

SUPREME COURT COPY

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

)
 PEOPLE OF THE STATE OF CALIFORNIA,)
)
 Plaintiff and Respondent,)
)
 v.)
)
 LOUIS MITCHELL, JR.,)
)
 Defendant and Appellant.)
)

No. S147335

(San Bernardino County
Superior Court No.
FSB051580)

SUPREME COURT
FILED

JUL 03 2014

Frank A. McGuire Clerk
Deputy

APPELLANT'S OPENING BRIEF

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

HONORABLE BRIAN S. MCCARVILLE, JUDGE

MICHAEL J. HERSEK
State Public Defender

HARRY GRUBER
State Bar No. 71053
Senior Deputy State Public Defender

1111 Broadway, 10th Floor
Oakland, California 94607
Telephone: (510) 267-3300

Attorneys for Appellant

DEATH PENALTY

TABLE OF CONTENTS

	Page
STATEMENT OF APPEALABILITY	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	4
A. The Guilt Phase	4
1. Introduction	4
2. The Shootings at the Used Car Dealership in Colton	6
a. Appellant accompanies his girlfriend to a used car dealership where she purchases a car that immediately breaks down	6
b. Appellant returns to CAS and shoots four employees	8
c. As a result of the shootings, two CAS employees are killed and two are injured, and the police search for appellant	12
3. The Shootings at the Yellows Apartment Complex	14
a. Armando Torres is shot and injured	15
b. Susano Torres is shot and killed	17
c. Appellant is seen leaving the area of the Yellows following the shooting	20
d. The forensic evidence	22

TABLE OF CONTENTS

	Page
4. Appellant is Shot and Arrested	23
a. Appellant’s bizarre behavior on 19th Street	23
b. Police confront, shoot and arrest appellant	25
c. Appellant’s post-arrest behavior	27
d. The physical and forensic evidence	27
B. The Penalty Phase	28
1. The Prosecution’s Case in Aggravation	28
a. The evidence of other criminal activity involving the threat of force or violence	29
b. Evidence of prior felony convictions	31
c. Victim impact evidence	32
i. The Lopez family	32
ii. The Mawikere family	33
iii. The Payan and Bizzotto families	34
iv. The Torres family	35
2. The Defense Case in Mitigation	36
a. Appellant’s upbringing and family history	37
b. Appellant’s criminal record, mental health problems, and performance on parole	41

TABLE OF CONTENTS

	Page
c. Appellant’s being under the influence of PCP at the time of the homicides	45
I. THE UNANIMITY-OF-DOUBT REQUIREMENT IN CALJIC NO. 8.71 AND CALJIC NO. 8.72 IMPERMISSIBLY AND PREJUDICIALLY SUBVERTED THE REASONABLE DOUBT STANDARD WHICH LOWERED THE STATE’S BURDEN OF PROOF FOR MURDER AND FIRST DEGREE MURDER	49
A. Introduction And Proceedings Below	49
B. The Delivery Of CALJIC Nos. 8.71 And 8.72, Requiring Jurors To Unanimously Agree They Had A Reasonable Doubt As To The Nature Of The Crime Or The Degree Of Murder Before Appellant Was Entitled To The Benefit Of That Doubt, Violated Both State Law And The Federal Constitution . . .	51
1. There Is a Reasonable Likelihood That the Jurors Understood and Applied the Unanimity-of-Doubt Requirement, Which This Court Criticized as Problematic and Confusing in <i>People v. Moore</i> (2011) 51 Cal.4th 386, in a Way That Violated State Law and the Federal Constitution . . .	53
2. The Other Instructions Did Not Correct the Constitutional Error Resulting From the Unanimity-of-Doubt Requirement in CALJIC Nos. 8.71 and 8.72	57
C. The Delivery Of CALJIC Nos. 8.71 And 8.72 With The Unanimity-Of-Doubt Requirement Mandates Reversal Of Appellant’s Murder Convictions And Death Sentence	66
1. The Errors Were Structural Requiring Automatic Reversal	66

TABLE OF CONTENTS

	Page
2. In the Alternative, Reversal Is Required Because the State Cannot Prove the Errors Harmless Beyond a Reasonable Doubt	73
a. The homicides at CAS	75
b. The homicide at the Yellows	82
D. Conclusion	84
II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING APPELLANT’S REQUEST TO DELIVER CALJIC NO. 8.73.1 AT THE GUILT PHASE	86
A. Proceedings Below	86
B. The Denial Of The Requested Hallucination Instruction, Which Was Supported By Substantial Evidence, Violated State Law	88
C. The Denial Of The Requested Hallucination Instruction Also Violated Appellant’s Federal Constitutional Rights To A Fair Trial And A Meaningful Opportunity To Present A Defense	97
D. The Instructional Error Requires Reversal	101
III. THE CUMULATIVE EFFECT OF THE INSTRUCTIONAL ERRORS AT THE GUILT PHASE REQUIRES REVERSAL . .	106
IV. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AT THE PENALTY PHASE BY DELETING AN APPLICABLE PARAGRAPH OF CALJIC NO. 2.20	111
A. Penalty Phase Jury Instruction Hearing	111

TABLE OF CONTENTS

	Page
B. The Court Erred When It Failed Sua Sponte To Instruct The Jury With All Applicable Provisions Of CALJIC No. 2.20	114
C. The Instructional Error Requires Reversal Of The Death Sentence	118
V. CALIFORNIA'S DEATH PENALTY STATUTE AND CALJIC INSTRUCTIONS, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATE THE UNITED STATES CONSTITUTION	125
A. Penal Code Section 190.2 Is Impermissibly Broad	125
B. The Broad Application Of Penal Code Section 190.3(a) Violated Appellant's Constitutional Rights	126
C. California's Death Penalty Statute And The CALJIC Instructions Given In This Case Failed To Set Forth The Appropriate Burden Of Proof And The Requirement Of Unanimity	128
1. Appellant's Death Sentence Is Unconstitutional Because It Was Not Premised on Findings Made Beyond a Reasonable Doubt	128
2. Some Burden of Proof Should Have Been Required, or the Jurors Should Have Been Instructed That There Was No Burden of Proof ..	130
3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings Regarding Aggravating Circumstances	131
D. California's Death Penalty Statute And The CALJIC Instructions Given In This Case On Mitigating And Aggravating Circumstances Violated Appellant's	

TABLE OF CONTENTS

	Page
Constitutional Rights	133
1. The Instructions Given Failed to Inform the Jurors That the Central Sentencing Determination Is Whether Death Is the Appropriate Penalty	133
2. The Use of Adjectives in the List of Potential Mitigating Circumstances Is Impermissibly Restrictive	134
3. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard	134
4. The Jurors Should Not Have Been Instructed on Inapplicable Sentencing Factors	135
5. The Jurors Should Have Been Instructed That Statutory Mitigating Circumstances Were Relevant Solely As Potential Mitigation	136
6. The Instructions Given Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without Possibility of Parole	136
7. The Instructions Given Erroneously Precluded the Jurors from Considering Sympathy for Appellant's Family and Limited Their Consideration of the Impact His Execution Would Have on Them	138
8. The Jurors Should Have Been Instructed on the Presumption That Life Without Possibility of Parole Was the Appropriate Sentence	140

TABLE OF CONTENTS

	Page
E. Failing To Require The Jurors To Make Written Findings Violated Appellant's Right To Meaningful Appellate Review	141
F. The Prohibition Against Intercase Proportionality Review Guarantees Arbitrary And Disproportionate Imposition Of The Death Penalty	142
G. California's Capital Sentencing Scheme Violates The Equal Protection Clause	142
H. California's Imposition Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms	143
VI. REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINE THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT	144
CONCLUSION	147
CERTIFICATE OF COUNSEL	148

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Apprendi v. New Jersey
(2000) 530 U.S. 466 128, 129

Arizona v. Fulminante
(1991) 499 U.S. 279 66

Ballew v. Georgia
(1978) 435 U.S. 223 131

Beck v. Alabama
(1980) 447 U.S. 625 107

Blakely v. Washington
(2004) 542 U.S. 296 128, 129

Blystone v. Pennsylvania
(1990) 494 U.S. 299 133

Boyde v. California
(1990) 494 U.S. 370 53, 124, 137

Bradley v. Duncan
(9th Cir. 2002) 315 F.3d 1091 100, 101

Byrd v. Lewis
(9th Cir. 2009) 566 F.3d 855 71

Cage v. Louisiana
(1990) 498 U.S. 39 52, 68, 69, 85

Caldwell v. Mississippi
(1985) 472 U.S. 320 117, 124, 146

California v. Trombetta
(1984) 467 U.S. 479 97

TABLE OF AUTHORITIES

	Page(s)
<i>Carter v. Kentucky</i> (1981) 450 U.S. 288	129
<i>Chambers v. Mississippi</i> (1973) 410 U.S. 284	98, 107, 109
<i>Chapman v. California</i> (1967) 386 U.S. 18	passim
<i>Clark v. Brown</i> (9th Cir. 2006) 450 F.3d 898	100, 101
<i>Coffin v. United States</i> (1895) 156 U.S. 432	52, 67
<i>Conde v. Henry</i> (9th Cir. 1999) 198 F.3d 734	100, 101
<i>Cool v. United States</i> (1972) 409 U.S. 100	57, 69, 70
<i>Cooper v. Fitzharris</i> (9th Cir. 1978) 586 F.2d 1325	107
<i>Cunningham v. California</i> (2007) 549 U.S. 270	52, 128, 129
<i>Cupp v. Naughten</i> (1973) 414 U.S. 141	57, 70
<i>Delo v. Lashley</i> (1993) 507 U.S. 272.	141
<i>Doe v. Busby</i> (9th Cir. 2011) 661 F.3d 1001	70, 71

TABLE OF AUTHORITIES

	Page(s)
<i>Eddings v. Oklahoma</i> (1982) 455 U.S. 104	138
<i>Estelle v. Williams</i> (1976) 425 U.S. 501	140
<i>Fahy v. Connecticut</i> (1963) 375 U.S. 85	73, 74
<i>Francis v. Franklin</i> (1985) 471 U.S. 307	60
<i>Furman v. Georgia</i> (1972) 408 U.S. 238	125
<i>Gibson v. Ortiz</i> (9th Cir. 2004) 387 F.3d 812	71
<i>Government of Virgin Islands v. Roldan</i> (3d Cir. 1979) 612 F.2d 775	92
<i>Gregg v. Georgia</i> (1976) 428 U.S. 153	141
<i>Harmelin v. Michigan</i> (1991) 501 U.S. 957	132
<i>Harris v. Wood</i> (9th Cir. 1995) 64 F.3d 1432	109
<i>Hedgpeth v. Pulido</i> (2008) 555 U.S. 57	67
<i>Hicks v. Oklahoma</i> (1980) 447 U.S. 343	130, 137, 140

TABLE OF AUTHORITIES

	Page(s)
<i>Hitchcock v. Dugger</i> (1987) 481 U.S. 393	146
<i>In re Winship</i> (1970) 397 U.S. 358	52, 67, 68, 69
<i>Johnson v. United States</i> (1997) 520 U.S. 461	67
<i>Keeble v. United States</i> (1973) 412 U.S. 205	54, 55, 56, 57
<i>Killian v. Poole</i> (9th Cir. 2002) 282 F.3d 1204	109
<i>Kyles v. Whitley</i> (1995) 514 U.S. 419	121
<i>Lockett v. Ohio</i> (1978) 438 U.S. 586	134, 138
<i>Maynard v. Cartwright</i> (1988) 486 U.S. 356	127, 135
<i>McKoy v. North Carolina</i> (1990) 494 U.S. 433	132, 138
<i>Mills v. Maryland</i> (1988) 486 U.S. 367	134
<i>Monge v. California</i> (1998) 524 U.S. 721	132
<i>Myers v. Ylst</i> (9th Cir. 1990) 897 F.2d 417	132

TABLE OF AUTHORITIES

	Page(s)
<i>Neder v. United States</i> (1999) 527 U.S. 1	67, 69, 70
<i>Payne v. Tennessee</i> (1991) 501 U.S. 808	117, 139, 140
<i>Pope v. Illinois</i> (1987) 481 U.S. 497	67
<i>Ring v. Arizona</i> (2002) 536 U.S. 584	128, 129, 132
<i>Rock v. Arkansas</i> (1987) 483 U.S. 44	97, 98
<i>Roper v. Simmons</i> (2005) 543 U.S. 551	143
<i>Rose v. Clark</i> (1986) 478 U.S. 570	67
<i>Simmons v. South Carolina</i> (1994) 512 U.S. 154	117, 124
<i>Skipper v. South Carolina</i> (1986) 476 U.S. 1	138, 146
<i>Stringer v. Black</i> (1992) 503 U.S. 222	136
<i>Sullivan v. Louisiana</i> (1993) 508 U.S. 275	passim
<i>Taylor v. Withrow</i> (6th Cir. 2002) 288 F.3d 846	98

TABLE OF AUTHORITIES

	Page(s)
<i>Tennard v. Dretke</i> (2004) 542 U.S. 274	138
<i>Trop v. Dulles</i> (1958) 356 U.S. 86	143
<i>Tuilaepa v. California</i> (1994) 512 U.S. 967	127
<i>United States v. Carreon</i> (7th Cir. 1980) 626 F.2d 528	92
<i>United States v. Cronic</i> (1984) 466 U.S. 648	117
<i>United States v. Frederick</i> (9th Cir. 1996) 78 F.3d 1370	109
<i>United States v. Gaudin</i> (1995) 515 U.S. 506	52
<i>United States v. Kojayan</i> (9th Cir. 1993) 8 F.3d 1315	121
<i>United States v. Mena</i> (1st Cir. 1991) 933 F.2d 19	92
<i>United States v. Partin</i> (6th Cir. 1974) 493 F.2d 750	117, 124
<i>United States v. Sayetsitty</i> (9th Cir. 1997) 107 F.3d 1405	98, 99
<i>United States v. Wallace</i> (9th Cir. 1988) 848 F.2d 1464	109

TABLE OF AUTHORITIES

	Page(s)
<i>Vasquez v. Hillery</i> (1986) 474 U.S. 254	125
<i>Victor v. Nebraska</i> (1994) 511 U.S. 1	53
<i>Wardius v. Oregon</i> (1973) 412 U.S. 470	137
<i>Woodson v. North Carolina</i> (1976) 428 U.S. 280	132, 133
<i>Yates v. Evatt</i> (1991) 500 U.S. 391	67
<i>Zant v. Stephens</i> (1983) 462 U.S. 862	126, 133

STATE CASES

<i>In re Avena</i> (1996) 12 Cal.4th 694	107
<i>LeMons v. Regents of University of California</i> (1978) 21 Cal.3d 869	60
<i>People v. Adcox</i> (1988) 47 Cal.3d 207	77
<i>People v. Anderson</i> (1968) 70 Cal.2d 15	passim
<i>People v. Aranda</i> (2012) 55 Cal.4th 342	71, 72, 73
<i>People v. Arias</i> (1996) 13 Cal.4th 92	131, 134, 141

TABLE OF AUTHORITIES

	Page(s)
<i>People v. Avila</i> (2006) 38 Cal.4th 491	134
<i>People v. Avila</i> (2009) 46 Cal.4th 680	92
<i>People v. Bacigalupo</i> (1993) 6 Cal.4th 457	134
<i>People v. Barnett</i> (1998) 17 Cal.4th 1044	93
<i>People v. Barton</i> (1995) 12 Cal.4th 186	106
<i>People v. Bemore</i> (2000) 22 Cal.4th 809	140
<i>People v. Blacksher</i> (2011) 52 Cal.4th 769	115, 116, 122, 123
<i>People v. Blair</i> (2005) 36 Cal.4th 686	127, 130
<i>People v. Boatman</i> (2013) 221 Cal.App.4th 1253	81
<i>People v. Bonilla</i> (2007) 41 Cal.4th 313	115
<i>People v. Breaux</i> (1991) 1 Cal.4th 281	135
<i>People v. Breverman</i> (1998) 19 Cal.4th 142	passim

TABLE OF AUTHORITIES

	Page(s)
<i>People v. Brown</i> (1988) 46 Cal.3d 432	74, 118, 144
<i>People v. Brown</i> (2004) 33 Cal.4th 382	128
<i>People v. Carasi</i> (2008) 44 Cal.4th 1263	97
<i>People v. Carter</i> (2003) 30 Cal.4th 1166	passim
<i>People v. Castro</i> (1985) 38 Cal.3d 301	122
<i>People v. Chun</i> (2009) 45 Cal.4th 1172	79
<i>People v. Cole</i> (2004) 33 Cal.4th 1158	76, 114, 115
<i>People v. Cook</i> (2006) 39 Cal.4th 566	135, 142, 143
<i>People v. Davenport</i> (1985) 41 Cal.3d 247	136
<i>People v. Dennis</i> (1998) 17 Cal.4th 468	63
<i>People v. Dewberry</i> (1959) 51 Cal.2d 548	51, 52, 55
<i>People v. Duckett</i> (1984) 162 Cal.App.3d 1115	89

TABLE OF AUTHORITIES

	Page(s)
<i>People v. Duncan</i> (1991) 53 Cal.3d 955	137
<i>People v. Edelbacher</i> (1989) 47 Cal.3d 983	125
<i>People v. Eid</i> (2010) 187 Cal.App.4th 859	109
<i>People v. Elize</i> (1999) 71 Cal.App.4th 605	94
<i>People v. Enraca</i> (2012) 53 Cal.4th 735	96, 97
<i>People v. Fairbank</i> (1997) 16 Cal.4th 1223	128
<i>People v. Fauber</i> (1992) 2 Cal.4th 792	141
<i>People v. Fierro</i> (1991) 1 Cal.4th 173	142
<i>People v. Flannel</i> (1979) 25 Cal.3d 668	88, 91
<i>People v. Gainer</i> (1977) 19 Cal.3d 835	54
<i>People v. Gay</i> (2008) 42 Cal.4th 1195	119
<i>People v. Ghent</i> (1987) 43 Cal.3d 739	143

TABLE OF AUTHORITIES

	Page(s)
<i>People v. Gonzales</i> (2011) 52 Cal.4th 254	78, 83
<i>People v. Gonzales</i> (2012) 54 Cal.4th 1234	138
<i>People v. Griffin</i> (2004) 33 Cal.4th 536	129
<i>People v. Gunder</i> (2007) 151 Cal.App.4th 412	passim
<i>People v. Gutierrez</i> (2002) 28 Cal.4th 1083	88
<i>People v. Gutierrez</i> (2009) 45 Cal.4th 789	88
<i>People v. Hamilton</i> (1989) 48 Cal.3d 1142	136
<i>People v. Hamilton</i> (2009) 45 Cal.4th 893	118
<i>People v. Hawthorne</i> (1992) 4 Cal.4th 43	128
<i>People v. Hillhouse</i> (2002) 27 Cal.4th 469	136
<i>People v. Holt</i> (1984) 37 Cal.3d 436	109, 110
<i>People v. Horning</i> (2004) 34 Cal.4th 871	114, 115, 119

TABLE OF AUTHORITIES

	Page(s)
<i>People v. Jeter</i> (1964) 60 Cal.2d 671	93
<i>People v. Kelley</i> (1980) 113 Cal.App.3d 1005	137
<i>People v. Kennedy</i> (2005) 36 Cal.4th 595	127
<i>People v. Lee</i> (1987) 43 Cal.3d 666	60, 61
<i>People v. Lee</i> (2011) 51 Cal.4th 620	51
<i>People v. Lenart</i> (2004) 32 Cal.4th 1107	131
<i>People v. Lewis</i> (2001) 25 Cal.4th 610	91
<i>People v. Manriquez</i> (2004) 37 Cal.4th 547	89, 143
<i>People v. Marks</i> (2003) 31 Cal.4th 197	77
<i>People v. Martinez</i> (2010) 47 Cal.4th 911	88
<i>People v. Mason</i> (2013) 218 Cal.App.4th 818	74
<i>People v. McLain</i> (1988) 46 Cal.3d 97	50

TABLE OF AUTHORITIES

	Page(s)
<i>People v. Medina</i> (1995) 11 Cal.4th 694	133
<i>People v. Mejia-Lenares</i> (2006) 135 Cal.App.4th 1437	89, 90
<i>People v. Melton</i> (1988) 44 Cal.3d 713	91
<i>People v. Moon</i> (2005) 37 Cal.4th 1	92
<i>People v. Moore</i> (1954) 43 Cal.2d 517	137
<i>People v. Moore</i> (2011) 51 Cal.4th 386	passim
<i>People v. Morse</i> (1964) 60 Cal.2d 631	52, 63
<i>People v. Moya</i> (2009) 47 Cal.4th 537	101, 102
<i>People v. Ochoa</i> (1999) 19 Cal.4th 353	140
<i>People v. Olmedo</i> (1985) 167 Cal.App.3d 1085	122
<i>People v. Osband</i> (1996) 13 Cal.4th 622	50
<i>People v. Padilla</i> (2002) 103 Cal.App.4th 675	87, 89, 95

TABLE OF AUTHORITIES

	Page(s)
<i>People v. Pennington</i> (1967) 66 Cal.2d 508	89, 90
<i>People v. Pescador</i> (2004) 119 Cal.App.4th 252	passim
<i>People v. Prieto</i> (2003) 30 Cal.4th 226	129, 132, 133
<i>People v. Riccardi</i> (2012) 54 Cal.4th 758	129
<i>People v. Rice</i> (1976) 59 Cal.App.3d 998	137
<i>People v. Rincon-Pineda</i> (1975) 14 Cal.3d 864	115
<i>People v. Roder</i> (1983) 33 Cal.3d 491	121
<i>People v. Romero</i> (2008) 44 Cal.4th 386	80
<i>People v. Saille</i> (1991) 54 Cal.3d 1103	88
<i>People v. Salas</i> (2006) 37 Cal.4th 967	93
<i>People v. Sanchez</i> (1995) 12 Cal.4th 1	116
<i>People v. Schmeck</i> (2005) 37 Cal.4th 240	125

TABLE OF AUTHORITIES

	Page(s)
<i>People v. Sedeno</i> (1974) 10 Cal.3d 703	106, 129
<i>People v. Sengpadychith</i> (2001) 26 Cal.4th 316	143
<i>People v. Snow</i> (2003) 30 Cal.4th 43	143
<i>People v. Stanley</i> (1995) 10 Cal.4th 764	126
<i>People v. Sturm</i> (2006) 37 Cal.4th 1218	144
<i>People v. Taylor</i> (1990) 52 Cal.3d 719	132, 133
<i>People v. Thomas</i> (1945) 25 Cal.2d 880	80
<i>People v. Thomas</i> (2013) 218 Cal.App.4th 630	102
<i>People v. Waidla</i> (2000) 22 Cal.4th 690	89
<i>People v. Ward</i> (2005) 36 Cal.4th 186	95, 96
<i>People v. Watson</i> (1956) 46 Cal.2d 818	101, 102
<i>People v. Wickersham</i> (1982) 32 Cal.3d 307	106

TABLE OF AUTHORITIES

Page(s)

People v. Wilkins
(2013) 56 Cal.4th 333 88

People v. Williams
(1971) 22 Cal.App.3d 34 107

People v. Williams
(1988) 44 Cal.3d 883 131

People v. Williams
(1992) 4 Cal.4th 354 88

People v. Williams
(1997) 16 Cal.4th 635 57

People v. Williams
(2009) 170 Cal.App.4th 587 107

People v. Williams
(2010) 49 Cal.4th 405 128

CONSTITUTIONS

U.S. Const., Amends V 126, 127, 134, 142
VI passim
VIII passim
XIV passim

Cal. Const., art. I, § 15 passim
Cal. Const., art. I, § 16 50, 66, 111
Cal. Const., art. I, § 17 86, 111
Cal. Const., art. VI, § 13 101

STATE STATUTES

Evid. Code, § 520 130

TABLE OF AUTHORITIES

	Page(s)
Health & Safety Code, §§	
11350	32
11351	32
11351.5	32
11359	32
11377	32
Pen Code, §§	
187(a)	2, 3
190.2	125, 126
190.2(a)(3)	passim
190.3	136, 137, 139
190.3(a)	28, 119, 126, 127
190.3(b)	28
190.3(c)	28
190.3(g)	134
190.3(k)	119
667.5(c)	3
1093(f)	86, 114
1093.5	86
1097	51
1158(a)	132
1192.7(c)	3
1239(b)	1
1259	115
12022.53(d)	3, 4
Veh. Code, §	
10851	31

STATE RULES

Cal. Rules of Court, rules	
4.421	143
4.423	143

JURY INSTRUCTIONS

CALCRIM, Nos.	
521	54
3450	94
3451	94

TABLE OF AUTHORITIES

	Page(s)
CALJIC, Nos.	
1.01	58, 61
1.02	122
2.00	122
2.20	passim
2.22	116
2.23	114, 116, 123
2.80	116, 122
3.01	122
3.11	116
3.12	116
4.00	94
4.10	94
8.50	57, 61, 64, 65
8.71	passim
8.72	passim
8.73.1	passim
8.74	61, 62
8.75	65
8.84.1	115
8.85	passim
8.86	128
8.87	128
8.88	passim
17.11	57, 63, 64
17.40	passim

OTHER AUTHORITIES

Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing (1984) 94 Yale L.J. 351	140, 141
---	----------

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,)	
)	No. S147335
Plaintiff and Respondent,)	
)	(San Bernardino
)	County Sup. Ct.
v.)	No. FSB051580)
)	
LOUIS MITCHELL, JR.,)	
)	
Defendant and Appellant.)	

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, § 1239, subd. (b).)¹

STATEMENT OF THE CASE

On August 9, 2005, appellant was arrested by San Bernardino Police Department Sheriff's deputies. (1 CT 190.) A felony complaint, an information and two amended informations were filed against appellant charging him with offenses committed against Patrick Mawikere, Mario Lopez, Susano Torres, Juan Bizzotto, Jerry Payan, Armando Torres,

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

Armando De Santiago, Brenda April Wierenga, and David Edward Roark. (3 CT 577-592 [felony complaint], 3 CT 634-652 [information], 4 CT 931-946 [first amended information], 4 CT 1039-1049 [second amended information].)

Ultimately, on July 14, 2006, the People filed a six-count third amended information on which appellant was tried. (64 CT 17087-17091.) Count 1 charged appellant with the August 8, 2005, murder of Patrick Mawikere, with malice aforethought, in violation of section 187, subdivision (a). (64 CT 17088.) Count 2 charged appellant with the August 8, 2005, murder of Mario Lopez, with malice aforethought, in violation of section 187, subdivision (a). (64 CT 17088.) Count 3 charged appellant with the August 8, 2005, murder of Susano Torres, with malice aforethought, in violation of section 187, subdivision (a). (64 CT 17089.) Count 4 charged appellant with the willful, premeditated, and deliberate attempted murder of Juan Bizzotto on August 8, 2005, in violation of sections 664 and 187, subdivision (a). (64 CT 17089-17090.) Count 5 charged appellant with the willful, premeditated, and deliberate attempted murder of Jerry Payan on August 8, 2005, in violation of sections 664 and 187, subdivision (a). (64 CT 17090.) Count 6 charged appellant with the willful, premeditated, and deliberate attempted murder of Armando Torres on August 8, 2005, in violation of sections 664 and 187, subdivision (a). (64 CT 17090-17091.)

Additionally, the third amended information alleged the single special circumstance of multiple murder, within the meaning of section 190.2, subdivision (a)(3), as to counts 1 through 3. (64 CT 17088-17089.)

Finally, the third amended information alleged three penalty enhancements as follows: First, it was alleged that the offenses charged in

counts 1 through 6 were serious felonies within the meaning of section 1192.7, subdivision (c). Second, it was alleged that the offenses charged in counts 1 through 3 were violent felonies within the meaning of section 667.5, subdivision (c). Third, it was alleged that in the commission of counts 1 through 6, appellant personally discharged a firearm proximately causing great bodily injury and/or death within the meaning of section 12022.53, subdivision (d). (64 CT 17088-17091.)

On July 17, 2006, appellant pleaded not guilty to all counts and denied the truth of all special circumstance and penalty allegations as charged in the third amended information. (64 CT 17100.)

Meanwhile, on May 8, 2006, trial had commenced with jury selection.² (4 CT 1050.) On July 12, 2006, jury selection was completed, with 12 jurors and 6 alternate jurors sworn and seated. (64 CT 17084-17086.) The prosecution began its guilt-phase case-in-chief on July 17, 2006 (64 CT 17100), concluded its case-in-chief on August 1, 2006 (65 CT 17167), and rested on August 3, 2006 (65 CT 17167-17173). The defense did not present a case at the guilt phase and rested on August 7, 2006. (65 CT 17174.)

On August 8, 2006, both sides presented argument; the jury received its instructions and commenced its deliberations. (65 CT 17179-17181.)

² Jury selection commenced on the basis of the second amended information, filed on April 27, 2006. That information alleged, inter alia, that appellant had committed three counts of willful, deliberate, and premeditated murder in violation of section 187, subdivision (a); that a multiple-murder special circumstance pursuant to section 190.2, subdivision (a)(3) applied; and that appellant had committed six counts of willful, deliberate, and premeditated attempted murder in violation of sections 664 and 187, subdivision (a). (4 CT 1039-1049.)

On August 9, 2006, the jury returned its verdicts, finding appellant guilty as charged of three counts of first degree murder, three counts of attempted first degree murder, and finding true the special circumstance allegation and all the penalty enhancements. (65 CT 17201-17203.)

On August 21, 2006, the penalty phase commenced. (65 CT 17336-17738.) The prosecution completed its case on August 22, 2006. (65 CT 17338.) Appellant commenced his penalty-phase case August 24, 2006, and he rested on August 29, 2006. (65 CT 17343-17354.) On August 31, 2006, the jury was instructed; both sides gave closing arguments, and the jury began its deliberations. (65 CT 17358-17360.) On September 5, 2006, the jury returned a death verdict. (65 CT 17367-17368.)

On October 4, 2006, the trial court heard and denied the automatic motion for modification of the death verdict. (66 CT 17448-17451.) Probation was denied, and appellant was sentenced to death on counts 1 through 3 pursuant to section 190.2, subdivision (a)(3). As to those same counts, the trial court also sentenced appellant to 25 years to life pursuant to section 12022.53, subdivision (d), to run consecutive to the death sentences. As to counts 4 through 6, appellant was sentenced to life in prison with the possibility of parole on each count, and 25 years to life pursuant to section 12022.53, subdivision (d), to run consecutive to the life sentence on each of those counts. A \$10,000 restitution fine was imposed; additionally, a \$10,000 parole restitution fine was imposed and stayed. (66 CT 17448-17451.)

STATEMENT OF FACTS

A. The Guilt Phase

1. Introduction

The crimes presented at trial consisted of three incidents, spanning

approximately 30 hours on August 8-9, 2005. The story began with the triggering event – the purchase of a defective car at California Auto Specialist (hereinafter, “CAS”), a used car dealership in Colton, California.

On the morning of August 8, 2005, appellant accompanied his girlfriend Dorene Small to the dealership where she negotiated the purchase of a Dodge Durango truck. Appellant left Small at CAS to complete the financing. On the way to the bank, the Durango broke down, but Small elected not to back out of the transaction. Appellant returned to CAS that afternoon with two male companions. There, he confronted a group of CAS employees inside the dealership office with a handgun and shot four of them before he left the scene – killing two.

The second chapter of the story took place at “the Yellows,” a housing project in San Bernardino. Approximately 45 minutes after the shootings at CAS, police were dispatched to a reported shooting at the Yellows. There, they found Susano Torres, a 16 year old, shot to death, and his brother, Armando Torres, suffering from a gunshot wound. According to the accounts of some witnesses, appellant, acting alone, was the person who shot the Torres brothers. Other witnesses claimed that appellant was one of two black men seen walking together shortly before the shooting. In confirmation, a surveillance video captured images of two men together shortly before the shooting. In some respects, these two men matched descriptions given by two of the surviving shooting victims at CAS.

The final chapter of the tale concerned events on the following day, i.e., August 9, 2005. That afternoon, San Bernardino police were dispatched to investigate a report of a person, later identified as appellant, acting bizarrely and firing a handgun in the air in front of a house on 19th Street. Appellant also threatened two people in a car with the gun.

Responding officers encountered appellant standing in the street. Appellant was belligerent and refused to obey police commands. Feeling threatened, an officer shot appellant in the leg, and appellant was arrested.

All the evidence about the crimes and appellant's arrest was presented by the prosecution. Defense counsel cross-examined the prosecution's witnesses, but presented no evidence. (13 RT 2384.)

2. The Shootings at the Used Car Dealership in Colton

a. Appellant accompanies his girlfriend to a used car dealership where she purchases a car that immediately breaks down

In August of 2005, appellant and Dorene Small were living together in an apartment in Riverside, along with Small's five children and three children fathered by appellant. (7 RT 1300-1302.) Appellant was unemployed at the time; Small was the breadwinner for the family. (7 RT 1302-1303.) Small had been in a car accident and received a settlement check from her insurance company on August 8, 2005. (7 RT 1302, 1304.) That same day, appellant accompanied Small to CAS to shop for a replacement vehicle for Small. (7 RT 1301, 1306.) They arrived at CAS between 10:00-10:30 a.m., in Small's white Chevy Lumina. Although the Lumina belonged to Small, it was driven and used by appellant. (7 RT 1305-1306.)

At first, they were helped by CAS salesman Juan Marcello Bizzotto. (7 RT 1307; 8 RT 1482.) Bizzotto could not speak English well and referred them to his colleague, Mario Lopez. (7 RT 1307, 1315; 8 RT 1484, 1515.) Lopez helped Small look at cars and complete paperwork to purchase a used brown Dodge Durango truck. (7 RT 1307-1309, 1312.) It