IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. LOUIS MITCHELL, JR., Defendant and Appellant.	No. S147335 (San Bernardino Co. Superior Court No. FSB 051580)

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of San Bernardino

HONORABLE BRIAN S. McCARVILLE, JUDGE

MARY K. McCOMB
State Public Defender

MARIA MORGA
State Bar No. 197218
Deputy State Public Defender
Morga@ospd.ca.gov

Office of the State Public Defender
1111 Broadway, 10th Floor
Oakland, California 94607
Telephone: (510) 267-3300
Facsimile: (510) 452-8712

Attorneys for Appellant

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	No. S147335
v.	)	(San Bernardino Co. Superior Court No. FSB 051580)
LOUIS MITCHELL, JR.,	)	
Defendant and Appellant.	)	

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this brief, appellant Louis Mitchell, Jr. ("Mitchell") replies to contentions made by respondent ("the State") that necessitate an answer in order to present the issues fully to this Court. However, he does not reply to arguments that are adequately addressed in his opening brief. In particular, Mitchell does not present a reply on Argument III, his claim of cumulative prejudice resulting from the instructional errors at the guilt phase and Argument VI, his claim of cumulative prejudice based on the cumulative effect of all the errors. The failure to address any particular argument, sub-argument or assertion made by the State, or to reiterate any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by Mitchell (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects his view that the issue has been

adequately presented and the positions of the parties are fully joined. The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief.

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ARGUMENT

I.

THE UNANIMITY-OF-DOUBT REQUIREMENT IN CALJIC NO. 8.71 AND CALJIC NO. 8.72 IMPERMISSIBLY AND PREJUDICIALLY SUBVERTED THE REASONABLE DOUBT STANDARD WHICH LOWERED THE STATE'S BURDEN OF PROOF FOR MURDER AND FIRST DEGREE MURDER

In accordance with CALJIC Nos. 8.71 and 8.72, the trial court instructed the jury on how to respond to doubts regarding whether appellant was guilty of the lesser or greater homicide offenses. The version of CALJIC Nos. 8.71 and 8.72 given in this case erroneously instructed jurors that they must *unanimously* agree that they have a reasonable doubt whether the murder was a greater or lesser offense before giving the defendant the benefit of that doubt. By requiring all twelve jurors to have a reasonable doubt regarding the greater offense before an individual juror could vote for the lesser offense, CALJIC Nos. 8.71 and 8.72 erroneously lowered the prosecution's burden of proof. The State, however, contends that the jury, viewing the instructions as a whole, would not have applied an improper burden of proof while making its guilt determinations. The State further contends that even if instructing with the flawed versions of CALJIC Nos. 8.71 and 8.72 was error, the error could not have affected the verdict and was harmless. Notwithstanding the Court's recent decision in *People v. Salazar* (2016) 63 Cal.4th 214, rejecting a similar claim, the trial court's giving the flawed versions of CALJIC Nos. 8.71 and 8.72 constituted reversible error for the reasons articulated in appellant's opening brief and below.

A. This Claim Is Cognizable On Appeal

This Court in *People v. Moore* (2011) 51 Cal.4th 386, 410 (hereafter "*Moore*"), found a similar appellate claim cognizable even where defense counsel did not object and had requested that the trial court give CALJIC No. 8.71. The State, however, contends that this issue is forfeited on appeal because Mitchell failed to object below to CALJIC Nos. 8.71 and 8.72, or to request a clarifying or amplifying instruction in the trial court. (RB 22-23.) The State relies on cases where the instruction was a correct statement of the law without potential for confusing the jury (RB 23, citing *People v. Bolin* (1998) 18 Cal.4th 297, 327, and *People v. Johnson* (1993) 6 Cal.4th 1, 52), which is not the situation in this case. Mitchell's claim is cognizable on appeal for the very reason the State acknowledges, the asserted error affected his substantial rights. Penal Code section 1259 exempts jury instruction claims affecting appellant's substantial rights from the customary rules relating to forfeiture by failure to object, and thus the State's forfeiture argument is without merit. (See *People v. Casares* (2016) 62 Cal.4th 808, 831 [reaching instructional claim that there was a reasonable likelihood the jury understood the instructions in a way that undermined the requirement of proof beyond a reasonable doubt despite defendant's failure to object]; *People v. Rundle* (2008) 43 Cal.4th 76, 148-149 [addressing ambiguous instruction claim where there was no objection], overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421; *People v. Kelly* (2007) 42 Cal.4th 763, 791 [addressing instructional claim where no objection or request for clarification].)

B. The Delivery Of CALJIC Nos. 8.71 And 8.72, Requiring Jurors To Unanimously Agree They Had A Reasonable Doubt As To The Nature Of The Crime Or The Degree Of Murder Before Appellant Was Entitled To The Benefit Of That Doubt, Violated Both State Law And The Federal Constitution

In his opening brief, Mitchell challenges the trial court's instruction to the jurors with the 1996 revised versions of CALJIC Nos. 8.71 and 8.72. (AOB 49-85.) These versions contained a unanimity-of-doubt requirement that this Court in *People v. Moore*, *supra*, 51 Cal.4th at pp. 411-412, found potentially confusing to jurors about the role of their individual judgments in deciding between first and second degree murder and murder or manslaughter. (AOB 53-57.) Mitchell argues that in this case, where the jury was given the disapproved of unanimity-of-doubt language, the jury was essentially told that unless the doubt was shared by each and every juror, the duty to give the defendant the benefit of the doubt did not arise and was, in effect, negated. By negating the benefit-of-the-doubt principle, the instructions lowered the prosecution's burden of proof and undermined the proof beyond a reasonable doubt standard, thereby violating Mitchell's state and federal constitutional rights. (AOB 49-85.)

1. There Is a Reasonable Likelihood That the Jurors Understood and Applied the Unanimity-of-Doubt Requirement, Which This Court Criticized As Problematic and Confusing in *People v. Moore* (2011) 51 Cal.4th 386, in a Way That Violated State Law and the Federal Constitution

Since this Court's decision in *Moore*, and the filing of Appellant's Opening Brief and Respondent's Brief, this Court addressed the same unanimity-of-doubt language in the 1996 revised versions of CALJIC Nos.

8.71 and 8.72 in *People v. Salazar* (2016) 63 Cal.4th 214 (hereafter "*Salazar*"). In *Salazar*, this Court acknowledged the advice in *Moore* that it is better practice not to use the 1996 revised versions of CALJIC Nos. 8.71 and 8.72 with the unanimity-of-doubt language, because it creates some potential for confusing jurors about the role of their individual judgements in deciding between the greater and lesser offenses. (*People v. Salazar*, *supra*, 63 Cal.4th at p. 246; RB 24-25.)[1] In fact, *Salazar* states that the unanimity-of-doubt language "may be confusing because it is unclear how the phrase 'unanimously agree that you have a reasonable doubt' applies to individual jurors' views . . ." (*People v. Salazar*, *supra*, at p. 247.) Nevertheless, *Salazar* held that in that case, where the jury was instructed with CALJIC No. 17.40, CALJIC No. 8.74 and CALJIC No. 17.10, a reasonable juror, considering the instructions as a whole, "would have understood that these terms reflect the principle stated in CALJIC No. 17.10: 'the court cannot accept a guilty verdict on a lesser crime unless you have unanimously found the defendant not guilty of the charged crime.'" (*People v. Salazar*, *supra*, 63 Cal.4th at pp. 247-248, quoting *People v. Moore*, *supra*, 51 Cal.4th at p. 411.)

Appellant respectfully requests that this Court reconsider its decision in *Salazar* for two reasons. First, this Court in *Salazar*, in holding that the

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[1] Mitchell does not claim that the 1996 revised versions of CALJIC Nos. 8.71 and 8.72 are erroneous. (See *People v. Salazar*, *supra*, 63 Cal.4th at p. 246.) Rather, appellant's argument is that based on the unanimity-of-doubt language in CALJIC Nos. 8.71 and 8.72 and the other instructions given in the case, it is reasonably likely that the jury understood the unanimity-of-doubt language as preventing any individual juror from giving effect to any reasonable doubt as to the degree of the offense. (AOB 56-57.)

unanimity-of-doubt language in CALJIC Nos. 8.71 and 8.72 reflected the principle of CALJIC No. 17.10, essentially viewed CALJIC Nos. 8.71 and 8.72 as instructions regarding the order of returning verdicts. (*People v. Salazar*, *supra*, 63 Cal.4th at pp. 247-248.) CALJIC Nos. 8.71 and 8.72, however, directly address the role the reasonable doubt standard should play in the jury's deliberations as to the degree of the offense and not the requirement for returning a verdict on the lesser rather than the greater charged offense. By itself, the text of CALJIC Nos. 8.71 and 8.72 neither states nor implies that the unanimity-of-doubt requirement applies to the returning of verdicts. Instead, CALJIC Nos. 8.71 and 8.72 state the fundamental principle this Court set forth in *People v. Dewberry* (1959) 51 Cal.2d 548, 555: "[W]hen the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense."

In light of the opinion in *Moore*, it is understandable that in *Salazar* this Court failed to distinguish instructing jurors on how to return verdicts from instructing jurors on what to do where a juror has a reasonable doubt as to what degree of offense was proved. In *Moore*, this Court found that inserting the unanimity-of-doubt language in CALJIC Nos. 8.71 and 8.72 was unnecessary because CALJIC No. 8.75, an instruction on returning verdicts, explained that the jury must unanimously agree to not guilty verdicts on the greater homicide offense before the jury as a whole may return verdicts on the lesser offense. (*People v. Moore*, *supra*, 51 Cal.4th at pp. 411-412.) In so holding, *Moore* viewed CALJIC Nos. 8.71 and 8.72 as instructions on returning verdicts. In *Salazar*, this Court has done the same

in determining that an instruction on returning verdicts – CALJIC No. 17.10 – cleared up any potential confusion. Since CALJIC Nos. 8.71 and 8.72 are meant to convey what to do when any juror has a reasonable doubt as to degree of offense, and not to instruct on returning verdicts, as outlined in the opening brief and below on pages 8-12, the other instructions given to the jury in this case do not dispel the potential for confusion. (AOB 49-66.)

Second, this Court in *Salazar* failed in its analysis to take into account or apply well-settled law regarding general versus specific instructions. As outlined in Appellant's Opening Brief, where two instructions are inconsistent, the more specific charge controls the general charge. (AOB 58-62.) Any specific instruction on how to deal with reasonable doubt as to the degree of offense would take precedence in guiding the jurors over general instructions on unanimity or reasonable doubt. (See *LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 878.) Thus, although the jury in this case was instructed with other general instructions, these other instructions would not have controlled the jury's interpretation of CALJIC Nos. 8.71 and 8.72. For both of these reasons, this Court should reconsider its ruling in *Salazar*, return CALJIC Nos. 8.71 and 8.72 to their original purpose of instructing the jury that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense. Further, this Court should make clear that other instructions that address the order of returning verdicts do not cure the harm of the unanimity-of-doubt language in CALJIC Nos. 8.71 and 8.72.

2. The Other Instructions Did Not Correct the Constitutional Error Resulting From the Unanimity-of-Doubt Requirement in CALJIC Nos. 8.71 and 8.72

Assuming this Court reconsiders its decision in *Salazar*, the other instructions – CALJIC Nos. 17.40, 8.50 and 8.74 – did not, contrary to the State's contention, clarify the possible confusion stemming from instructing the jury in this case with the 1996 version of CALJIC Nos. 8.71 and 8.72. (RB 22-25.) Although the jurors in this case were instructed with CALJIC No. 17.40, as Mitchell has outlined in his opening brief, that instruction did not dispel the confusion created by the unanimity-of-doubt language in CALJIC Nos. 8.71 and 8.72. (AOB 58-61.) The State's argument to the contrary is based on the decision in *People v. Gunder* (2007) 151 Cal.App.4th 412. (RB 31.) In *Gunder*, finding no error in giving CALJIC No. 8.71 with the unanimity language, the Court of Appeal relied on the trial court's having instructed with CALJIC No. 17.40 on individual opinion and CALJIC No. 8.75 on the procedure for returning verdicts. (*People v. Gunder*, *supra*, 151 Cal.App.4th at p. 425.) *Gunder* characterized CALJIC No. 17.40 as crucial in determining the reasonable likelihood of the jury misinterpreting CALJIC No. 8.71. *Gunder* reasoned that once the jury was instructed with CALJIC No. 17.40, a reasonable juror would view the statement about unanimity in CALJIC No. 8.71 in its "proper context" of the procedure for returning verdicts because the jurors were also instructed with CALJIC No. 8.75. (*People v. Gunder*, *supra*, at p. 425.)[2] Putting aside whether the court's reasoning in *Gunder* is correct, the jury in this

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[2] The court in *Gunder* did not consider whether CALJIC No. 8.50 would have rectified the flaw in CALJIC No. 8.72.

case was not instructed with CALJIC No. 8.75. Thus, *Gunder* offers little support for the State's argument.

The State, following *Gunder*, claims that the crucial factor in determining whether the jury was confused by CALJIC Nos. 8.71 and 8.72 is whether the jurors were properly instructed as to their duty to make decisions individually. (RB 33.) CALJIC No. 17.40, the State asserts, ensured that this was properly understood. The State, however, fails to address the distinction between informing the jurors of their ability to make an individual decision (as CALJIC No. 17.40 does) and informing the jurors of an unanimity-of-doubt requirement. In other words, a juror can make a decision individually, but still believe that he or she is hamstrung by the unanimity-of-doubt language in CALJIC Nos. 8.71 and 8.72 when deciding whether or how to give the defendant the benefit of the doubt in deciding the degree of the offense. Indeed, the court in *Gunder*, acknowledged that if it were reasonably likely that CALJIC No. 8.71 communicated the need for the procedural prerequisite of a unanimous finding of doubt as to degree (which it does), the instruction on the duty to deliberate individually would not refute this directly. (*People v. Gunder*, *supra*, 151 Cal.App.4th at p. 425.) Thus, CALJIC No. 17.40 given in this case did not dispel the confusion created by CALJIC Nos. 8.71 and 8.72.

The State's reliance on *People v. Pescador* (2004) 119 Cal.App.4th 252, 255 is also problematic. In *Pescador* the jury was instructed with CALJIC Nos. 17.11 and 8.50 in addition to CALJIC No. 8.71. (*People v. Pescador*, *supra*, 119 Cal.App.4th at p. 258.) Here, the jury was also instructed with CALJIC No. 8.50, but not CALJIC No. 17.11. Relying on *Pescador*, the State contends that CALJIC No. 8.50 dispelled any confusion by establishing the State's burden of proving that the killing was murder

and not manslaughter. (RB 32.) Reiterating to the jury that the prosecution had to prove each element beyond a reasonable doubt, however, did not clarify the confusing message given by the unanimity-of-doubt language in CALJIC Nos. 8.71 and 8.72. A juror could understand that the prosecution must prove each element beyond a reasonable doubt, and yet still believe that the unanimity-of-doubt language precludes him or her from giving effect to his or her reasonable doubt as to first degree murder when other jurors do not share that doubt. Further, *Pescador*, although referencing CALJIC No. 8.50 in its conclusion that the challenged instructions (CALJIC Nos. 8.71 and 8.72) read together with other instructions given (CALJIC Nos. 17.11 and 8.50) would not likely have led jurors to believe they were required to vote for first degree murder if any of the other jurors found that charge proven, did not explain how CALJIC No. 8.50 was helpful in this regard.

Moreover, the State fails to address both *Pescador's* reliance on cases upholding the validity of CALJIC Nos. 8.71 and 8.72 that did not involve the 1996 revision with the problematic unanimity language (*People v. Pescador*, *supra*, 119 Cal.App.4th at p. 257; AOB 62-63), or that the decision offers no analysis for its conclusion that CALJIC Nos. 17.11 and 17.40 establish that the jury would not misunderstand the unanimity language and apply that language in an unconstitutional manner (AOB 63). Thus, the State's reliance on *Pescador*, like its reliance on *Gunder*, does not refute Mitchell's argument.[3]

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[3] In addition to its reliance on *Gunder* and *Pescador*, the State contends that this Court should follow *People v. Frye* (1998) 18 Cal.4th 894, in resolving this issue. The State, however, openly admits that the

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The State also contends that CALJIC No. 8.74 dispelled any potential confusion created by the unanimity-of-doubt language in CALJIC Nos. 8.71 and 8.72. (RB 32.) CALJIC No. 8.74, however, failed to fix the problem because it did not address reasonable doubt – let alone an individual juror's ability to give effect to her reasonable doubt even when no other juror agreed – and would have been understood by the jurors as stating the general unanimity principle for deciding the homicide offense. This was in contrast to CALJIC Nos. 8.71 and 8.72 which stated a specific limit for an individual juror in resolving doubts as to which offense or degree had been proved.

C. The Delivery Of CALJIC Nos. 8.71 And 8.72 With The Unanimity-Of-Doubt Requirement Mandates Reversal Of Appellant's Murder Convictions And Death Sentence

In his opening brief, Mitchell explains that the error here is structural error, and in the alternative, reversal is required because the State cannot prove the errors harmless beyond a reasonable doubt.[4] The State, however,

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[3] (...continued)
version of the CALJIC instructions used in *Frye* did not contain the problematic language at issue in *Moore*. (RB 28-31.) Indeed, because the instructions in *Frye* did not contain the problematic unanimity-of-doubt language, *Frye* is inapplicable.

[4] As outlined in the opening brief, the unanimity-of-doubt language in CALJIC Nos. 8.71 and 8.72 subverted the reasonable doubt standard in a more tangible way than the terms "grave uncertainty" and "substantial doubt" in *Cage v. Louisiana* and *Sullivan v. Louisiana*. (*Cage v. Louisiana* (1990) 498 U.S. 39, 41; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277; AOB 66-73.) The consequences of this error are unquantifiable and indeterminate, thus, a harmless error analysis would require the Court to speculate about how the jurors applied the reasonable doubt standard, here
(continued...)

characterizes the error in this case as improperly describing or omitting an element of the offense, more akin to the instructional error addressed in *People v. Flood* (1998) 18 Cal.4th 470, 479-480. (RB 34.) In *Flood*, this Court held that an instructional error that improperly describes or omits an element of an offense generally is not a structural defect, but falls within trial error subject to *Chapman* review. (RB 34.) The State contends, however, that the error must be reviewed under the state prejudice standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, and, if the error is characterized as relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense, thus violating both the United States and California Constitutions, then it should be reviewed under the federal constitutional standard of prejudice, *Chapman v. California* (1967) 386 U.S. 18, 24. (RB 34.)

The prejudicial impact of the instructional error is fully set out in the opening brief. (AOB 74-84.) In analyzing prejudice under both the state and federal standard, the State contends that the instructional error could not have contributed to the verdict because there was no evidence "whatsoever" from which the jury could find Mitchell guilty of a lesser offense than first degree murder and any federal constitutional error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24. (RB 34.) If, however, even one juror could have entertained a reasonable doubt that the homicides were committed with

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[4] (...continued)
tainted by the unanimity-of-doubt requirement in reaching the verdicts on counts 1-3. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281.) As such, Mitchell argues the error is structural. Because respondent does not add to the discussion of structural error, this issue is joined and no further reply to respondent on this issue is necessary.

premeditation and deliberation, but was prevented from giving effect to that doubt by the unanimity-of-doubt language, it thus impacted the verdict on the degree of murder and the error is prejudicial. As outlined in more detail in the opening brief and incorporated here, Mitchell contends that at least one juror could have had such a doubt based on the evidence presented. (AOB 75-84.)

The State's prejudice analysis lists evidence supporting the jury's verdict, but does not address the evidence raised by Mitchell that could have reasonably left room for doubt. If properly instructed, at least one juror could have considered and had a reasonable doubt that the homicides were committed with first degree premeditation and deliberation. The State asserts that Mitchell carried out his revenge at the CAS dealership in a premeditated and deliberate manner. (RB 35.) Nonetheless, there was evidence from which a juror could have had a reasonable doubt as to whether Mitchell acted with premeditation and deliberation: (1) there was no evidence that Mitchell arrived at the car dealership with a preexisting plan to shoot or kill anyone; (2) there was conflicting evidence about motive, whether Mitchell was angry with Small or angry with the CAS dealership; and (3) there was evidence that Mitchell may have felt provoked.[5]

The prosecutor's theory was that Mitchell premeditated and deliberated the murders and attempted murders at CAS as demonstrated by motive and method: feeling "wronged by" the people at the car dealership (13 RT 2434), and bringing a weapon to the dealership and multiple

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[5] The jury was instructed with the provocation instruction CALJIC No. 8.42. (65 CT 17,272-17,273.)

gunshots at the scene. (13 RT 2431-2433.)[6] According to the prosecutor, Mitchell's motive in the CAS dealership murders and attempted murders was his belief that the dealership had "screwed them over" (10 RT 2046), but the evidence whether Mitchell knew the car had broken down when he entered CAS that afternoon was unclear. Small testified that she did not have a cell phone at the dealership to inform Mitchell of the car breaking down. (7 RT 1315, 1341.) Small did call her son Kenrod from the dealership's phone and tell him she did not have the Durango she had just purchased and that she was on the way home. (6 RT 1244.) Once Small returned home, she discovered the cell phone that Mitchell used was at her apartment and not with Mitchell. (7 RT 1343.) Small testified that she only talked with Mitchell later in the afternoon when she received a call from him before she took her children to the park, which it turned out was after the murders at the CAS dealership. (7 RT 1354.) During that conversation Mitchell told her he was coming home. He did not mention the homicides and attempted homicides at CAS, and she did not remember if she told Mitchell about the car breaking down. (7 RT 1354-1355.) Without knowing that the car had broken down, giving Mitchell a motive to plan the murders and attempted murders, a reasonable juror could have doubt as to whether Mitchell arrived at the CAS dealership with a pre-existing plan to kill.

Even if Mitchell did believe the car dealership "screwed them over" (10 RT 2047), there was evidence that he was not upset about the situation, again casting doubt on a pre-existing plan to kill and thus whether Mitchell

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[6] Appellant's Opening Brief addresses in detail how Mitchell's normal habit of carrying a weapon and the imprecise nature of the shooting cast doubt on premeditation and deliberation. (AOB 77-80.)

premeditated and deliberated the murders. Christina Eyre, Mitchell's girlfriend, testified that when she and Mitchell talked on the phone at 2:00 p.m. on August 8, 2005, shortly before the murders and attempted murders, Mitchell did not say anything about going to the CAS dealership. (10 RT 2045-2046.) Eyre repeatedly testified that she and Mitchell did not discuss the CAS dealership. (10 RT 2046-2047.) Eyre admitted, however, after repeated questions from the prosecutor, that Mitchell said something to the effect that "they" [the car dealership] were screwing him over on the car. (10 RT 2047.) Mitchell and Eyre discussed that Small would do what she wanted to do, that it was her money, and that the car would belong to Small. (10 RT 2047.) Eyre also testified that Mitchell did not say that he was mad. (10 RT 2047.) Their conversation took place at 2:00 p.m. and lasted less than five minutes. (10 RT 2048.) This conversation, without any expressed animosity from Mitchell toward the CAS dealership or employees shortly before the murders could cause a reasonable juror to doubt that Mitchell had a preexisting plan to kill when he returned to the dealership. Even if Mitchell arrived at the car dealership intending to confront Mario Lopez who handled the car deal for taking advantage of Small, Mitchell had no pre-existing plan to kill Juan Bizzotto, Jerry Payan, or Patrick Mawikere who were not involved in the car deal.

There was evidence that Mitchell was angry with Small rather than the dealership. There was testimony that Mitchell and Small argued during the initial visit to the car dealership. According to Payan, who overheard a conversation between Mitchell and Small, Mitchell wanted one type of car and Small wanted a different car. (8 RT 1463-1464.) Payan described the conversation as a heated argument. (8 RT 1467.) Payan also testified that Mitchell was angry when he left the dealership the first time. (8 RT 1467.)

According to Payan, Mitchell did not yell at the sales people, nor did he say anything to anyone, but just left mad. (8 RT 1468.) When Mitchell returned to the dealership, he was excited and angry while repeatedly asking for Small. (7 RT 1419-1420; 8 RT 1495.) Based on this testimony, a juror could have reasoned that Mitchell was upset with Small and angered by their differences over the car deal. Thus, a juror could have had a reasonable doubt that Mitchell killed with premeditation and deliberation because he felt wronged by salesmen at the car dealership.

Once at the CAS dealership, the evidence also showed that Mitchell may have been provoked, calling into doubt the prosecutor's theory of premeditation and deliberation. Juan Bizzotto testified that Mitchell was excited and angry when Lopez was directing him outside and that Mitchell pushed Lopez back from the front door of the dealership as Lopez was attempting to escort Mitchell out. (8 RT 1495, 1497.) During this encounter between Mitchell and Lopez, both Payan and Mawikere stood up, intending to assist Lopez. (7 RT 1422; 8 RT 1495.) Based on Mitchell being escorted out of the dealership and possibly being confronted by two additional men, at least one juror could have reasonable doubt whether the murder was first degree deliberate and premeditated murder rather than second degree murder.

Based on all this evidence, a reasonable juror could have concluded that Mitchell was not aware of the car breaking down, was angry with Small and not the car dealership, and thus had no preexisting plan to kill, or that, upon arrival at the CAS dealership Mitchell did not premeditate and deliberate the murders because he was provoked by Lopez escorting him out of the car dealership and two other employees standing to support Lopez. Thus, a juror could have had a reasonable doubt that the murders at

the CAS dealership were first degree premeditated and deliberated. If at least one juror had such reasonable doubt about whether the murders were first degree premeditated and deliberated, the unanimity-of-doubt language would have precluded the juror from voting against the greater crime if the other jurors did not agree. Therefore, the instructional error contributed to the verdict.

The State alleges that Mitchell's conduct at the Yellows also cannot be reconciled with anything other than deliberate and premeditated murder. (RB 35.) To support this contention the State asserts that Mitchell's alleged statement to Armando that he "fucked up" can only be reconciled with planning to deliberately shoot and kill Armando. (RB 35-36.) The State, however, ignores evidence that Mitchell was acting strangely and may have been suffering from a hallucination that Armando was the devil. Armando testified that Mitchell called him devil and was trying to get Armando to approach for some unknown reason. (9 RT 1717.) Armando did not know why Mitchell confronted him. (13 RT 2445.) Armando and Mitchell had seen each other one or two days before and had no problems. (9 RT 1727.) Further, Mitchell shot without precision at both Armando and Susano, further suggesting Mitchell may have been experiencing a hallucination rather than specifically targeting Armando and Susano. (9 RT 1720, 1758.)

In addition, the State asserts that statements of "that's what they get" after the murder of Susano demonstrate that Mitchell killed Susano with premeditation and deliberation. (RB 36.) The State, however, does not address the fact that Valerie Hernandez testified that although she heard that statement being made, she did not know who said it and could not attribute it to Mitchell. (9 RT 1767-1768.) Based on all of this evidence, a juror could have rejected the prosecutor's theory that Mitchell wanted to confront

and kill people whom he felt had wronged him and had a reasonable doubt that Mitchell premeditated and deliberated the murder and attempted murder at the Yellows. (13 RT 2434- 2435.) If a juror had such reasonable doubt, the unanimity-of-doubt language would have precluded the juror from giving effect to that doubt, unless her doubt was shared by all the other jurors, which ultimately would have affected the verdict.

It would not have been unreasonable for a juror to find that both the murders and attempted murders at the car dealership and the murder and attempted murder at the Yellows were impulsive and the product of a delusional mind. In addition to the above evidence, there was evidence that Mitchell was delusional and mentally unstable in the day following the murders and attempted murders which would also support any reasonable doubt a juror may have already had as to the murders and attempted murders at the CAS dealership and the Yellows. (11 RT 2098-2099, 2116, 2127-2128, 2163-2168, 2171-2174, 2292-2295.) Thus, a juror could have had a reasonable doubt about whether the murders were premeditated and deliberated, but there is a reasonable possibility that the confusing unanimity-of-doubt language would have prevented the juror from giving effect to this doubt thereby affecting the verdict. Failing to address these issues, the State has not met its burden to prove the instructional error was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.) The convictions on count 1, 2, and 3, and the special circumstance finding must be reversed.

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II.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING APPELLANT'S REQUEST TO DELIVER CALJIC NO. 8.73.1 AT THE GUILT PHASE

In his opening brief, Mitchell challenges the trial court's refusal to give his requested instruction, CALJIC No. 8.73.1, "Evidence Of Hallucination May be Considered In Determining Degree of Murder." With this instruction, the jury could consider any evidence that the perpetrator of an unlawful killing suffered from a hallucination which contributed as a cause of the homicide on the issue of whether the killing was done with or without deliberation and premeditation. (AOB 86-105.)[7] Both parties agree on the law governing the claim: (1) the trial court must give the instruction if there is substantial evidence to support it, in other words, sufficient to deserve consideration by the jury (AOB 88-89; RB 36-37); (2) in assessing whether substantial evidence supports the instruction, the credibility of the witnesses is for the jury, not the trial court, to determine (AOB 91; RB 37); and (3) doubts as to sufficiency of the evidence to warrant an instruction must be resolved in favor of the defendant (AOB 88; RB 37).

Mitchell and the State differ, however, on the question whether there was substantial evidence to support an instruction with CALJIC No. 8.73.1. Mitchell argues that the evidence that Mitchell called Armando "devil" together with evidence that he was likely under the influence of phencyclidine (PCP) the day after the murders and attempted murders met

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[7] The State mistakenly summarizes Mitchell's argument as contending that a jury instructed with CALJIC No. 8.73.1 could have determined that he was hallucinating and that he committed the crimes in a heat of passion negating the element of premeditation and deliberation. (RB 38.) Appellant makes no such heat of passion argument.

the threshold requirement that Mitchell suffered from a hallucination that contributed as a cause of the homicide, which entitled him to the instruction. (AOB 88-97.) The State contends it does not. (RB 38-42.)

Although the State argues that Mitchell's statement about the devil was in reference to horns tattooed on Armando's head (RB 40), and that Mitchell normally used that term when referring to Armando, even the prosecutor below implicitly agreed that Mitchell's reference to the devil at the Yellows prior to the attempted murder was not necessarily in reference to Armando, but the actual devil. (12 RT 2361.) During the discussion of the instruction, defense counsel stated, "I don't know if Armando is the devil. I thought he was talking about the other devil." (12 RT 2361.) The prosecutor then stated: "He may be talking about the other devil." (*Ibid.*)[8]

Armando clearly testified that Mitchell called him "devil," had not called him that before, and that no one else called him "devil." (9 RT 1717.) On cross-examination, defense counsel asked Armando: "So he called you devil as a name; is that correct?" Armando answered: "That's what I think. Nobody was there." (9 RT 1734.) Armando's own testimony reveals that he did not necessarily know who or what Mitchell was referring to, but assumed Mitchell was referring to him in the absence of other people at the scene. This contradicts any notion of Mitchell calling Armando by an oft-used nickname – which, if it was indeed his nickname, Armando would know that Mitchell was referring to him. The State contends that Armando's testimony during redirect examination that Mitchell always called him devil "clarified" his earlier testimony, when in fact it directly

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[8] The fact that the prosecutor understood the testimony in this way discredits the State's attempt to make much of the difference between calling Armando "devil" and calling him "the devil." (See RB 40.)

contradicted his prior testimony. (9 RT 1738.) Finally, as Armando testified, there was no pending conflict between him and Mitchell. They had seen each other a day or two before with no problems, thus there was no motivation for Mitchell to kill Armando. (9 RT 1727.) In the absence of a motive, Mitchell's calling Armando "devil" indicates he thought he was dealing with the devil and not Armando.

In its argument, the State focuses exclusively on the interaction between Mitchell and Armando at the Yellows to contend that there was no evidence presented that Mitchell suffered from hallucinations in the past or at the time of the charged crimes. (RB 40.) Although past evidence of hallucinations is not required by law, Mitchell's earlier erratic behavior, combined with Mitchell's statements about the devil, and his behavior the day after the murders and attempted murders constitute substantial evidence that a hallucination about the devil contributed as a cause of the homicides or attempted homicides.

The jury would have considered the "devil" statements made by Mitchell together with his earlier abnormal behavior at the car dealership – returning to the car dealership partially dressed (7 RT 1421; 8 RT 1467, 1491), and demanding to know where Small was even after being told she had left (7 RT 1419-1420; 8 RT 1495). These facts considered on their own may not indicate that Mitchell was experiencing a hallucination at the car dealership or at The Yellows, but provide important background and context to Mitchell's statements and actions at the Yellows a short time later.

The events of the next day also indicate that Mitchell was suffering from a hallucination which contributed as a cause of the homicide. The evidence showed that the next day, Mitchell acted crazy by shooting a gun

in the air and at random strangers while muttering to himself about the devil (11 RT 2116, 2127-2128), referring to the devil when shot by police officers (11 RT 2098-2099, 2172; 12 RT 2292-2295), behaving like someone under the influence of PCP (11 RT 2171-2172) and exhibiting erratic behavior and making statements, including that God would not judge him for killing the devil, while strapped to the gurney in the hospital (11 RT 2163-2168, 2171-2174). Officer Jeffery testified that Mitchell's behavior, characterized by rapid fluctuations between a state of agitation and calmness was consistent with that of people under the influence of PCP. (11 RT 2171-2172.)

The State contends, however, that evidence that Mitchell was under the influence of PCP the following day does not constitute evidence that Mitchell experienced a hallucination the day before, the day of the murders and attempted murders. (RB 41.) While these events occurred after the murders and attempted murders, as explained in the opening brief (AOB 92), evidence after the murders can be considered in determining premeditation and deliberation. The State does not dispute Mitchell's argument and authorities that Mitchell's state of mind the day following the murders was relevant to prove his mental state at the time of the homicides. (See AOB and RB 41.) At end, there was enough evidence of hallucination for the instruction to be given and to allow the jury to decide if the evidence was sufficient to reduce the degree of murder.

The State alleges that there was no direct evidence that Mitchell was under the influence of PCP intoxication on August 8, 2005. (RB 40.) This, however, is not dispositive. There is no requirement that the definitive cause of the hallucination must be presented before the jury can consider that Mitchell was hallucinating and the effect of that hallucination. Even if

not direct evidence, there was certainly evidence that it appeared to experienced law enforcement professionals that Mitchell was under the influence of PCP. (11 RT 2171-2172.) Cocaine was also found in the Chevy Lumina last used by Mitchell. (9 RT 1810.)

The State further asserts that a reasonable jury "could not interpret Mitchell's statements over the course of two days as establishing he was provoked into shooting six people because he hallucinated Armando was the devil." (RB 41-42.) The State misses the issue. The question is whether a reasonable jury could interpret Mitchell's statements as establishing that he was hallucinating. If so, the instruction should have been given. Further, the evidence of hallucination does not need to apply to each shooting. Evidence of hallucination as to either shooting would warrant an instruction.

The State attempts to juxtapose the evidence of hallucination in *People v. Padilla* (2002) 103 Cal.App.4th 675 with the evidence in this case. (RB 41-42.) The comparison is misplaced. Although the Court of Appeal's decision in *Padilla* states that evidence of a hallucination is admissible as to whether the killer acted with deliberation and premeditation, *Padilla* does not set out what evidence will constitute substantial evidence of hallucination. (*Id.* at pp. 677-678.) If not in regard to the murders and attempted murders at the car dealership, at the very least CALJIC No. 8.73.1 connected the evidence of Mitchell's devil hallucinations with his conduct at the time of the homicides and attempted homicides of Armando and Susano Torres. There was evidence which a reasonable jury could find persuasive that Mitchell suffered from a hallucination prior to shooting Armando. Thus, the instruction should have been given.

As explained in the opening brief, without the hallucination instruction, Mitchell was denied his federal constitutional rights to a fair trial and a meaningful opportunity to present a defense because the hallucination instruction would have provided the legal basis to argue a defense theory of the case. (AOB 97-101.) The State counters that Mitchell's federal constitutional rights were not denied because defense counsel could have presented evidence on Mitchell's behalf in support of this defense theory and argued it to the jury. (RB 42.) The State again overlooks the point. Mitchell's contention is not that defense counsel was prevented from presenting evidence or arguing its theory, but that without an instruction the jury could not give effect to a defense that the evidence supported and the law recognized. Defense counsel requested an instruction which would have provided an alternative to his primary defense: even if the jury found Mitchell to be the perpetrator of the crimes, they were not deliberate and premeditated. With the instruction, the defense could have argued that Mitchell was hallucinating when he was arrested, at the time of the murder and attempted murder at the Yellows and most likely at the time of the homicides and attempted homicide at the car dealership, and that Mitchell's hallucinations raised a reasonable doubt about premeditation and deliberation of the murders and attempted murders.

Even assuming error, the State contends that the error should be reviewed under the harmless error test set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (RB 43.) On the contrary, as explained in Appellant's Opening Brief, the instructional error should be assessed under *Chapman* because the denial of the instruction resulted in Mitchell's inability to urge the jury to consider an applicable defense that would negate an element of the offense and thus denied appellant his right to a meaningful opportunity

to present a complete defense. This constitutes federal constitutional error. (AOB 97-102; see *People v. Thomas* (2013) 218 Cal.App.4th 630, 633, 644 [finding federal constitutional error and reversing under *Chapman*, rather than *Watson*, where trial court denied defendant's request for instruction on heat of passion to negate malice].)

The State claims that even if viewed under the *Chapman* standard for federal constitutional error, the trial court's failure to provide the hallucination instruction was harmless beyond a reasonable doubt. (RB 43.) The State opines that there is no reasonable possibility that if the jury had been instructed that it could consider hallucinations in evaluating whether Mitchell acted with premeditation and deliberation, that the jury would be persuaded that Mitchell hallucinated and was guilty of a lesser offense than first degree murder. (RB 43.) In making this sweeping assertion, the State fails to address the evidence raised by Mitchell that the jury could have given effect to if instructed with the hallucination instruction. As set forth in Appellant's Opening Brief (AOB 103-105) and above (at pp. 13-19), and incorporated here, a reasonable juror having been instructed with CALJIC No. 8.73.1 regarding hallucinations could have been persuaded that Mitchell was guilty of a lesser offense than first degree murder. The trial court's failure to instruct with the hallucination instruction violated state law and denied Mitchell's federal constitutional rights to a fair trial and meaningful opportunity to present a defense. The State has not met its burden to prove the instructional error was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) The judgment must be reversed.

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III.

THE CUMULATIVE EFFECT OF THE INSTRUCTIONAL ERRORS AT THE GUILT PHASE REQUIRES REVERSAL

This issue has been adequately presented and the positions of the parties are fully joined. (See Introduction *ante*.)

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IV.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AT THE PENALTY PHASE BY DELETING AN APPLICABLE PARAGRAPH OF CALJIC NO. 2.20

In his opening brief, Mitchell challenges the trial court's delivery of an incomplete and insufficient jury instruction, CALJIC No. 2.20, relating to the assessment of witness credibility at the penalty phase, which prejudicially denied Mitchell his state and federal constitutional rights to a fair penalty trial, as well as his right to due process and a reliable penalty determination, requiring reversal of the death judgment. (AOB 111-124.) The trial court, during discussions about CALJIC No. 2.20, stated that "no witness had a felony conviction" and then eliminated the last six paragraphs of the pattern CALJIC No. 2.20 instruction. (AOB 112.)[9] Mitchell argues that the trial court committed error in failing in its sua sponte duty to instruct the jury with all applicable provisions of CALJIC No. 2.20, and that Mitchell was entitled to have the jury accurately and comprehensively assess Armando's testimony and rebut the victim-impact testimony presented by the prosecution in aggravation. (AOB 114-118.) The State

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[9] The last six paragraphs of CALJIC No. 2.20 that were eliminated:

> [A statement [previously] made by the witness that is [consistent] [or] [inconsistent] with [his] [her] testimony [.] [;]
>
> [The character of the witness for honesty or truthfulness or their opposites] [;]
>
> [An admission by the witness of untruthfulness] [;]
>
> [The witness's prior conviction of a felony] [;]
>
> [Past criminal conduct of a witness amounting to a misdemeanor] [;]
>
> [Whether the witness is testifying under a grant of immunity].

(65 CT 17384.)

concedes error. (RB 44, 47-48.) Thus, the only disputed issue in this case is whether the error is harmless under *Chapman v. California* (1967) 386 U.S. 18, 24.[10]

The State contends that such error is harmless if "'the jury expressed no confusion in this regard and never requested clarification,'" citing *People v. Blacksher* (2011) 52 Cal.4th 769, 845-846 and *People v. Carter* (2003) 30 Cal.4th 1166, 1221. (RB 47-49.) As outlined in the opening brief, this Court's decisions in *Blacksher* and *Carter* do not control the prejudice finding in this case. (AOB 122-123.) While an indication the jury was confused may support a finding that an instructional error is prejudicial, it is not a prerequisite for such a finding. (See *LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 878 ["While there is no precise formula for measuring the effect of an erroneous instruction, a number of factors are considered in measuring prejudice: (1) the degree of conflict in the evidence on critical issues; (2) whether respondent's argument to the jury may have contributed to the instruction's misleading effect; (3) whether the jury requested a rereading of the erroneous instruction or of related evidence; (4) the closeness of the jury's verdict; and (5) the effect of other instructions in remedying the error [citations omitted]".)

In further support of its harmless error argument, the State relies upon *People v. Horning* (2004) 34 Cal.4th 871. *Horning*, however, dealt with a guilt phase instructional issue. Mitchell's claim deals with an

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[10] Although the State asserts that the error was not preserved for appeal by an objection at trial, in the very next sentence it concedes the claim is reviewable under Penal Code section 1259 (RB 47), as Mitchell set forth in his opening brief (AOB 114-115, fn. 24).

instruction at the penalty phase used by the jurors to determine the appropriate penalty of death or life in prison without the possibility of parole. The ultimate decision whether to impose death or life without the possibility of parole is discretionary. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1267.) Thus, a proper assessment of credibility plays an even more pivotal role.

In *Horning*, unlike the inadvertence in this case, the parties agreed to eliminate the felony conviction language from CALJIC No. 2.20. Moreover, this Court found it unnecessary to include a felony conviction among the specific factors in CALJIC No. 2.20 where the prosecutor only briefly cited the witness's testimony and acknowledged that the witness was "certainly no prize in his own right." (*People v. Horning*, *supra*, 34 Cal.4th at p. 911.) Here, however, as outlined in Appellant's Opening Brief, the prosecutor used Armando's testimony as the link to urge the death penalty. (17 RT 2999-3001; AOB 120-121.) This Court acknowledged in *Horning* that it might have benefitted the defendant for the court to include a felony conviction among the specific factors listed in CALJIC No. 2.20. (*People v. Horning*, *supra*, 34 Cal.4th at p. 911.) No less is true in this case.

Armando's testimony was critical in the jury's assessment of factor (a), regarding the circumstances of the crime at the Yellows. If the jurors had been instructed with the omitted part of CALJIC No. 2.20, they could have put Armando's testimony in its proper context and have meaningfully assessed Armando's testimony. With the omitted part of this instruction, it is reasonably possible that the jury would have discounted Armando's testimony or, at the minimum, not have connected the attempted murder and murder at the Yellows to Armando's life choices after the fact. The lingering effects of the attempted murder at the Yellows, as described in

Armando's testimony, may well have influenced the jurors' decision to impose the death penalty. Without instruction on how they could use prior criminal history in assessing credibility, it is unlikely they did so.

As outlined in the opening brief, it was not a foregone conclusion that the jury would have sentenced Mitchell to death. (AOB 118-124.) The State claims the error here did not prejudice Mitchell because the evidence in mitigation paled in comparison to the murders and that it is not reasonably possible that the jury would not have returned a death verdict. (RB 51-52.) To be sure, the multiple murders were aggravated, but a death penalty was not a foregone conclusion. The mitigating evidence was substantial and showed that the violent crimes committed by Mitchell were an aberration and the result of impulsive drug-induced behavior.

Mitchell was born into a highly volatile, abusive and neglectful home. (16 RT 2910-2911, 2919-2923.) His father, a veteran, drank and used drugs. (16 RT 2884, 2900.) During Mitchell's early childhood, the situation in his home was characterized by an incident where his father beat his mother and his mother stabbed his father. (16 RT 2919-2920.) Mitchell was eventually placed in foster care around the age of 7. (16 RT 2890, 2911.) Testimony from Mitchell's step-mother, uncle and brother regarding Mitchell's childhood chronicled the abuse, neglect and abandonment experienced by Mitchell and his brother at the hands of their parents which caused them to be removed more than once from the physical custody of their mother. Their father did not intervene or visit his children in foster care. Mitchell lived in more than five foster homes before being returned to his father's physical custody and then soon after placed yet again in foster care. (16 RT 2894.) As a result, Mitchell spent his youth in and out of foster care homes, the criminal justice system and juvenile and youth

facilities well into his teens. (16 RT 2883, 2903.)

Mitchell also struggled with psychotic problems from the age of 12 and was placed in a prison psychiatric hospital due to behavior problems. (16 RT 2838.) Defense expert Dr. Abrams testified that although Mitchell engaged in conduct commonly engaged in by out-of-control teenage boys and suffered disturbing behavior at the McClaren Training School, Mitchell had no episodes of violent conduct since 1990. (15 RT 2685-2686.) As an adult, Mitchell's criminal offenses were drug-related and included possession of PCP, his drug of choice. (15 RT 2686-2688.) Despite his criminal record, horrific upbringing and teenage struggles, by all accounts Mitchell as an adult was a loving and caring father. (16 RT 2925-2936.)

Prior to his last release from prison, Mitchell was receiving psychiatric treatment while in custody. (15 RT 2694-2695.) Mitchell continued to receive psychiatric treatment upon his release on parole. (15 RT 2700.) By May or June of 2005, appellant elected to discontinue antidepressant medications prescribed by Department of Corrections psychiatrists. (16 RT 2836, 2862.) Defense expert Dr. Kim explained that a subsequent ingestion of illicit drugs after going off the medication previously prescribed for Mitchell could exacerbate the onset of decompensation. (16 RT 2840.)

Two to three days prior to his arrest, Mitchell reported to the parole office and tested negative for any substance abuse. (16 RT 2847-2848.) Dr. Grange's medical report from Loma Linda Hospital after Mitchell's arrest in this case revealed that Mitchell tested positive for PCP and cannabinoids and confirmed that Mitchell's behavior was consistent with the test results. (15 RT 2702, 2764; 16 RT 2791.) According to Dr. Abrams, the result from the National Toxicology Laboratories meant that

Mitchell had used PCP within 24 or 72 hours and had smoked a full dose at one point. (15 RT 2709.) Dr. Abrams could not determine from a result of 11 nanograms whether the PCP was ingested on August 9 or August 8 (15 RT 2719), but testified that the combination of Mitchell's irrational behavior and his blood level of PCP led to his opinion that sometime after noon on August 8, Mitchell's ability to act rationally changed dramatically (15 RT 2719).

Despite the State's characterization of the mitigating evidence as pale in comparison to the facts of the crime (RB 52), mitigation evidence matters and can mean the difference in the death penalty decision. There still exists "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse . . ." (*California v. Brown* (1987) 479 U.S. 538, 545 (conc. opn. of O'Connor, J.).) Moreover, even in highly aggravated multiple murders, juries return sentences of life in prison without the possibility of parole. (See e.g., *People v. Scott* (1991) 229 Cal.App.3d 707, 710 [jury returned life without possibility of parole sentence for four murders]; *People v. Henderson* (1990) 225 Cal.App.3d 1129, 1137 [one defendant convicted of three counts of murder (including a fetus), manslaughter and robbery, and jury sentenced defendant to life imprisonment without parole].)

Based on all of the mitigating and aggravating factors, death was not a foregone conclusion. If the jury had been properly instructed on how to assess Armando's credibility as a witness, this could have tipped the balance of mitigating and aggravating factors making it reasonably possible that at least one juror would not have returned a death verdict. At end, the

State has not met its burden to prove the instructional error was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.) The death judgment must be reversed.

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V.

CALIFORNIA'S DEATH PENALTY STATUTE AND CALJIC INSTRUCTIONS, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATE THE UNITED STATES CONSTITUTION

In his opening brief, Mitchell challenges the California death penalty scheme on grounds that this Court has rejected and seeks reconsideration of the Court's previous decisions holding that the California law does not violate the federal Constitution. (AOB 125-143.) The State counters that the Court's prior decisions are correct and should not be reconsidered. (RB 52, 54-58.) After Mitchell filed his opening brief, and after the State filed its respondent's brief, the United States Supreme Court held Florida's death penalty statute unconstitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584 because the sentencing judge, not the jury, made a factual finding, the existence of an aggravating circumstance, that is required before the death penalty can be imposed. (*Hurst v. Florida* (2016) ___ U.S. ___ [136 S.Ct. 616, 624] [hereafter "*Hurst*"].)[11] *Hurst* supports Mitchell's request in Argument V.C.1 and V.C.3 of his opening brief that this Court reconsider its rulings that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), does not require factual findings within the meaning of *Ring*

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[11] Mitchell's argument here does not alter his claim in the opening brief, but provides additional authority for argument in V.C.1 and V.C.3 of the opening brief. To the extent this Court considers this not to be true, Mitchell asks this Court to deem this argument a supplemental brief. Mitchell has no objection to a supplemental brief by the Attorney General if this Court believes it necessary.

(*People v. Merriman* (2014) 60 Cal.4th 1, 106), and therefore does not require the jury to find unanimously and beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances before the jury can impose a sentence of death (*People v. Prieto* (2003) 30 Cal.4th 226, 275). (See AOB at 128-130, 131-133; see also, RB at 55 [State argues that there is no constitutional requirement that the jury find that aggravating factors outweigh mitigating factors beyond a reasonable doubt].)

A. Under *Hurst*, Each Fact Necessary To Impose A Death Sentence, Including The Determination That The Aggravating Circumstances Outweigh The Mitigating Circumstances, Must Be Found By A Jury Beyond A Reasonable Doubt

In *Apprendi*, a noncapital sentencing case, and *Ring*, a capital sentencing case, the United States Supreme Court established a bright-line rule: if a factual finding is required to subject the defendant to a greater punishment than that authorized by the jury's verdict, it must be found by the jury beyond a reasonable doubt. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 589 [hereafter "*Ring*"]; *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 483 [hereafter "*Apprendi*"].) As the Court explained in *Ring*:

> The dispositive question, we said, "is one not of form, but of effect." [Citation]. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found, by a jury beyond a reasonable doubt. [Citation].

(*Ring*, *supra*, 536 U.S. at p. 602, quoting *Apprendi*, *supra*, 530 U.S. at pp. 494, 482-483.) Applying this mandate, the high court invalidated Florida's death penalty statute in *Hurst*. (*Hurst*, *supra*, 136 S.Ct. at pp. 621-624.) The Court restated the core Sixth Amendment principle as it applies to capital sentencing statutes: "The Sixth Amendment requires a

jury, not a judge, to find *each fact necessary to impose a sentence of death.*" (*Hurst, supra*, 136 S.Ct. at p. 619, italics added.) Further, as explained below, in applying this Sixth Amendment principle, *Hurst* made clear that the weighing determination required under the Florida statute was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst, supra*, 136 S.Ct. at p. 622.)

In Florida, a defendant convicted of capital murder is punished by either life imprisonment or death. (*Hurst, supra*, 136 S.Ct. at p. 620, citing Fla. Stat. §§ 782.04(1)(a), 775.082(1).) Under the statute at issue in *Hurst*, after returning its verdict of conviction, the jury rendered an advisory verdict at the sentencing proceeding, but the judge made the ultimate sentencing determinations. (*Hurst, supra*, at p. 620.) The judge was responsible for finding that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh aggravating circumstances," which were prerequisites for imposing a death sentence. (*Hurst, supra*, at p. 622, citing Fla. Stat. § 921.141(3).) The Court found that these determinations were part of the "necessary factual finding that *Ring* requires." (*Ibid.*)[12]

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[12] The Court in *Hurst* explained:

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

(*Hurst, supra*, 136 S.Ct. at p. 622.)

The questions decided in *Ring* and *Hurst* were narrow. As the Supreme Court explained, "Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." (*Ring*, *supra*, 536 U.S. at p. 597, fn. 4.) *Hurst* raised the same claim. (See Petitioner's Brief on the Merits, *Hurst v. Florida*, 2015 WL 3523406 at *18 ["Florida's capital sentencing scheme violates this [Sixth Amendment] principle because it entrusts to the trial court instead of the jury the task of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty'"].) In each case, the Court decided only the constitutionality of a judge, rather than a jury, finding the existence of an aggravating circumstance. (See *Ring*, *supra*, 536 U.S. at p. 588; *Hurst*, *supra*, 136 S.Ct. at p. 624.)

Nevertheless, the seven-justice majority opinion in *Hurst* shows that its holding, like that in *Ring*, is a specific application of a broader Sixth Amendment principle: any fact that is required for a death sentence, but not for the lesser punishment of life imprisonment, must be found by the jury. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) At the outset of the opinion, the Court refers not simply to the finding of an aggravating circumstance, but, as noted above, to findings of "each fact *necessary to impose a sentence of death*." (*Hurst*, *supra*, 136 S.Ct. at p. 619, italics added.) The Court reiterated this fundamental principle throughout the opinion.[13] The Court's

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[13] See *id.* at p. 621 ["In *Ring*, we concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts *necessary to sentence a defendant to death*," italics added]; *id.* at p. 622 ["Like Arizona at the time of *Ring*, Florida does not require the jury to make *the critical findings necessary to impose the death penalty*," italics added]; *id.* at p. 624 ["Time and subsequent cases have

(continued...)

language is clear and unqualified. It also is consistent with the established understanding that *Apprendi* and *Ring* apply to each fact essential to imposition of the level of punishment the defendant receives. (See *Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.); *Apprendi*, *supra*, 530 U.S. at p. 494.) The high court is assumed to understand the implications of the words it chooses and to mean what it says. (See *Sands v. Morongo Unified School District* (1991) 53 Cal.3d 863, 881-882, fn. 10.)

B. California's Death Penalty Statute Violates *Hurst* By Not Requiring That The Jury's Weighing Determination Be Found Beyond A Reasonable Doubt

California's death penalty statute violates *Apprendi*, *Ring* and *Hurst*, although the specific defect is different than those in Arizona's and Florida's laws: in California, although the jury's sentencing verdict must be unanimous (Pen. Code, § 190.4, subd. (b)), California applies no standard of proof to the weighing determination, let alone the constitutional requirement that the finding be made beyond a reasonable doubt. (See *People v. Merriman*, *supra*, 60 Cal.4th at p. 106.) Unlike Arizona and Florida, California requires that the jury, not the judge, make the findings necessary to sentence the defendant to death. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16 [distinguishing California's law from that invalidated in *Hurst* on the grounds that, unlike Florida, the jury's "verdict is not merely advisory"].) California's law, however, is similar to the

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[13] (...continued)
washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is *necessary for imposition of the death penalty*," italics added].

statutes invalidated in Arizona and Florida in ways that are crucial for applying the *Apprendi/Ring/Hurst* principle. In all three states, a death sentence may be imposed only if, after the defendant is convicted of first degree murder, the sentencer makes two additional findings. In each jurisdiction, the sentencer must find the existence of at least one statutorily-delineated circumstance – in California, a special circumstance (Pen. Code, § 190.2) and in Arizona and Florida, an aggravating circumstance (Ariz. Rev. Stat. § 13-703(G); Fla. Stat. § 921.141(3)). This finding alone, however, does not permit the sentencer to impose a death sentence. The sentencer must make another factual finding: in California that "'the aggravating circumstances outweigh the mitigating circumstances'" (Pen. Code, § 190.3); in Arizona that "'there are no mitigating circumstances sufficiently substantial to call for leniency'" (*Ring*, *supra*, 536 U.S. at p. 593, quoting Ariz. Rev. Stat. § 13-703(F)); and in Florida, as stated above, "that there are insufficient mitigating circumstances to outweigh aggravating circumstances" (*Hurst*, *supra*, 136 S.Ct. at p. 622, quoting Fla. Stat. § 921.141(3)).[14]

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[14] As *Hurst* made clear, "the Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.'" (*Hurst*, *supra*, 136 S.Ct. at p. 622, citation and italics omitted.) In *Hurst*, the Court uses the concept of death penalty eligibility in the sense that there are findings which actually authorize the imposition of the death penalty in the sentencing hearing, and not in the sense that an accused is only potentially facing a death sentence, which is what the special circumstance finding establishes under the California statute. For *Hurst* purposes, under California law it is the jury determination that the aggravating factors outweigh the mitigating factors that finally authorizes imposition of the death penalty.

Although *Hurst* did not decide the standard of proof issue, the Court made clear that the weighing determination was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst*, *supra*, 136 S.Ct. at p. 622 [in Florida the judge, not the jury, makes the "critical findings necessary to impose the death penalty," including the weighing determination among the facts the sentencer must find "to make a defendant eligible for death"].) The pertinent question is not what the weighing determination is called, but what is its consequence. *Apprendi* made this clear: "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (*Apprendi*, *supra*, 530 U.S. at p. 494.) So did Justice Scalia in *Ring*:

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

(*Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) The constitutional question cannot be answered, as this Court has done, by collapsing the weighing finding and the sentence-selection decision into one determination and labeling it "normative" rather than factfinding. (See, e.g., *People v. Karis* (1988) 46 Cal.3d 612, 639-640; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1366.) At bottom, the *Ring* inquiry is one of function.

In California, when a jury convicts a defendant of first degree murder, the maximum punishment is imprisonment for a term of 25 years to life. (Pen. Code, § 190, subd. (a) [cross-referencing §§ 190.1, 190.2, 190.3,

190.4 and 190.5].) When the jury returns a verdict of first degree murder with a true finding of a special circumstance listed in Penal Code section 190.2, the penalty range increases to either life imprisonment without the possibility of parole or death. (Pen. Code, § 190.2, subd. (a).) Without any further jury findings, the maximum punishment the defendant can receive is life imprisonment without the possibility of parole. (See, e.g., *People v. Banks* (2015) 61 Cal.4th 788, 794 [where jury found defendant guilty of first degree murder and found special circumstance true and prosecutor did not seek the death penalty, defendant received "the mandatory lesser sentence for special circumstance murder, life imprisonment without parole"]; *Sand v. Superior Court* (1983) 34 Cal.3d 567, 572 [where defendant is charged with special-circumstance murder, and the prosecutor announced he would not seek death penalty, defendant, if convicted, will be sentenced to life imprisonment without parole, and therefore prosecution is not a "capital case" within the meaning of Penal Code section 987.9]; *People v. Ames* (1989) 213 Cal.App.3d 1214, 1217 [life in prison without possibility of parole is the sentence for pleading guilty and admitting the special circumstance where death penalty is eliminated by plea bargain].) Under the statute, a death sentence can be imposed only if the jury, in a separate proceeding, "concludes that the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code, § 190.3.) Thus, under Penal Code section 190.3, the weighing finding exposes a defendant to a greater punishment (death) than that authorized by the jury's verdict of first degree murder with a true finding of a special circumstance (life in prison

without parole). The weighing determination is therefore a factfinding.[15]

C. This Court's Interpretation Of The California Death Penalty Statute In *People v. Brown* Supports The Conclusion That The Jury's Weighing Determination Is A Factfinding Necessary To Impose A Sentence of Death

This Court's interpretation of Penal Code section 190.3's weighing directive in *People v. Brown* (1985) 40 Cal.3d 512 (revd. on other grounds *sub nom. California v. Brown* (1987) 479 U.S. 538) does not require a different conclusion. In *Brown*, the Court was confronted with a claim that the language "shall impose a sentence of death" violated the Eighth Amendment requirement of individualized sentencing. (*Id.* at pp. 538-539.) As the Court explained:

> Defendant argues, by its use of the term "outweigh" and the mandatory "shall," the statute impermissibly confines the jury to a mechanical balancing of aggravating and mitigating factors . . . Defendant urges that because the statute requires a death judgment if the former "outweigh" the latter under this mechanical formula, the statute strips the jury of its constitutional power to conclude that the totality of constitutionally relevant circumstances does not warrant the death penalty.

(*Id.* at p. 538.) The Court recognized that the "the language of the statute, and in particular the words 'shall impose a sentence of death,' leave room

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[15] Justice Sotomayor, the author of the majority opinion in *Hurst*, previously found that *Apprendi* and *Ring* are applicable to a sentencing scheme that requires a finding that the aggravating factors outweigh the mitigating factors before a death sentence may be imposed. More importantly here, she has gone on to find that it "is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole." (*Woodward v. Alabama* (2013) ___ U.S. ___ [134 S.Ct. 405, 410-411, 187 L.Ed.2d 449] (dis. opn. from denial of certiorari, Sotomayor, J.).)

for some confusion as to the jury's role" (*id.* at p. 545, fn. 17) and construed this language to avoid violating the federal Constitution (*id.* at p. 540). To that end, the Court explained the weighing provision in Penal Code section 190.3 as follows:

> [T]he reference to "weighing" and the use of the word "shall" in the 1978 law need not be interpreted to limit impermissibly the scope of the jury's ultimate discretion. In this context, the word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor "k" as we have interpreted it. By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.

(*People v. Brown*, *supra*, at p. 541, [hereafter "*Brown*"], footnotes omitted.)[16]

Under *Brown*, the weighing requirement provides for jury discretion in both the assignment of the weight to be given to the sentencing factors

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[16] In *Boyde v. California* (1990) 494 U.S. 370, 377, the Supreme Court held that the mandatory "shall impose" language of the pre-*Brown* jury instruction implementing Penal Code section 190.3 did not violate the Eighth Amendment requirement of individualized sentencing in capital cases. Post-*Boyde*, California has continued to use *Brown*'s gloss on the sentencing instruction.

and the ultimate choice of punishment. Despite the "shall impose death" language, Penal Code section 190.3, as construed in *Brown*, provides for jury discretion in deciding whether to impose death or life without possibility of parole, i.e. in deciding which punishment is appropriate. The weighing decision may assist the jury in reaching its ultimate determination of whether death is appropriate, but it is a separate, statutorily-mandated finding that precedes the final sentence selection. Thus, once the jury finds that the aggravation outweighs the mitigation, it still retains the discretion to reject a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979 ["[t]he jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death"].)

In this way, Penal Code section 190.3 requires the jury to make two determinations. The jury must weigh the aggravating circumstances and the mitigating circumstances. To impose death, the jury must find that the aggravating circumstances outweigh the mitigating circumstances. This is a factfinding under *Ring* and *Hurst*. (See *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 257-258 [finding weighing is *Ring* factfinding]; *Woldt v. People* (Colo. 2003) 64 P.3d 256, 265-266 [same].) The sentencing process, however, does not end there. There is the final step in the sentencing process: the jury selects the sentence it deems appropriate. (See *Brown*, *supra*, 40 Cal.3d at p. 544 ["Nothing in the amended language limits the jury's power to apply those factors as it chooses in deciding whether, under all the relevant circumstances, defendant deserves the punishment of death or life without parole"].) Thus, the jury may reject a death sentence even after it has found that the aggravating circumstances outweighs the mitigation. (*Brown*, *supra*, 40 Cal.3d at p. 540.) This is the

"normative" part of the jury's decision. (*Brown*, *supra*, 40 Cal.3d at p. 540.)

This understanding of Penal Code section 190.3 is supported by *Brown* itself. In construing the "shall impose death" language in the weighing requirement of section 190.3, this Court cited to Florida's death penalty law as a similar "weighing" statute:

> [O]nce a defendant is convicted of capital murder, a sentencing hearing proceeds before judge and jury at which evidence bearing on statutory aggravating, and all mitigating, circumstances is adduced. The jury then renders an advisory verdict "[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." (Fla. Stat. (1976-1977 Supp.) § 921.141, subd. (2)(b), (c).) The trial judge decides the actual sentence. He *may* impose death if satisfied in writing "(a) [t]hat sufficient [statutory] aggravating circumstances exist . . . and (b) [t]hat there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances." (*Id.*, subd. (3).)

(*Brown*, *supra*, 40 Cal.3d at p. 542, italics added.) In *Brown*, the Court construed Penal Code section 190.3's sentencing directive as comparable to that of Florida – if the sentencer finds the aggravating circumstances outweigh the mitigating circumstances, it is authorized, but not mandated, to impose death.

The standard jury instructions were modified, first in CALJIC No. 8.84.2 and later in CALJIC No. 8.88, to reflect *Brown*'s interpretation of

section 190.3.[17] The requirement that the jury must find that the aggravating circumstances outweigh the mitigating circumstances remained a precondition for imposing a death sentence. Nevertheless, once this prerequisite finding was made, the jury had discretion to impose either life or death as the punishment it deemed appropriate under all the relevant circumstances. The revised standard jury instructions, CALCRIM, "written in plain English" to "be both legally accurate and understandable to the

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[17] CALJIC No. 8.84.2 (4th ed. 1986 revision) provided:

> In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence (circumstances) is (are) so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

From 1988 to the present, CALJIC No. 8.88, closely tracking the language of *Brown*, has provided in relevant part:

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

average juror" (CALCRIM (2006), vol. 1, Preface, p. v.), make clear this two-step process for imposing a death sentence:

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

(CALCRIM No. 766, italics added.) As discussed above, *Hurst*, *supra*, 136 S.Ct. at p. 622, which addressed Florida's statute with its comparable weighing requirement, indicates that the finding that aggravating circumstances outweigh mitigating circumstances is a factfinding for purposes of *Apprendi* and *Ring*.

D. This Court Should Reconsider Its Prior Rulings That The Weighing Determination Is Not A Factfinding Under *Ring* And Therefore Does Not Require Proof Beyond A Reasonable Doubt

This Court has held that the weighing determination – whether aggravating circumstances outweigh the mitigating circumstances – is not a finding of fact, but rather is a "'fundamentally normative assessment . . . that is outside the scope of *Ring* and *Apprendi*.'" (*People v. Merriman*, *supra*, 60 Cal.4th at p. 106, quoting *People v. Griffin* (2004) 33 Cal.4th 536, 595, citations omitted; accord, *People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263.) Mitchell asks the Court to reconsider this ruling because, as shown above, its premise is mistaken. The weighing determination and the ultimate sentence-selection decision are not one unitary decision. They are two distinct determinations. The weighing question asks the jury a "yes" or "no" factual question: do the aggravating circumstances outweigh the mitigating circumstances? An affirmative answer is a necessary precondition – beyond the jury's guilt-phase verdict finding a special

circumstance – for imposing a death sentence. The jury's finding that the aggravating circumstances outweigh the mitigating circumstances opens the gate to the jury's final normative decision: is death the appropriate punishment considering all the circumstances?

However the weighing determination may be described, it is an "element" or "fact" under *Apprendi*, *Ring* and *Hurst* and must be found by a jury beyond a reasonable doubt. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) As discussed above, *Ring* requires that any finding of fact required to increase a defendant's authorized punishment "must be found by a jury beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. at p. 602; see *Hurst*, *supra*, 136 S.Ct. at p. 621 [the facts required by *Ring* must be found beyond a reasonable doubt under the due process clause].)[18] Because California applies no standard of proof to the weighing determination, a factfinding by the jury, the California death penalty statute violates this beyond-a-reasonable-doubt mandate at the weighing step of the sentencing process.

The recent decision of the Delaware Supreme Court in *Rauf v. State* (Del., Aug. 2, 2016, No. 39) 2016 WL 4224252 [hereafter "*Rauf*"] supports Mitchell's request that this Court revisit its holdings that the *Apprendi* and *Ring* rule do not apply to California's death penalty statute. *Rauf* held that Delaware's death penalty statute violates the Sixth Amendment under

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[18] The *Apprendi/Ring* rule addresses only facts necessary to increase the level of punishment. Once those threshold facts are found by a jury, the sentencing statute may give the sentencer, whether judge or jury, the discretion to impose either the greater or lesser sentence. Thus, once the jury finds a fact required for a death sentence, it still may be authorized to return the lesser sentence of life imprisonment without the possibility of parole.

Hurst. (*Rauf, supra*, at *1 (*per curiam* opn. of Strine, C.J., Holland, J. and Steitz, J.).) In Delaware, unlike in Florida, the jury's finding of a statutory aggravating circumstance is determinative, not simply advisory. (*Id.* at *18.) Nonetheless, in a 3-to-2 decision, the Delaware Supreme Court answered five certified questions from the superior court and found the state's death penalty statute violates *Hurst*.[19] One reason the court invalidated Delaware's law is relevant here: the jury in Delaware, like the jury in California, is not required to find that the aggravating circumstances outweigh the mitigating circumstances unanimously and beyond a reasonable doubt. (*Id.* at *2; see *id.* at *39 (conc. opn. of Holland, J.).) With regard to this defect, the Delaware Supreme Court explained:

> This Court has recognized that the weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence. "[A] judge cannot sentence a defendant to death without finding that the aggravating factors outweigh the mitigating factors . . . ." The relevant "maximum" sentence, for Sixth Amendment purposes, that can be imposed under Delaware law, in the absence of any judge-made findings on the relative weights of the aggravating and mitigating factors, is life imprisonment.

(*Ibid.*) The Delaware court is not alone in reaching this conclusion. Other

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[19] In addition to the ruling discussed in this brief, the court in *Rauf* also held that the Delaware statute violated *Hurst* because: (1) after the jury finds at least one statutory aggravating circumstance, the "judge alone can increase a defendant's jury authorized punishment of life to a death sentence, based on her own additional factfinding of non-statutory aggravating circumstances" (*Rauf, supra*, at *1-2 (*per curiam* opn.) [addressing Questions 1-2] and at *37-38 (conc. opn. of Holland, J.)); and (2) the jury is not required to find the existence of any aggravating circumstance, statutory or non-statutory, unanimously and beyond a reasonable doubt (*id.* at *2 (*per curiam* opn.) [addressing Question 3] and at *39 (conc. opn. of Holland, J.)).

state supreme courts have recognized that the determination that the aggravating circumstances outweigh the mitigating circumstance, like the finding that an aggravating circumstance exists, comes within the *Apprendi/Ring* rule. (See e.g., *State v. Whitfield*, *supra*, 107 S.W.3d at pp. 257-258; *Woldt v. People*, *supra*, 64 P.3d at pp. 265-266; see also *Woodward v. Alabama*, *supra*, 134 S.Ct. at pp. 410-411 (Sotomayor, J., dissenting from denial of cert.) ["The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is . . . [a] factual finding" under Alabama's capital sentencing scheme]; contra, *United States v. Gabrion* (6th Cir. 2013) 719 F.3d 511, 533 (en banc) [concluding that – under *Apprendi* – the determination that the aggravators outweigh the mitigators "is not a finding of fact in support of a particular sentence"]; *Ritchie v. State* (Ind. 2004) 809 N.E.2d 258, 265 [reasoning that the finding that the aggravators outweigh the mitigators is not a finding of fact under *Apprendi* and *Ring*]; *Nunnery v. State* (Nev. 2011) 263 P.3d 235, 251-253 [finding that "the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor" under *Apprendi* and *Ring*].)

Because in California the factfinding that aggravating circumstances outweigh mitigating circumstances is a necessary predicate for the imposition of the death penalty, *Apprendi*, *Ring* and *Hurst* require that this finding be made, by a jury and beyond a reasonable doubt. As appellant's jury was not required to make this finding, appellant's death sentence must be reversed.

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VI.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINE THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

This issue has been adequately presented and the positions of the parties are fully joined. (See Introduction *ante*.)

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CONCLUSION

For the reasons stated above, as well as for the reasons stated in Appellant's Opening Brief on automatic appeal, the entire judgment of conviction, special circumstance findings, and sentence of death should be reversed.

Dated: September 22, 2016

Respectfully Submitted,
MARY K. McCOMB
State Public Defender

MARIA MORGA
Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, Rule 8.630(b)(2))

I, MARIA MORGA, am the Deputy State Public Defender assigned to represent appellant LOUIS MITCHELL, JR., in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates is 13,962 words in length.

Dated: September 22, 2016

MARIA MORGA
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Louis Mitchell, Jr.* Cal. Supreme Ct. No. S147335
(San Bernardino Co. Sup. Ct. No. FSB 051580)

I, Marcus Thomas, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, Suite 1000, Oakland, California 94607. On this day, I served a copy of the following document(s):

APPELLANT'S REPLY BRIEF

by enclosing it in envelopes and

/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;

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The envelopes were addressed and mailed on **September 23, 2016**, as follows:

Kristen Kinnaird Chenelia
Deputy Attorney General
Office of the Attorney General
P.O. Box 85266
San Diego, CA 92186-5266

The Honorable Brian McCarville
San Bernardino Justice Center
247 West Third Street
Department S-30
San Bernardino, CA 92415

Louis Mitchell, Jr., # P-88192
CSP-SQ
3-EY-23
San Quentin, CA 94974

California Appellate Project – SF
101 Second Street, Suite 600
San Francisco, CA 94105

I declare under penalty of perjury that the foregoing is true and correct. Signed on **September 23, 2016**, at Oakland, California.

DECLARANT