SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Respondent,** **v.** **LOUIS MITCHELL JR.,** **Appellant.**	**CAPITAL CASE** Case No. S147335

San Bernardino County Superior Court
Case No. FSB 051580
The Honorable Brian McCarville, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On July 14, 2006, the San Bernardino County District Attorney filed a third amended information charging Appellant Louis Mitchell Jr. in counts 1 through 3, with the willful, deliberate, premeditated murders of Mario Lopez, Patrick Mawikere and Susano Torres, and alleged the special circumstance of multiple murder. (Pen. Code[1], §§ 187, subd. (a), & 190.2, subd. (a)(2).) Mitchell was charged in counts 4 through 6 with the attempted willful, deliberate, premeditated murders of Juan Bizzotto, Jerry Payan, and Armando Torres. (§§ 664/187, subd. (a).) It was further alleged as to all six counts that Mitchell personally and intentionally discharged a firearm causing great bodily injury and death. (§ 12022.53, subd. (d).) (64 CT 17087-17091.)

The jury was sworn on July 12, 2006. (64 CT 17084-17085.) On August 9, 2006, the jury found Mitchell guilty on all counts as charged, and found the special circumstance and enhancement allegations were true. (65 CT 17185-17200.) The penalty phase began on August 21, 2006. (65 CT 17331-17332.) On September 5, 2006, the jury returned a verdict of death. (65 CT 17366-17368.)

The trial court sentenced Mitchell to death for the murders of Mario Lopez, Patrick Mawikere and Susano Torres, and imposed an additional sentence of 150 years to life in prison for the remaining attempted murder convictions, and gun enhancements. (66 CT 17449-17451, 17458-17459.)

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

STATEMENT OF FACTS

A. Prosecution Case-In-Chief

Mitchell accompanied his girlfriend to a car lot in Colton where she purchased a used car that later broke down. He returned to the car lot that afternoon and shot four employees, killing two. Mitchell then went to the "Yellows" apartment complex where he shot Armando Torres, and shot and killed Susano Torres. The following day Mitchell was firing his gun in the air and he was subsequently arrested after the police responded to the location where the shots were fired.

1. The shooting at California Auto Specialists

On August 8, 2005, at about 10:00 in the morning, Mitchell drove his girlfriend Dorene Small in his white Chevy Lumina to California Auto Specialists, a used car dealership in Colton. (7 RT 1305-1306.) Small needed to replace her car following an accident and had just received a check from her insurance company. (7 RT 1302, 1304.) Mitchell and Small were initially assisted by Juan Bizzotto, and then Mario Lopez. (7 RT 1307, 1406-1407; 8 RT 1482, 1484.) Small picked out a used Dodge Durango. (7 RT 1307.) Mitchell wanted Small to get a Tahoe, but Small said she could not afford it and that it was her decision. (7 RT 1410, 1484.) They argued over which car to get and Mitchell left the dealership angry. (7 RT 1410-1411; 8 RT 1464, 1468, 1485.)

Small remained at the dealership and filled out the paperwork necessary to purchase the Durango. (8 RT 1485.) She then drove the Durango to the bank to deposit the insurance check and Bizzotto followed her. (7 RT 1325, 1327-1328; 8 RT 1486.) On the way back to the dealership the Durango stopped and would not start up again. (7 RT 1329; 8 RT 1488.) Bizzotto drove Small back to the dealership. (7 RT 1330.) Small was not upset about the Durango and still wanted to purchase it. (7

RT 1330, 1414, 1490, 1516-1517.) The dealership provided her a loaner while they figured out what was wrong with the Durango. (7 RT 1331, 1414; 8 RT 1489.) Small called her home—the apartment in Rialto where she lived with Mitchell and their children—and told her son, Kenneth Bell, she was not coming home with a new car because it broke down. (7 RT 1301-1302, 1339, 1366-1367.)

Christina Eyre, another girlfriend of Mitchell's, spoke with Mitchell around 2:00 p.m., and he told her they had been "screwed over" by the car dealership. (10 RT 2046.) Eyre heard Romen Williams ("Chrome") and Bell in the background. (10 RT 2042.) Mitchell told Eyre not to make plans because he was coming over that evening. (10 RT 2041.)

Small left the dealership and stopped home to change before going to work around 2:30 p.m. (7 RT 1343-1345.) Mitchell was not at their apartment and had left his cellphone there. (7 RT 1343-1345.) Unbeknownst to her, Mitchell had returned to the car dealership. (7 RT 1415, 1421; 8 RT 1491-1492.) He was driving his white Lumina and had two passengers in the car. (8 RT 1493, 1522.) Mitchell entered the office and repeatedly asked, "Where's my girlfriend?" and "Where's my wife?" (7 RT 1419; 8 RT 1495.) Lopez told Mitchell she had left and gone to work. (7 RT 1420; 8 RT 1495.)

Mitchell pulled out a gun and shot Lopez twice. (7 RT 1422; 8 RT 1497-1498.) He then turned the gun on Jerry Payan and Patrick Mawikere. (7 RT 1422; 8 RT 1482; 10 RT 1968.) Mawikere asked Mitchell not to shoot, and Mitchell then shot Mawikere in the head. (8 RT 1498.) Mitchell was blocking the only door to the office, so Payan crashed through a window. Mitchell shot Payan in the arm and continued to shoot at Payan as he fled. (7 RT 1422-1427; 8 RT 1498.) Bizzotto was on the phone with his wife when Mitchell started shooting. (8 RT 1497-1498, 1529.) He hid

under his metal desk as Mitchell shot him in the arm and the leg. (8 RT 1499-1501.)

As soon as he heard Mitchell leave, Bizzotto had his wife call 9-1-1 and he ran outside to flag down some help. (8 RT 1502-1503, 1507, 1532, 1539, 1576-1579.) Mawikere died from a gunshot wound to his head and was pronounced dead at 2:55 p.m. (8 RT 1542; 10 RT 1919, 1973-1975.) Lopez died later that night at the hospital from three gunshot wounds. (8 RT 1502-1503, 1540-1541; 10 RT 1920, 1975-1976, 1985.) Bizzotto survived but his hand is partially paralyzed as a result of Mitchell shooting him. (8 RT 1513.) Payan also survived but experiences residual loss of function in his right arm. (8 RT 1456-1458.)

2. The shooting at the "Yellows" apartment complex

Situated around the 1400 block of Genevieve Street and on the west side of the 1400 block of North Sierra Way in San Bernardino, is a housing complex referred to as the "Yellows." On August 8, 2005, around 3:00 p.m., Armando Torres was at the complex visiting his mother and younger brother Susano Torres.[2] (9 RT 1708-1709.) Mitchell had lived at the complex a year earlier and still spent a lot of time there. (7 RT 1301, 1356.) Armando and Susano knew Mitchell from around the complex and had not had any problems with him. (9 RT 1716.)

Armando was on his way to a friend's apartment when he passed Susano talking to Rita Ochoa and told Susano their mother was looking for him. (9 RT 1710, 1712.) Once at his friend's apartment, Armando smoked methamphetamine. (9 RT 1713.) As Armando was leaving his friend's apartment, Mitchell walked towards Armando and said, "Hey devil, let me talk to you," and repeatedly told Armando to "come here." (9 RT 1713-

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[2] To avoid confusion due to shared surnames, Armando and Susano are subsequently referenced herein by their first names.

1715, 1733.) Armando told him that was not his name.[3] (9 RT 1738-1739.) In response to Mitchell asking to speak with him, Armando asked Mitchell, "Why?" (9 RT 1715.) Mitchell then pulled out a gun and said, "You fucked up." (9 RT 1727, 1734.) He fired his gun at least three times at Armando, hitting him once in the leg as Armando's friend managed to pull him inside her apartment to safety. (9 RT 1718-1719, 1799, 1818.)

Susano was with his friend Phillip Mancha talking to Rita Ochoa outside her window when they heard shots. (10 RT 1826-1828, 1844.) Mancha climbed through Ochoa's window and he and Ochoa got down on the ground. (10 RT 1831-1832, 1845.) Susano went to check what was happening and Mitchell shot him. (9 RT 1756-1757, 1765, 1806; 10 RT 1829, 1845.) Mitchell put away his gun and said to his companion Williams, "Fuck that. That's what they get." (9 RT 1767.) Ochoa looked outside and saw Susano on the ground bleeding. (10 RT 1846.) The bullet passed through both of Susano's lungs and he died shortly thereafter from internal bleeding. (9 RT 1816; 10 RT 1990-1992.)

Mitchell and Williams[4] walked towards the parking lot and were filmed by a security camera walking toward the northern part of the driveway. (10 RT 1865, 1886.) Mitchell was still carrying the gun and wearing dark pants and a camouflage hat. (9 RT 1762-1763; 10 RT 1833, 1865, 1866.) Mitchell passed by Rosalba Villaneda in the parking lot and

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[3] Armando had a very distinct tattoo consisting of horns tattooed on his head. (9 RT 1708.)

[4] Williams was located over four months later at his mother's house at 364 West 19th Street. (10 RT 2017.) He knew Mitchell and Small's son. (10 RT 2018.) Williams said he was at the Yellows visiting a friend named "Chocolate" at the time of the shooting but was not with Mitchell. (10 RT 2020, 2026.) He identified himself and Mitchell in photographs from the security video, but said he was on his way to the store to buy a "blunt" and was not with Mitchell. (10 RT 2021-2022.) A blunt is a cigarette with the tobacco removed and replaced with marijuana. (10 RT 2023.)

said, "Hello mama" as he made a slide action with his gun. (10 RT 1900-1901.) Mitchell got into the passenger seat of a car and drove down the driveway onto North Sierra Way. (10 RT 1904, 1096.)

3. Mitchell is identified as the shooter

Bizzotto told Colton police officers Mitchell had been there earlier with his girlfriend buying a Dodge Durango. (10 RT 1920.) Martha Kugler, the finance director of California Auto Specialists provided the authorities with the loan documents, enabling police to identify Dorene Small and Mitchell. (7 RT 1381.) Officers surveyed the apartment where Small and Mitchell lived and they spoke with Small when she arrived home. (10 RT 1922-1923, 1925.) Small told the officers that Mitchell spent time at the Yellows. (10 RT 1926.) The Colton officers then learned of the shooting that took place there. (10 RT 1926.)

4. Mitchell is arrested the following day on 19th Street

The next day, August 9, 2005, Tracy Ruff was at his apartment in the Del Mar apartment complex at 364 West 19th Street in San Bernardino. (11 RT 2108-2109.) Mitchell came over, as did another individual identified only as Rami J. and the three of them "hung out" and smoked marijuana and cigarettes. (11 RT 2110-2112.) Suddenly, Mitchell pulled out his gun and fired it into the air six or seven times. (11 RT 2113-2114.) They laughed and kicked the casings off the walkway. (11 RT 2114.) Mitchell walked out in front of the complex waiving his gun in the air. He sat on the neighbor's truck and pointed and fired his empty gun at cars, people, and houses. (11 RT 2080-2082, 2095.) Ruff followed Mitchell to the street. Ruff saw Mitchell waive his gun in the air and say, "I killed the devil." (11 RT 2116.) Ruff told Mitchell the police were going to come, and Ruff asked Mitchell to give him the gun. (11 RT 2115, 2117.) Ruff

returned to the apartments and hid the gun in the tire well of a van in the rear parking structure. (11 RT 2118-2119.)

Officer Thomas Adams responded to Mitchell's location and Mitchell immediately started yelling at him. (12 RT 2290.) Mitchell was wearing no shirt, jeans, and a camouflage hat. (12 RT 2289.) Officer Adams made numerous commands that Mitchell ignored. (12 RT 2292.) Instead, Mitchell kept approaching the officer and said, "My gun is bigger than yours. Fuck it. I'll just take your gun." (12 RT 2292, 2295.) Officer Adams finally shot Mitchell in the leg from about five feet away to stop him from advancing. (12 RT 2294.) Officer Adams thought Mitchell was acting like he wanted to "commit suicide by cop." (12 RT 2297.)

Mitchell was very hostile and combative with the officers when they were handcuffing him and in the ambulance on the way to the hospital. (11 RT 2163-2165; 12 RT 2282-2285.) Mitchell told Officer Joshua Cogswell that if he was going to die then the officer was going to go with him. (12 RT 2285.) He said to Officer Kevin Jeffery, who was also black, "They shot me nigga. I'm going to blow this muther fucker up. They shot me nigga." (11 RT 2166.) He also told Officer Jeffery, "God would not judge him for killing the devil." (11 RT 2169.) Mitchell would not respond to the paramedics or hospital staff when they asked him questions. (11 RT 2166, 2168.) Mitchell laid on the gurney motionless for the first 45 minutes at the hospital and then suddenly jumped from the gurney in an attempt to flee but was stopped by his ankle cuffs. (11 RT 2168.) Officer Jeffery thought that Mitchell's behavior was possibly consistent with being under the influence of PCP. (11 RT 2171.)

Both of Mitchell's hands tested positive for gunshot residue. (11 RT 2185; 12 RT 2248.) Officers recovered Mitchell's gun—a nine millimeter Sig Sauer semi-automatic pistol with an empty magazine—and the gun had his DNA on it. (11 RT 2145-2147; 12 RT 2264.) Police recovered a

second empty nine millimeter magazine inside Mitchell's pant pocket. (11 RT 2155.) Criminalist Kerri Heward opined the casings recovered from the car dealership, the apartment complex, and 19th Street, were all fired from Mitchell's gun. (8 RT 1592, 1597; 11 RT 2207, 2215-2216, 2221.)

B. Mitchell Defense

The defense theory of the case focused on inconsistencies in witness testimony and lack of scientific evidence. (14 RT 2463.) Defense counsel argued Payan's account of Lopez's death conflicted with the medical examiner's findings. (14 RT 2461-2463.) Counsel challenged the credibility of Armando's testimony on account he was under the influence of methamphetamine and his brother was killed. (14 RT 2458-2460.) He also challenged Hernandez's credibility contending her testimony identifying Mitchell as killing Susano was inconsistent. (14 RT 2456-2458.) Defense counsel criticized the prosecution for not scientifically matching any of the bullets recovered from the victims to the casings at the crime scenes and to Mitchell's gun. (14 RT 2454-2455.)

THE PENALTY PHASE

A. Prosecution Evidence in Aggravation

1. Evidence of Mitchell's criminal activity involving force or violence

a. 1988 carjacking

On July 10, 1988, about 5:30 p.m., Rebecca Davis and Lupe Chavez were parked at the Circle K Market in San Bernardino. (15 RT 2625-2626.) Chavez was in the driver's seat, Davis was in the passenger seat, and Davis's infant daughter was sitting in between them. (15 RT 2627.) The two of them were drinking sodas and talking. (15 RT 2627.) Davis noticed two black males talking to each other. One of them approached the driver's side and the other, Mitchell, approached the passenger's side of the

car. (15 RT 2628, 2630.) The man on the driver's side was wearing brass knuckles and told Chavez to get out of the car. (15 RT 2628-2630.) When she refused, he pulled her out of the car and she fell to the ground. (15 RT 2628-2629.) Mitchell told Davis to get out and get her baby out, and she did. (15 RT 2629-2630.) The men drove away in the car with Chavez's wallet still inside. (15 RT 2630.)

b. Firing a gun at Wierenga, Roark and DeSantiago on August 9, 2005

On August 9, 2005, at 3:00 p.m., Mitchell was in the middle of 19th street with a gun. (14 RT 2511-1512.) Brenda Wierenga pulled her car next to the curb and saw Mitchell pointing a gun at her and she ducked under the steering wheel. (14 RT 2521, 2536, 2538, 2540.) Mitchell fired the empty gun five to six times at the car's passenger side where David Roark was seated. (14 RT 2536, 2540, 2542.) He made a number of statements such as, "Come on. Get out. Get out. What's up?" (14 RT 2540, 2542.) "All you whites and Mexicans stay inside," and "Where is all my niggers?" (14 RT 2542.) He also said, "Get out of my way." (14 RT 2542.) Wierenga started her car and drove around the back of their apartment complex through the alley. (14 RT 2541.) As the car drove away, Mitchell said, "See y'all don't want none." (14 RT 2513, 2517.) Mitchell yelled out, "Hey, anybody want to come out here and fight me? We can get down right now." (14 RT 2516.) Mitchell pointed the gun at the sky, took out the clip and pointed it at his head and said, "See, I'll even shoot myself." (14 RT 2513.) He also said to himself, "Go back inside. You all need to go back inside. The devil is talking to me." (14 RT 2519.)

Armando DeSantiago worked for Federal Express and was delivering a package on 19th Street when he heard gunshots. (14 RT 2523-2524.) DeSantiago saw Mitchell in the middle of the street pointing a gun at everyone and everything moving. (14 RT 2524-2526.) Mitchell yelled,

"I'm the devil. I'm going to shoot everybody. Just come out wherever you are." (14 RT 2526.) Mitchell saw DeSantiago, pointed the gun at him, said "I'm going to kill you" and "get out of there," and pulled the trigger three times from about 18 feet away. (14 RT 2526-2527, 2530, 2533.) DeSantiago was afraid and hid behind his truck. (14 RT 2528.)

Mitchell went back inside the apartment complex and came back out, followed by Tracy Ruff telling him to calm down. (14 RT 2514, 2520.) Mitchell and Ruff struggled over the gun and finally Mitchell gave it to him. (14 RT 2517-2518.) When the officer arrived, Mitchell walked towards the officer pantomiming he had a gun in his hand and was firing it. (14 RT 2515.) Mitchell said to the officer, "Come on, you're a cop. You're supposed to kill me." (14 RT 2545.) He also told an officer to unhandcuff him and "He'll kick his ass." (14 RT 2545.)

2. Victim impact evidence [5]

a. The murder of Mario Lopez

Rene Lopez, one of Mario Lopez's four sons, testified about his father. (14 RT 2549-2550.) Rene described Mario as a happy man who cared about everything and everyone. (14 RT 2550.) He described Mario as "the best mechanic in the world. The best father. The best grandfather." (14 RT 2550.) Mario doted on his grandson and loved spending the holidays with them. (14 RT 2552.) He also loved spending time with his wife Cecelia, and they were constantly going places. (14 RT 2553-2554.) Rene travelled to the hospital when he heard Mario was shot and stayed with him until he died. (14 RT 2554.) Since his father's death, Rene said there are "times I lose myself" and he goes through bouts of depression,

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[5] Due to shared surnames, family members are referenced herein by their first names.

where he just goes through the motions of life. (14 RT 2557.) He also misses the relationship his father had with his son. (14 RT 2558.)

Cecelia Lopez had been Mario's common-law wife for nine years. (14 RT 2561.) She described Mario as a family man, always worrying about his children and grandchildren. (14 RT 2561.) He was also a gentleman and very hardworking. (14 RT 2561-2562.) Since his death, Cecelia has had to sell their house, move in with her daughter, and give up her two dogs. (14 RT 2562.) Cecelia said what she missed most about Mario was his presence, his caring, and that he looked after her reminding her to take her medication. (14 RT 2569.) Her medical problems have gotten worse since Mario was murdered due to high blood pressure and anxiety. (14 RT 2570.)

Payan had known Mario Lopez for over five years. (14 RT 2587.) Payan said Mario was always concerned about everybody else and would always tell Payan not to worry about the small things. (14 RT 2587.) He missed Mario's advice and encouragement. (14 RT 2593.)

b. The murder of Patrick Mawikere

John Mawikere spoke about the younger of his two sons, 21-year-old Patrick. (14 RT 2572-2573.) John received a call from his son Sandy that there was a shooting at Patrick's work. He rushed there and then to the hospital, only to find out Patrick was still at the car dealership. (14 RT 2573.) He was finally able to confirm it was Patrick who had been shot at 11:00 that evening. (14 RT 2574.) Patrick had an apartment with his brother Sandy, but often came to visit his parents on his days off. (14 RT 2575.) He loved working and was very generous with his money. (14 RT 2575.) Patrick had a lot of friends; more than 1600 people attended his funeral. (14 RT 2577, 2579.)

Patrick's mother, Mary Mawikere, was very close with her son and would talk to him every day. (14 RT 2581-2584.) Patrick loved to take his

niece and nephew to the mall on his day off and out to dinner. (14 RT 2583.) Mary has gone to counseling and prays for Patrick every morning. (14 RT 2583-2584.) Patrick's older brother Sandy has to pass by the car dealership when taking patients to Arrowhead and it gives him headaches and he cannot sleep. (14 RT 2584.)

Payan had known Patrick for two years and they became friends. (14 RT 2588.) He said Patrick was raised very well by his parents, was hard working and had a lot of goals for himself. (14 RT 2594.)

c. The attempted murder of Jerry Payan

Payan was a very active person before being shot and losing some function of his right arm and still suffering from the injury to his knee. He is frustrated and angry because he can no longer do things like hug his wife, hold his children, and play sports with his son. (14 RT 2588, 2594.)

Payan's wife, Doris Payan, described their relationship with his slain coworkers. Doris described Mario Lopez as a "man of wisdom" and a "good man." (14 RT 2597.) He was also great with their son and had nicknamed him "mini me" because he looked just like Jerry. (14 RT 2598.) The Payans have a son that is Patrick Mawikere's age and they had become friends. Doris thought this was great because Patrick was such a great kid and good example for their son. (14 RT 2599.) Doris did not immediately tell Payan that Mario had died because Payan was still undergoing surgery and she did not want to exacerbate his stress. (14 RT 2599-2600.)

Doris described the changes in their lifestyle since Jerry was shot. Instead of spending days off taking their son to the amusement park and doing other activities, they now spend that time going to therapy. (14 RT 2596.) It is also hard for them coming to court, more so for Jerry. (14 RT 2597.) Jerry is no longer the calm person he once was that joked with people, now he is quick to become agitated. (14 RT 2601.) He is also very

uneasy at home because he does not feel safe and worries that he will not be able to protect her if something happens. (14 RT 2602.)

d. The attempted murder of Juan Bizzotto

When Juan Bizotto was shot he had two children, one-year-old twins. (15 RT 2639.) The injury from his gunshot wound has severely limited the use of his right hand and arm such that he can no longer lift his children or feed them with his right arm. (15 RT 2640-2641.) As a result of his injuries, he uses his left arm 90 percent of the time. (15 RT 2641.) Bizotto's mental and emotional health has been adversely affected by the shooting. He has trouble going out in public because he is afraid of black people. He is no longer able to work, so his wife has to work fulltime, and he stays home with the children. (15 RT 2642.)

e. The murder of Susano Torres

Rafaela Navarete is Susano and Armando's mother. (14 RT 2604.) Susano was the second youngest of her eight children. (14 RT 2604.) Susano lived with her, as did Armando off and on. (14 RT 2605, 2608.) Susano loved playing with her grandchildren when they were over and helped watch them. (14 RT 2606-2607.) Susano was a happy child that loved to work with his hands, breaking things apart and putting them back together. (14 RT 2610.) Navarete knew Mitchell, who was friends with her children and would come by and ask for them. He even called her "mom." (14 RT 2610.) She was very angry because Mitchell took Susano's life away and she did not understand why. (14 RT 2610.) Navarete was home watching her grandchildren when she saw a lot of people outside and asked her granddaughter to find out what was going on. (14 RT 2609.) Her granddaughter came back and said Susano was killed. Navarete tried to go to Susano, but they would not let her. Because of her many medical problems, including diabetes, the stress landed her in the

hospital. She did not even find out Armando was also shot until the following day. (14 RT 2609.) Navarete has since moved from the Yellows apartment complex. She goes to the cemetery every day to visit Susano, cry and talk to him. She said, "I just feel like he's not listening to me. I don't know." (14 RT 2612.)

Sergio Quintero is Susano and Armando's older brother. (14 RT 2613.) At one point Susano lived with Quintero in Redlands before he moved in with their mother. (14 RT 2614.) Quintero said Susano was his brother and friend, and they would spend a lot of time hanging out together. (14 RT 2615.)

Beatriz Lopez, Susano's older sister, recalled that Susano was a good boy. Whenever she went to their mother's to visit Susano would always be playing with the kids. (14 RT 2616.) When Beatriz was cooking, Susano would come up from behind her, hug her and say, "I love you sis." (14 RT 2616.) Beatriz found out about his death when she received a call from her sister-in-law at work. (14 RT 2617-2618.) She misses everything about him. They had a great relationship. (14 RT 2618.) This last Christmas her mother did not want to be with the family, but alone in her room. (14 RT 2619.)

Armando Torres missed Susano's smile, how Susano used to treat him, and the time they spent hanging out together. (15 RT 2634-2635.) He said Susano was a nice person and a good kid. (15 RT 2636.) Armando has not returned to the Yellows since the shootings because he does not want to remember it. When Armando thinks about his brother, he uses drugs to make his thoughts go away. Since the shootings, Armando's methamphetamine use has gotten worse and he keeps "messing up" and ending up in custody. (15 RT 2636.) Armando was currently in custody for charges involving great bodily injury, drugs, a firearm, and a strike. (15 RT 2634, 2637.)

B. Defense Case in Mitigation

Dr. Alan Abrams examined Mitchell and testified as an expert on psychopharmacology. (15 RT 2654.) He also reviewed Mitchell's childhood school records and concluded they were consistent with Mitchell growing up in a highly unstable, abusive, and neglectful home. He and his siblings were in and out of foster care and group homes because of their mother's abuse and neglect and father's inability to care for them. (15 RT 2679-2680.) As a child Mitchell tested average to above average in intelligence, but his academic performance was terrible. (15 RT 2681-2682.)

Review of Mitchell's health records disclosed that Mitchell had a psychiatric diagnosis of dysthymia and was prescribed a variety of antidepressants including Remeron, Paxil, Prozac, and Wellbutrin. (15 RT 2696-2698.) Dr. Abrams described dysthymic disorder as a sort of depression people experience when they have been unhappy their whole life, but not to the extreme of wanting to commit suicide or having the inability to get out of bed. (15 RT 2699-2700.) These people "have a low-grade alienation feeling that something is missing, joylessness" and usually has to do with genetic predisposition and problems in child rearing. (15 RT 2700.)

As a condition of his parole in 2005, Mitchell was required to continue under the care of a doctor. (15 RT 2697.) On June 24, 2005, Mitchell told his doctor that he had stopped taking his medication a month earlier. (15 RT 2700, 2744-2745.) There were indications he did so because he was unhappy with the side effects, in particular he felt too sedated. (15 RT 2700.) Mitchell had not been testing positive for illicit street drugs during his parole. (15 RT 2701.) When an individual stops taking antidepressants, they are tapered off because rapid discontinuation can lead to symptoms such as irritability, insomnia, anxiety, and agitation.

(15 RT 2700-2701.) Dr. Abrams opined that Mitchell was under the influence of PCP at the time of the shootings. (15 RT 2724.)

1. Mitchell's family and childhood

Mitchell's mother, Kathy Joiner, was 16 years old when she married Mitchell's father, Louis Mitchell Senior. (16 RT 2918.) Mitchell, the first of their three children together, was born in 1970. (16 RT 2909, 2918.) Louis Sr. returned from service in the Marines in 1971. (16 RT 2908.) They had a tumultuous marriage and separated three times before their divorce in 1975. (16 RT 2911.)

John Mitchell is Mitchell's uncle. (16 RT 2899.) When Mitchell and his younger brother Dante Mitchell were ages five and six, Louis Sr. went to jail. (16 RT 2892.) John and his wife took Mitchell and Dante in and cared for them. (16 RT 2902.) They stayed with John for about four and a half months until the state placed them in the foster system. (16 RT 2903.) John described Mitchell's father as an "absentee dad" even to this day. (16 RT 2903.) John said Mitchell's parents were both very young and inexperienced and incapable of raising children. (16 RT 2904.)

Dante Mitchell said he was five and Mitchell was seven when they went to their first foster home. (16 RT 2889-2890.) When they were eight and ten, they lived with a couple named Matty and Big Jim until they moved back in with their father. (16 RT 2894.) Things began to deteriorate from there, and at Louis Sr.'s request, they went back to foster care. (16 RT 2894, 2911.) They were returned to their mother in 1979 and shortly thereafter, removed from her care when she was arrested for alleged child abuse and neglect. (16 RT 1912, 2919.)

Wendy Williams is Mitchell's stepmother, although she has been separated from Louis Sr. for about 22 years. (16 RT 2882-2883.) Mitchell and his brother Dante lived with her and Louis Sr. twice, for relatively short periods of time when they were younger. (16 RT 2884.) One of these

times she came home to find the boys sitting on the porch of her apartment building alone with a box of clothes. (16 RT 2885.) Louis Sr. had poor parenting skills and he did not interact with any of his children. (16 RT 2884.) Williams last saw Mitchell when he was 17 years old, and stopped by her home. (16 RT 2886-2887.)

When Dante got out of foster care for the last time, he came to California to live with their mother. He now lives in Los Angeles and has a good relationship with his mother, but does not get to see his father as much. (16 RT 2891, 2894.) Louis Sr. said he could not raise Mitchell because he could not get a job and life was difficult for himself as well. (16 RT 2916-2917.) Kathy said she failed her son as a mother. (16 RT 2923.)

The last time Dante had seen Mitchell was on the morning of August 9, 2005. (16 RT 2895.) Mitchell came to Dante's house in Los Angeles just before Dante was leaving for work at about 8:00 in the morning. (16 RT 2895-2896.) He came into Dante's room while he was ironing and said "Hey Dante. What's up?" He also told Dante that he looked like Mitchell's children and that he loved him. (16 RT 2895.) It was a brief visit. (16 RT 2895.)

Lashona Blue and Mitchell have three children; 11-year-old twins Hasan and Amena, and eight-year-old Mustafa. (16 RT 2924-2925.) Blue and Mitchell met in 1994 and lived together in Los Angeles for three to four years. (16 RT 2926.) She said Mitchell loved their children and was a good father, and he never abused her in any way. (16 RT 2926.) Blue said she had some great times with Mitchell and their children, and he was never vicious. (16 RT 2927.) Now she is a single mother of five and her sons are having problems and acting out because of their father. (16 RT 2931.) Every day their entire family is struggling with what is being said about Mitchell. (16 RT 2932.)

Mitchell's daughter Amena said she loved her father and knew he was in a lot of trouble. She promised that she was going to stay in touch with him and send him letters. (16 RT 2936.)

2. Mitchell's criminal and mental health history

Mitchell was convicted in August 1988 for unlawfully taking a motor vehicle and placed on felony probation. In December 1989, he was convicted of possession of cocaine for sale. He was arrested in March 1990 for possession of cocaine and convicted in August 1990. Mitchell was arrested in August 1992, and ultimately convicted in November 1992 of possession of cocaine base for sale. His probation for the carjacking offense in 1988 was revoked and he was sentenced to four years in prison. In December 1996 Mitchell was convicted of possession of marijuana for sale and granted probation. Mitchell was convicted of possession of PCP in July 2000, sentenced to two years in prison, and released January 2002. He was arrested again, this time for possession of cocaine base for sale, and convicted in December 2002. He was sentenced to prison for four years. (66 CT 17643-17645.)

Karen Hofmeister of the University of California San Diego psychiatry department interviewed Mitchell in June 2004 at the California Institute for Men because he was going to be paroled. (16 RT 2824.) The point of the interview was to gather information for the Parole Outpatient Center. (16 RT 2825.) She wrote in her report that Mitchell appeared depressed. (16 RT 2825.)

While still incarcerated, Mitchell came under the care of Dr. William Lawrence who treated Mitchell for depression and prescribed a number of medications for Mitchell while he was in prison, most recently Wellbutrin. (15 RT 2694-2695; 16 RT 2867.) According to Dr. Lawrence's notes, there did not appear to be any change in Mitchell's mood and mental status from July 2004 to February 2005 and his medication did not change. (16 RT

2871-2872.) The last time he saw Mitchell was in March 2005 and his Mental Status Exam was "in essence, normal." He had a diagnosis of dysthymia and was on the same dose of Wellbutrin. Their next scheduled appointment was not for three months, implying that Mitchell was doing well and stable. (16 RT 2874.) Dr. Lawrence said that if a patient had decided to stop taking their medication on their own he would want to see them, find out why, and discuss it. (16 RT 2868.)

Dr. Nuingyu Kim is a psychiatrist for the California Department of Corrections. (16 RT 2836.) He met with Mitchell on June 24, 2005, and Mitchell told him he had stopped taking his prescribed antidepressant Wellbutrin. (16 RT 2837.) Prior to meeting with Mitchell, Dr. Kim read a brief summary of his social background. It stated that Mitchell had a long history of being institutionalized, abused as a child, and a long history of substance abuse, his drug of choice being PCP. (16 RT 2838.) Dr. Kim had concerns because Mitchell stopped taking his medication, but he could not force Mitchell to take it. They agreed that Mitchell would continue to come see Dr. Kim once a month in case he needed medication, but then Mitchell did not show up for his next scheduled appointment. (16 RT 2839.) When a person discontinues their medication there is always a danger they will decompensate and the ingestion of street drugs may exacerbate the situation. (16 RT 2840.)

Parole Agent Steven Day supervised Mitchell for a short period of time and he appeared compliant with his parole. (16 RT 2843-2845.) During those three months or so, Mitchell never tested positive for any kind of narcotics. (16 RT 2847.) The last time he was tested was two to three days prior to his arrest. (16 RT 2847.)

3. Mitchell's use of PCP

Dr. Jeff Grange treated Mitchell at the hospital for a gunshot wound and altered mental state. (16 RT 2788-2790.) Mitchell arrived in an almost

catatonic state, and then later exhibited bizarre behavior. This along with the history from the paramedics and law enforcement, were reasons he was tested for drugs. A presumptive urine test showed Mitchell was positive for PCP and marijuana. (15 RT 2782; 16 RT 2792, 2808.) It was Dr. Grange's opinion that Mitchell likely had PCP in his system and he exhibited behavior consistent with being on PCP. (16 RT 2793.)

At 4:50 p.m., Mitchell's blood was drawn at the hospital. (15 RT 2780-2781; 16 RT 2806-2807.) Per defense request, a portion of the blood sample was sent to an independent lab for analysis. (16 RT 2810-2812.) The specimen contained 11 nanograms per milliliter of blood of PCP. (16 RT 2819-2820.) Mitchell was stabilized at about 6:00 p.m. and transferred to Arrowhead Regional Medical Center. (16 RT 2799-2800.)

Felix D'Amico testified as a drug recognition expert. (15 RT 2753.) He said the symptoms of PCP appear almost immediately after smoking it and usually peak two to three hours later. There will continue to be clinical symptoms up to four to six hours, and behavioral manifestations for up to 11 hours, and even weeks because it stores in fatty cells and can be released by adrenaline. (15 RT 2771-2772.)

Some behaviors he has observed of people under PCP include being agitated, excited, having hallucinations—they are seeing, hearing or interpreting things that really only exist in their mind—delusions, and paranoia. (15 RT 2765.) Their vital signs are extremely high, for example, their pulse, body temperature, and blood pressure. (15 RT 2765.) Other symptoms include abnormal eye movements, blank stare, and the inability to verbalize by breaks in their speech and mumbling, making them hard to understand. (15 RT 2765-2766.) These symptoms tend to cycle so one moment the individual will be calm and something sets them off and they become agitated. (15 RT 2766.)

When PCP is used with marijuana, in addition to the possible symptoms from the PCP, a user may have greater impairment in terms of misperception of time, space, and distance. This impairment will last two to three hours, whereas the PCP will usually last four to six hours. (15 RT 2768.)

Toxicology results alone are not conclusive by themselves as proof of someone being under the influence of drugs, rather in order to make a determination one must take into account observable behavior. (15 RT 2767, 2768.) D'Amico was of the opinion that Mitchell was under the influence of PCP on August 9, 2005. (15 RT 2770.)

Dr. Abrams said PCP is unlike almost any other drug of abuse because it makes people catatonic, insensible and excitable. (15 RT 2718.) He described the phases of PCP users as the initial intoxication where they act irrationally, then the second phase when they seem to recover, and if they do not recover, they move on to a long-term psychosis. (15 RT 2718.) Dr. Abrams was of the opinion that the level of Mitchell's drug test - PCP in the amount of 11 nanograms per milliliter, indicated Mitchell most likely smoked a substantial amount of PCP within the 24 to 72 hours before his arrest. (15 RT 2709.)

Dr. Abrams explained when Mitchell was under the influence of PCP could not be determined by the blood level alone. However, the blood level combined with Mitchell's irrational, violent, senseless, and out of control behavior, suggests that sometime after noon on August 8, 2005, Mitchell's behavior was strongly influenced by the effects of PCP. (15 RT 2721-2722.) One side effect of PCP is it prevents the formation of memories. (15 RT 2721.) Mitchell told Dr. Abrams that he could not remember any involvement in the shootings, only that he "was driving around that day." (15 RT 2730-2731.) Dr. Abrams was of the opinion that Mitchell was

intoxicated at the time of the shootings, but whether he acted with premeditation or malice "would be up for grabs." (15 RT 2724.)

ARGUMENT

I. CALJIC NOS. 8.71 AND 8.72 DID NOT LOWER THE PROSECUTION'S BURDEN OF PROOF AND COERCE JURORS TO RELINQUISH THEIR VIEW AS TO MITCHELL'S LEVEL OF CULPABILITY; MOREOVER, ANY ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT

Mitchell contends that his convictions for murder and the special circumstance finding should be reversed because the jury was instructed with flawed versions of CALJIC No. 8.71, on "Doubt Whether First or Second Degree Murder" and CALJIC No. 8.72, on "Doubt Whether Murder or Manslaughter." He argues the instructions lowered the prosecution's burden of proof and undermined the proof beyond a reasonable doubt standard, thereby violating his state and federal constitutional rights. (AOB 49-85.) Mitchell contends this is so because the jury could have misinterpreted CALJIC Nos. 8.71 and 8.72 as requiring it to unanimously find there was reasonable doubt he committed first degree murder or murder before it could give him the benefit of the doubt and find second degree murder or manslaughter. (AOB 55-57.) He reasons this suggestion made first degree murder the de facto default finding and lowered the prosecution's burden of proof by reassigning the benefit of the doubt to the prosecution. (AOB 56, 68-69.) Any possible confusion from instructing with both CALJIC Nos. 8.71 and 8.72 was clarified by other instructions and therefore Mitchell's due process rights were not implicated by these instructions. Even assuming error, Mitchell was not prejudiced.

Preliminarily, respondent notes that 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. (12 RT 2358.) To the extent that Mitchell asserts the instructions were erroneous as a matter of state law, he has failed

to preserve the issue for appeal by failing to object or seek clarification. (See, e.g., *People v. Bolin* (1998) 18 Cal.4th 297, 327 ["The instruction correctly states the law, and defendant did not request clarification or amplification. He has therefore waived the issue on appeal."]; *People v. Johnson* (1993) 6 Cal.4th 1, 52 [same]; *People v. Daya* (1994) 29 Cal.App.4th 697, 714 ["[A] defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions."].) Respondent is mindful that a failure to object to instructional error does not preclude appellate review of a claim if the substantial rights of the defendant are affected. (Pen. Code. § 1259; *People v. Lucas* (2014) 60 Cal.4th 153, 282.) Mitchell's assertion that the combination of the two standard jury instructions at issue deprived him of due process, states a claim that, if valid, involves his substantial rights. Accordingly, in contrast to any state law error, Mitchell's claim of a denial of due process based on instructional error has not been forfeited.

A. Viewed as a Whole, the Jury Instructions Were Proper

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

correlating, and applying all the instructions given to them. (*People v. Lewis* (2001) 26 Cal.4th 334, 390.)

This Court has acknowledged "some potential for confusing jurors about the role of their individual judgments in deciding between first and second degree murder" when given the versions of CALJIC Nos. 8.71 and 8.72 that were given here, but this Court did not consider whether other instructions, specifically, CALJIC No. 17.40 (also given here), adequately dispels any possible confusion and instead resolved Moore's claim based on any possible error being harmless beyond a reasonable doubt. (*People v. Moore* (2011) 51 Cal.4th 386, 411-412.) As explained below, any conceivable confusion posed by the combination of CALJIC Nos. 8.71 and 8.72 being considered in isolation, evaporates when the totality of the instructions are considered as a whole—as the jury was instructed to, and required to do—and presumed to have done.

The trial court instructed the jury with former CALJIC Nos. 8.71 and 8.72 (6th ed. 1996) without objection (12 RT 2358):

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.

(CALJIC No. 8.71; 65 CT 17281; 13 RT 2412-2413.)

> If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder.

(CALJIC No. 8.72; 65 CT 17282; 13 RT 2413.)

In *People v. Moore, supra,* 51 Cal.4th 386, this Court found the "better practice" was not to use the 1996 revised version of CALJIC Nos.

8.71 and 8.72 given here because it carried "at least some potential for confusing jurors about the role of their individual judgments in deciding between first and second degree murder, and between murder and manslaughter." (*Id.* at p. 411.) This Court presumed the references to unanimity were included to "convey the principle that the jury as a whole may not return a verdict for a lesser included offense unless it first reaches an acquittal on the charged greater offense," but found it "unnecessary, as CALJIC No. 8.75 fully explains that the jury must unanimously agree to not guilty verdicts on the greater homicide offenses before the jury as a whole may return verdicts on the lesser. [Fn. omitted.]" (*Id.* at pp. 411-412.) However, this Court has never explicitly held that it is error to instruct with CALJIC Nos. 8.71 and 8.72, as the issue was not resolved in *Moore* because the Court resolved the challenge to these standard instructions being given in combination based on finding that "[a]ny error was harmless beyond a reasonable doubt . . . ." under the circumstances of that particular case. (*Id.* at p. 412.)

Significantly, this Court's decision in *Moore* acknowledged and declined to disturb the holdings in two lower appellate court decisions, *People v. Pescador* (2004) 119 Cal.App.4th 252, and *People v. Gunder* (2007) 151 Cal.App.4th 412. Both opinions found instructing a jury with the 1996 version of CALJIC Nos. 8.71 and 8.72 was not error because the challenged instructions were given with other instructions that made it unlikely jurors would believe they had to vote for first degree murder if any other juror found first degree murder had been proven. (*People v. Moore, supra*, 51 Cal.4th at pp. 410-412.)

In *People v. Pescador, supra*, 119 Cal.App.4th 252, the defendant argued that the 1996 versions of CALJIC Nos. 8.71 and 8.72 "force[d] individual jurors who had a reasonable doubt as to the degree of murder" to conclude that they could not individually give the defendant the benefit of

that doubt, unless "the jury collectively and unanimously agree[d] upon the existence of reasonable doubt." (*Id.* at p. 256.) The court of appeal rejected that assertion, observing the court reviews all of the instructions given, rather than considering only "parts of an instruction or . . . a particular instruction." (*Id.* at p. 257.) The court then noted that the defendant's proposed interpretation of the challenged instructions flew "in the face of CALJIC Nos. 17.11 and 17.40." (*Id.* at p. 257.) CALJIC No. 17.11 specifically informed the jurors that if they had "a reasonable doubt" regarding the degree of murder, the jurors must give the defendant the benefit of that doubt and "find him guilty of that crime in the second degree." (*Ibid.*) CALJIC No. 17.40 further instructed the jurors that the prosecution and defense were "entitled to the individual opinion of each juror," and that each juror must "decide the case" for himself, and that a juror should "not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision." (*Ibid.*) Finally, the jurors were further directed to "'[c]onsider the instructions as a whole and each in light of all the others.'" (*Ibid.*)

The court of appeal in *Pescador* concluded that, in "light of the instructions as a whole," it was not reasonably likely that the jury interpreted CALJIC No. 8.71 "as requiring them to make a unanimous finding that they had reasonable doubt as to whether the murder was first or second degree." (*People v. Pescador, supra*, 119 Cal.App.4th at p. 257.) For the same reasons, the court also found that "CALJIC No. 8.72, when considered in context with CALJIC No. 8.50 [explaining difference between murder and manslaughter], 17.11, and 17.40, did not instruct the jury that it had to make a unanimous finding that they had a reasonable doubt as to whether the crime was murder or manslaughter in order for defendant to receive the benefit of the doubt." (*Ibid.*)

Following the decision in *Pescador*, the validity of CALJIC No. 8.71 was again considered in *People v. Gunder, supra*, 151 Cal.App.4th 412. There, as in *Pescador*, the defendant argued that the instruction violated his due process rights because it purportedly "condition[ed] any juror's decision in favor of second degree murder on the unanimous agreement of the jurors that a doubt exists as to degree." (*Id.* at pp. 424-425.) Gunder asserted that *Pescador* was inapposite, because the jury in *Pescador*, unlike his jury, was given CALJIC No. 17.11, the instruction stating that if there were a reasonable doubt as to the degree of murder, the defendant was to be given the benefit of that doubt. (*Id.* at p. 425.) The court of appeal in *Gunder* concluded that the distinction *Gunder* was seeking to draw was immaterial:

> We disagree that this is a crucial distinction. If indeed 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, the parallel pattern instruction [CALJIC No. 17.11] does not refute this any more directly than the instruction on the duty to deliberate individually. It is mere icing on the cake. What is crucial in determining the reasonable likelihood of defendant's posited interpretation is the express reminder that each juror is not bound to follow the remainder in decision making. Once this principle is articulated in the instructions, a reasonable juror will view the statement about unanimity in its proper context of the procedure for returning verdicts, as indeed elsewhere the jurors are told they cannot return any verdict absent unanimity and cannot return the lesser verdict of second degree murder until the jury unanimously agrees that the defendant is not guilty of first degree murder. Thus, nothing in the instruction is likely to prevent a minority of jurors from voting against first degree murder and in favor of second degree murder.

(*Id.* at pp. 827-828.)

Although this Court concluded in *Moore* that the "better practice" was to avoid the use of CALJIC Nos. 8.71 and 8.72, it did not hold the instruction was given in error and declined to decide whether *Gunder* was

correctly decided in finding that giving CALJIC No. 17.40 in conjunction with CALJIC No. 8.71 removed the danger of jurors being confused by the unanimity language in CALJIC No. 8.71. (*People v. Moore, supra*, 51 Cal.4th at pp. 411-412.) Nor did this Court follow *Pescador* because similar instructions given in that case, CALJIC Nos. 17.11 and 8.50, were not given to *Moore's* jury. (*Id.* at p. 411.) Instead, this Court concluded in *Moore* that any error was harmless beyond a reasonable doubt because, having found that the defendant had killed the victim while committing robbery and burglary, the jury was precluded from finding the defendant guilty of either of the lesser offenses of second degree murder or manslaughter. (*Id.* at p. 412.)

Another case where this Court examined the propriety of instructing with both CALJIC Nos. 8.71 and 8.72 is *People v. Frye* (1998) 18 Cal.4th 894. There, the defendant asserted that the 1979 versions of CALJIC Nos. 8.71 and 8.72 violated his due process rights, "by suggesting to members of the jury that they should compromise their firmly held beliefs in order to arrive at a verdict." (*Id.* at p. 963.) As this Court noted in *Moore*, the version of the CALJIC instructions used in *Frye* did not contain the problematic language at issue in that case and had not been resolved by this Court. (*People v. Moore, supra*, 51 Cal.4th at p. 410.) However, the instructions were substantially similar in all pertinent respects to the issue Mitchell has raised, and this Court's reasoning for approving their combined use was sound and logically applies to the instant case.[6] In *Frye*, this Court rejected the defendant's contention, stating:

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[6] In *Frye*, "the trial court instructed the jury in the language of CALJIC No. 8.71 (1979 rev.) that '[i]f you are convinced beyond a reasonable doubt that the crime of murder has been committed by ... defendant, but have a reasonable doubt whether such murder was of the first or second degree, you must give the defendant the benefit of that doubt (continued...)

Defendant's argument relies on a strained reading of the challenged instructions. The thrust of these instructions was to inform jurors they must give defendant the benefit of any reasonable doubts by returning a second degree murder verdict in the one circumstance, and a manslaughter verdict in the other. Nothing in this language can reasonably be understood as encouraging jurors to forego their personally held views so that a verdict could be rendered. Moreover, the jury was specifically instructed otherwise. The trial court explained, 'Both the People and the defendant are entitled to the individual opinion of each juror. [¶] It is the duty of each of you to consider the evidence for the purpose of arriving at a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after a discussion of the evidence and instructions with the other jurors. [¶] You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision.' In

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(...continued)
and return a verdict fixing the murder as of the second degree.' The court then instructed jurors pursuant to CALJIC No. 8.72 (4th ed. 1979 bound vol.), which states, 'If you are satisfied beyond a reasonable doubt that the killing was unlawful, but you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of such doubt and find it to be manslaughter rather than murder.'" (*People v. Frye, supra*, 18 Cal.4th at pp. 963-964.)

As this Court observed in *Moore:* "[p]rior to revision in 1996, neither instruction required unanimity on reasonable doubt as to the greater offense in order for a juror to give the defendant the benefit of such a reasonable doubt. CALJIC No. 8.71 (5th ed. 1988) stated: 'If you are convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, *but you have a reasonable doubt* whether such murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.' (Italics added.) Similarly, CALJIC No. 8.72 (5th ed. 1988) stated: 'If you are satisfied beyond a reasonable doubt that the killing was unlawful, *but you have a reasonable doubt* whether the crime is murder or manslaughter, you must give the defendant the benefit of such doubt and find it to be manslaughter rather than murder.' (Italics added.)" (*People v. Moore, supra*, 51 Cal.4th at p. 409, fn. 7.)

> light of this instruction[7], jurors were adequately informed not to abandon their views for the sake of a verdict. The instructions compelling verdicts of second degree murder and manslaughter if jurors had reasonable doubts when deciding between first and second degree murder, and murder and manslaughter, respectively, did not undermine this command.

(*Id.* at pp. 963-964.)

The intended purpose of CALJIC Nos. 8.71 and 8.72 is to provide a defendant with the benefit of the doubt as to the degree of guilt. (*People v. Frye, supra*, 18 Cal.4th at p. 964.) Viewing the instructions in their entirety, there was no reasonable likelihood that the jury applied the trial court's instructions in an unconstitutional manner resulting in a lessening of the prosecution's burden to prove him guilty beyond a reasonable doubt of first degree murder.

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[7] The instruction quoted in *Frye* as adequately informing the jury to reach their individual opinion as to the degree of murder when both CALJIC Nos. 8.71 and 8.72 are given is substantially similar to CALJIC No. 17.40 given which provides as follows:

> *The People and the defendant are entitled to the individual opinion of each juror.*
>
> *Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors.*
>
> Do not hesitate to change an opinion if you are convinced it is wrong. However, do *not decide any question in a particular way because a majority of the jurors, or any of them, favor* that decision.
>
> Do not decide any issue in this case by the flip of a coin, or by any other chance determination.

(CALJIC No. 17.40, italics added.)

Here, as in *Frye*, *Pescador*, and *Gunder*, the totality of the instructions clearly informed the jurors not to forsake their individual opinions when considering Mitchell's guilt or innocence. The jury in this case was instructed with CALJIC No. 17.40, that both the People and the defendant were "entitled to the individual opinion of each juror," and that each juror must "decide the case" for himself, and that a juror should "not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision." (65 CT 17296; 13 RT 2419.)

As the court of appeal aptly pointed out in *Gunder*,"[w]hat is crucial in determining the reasonable likelihood of defendant's posited interpretation is the express reminder that each juror is not bound to follow the remainder in decision making." (*Gunder, supra*, 151 Cal.App.4th at p. 425.) The unanimity language of CALJIC Nos. 8.71 and 8.72 is framed in terms of returning verdicts, not individual juror decision making. (*Id.* at p. 411.) A jury would not have assumed, based on CALJIC No. 8.71, that its ability to find Mitchell guilty of second degree murder first hinged on the entire jury concluding that he was not guilty of first degree murder. Certainly, nothing in the language of the challenged instructions superseded the clear mandate of CALJIC No. 17.40 or forced individual jurors in the instant case to surrender their own opinion as to the degree of Mitchell's guilt of murder.

Mitchell insists the jury would have presumed that in case of a conflict they were to follow CALJIC Nos. 8.71 and 8.72 because those instructions were more specific than CALJIC No. 17.40. (AOB 58-61.) However, his argument ignores the fact that the jurors were properly instructed to consider the instructions as a whole. (CALJIC No. 1.01; 65 CT 17229; 13 RT 2388.) Moreover, the fact that CALJIC Nos. 8.71 and 8.72 were read earlier and pertained specifically to the murder charges would not result in the jury ignoring the import of CALJIC No. 17.40 since

the jury was also instructed that "[t]he order in which the instructions are given has no significance as to their relative importance." CALJIC No. 8.74 also dispelled any potential confusion, clarifying, "Before you may return a verdict in this case you must agree unanimously not only as to whether the defendant is guilty or not guilty, but also if you should find him guilty of an unlawful killing, you must agree unanimously as to whether he is guilty of murder of the first degree or murder of the second degree or voluntary manslaughter." (65 CT 17284; 13 RT 2413.)

Also, the court instructed the jury with CALJIC No. 8.50 establishing the State's burden of proving that the killing was murder and not manslaughter. (65 CT 17276; 13 RT 2410.) By reiterating to the jury that the prosecution had to prove each element beyond a reasonable doubt, it precluded interpreting CALJIC Nos. 8.71 and 8.72 as Mitchell suggests, i.e., as requiring the jury to find Mitchell guilty of the greater offense without necessarily finding that particular crime was committed beyond a reasonable doubt.

CALJIC No. 17.10 was also given to Mitchell's jury, and instructed the jury, "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict him of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime." (65 CT 17291; 13 RT 2416-2417.)

Moreover, the trial court provided all the critical instructions explaining the prosecution's burden of proof: First, any fact or circumstance relied upon to prove Mitchell's guilt must be proven beyond a reasonable doubt (CALJIC No. 2.01; 65 CT 17234; 13 RT 2392-2393); the People must prove beyond a reasonable doubt every element or charge against Mitchell (CALJIC No. 2.61; 65 CT 17250; 13 RT 2398); and that Mitchell was innocent until proven guilty beyond a reasonable doubt (CALJIC No. 2.90; 65 CT 17256; 13 RT 2401).

Considering the instructions given as a whole, there is no reasonable likelihood the jury interpreted and misapplied CALJIC Nos. 8.71 and 8.72 as requiring them to unanimously find that they had a reasonable doubt as to the greater offense before giving Mitchell the benefit of doubt and the lesser. 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. CALJIC No. 17.40 ensured this was properly understood. In addition, the entire charge to the jury repetitively told them their verdict and each underlying element must be proved beyond a reasonable doubt. Thus, because the jury in this case was given CALJIC No. 17.40, along with various other instructions that properly set forth the People's burden of proof, this Court should adopt the reasoning of *Frye*, *Pescador* and *Gunder* and reject Mitchell's claim of error.

D. Any Error Was Harmless

Even assuming error in CALJIC Nos. 8.71 and 8.72 being given in combination, for the reasons explained above, there is no reasonable likelihood the jury would misconstrue the instructions in a unconstitutional manner. Accordingly, Mitchell would not be entitled to relief absent demonstrating a miscarriage of justice, i.e., that it is reasonably probable he would have obtained a more favorable verdict absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) As discussed below, given the evidence before the jury, there is no reasonable probability of the jury finding less than murder in the first degree.

Mitchell insists the purported instructional deficiency constituted a structural error requiring reversal of his conviction. (AOB 66-73.) He reasons CALJIC Nos. 8.71 and 8.72 subverted the reasonable doubt standard by reassigning the benefit of the doubt to the prosecution. (AOB 68-69.) Even assuming error of a federal constitutional magnitude, his

assertion of structural error is untenable. "[I]nstructional error relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violates the defendant's rights under both the United States and California Constitutions." (*People v. Flood* (1998) 18 Cal.4th 470, 479-480.) In *Flood*, however, this Court held that instructional error that "improperly describes or omits an element of an offense, or that raises an improper presumption or directs a finding or a partial verdict upon a particular element, generally is not a structural defect in the trial mechanism that defies harmless error review and automatically requires reversal . . . ." (*Id.* at pp. 502-503.) Rather, this type of error "falls within the broad category of trial error subject to *Chapman* review." (*Id.* at p. 503; *Neder v. United States* (1999) 527 U.S. 1, 15 [119 S.Ct. 1827, 144 L.Ed.2d 35].) Thus, the alleged error in this case is not reversible per se; rather, it would not compel reversal if this Court found it to be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

An error is harmless beyond a reasonable doubt when the error did not contribute to the verdict, i.e., when the error is unimportant in relation to what the record discloses in terms of everything else the jury considered on the issue. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Yates v. Evatt* (1991) 500 U.S. 391, 403.) Here, even assuming error of a federal constitutional magnitude, any error in giving the challenged instructions was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Any 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. Mitchell arrived at the car dealership with a loaded gun. He did not begin shooting immediately, and instead asked where Small was and Lopez said she had

left for work. (7 RT 1419-1420; 8 RT 1495.) He took advantage of being confined inside a small office when he shot Lopez twice. (7 RT 1422; 8 RT 1497-1498.) He had additional time to reflect before shooting Mawikere, as Mawikere pleaded with Mitchell not to shoot him when he turned his gun toward Mawikere. Mitchell responded to his plea by shooting him in the head. (8 RT 1498.) Next he targeted Payan, but could only manage to shoot him once before Payan crashed through the window. (7 RT 1422-1425.) Even after Payan was able to get out of the office, Mitchell continued to aim and fire at Payan through the window. (7 RT 1426.) Mitchell next took aim at Bizzotto, but was only able to wound him twice because Bizzotto had managed to hide under his metal desk that provided him some protection. (8 RT 1499-1501.)

Mitchell's motive was his belief the dealership had "screwed them over." (10 RT 2046.) He went to the dealership with a loaded weapon and once there, he methodically set about shooting his victims; first firing at Lopez—one of the two employees who initially assisted him and his girlfriend with the purchase of the car that later became disabled. (7 RT 1307, 1406-1407; 8 RT 1482, 1484.) Beyond Payan crashing through a window and Bizzotto seeking shelter under a metal desk, the employees did nothing when confronted by an armed Mitchell. (7 RT 1422-1427; 8 RT 1498-1501.) Facing no resistance whatsoever, Mitchell carried out his revenge in a premeditated and deliberate manner. Based on the evidence before the jury, Mitchell's conduct that day cannot be reconciled with anything less than first degree murder.

Mitchell's subsequent conduct at the Yellows also cannot be reconciled with anything other than premeditated and deliberate murder. Mitchell waited for Armando, motioning him to come closer, and then in response to what he wanted, Mitchell shot him, explaining, "You fucked up." (9 RT 1713-1715, 1727, 1733-1734.) He then shot and killed Susano

and, making clear the deliberate and premeditated nature of his actions, Mitchell added, "Fuck that. That's what they get." (9 RT 1767.) The evidence showed Mitchell specifically targeted Armando and Susano and deliberately shot them. He waited for Armando to exit the apartment, approached him, and tried to lure him in even closer. This coupled with his statement to Armando that he "fucked up" can only be reconciled with planning to kill Armando and deliberately shooting him. Likewise, Mitchell's acts of shooting Susano immediately after and stating "that's what they get" demonstrate Mitchell not only intended to kill them, but had a preconceived motive to do so. In light of the evidence before the jury, any instructional error did not contribute to a verdict because the evidence did not support finding any lesser degree of murder than first degree. Accordingly, any alleged error in providing CALJIC Nos. 8.71 and 8.72 did not contribute to the verdicts and was harmless beyond a reasonable doubt.

II. THE TRIAL COURT PROPERLY DENIED MITCHELL'S REQUEST TO INSTRUCT THE JURY WITH CALJIC NO. 8.73.1 ON HALLUCINATIONS BECAUSE IT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE; ANY POSSIBLE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT

Mitchell contends the trial court's refusal to instruct the jury with CALJIC No. 8.73.1 that it could consider evidence that he was hallucinating on the issue of premeditation and deliberation violated his state and federal constitutional rights and mandates reversal of his convictions. (AOB 86-105.) The trial court did not err in refusing to instruct the jury on hallucinations to show the absence of premeditation and deliberation in support of Mitchell's theory that he committed second degree murder because it was not supported by the evidence. Furthermore, even assuming error, it would be harmless beyond a reasonable doubt.

A trial court must give a requested instruction only if the defendant proffers evidence sufficient to deserve consideration by the jury; such

evidence is that from which a jury composed of reasonable persons could have concluded that the particular facts underlying the instruction were true. (*People v. Cole, supra*, 33 Cal.4th 1158, 1215; *People v. Barrick* (1982) 33 Cal.3d 115, 132, superseded by statute on another issue; *People v. Flannel* (1979) 25 Cal.3d 668, 684.) On appeal, the reviewing court asks "only whether the requested instruction was supported by substantial evidence—evidence that, if believed by a rational jury, would have raised a reasonable doubt as to whether" Mitchell's murders and attempted murders were premeditated and deliberated. (*People v. Mentch* (2008) 45 Cal.4th 274, 288.)

In evaluating the evidence to determine whether a requested instruction should be given, the trial court should not measure its substantiality by weighing the credibility of the witnesses, as that task is exclusively for the jury. If the evidence is "minimal and insubstantial," however, the court need not instruct on its effect. (*People v. Flannel, supra*, 25 Cal.3d at p. 685.) Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused. (*Ibid.*)

This instruction on hallucinations requested by Mitchell is based on the *Padilla* decision. In *Padilla*, the defendant stabbed and strangled his prison cellmate, Raymond Loya. (*People v. Padilla* (2002) 103 Cal.App.4th 675, 677.) The defendant pleaded not-guilty-by-reason-of-insanity and, at the guilt phase of his first-degree-murder trial, *Padilla* sought to admit the testimony of two psychologists that he committed a retaliatory homicide after hallucinating that Loya had killed Padilla's father and brothers. (*Ibid.*) The trial court allowed him to present this evidence at the sanity phase but not at the guilt phase and the jury subsequently convicted Padilla of first degree murder. (*Ibid.*) On appeal, Padilla argued one psychologist could have testified that Padilla hallucinated and the other about the concept of hallucination as provocation. (*Id.* at p. 678.) "That

evidence, he argues, could have led to a second degree murder verdict or to a voluntary manslaughter verdict." (*Ibid.*) The Court of Appeal found that the trial "court's order rejecting his proffer of evidence was error." (*Id.* at p. 679.)

While the court in *Padilla* held evidence that a defendant was "provoked" by a hallucination will not reduce a homicide from murder to manslaughter, because under the provocation/sudden quarrel variant of voluntary manslaughter, "[a] perception with no objective reality cannot arouse the passions of the ordinarily reasonable person" it may reduce a first degree murder to murder of the second degree when the defendant was subjectively provoked by that hallucination. (*People v. Padilla, supra*, 103 Cal.App.4th at p. 679; see also *People v. Mejia–Lenares* (2006) 135 Cal.App.4th 1437, 1444 [evidence the defendant killed his victim because of a delusion that the victim was the devil and wanted to kill him, delusions alone cannot support a claim of imperfect self-defense].) Thus, in *Padilla* the court found that precluding testimony by the defense psychologists at the guilt trial comprised prejudicial error. (*People v. Padilla, supra*, 103 Cal.App.4th at pp. 678, 680.) This was because the jury had no other evidence about Padilla's hallucination and the psychiatric testimony that he killed based on a delusion "could well have persuaded the jury to find that his hallucination provoked a heat of passion in which he committed not a first degree murder but a second degree murder." (*Id.* at p. 679.)

A. The Trial Court's Refusal to Instruct on Hallucinations Was Not Error

Mitchell contends that a jury instructed with CALJIC No. 8.73.1 could have determined that he was hallucinating and that, as a result, he shot and killed his victims in a heat of passion negating the element of premeditation and deliberation. He reasons there was substantial evidence to give the instruction because he called Armando "devil" before shooting

him, and displayed erratic and bizarre behavior the next day including statements that he killed the devil. (AOB 89, 91.) To the contrary, evidence that Mitchell called Armando "devil" and that Mitchell was possibly under the influence of PCP the day after he killed his victims, does not come close to meeting the threshold requirement that he "suffered from a hallucination which contributed as a cause of the homicide." (CALJIC No. 8.73.1.)

The trial court raised the issue of whether CALJIC No. 8.73.1, "Evidence Of Hallucination May Be Considered In Determining Degree Of Murder," should be given to the jury. (12 RT 2359.) The instruction reads, "A hallucination is a perception that has no objective reality. If the evidence establishes that the perpetrator of an unlawful killing suffered from a hallucination which contributed as a cause of the homicide, you should consider that evidence solely on the issue of whether the perpetrator killed with or without deliberation and premeditation." (CALJIC No. 8.73.1.)

The parties agreed that there was no medical evidence Mitchell was hallucinating, and at most, that he was on PCP on August 9, 2005, the day following the shootings. (12 RT 2359-2360.) However, they also acknowledged there was evidence Mitchell made a statement about shooting the devil which did not necessarily refer to Armando who had horns tattooed on his head. (12 RT 2359-2361.) The trial court instructed the parties to read *People v. Padilla, supra*, 103 Cal.App.4th 675, the case cited in the CALJIC No. 8.73.1 use notes. (12 RT 2360-2361.)

Mitchell's counsel had informed the court multiple times that Mitchell did not want to present a drug or psychiatric defense. (12 RT 2243; 13 RT 2382.) Nonetheless, counsel was requesting CALJIC No. 8.73.1 in light of references to Mitchell being under the influence of something the day after the homicides. (13 RT 2382.) The prosecutor responded the instruction

was not relevant because Mitchell was not charged with any crimes on the day he may have been under the influence, only the day before. (13 RT 2383.) The trial court held, "I'm going to note that the defense is requesting it. And I am going to refuse it based on the state of the evidence at this time." (13 RT 2383.)

A hallucination is "a perception with no objective reality" or a "'[p]erception of visual, auditory, tactile, olfactory, or gustatory experiences without an external stimulus.'" (*People v. Padilla, supra*, 103 Cal.App.4th at p. 678.) There was no evidence presented that Mitchell suffered from hallucinations in the past or at the time of the charged crimes. Referring to Armando by the nickname "devil" did not establish otherwise.

Armando testified he has horns tattooed on his head. (9 RT 1707-1708.) That day, Armando was saying goodbye to his friend as he was leaving her apartment when Mitchell walked up to him and said he wanted to talk. (9 RT 1714.) Armando said Mitchell called him "devil." (9 RT 1717.) On cross-examination Armando put his reference to "devil" in context, explaining Mitchell said, "Hey, devil. Let me talk to you." (9 RT 1733.) Mitchell pulled out the gun, said, "You fucked up," and started shooting. (9 RT 1733-1734.) Armando understood that Mitchell called him devil as a name. (9 RT 1734.) On redirect, Armando said that Mitchell always called him devil and had done so on other occasions before the shooting. (9 RT 1737-1738.) Armando had said to Mitchell, "Hey, don't be calling me devil. That ain't my name." (9 RT 1738.)

There is a significant difference between calling Armando "the devil" and "devil." Armando never testified that Mitchell literally referred to him as "the" devil, only that he called him devil as a nickname. (9 RT 1717, 1726, 1733-1735, 1737-1738.) While Mitchell argues Armando's testimony was conflicting about whether anyone—including Mitchell—had called him "devil" previously (AOB 89-90), any inconsistency about

whether he was ever called "devil" prior to Mitchell calling him over before shooting him does not amount to substantial evidence supporting an inference that Mitchell was hallucinating at the time he shot Armando. While Armando testified initially that neither Mitchell nor anyone else called him "devil." (9 RT 1717) He later clarified on redirect examination that Mitchell had called him "devil" on other occasions before the shooting. (9 RT 1737-1738.) What was clear was the use of that nickname by Mitchell was unwelcomed which is why Armando had told Mitchell on prior occasions, "Hey, don't be calling me devil. That ain't my name." (9 RT 1738.) Even if the jury rejected Armando's testimony that Mitchell had used the word devil to refer to him on earlier occasions, the mere reference to "devil" in summoning Armando is insufficient to support the hallucination instruction.

Mitchell also claims his erratic and bizarre behavior the following day supported the instruction on hallucination. (AOB 91.) But his conduct the next day does not provide a jury with substantial evidence from which to conclude that he was hallucinating when he shot six people at two separate locations the day before. While Mitchell may have been talking to himself and made references to killing the devil the following day after killing three people, and wounding three others, that conduct was attributable to his being under the influence of PCP, and does not constitute evidence supporting finding that he experienced a hallucination the day before. Even assuming Mitchell was hallucinating when he was arrested on the day following the shootings, he exhibited no conduct on the day of the shootings that would support an inference he was hallucinating at the time of the charged crimes.

In contrast to the facts in *Padilla*, Mitchell offered no evidence that he was hallucinating at any point from the time he went to the dealership to him being arrested. 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. Rather, there was no evidence Mitchell shot any person—at the car lot—or later at the Yellows apartment complex because he subjectively believed Armando was the devil. He shot the employees at the car dealership because he felt "screwed over" and the Torres brothers because Mitchell decided they "fucked up." Since there was no evidence at the time of the shootings that Mitchell was experiencing hallucinations, the instruction on hallucinations would not have been proper. Accordingly, the trial court did not err in refusing to instruct the jury on hallucinations.

Mitchell argues the trial court's refusal to instruct with CALJIC No. 8.73.1 denied him the right to a fair trial and meaningful opportunity to present a defense, and was federal constitutional error. (AOB 101-102.) He is wrong. The trial court refused to provide the instruction "based on the state of the evidence at this time." (13 RT 2383.) This ruling did not prevent Mitchell from presenting evidence on his behalf in support of this defense theory and arguing it to the jury. At that point in the trial, there was no evidence supporting the instruction. Jury instructions, whether they are to be given sua sponte or requested by the parties, must be supported by substantial evidence. (See *People v. Enraca* (2012) 53 Cal.4th 735, 760.) Had Mitchell proffered evidence that supported the finding, the instruction would have been given. Accordingly, the trial court did not prevent him from presenting a full defense or the right to a fair trial and Mitchell's federal constitutional rights were not impacted by the trial court's refusal to instruct on hallucinations.

B. Any Possible Error Was Harmless Beyond a Reasonable Doubt

Even assuming for the sake of argument that the trial court erred in failing to instruct the jury on hallucinations, this omission was purely state

error and is reviewed under the harmless error test set forth in *People v. Watson, supra*, 46 Cal.2d at page 836. Mitchell argues the trial court's refusal to instruct with CALJIC No. 8.73.1 denied him the right to a fair trial and meaningful opportunity to present a defense, and as federal constitutional error, it is subject to the *Chapman* beyond a reasonable doubt standard. (AOB 101-102; *Chapman v. California, supra*, 386 U.S. at p. 24.) As explained above, it was not federal constitutional error to refuse to give an instruction on hallucinations in light of the absence of substantial evidence to support the instruction.

In any event, any error was harmless even applying the more rigorous *Chapman* standard. The trial court's failure to provide the hallucination instruction was harmless beyond a reasonable doubt because the error complained of did not contribute to the verdict obtained. This is because 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 evidence that Mitchell referred to Armando as "devil" and Mitchell's behavior evidencing he was under the influence of PCP the following day after the murders would have persuaded the jury that he hallucinated and was guilty of the lesser offense than first degree murder. As explained above, Mitchell's conduct on the day of the shootings could only be reconciled with premeditation and deliberation. Accordingly, any error was harmless beyond a reasonable doubt because it did not contribute to the verdict.

III. THERE WAS NO CUMULATIVE ERROR IN THE GUILT PHASE

Mitchell contends that he was prejudiced at the guilt phase by the cumulative impact of the alleged errors raised in Arguments I and II. (AOB 106-110.) However, he cannot show that he was denied a fair trial because he failed to show error or that he suffered prejudice as a result of any particular error or combined errors.

As set forth in detail, there is no reasonable likelihood the jury misinterpreted and misapplied CALJIC Nos. 8.71 and 8.72. Nor was there sufficient evidence requiring the trial court to instruct the jury on CALJIC No. 8.73.1. As further noted in each argument, even if there were error Mitchell failed to show prejudice as to any of the foregoing claims, individually or in combination.

Because Mitchell has failed to show error or that he suffered prejudice as a result of any particular error or combined errors, he has failed to show he was denied a fair trial or otherwise prejudiced as a result of any cumulative error. As stated by this Court, defendants are entitled to "a fair trial but not a perfect one." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box* (2000) 23 Cal.4th 1153, 1214, 1219; see also *People v. Horning* (2004) 34 Cal.4th 871, 913 [no denial of right to fair trial where there was "little, if any, error to accumulate"].) Accordingly, there was no cumulative error at the guilt phase.

IV. OMITTING THE CALJIC NO. 2.20 PARAGRAPH ON PRIOR FELONY CONVICTIONS WAS HARMLESS BEYOND A REASONABLE DOUBT

The jury was instructed at the penalty phase on witness credibility with CALJIC No. 2.20. However, the parties failed to include the paragraph on prior felony convictions. Armando had a prior felony conviction and testified at the penalty phase. Mitchell contends the incomplete instructions denied his state and federal constitutional rights to a fair penalty trial, due process, and a fair penalty determination mandating the reversal of his death judgment. (AOB 111.) He is incorrect as the error in failing to reinstruct on principles relating to evaluating the credibility of a witness in the penalty phase was harmless beyond a reasonable doubt.

"A trial court has a sua sponte duty to 'instruct on general principles of law that are closely and openly connected to the facts and that are

necessary for the jury's understanding of the case,' including instructions relevant to evaluating the credibility of witnesses. [Citation.]" (*People v. Blacksher* (2011) 52 Cal.4th 769, 845-846; *People v. Breverman* (1998) 19 Cal.4th 142, 154; see also, §§ 1093, subd. (f), 1127.) This duty includes giving correct instructions regarding the credibility of witnesses. (*People v. Horning, supra*, 34 Cal.4th at p. 910; *People v. Rincon–Pineda* (1975) 14 Cal.3d 864, 883-884.) "[T]he court should give the substance of CALJIC No. 2.20 in every criminal case, although it may omit factors that are inapplicable under the evidence." (*Horning, supra*, 34 Cal.4th at p. 910; *People v. Rincon–Pineda, supra*, 14 Cal.3d at pp. 883-884.)

Here, all parties agreed CALJIC No. 2.20 on Believability of Witness should be provided to the jury. (17 RT 2947.) The instruction as given here, read;

> Every person who testifies under oath is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.
>
> In determining the believability of a witness you may consider anything that has a tendency reasonably to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following:
>
> The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness testified;
>
> The ability of the witness to remember or to communicate any matter about which the witness has testified;
>
> The character and quality of that testimony;
>
> The demeanor and manner of the witness while testifying;
>
> The existence or nonexistence of a bias, interest, or other motive;
>
> The existence or nonexistence of any fact testified to by the witness;

The attitude of the witness toward this action or toward the giving of testimony.

(65 CT 17384; 17 RT 2969-2970.)

CALJIC No. 2.20 also includes a number of bracketed factors that may be omitted if inapplicable:

[A statement [previously] made by the witness that is [consistent] [or] [inconsistent] with [his] [her] testimony] [.] [;]

[The character of the witness for honesty or truthfulness or their opposites] [;]

[An admission by the witness of untruthfulness] [;]

[The witness' prior conviction of a felony] [;]

[Past criminal conduct of a witness amounting to a misdemeanor] [;]

[Whether the witness is testifying under a grant of immunity].

The trial court went through each factor with the parties. (17 RT 2947-2948.) When the court arrived at "[The witness's prior conviction of a felony]," the court asked, "No witness had a felony conviction." Defense counsel responded, "No." The trial court next asked, "No witness had a misdemeanor conviction. Acceptable?" and both parties responded "Yes." (17 RT 2948.)

Other instructions provided included CALJIC No. 8.84.1, in relevant part, "You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial." (65 CT 17394; 17 RT 2974.) In addition, CALJIC No. 8.85, instructed the jury to "consider all of the evidence which has been received during any part of the trial in this case." (65 CT 17395; 17 RT 2974.)

In closing argument, the prosecutor made the following references to Armando Torres: "Armando Torres lying in the hospital in pain from a gunshot wound to the leg, who has probably damaged his life more in the last year because of this incident." (17 RT 2991.)

"And when Armando described not only how he has changed, but talking about his brother, he said, 'He's a nice person and he was a good kid. I liked the way he acted.' Describing his mother, he said, 'My mother can't sleep. And I can't sleep. I keep messing up because I come out of jail, keep on meth, keep doing meth. I don't want to remember the things.'" (17 RT 2999.)

A. The Omission of the Prior Felony Factor When Determining Witness Believability Was Harmless Beyond a Reasonable Doubt

Mitchell did not object to CALJIC No. 2.20 below on the basis the court omitted bracketed language regarding Armando's prior felony conviction. In fact, defense counsel agreed with the trial court there was no reason to provide that part of the instruction. (17 RT 2948.) Therefore, any claim of state law error has not been preserved for appeal. (See *People v. Bolin, supra*, 18 Cal.4th at p. 328.) However, under section 1259, a reviewing court has the authority to review any question of law involving an instruction if a defendant's substantial rights were affected, notwithstanding a failure to preserve the issue for appeal. (§ 1259.) Thus, despite Mitchell's failure to object below, respondent is mindful that this Court can review the merits of Mitchell's claim the omitted portion of the instruction was federal constitutional error.

This Court has consistently held that a failure to reinstruct at the penalty phase "on the applicable principles of evaluating the credibility of witnesses" is error, but the error is harmless if "'the jury expressed no confusion in this regard and never requested clarification.'" (*People v.*

Blacksher, supra, 52 Cal.4th at pp. 845-846, quoting *People v. Carter* (2003) 30 Cal.4th 1166, 1221.) As in *Blacksher* and *Carter*, the error in this case did not prejudice Mitchell.

In *People v. Carter, supra*, 30 Cal.4th 1166, the trial court failed to provide the jury with standard evidentiary instructions at the penalty phase including CALJIC No. 2.20. (*Id.* at p. 1219.) This Court found that even assuming error the defendant had failed to demonstrate prejudice resulted from the omission under either standard of review. (*Id.* at pp. 1221-1222, citing *People v. Brown* (1988) 46 Cal.3d 432, 446-448; *Chapman v. California, supra*, 386 U.S. at p. 24.) "Notwithstanding defendant's complaint that the jury was left 'in the complete dark' as to how to evaluate [expert's] testimony and that of other witnesses, the jury expressed no confusion or uncertainty in this regard and never requested clarification." (*Carter, supra*, at p. 1221.)

This Court followed its reasoning in *Carter* when a similar issue arose in *People v. Blacksher, supra*, 52 Cal.4th 769. At the penalty phase, the trial court instructed the jury to disregard instructions given at prior phases, but failed to reinstruct on evaluating witness credibility. (*Id.* at p. 846.) The defendant alleged prejudice because his former girlfriend was able to testify that he raped and beat her, without instruction to the jury that it could consider her prior felony convictions. (*Ibid.*) This Court found;

> There was no evidence she testified in exchange for any reward or immunity in relation to her prior criminality, which was in evidence. Her testimony was detailed, vivid, and appeared otherwise credible. In these circumstances, her prior convictions were of marginal impeachment value. Finally, given that counsel for both parties strongly argued the credibility of certain witnesses in their penalty phase closing arguments, defendant simply cannot argue that the jury was 'adrift' when it came to evaluating the credibility of the witnesses at the penalty phase.
>
> Defendant, therefore, fails to establish a reasonable possibility that any error under state law affected the verdict. We also

> conclude it appears beyond a reasonable doubt that the error did not contribute to the verdict of death under the federal standard of review of constitutional error. (*Carter, supra*, 30 Cal.4th at pp. 1221-1222.)

(*People v. Blacksher, supra*, 52 Cal.4th at p. 846.)

In *People v. Horning*, the same omission was made as here, but at the guilt phase of trial. (*People v. Horning, supra*, 34 Cal.4th at pp. 910-911.) The parties and the court mistakenly believed none of the witnesses had a prior felony conviction and failed to include it in CALJIC No. 2.20 or give CALJIC No. 2.23 telling a jury it may consider a felony conviction as a circumstance to determine credibility. (*Ibid.*) This Court in *Horning* did not determine if the trial court erred or it was invited error because it was harmless under any standard. (*Id.* at p. 911.) This Court recognized the defendant may have benefitted from including a prior felony as a listed factor in CALJIC No. 2.20, but it was unnecessary because the witness testified he was currently serving a sentence for burglary and had other prior convictions. In addition, the jury was provided most of CALJIC No. 2.20, including, "In determining the believability of a witness you may consider anything that has a tendency reasonably to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following. . . ." Therefore, the jury was permitted to consider the witness' felony conviction on credibility. (*Id.* at p. 911.) Moreover, the defense thoroughly challenged the credibility of the witness, and in closing argument the prosecutor only briefly cited the testimony and said the witness was, "certainly no prize in his own right." (*Ibid.*)

Applying the foregoing decisions to the facts of this case, any error resulting from the omitted paragraph was harmless beyond a reasonable doubt. In order to assess prejudice, this Court has considered a variety of factors, none which inure to Mitchell's benefit.

The circumstances in *Horning* are similar to those here. First, the jury was well aware of Armando's status as a felon. Armando testified in the guilt phase that he had a prior felony conviction for robbery. (9 RT 1704.) The jury had heard this testimony and was instructed it could consider evidence from any phase of trial. (See CALJIC No. 8.85.) At the penalty phase, Armando testified that he was currently in custody for charges involving great bodily injury, drugs, a firearm, and a strike. (15 RT 2634, 2637.) Thus, the jury knew of Armando's past criminal activity and that he was in custody while testifying at the penalty phase.

Also, similar to *Horning*, the jury in this case was provided the remainder of CALJIC No. 2.20, instructing the jury it could "consider *anything* that has a tendency reasonably to prove or disprove the truthfulness of the testimony of the witness." (Italics added.) And, other instruction informed the jury it could consider any evidence in the guilt phase. Therefore, the jury knew it could consider Armando's criminal status and history when assessing his credibility as a witness.

In addition, similar to *Carter* and *Blacksher*, the jury "expressed no confusion or uncertainty in this regard and never requested clarification." (*Carter, supra*, at p. 1221; *Blacksher, supra*, at p. 846.) The length of deliberations (See, 65 CT 17357, 17359-17360, 17365-17368) do not support any inference of prejudice from Armando's penalty phase testimony being considered without expressly being told his criminal record could be taken into account in assessing his credibility.

Mitchell puts much weight on Armando's penalty phase testimony and reasons the instructional omission "provided an unwarranted veneer of credibility to the entirety of Armando's testimony" and "might well have tilted the scales in favor of the jury's death verdict." (AOB 120.) This is not possible. Armando's penalty phase testimony consisted of him telling the jury he liked his younger brother and missed him. (15 RT 2634-2636.)

When Armando thinks about his brother, he uses drugs to make his thoughts go away. Since the shootings, Armando's methamphetamine use has gotten worse and he keeps "messing up" and ending up in custody. (15 RT 2636.) On cross-examination, defense counsel elicited from Armando that he was currently in custody for charges involving great bodily injury, drugs, a firearm, and a strike. (15 RT 2637.) It is not reasonably possible that a death verdict rested on whether or not the jury believed that Armando believes his drug use is related to his being shot, and his brother shot to death by Mitchell.

Mitchell murdered three people in a single day at two different locations, and caused permanent physical injury to another two. Numerous family members of those Mitchell killed, and his surviving victims testified to the adverse impact Mitchell's crimes have had on their lives. Mitchell complains the impact of Armando's penalty phase testimony was somehow more significant than the others because he described "a present and future life hopelessly impacted by Mitchell's conduct." (AOB 120.) But he fails to explain how instructing the jury it could consider Armando's prior felony conviction when assessing his believability would have yielded a more favorable outcome in the penalty phase.

Armando's prior felony was for his robbery conviction on August 31, 2005, after Susano's murder. (9 RT 1706.) The exact date of when Armando committed the robbery is unknown. When Armando testified on July 24, 2006, at the guilt phase, he was on felony probation. (9 RT 1706.) He even testified to using methamphetamine immediately before he was shot. (9 RT 1713.) Thus, the jury necessarily viewed Armando as a criminal that used methamphetamine before his brother was killed and that he became a convicted felon after Susano's murder. When he returned to testify at the penalty phase on August 22, 2006, he was in custody for new charges. Armando's prior felony lends credibility to his testimony that his

life has gone downhill since his brother's death. In any event, whether the jury believed Armando's testimony that he placed blame with Mitchell for his current circumstances, or loved and missed his brother, hardly impacts the weight of the aggravating evidence presented by the prosecution in comparison to the evidence in mitigation. The evidence in mitigation paled in comparison to the evidence of Mitchell taking three lives and traumatizing his two surviving gunshot victims and their families. Accordingly, it is not reasonably possible that the jury would not have returned a death verdict if only the jury had been expressly told in the penalty phase it could consider Armando's criminal record in assessing the credibility of his testimony. Any instructional error was harmless beyond a reasonable doubt. (*People v. Blacksher, supra*, 52 Cal.4th at p. 846.)

V. CALIFORNIA'S DEATH PENALTY SCHEME, AS INTERPRETED BY THIS COURT AND APPLIED AT MITCHELL'S TRIAL, DOES NOT VIOLATE THE UNITED STATES CONSTITUTION AND INTERNATIONAL LAW; VARIOUS CHALLENGES TO MURDER AND GUILT-PHASE INSTRUCTIONS ARE WITHOUT MERIT

Mitchell contends that many features of California's capital punishment scheme violate the United States Constitution. He correctly acknowledges that this Court has repeatedly rejected each of these claims, but raises these challenges to urge their reconsideration and preserve them for federal review. (AOB 125.) Accordingly, his contentions fail. (*People v. Jackson* (2009) 45 Cal.4th 662, 699-702.)

A. Penal Code section 190.2 Is Not Impermissibly Broad

Mitchell claims that section 190.2 is impermissibly broad because, at the time of his trial, it listed 22 special circumstances, which in total made 33 factually distinct murders eligible for the death penalty, and, therefore, it does not meaningfully narrow the pool of murderers eligible for the death penalty. (AOB 125-126.) He asks this Court to reconsider its decision in *People v. Stanley* (1995) 10 Cal.4th 764 at pages 842-843. (AOB 126.)

This Court has rejected this claim, holding that, "California's death penalty statute 'does not fail to perform constitutionally required narrowing function by virtue of the number of special circumstances it provides or the manner in which they have been construed.'" (*People v. Beames* (2007) 40 Cal.4th 907, 933, quoting *People v. Morrison* (2004) 34 Cal.4th 698, 730.) Also, this Court held that the California death-penalty scheme meets Eighth-Amendment requirements and is not overbroad based on the number of special circumstances. (*People v. Cornwell* (2005) 37 Cal.4th 50, 102.) Thus, this Court should reject this claim.

B. Application of Penal Code section 190.3, subdivision (a) Did Not Violate Mitchell's Constitutional Rights

Mitchell contends that Penal Code section 190.3, factor (a), is too broadly applied such that the concept of "aggravating factors" has been applied to almost all features of every murder, violating the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 126-128.) Mitchell acknowledges, however, that this Court has rejected this claim. (AOB 127.)

Allowing the jury to consider the circumstances of the crime (Pen. Code, § 190.3, factor (a)), does not lead to the imposition of the death penalty in an arbitrary or capricious manner. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 33 Cal.4th 382, 401.) This case presents no compelling reason to reconsider this holding. "Nor is section 190.3, factor (a) applied in an unconstitutionally arbitrary or capricious manner merely because prosecutors in different cases may argue that seemingly disparate circumstances, or circumstances present in almost any murder, are aggravating under factor (a)." (*People v. Carrington* (2009) 47 Cal.4th 145, 200.) Instead, "'each case is judged on its facts, each defendant on the particulars of his [or her] offense.'" (*Ibid.*, quoting *People v. Brown, supra*, 33 Cal.4th at p. 401, alteration in original.)

This Court determined, "California's death penalty statute 'does not fail to perform the constitutionally required narrowing function by virtue of the number of special circumstances it provides or the manner in which they have been construed.'" (*People v. Beames, supra*, 40 Cal.4th at p. 933, quoting *People v. Morrison, supra*, 34 Cal.4th at p. 730.) Also, this Court held that the California death-penalty scheme meets Eighth-Amendment requirements and is not overbroad based on the number of special circumstances. (*People v. Cornwell, supra*, 37 Cal.4th at p. 102.) Thus, this Court should reject this claim.

C. The Instructions Provided to the Jury at the Penalty Phase Were Constitutional and Complete

Mitchell presents three challenges to California's death penalty statute and accompanying jury instructions given and omitted. (AOB 128-133.) None of his claims have merit.

1. The penalty is constitutional and does not require a higher burden of proof

Mitchell argues that his death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt. This Court has held otherwise.

> The death penalty law is not unconstitutional for failing to impose a burden of proof—whether beyond a reasonable doubt or by a preponderance of the evidence—as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence.

(*People v. Hoyos* (2007) 41 Cal.4th 872, 926; *People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1066.) Because the California death-penalty law requires a beyond-a-reasonable-doubt standard for proving special circumstances, and then requires the jury to consider and take into account all mitigating and aggravating circumstances in determining whether to

impose the death penalty, it is constitutional. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1429.)

> Under the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense . . . ¶ Because any finding of aggravating factors during the penalty phase does not 'increase[] the penalty for a crime beyond the prescribed statutory maximum' (*Apprendi, supra*, 530 U.S. at p. 490), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings.

(*People v. Prieto* (2003) 30 Cal 4th 226, 263, italics in original.)

Mitchell acknowledges the holding in *Prieto* but urges this Court to reconsider it in light of *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Ring v. Arizona* (2002) 536 U.S. 584; *Blakely v. Washington* (2004) 542 U.S. 961; and *Cunningham v. California* (2007) 549 U.S. 270. (AOB 129.) But this Court has already done so, and has concluded, "[t]he recent decisions of the United States Supreme Court interpreting the Sixth Amendment's jury trial guarantee do not compel a different result." (*People v. Bramit* (2009) 46 Cal.4th 1221, 1250, footnote omitted.)

This Court should also reject Mitchell's request to reconsider its holding in *People v. Blair* (2005) 36 Cal.4th 686 at page 753, (AOB 130), that: "neither the cruel and unusual punishment clause of the Eighth Amendment, nor the due process clause of the Fourteenth Amendment, requires a jury to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty." This claim should be rejected.

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2. Capital sentencing is not susceptible to burdens of proof

Mitchell contends that his jury should have been instructed that the State had the burden of persuasion regarding the existence and weighing of aggravating and mitigating factors, the appropriateness of the death penalty, and a presumption of life without parole. (AOB 130-131.) However, he acknowledges that this Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (AOB 131; *People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) Thus, there is no requirement that the court instruct the jury that it had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors and that death was the appropriate penalty. (*People v. Contreras* (2013) 58 Cal.4th 123, 173.)

Mitchell also posits that the trial court should have articulated to the jury that the prosecution had no burden of proof. (AOB 131; *People v. Williams* (1988) 44 Cal.3d 883, 960-961.) This Court has also settled this issue. Since California does not specify any burden of proof, except for other-crimes evidence, the trial court should not instruct at all on the burden of proving mitigating or aggravating circumstances. (*People v. Holt* (1997) 15 Cal.4th 619, 682-684; *People v. Carpenter* (1997) 15 Cal.4th 312, 417-418.) Thus, the trial court need not instruct that "no party bears the burden of proof on the matter of punishment." (*People v. Lewis, supra*, 46 Cal.4th at p. 1319; accord *People v. McKinnon* (2011) 52 Cal.4th at 610, 697-698.) This claim, too, should fail.

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3. The penalty does not have to be based on unanimous jury findings regarding factors in aggravation

Mitchell contends that because his death verdict was not premised on unanimous jury findings regarding aggravating factors, the verdict violates the Sixth, Eighth, and Fourteenth Amendments. (AOB 131-133.) There is no requirement that the jury unanimously agree on the aggravating circumstances that support the death penalty, since aggravating circumstances are not elements of an offense. (*People v. Jackson, supra*, 45 Cal.4th at p. 701; *People v. Hoyos, supra*, 41 Cal.4th at p. 926.) Mitchell acknowledges that this Court reaffirmed this holding after the decision in *Ring v. Arizona, supra*, 536 U.S. at page 584. (See *People v. Prieto, supra*, 30 Cal.4th at p. 275; AOB 301.) He presents no compelling reason to revisit the decision.

Mitchell also argues the failure to require a finding of unanimity on the aggravating factors violates the Equal Protection clause of the Fourteenth Amendment by providing more protection to a noncapital defendant than to a capital defendant. (AOB 132-133.) He reasons that because under California law when a criminal defendant has been charged with certain special allegations that may increase the severity of the sentence, the jury must render a separate and unanimous verdict on the truth of the allegations, then capital defendants are likewise guaranteed this additional protection. (AOB 132.) Mitchell's claim fails as this Court has consistently held that "capital and noncapital defendants are not similarly situated and therefore may be treated differently without violating constitutional guarantees of equal protection of the laws or due process of law." (*People v. Manriquez* (2005) 37 Cal.4th 547, 590, citing *People v. Johnson, supra*, 3 Cal.4th at pp. 1242-1243.)

The availability of certain procedural protections in noncapital sentencing—such as a burden of proof, written findings, jury unanimity and disparate sentence review—when those same protections are unavailable in capital sentencing, does not signify that California's death penalty statute violates Fourteenth Amendment equal protection principles. [Citations.]

People v. Pearson (2013) 56 Cal.4th 393, 478-479, quoting *People v. Cowan, supra*, 50 Cal.4th at p. 510.) There is no need to reconsider this Court's holdings in *People v. Taylor* (1990) 52 Cal.3d 719, 749 and *People v. Prieto, supra*, 30 Cal.4th at page 275.

D. The Death Penalty Statute and Accompanying Jury Instructions on Mitigating and Aggravating Circumstances Given in This Case Did Not Violate Mitchell's Constitutional Rights

Mitchell presents eight challenges to the CALJIC instructions given to the jury on the subject of mitigating and aggravating circumstances and argues they violated his constitutional rights. (AOB 133-141.) These claims have all been addressed and rejected by this Court. He presents no arguments compelling reconsideration of this Court's prior holdings.

1. The instructions provided properly informed the jury to determine whether death is the appropriate penalty

Mitchell argues that CALJIC No. 8.88 failed to adequately instruct the jury that the ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty instead of life without parole and instead instructs them to return a death verdict if the aggravating evidence warrants it. (AOB 133-134.) He acknowledges that this Court previously rejected this challenge to CALJIC No. 8.88 in *People v. Arias* (1996) 13 Cal.4th 92, 171. (AOB 134.) Mitchell offers no reasons for this Court to reconsider its finding that CALJIC No. 8.88 is not defective in requiring the jury to determine whether death is "warranted" as opposed to "appropriate."

(*People v. McKinzie* (2012) 54 Cal.4th 1302, 1361; *People v. Rogers* (2009) 46 Cal.4th 1136, 1179; *People v. Watson* (2008) 43 Cal.4th 652, 702.) Accordingly, this claim fails.

2. The use of adjectives in the list of potential mitigating circumstances is not impermissibly restrictive

Mitchell contends that the instructions on mitigating and aggravating factors violated his constitutional rights because the use of restrictive adjectives in the list of potential mitigating factors impeded the jurors' consideration of mitigation. (AOB 134.) He acknowledges this argument has been rejected, but urges reconsideration. (AOB 134.) The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" in CALJIC No. 8.85 did not prevent the jury from considering mitigating factors in violation of Mitchell's constitutional rights. (*People v. Avila* (2006) 38 Cal.4th 491, 614; *People v. Jackson, supra*, 45 Cal.4th at p. 700.) Mitchell presents no compelling reason to reconsider these decisions.

3. The standard for the penalty determination was not impermissibly vague and ambiguous

Mitchell argues that the death penalty determination hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warranted death instead of life without parole." (AOB 134.) He argues that the phrase "so substantial" is impermissibly broad and does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. (AOB 134-135.) He acknowledges, however, that this Court found use of this phrase does not render the instruction constitutionally deficient in *People v. Breaux* (1991) 1 Cal.4th 281, 316, footnote 14. (AOB 135.) He provides no reason for this Court to reconsider the *Breaux* opinion or the many others holding

that the requirement that the jury find the aggravating circumstances "so substantial" in comparison with the mitigating circumstances that it "warrants death" is not vague or directionless. (*People v. Chatman* (2006) 38 Cal.4th 344, 409; *People v. Arias, supra*, 13 Cal.4th at p. 170.) As such, this claim fails.

4. The trial court was not required to omit inapplicable sentencing factors

Mitchell contends the trial court's failure to omit from CALJIC No. 8.85 factors that were inapplicable to his case likely confused jurors or prevented them from making a reliable penalty determination, and asks this Court to reconsider its decision in *People v. Cook* (2006) 39 Cal.4th 566, 618, rejecting this same contention. (AOB 135.) Reconsideration of the *Cook* holding is not warranted in this case as this Court has held jurors are presumed to follow the trial court's instruction, and here, the jury was instructed with CALJIC No. 8.85 to consider and be guided by the factors "if applicable." (*People v. McKinzie, supra*, 54 Cal.4th at pp. 1364-1365, quoting *People v. Maury* (2003) 30 Cal.4th 342, 439-440.) Nothing more was required. Mitchell's claim should be rejected. (*People v. Bivert* (2011) 52 Cal.4th 96, 124)

5. The trial court was not required to identify for the jurors the statutory factors relevant solely as mitigating circumstances

Mitchell argues that the trial court erroneously failed to instruct the jury which factors were relevant solely as mitigating circumstances. (AOB 136.) The trial court is not required to instruct the jury which factors are relevant solely as potential mitigating circumstances and which factors are relevant as aggravating circumstances. (*People v. Wilson* (2005) 36 Cal.4th 309, 360; *People v. Farnam* (2002) 28 Cal.4th 107, 191-192.) CALJIC No. 8.88 is not defective because "the aggravating and/or mitigating nature of

the various factors is readily apparent without such labels, even in the face of contrary argument." (*People v. McKinzie, supra*, 54 Cal.4th at p. 1362, quoting *People v. Millwee* (1998) 18 Cal.4th 96, 163.)

So long as the instructions "focus the sentencer's consideration on 'specific, provable, and commonly understandable facts' that properly bear on the appropriate penalty, they cannot be deemed unconstitutionally vague 'simply because they leave the sentencer free to evaluate the evidence in accordance with his or her own subjective values.' [Citation.]" (*People v. McKinzie, supra*, at p. 1362, quoting *People v. Montiel* (1993) 5 Cal.4th 877, 945 [addressing § 190.3's failure to identify which factors are aggravating or mitigating].) This claim should be rejected.

6. There is no requirement that the trial court instruct the jury that if mitigation outweighed aggravation then it must return a sentence of life without the possibility of parole

Mitchell contends that CALJIC No. 8.88 was defective for failing to tell the jury that if mitigating circumstances outweighed aggravating circumstances, then the jury must sentence him to a term of life without possibility of parole. (AOB 136-137.) He reasons the non-reciprocity of CALJIC No. 8.88 conflicts with due process principles by emphasizing the prosecution theory of the case while ignoring or minimizing the defense theory. (AOB 137.) This claim should be denied.

CALJIC No. 8.88 "[i]s not unconstitutional for failing to inform the jury that if it finds the circumstances in mitigation outweigh those in aggravation, it is required to impose a sentence of life without the possibility of parole [citation]." (*People v. Moon* (2005) 37 Cal.4th 1, 42.) The instruction informs the jury regarding the proper weighing of aggravation and mitigation to determine whether death or life without parole is warranted. (*People v. Perry* (2006) 38 Cal.4th 302, 320; *People v. Smith* (2005) 35 Cal.4th 334.)

An "'admonishment was unnecessary in light of the express instruction that a death verdict could be entered only if aggravating circumstances outweighed mitigating ones.'" (*People v. McKinzie, supra*, 54 Cal.4th at pp. 1361-1362; quoting *People v. Medina* (1995) 11 Cal.4th 694, 782; see *People v. Ray* (1996) 13 Cal.4th 313, 356 ["By stating that death can be imposed in only one circumstance—where aggravation substantially outweighs mitigation—the instruction clearly implies that a sentence less than death may be imposed in all other circumstances."].) This Court should not disturb its earlier opinions on this matter. Accordingly, Mitchell's claim must be rejected.

7. The trial court did not err by instructing the jury not to consider sympathy for Mitchell's family

Mitchell argues CALJIC No. 8.85 erroneously precludes the jury from considering sympathy for his family as a factor in mitigation. (AOB 138-140.) He urges this Court to reconsider earlier decisions and find this portion of the instruction unconstitutional. (AOB 140.) This Court has addressed and rejected this claim. (*People v. Bemore* (2000) 22 Cal.4th 809, 855-856, accord *People v. Livingston* (2012) 53 Cal.4th 1145, 1178-1179.)

> We have rejected similar claims before, and do so again here. ([Citations].) The foregoing cases make clear that while so-called victim impact considerations show the specific harm caused by the defendant and his moral culpability for purposes of determining whether he deserves to die, the impact of a death sentence on the defendant's family and friends has no similar bearing on the individualized nature of the penalty decision. Sympathy for defendant's loved ones, as such, and their reaction to a death verdict, as such, do not relate to either the circumstances of the capital crime or the character and background of the accused. Because the challenged instruction was consistent with the foregoing principles, the trial court did not err in giving it at defendant's trial.

(*People v. Bemore, supra*, 22 Cal.4th at p. 856.)

Moreover, Mitchell's contention that the majority decision *in Payne v. Tennessee* (1991) 501 U.S. 808, 827 [111 S.Ct. 2597, 2609, 115 L.Ed.2d 720] (*Payne*), supports his claim is also unavailing. (AOB 139-140.) Specifically, he argues that *Payne* "requires an even balance between the evidence available to the defendant and that available to the state" during the sentencing phase of a capital trial. (AOB 139.) This Court has previously rejected this claim. (*People v. Smithey* (1999) 20 Cal.4th 936, 1000)

More recently, this Court reaffirmed the principle that sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation. (See *People v. Alexander* (2010) 49 Cal.4th 846, 929 [citing *People v. Ochoa* with approval for the proposition that "a capital jury cannot consider sympathy for a defendant's family in mitigation"]; *People v. Bennett* (2009) 45 Cal.4th 577, 601 [same]; *People v. Harris* (2005) 37 Cal.4th 310, 355 [citing *People v. Benmore* with approval for the proposition that "sympathy for defendant's loved ones and their reaction to a death verdict do not relate to either the circumstances of the capital crime or the character and background of the accused"]. Mitchell has not advanced any persuasive arguments requiring this Court to reject its prior holdings.

8. There is no requirement that the trial court instruct the penalty jury on the presumption of life

Mitchell claims the trial court erred and violated his right to due process of law by not instructing the jury as to the presumption that life without the possibility of parole is the appropriate sentence. (AOB 140-141.) As he acknowledges, this Court has rejected the argument that such an instruction is required in capital cases. (AOB 141; *People v. Arias, supra*, 13 Cal.4th at p. 190; see *People v. Abilez* (2007) 41 Cal.4th 472,

532.) CALJIC No. 8.88 is "not unconstitutional for failing to inform the jury there is a presumption of life." (*People v. Moon, supra*, 37 Cal.4th at p. 43, citing *People v. Maury, supra*, 30 Cal.4th at p. 440.) There is no requirement that the jury be instructed on a presumption of life in the penalty phase of a capital trial that is analogous to the presumption of innocence at the guilt trial. (*People v. Contreras, supra*, 58 Cal.4th at p. 173; *People v. Jackson, supra*, 45 Cal.4th at p. 701.) Accordingly, this claim should be rejected.

E. Failing to Require the Jury to Make Written Findings Does Not Violate Mitchell's Right to Meaningful Appellate Review

Mitchell contends that the failure to require written or other specific findings by the jury deprived him of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review. (AOB 141-142.) As acknowledged, this Court has rejected this claim, holding that CALJIC No. 8.88 is not unconstitutional for failing to require written findings so as to facilitate "meaningful appellate review." (*People v. Cook, supra*, 39 Cal.4th at p. 619; *People v. Moon, supra*, 37 Cal.4th at p. 43, citing *People v. Williams* (1997) 16 Cal.4th 153, 276.) Therefore, this claim should be rejected.

F. Intercase Proportionality is Not Required

Mitchell argues that the prohibition of intercase proportionality review in capital sentencing and failure to conduct such a review guarantees arbitrary and disproportionate impositions of the death penalty. (AOB 142.) Intercase proportionality review is not required and Mitchell has presented no persuasive reasoning to reconsider this Court's prior decisions. (*People v. McKinzie, supra*, 54 Cal.4th at p. 1365.) "Comparative intercase proportionality review by the trial or appellate

courts is not constitutionally required." (*People v. Snow* (2003) 30 Cal.4th 43, 126; accord *People v. Demetrulias* (2006) 39 Cal.4th 1, 44.)

G. California's Death Penalty Statute Does Not Violate Equal Protection

Mitchell contends that California's death penalty statute violates equal protection because it "provides significantly fewer procedural protections" than those afforded to non-capital defendants, and asks this Court to reconsider its ruling in *People v. Manriquez, supra*, 37 Cal.4th at p. 590. (AOB 142-143.) To prevail on an equal protection claim, a defendant must establish that "the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*People v. Smith* (2007) 40 Cal.4th 483, 527, quotations and citations omitted.) Mitchell has not met his necessary burden.

This Court has rejected the claim that procedural differences in capital and non-capital cases, including the availability of certain "safeguards" such as intercase proportionality review, violate equal protection principles under the Fourteenth Amendment. (See *People v. Blair, supra*, 36 Cal.4th at p. 754; *People v. Ramos* (1997) 15 Cal.4th 1133, 1182.) As this Court has observed, capital case sentencing involves considerations wholly different from those involved in ordinary criminal sentencing. (*People v. Blair, supra*, 36 Cal.4th at p. 754.) "[B]y definition, a defendant in a non-capital case is not similarly situated to his capital case counterpart for the obvious reason that the former's life is not on the line." (*People v. Smith, supra*, 40 Cal.4th at p. 527, quotation and citation omitted). "Thus, California's death penalty law does not violate equal protection because it does not require juror unanimity on aggravating circumstances, impose a burden of proof on the prosecution, or require a statement of reasons for a death sentence. (*People v. Gonzales* and *Soliz, supra*, 52 Cal.4th at p. 333; *People v. Carey* (2007) 41 Cal.4th 109, 136-137; see also *People v.*

Zamudio (2008) 43 Cal.4th 327, 373 [death penalty law does not violate equal protection because sentencing procedures for capital and noncapital defendants are different].)

H. Use of the Death Penalty Does Not Violate International Law

Mitchell argues that use of the death penalty violates international law, the Eighth and Fourteenth Amendments of the United States Constitution, and "evolving standards of decency." (AOB 143.) He acknowledges this Court's rejection of these claims, but urges reconsideration in light of the decision in *Roper v. Simmons* (2005) 543 U.S. 551, 554, that cites international law to support its prohibition of capital punishment against defendants that committed their crimes as juveniles. (AOB 143.) This Court has recently considered and rejected Mitchell's claim:

> California's death penalty scheme does not violate international law and norms. (E.g., *People v. Houston* (2012) 54 Cal.4th 1186, 1232 [144 Cal. Rptr. 3d 716, 281 P.3d 799].) We are not persuaded otherwise by *Roper v. Simmons* (2005) 543 U.S. 551 [161 L. Ed. 2d 1, 125 S. Ct. 1183], in which the high court cited evolving international standards as 'respected and significant' support for its holding that the Eighth Amendment prohibits imposition of the death penalty against persons who committed their crimes as juveniles. (*Roper*, at p. 578.)

(*People v. Mai* (2013) 57 Cal.4th 986, 1058.)

Moreover, international law does not require California to eliminate capital punishment. (*People v. Blacksher,* 52 Cal.4th at p. 849; *People v. Martinez* (2010) 47 Cal.4th 911, 968; *People v. Doolin, supra*, 45 Cal.4th at p. 456.) Furthermore, California does not impose the death penalty as regular punishment in California for numerous offenses. (*Ibid.*) Instead, "[t]he death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true; furthermore,

administration of the penalty is governed by constitutional and statutory provisions different from those applying to 'regular punishment' for felonies. (E.g., Cal. Const., art. VI, § 11; §§ 190.1-190.9, 1239, subd. (b).)" (*People v. Doolin, supra*, 45 Cal.4th at p. 456, quoting *People v. Demetrulias*, *supra,* 39 Cal.4th at p. 44.) Thus, California's death penalty law does not violate international law or the federal Constitution.

VI. THERE IS NO REVERSIBLE CUMULATIVE ERROR

Mitchell contends that even if none of the errors he identified prejudiced him standing alone, the cumulative effect of the errors undermines confidence in the integrity of both phases of his capital trial. (AOB 144-146.) But, where, as here, the claims of error are defective, the defendant has presented nothing to cumulate. (*People v. Staten* (2000) 24 Cal.4th 434, 464; *People v. Rountree* (2013) 56 Cal.4th 823, 860.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1009; *People v. Box, supra*, 23 Cal.4th at pp. 1214, 1219.) Here, Mitchell's claims of prejudicial error have failed, and he cannot prevail on his argument that the cumulative effect of errors made during trial deprived him of his right to a fair trial. Accordingly, his claim fails and reversal is not warranted.

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CONCLUSION

Accordingly, respondent respectfully asks this Court to affirm the judgment.

Dated: May 22, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 20,664 words.

Dated: May 22, 2015

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: ***People v. Mitchell,* Jr.**
No.: **S147335**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **May 22, 2015**, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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San Bernardino, CA 92415

California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105-3647

and, furthermore I declare, in compliance with California Rules of Court, rules 2.25(i)(1)(A)-(D) and 8.71 (f)(1)(A)-(D), I electronically served a copy of the above document from Office of the Attorney General's electronic service address ADIEService@doj.ca.gov on **May 22, 2015**, to Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com by 5:00 p.m. on the close of business day.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **May 22, 2015**, at San Diego, California.

S. McBrearty
Declarant

S McBrearty
Signature

SD2006701469/80965282.doc