

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

SUPREME COURT
FILED

MAY 26 2015

Frank A. McGuire Clerk

Deputy

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

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
JULIE L. GARLAND
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General
KRISTEN KINNAIRD CHENELIA
Deputy Attorney General
State Bar No. 225152
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 525-4232
Fax: (619) 645-2191
Email: Kristen.Chenelia@doj.ca.gov
Attorneys for Respondent

DEATH PENALTY

TABLE OF CONTENTS

	Page
Statement of the Case.....	1
Statement of Facts.....	2
A. Prosecution case-in-chief.....	2
1. The shooting at California Auto Specialists	2
2. The shooting at the “Yellows” apartment complex	4
3. Mitchell is identified as the shooter.....	6
4. Mitchell is arrested the following day on 19th Street.....	6
B. Mitchell defense.....	8
The Penalty Phase.....	8
A. Prosecution evidence in aggravation	8
1. Evidence of Mitchell’s criminal activity involving force or violence.....	8
a. 1988 carjacking	8
b. Firing a gun at Wierenga, Roark and DeSantiago on August 9, 2005	9
2. Victim impact evidence	10
a. The murder of Mario Lopez	10
b. The murder of Patrick Mawikere	11
c. The attempted murder of Jerry Payan	12
d. The attempted murder of Juan Bizzotto.....	13
e. The murder of Susano Torres	13
B. Defense case in mitigation.....	15
1. Mitchell’s family and childhood	16

TABLE OF CONTENTS
(continued)

	Page
2. Mitchell’s criminal and mental health history	18
3. Mitchell’s use of PCP	19
Argument	22
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	22
A. Viewed as a whole, the jury instructions were proper	23
D. Any error was harmless	33
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.....	36
A. The trial court’s refusal to instruct on hallucinations was not error.....	39
B. Any possible error was harmless beyond a reasonable doubt.....	43
III. There was no cumulative error in the guilt phase.....	44
IV. Omitting the CALJIC No. 2.20 paragraph on prior felony convictions was harmless beyond a reasonable doubt	44
A. The omission of the prior felony factor when determining witness believability was harmless beyond a reasonable doubt.....	47
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	52

TABLE OF CONTENTS
(continued)

	Page
A. Penal Code section 190.2 is not impermissibly broad	53
B. Application of Penal Code section 190.3, subdivision (a) did not violate Mitchell's constitutional rights	53
C. The instructions provided to the jury at the penalty phase were constitutional and complete	54
1. The penalty is constitutional and does not require a higher burden of proof.....	54
2. Capital sentencing is not susceptible to burdens of proof.....	56
3. The penalty does not have to be based on unanimous jury findings regarding factors in aggravation	57
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	58
1. The instructions provided properly informed the jury to determine whether death is the appropriate penalty	58
2. The use of adjectives in the list of potential mitigating circumstances is not impermissibly restrictive	59
3. The standard for the penalty determination was not impermissibly vague and ambiguous	59
4. The trial court was not required to omit inapplicable sentencing factors.....	60
5. The trial court was not required to identify for the jurors the statutory factors relevant solely as mitigating circumstances.....	61

TABLE OF CONTENTS
(continued)

	Page
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	61
7. The trial court did not err by instructing the jury not to consider sympathy for Mitchell's family	62
8. There is no requirement that the trial court instruct the penalty jury on the presumption of life.....	64
E. Failing to require the jury to make written findings does not violate Mitchell's right to meaningful appellate review.....	64
F. Intercase proportionality is not required.....	65
G. California's death penalty statute does not violate equal protection.....	65
H. Use of the death penalty does not violate international law	66
VI. There is no reversible cumulative error	67
Conclusion	68

TABLE OF AUTHORITIES

	Page
CASES	
<i>Apprendi v. New Jersey</i> (2000) 530 U.S. 466	55
<i>Blakely v. Washington</i> (2004) 542 U.S. 961	55
<i>Chapman v. California</i> (1967) 386 U.S. 18	34, 43, 48
<i>Cunningham v. California</i> (2007) 549 U.S. 270	55
<i>Estelle v. McGuire</i> (1991) 502 U.S. 62	23
<i>Neder v. United States</i> (1999) 527 U.S. 1	34
<i>Payne v. Tennessee</i> (1991) 501 U.S. 808	63
<i>People v. Abilez</i> (2007) 41 Cal.4th 472	64
<i>People v. Alexander</i> (2010) 49 Cal.4th 846	63
<i>People v. Arias</i> (1996) 13 Cal.4th 92	58, 60, 64
<i>People v. Avila</i> (2006) 38 Cal.4th 491	59
<i>People v. Barrick</i> (1982) 33 Cal.3d 115	37
<i>People v. Beames</i> (2007) 40 Cal.4th 907	53, 54

<i>People v. Bemore</i> (2000) 22 Cal.4th 809.....	62, 63
<i>People v. Bennett</i> (2009) 45 Cal.4th 577.....	63
<i>People v. Bivert</i> (2011) 52 Cal.4th 96.....	60
<i>People v. Blacksher</i> (2011) 52 Cal.4th 769.....	<i>passim</i>
<i>People v. Blair</i> (2005) 36 Cal.4th 686.....	55, 65
<i>People v. Bolin</i> (1998) 18 Cal.4th 297.....	23, 47
<i>People v. Box</i> (2000) 23 Cal.4th 1153.....	44, 67
<i>People v. Bramit</i> (2009) 46 Cal.4th 1221.....	55, 56
<i>People v. Breaux</i> (1991) 1 Cal.4th 281.....	59
<i>People v. Breverman</i> (1998) 19 Cal.4th 142.....	45
<i>People v. Brown</i> (2004) 33 Cal.4th 382.....	53
<i>People v. Carey</i> (2007) 41 Cal.4th 109.....	66
<i>People v. Carpenter</i> (1997) 15 Cal.4th 312.....	56
<i>People v. Carrington</i> (2009) 47 Cal.4th 145.....	53
<i>People v. Carter</i> (2003) 30 Cal.4th 1166.....	48, 50

<i>People v. Chatman</i> (2006) 38 Cal.4th 344.....	60
<i>People v. Cole</i> (2004) 33 Cal.4th 1158.....	23, 37
<i>People v. Contreras</i> (2013) 58 Cal.4th 123.....	56, 64
<i>People v. Cook</i> (2006) 39 Cal.4th 566.....	60, 64
<i>People v. Cornwell</i> (2005) 37 Cal.4th 50.....	53, 54, 65
<i>People v. Cunningham</i> (2001) 25 Cal.4th 926.....	44, 67
<i>People v. Davis</i> (2005) 36 Cal.4th 510.....	66
<i>People v. Daya</i> (1994) 29 Cal.App.4th 697.....	23
<i>People v. Demetrulias</i> (2006) 39 Cal.4th 1.....	65
<i>People v. Enraca</i> (2012) 53 Cal.4th 735.....	42
<i>People v. Farnam</i> (2002) 28 Cal.4th 107.....	60
<i>People v. Flannel</i> (1979) 25 Cal.3d 668.....	37
<i>People v. Flood</i> (1998) 18 Cal.4th 470.....	34
<i>People v. Frye</i> (1998) 18 Cal.4th 894.....	<i>passim</i>
<i>People v. Gunder</i> (2007) 151 Cal.App.4th 412.....	25, 27, 31, 33

<i>People v. Harris</i> (2005) 37 Cal.4th 310.....	63
<i>People v. Holt</i> (1997) 15 Cal.4th 619.....	56
<i>People v. Horning</i> (2004) 34 Cal.4th 871.....	44, 45, 49, 50
<i>People v. Houston</i> (2012) 54 Cal.4th 1186.....	23
<i>People v. Hoyos</i> (2007) 41 Cal.4th 872.....	54, 57
<i>People v. Jackson</i> (2009) 45 Cal.4th 662.....	52, 57, 59, 64
<i>People v. Johnson</i> (1993) 6 Cal.4th 1.....	23, 56
<i>People v. Kennedy</i> (2005) 36 Cal.4th 595.....	53
<i>People v. Lenart</i> (2004) 32 Cal.4th 1107.....	56
<i>People v. Leonard</i> (2007) 40 Cal.4th 1370.....	55
<i>People v. Lewis & Oliver</i> (2006) 39 Cal.4th 970.....	54
<i>People v. Lewis</i> (2001) 26 Cal.4th 334.....	24
<i>People v. Livingston</i> (2012) 53 Cal.4th 1145.....	62
<i>People v. Lucas</i> (2014) 60 Cal.4th 153.....	23
<i>People v. Mai</i> (2013) 57 Cal.4th 986.....	66

<i>People v. Manriquez</i> (2005) 37 Cal.4th 547	57, 65
<i>People v. Martinez</i> (2010) 47 Cal.4th 911	67
<i>People v. McKinnon</i> (2011) 52 Cal.4th 610	56
<i>People v. McKinzie</i> (2012) 54 Cal.4th 1302	<i>passim</i>
<i>People v. Mejia-Lenares</i> (2006) 135 Cal.App.4th 1437	38
<i>People v. Mentch</i> (2008) 45 Cal.4th 274	37, 67
<i>People v. Moon</i> (2005) 37 Cal.4th 1	61, 64
<i>People v. Moore</i> (2011) 51 Cal.4th 386	<i>passim</i>
<i>People v. Padilla</i> (2002) 103 Cal.App.4th 675	<i>passim</i>
<i>People v. Pearson</i> (2013) 56 Cal.4th 393	58
<i>People v. Perry</i> (2006) 38 Cal.4th 302	62, 64
<i>People v. Pescador</i> (2004) 119 Cal.App.4th 252	<i>passim</i>
<i>People v. Posey</i> (2004) 32 Cal.4th 193	23
<i>People v. Prieto</i> (2003) 30 Cal 4th 226	55, 57, 58
<i>People v. Ramos</i> (1997) 15 Cal.4th 1133	65

<i>People v. Ray</i> (1996) 13 Cal.4th 313	62
<i>People v. Rincon–Pineda</i> (1975) 14 Cal.3d 864	45
<i>People v. Rogers</i> (2009) 46 Cal.4th 1136	59
<i>People v. Rountree</i> (2013) 56 Cal.4th 823	67
<i>People v. Smith</i> (2005) 35 Cal.4th 334	62
<i>People v. Smith</i> (2007) 40 Cal.4th 483	65, 66
<i>People v. Smithey</i> (1999) 20 Cal.4th 936	63
<i>People v. Snow</i> (2003) 30 Cal.4th 43	65
<i>People v. Stanley</i> (1995) 10 Cal.4th 764	52
<i>People v. Staten</i> (2000) 24 Cal.4th 434	67
<i>People v. Taylor</i> (1990) 52 Cal.3d 719	58
<i>People v. Watson</i> (1956) 46 Cal.2d 818	33, 43
<i>People v. Watson</i> (2008) 43 Cal.4th 652	59
<i>People v. Williams</i> (1988) 44 Cal.3d 883	56
<i>People v. Wilson</i> (2005) 36 Cal.4th 309	60

<i>People v. Zamudio</i> (2008) 43 Cal.4th 327	66
<i>Ring v. Arizona</i> (2002) 536 U.S. 584	55, 57
<i>Roper v. Simmons</i> (2005) 543 U.S. 551	66
<i>Sullivan v. Louisiana</i> (1993) 508 U.S. 275	34
<i>Yates v. Evatt</i> (1991) 500 U.S. 391	34

STATUTES

Penal Code

§ 187, subd. (a)	1, 23
§ 190.1-190.9	67
§ 190.2	52
§ 190.2, subd. (a)(2)	1
§ 190.3	53, 61
§ 190.3, subd. (a)	53
§ 664	1
§ 1093, subd. (f)	45
§ 1127	45
§ 1239, subd. (b)	67
§ 1259	23, 47
§ 12022.53, subd. (d)	1

CONSTITUTIONAL PROVISIONS

United States Constitution

Fifth Amendment	53
Sixth Amendment	<i>passim</i>
Eighth Amendment	<i>passim</i>
Fourteenth Amendment	<i>passim</i>

California Constitution

art. VI, § 11	67
---------------------	----

OTHER AUTHORITIES

CALJIC Nos.

1.0131
2.0132
2.20 *passim*
2.2349
2.6132
2.9032
8.50 26, 28, 32
8.71 *passim*
8.72 *passim*
8.73.1 *passim*
8.7432
8.7525
8.84.146
8.85 *passim*
8.88 58, 60, 61, 64
17.1032
17.11 26, 28, 27
17.40 *passim*

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. Code¹, §§ 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.)

///

///

///

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-

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 Williams⁴ 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

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 waving 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 evidence⁵

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,

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