangs they were from. A woman nearby noticed that they appeared excited, and she heard one of them say "I got it on me."

One of the persons Lewis and Roberts approached was Joshua Moton. In a recorded interview with officers that was played at trial for the jury,[2] Moton stated the following: Lewis asked Moton where he was "from." Roberts told Moton he was a Swan Blood. Lewis said he was from "Grape Street," and warned, "Just know I'm not lacking." Moton explained this meant that Lewis was carrying a gun. The brothers "introduce theirself to everybody [at the station]. So they go around to everybody else banging on everybody else." Brown walked up to them, and Lewis asked Brown where he was from. Brown said: "I don't bang, but . . . we can fight if you got a problem with me." Roberts said he was from the Swans gang. Someone hit Roberts and a fight broke out between about four men, including Lewis, Brown,

[2] At trial, Moton denied much of what he told officers in the interview.

and Roberts. Lewis was getting beaten and was balled up on the ground in the corner. He jumped up and whipped out a gun. Moton yelled that Lewis had a gun, but "it was too late." Lewis shot Brown, who was unarmed. Brown ran a few steps, and then collapsed, struggling to breathe. He was subsequently taken to a hospital, where he died from a gunshot wound to the chest.

A video recording taken from the Compton station corroborated Moton's statement, but did not depict Lewis shooting Brown. Lewis was out of camera range when he fired the fatal shot.

After the killing, several of Lewis's phone calls were recorded as part of an ongoing wiretap investigation. Lewis had the following conversation with TK Don, a fellow Grape Street gang member:

"Lewis: I probably finna, I probably finna get on the run all type of shit.

"[TK Don]: What happened?

"Lewis: I just had to do a [guy] at the train station.

"[TK Don]: (Unintelligible) on Beezy![3]

"Lewis: On Beezy!

"[TK Don]: What happened?

[¶] . . . [¶]

"Lewis: Man on Young, first we on the train coming from Long Beach, some [derogatory name for rival gang

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[3] On Beezy, on Geo, on Young, and on Grape are used by Grape Street gang members to swear to the truth of what they have said.

members] get on the train, about three of them. We mark them out, on Geo, they didn't want to do nothing. . . .

[¶] . . . [¶]

". . . Man, on Young look, so look, a [guy] get off the train, on Beez, now I'm telling somebody. I'm talking to my Mamacita right there. (unintelligible) I got it on me, woopty woo. [The guy] said something like 'Oh I got it on me too.' (Unintelligible) said 'What, [man]?' On Geo, [man], what you gonna, On Young, so I got on him, 'What you wanna do?' On Geo the [guy] said, said something like, ['Well I ain't never lacking,' like straight, tried to fake shuffle, I half way whipped it out, and it, on Beezy, now my brother, now the [guy] say something, something, something, PJ's. Looked at my brother, he said 'Swan Deuce.' Yo, I instantly I kicked it off safety, on Beezy. Man this lil [jerk], another [guy] walked up talking about Four-Six Neighbo– I'm like Grape Street or nothin. Lil [guy] walked up like, 'Four-Six Neighborhood.' Man, on Beez, next thing you know, [guys] come, they pull, they pull to us. On Beezy like, one [guy] said something, next thing you know we coming from everywhere. Man they, man– ten, twenty, ten, fifteen [guys] came, came out the woodwork, on Young. On Geo, one [guy] talking about Four-Six Neighborhoods. My brother's like, Swans woot woot. On Geo, then next thing you know, on Beez, they tried to came from everywhere. Man, a [guy] ran up from behind me like, like he stole on Beez some soft (Unintelligible) it ain't do no– I ain't, I ain't budge. Soon as I like turn around, on Beezy, my brother socked a [guy], the

[guy] go down. On Geo, now I, I see a [guy] running up, on Beez, I whipped on it. Bow! On Young, it jammed and everything. The [guy] went 'Oh!' On Beezy we got out of there at the Compton station."

"Lewis: Beezy, but I know the [guy] got hit. . . . I was right up on the [guy], on Young. Beezy, 'Oh!' On Young, everybody started running everywhere, scattering, getting outta there. On Beezy, we started getting outta there.

[¶] . . . [¶]

"Then we started hearing the sirens and all that coming. On Geo, we got picked up, there was police everywhere. We were laying down."

Lewis had another conversation in which he discussed the victim's identity.

"[Caller:] Man whe– . . . man, where this [guy] was from?

"[Lewis:] Man, Flea Jay, then there was [guys] from everywhere.[4] Flea Jay, Fo' Six Neighborhood, man. I don't know. [Guys] started comin' out the woodwork. On Young."

In another call with TK Don, Lewis learned the identity of the man he shot:

"[TK Don:] On Young, I see who the [guy] is.

"[Lewis:] Yeah?

[¶] . . . [¶]

"[TK Don:] On Young. He from 4–6 Neighborhood. On Beezy.

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[4] "Flea Jay" is a derogatory term used by Grape Street members to refer to the "PJ" Watts gang.

"[Lewis:] Yeah?

[¶] . . . [¶]

"[TK Don:] Hold on. I'm finna. Go to, go . . . You can get on, you can get on social media?

"[Lewis:] Yep.

"[TK Don:] It's Travon Brown.

"[Lewis:] Huh?

"[TK Don:] Tra–, a [guy], uh, a [guy] with some little dreads.

[¶] . . . [¶]

"[TK Don:] Know what I'm sayin'. The weird, the lil' fat [guy], I just seen the fat [guy] post somethin' like, 'RIP, bro. I love you, fool. It was too soon to go.'"

DISCUSSION

Admission of Prior Gang-Related Crimes Evidence

Lewis contends that the trial court erred in admitting evidence of prior gang crimes because the evidence was not relevant to intent, and the uncharged crimes were not sufficiently similar to the charged crime. He further argues that the error rose to the level of a due process violation.

Proceedings

Prior to trial, the prosecution moved to consolidate this matter with Los Angeles County Superior Court case No.

TA145980, another murder case in which Lewis was charged (the 76 Station case).

The trial court denied the motion, reasoning that not all evidence would be cross-admissible, the crimes were not part of the same transaction, and consolidation would be time-consuming. The trial court further explained that the other six defendants charged in the 76 Station case could suffer undue prejudice from consolidation, as the jury could be confused by the evidence with respect to those defendants.

The prosecution subsequently filed a motion in limine to admit evidence of Lewis's participation in the 76 Station case, for the purposes of proving intent, premeditation and deliberation, motive, and lack of accident or self-defense in the present case under Evidence Code section 1101, subdivision (b). The prosecution proffered that, in August of 2016, Lewis was part of a three-car caravan of Grape Street gang members who entered rival gang territory and shot and killed a man at a 76 gas station. Lewis was not the shooter, but drove the car that acted as a decoy vehicle for the vehicle containing the shooter.

Lewis filed a written opposition to the motion. He conceded that, in the instant case, he intended to kill Brown, but argued that he acted in self-defense. He contended that the uncharged crime was inadmissible to show intent because "there has been no finding that [he] in fact had the intent to kill when he participated in the prior crime"; and the incident was not sufficiently similar to the charged crime

to be probative of intent. Lewis reasoned that, because the crimes were not sufficiently similar to establish intent, the 2016 incident could not be admissible under Evidence Code section 1101, subdivision (b) for any other purpose, as intent requires the least degree of similarity for admission. Lewis argued he was not claiming accident or mistake, so the incident was not relevant for the purpose of rebutting those defenses. He asserted that the incident did not provide a motive for the instant crime and was therefore not probative for that purpose. Finally, Lewis contended that evidence of the 76 Station shooting should be excluded under Evidence Code section 352, because the evidence would require considerable time to present, and "if the evidence shows that this crime was similar to the alleged previous one, then evidence of the previous crime is superfluous."

At a hearing on the matter, the prosecution elaborated on the details of the 76 Station shooting. The prosecutor explained that two of Lewis's fellow gang members fell out of good standing with the Grape Street gang, and, as a result, a shot caller in the gang ordered them to redeem their reputations by going out "trooping." The shot caller told the men, "'you've got to shoot.'" He asked for other volunteers, and several other gang members, including Lewis, agreed to participate in the shooting. The men split up into three cars, which stayed in constant communication via cell phones in speaker mode. The shot caller was in one vehicle, the shooter was in a second vehicle, and Lewis drove the third vehicle, which served as a decoy.

The cars drove to the area near the Howard Hughes Center, where the shot caller identified a target. The shooter stepped out of the car and fired into another vehicle at the individual who had been targeted. The intended victim was not killed and drove away.

Afterwards, the gang members re-grouped. The shot caller was angry that the target survived the shooting and ordered a second shooting about an hour later in Nickerson Gardens. There, the shooter shot into a crowd of people, but no one was hit.

The gang members again re-grouped, this time in the Watts area. The shot caller was very upset that the shooter had missed again and ordered a third hit. The shot caller pointed out another target at a 76 gas station. The shooter's car pulled into the gas station next to a parked car, and the shooter shot and killed the individual who had been targeted.

The prosecutor proposed to introduce the evidence through one of the gang members who participated in the 76 Station murder, with possible testimony by a sheriff's deputy and a police officer.

Defense counsel argued that the instant case against Lewis was weak and would be unfairly bolstered by the stronger 76 Station case. Counsel asserted that intent had not been proven in the 76 Station case which had not yet been tried, and was "not necessarily the issue" in the present case.

The trial court disagreed, noting that the defense's position was "the intent is there, but mitigating it. But intent, regardless, is going to be an issue in this case."

Defense counsel responded that the 76 Station case was too dissimilar to the present case to be admissible. Counsel argued that the prosecution was "trying to use the other case to prove intent on this case."

The prosecutor countered, "[I]ntent remains an issue. But, also, we don't agree. We agree that there was intent at the moment of the shooting. But the People's argument is that there was intent even before they got on the train. And that intent is informed by what [Lewis] has done in the past." The prosecutor continued, "Now, 1101(b) doesn't mention premeditation and deliberation. But whether you want to call it intent or deal with them as one of the other issues, those are all things that are elements that need to be proven. And, obviously, having been implicated and involved in another fatal shooting does show that you have had reason to think about what these guns do."

The prosecutor noted that the audio and video evidence in the instant case was clear, "[s]o the real question is what was in Arthur Lewis' and to a different extent Eric Roberts' minds? And when Arthur Lewis goes out that day with a gun in his waistband and starts creating these issues, does he -- what is his view towards how this gang life operates? [¶] . . . [¶] And what you have on both occasions is going out and finding someone that you perceive to be a rival and shooting them."

The prosecutor explained, "[T]he important part isn't his criminal liability in [the 76 Station] case. The important part is he's been involved in finding random people who are perceived to be rivals, in rival territory, and watching as they are shot and killed -- or shot at and one is killed, simply for that reason. And that he's had the chance to premeditate and deliberate on what he would do with this gun, under those circumstances, and then he did it. [¶] So the idea that this quarrel arose out of no where [*sic*], or for the jury to think to themselves, well, maybe he never thought about what it's like, or what he would do if it gets this far."

The trial court granted the prosecution's motion, stating: "[In this case,] [Lewis] actually went into an area where he was going to be exposed, and was exposed, because somebody came up from behind him and . . . [punched] him. . . . And they put themselves in a position where if not armed are going to, at the very least, be beaten.

[¶] . . . [¶]

"But what is the reason for going into that territory, standing behind his brother? That's going to be for the jury to make that decision. And whether or not that shot was fired in self defense is going to be for them. But the intent is going to be at issue here. And the Court is going to allow the People to put on the evidence of the [76 Station] murder, but it is going to be minimal. We are not going to be getting into a second trial."

The prosecution called Deanthony Bradford, who testified consistently with the prosecutor's proffer at the

hearing. Bradford explained that the goal was to kill a rival gang member from the Bounty Hunters. The caravan of cars assembled outside of Jordan Downs in an area that was free of cameras. Bradford identified the man who was to be killed; he believed that the man was a Bounty Hunter because he was a black man in Bounty Hunter territory. After the shooting "it played out like a puzzle"—the cars drove away with the shooter in the lead and the decoy vehicle last. Police officers pulled over the decoy vehicle that Lewis was driving, just as the shot caller had planned, and the other cars drove away.

Officer Richard Delgado and Deputy Steven Blagg also testified regarding the murder at the 76 station.

The court instructed the jury under CALCRIM No. 375, explaining that it could use the evidence of the killing at the 76 station "only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offenses[,]" and could consider the evidence only "for the limited purpose of deciding whether, first, the defendant had a motive to commit the offense alleged in this case; second, the defendant knew the nature and consequences of his actions when he allegedly acted in this case; third, the defendant's alleged actions were not the result of mistake or accident; or, four, the defendant had the required mental state during the commission of the charged offense."

Legal Principles

"Only relevant evidence is admissible . . . ." (*People v. Harris* (2005) 37 Cal.4th 310, 337 (*Harris*); Evid. Code, §§ 210, 350.) Evidence is relevant if it "'tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive.' [Citation.]" (*Harris*, *supra*, at p. 337.) Trial courts have broad discretion in determining whether evidence is relevant. (*Ibid*.) We review a trial court's ruling on the admissibility of evidence for an abuse of that discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.)

"[E]vidence that a person committed a crime, civil wrong, or other act" is admissible when it is relevant to prove some fact such as "motive, opportunity, intent, preparation, plan, knowledge, identity, [or] absence of mistake or accident" (Evid. Code, § 1101, subd. (b)), "'or to overcome any material matter sought to be proved by the defense.' [Citation.]" (*People v. Alcala* (1984) 36 Cal.3d 604, 631, superseded by statute on other grounds as stated in *People v. Falsetta* (1999) 21 Cal.4th 903, 911). Even when evidence is relevant under Evidence Code section 1101, subdivision (b), however, it must be excluded under Evidence Code section 352 if its prejudicial effect substantially outweighs its probative value. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404 (*Ewoldt*).)

Evidence Code section 352 is intended to prevent undue prejudice, that is "'"evidence which uniquely tends to

evoke an emotional bias against the defendant as an individual and which has very little effect on the issues,'" not the prejudice 'that naturally flows from relevant, highly probative evidence.' [Citations.]" (*People v. Padilla* (1995) 11 Cal.4th 891, 925, overruled on other grounds by *People v. Hill* (1998) 17 Cal.4th 800.) The courts recognize that gang-related evidence may have a "'highly inflammatory'" impact. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167.) However, "evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation . . . can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.)

This court will not disturb a trial court's exercise of discretion under Evidence Code section 352 absent a showing that the trial court abused its discretion. (*People v. Branch* (2001) 91 Cal.App.4th 274, 281–282.) Under Evidence Code section 352, "[t]he least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . .' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must

be sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance.' [Citations.]' [Citation.]" (*Ewoldt*, *supra*, 7 Cal.4th at p. 402.)

Analysis

The People contend that Lewis forfeited his challenges to the other crimes evidence by failing to object during trial. As a general rule, even "'when an *in limine* ruling that evidence is admissible has been made, the party seeking exclusion must object at such time as the evidence is actually offered to preserve the issue for appeal.' [Citations.]" (*People v. Morris* (1991) 53 Cal.3d 152, 189 (*Morris*), disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) There is an exception, however, and an in limine motion will preserve the issue for appeal, if the motion satisfies the requirements of Evidence Code section 353, subdivision (a).[5] (*Morris*, *supra*, at p. 190.) A motion in limine meets the requirements of Evidence Code section 353, subdivision (a), only when: "(1) a specific legal ground for exclusion is advanced and subsequently raised on

[5] Evidence Code section 353 provides in part: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion."

appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context." (*Morris*, *supra*, at p. 190.) In this case, Lewis objected to specific prior crimes evidence on the basis that it was not probative of intent and the prior crimes were not sufficiently similar to the charged crime. The evidence discussed at the hearing on the motion in limine did not vary from the evidence presented at trial in a manner that would require us to review it in a different context than the trial court did. We are satisfied that the objection met the requirements of Evidence Code section 353, and preserved Lewis's challenge on appeal. Although Lewis preserved the issue, however, we agree with the People that it is without merit. The uncharged crimes were relevant and sufficiently similar to the charged crimes to be admissible to establish intent under section 1101, subdivision (b).

We reject Lewis's argument that the trial court erred because it confused intent and common design or plan. Lewis conflates these separate bases for admission of evidence under section 1101, subdivision (b). Evidence is relevant to common plan if it tends to establish an overarching scheme; intent refers to the defendant's mental state. The evidence of the 76 Station murder was not admitted for the purpose of demonstrating an overarching scheme or connection between the two offenses, and indeed, the jury did not consider it to be, as it found the allegation

that the murder was committed for the benefit of the Grape Street gang not true. The evidence was offered to illuminate Lewis's thought process at the time of the shooting. The fact that Lewis had volunteered to participate in the murder of a (perceived) rival outside of Grape Street territory was evidence from which the jury could draw the inference that on the date of the instant crime he had also voluntarily gone into an area where he was likely to encounter rival gang members, and intended to kill one. The evidence tended to negate Lewis's argument that he reacted in self-defense, and support the prosecution's theory that he acted with premeditation and deliberation.

We also reject Lewis's contention that because he was not the shooter in the 76 Station case, the evidence of that shooting was not probative of his intent in the present case. Lewis interprets precedent to require that the uncharged acts and charged acts be identical. There is no such requirement. (*Ewoldt*, *supra*, 7 Cal.4th at p. 402 ["[t]he least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent"].) Our Supreme Court has held that "a fact finder properly may consider admissible 'other crimes' evidence to prove intent, so long as (1) the evidence is sufficient to sustain a finding that the defendant committed both sets of crimes [citations], and further (2) the threshold standard articulated in *Ewoldt* can be satisfied—that is, 'the factual similarities among the charges tend to demonstrate that in each instance the

perpetrator harbored' the requisite intent. [Citations.]" (*People v. Soper* (2009) 45 Cal.4th 759, 778.)

Lewis's own actions in the 76 Station case evidenced his intent. He volunteered to facilitate the deadly 76 Station shooting, and his culpability arose from that participation. The shooting was carefully orchestrated—cars were loaded in areas without cameras and three vehicles were used, including Lewis's decoy vehicle which was intended to draw police away from the shooter's vehicle and the murder weapon. The jury in the instant case could have found, by a preponderance of the evidence, that Lewis was a direct aider and abettor of the shooter in the 76 Station case, and as such, that he harbored the intent to kill, or even committed premeditated and deliberate murder.

The incidents bore significant similarities. In the 76 Station case, Lewis was part of an armed caravan that entered rival gang territory to kill a rival gang member. In the instant case, Lewis entered an area where he was likely to meet rival gang members carrying a loaded gun, confronted numerous persons to ascertain whether they were affiliated with rival gangs, and shot a man after he encountered people who claimed gangs other than Grape Street. These similarities are great enough "to support the inference that [Lewis] '"probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*Ewoldt*, *supra*, 7 Cal.4th at p. 402.)

Finally, Lewis argues that, even if the evidence of the 76 Station murder was relevant to intent, he did not dispute

that he intended to kill Brown, such that the evidence relating to intent was both irrelevant and unduly prejudicial. Intent was the primary issue in this case. Lewis argued that he acted in self-defense, which, if reasonable, would have absolved him of the crime. In contrast, the prosecution charged him with first degree murder, alleging that the crime was premeditated and deliberate. The evidence of the 76 Station murder was relevant, as we have discussed, but not unduly prejudicial. In that case, Lewis played a less central role. The jury watched the video of Lewis shooting Brown. In comparison, the fact that he drove the decoy vehicle in the 76 Station case was highly unlikely to unfairly inflame the jurors.

Even if Lewis's intent or mental state had been uncontested, however, our Supreme Court "rejected this argument in [*People v.*] *Scott* [(2011)] 52 Cal.4th 452 . . . . Defendants pleaded not guilty, placing in issue all the elements of murder." (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 407.) Having pleaded not guilty to murder, Lewis necessarily placed intent in contention. The trial court did not abuse its discretion by admitting the uncharged crimes evidence, nor did it violate Lewis's right to due process by admitting the prior crimes evidence. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1010 ["[t]he 'routine application of state evidentiary law does not implicate [a] defendant's constitutional rights'"].)

Imposition of the High Term for Manslaughter and the Weapons Enhancement

Prior to imposing the high term on both the voluntary manslaughter conviction and weapons enhancement, the trial court stated, "I thought it was very clear that you should have been convicted of murder. All right. And I can't do anything about that. That's what the jury saw, and I respect that, and we all have to accept that.

"But you are the one who went with your brother. You engaged, at least through part of that day, in wanting to let people know who you were and what you stood for.

"All right. You were the one who was armed with that handgun. There was no reason for you to do that.

"I shouldn't say that. There's no good reason. There is no legitimate reason for you to have done that.

"And in this situation, whether or not it was Travon or whomever that was getting the best of you and your brother, . . . you decided to up the ante. . . . You stepped it up and you decided that you were going to utilize what you had to make sure that you were going to be victorious. I don't think that you cared whether or not you were killing somebody at that time."

The court addressed the families of both Lewis and Brown, and then continued, "[s]o with that, in this matter I think that the factors in aggravation greatly outweigh the factors in mitigation, in that Mr. Brown was unarmed, that

he was not the cause of, but his death was the effect of yourself and your actions and your brother's actions."

The trial court then imposed the high term of 11 years for voluntary manslaughter and the high term of 10 years for the firearm enhancement. Lewis did not object.

Analysis

Lewis contends that the trial court erred by making findings that were contrary the jury's "verdict of acquittal," in violation of his Sixth Amendment right to a trial by jury, the Fourteenth Amendment presumption of innocence, and the prohibition on double jeopardy.[6] Alternatively, he argues that, even if the trial court's findings did not rise to the level of a constitutional violation, the court nonetheless abused its discretion by not considering factors in mitigation. The People respond that Lewis forfeited the arguments by failing to raise them below, but that regardless, the aggravating factors upon which the trial court relied were not improper, and it did not abuse its discretion by imposing the upper terms for voluntary manslaughter and the firearm enhancement. We agree with the People.

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[6] Lewis admits that, under current law, the prescribed determinate sentence high term is the statutory maximum for purposes of *Apprendi v. New Jersey* (2000) 530 U.S. 466, and that the court may consider facts outside of the trial record that were not found by a jury.

"[C]omplaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 356.) This includes claims that the trial court failed to consider mitigating factors. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 582.) Lewis failed to object to the trial court's selection of the upper term of imprisonment on the specific ground that the trial court made findings contrary to the jury's verdict, and has thus forfeited the contention. (*People v. Scott*, *supra*, 9 Cal.4th at pp. 352–353.) Regardless, the contention lacks merit.

A trial court's exercise of its discretion in selecting a lower, middle, or upper term sentence under section 1170 is reviewed for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) "[A] trial court is free to base an upper term sentence upon any aggravating circumstance that the court deems significant," and is "'reasonably related to the decision being made.' [Citation.]" (*Id.* at p. 848.) A single factor may be determinative in the sentencing decision. (*People v. Black* (2007) 41 Cal.4th 799, 812.)

In *People v. Towne* (2008) 44 Cal.4th 63 (*Towne*), our Supreme Court held that a trial court has "broad discretion to consider relevant evidence at sentencing." (*Id.* at p. 85.) "Nothing in the applicable statute or rules suggests that a trial court must ignore evidence related to the offense of which the defendant was convicted, merely because that evidence did not convince a jury that the defendant was

guilty beyond a reasonable doubt of related offenses." (*Id.* at pp. 85–86.) *Towne* further held that the Sixth Amendment right to a jury trial is not offended when a judge considers conduct underlying acquitted charges. (*Id.* at p. 86.) "[A]n acquittal merely establishes the existence of a reasonable doubt as to guilt. Unless specific findings are made, 'the jury cannot be said to have "necessarily rejected" any facts when it returns a general verdict. . . .' [Citation.]" (*Ibid.*) "'Judicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments.' [Citation]." (*Ibid.*)

Lewis urges us not to follow *Towne*, which he claims was decided on the basis of the defendant's extensive criminal history, a factor he alleges is not present in this case. He also argues that the *Towne* court did not need to decide whether the trial court could consider conduct underlying acquitted charges, and its discussion thereof was dicta.

We are bound to follow *Towne* where it is applicable. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [appellate court is bound to follow holdings of the Supreme Court].) In this case, however, the facts the trial court relied upon did not contravene the jury's findings or verdicts or otherwise rely on conduct underlying acquitted charges. The jury's manslaughter verdict encompassed either the finding that Lewis (a) actually believed that he or Roberts was in imminent danger of being killed or suffering

great bodily injury and that the immediate use of deadly force was necessary to defend against the danger, but at least one of those beliefs was unreasonable (CALCRIM No. 571 [Imperfect Self-Defense]); or (b) was provoked, and acted rashly and under the influence of intense emotion that obscured his reasoning or judgment as a result of that provocation, and the provocation would have caused a person of average disposition to act rashly and without due deliberation (CALCRIM No. 570 [Provocation/Heat of Passion]). The jury also found that Lewis personally discharged a firearm, causing Brown's death.

None of those findings was contrary to the trial court's stated factors in aggravation—that Brown was unarmed when Lewis shot him; that Lewis was callous regarding Brown's death; or that Lewis's actions caused Brown's death.[7] At trial, it was uncontested that Brown was

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[7] Lewis argues that the trial court's pronouncement at sentencing showed that it agreed with three of the aggravating factors listed in the prosecution's sentencing memorandum, specifically: "(1) The crime involved great violence and callousness in that Brown was shot dead and appellant expressed no remorse in the subsequent telephone call; [¶] (2) The victim was particularly vulnerable in that Brown was unarmed; [¶] (3) The the [*sic*] manner in which the crime was carried out indicated planning and sophistication in that appellant and Roberts 'sought to provoke gang members on the train' and that when 'individuals' at the station responded to appellant and Robert's 'challenges,' appellant 'kicked off the safety' of his weapon." In fact, the trial court did not expressly adopt the

unarmed when he was killed. Neither the defense of provocation nor imperfect self-defense required the jury to make a finding regarding Lewis's callousness to Brown's death—it had only to determine that he was adequately provoked or had acted in the unreasonable belief that he or Roberts would suffer great bodily injury or death if he did not act. With respect to Lewis's actions causing Brown's death, it was undisputed that he chose to carry a loaded gun and exited the light rail outside of Grape Street territory. Moton stated to police that Lewis had issued gang challenges to "everyone" on the platform, and specifically to Brown. Although the jury was instructed that "[i]mperfect self-defense does not apply when the defendant, through his own wrongful conduct, has created circumstances that justify his adversary's use of force[,]" it was not required to find that Lewis did not issue gang challenges. Even assuming that it found Lewis acted in imperfect self-defense, the jury could

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reasoning in the People's sentencing memorandum, but stated to the contrary that, although the court generally agreed with the People, "[the court] may not agree 100 percent with what the People said." Lewis also reasons that because it did not state otherwise the trial court "apparently agreed" with defense counsel's argument that "appellant had not been convicted of anything in relation to the other gang-shooting and 'had no previous violent conduct on his record.'" We disagree. The trial court clearly stated the factors upon which it relied in pronouncing sentence. We evaluate the propriety of the sentence based upon the factors the court itself articulated.

still reach the conclusion that Lewis "banged on" Brown, but that his actions weren't sufficient to justify Brown in punching him. The trial court could find that Lewis's actions "caused" the shooting that followed, even if a reasonable person would not react as Brown did, without contravening the jury's manslaughter verdict. Consideration of these factors neither contravened the jury's verdict nor otherwise impinged on Lewis's constitutional rights.

Alternatively, Lewis complains that, even if the trial court's imposition of the high terms did not rise to the level of a constitutional violation, the trial court abused its discretion by not considering mitigating factors, including that "(1) The victim was an initiator of, willing participant in the crime; [¶] (2) The crime was committed because of an unusual circumstances [*sic*], such as great provocation; [¶] (3) The defendant has no prior record, or has an insignificant record of criminal conduct, considering the recency [*sic*] and frequency of prior crimes; [and] [¶] (4) The defendant's prior performance on probation, mandatory supervision, post-release community supervision, or parole was satisfactory."[8]

"Absent an explicit statement by the trial court to the contrary, it is presumed the court properly exercised its legal duty to consider all possible mitigating and aggravating

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[8] In light of Lewis's argument in the opening brief that the court "apparently agreed" with the third mitigating factor enumerated in his sentencing memorandum, it is perplexing that he argues the trial court did not consider this proposed mitigating factor.

factors in determining the appropriate sentence." (*People v. Oberreuter* (1988) 204 Cal.App.3d 884, 888, disapproved on another ground in *People v. Walker* (1991) 54 Cal.3d 1013, 1022–1023.) Here, the record does not affirmatively show the court ignored any relevant mitigating factors. To the contrary, the trial court stated that it had reviewed the defense's sentencing memorandum, which listed all of these specific factors, before pronouncing sentence. The court acknowledged the existence of mitigating factors, stating that "the factors in aggravation greatly outweigh the factors in mitigation." It was not required to give specific reasons for rejecting mitigating factors. (*People v. Jones* (1985) 164 Cal.App.3d 1173, 1181 [trial court required to consider aggravating and mitigating factors prior to sentencing, but not required to set forth reasons for rejecting mitigating factors].) The trial court did not abuse its discretion.

DISPOSITION

We affirm the trial court's judgment.

MOOR, J.

We concur:

BAKER, Acting P. J.

KIM, J.

APPENDIX B

Court of Appeal, Second Appellate District, Division Five - No. B302108

S268905

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ARTHUR LEE LEWIS, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX C

Cal. Penal Code, § 187, sub. (a):

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

(b) [exempts abortions as defined and as exempted by law]

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

(Amended by Stats. 1996, Ch. 1023, Sec. 385. Effective September 29, 1996.)

Cal. Penal Code, § 188:

(a) For purposes of Section 187, malice may be express or implied.

(1) Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature.

(2) Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

(3) Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.

(b) If it is shown that the killing resulted from an intentional act with express or implied malice, as defined in subdivision (a), no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite that awareness is included within the definition of malice.

Cal. Penal Code, § 189:

(a) All murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 287, 288, or 289, or former Section 288a, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree.

(b) All other kinds of murders are of the second degree.

(c) As used in this section, the following definitions apply:

(1) "Destructive device" has the same meaning as in Section 16460.

(2) "Explosive" has the same meaning as in Section 12000 of the Health and Safety Code.

(3) "Weapon of mass destruction" means any item defined in Section 11417.

(d) To prove the killing was "deliberate and premeditated," it is not necessary to prove the defendant maturely and meaningfully reflected upon the gravity of the defendant's act.

(e) A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven:

(1) The person was the actual killer.

(2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.

(3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.

(f) Subdivision (e) does not apply to a defendant when the victim is a peace officer who was killed while in the course of the peace officer's duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of the peace officer's duties.

(Amended by Stats. 2019, Ch. 497, Sec. 192. (AB 991) Effective January 1, 2020. Note: This section was amended on June 5, 1990, by initiative Prop. 115.)

Cal. Penal Code, § 189.5:

(a) Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

(b) Nothing in this section shall apply to or affect any proceeding under Section 190.3 or 190.4.

Cal. Penal Code, § 190:

(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.

(Amended by Stats. 1998, Ch. 760, Sec. 6. Approved in Proposition 19 at the March 7, 2000, election. Prior History: Added Nov. 7, 1978, by initiative Prop. 7; amended June 7, 1988, by Prop. 67 (from Stats. 1987, Ch. 1006); amended June 7, 1994, by Prop. 179 (from Stats. 1993,

Ch. 609); amended June 2, 1998, by Prop. 222 (from Stats. 1997, Ch. 413, Sec. 1, which incorporated Stats. 1996, Ch. 598).)

Cal. Penal Code, § 190.05:

(a) The penalty for a defendant found guilty of murder in the second degree, who has served a prior prison term for murder in the first or second degree, shall be confinement in the state prison for a term of life without the possibility of parole or confinement in the state prison for a term of 15 years to life. For purposes of this section, a prior prison term for murder of the first or second degree is that time period in which a defendant has spent actually incarcerated for his or her offense prior to release on parole.
(b) A prior prison term for murder for purposes of this section includes either of the following:

(1) A prison term served in any state prison or federal penal institution, including confinement in a hospital or other institution or facility credited as service of prison time in the jurisdiction of confinement, as punishment for the commission of an offense which includes all of the elements of murder in the first or second degree as defined under California law.

(2) Incarceration at a facility operated by the Youth Authority for murder of the first or second degree when the person was subject to the custody, control, and discipline of the Director of Corrections.

(c) The fact of a prior prison term for murder in the first or second degree shall be alleged in the accusatory pleading, and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by a plea of guilty or nolo contendere or by trial by the court sitting without a jury.

(d) In case of a reasonable doubt as to whether the defendant served a prior prison term for murder in the first or second degree, the defendant is entitled to a finding that the allegation is not true.

(e) If the trier of fact finds that the defendant has served a prior prison term for murder in the first or second degree, there shall be a separate penalty hearing before the same trier of fact, except as provided in subdivision (f).

(f) If the 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 or nolo contendere, 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 the 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 the state prison for a term of 15 years to life.

(g) 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 at 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.

(h) In the proceeding 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 the prior prison term for murder of the first or second degree which subjects a defendant to the punishment of life without the possibility of parole, 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.

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

(1) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of the prior prison term for murder.

(2) 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.

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

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

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

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

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

(8) Whether or not at the time of the offense the ability of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication.

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

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

(11) 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 life without the possibility of parole 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 the state prison for 15 years to life.

(i) Nothing in this section shall be construed to prohibit the charging of finding of any special circumstance pursuant to Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

(Added by Stats. 1985, Ch. 1510, Sec. 1.)

Cal. Penal Code, § 192:

Manslaughter is the unlawful killing of a human being without malice. It is of three kinds:
(a) Voluntary—upon a sudden quarrel or heat of passion.

(b) Involuntary—in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. This subdivision shall not apply to acts committed in the driving of a vehicle.

(c) Vehicular— [omitted as inapplicable]

(d) [omitted as inapplicable]

(e) "Gross negligence," as used in this section, does not prohibit or preclude a

charge of murder under Section 188 upon facts exhibiting wantonness and a conscious disregard for life to support a finding of implied malice, or upon facts showing malice, consistent with the holding of the California Supreme Court in People v. Watson (1981) 30 Cal.3d 290.

(f) (1) For purposes of determining sudden quarrel or heat of passion pursuant to subdivision (a), the provocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship. Nothing in this section shall preclude the jury from considering all relevant facts to determine whether the defendant was in fact provoked for purposes of establishing subjective provocation.

(2) For purposes of this subdivision, "gender" includes a person's gender identity and gender-related appearance and behavior regardless of whether that appearance or behavior is associated with the person's gender as determined at birth.

(Amended by Stats. 2014, Ch. 684, Sec. 1. (AB 2501) Effective January 1, 2015.)

Cal. Penal Code, § 193:

(a) Voluntary manslaughter is punishable by imprisonment in the state prison for 3, 6, or 11 years.

(b) Involuntary manslaughter is punishable by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years.

(c) Vehicular manslaughter is punishable as follows:

(1) A violation of paragraph (1) of subdivision (c) of Section 192 is punishable either by imprisonment in the county jail for not more than one year or by imprisonment in the state prison for two, four, or six years.

(2) A violation of paragraph (2) of subdivision (c) of Section 192 is punishable by imprisonment in the county jail for not more than one year.

(3) A violation of paragraph (3) of subdivision (c) of Section 192 is punishable by imprisonment in the state prison for 4, 6, or 10 years.

(Amended by Stats. 2011, Ch. 15, Sec. 282. (AB 109) Effective April 4, 2011. Operative October 1, 2011, by Sec. 636 of Ch. 15, as amended by Stats. 2011, Ch. 39, Sec. 68.)

Cal. Penal Code, § 195:

Homicide is excusable in the following cases:

1. When committed by accident and misfortune, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.

2. When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner.

Cal. Penal Code, § 197:

Homicide is also justifiable when committed by any person in any of the following cases:

(1) When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person.

(2) When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein.

(3) When committed in the lawful defense of such person, or of a spouse, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he or she was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed.

(4) When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.

(Amended by Stats. 2016, Ch. 50, Sec. 67. (SB 1005) Effective January 1, 2017.)

Cal. Penal Code, § 12022.53.

(a) This section applies to the following felonies:

(1) Section 187 (murder).

(2) Section 203 or 205 (mayhem).

(3) Section 207, 209, or 209.5 (kidnapping).

(4) Section 211 (robbery).

(5) Section 215 (carjacking).

(6) Section 220 (assault with intent to commit a specified felony).

(7) Subdivision (d) of Section 245 (assault with a firearm on a peace officer or

firefighter).

(8) Section 261 or 262 (rape).

(9) Section 264.1 (rape or sexual penetration in concert).

(10) Section 286 (sodomy).

(11) Section 287 or former Section 288a (oral copulation).

(12) Section 288 or 288.5 (lewd act on a child).

(13) Section 289 (sexual penetration).

(14) Section 4500 (assault by a life prisoner).

(15) Section 4501 (assault by a prisoner).

(16) Section 4503 (holding a hostage by a prisoner).

(17) Any felony punishable by death or imprisonment in the state prison for life.

(18) Any attempt to commit a crime listed in this subdivision other than an assault.

(b) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply.

(c) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally and intentionally discharges a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 20 years.

(d) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 26100, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life.

(e) (1) The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved:

(A) The person violated subdivision (b) of Section 186.22.

(B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d).

(2) An enhancement for participation in a criminal street gang pursuant to Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1 shall not be imposed on a person in addition to an enhancement imposed pursuant to this

subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense.

(f) Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment. An enhancement involving a firearm specified in Section 12021.5, 12022, 12022.3, 12022.4, 12022.5, or 12022.55 shall not be imposed on a person in addition to an enhancement imposed pursuant to this section. An enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d).

(g) Notwithstanding any other provision of law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person found to come within the provisions of this section.

(h) The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.

(i) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 or pursuant to Section 4019 or any other provision of law shall not exceed 15 percent of the total term of imprisonment imposed on a defendant upon whom a sentence is imposed pursuant to this section.

(j) For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact. When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment for that enhancement pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another enhancement provides for a greater penalty or a longer term of imprisonment.

(k) When a person is found to have used or discharged a firearm in the commission of an offense that includes an allegation pursuant to this section and the firearm is owned by that person, a coparticipant, or a coconspirator, the court shall order that the firearm be deemed a nuisance and disposed of in the manner provided in Sections 18000 and 18005.

(l) The enhancements specified in this section shall not apply to the lawful use or discharge of a firearm by a public officer, as provided in Section 196, or by any person in lawful self-defense, lawful defense of another, or lawful defense of property, as provided in Sections 197, 198, and 198.5.

(Amended by Stats. 2018, Ch. 423, Sec. 114. (SB 1494) Effective January 1, 2019.)

Cal. Penal Code, § 186.22.

(a) Any person who actively participates in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.

(b) (1) Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows:

(A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion.

(B) If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years.

(C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years.

(2) If the underlying felony described in paragraph (1) is committed on the grounds of, or within 1,000 feet of, a public or private elementary, vocational, junior high, or high school, during hours in which the facility is open for classes or school-related programs or when minors are using the facility, that fact shall be a circumstance in aggravation of the crime in imposing a term under paragraph (1).

(3) The court shall select the sentence enhancement that, in the court's discretion, best serves the interests of justice and shall state the reasons for its choice on the record at the time of the sentencing in accordance with the provisions of subdivision (d) of Section 1170.1.

(4) Any person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

(A) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 3046, if the felony is any of the offenses enumerated in subparagraph (B) or (C) of this paragraph.

(B) Imprisonment in the state prison for 15 years, if the felony is a home invasion robbery, in violation of subparagraph (A) of paragraph (1) of subdivision (a) of Section 213; carjacking, as defined in Section 215; a felony violation of Section 246; or a violation of Section 12022.55.

(C) Imprisonment in the state prison for seven years, if the felony is extortion, as defined in Section 519; or threats to victims and witnesses, as defined in Section 136.1.

(5) Except as provided in paragraph (4), any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served.

(c) If the court grants probation or suspends the execution of sentence imposed upon the defendant for a violation of subdivision (a), or in cases involving a true finding of the enhancement enumerated in subdivision (b), the court shall require that the defendant serve a minimum of 180 days in a county jail as a condition thereof.

(d) Any person who is convicted of a public offense punishable as a felony or a misdemeanor, which is committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall be punished by imprisonment in a county jail not to exceed one year, or by imprisonment in a state prison for one, two, or three years, provided that any person sentenced to imprisonment in the county jail shall be imprisoned for a period not to exceed one year, but not less than 180 days, and shall not be eligible for release upon completion of sentence, parole, or any other basis, until he or she has served 180 days. If the court grants probation or suspends the execution of sentence imposed upon the defendant, it shall require as a condition thereof that the defendant serve 180 days in a county jail.

(e) As used in this chapter, "pattern of criminal gang activity" means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons:

(1) Assault with a deadly weapon or by means of force likely to produce great bodily injury, as defined in Section 245.

(2) Robbery, as defined in Chapter 4 (commencing with Section 211) of Title 8.

(3) Unlawful homicide or manslaughter, as defined in Chapter 1 (commencing with Section 187) of Title 8.

(4) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances as defined in Sections 11054, 11055,

11056, 11057, and 11058 of the Health and Safety Code.

(5) Shooting at an inhabited dwelling or occupied motor vehicle, as defined in Section 246.

(6) Discharging or permitting the discharge of a firearm from a motor vehicle, as defined in subdivisions (a) and (b) of Section 12034 until January 1, 2012, and, on or after that date, subdivisions (a) and (b) of Section 26100.

(7) Arson, as defined in Chapter 1 (commencing with Section 450) of Title 13.

(8) The intimidation of witnesses and victims, as defined in Section 136.1.

(9) Grand theft, as defined in subdivision (a) or (c) of Section 487.

(10) Grand theft of any firearm, vehicle, trailer, or vessel.

(11) Burglary, as defined in Section 459.

(12) Rape, as defined in Section 261.

(13) Looting, as defined in Section 463.

(14) Money laundering, as defined in Section 186.10.

(15) Kidnapping, as defined in Section 207.

(16) Mayhem, as defined in Section 203.

(17) Aggravated mayhem, as defined in Section 205.

(18) Torture, as defined in Section 206.

(19) Felony extortion, as defined in Sections 518 and 520.

(20) Felony vandalism, as defined in paragraph (1) of subdivision (b) of Section 594.

(21) Carjacking, as defined in Section 215.

(22) The sale, delivery, or transfer of a firearm, as defined in Section 12072 until January 1, 2012, and, on or after that date, Article 1 (commencing with Section 27500) of Chapter 4 of Division 6 of Title 4 of Part 6.

(23) Possession of a pistol, revolver, or other firearm capable of being concealed upon the person in violation of paragraph (1) of subdivision (a) of Section 12101 until January 1, 2012, and, on or after that date, Section 29610.

(24) Threats to commit crimes resulting in death or great bodily injury, as defined in Section 422.

(25) Theft and unlawful taking or driving of a vehicle, as defined in Section 10851 of the Vehicle Code.

(26) Felony theft of an access card or account information, as defined in Section 484e.

(27) Counterfeiting, designing, using, or attempting to use an access card, as

defined in Section 484f.

(28) Felony fraudulent use of an access card or account information, as defined in Section 484g.

(29) Unlawful use of personal identifying information to obtain credit, goods, services, or medical information, as defined in Section 530.5.

(30) Wrongfully obtaining Department of Motor Vehicles documentation, as defined in Section 529.7.

(31) Prohibited possession of a firearm in violation of Section 12021 until January 1, 2012, and on or after that date, Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.

(32) Carrying a concealed firearm in violation of Section 12025 until January 1, 2012, and, on or after that date, Section 25400.

(33) Carrying a loaded firearm in violation of Section 12031 until January 1, 2012, and, on or after that date, Section 25850.

(f) As used in this chapter, "criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity.

(g) Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition.

(h) Notwithstanding any other law, for each person committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities for a conviction pursuant to subdivision (a) or (b) of this section, the offense shall be deemed one for which the state shall pay the rate of 100 percent of the per capita institutional cost of the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, pursuant to former Section 912.5 of the Welfare and Institutions Code.

(i) In order to secure a conviction or sustain a juvenile petition, pursuant to subdivision (a) it is not necessary for the prosecution to prove that the person devotes all, or a substantial part, of his or her time or efforts to the criminal street gang, nor is it necessary to prove that the person is a member of the criminal street gang. Active participation in the criminal street gang is all that is required.

(j) A pattern of gang activity may be shown by the commission of one or more of

the offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), and the commission of one or more of the offenses enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e). A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone.

(k) This section shall remain in effect only until January 1, 2022, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2022, deletes or extends that date.

(Amended (as amended by Stats. 2016, Ch. 887, Sec. 1) by Stats. 2017, Ch. 561, Sec. 178. (AB 1516) Effective January 1, 2018. Repealed as of January 1, 2022, by its own provisions. See later operative version, as amended by Sec. 179 of Stats. 2017, Ch. 561. Note: This section was amended on March 7, 2000, by initiative Prop. 21.)

Cal. Penal Code, § 1170: (as applicable)

(a) (1) The Legislature finds and declares that the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice. When a sentence includes incarceration, this purpose is best served by terms that are proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances.

(2) • • •

(3) In any case in which the sentence prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison or a term pursuant to subdivision (h) of any specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified unless the convicted person is given any other disposition provided by law, including a fine, jail, probation, or the suspension of imposition or execution of sentence or is sentenced pursuant to subdivision (b) of Section 1168 because they had committed their crime prior to July 1, 1977. In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council. The court, unless it determines that there are circumstances in mitigation of the sentence prescribed, shall also impose any other term that it is required by law to impose as an additional term. Nothing in this article shall affect any provision of law that imposes the death penalty, that authorizes or restricts the granting of probation or suspending the execution or imposition of sentence, or expressly provides for imprisonment in the state prison for life, except as provided in paragraph (2) of subdivision (d). In any case in which the amount of preimprisonment credit under Section 2900.5 or any other law is equal to or exceeds any sentence imposed pursuant to this chapter, except for the remaining portion of mandatory supervision pursuant to subparagraph (B) of paragraph (5) of subdivision (h), the entire sentence shall be deemed to have been served, except for the remaining period of mandatory supervision, and the defendant

shall not be actually delivered to the custody of the secretary or to the custody of the county correctional administrator. The court shall advise the defendant that they shall serve an applicable period of parole, postrelease community supervision, or mandatory supervision, and order the defendant to report to the parole or probation office closest to the defendant's last legal residence, unless the in-custody credits equal the total sentence, including both confinement time and the period of parole, postrelease community supervision, or mandatory supervision. The sentence shall be deemed a separate prior prison term or a sentence of imprisonment in a county jail under subdivision (h) for purposes of Section 667.5, and a copy of the judgment and other necessary documentation shall be forwarded to the secretary.

(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation. In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports, including reports received pursuant to Section 1203.03, and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended.

(c) The court shall state the reasons for its sentence choice on the record at the time of sentencing. The court shall also inform the defendant that as part of the sentence after expiration of the term they may be on parole for a period as provided in Section 3000 or 3000.08 or postrelease community supervision for a period as provided in Section 3451.

• • •

Penal Code, § 1170.3.

The Judicial Council shall seek to promote uniformity in sentencing under Section 1170 by:

(a) The adoption of rules providing criteria for the consideration of the trial judge at the time of sentencing regarding the court's decision to:

(1) Grant or deny probation.

(2) Impose the lower, middle, or upper prison term.

(3) Impose the lower, middle, or upper term pursuant to paragraph (1) or (2) of subdivision (h) of Section 1170.

(4) Impose concurrent or consecutive sentences.

(5) Determine whether or not to impose an enhancement where that determination is permitted by law.

(6) Deny a period of mandatory supervision in the interests of justice under paragraph (5) of subdivision (h) of Section 1170 or determine the appropriate period and conditions of mandatory supervision. The rules implementing this paragraph shall be adopted no later than January 1, 2015.

(7) Determine the county or counties of incarceration and supervision when the court is imposing a judgment pursuant to subdivision (h) of Section 1170 concurrent or consecutive to a judgment or judgments previously imposed pursuant to subdivision (h) of Section 1170 in a county or counties.

(b) The adoption of rules standardizing the minimum content and the sequential presentation of material in probation officer reports submitted to the court regarding probation and mandatory supervision under paragraph (5) of subdivision (h) of Section 1170.

(c) This section shall remain in effect only until January 1, 2022, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2022, deletes or extends that date.

Penal Code, § 1259:

Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.

Penal Code, § 1459:

Upon appeal by the people the reviewing court may review any question of law involved in any ruling affecting the judgment or order appealed from, without exception having been taken in the trial court. Upon an appeal by a defendant the court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the trial court and which affected the substantial rights of the defendant. The court may also review any instruction given, refused or modified, even though no objection was made thereto in the trial court if the substantial rights of the defendant were affected

thereby. The reviewing court may reverse, affirm or modify the judgment or order appealed from, and may set aside, affirm or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial. If a new trial is ordered upon appeal, it must be had in the court from which the appeal is taken.

California Rules of Court, Rule 4.401. Authority

The rules in this division are adopted under Penal Code section 1170.3 and under the authority granted to the Judicial Council by the Constitution, article VI, section 6, to adopt rules for court administration, practice, and procedure.

California Rules of Court, Rule 4.403. Application

These rules apply to criminal cases in which the defendant is convicted of one or more offenses punishable as a felony by (1) a determinate sentence imposed under Penal Code part 2, title 7, chapter 4.5 (commencing with section 1170) and (2) an indeterminate sentence imposed under section 1168(b) only if it is imposed relative to other offenses with determinate terms or enhancements.

Rule 4.403 amended effective January 1, 2018; adopted as rule 403 effective July 1, 1977; previously amended and renumbered effective January 1, 2001; previously amended effective July 1, 2003, January 1, 2007, and January 1, 2017.

(a) How given

If the sentencing judge is required to give reasons for a sentence choice, the judge must state in simple language the primary factor or factors that support the exercise of discretion. The statement need not be in the language of the statute or these rules. It must be delivered orally on the record. The court may give a single statement explaining the reason or reasons for imposing a particular sentence or the exercise of judicial discretion, if the statement identifies the sentencing choices where discretion is exercised and there is no impermissible dual use of facts.

(Subd (a) amended effective January 1, 2018; previously amended effective January 1, 2007.)

(b) When reasons required

Sentence choices that generally require a statement of a reason include, but are not limited to:

(1) Granting probation when the defendant is presumptively ineligible for probation;

(2) Denying probation when the defendant is presumptively eligible for probation;

(3) Declining to commit an eligible juvenile found amenable to treatment to the Department of Corrections and Rehabilitation, Division of Juvenile Justice;

(4) Selecting one of the three authorized terms in prison or county jail under section 1170(h) referred to in section 1170(b) for either a base term or an enhancement;

(5) Imposing consecutive sentences;

(6) Imposing full consecutive sentences under section 667.6(c) rather than consecutive terms under section 1170.1(a), when the court has that choice;

(7) Waiving a restitution fine;

(8) Granting relief under section 1385; and

(9) Denying mandatory supervision in the interests of justice under section 1170(h)(5)(A).

(Subd (b) amended and renumbered effective January 1, 2018; previously amended effective January 1, 2001, July 1, 2003, January 1, 2006, January 1, 2007, May 23, 2007, and January 1, 2017.)

Rule 4.406 amended effective January 1, 2018; adopted as rule 406 effective January 1, 1991; previously amended and renumbered effective January 1, 2001; previously amended effective July 1, 2003, January 1, 2006, January 1, 2007, May 23, 2007, and January 1, 2017.

California Rules of Court, Rule 4.420. Selection of term of imprisonment

(a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge must select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules.

(Subd (a) amended effective May 23, 2007; previously amended effective July 28, 1977, January 1, 1991, and January 1, 2007.)

(b) In exercising his or her discretion in selecting one of the three authorized terms of imprisonment referred to in section 1170(b), the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. The relevant circumstances may be obtained from the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any evidence introduced at the sentencing hearing.

(Subd (b) amended effective January 1, 2017; previously amended effective July 28, 1977, January 1, 1991, January 1, 2007, May 23, 2007, and January 1, 2008.)

(c) To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing a particular term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term.

(Subd (c) amended effective January 1, 2018; adopted effective January 1, 1991.)

(d) A fact that is an element of the crime on which punishment is being imposed may not be used to impose a particular term.

(Subd (d) amended effective January 1, 2018; adopted effective January 1, 1991; previously amended effective January 1, 2007, May 23, 2007, and January 1, 2008.)

(e) The reasons for selecting one of the three authorized terms of imprisonment referred to in section 1170(b) must be stated orally on the record.

(Subd (e) amended effective January 1, 2017; previously amended and relettered effective January 1, 1991; previously amended effective July 28, 1977, January 1, 2007, and May 23, 2007.)

Rule 4.420 amended effective January 1, 2018; adopted as rule 439 effective July 1, 1977; previously amended and renumbered as rule 420 effective January 1, 1991; previously renumbered effective January 1, 2001; previously amended effective July 28, 1977, January 1, 2007, May 23, 2007, January 1, 2008, and January 1, 2017.

California Rules of Court, Rule 4.421. Circumstances in aggravation

Circumstances in aggravation include factors relating to the crime and factors relating to the defendant.

(a) Factors relating to the crime

Factors relating to the crime, whether or not charged or chargeable as enhancements include that:

(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness;

(2) The defendant was armed with or used a weapon at the time of the commission of the crime;

(3) The victim was particularly vulnerable;

(4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission;

(5) The defendant induced a minor to commit or assist in the commission of the crime;

(6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process;

(7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed;

(8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism;

(9) The crime involved an attempted or actual taking or damage of great monetary value;

(10) The crime involved a large quantity of contraband; and

(11) The defendant took advantage of a position of trust or confidence to commit the offense.

(12) The crime constitutes a hate crime under section 422.55 and:

(A) No hate crime enhancements under section 422.75 are imposed; and

(B) The crime is not subject to sentencing under section 1170.8.

(Subd (a) amended effective May 23, 2007; previously amended effective January 1, 1991, and January 1, 2007.)

(b) Factors relating to the defendant

Factors relating to the defendant include that:

(1) The defendant has engaged in violent conduct that indicates a serious danger to society;

(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness;

(3) The defendant has served a prior term in prison or county jail under section 1170(h);

(4) The defendant was on probation, mandatory supervision, postrelease community supervision, or parole when the crime was committed; and

(5) The defendant's prior performance on probation, mandatory supervision, postrelease community supervision, or parole was unsatisfactory.

(Subd (b) amended effective January 1, 2017; previously amended effective January 1, 1991, January 1, 2007, and May 23, 2007.)

(c) Other factors

Any other factors statutorily declared to be circumstances in aggravation or that reasonably relate to the defendant or the circumstances under which the crime was committed.

(Subd (c) amended effective January 1, 2018; adopted effective January 1, 1991; previously amended effective January 1, 2007, and May 23, 2007.)

*Rule 4.421 amended effective January 1, 2018; adopted as rule 421 effective July 1, 1977; previously renumbered effective January 1, 2001; previously amended effective January 1, 1991, January 1, 2007, May 23, 2007, and Januar**y 1, 2017.***

California Rules of Court, Rule 4.423. Circumstances in mitigation

Circumstances in mitigation include factors relating to the crime and factors relating to the defendant.

(a) Factors relating to the crime

Factors relating to the crime include that:

(1) The defendant was a passive participant or played a minor role in the crime;

(2) The victim was an initiator of, willing participant in, or aggressor or provoker of the incident;

(3) The crime was committed because of an unusual circumstance, such as great provocation, that is unlikely to recur;

(4) The defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense;

(5) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime;

(6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim;

(7) The defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal;

(8) The defendant was motivated by a desire to provide necessities for his or her family or self; and

(9) The defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime, and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child; and the abuse does not amount to a defense.

(Subd (a) amended effective May 23, 2007; previously amended effective January 1, 1991, July 1, 1993, and January 1, 2007.)

(b) Factors relating to the defendant

Factors relating to the defendant include that:

(1) The defendant has no prior record, or has an insignificant record of criminal conduct, considering the recency and frequency of prior crimes;

(2) The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime;

(3) The defendant voluntarily acknowledged wrongdoing before arrest or at an early stage of the criminal process;

(4) The defendant is ineligible for probation and but for that ineligibility would have been granted probation;

(5) The defendant made restitution to the victim; and

(6) The defendant's prior performance on probation, mandatory supervision, postrelease community supervision, or parole was satisfactory.

(Subd (b) amended effective January 1, 2017; previously amended effective January 1, 1991, January 1, 2007, and May 23, 2007.)

(c) Other factors

Any other factors statutorily declared to be circumstances in mitigation or that reasonably relate to the defendant or the circumstances under which the crime was committed.

(Subd (c) adopted effective January 1, 2018.)

Rule 4.423 amended effective January 1, 2018; adopted as rule 423 effective July 1, 1977; previously renumbered effective January 1, 2001; previously amended effective January 1, 1991, July 1, 1993, January 1, 2007, May 23, 2007, and January 1, 2017.

(See generally: https://www.courts.ca.gov/cms/rules/index.cfm?title=four)

PROOF OF SERVICE (duplicate)

Title: ARTHUR LEE LEWIS v. CALIFORNIA **Court of Appeal Case No.:** **B302108**

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The undersigned declares:

I am a citizen of the United States of America, over the age of eighteen years and counsel for petitioner herein. My business address is 1535 Farmers Lane 133, Santa Rosa, CA 95405.

On 22 September 2021 I served the attached, **PETITION FOR CERTIORARI & MOTION TO PROCEED IN FORMA PAUPERIS** on the parties in this action by placing a true copy thereof, in a sealed envelope with first class postage fully prepaid, in the United States Mail, addressed as follows:

[x] Second District Court of Appeal
300 South Spring St., N.Tower,
L.A., CA 90013

[x] Attorney General of California
300 South Spring Street, Suite 1702
Los Angeles, CA 90013

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

Sworn this 22 September 2021, at Santa Rosa, California

/Kmanjarrez

Kieran D. C. Manjarrez