No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MANUEL BRACAMONTE, *Petitioner*

v.

STATE OF CALIFORNIA, *Respondent*.

ON A PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

(DEATH PENALTY CASE)

MARY K. MCCOMB
State Public Defender for the State of California

AJ KUTCHINS
Supervising Deputy State Public Defender
**Counsel of Record*

OFFICE OF THE STATE PUBLIC DEFENDER
1111 Broadway, Suite 1000
Oakland, CA 94607
aj.kutchins@ospd.ca.gov
Tel: (510) 267-3300
Fax: (510) 452-8712

Counsel for Petitioner

CAPITAL CASE

QUESTION PRESENTED

Does the mandatory weighing of aggravating and mitigating circumstances under the California death penalty statute—a factfinding determination that serves to increase the statutory maximum for the crime—violate the Fifth, Sixth and Fourteenth Amendments where there is no requirement this determination must be found by a jury beyond a reasonable doubt?

STATEMENT OF RELATED PROCEEDINGS

People v. Manuel Bracamontes,[1] Case No. SCD178329
Superior Court of San Diego County (California).
(Trial judgment entered December 14, 2005)

People v. Manuel Bracamontes, Case No. S139702
Supreme Court of California
(Direct appeal, decision issued April 11, 2022; petition for rehearing denied June 15, 2022)

[1] Although the petitioner's name is actually "Bracamonte" – spelled without a final "s", the California courts consistently referred to him as "Bracamontes."

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2022

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MANUEL BRACAMONTE, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

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ON A PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF CALIFORNIA
(DEATH PENALTY CASE)

Petitioner Manuel Bracamonte respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of California affirming his conviction of murder and sentence of death.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were petitioner, Manuel Bracamonte, and respondent, the People of the State of California.

OPINION BELOW

The California Supreme Court issued an opinion in this case on April 11, 2022, reported as *People v. Bracamontes*, 12 Cal. 5th 977 (2022). A copy of the published opinion is attached as Appendix A. On June 15, 2022, the California Supreme Court

issued an order denying the petition for rehearing. A copy of that order is attached as Appendix B.

JURISDICTION

The California Supreme Court entered its judgment on April 11, 2022 and denied a timely filed petition for rehearing on June 15, 2022. On August 25, 2022, Justice Kagan granted petitioner's application for extension of time within which to file a petition for certiorari in this case to November 12, 2022. A copy of the letter from the Clerk of the Court notifying petitioner of the extension is attached as Appendix C. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I. FEDERAL CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person . . . shall be deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions the accused shall enjoy the right to [trial] by an impartial jury . . . ."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

II. STATE STATUTORY PROVISIONS

The relevant state statutes, attached as Appendix D, include California Penal Code sections 187, 190, 190.1, 190.2, 190.3, 190.4 and 190.5.

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INTRODUCTION: THE ERROR AND ITS CONTEXT – CALIFORNIA'S DEATH PENALTY SCHEME

When it permitted the jury in Petitioner's case to decide whether he should be put to death it did not require the jury to make the pivotal factual determination underlying that fatal decision under the constitutionally mandated "beyond a reasonable doubt" standard. This was straightforward constitutional error under the principles expounded by this Court in *Hurst v. Florida*, 577 U.S. 92 (2016); *Ring v. Arizona*, 536 U.S. 584, 604 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000). But understanding how that error came about, and how it is rationalized by the State, requires a rather less straightforward journey through California's capital sentencing scheme.

California's death penalty law was adopted by an initiative measure in 1978. Cal. Penal Code §§ 190-190.4.[2] Under this scheme, once the defendant has been found guilty of first degree murder, the trier of fact determines whether any of the special circumstances enumerated in section 190.2 are true beyond a reasonable doubt. If so, a separate penalty phase is held to determine whether the defendant will be sentenced to life imprisonment without possibility of parole or death. §§ 190.2 & 190.3; *Tuilaepa v. California*, 512 U.S. 967, 975-76 (1994).

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[2] All statutory references are to the California Penal Code unless otherwise specified. "CT" refers to the Clerk's Transcript. "RT" refers to the Reporter's Transcript.

At the penalty phase, the parties may present evidence "relevant to aggravation, mitigation, and sentence. . . ." § 190.3. California law defines an aggravating factor as "any fact, condition or event attending the commission of a crime which increases its severity or enormity or adds to its injurious consequences which is above and beyond the elements of the crime itself." California Jury Instruction Criminal (CALJIC) No. 8.88; *see People v. Steele*, 27 Cal. 4th 1230 (2002). Section 190.3 lists the aggravating and mitigating factors the jury is to consider.[3] Pursuant to section 190.3, the jury "shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances."

Under this statutory scheme, the trial court instructed the jurors in this case that they "shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances" and could sentence petitioner to death only

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[3] This list includes the circumstances of the crime, including: any special circumstances found to be true (factor (a)); the presence or absence of criminal activity involving the use or threat of force or violence (factor (b)) or of prior felony convictions (factor (c)); whether the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance (factor (d)); whether the victim was a participant in or consented to the defendant's conduct (factor (e)); whether the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation (factor (f)); whether the defendant acted under extreme duress or the substantial domination of another person (factor (g)); whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication (factor (h)); the defendant's age at the time of the crime (factor (i)); whether the defendant was an accomplice whose participation in the offense was relatively minor (factor (j)); and any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime (factor (k)). § 190.3.

after each of them was "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." 42 RT 3686; CALJIC No. 8.88.[4] Both the wording of the statute and the instruction given to the jurors make clear that the jury must not only weigh the aggravating and mitigating circumstances, but determine whether the aggravating circumstances outweigh the mitigating circumstances.

Apart from section 190.3 factors (b) and (c)—prior violent criminal activity and prior felony convictions—California's death penalty scheme does not address the burden of proof applicable to the mandatory factfinding. For section 190.3 factors (b) and (c) the standard of proof is beyond a reasonable doubt. *See People v. Montes*, 58 Cal. 4th 809, 899 (2014). But under California law, proof beyond a reasonable doubt is not required for any other sentencing factor; the prosecutor does not have to establish beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances or that death is the appropriate penalty. *Id.* It is up to the individual juror to believe in the truth or existence of the aggravating factor in the weighing process.[5] Further, the state high court has also concluded that a capital sentencing jury

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[4] In 2006 the California Judicial Council adopted revised jury instructions known as California Jury Instructions (Criminal), or "CALCRIM." CALCRIM No. 766 provides in part that: "To return a judgment of death, each of you must be persuaded that the aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified."

[5] The capital sentencing jury is not instructed in the exact language of the statute, which provides in part:

need not agree on the existence of any one aggravating factor or find a factor unanimously. *See, e.g., People v. Contreras*, 58 Cal. 4th 123 (2013) (juror unanimity not required for any aggravating factor); *but see People v. McDaniel*, 12 Cal. 5th 97, 157, 159-60, 175 (2021) (Liu, J. concurring) (stating, "There is a serious question whether our capital sentencing scheme is unconstitutional in light of *Apprendi"* and the Sixth Amendment because California does not require that the jury find at least one single aggravating factor beyond a reasonable doubt.). This is true even though the jury must make certain factual findings in order to consider specific circumstances as aggravating factors. *See, e.g., People v. Prieto*, 30 Cal. 4th 226, 263 (2003).[6]

By requiring capital sentencing jurors to make the factual determination that aggravation outweighs mitigation but failing to require that the determination be made

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> After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

Cal. Penal Code § 190.3

[6] In this case, the trial court instructed the jury, with respect to 190.3, subdivision (b), relating to other criminal activity, that "[i]t is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose." 9 CT 1916; CALJIC No. 8.87.

beyond a reasonable doubt, California's death penalty scheme violates the Fifth, Sixth and Fourteenth Amendments. This Court should grant certiorari to bring the largest death row population in the nation into compliance with the guarantees of the United States Constitution.

STATEMENT OF THE CASE

Petitioner was charged with the first degree felony murder of Laura Arroyo and other offenses. The jury found petitioner guilty of the murder and found true the special circumstances that the murder was committed while engaged in the commission of a kidnaping, oral copulation and a lewd act on a child, as well as a sentencing "enhancement" for personal use of a deadly weapon. The jury also convicted petitioner of the non-capital offense of assault with a deadly weapon on a peace officer, in connection with his attempt to evade arrest. *Bracamontes*, 12 Cal. 5th at 982 & n.1.

At the penalty phase, the prosecutor's case in aggravation consisted almost entirely of extensive victim impact testimony. *Bracamontes*, 12 Cal.5th at 985.[7] In mitigation, the defense presented "[t]wenty-one defense witnesses [who] testified that [petitioner] was incapable of committing the murder"; these included the mother of his child and her ex-husband;[8] her two adult children who testified that Petitioner was a

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[7] The sole evidence of prior misconduct on Petitioner's part pertained to a domestic dispute with the mother of his child in which he pushed her down and held her down by the arm and neck, resulting in abrasions to her upper body. *Ibid.*

[8] The ex-husband had provided the bulk of the prosecution evidence bearing on the domestic dispute described in the previous footnote. 42 RT 3712-3717, 3722.

good father and had never said or done anything inappropriate; and various family members who testified to the care and support he showed his parents, siblings and their children. *Id.* at 985-986.

The court then instructed the jury in accordance with the statutory sentencing scheme at issue here. 45 RT 4029-4042; CALJIC Nos. 8.86, 8.87 & 8.88. In conformity with California law, petitioner's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. *Ibid.* The jury was specifically instructed:

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

45 RT 4134; CALJIC No. 8.88.

The jury returned a verdict of death and judgment was entered on December 7, 2005. 41 RT 4164-4166.

On direct appeal Petitioner argued that the Sixth and Fourteenth Amendments, as interpreted in *Hurst, Ring, Apprendi* and *Blakely v. Washington*, 542 U.S. 296 (2004), require that any fact that is used to support an increased sentence (other than a prior conviction) be submitted to the jury and proved beyond a reasonable doubt. Petitioner argued that in order to impose the death penalty, his jury had to make

several factual findings: that aggravating factors were present; that the aggravating factors outweighed the mitigating factors; and that the aggravating factors were so substantial as to make death an appropriate punishment. Because these additional findings were required before the jury could impose the death sentence, *Hurst, Ring*, and *Apprendi* required that each of these findings be made beyond a reasonable doubt. Petitioner urged the court to reconsider its holdings that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi*, does not require factual findings, and is not required by this Court's jurisprudence to impose a reasonable doubt standard on California's capital penalty phase proceedings, so that California's death penalty scheme will comport with the constitutional principles set forth. Appellant's Opening Brief at 125-141, *People v. Bracamontes*, 12 Cal. 5th 977 (Cal. Sup. Ct. No. S139702).

The California Supreme Court rejected that analysis, noting that:

> "[w]e have previously held that the death penalty is not unconstitutional for failing to require proof beyond a reasonable doubt that aggravating factors exist, outweigh the mitigating factors, and render death the appropriate punishment. We also have consistently held the death penalty does not constitute an increased sentence. And we have determined that these conclusions are unaltered by *Apprendi*, *Ring*, [or] *Blakely* …. The jury's determination of the appropriate sentence within the statutorily specified options is an inherently moral and normative function, and not a factual one amenable to burden of proof calculations and the prosecution has no obligation to bear a burden of proof or persuasion. Nor does the federal Constitution require an instruction that life is the presumptive penalty. [¶] *Hurst* … does not alter our conclusion under the federal Constitution or under the Sixth Amendment about the burden of proof or unanimity regarding aggravating circumstances, the weighing of aggravating and mitigating circumstances, or the ultimate penalty determination. And we have concluded that *Hurst* does not cause us to reconsider our holdings that imposition of the death penalty does not constitute an increased sentence within

> the meaning of *Apprendi*, or that the imposition of the death penalty does not require factual findings within the meaning of *Ring*."

Bracamontes, 12 Cal. 5th at 1003-1004 (citations and internal quotation marks omitted).

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REASONS FOR GRANTING THE PETITION

CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER CALIFORNIA'S DEATH PENALTY STATUTE VIOLATES THE CONSTITUTIONAL REQUIREMENT THAT ANY FACT THAT INCREASES THE PENALTY FOR A CRIME MUST BE FOUND BY A JURY BEYOND A REASONABLE DOUBT

I. THIS COURT HAS HELD THAT EVERY FACT THAT SERVES TO INCREASE A MAXIMUM CRIMINAL PENALTY MUST BE PROVEN TO A JURY BEYOND A REASONABLE DOUBT

The Fifth, Sixth and Fourteenth Amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995). Where proof of a particular fact, other than a prior conviction, exposes the defendant to greater punishment than that applicable in the absence of such proof, that fact must be proven to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490; *see also Cunningham v. California*, 549 U.S. 270, 281-82 (2007); *Blakely v. Washington*, 542 U.S. at 301. As the Court put it in *Apprendi*, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494. In *Ring*, a capital sentencing case, this Court established a bright-line rule: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602, quoting *Apprendi*, 530 U.S. at 482-83 (citation omitted).

Applying this mandate, the Court in *Hurst* invalidated Florida's death penalty statute, restating the core Sixth Amendment principle as it applies to capital sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence of death*." *Hurst*, 577 U.S. at 94 (emphasis added). And, as explained below, *Hurst* makes clear that the weighing determination required under the Florida statute at issue was an essential part of the sentencer's *factfinding* exercise, within the meaning of *Ring*. *See Hurst*, 577 U.S. at 99-100.[9]

The questions decided in *Ring* and *Hurst* were narrow. "Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." *Ring*, 536 U.S. at 597 n.4. The petitioner in *Hurst* raised the same claim. *See* Petitioner's Brief on the Merits, *Hurst v. Florida*, (No. 14-7505), 2015 WL 3523406 at *18 (the trial court rather than the jury has the task of making factual findings necessary to impose death penalty). In each case, this Court decided only the constitutionality of a judge, rather than a jury, determining the existence of an aggravating circumstance. *See Ring*, 536 U.S. at 588; *Hurst*, 577 U.S. at 102.

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[9] Under the capital sentencing statute invalidated in *Hurst*, former Fla. Stat. § 782.04(1)(a), the jury rendered an advisory verdict at the sentencing proceeding, with the judge then making the ultimate sentencing determination. Hurst, 577 U.S. at 95, citing § 775.082(1). The judge was responsible for finding that "sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh aggravating circumstances," which were prerequisites to imposing a sentence of death. *Id.* at 100, citing former Fla. Stat. § 921.141(3). These determinations were part of the "necessary factual finding that *Ring* requires." *Id*.

Yet *Hurst* shows that the Sixth Amendment requires that any fact that must be established to impose a death sentence, but not the lesser punishment of life imprisonment, must be found by the jury. *Hurst*, 577 U.S. at 94, 99. *Hurst* refers not simply to the finding of an aggravating circumstance, but as noted, to the finding of "each fact *necessary to impose a sentence of death*." *Id.* at 94 (emphasis added). And *Ring* shows that it does not matter how a state labels the fact; if it increases a defendant's authorized punishment, it must be found by the jury beyond a reasonable doubt. *Ring*, 536 U.S. at 602.

II. CALIFORNIA'S DEATH PENALTY STATUTE VIOLATES *APPRENDI*, *RING* AND *HURST* BY NOT REQUIRING THAT THE JURY'S FACTUAL SENTENCING FINDINGS BE FOUND BEYOND A REASONABLE DOUBT

California's death penalty statute violates *Apprendi*, *Ring* and *Hurst*. In California, although the jury's final sentencing verdict must be unanimous, § 190.4, subd. (b), California does not require that a finding that aggravating circumstances are so substantial in comparison to mitigating circumstances be found beyond a reasonable doubt. While California law requires the jury and not the judge to make the findings necessary to sentence the defendant to death, *see*, *e.g.*, *People v. Rangel*, 62 Cal. 4th 1192, 1235 n. 16 (2016) (distinguishing California's law from that invalidated in *Hurst* on the grounds that, unlike Florida, the jury's verdict is not merely advisory), the law in California is similar in other respects to the statutes invalidated in Arizona and Florida. Under all three statutes, the sentencer must make an additional factual finding before imposing a death sentence: in California's that "the aggravating circumstances

outweigh the mitigating circumstances" § 190.3; in Arizona, that "'there are no mitigating circumstances sufficiently substantial to call for leniency'" *Ring*, 536 U.S. at 593, quoting Ariz. Rev. Stat. Ann. § 13-703(F); and in Florida's, "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances" *Hurst*, 577 U.S. at 100, quoting former Fla. Stat. § 921.141(3).

Under the principles that animate this Court's decisions in *Apprendi*, *Ring* and *Hurst*, the California death penalty statute should require the jury to make these factual findings unanimously and beyond a reasonable doubt. *See* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967, 2004 (2005) (*Blakely* arguably reaches "any factfinding that matters at capital sentencing, including those findings that contribute to the final selection process").

Although *Hurst* did not address standard of proof as such, and the state high court claims otherwise, this Court has made clear that weighing sentencing factors is an essentially factual exercise, within the ambit of *Ring*. As Justice Scalia explained in *Ring*:

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

Ring, 536 U.S. at 610 (Scalia, J., concurring) (emphasis added); s*ee also Hurst*, 577 U.S. at 98-99 (in Florida the "critical findings necessary to impose the death penalty" include weighing the facts the sentencer must find before death is imposed).

Other courts have not been uniform in their application of this Court's jurisprudence on this subject. Some have recognized the factfinding nature of the weighing exercise. The Delaware Supreme Court has found that "the weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence." *Rauf v. State*, 145 A.3d 430, 485 (Del. 2016). The Missouri Supreme Court has also described the determination that aggravation warrants death, or that mitigation outweighs aggravation, as a finding of fact that a jury must make. *State v. Whitfield*, 107 S.W.3d 253, 259-60 (Mo. 2003). Similarly, Justice Sotomayor has stated that "[t]he statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is . . . [a] factual finding" under Alabama's capital sentencing scheme. *Woodward v. Alabama*, 571 U.S. 1045, 134 S. Ct. 405, 410-11 (2013) (Sotomayor, J., dissenting from denial of cert.).

The Florida Supreme Court, in *Hurst v. State*, 202 So. 3d 40, 43 (Fla. 2016), reviewed whether a unanimous jury verdict was required in capital sentencing, in light of this Court's decision discussed above. The determinations to be made, including whether aggravation outweighed mitigation, were described as "elements," like the elements of a crime itself, determined at the guilt phase. *Hurst v. State*, 202 So. 3d at 53, 57. There was nothing that separated the capital weighing determination from any other finding of fact. However, in 2020, in *State v. Poole*, 292 So. 3d 694 (Fla. 2020), that court determined that it had erred in that 2016 opinion in *Hurst v. State*, declaring in a per curium opinion, "[W]e recede from *Hurst v. State* except to the extent it requires a

jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt." *Id.* at 714. When a jury has found one or more of the "eligibility" factors, there is not state or federal constitutional mandate that the jury make the selection finding or recommend a sentence of death. *Id.* at 709.

Other courts similarly have failed to recognize the fact-finding nature of the weighing exercise. *See United States v. Gabrion*, 719 F.3d 511, 533 (6th Cir. 2013) (federal jurisdiction; under *Apprendi* the determination that the aggravating factors outweigh the mitigating factors "is not a finding of fact in support of a particular sentence"); *Nunnery v. State*, 263 P.3d 235, 253 (Nev. 2011) ("the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor"); *Ritchie v. State*, 809 N.E.2d 258, 265-66 (Ind. 2004) (same). This conflict further supports granting certiorari on the issue presented here.

The question cannot be avoided, as the state high court has done, by merely characterizing the weighing factfinding that is a prerequisite to the imposition of a death penalty as "normative" rather than "factual." *See, e.g., People v. Karis*, 46 Cal. 3d 612, 639-40 (1988); *People v. McKinzie*, 54 Cal. 4th 1302, 1366 (2012). At end, the inquiry is one of function. *See Ring*, 536 U.S. at 610 (Scalia, J., concurring).

In California, when a jury convicts a defendant of first degree murder, the maximum punishment is imprisonment for a term of 25 years to life. §190, subd. (a) (cross-referencing §§ 190.1, 190.2, 190.3, 190.4 and 190.5). When the jury returns a verdict of first degree murder with a true finding of a special circumstance listed in

Penal Code section 190.2, the maximum punishment that can be imposed without any further jury findings is life imprisonment without the possibility of parole. *See, e.g., People v. Banks,* 61 Cal. 4th 788, 794 (2015) (where jury found defendant guilty of first degree murder and found special circumstance true and prosecutor did not seek the death penalty, defendant received "the mandatory lesser sentence for special circumstance murder, life imprisonment without parole"). Under the statute, a death sentence can be imposed only if the jury, in a separate proceeding, "concludes that the aggravating circumstances outweigh the mitigating circumstances." § 190.3. Thus, under Penal Code section 190.3, the weighing finding exposes a defendant to a greater punishment (death) than that authorized by the jury's verdict of first degree murder with a true finding of a special circumstance (life in prison without parole). The weighing determination is therefore a factfinding. Justice Sotomayor, the author of the majority opinion in *Hurst*, previously found that *Apprendi* and *Ring* are applicable to a sentencing scheme that requires a finding that the aggravating factors outweigh the mitigating factors before a death sentence may be imposed. More importantly here, she has gone on to find that it "is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole." *Woodward v. Alabama*, 134 S. Ct. at 411 (Sotomayor, J., dissenting from denial of cert.).

Although the state high court characterizes the weighing determination as a normative process, this conclusion was made in the context of the state high court being

confronted with a claim that the language "'shall' impose a sentence of death" violated the Eighth Amendment requirement of individualized sentencing and not whether the weighing determination is a factfinding. *People v. Brown*, 40 Cal. 3d 512, 538 (1985). According to the state high court in *Brown*, the weighing requirement provides for jury discretion in both the assignment of the weight to be given to the sentencing factors and the ultimate choice of punishment. As construed by *Brown*, section 190.3 provides for jury discretion in deciding which punishment is appropriate. The weighing decision may assist the jury in reaching its ultimate determination whether death is appropriate, but it is a separate, statutorily-mandated finding that precedes the final sentence selection. Once the jury finds that the aggravation outweighs the mitigation, it still retains the discretion to reject a death sentence. *See, e.g.*, *People v. Duncan*, 53 Cal. 3d 955, 979 (1991). Thus, the jury under California's death statute is required to make two determinations: the jury must determine whether the aggravating circumstances outweigh the mitigating circumstances, then the jury selects the sentence it deems appropriate. The first step is a factfinding, separate and apart from the second step, even though the state high court characterizes both steps as one normative process.[10]

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[10] The revised standard jury instructions, CALCRIM, "written in plain English" to "be both legally accurate and understandable to the average juror" (CALCRIM (2006), vol. 1, Preface, p. v.), makes clear this two-step process for imposing a death sentence:

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

As discussed above, *Hurst*, 577 U.S. at 99-100, which addressed Florida's statute with its comparable weighing requirement, indicates that the finding that aggravating circumstances outweigh mitigating circumstances is a factfinding for purposes of *Apprendi* and *Ring*.[11]

III. CALIFORNIA IS AN OUTLIER IN REFUSING TO APPLY THE BEYOND-A-REASONABLE-DOUBT STANDARD TO FACTUAL FINDINGS THAT MUST BE MADE BEFORE A DEATH SENTENCE CAN BE IMPOSED

The California Supreme Court has applied its flawed understanding of *Ring*, *Apprendi* and *Hurst* to its review of numerous death penalty cases. The issue presented here is well defined and will not benefit from further development in the California Supreme Court or other state courts. These facts favor grant of certiorari, for two reasons.

First, as of October 22, 2022 California, with 690 inmates on death row, had over one-fourth of the country's total death-row population of 2,414. *See Facts about the Death Penalty*, Death Penalty Information Center at https://documents.

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mitigating circumstances that a sentence of death is appropriate and justified.

CALCRIM No. 766, italics added.

[11] This Court's decision in *McKinney v. Arizona,* 140 S.Ct 702 (2020) does not resolve this issue. As the Court stressed, the issue in *McKinney* was "narrow"—whether, after a federal habeas court identified an Eighth Amendment error, "the Arizona Supreme Court could not itself reweigh the aggravating and mitigating circumstances." 140 S.Ct. at p. 706. Thus the Court held that *Ring* and *Hurst* did not preclude appellate reweighing to determine if reversal was required. (*Id.* at p. 707.)

deathpenaltyinfo.org/pdf/FactSheet.pdf (last visited November 4, 2022). California's refusal to require a jury to make the factual findings necessary to impose the death penalty beyond a reasonable doubt has widespread effect on a substantial portion of this country's capital cases.

Second, of the 30 jurisdictions in the nation with the death penalty, including the federal government and the military, the statutes of nearly all provide that aggravating factors must be proven beyond a reasonable doubt.[12] The statutes of several states are silent on the standard of proof by which the state must prove aggravating factors to the trier of fact.[13] But with the exception of the Oregon Supreme Court,[14] the courts of these jurisdictions have explicitly determined that the trier of fact must find factors in

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[12] *See* Ala. Code 1975 § 13A-5-45(e); Ariz. Rev. Stat. Ann. § 13-751(B); Ark. Code Ann. § 5-4-603(a); Fla. Stat. § 921.141(2)(a); Ga. Code Ann. § 17-10-30(C); Idaho Code Ann. § 19-2515(3)(b); Ind. Code Ann. § 35-50-2-9(A); Kan. Stat. Ann. § 21-6617(e); Ky. Rev. Stat. Ann. § 532.025(3); La. Code Crim. Proc. Ann. art. 905.3; Miss. Code. Ann. § 99-19-103; Mo. Ann. Stat. § 565.032(1); Mont. Code Ann. § 46-18-305; Neb. Rev. Stat. § 29-2520(4)(f); Nev. Rev. Stat. § 175.554(4); N.C. Gen. Stat. § 15A-2000(c)(1); Ohio Rev. Code Ann. § 2929.04(B); Okla. Stat. Ann. tit. 21, § 701.11; 42 Pa. Stat. and Cons. Stat. § 9711(c)(1)(iii); S.C. Code Ann. § 16-3-20(A); S.D. Codified Laws § 23A-27A-5; Tenn. Code Ann. § 39-13-204(f); Tex. Crim. Proc. Code Ann. § 37.071 § (2)(c); Wyo. Stat. Ann. § 6-2-102(d)(i)(A), (e)(i); 18 U.S.C. § 3593(c).

[13] *See* Or. Rev. Stat. Ann. § 163.150(1)(a); Utah Code Ann. § 76-3-207(2)(a)(iv). Washington's death penalty law does not mention aggravating factors but requires that before imposing a sentence of death the trier of fact must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. Wash. Rev. Code Ann. § 10.95.060(4).

[14] *See State v. Longo*, 148 P.3d 892, 905-06 (Or. 2006).

aggravation beyond a reasonable doubt before it may use them to impose a sentence of death.[15] California may be one of only several states that refuse to do so.

Certiorari is necessary to bring California, with the largest death row population in the nation, into compliance with the Fifth, Sixth and Fourteenth Amendments by requiring the state to prove beyond a reasonable doubt the factual findings that are a prerequisite to the imposition of the death penalty.[16]

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[15] *See State v. Steele*, 921 So. 2d 538, 540 (Fla. 2005); *State v. Gardner*, 947 P.2d 630, 647 (Utah 1997).

[16] Further, if the factual findings set forth above are the functional equivalents of elements of an offense, to which the Fifth, Sixth, and Fourteenth Amendment rights to trial by jury on proof beyond a reasonable doubt apply, then it follows, contrary to the view of the California Supreme Court, that aggravating circumstances must be found by a jury unanimously. Cal. Const. art. I, § 16 (right to trial by jury guarantees right to unanimous jury verdict in criminal cases); *People v. Maury*, 30 Cal. 4th 342, 440 (2003) (because there is no Sixth Amendment right to jury trial as to aggravating circumstances, there is no right to unanimous jury agreement as to truth of aggravating circumstances); *People v. Wolfe*, 114 Cal. App. 4th 177, 187 (2003) and authorities cited therein (although right to unanimous jury stems from California Constitution, once state requires juror unanimity, federal constitutional right to due process requires that jurors unanimously be convinced beyond a reasonable doubt).

CONCLUSION

Wherefore, Petitioner respectfully requests that this Court grant the petition for a writ of certiorari and reverse the judgment of the Supreme Court of California upholding his death sentence.

Dated: November 14, 2022

Respectfully submitted,

MARY K. McCOMB
STATE PUBLIC DEFENDER
FOR THE STATE OF CALIFORNIA

/s/ AJ Kutchins
AJ KUTCHINS
Supervising Deputy State Public Defender

APPENDIX A

***People v. Manuel Bracamontes*, 12 Cal. 5th 977 (2022)**
California Supreme Court Opinion, April 11, 2022

People v. Bracamontes

Supreme Court of California

April 11, 2022, Opinion Filed

S139702

Reporter
12 Cal. 5th 977 *; 507 P.3d 939 **; 292 Cal. Rptr. 3d 281 ***; 2022 Cal. LEXIS 1888 ****

THE PEOPLE, Plaintiff and Respondent, v. MANUEL BRACAMONTES, Defendant and Appellant.

Subsequent History: Reported at *People v. Bracamontes, 2022 Cal. LEXIS 2701 (Cal., Apr. 11, 2022)*

Time for Granting or Denying Rehearing Extended *People v. Bracamontes, 2022 Cal. LEXIS 3098 (Cal., May 4, 2022)*

Prior History: **[****1]** Superior Court of San Diego County, SCD178329, John M. Thompson, Judge.

People v. Bracamontes, 2019 Cal. LEXIS 5682 (Cal., July 10, 2019)

Counsel: Mary K. McComb, State Public Defender, under appointment by the Supreme Court, and AJ Kutchins, Deputy State Public Defender, for Defendant and Appellant.

Xavier Becerra and Rob Bonta, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Holly D. Wilkens, Theodore M. Cropley and Michael T. Murphy, Deputy Attorneys General, for Plaintiff and Respondent.

Judges: Opinion by Corrigan, J., with Cantil-Sakauye, C. J., Liu, Kruger, Groban, Jenkins, and Menetrez*, JJ., concurring.

Opinion by: Corrigan, J.

Opinion

[*982]

[*288]** **[**945]** **CORRIGAN, J.**—A jury convicted Manuel Bracamontes of the first degree murder of nine-year-old Laura Arroyo, with special circumstances for committing the murder while engaged in kidnapping, lewd act on a child under **[***289]** 14, and oral copulation.[1] A death sentence was returned and imposed. We affirm.

I. BACKGROUND

A. *Guilt Phase*

1. *Prosecution Evidence*

Luis and Laura Arroyo lived in a San Diego apartment complex with their children: Augustine, aged 11; Jose, aged 10; and Laura, aged 9.[2] Maggie Porter lived in the same complex with her three children, including four-year-old Jessica and an infant **[****2]** son, Manuel Jr. Laura and Jessica were "best friends" and played together almost daily. Defendant, Manuel Jr.'s father, had lived in the Porter apartment, but moved. After his departure, he was often seen at the complex.

On June 19, 1991, Laura came home from school and played outside with her friends, including preteens Elizabeth Alcarez and Leonor Gomez. Defendant greeted the girls as he walked past them toward Porter's apartment. Defendant came back a second time and told Elizabeth her mother was looking for her. Laura went home with Elizabeth, but her mother said she had not been looking for her. The children played outside until just before 9:00 p.m., then Elizabeth walked Laura home and saw her go inside. Luis had come home from work about 8:30 p.m. Laura asked if she could play a bit longer and he agreed. At about the same time, a neighbor and his friend saw defendant walking toward the complex from his car. They invited him to join them but he declined. Defendant's black

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* Associate Justice of the Court of Appeal, Fourth Appellate District, Division Two, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

[1] *Penal Code sections 187, subdivision (a)*, *190.2, subdivision (a)(17)(B)*, *(E)*, *(F)*. The jury also found true an enhancement for personal deadly weapon use (*Pen. Code, § 12022, subd. (b)(1)*) and convicted defendant of assault with a deadly weapon on a peace officer (*Pen. Code, § 245, subd. (c)*) in connection with an attempt to evade arrest. The trial court struck the enhancement and imposed a concurrent midterm on the assault count.

[2] To avoid confusion, we will refer to the younger Laura Arroyo as "Laura" and her mother as "Mrs. Arroyo."

Volkswagen Jetta was seen leaving the complex about 20 minutes later.

Once home, Laura went upstairs and watched television with her mother. Five minutes later, the doorbell rang and Laura went downstairs to **[****3]** answer it. **[*983]** Mrs. Arroyo heard Laura asking, "Who is it?" but heard nothing else. A few minutes after that, Mrs. Arroyo went downstairs and noticed the front door and metal security door were ajar. Thinking nothing was amiss, she began cooking. When Luis and his sons came downstairs, Mrs. Arroyo sent one of the boys to look for Laura. He could not find her, and they noticed Laura's shoes were inside. The entire family went searching for Laura. Unsuccessful, they called police at 9:31 p.m. Officers and neighbors searched for Laura throughout the night.

About 6:30 the next morning, Laura's body was found in the parking lot of an industrial complex in Chula Vista, three-and-a-half miles from her home. She lay on her back, wearing pink pajamas and underwear. She had been stabbed at least 10 times in the upper body and torso. The concrete beneath her had been chipped away at various spots, and her wounds were consistent with having been stabbed with a pickaxe. Petechial hemorrhaging indicated strangulation. Other injuries included a broken nose and chipped teeth, along with bruising and lacerations. Although her genitalia bore no signs of sexual assault, swabs were collected from her mouth, **[****4]** vagina, anus, and neck. An initial **[**946]** examination did not reveal the presence of sperm.

[*290]** Between July 14 and August 1, 1991, Chula Vista Police interviewed defendant four times. Initially, he claimed he first went to the apartment complex at about 9:45 in the evening, only after Porter called and told him about Laura's disappearance. He said he had not been to the complex in a week. He subsequently asserted he went to the complex earlier that day to pick up Manuel Jr. and returned that afternoon to drop off the baby. He denied any involvement with Laura's disappearance and insisted he never spoke to Laura or any of the neighborhood girls. Defendant ultimately refused to answer more questions but did provide hair, blood, and saliva samples.

On August 1, 1991, pursuant to warrant, officers searched defendant's residence and car, seizing clothing and tools. These items, along with evidence recovered during the autopsy, were sent to an FBI lab. A blue-green fiber found on Laura's pants was deemed potentially consistent with a fiber from a sweater found at defendant's home and with other fibers recovered from his car. At the time, no other physical evidence tied him to Laura's murder.

Police investigated **[****5]** other leads. Mrs. Arroyo and three others reported seeing a suspicious brown car parked in a cul-de-sac near the complex. Neither the car nor any occupants were ever identified. Officers also investigated a dispute over the Arroyos' sale of their taco shop but found no link to **[*984]** the abduction. In June 1992, approximately a year after the killing, police spoke again with defendant, who continued to deny any involvement. No new evidence was uncovered.

Eleven years later, the San Diego County District Attorney's Office established a "cold case" unit, and the evidence in Laura's case was reexamined in 2003. Chula Vista Police also sought assistance from the San Diego Police Department crime lab. New slides were prepared from the autopsy swabs using a method that had not been employed in 1991. The new slides revealed the presence of sperm in swabs from Laura's mouth, neck, and fingernails. A DNA profile was developed and found to match DNA taken from defendant's hair sample. The probability of a random match was one in 2.7 trillion in the Latino population, one in 3.2 trillion among Caucasians, and one in nine trillion among African-Americans. Laura's pajamas were placed under an alternate light source **[****6]** which revealed biological matter. Tested samples from the garment confirmed the presence of sperm. The resulting DNA profile matched defendant's reference sample. The likelihood of a random match was one in 30 quadrillion.

On October 24, 2003, more than 12 years after Laura's murder, district attorney investigators Robert Marquez and Michael Howard went to Porter's apartment looking for defendant. Manuel Jr. said his mother was not home, but defendant was expected to pick him up shortly. While the investigators waited in their car, defendant arrived and parked his Ford Explorer in front of the apartment. As Manuel Jr. approached the car, the investigators drove up and stopped in front of the Explorer. Marquez approached defendant and identified himself. Howard drew his gun, opened the passenger door, and told defendant he was under arrest for murder. Defendant initially raised his hands but then sped off. Howard fired twice toward the fleeing car.

Early the next morning, officers saw defendant's Explorer parked at a Chula Vista motel and placed a tracking device on it. About 10:30 a.m., the device indicated defendant had left the motel. Two officers in separate marked patrol cars found **[****7]** the Explorer parked in an alley. After blocking either end of the alley, officers approached on foot. Defendant started the **[***291]** engine and made a U-turn as officers drew their guns and ordered him to stop. He sped past them and drove over a curb to escape. After a high-speed freeway chase, defendant lost control of his car, crashed, and was arrested.

2. *Defense Evidence*

Five years after the murder and eight years before the cold case review, Chula Vista Police Detective Susan Rodriguez looked into the case. Defendant's Jetta, which had been sold, was reexamined in vain. Latent fingerprints **[*985]** from the Arroyos' front **[**947]** door did not match his. Rodriguez also recontacted a psychic who had been consulted during the initial investigation. No new leads were developed. Evidence from Laura's body was not reexamined because Rodriguez had no reason to doubt the medical examiner's conclusion ruling out sexual assault.

Manuel Jr. testified that when Marquez and Howard first approached him at the apartment they only identified themselves by name.[3] They refused to tell defendant why he was being arrested and both men shot at defendant's fleeing car. Several other witnesses testified about the attempted arrest. **[****8]** Defendant checked into a motel later that night using his real name.

B. *Penalty Phase*

1. *Prosecution Evidence*

Laura's parents and two brothers described the impact of her life and murder. Laura wanted to be a high school cheerleader and then a teacher, a role she often assumed while playing with friends. She was friendly with everyone and her mother's constant companion. The family trip to Disneyland was replaced by Laura's funeral. Laura was buried in the dress she was to wear for her first communion. Laura's brothers were afraid to go anywhere after the murder. The family kept Laura's room unchanged for six years after her death and still visited her grave every Sunday and on her birthday. Mari Peterson, Laura's third grade teacher, testified about the impact of Laura's death on her and her class. The jury was also shown a two-and-a-half minute video of an interview between Peterson and Laura filmed a few weeks before the crimes.

In June 1996, Porter told defendant she wanted to end their relationship and he became violent. He refused to leave, pushed her, and held her down by the arm and neck. Photos showed abrasions to Porter's upper body. Defendant pled guilty to inflicting corporal **[****9]** injury on the mother of his child.[4]

2. *Defense Evidence*

Twenty-one defense witnesses testified that defendant was incapable of committing the murder. Porter related she married defendant shortly before trial and believed he was not capable of killing Laura. Porter's ex-husband gave similar testimony. Porter's two adult children described defendant as a **[*986]** good father who never said or did anything inappropriate with them. Family members described defendant‘s childhood as normal and not marked by abuse. He played with his siblings, participated in Little League, and cared for his pets. As an adult, defendant was supportive of his family and a good father to Manuel Jr. After his father was injured in a car accident and confined to bed for two **[***292]** years, defendant helped care for him and the family. He also comforted his sister when her husband was fatally shot. He never acted inappropriately with his sisters or nieces. A work supervisor testified he was a hard worker who got along with others.

II. DISCUSSION

A. *Pretrial Issues*

1. *Prefiling Delay*

While the murder occurred in June 1991, defendant was not charged until October 2003. He argues the delay was unjustified and denied him due process because **[****10]** some evidence he could have presented, particularly schooling and employment evidence for the penalty phase, became unavailable during that time. We reject the claim.

a. *Background*

The defense argued that all charges should be dismissed because the prefiling delay violated due process. The trial court heard from numerous witnesses, primarily related to potential prejudice from lost evidence. Elementary and high school employees testified that, although records of enrollment are kept permanently, other student files are usually destroyed after five years. Defendant graduated from high school in 1981, 10 years before **[**948]** Laura's murder. Several of defendant's elementary school teachers had died by the time of the 2005 hearing; two others did not remember him. Representatives from seven companies where defendant worked between 1979 and 1993 testified as to defendant's employment records and pay stubs, with most indicating that detailed records were either never kept or were no longer available. The defense also presented evidence that three people who had a positive impression of defendant had passed away. Defendant also suggested that evidence regarding an alarm system at his parents' house **[****11]** and record of a U-Haul truck his sister rented for her move supported his alibi but had been lost. Guadalupe Echeverria, whom the defense claimed was unhappy following her

[3] In rebuttal, the prosecution presented evidence of an audiotape of the investigators' interaction with Manuel Jr. in which Marquez identified himself as being a district attorney investigator.

[4] ***Penal Code section 273.5, subdivision (a)***.

purchase of the Arroyos' taco shop (see discussion *post*), had died in December 1991.

In its opposition, the prosecution asserted the delay was justified. It observed that the initial medical examination of the victim's body in 1991 did **[*987]** not reveal the presence of sperm or injuries consistent with sexual assault, and the victim's clothing was intact, leading the medical examiner to conclude no such assault had occurred. Police searched defendant's car and home and repeatedly interviewed him. The blue-green fiber from the victim's pajamas may have matched fibers from defendant's car and clothing, but the result was inconclusive. It was not until 2003 that a reexamination of evidence revealed sperm on swabs from the victim and a subsequent DNA test linked the sperm to defendant. Expert testimony explained that, in 1991, a water-based extraction method was used to transfer evidence from a swab to a slide for examination. It was later discovered that this method, in contrast to a detergent-based method used in 2003, was **[****12]** often ineffective and may have led to false negative results. Further, the restriction fragment length polymorphism DNA tests prevalent in 1991 required more material for testing than was present on the oral swabs. Defendant's sister Teresa also testified that friends and family remained available to testify about defendant's life, which she described as normal and unaffected by childhood abuse or involvement with gangs, alcohol, or drugs. A prosecution investigator testified defendant's employers at the time of the murder remembered him and that he had been disciplined **[***293]** for failing to perform assigned duties and threatening a supervisor.

The trial court denied defendant's motion. It concluded that the prosecution could not reasonably bring charges in 1991 based on the uncertain state of the evidence. The court balanced the justification for the delay with any potential prejudice. It held the strong public interest in prosecution outweighed any potential prejudice. The defense unsuccessfully renewed its motion to dismiss at the penalty phase, arguing the charging delay resulted in an "incomplete picture" of defendant being presented to the jury.

b. *There Was No Prejudicial Prefiling Delay* ***[****13]***

(1) "Although precharging delay does not implicate speedy trial rights, a defendant is not without recourse if the delay is unjustified and prejudicial. '[T]he right of due process protects a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence.' [Citation.] Accordingly, '[d]elay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay.'" (*People v. Nelson (2008) 43 Cal.4th 1242, 1250 [78 Cal. Rptr. 3d 69, 185 P.3d 49] (Nelson)*.)
[*988]

(2) *Nelson* observed that both negligent and purposeful charging delay, if accompanied by a showing of prejudice, can violate due process. "This does not mean, however, that whether the delay was purposeful or negligent is irrelevant … . [W]hether **[****14]** the delay was negligent or purposeful is relevant to the balancing process. Purposeful delay to **[**949]** gain an advantage is totally unjustified, and a relatively weak showing of prejudice would suffice to tip the scales towards finding a due process violation. If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation."[5] (*Nelson, supra, 43 Cal.4th at pp. 1255–1256*.)

No prejudicial delay appears here. Defendant argues the charging delay was unjustified because evidence of sperm on the victim's clothing and, thus, defendant's DNA, could have been detected sooner using technology available at the time. We rejected a similar argument in *Nelson*, where the defendant argued "the DNA technology used here existed years before law enforcement agencies made the comparison in this case and that, therefore, the comparison could have, and should have, been made sooner than it actually was." (*Nelson, supra, 43 Cal.4th at p. 1256*.) We cautioned **[***294]** there that "[a] court may not find negligence by second-guessing how the state allocates its resources or how law enforcement agencies could have investigated a given case." (*Ibid.*) Similarly here, the initial investigation into Laura's killing suggested a sexual assault was not involved. **[****15]** The medical examination of the victim's body did not reveal a sexual assault. The victim's clothing was intact and her genitalia uninjured. Swabs collected from her

[5] *Nelson* noted that state and federal constitutional standards regarding justification for delay differ. (*Nelson, supra, 43 Cal.4th at p. 1251*; see *United States v. Lovasco (1977) 431 U.S. 783, 795–796 [52 L. Ed. 2d 752, 97 S. Ct. 2044]*; *United States v. Marion (1971) 404 U.S. 307, 325–326 [30 L. Ed. 2d 468, 92 S. Ct. 455]*.) *Nelson*, however, rested its holding on California's Constitution because "the law under the California Constitution is at least as favorable for defendant in this regard as the law under the United States Constitution." (*Nelson, at p. 1251*.) We do so here as well.

body did not reveal the presence of sperm. The medical examiner's conclusion that there had been no sexual assault, while reasonable, may have set back the investigation. Not until sperm was discovered later during a "cold case" review and a DNA profile was produced did physical evidence connect defendant to the crimes. Indeed, defendant's initial connection to the murder was inconclusive. The only physical evidence linking him to the crimes was a single blue-green fiber that may have matched fibers found in his car and residence. He had been seen at the apartment complex just before Laura's disappearance, and he initially lied to police about being there. However, defendant denied involvement and no direct evidence linked him to the crimes. Further, the inability to detect sperm on the victim's body not only deprived investigators of DNA evidence but also a motive for Laura's murder. That his girlfriend's daughter and Laura were friends did little to explain why defendant would have killed the child.

[*989]

Ultimately, "[t]he **[****16]** delay was investigative delay, nothing else." (*Nelson, supra, 43 Cal.4th at p. 1256*.) As we observed in *People v. Cordova (2015) 62 Cal.4th 104 [194 Cal. Rptr. 3d 40, 358 P.3d 518] (Cordova)*: "Sometimes a crime simply is not solved immediately but must await some break in the case, a break that occurred here … when a cold hit revealed a match between defendant and the evidence samples." (*Id. at p. 120*.) As in *Nelson*: "'The delay was the result of insufficient evidence to identify defendant as a suspect and the limits of forensic technology. [Citations.] When the forensic technology became available to identify defendant as a suspect and to establish his guilt, the prosecution proceeded with promptness.'" (*Nelson, supra, 43 Cal.4th at p. 1257*.) There is no indication that prosecution here was delayed to secure any improper advantage.

In any event, "if the defendant fails to meet his or her burden of showing prejudice, there is no need to determine whether the delay was justified." (*People v. Jones (2013) 57 Cal.4th 899, 921 [161 Cal. Rptr. 3d 295, 306 P.3d 1136]*.) The potential prejudice identified by defendant appears minimal. As to the guilt phase, defendant asserts that the delay prevented adequate defense investigation into potential third party culpability evidence, including the occupants of a brown car near the victim's apartment complex and the **[**950]** Arroyos' sale of a taco shop. (See discussion *post*.) Near the time of the crimes, **[****17]** several witnesses reported seeing a brown car, but no one could identify the car or its occupants. Defendant speculates that an earlier investigation would have identified these persons but does not suggest how the defense investigation was hindered. With respect to the taco shop sale, Echeverria died only five months after the murder. Defendant also does not suggest what evidence Echeverria would have provided that was not otherwise available.

As for the penalty phase, defendant broadly contends that "whole categories of evidence essential to presenting the jury with a full picture of appellant were lost," including school, employment, and medical records, as well as mitigation witnesses **[***295]** who passed away. The record belies this claim. Defendant presented 21 witnesses at the penalty phase who testified about his childhood and adult life; positive family interactions, favorable experiences and opinions; and testimony from a work supervisor. In light of this extensive presentation, any prejudice from the absence of additional similar evidence would appear minimal. Defendant does not explain how documentary evidence regarding his education, employment, or medical care would have bolstered **[****18]** the evidence presented. On this record, "the claimed prejudice is speculative" and "[d]efendant was able to, and did, present evidence in his defense … ." (*Cordova, supra, 62 Cal.4th at p. 120*.)

[*990]

2. *Shackling*

Defendant contends the trial court improperly ordered him to wear leg chains during trial, which prejudiced him at both the guilt and penalty phases. Prejudice does not appear on this record.

a. *Background*

Defendant moved to appear without physical restraints, pointing out that he had previously made court appearances without disruption. The court tentatively indicated it would deny the motion but explained that "Mr. Bracamontes will have … ankle cuffs on, that they be tethered to a bolt in the floor. His hands will not be shackled. He will not be waist chained. He will be free to stand, turn to talk to both counsel, certainly assist in his defense. [¶] What he will be prevented from doing is leaving counsel table, which he isn't allowed to do anyway. [¶] We'll make every effort to ensure that the panel is not aware that he is chained to the floor." When defense counsel argued defendant had been cooperative and had not been disruptive in the courtroom, the court noted that defendant had twice fled from police **[****19]** before being apprehended. The court also inquired whether it could consider the "mere fact of the charges and the potential penalty in the case … ." Both defense counsel responded that was not part of the inquiry whether there was a manifest need for restraints. Although agreeing with defense counsel that "Mr. Bracamontes has always been very respectful in court" and no instances of jail disruption had been reported, the court denied defendant's motion. If defendant chose to testify, the court indicated he would be allowed to walk to the stand

"unimpeded" and "when he's excused, he's free to walk back and sit down. We'll make those arrangements." Defendant elected not to testify so this eventuality did not arise.

Later, outside the presence of prospective jurors, defense counsel commented that, the day before, "with the table turned facing the audience, that the jurors that were seated in the jury box, at least some of them could see that Mr. Bracamontes was shackled to the floor … . The wire was visible underneath the chairs at least to probably the six people that are closest to the bench." The "wire" was an apparent reference to the tether mentioned by the court. The court **[****20]** stated it was "not going to get rid of the panel" but asked the bailiff if counsel table could be turned. The bailiff responded, "I don't know how I can. There's more people at counsel table than expected, and there's more people in the way when he stands." The court replied, "We'll leave it the way it is," and defense counsel addressed another matter.

b. *The Trial Court Abused Its Discretion*

(3) "'In general, the "court has broad power to maintain courtroom security **[**951]** and orderly proceedings" [citation], and its decisions on these **[*991]** matters are reviewed for abuse of discretion. [Citation.] However, **[***296]** the court's discretion to impose physical restraints is constrained by constitutional principles. Under California law, "a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." [Citation.] Similarly, the federal "Constitution forbids the use of visible shackles … unless that use is 'justified by an essential state interest'—such as the interest in courtroom security—specific to the defendant on trial." …'" (*People v. Bell (2019) 7 Cal.5th 70, 123 [246 Cal. Rptr. 3d 527, 439 P.3d 1102] (Bell)*.) "The imposition of physical restraints in the absence **[****21]** of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion." (*People v. Duran (1976) 16 Cal.3d 282, 291 [127 Cal. Rptr. 618, 545 P.2d 1322] (Duran)*.) "'In deciding whether restraints are justified, the trial court may "take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial." [Citation.] These factors include evidence establishing that a defendant poses a safety risk, a flight risk, or is likely to disrupt the proceedings or otherwise engage in nonconforming behavior.'" (*People v. Virgil (2011) 51 Cal.4th 1210, 1270 [126 Cal. Rptr. 3d 465, 253 P.3d 553] (Virgil)*.)

(4) As these authorities make clear, physical restraints are considered extraordinary measures. Courts entertaining such action must seriously consider the question on an individualized basis and ensure there is an adequate record for their ruling. Constitutional principles "prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." (*Deck v. Missouri (2005) 544 U.S. 622, 629 [161 L. Ed. 2d 953, 125 S. Ct. 2007] (Deck)*.) The individualized consideration necessary before imposing restraints would be inconsistent with a blanket policy of shackling defendants charged with **[****22]** certain offenses, such as capital murder. (*People v. Hawkins (1995) 10 Cal.4th 920, 944 [42 Cal. Rptr. 2d 636, 897 P.2d 574]*; *Duran, supra, 16 Cal.3d at p. 293*.) "The mere facts that the defendant is an unsavory character and charged with a violent crime are not sufficient to support a finding of manifest need." (*People v. Bryant, Smith and Wheeler (2014) 60 Cal.4th 335, 389–390 [178 Cal. Rptr. 3d 185, 334 P.3d 573] (Bryant)*.)

Defendant contends there was no manifest need to shackle him, noting the lack of any courtroom or jail incidents involving nonconforming behavior. However, the record here does not support defendant's assertion that the court relied primarily on a blanket policy to shackle capital murder defendants and failed to consider his particular circumstances. The court did inquire at one point whether it could consider the present charges and commented that its prior handling of similar murder cases had "proved very successful in the **[*992]** past." Nonetheless, the court specifically cited as a relevant factor defendant's two attempts to evade arrest under dangerous circumstances.

(5) A court's determination that a defendant constitutes a flight risk may justify a finding of manifest need for restraints. For example, in *Vigil*, we concluded there was no abuse of discretion in shackling the defendant because he "was a genuine escape risk" where he used "a makeshift key to unlock another inmate's handcuffs" **[****23]** and lied about it. (*Virgil, supra, 51 Cal.4th at p. 1271*; see *People v. Cunningham (2001) 25 Cal.4th 926, 988 [108 Cal. Rptr. 2d 291, 25 P.3d 519] (Cunningham)*.) **[***297]** Further, a defendant's recent attempt to escape custody, or evidence of an intent to escape, could support a finding of a manifest need for restraints. (See *People v. Smith (2015) 61 Cal.4th 18, 44 [186 Cal. Rptr. 3d 550, 347 P.3d 530]*; *People v. Livaditis (1992) 2 Cal.4th 759, 774 [9 Cal. Rptr. 2d 72, 831 P.2d 297]*; *People v. Condley (1977) 69 Cal.App.3d 999, 1006 [138 Cal. Rptr. 515]*.)

However, our cases teach that a mere disposition to violence or escape standing alone cannot justify the use of restraints. "A court's decision about the use of restraints involves a prediction of the likelihood **[**952]** of violence, escape, or disruption weighed against the potential burden on the

defendant's right to a fair trial. Given the serious potential consequences on both sides of the scale, the range of factors the court may consider in assessing and weighing the risks should be broad." (*Bryant, supra, 60 Cal.4th at p. 390*.) The necessary individualized assessment requires a determination, based on the totality of the circumstances, that a defendant presently intends to engage in nonconforming courtroom behavior, i.e., conduct that "'would disrupt the judicial process if unrestrained.'" (*People v. Cox (1991) 53 Cal.3d 618, 651 [280 Cal. Rptr. 692, 809 P.2d 351] (Cox)*, disapproved on another ground in *People v. Doolin (2009) 45 Cal.4th 390, 421, fn. 22 [87 Cal. Rptr. 3d 209, 198 P.3d 11]*.) "The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion." (*Duran, supra, 16 Cal.3d at p. 291*; see **[****24]** *People v. Montes (2014) 58 Cal.4th 809, 841 [169 Cal. Rptr. 3d 279, 320 P.3d 729]*.)

(6) A defendant's prearrest attempt to evade capture, standing alone, would not justify the use of physical restraints. *People v. Jacla (1978) 77 Cal.App.3d 878 [144 Cal. Rptr. 23]* concluded no manifest need for shackling was shown where the defendant, while on bail, was involved in a shooting and an ensuing high-speed chase. The court explained: "We conceive *Duran* to hold that it is the defendant's conduct in *custody*, now or at other times [citations], or his expressed intention to escape or engage in nonconforming conduct during the trial that should be considered in determining whether there is a 'manifest need' for shackles." (*Jacla, at p. 884*; see also **[*993]** *People v. Burnett (1980) 111 Cal.App.3d 661, 667 [168 Cal. Rptr. 833]*.) This court quoted *Jacla* positively in *People v. Allen (1986) 42 Cal.3d 1222 [232 Cal. Rptr. 849, 729 P.2d 115]*. With respect to the shackling of a witness, *Allen* observed that "none of the evidence presented by the prosecution relates to [the witness's] present or past conduct in custody or in the courtroom, and most of the evidence seems of limited value in predicting [his] future conduct in the courtroom." (*Id. at p. 1263*.)

Similarly here, although defendant attempted to evade capture before his eventual arrest, there was no evidence that defendant harbored a present intent to escape from custody or otherwise disrupt court proceedings. The trial court agreed that defendant had "always been very respectful **[****25]** in court" and there had been no reports of misbehavior in custody. The ultimate question remains whether there exists a manifest need for shackling or other restraint. The need must arise from a current risk of flight, violence, or other disruptive behavior. Although the court's consideration is not limited solely to custodial conduct, it must make a determination, based on the totality of the circumstances, that a manifest need for restraints currently **[***298]** exists. (See *Cox, supra, 53 Cal.3d at p. 651*.) The evidence was insufficient to justify such a determination here. Under these circumstances, the court abused its discretion by ordering the use of restraints.

(7) Finally, we emphasize that the justification "in support of the court's determination to impose physical restraints must appear as a matter of record" (*Duran, supra, 16 Cal.3d at p. 291*). When restraints are requested by the prosecution, the People should place facts justifying their use on the record "so that the court may make its own determination of the nature and seriousness of the conduct and whether there is a manifest need for such restraints." (*People v. Simon (2016) 1 Cal.5th 98, 115 [204 Cal. Rptr. 3d 380, 375 P.3d 1]*; cf. *People v. Miller (2009) 175 Cal.App.4th 1109, 1114 [96 Cal. Rptr. 3d 716]*; *People v. Prado (1977) 67 Cal.App.3d 267, 275–276 [136 Cal. Rptr. 521]*.) We note the court may consider imposing restraints in the absence of a prosecutorial request. Further, and importantly, the court **[****26]** must ensure the record reflects both the reasons justifying the restraints, along with a description of "the type of restraints used [and] whether they were visible to the jury" (*People v. Jackson (1993) 14 Cal.App.4th 1818, 1826 [18 Cal. Rptr. 2d 586]*). Of course, "[i]t is settled that the use of **[**953]** physical restraints in the trial court cannot be challenged for the first time on appeal. Defendant's failure to object and make a record below waives the claim … ." (*People v. Tuilaepa (1992) 4 Cal.4th 569, 583 [15 Cal. Rptr. 2d 382, 842 P.2d 1142] (Tuilaepa)*; see *People v. Majors (1998) 18 Cal.4th 385, 406 [75 Cal. Rptr. 2d 684, 956 P.2d 1137]*.) As such, if the defense disagrees with the trial court's initial assessment of the visibility of the restraints at any point during trial, the defense should object so the trial court can make an appropriate record.

[*994]

c. *The Trial Record Does Not Establish Prejudice*

(8) As the high court has stated, where a court improperly orders the use of visible physical restraints, "[t]he State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.'" (*Deck, supra, 544 U.S. at p. 635*; see *People v. Miracle (2018) 6 Cal.5th 318, 350, fn. 6 [240 Cal. Rptr. 3d 381, 430 P.3d 847]*.) Defendant contends that "the shackles apparently remained in the jury's view for the duration of the trial." The record on direct appeal does not support this contention. Defense counsel commented during jury selection that, "with the table turned facing the audience," "at least some **[****27]** of" the prospective jurors could see the "wire," suggesting that it was visible "to probably the six people that are closest to the bench." The record does not indicate whether counsel

table remained in the same location during trial, or any of the seated jurors ever saw the restraints. All that can be established is that, for an unspecified period of time during voir dire, some prospective jurors may have seen a portion of the "wire" used in the system. "Brief glimpses of a defendant in restraints have not been deemed prejudicial." (*Cunningham, supra, 25 Cal.4th at p. 988*; see *Duran, supra, 16 Cal.3d at p. 287, fn. 2*.)

"Even if the restraint had been glimpsed during that portion of voir dire by one or more of the prospective jurors who actually sat on the jury, the unjustified shackling was harmless beyond a reasonable doubt." (*People v. Ervine (2009) 47 Cal.4th 745, 774 [102 Cal. Rptr. 3d 786, 220 P.3d 820]*.) **[***299]** As we reasoned in *Tuilaepa, supra, 4 Cal.4th 569*: "Strong guilt evidence in the form of eight positive eyewitness identifications established that defendant shot four individuals and killed one of them in the course of robbing people in a neighborhood bar. No other guilt errors are raised on appeal or are evident from the record, and no prejudicial error occurred at the penalty phase for reasons we will explain. Defendant elected not to testify in his own behalf. **[****28]** Any glimpse jurors might have received of the restraints as defendant entered the courtroom could not possibly have shocked them or affected their assessment of the evidence." (*Id. at pp. 584–585*.) Similarly here, with respect to the guilt phase, strong DNA evidence tied defendant to the murder. The *lowest* probability for a random match among the samples was one in 2.7 trillion among the Latino population. Further, as discussed below, no other error appears on this record. The court, in deciding to order shackling, reassured the defense that if defendant decided to testify, he would be allowed to walk to and from the stand unrestrained, and there is no assertion that the restraints otherwise inhibited defendant's ability to assist in his defense.

Even assuming some jurors may have briefly glimpsed the restraints, the shackling error was also harmless beyond a reasonable doubt at the penalty **[*995]** phase. During jury argument, the prosecutor identified only three aggravating factors: the circumstances of the crime; defendant's age at the time of the offenses; and defendant's commission of a prior domestic violence incident. (See *Pen. Code, § 190.3, factors (a)*, *(b)*, *(i)*.) Of these, the prosecutor focused primarily on the circumstances of the offense, **[****29]** calling it "one of the most important factors in this case." After acknowledging that defendant's lack of felony convictions constituted a mitigating factor, along with defense evidence regarding "any good things about [defendant's] life" (see *Pen. Code, § 190.3, factors (c)*, *(k)*), the prosecutor argued these factors were "extremely weak" compared to "the **[**954]** facts, circumstances of this case, like this one right here where her final resting place on that sidewalk is, it's like comparing tons to ounces." He graphically described the scene where the victim was found: "How about comparing all of those stab wounds to that little girl on that sidewalk, where she was impaled on that sidewalk, compare that to all the mitigation. I submit it makes the scale on this side go all the way to the ground. [¶] The chop wounds to the face and the other injuries to the face, shoulders, neck, each and every one of those facts, ladies and gentlemen, wipes out any weight, any slight weight that any of those items have on that mitigating side." The prosecutor described the impact of the murder on Laura's parents, brothers, her teacher, and classmates, then discussed Laura's potential future and how she might have experienced the crimes **[****30]** as they were happening. Thereafter, the prosecutor argued: "You have to put this now on that scale, ladies and gentlemen. When you compare all of these things on this side of the scale, everything we just talked about, including the assault on the cop, the pickaxe that he used, the lewd act on the child, these are the special circumstances, the forced oral [copulation]. And the kidnapping, ladies and gentlemen, the aggravating side of this scale outweighs the mitigating side of the scale like the Queen Mary outweighs a rowboat. Like a 6', 220-pound male outweighs a 61-pound third grade girl." The single reference to an "assault on the cop" was not explained, and the prosecutor did not otherwise mention defendant's flight from police during jury argument that spanned almost 30 **[***300]** pages of the reporter's transcript. Further, aside from the specific commission of a domestic violence incident, the prosecutor did not suggest that defendant had a violent background warranting the death penalty. As noted, he acknowledged defendant's lack of felony convictions constituted a *mitigating* factor.

The defense acknowledged the prosecution's emphasis on the circumstances of the offense, with counsel **[****31]** commenting that, "as expected, the prosecutor has focused on the facts of the crime, because in this case that's really all that he has to talk about." Both defense counsel mentioned that defendant had no background of violence. This argument dovetailed into the two primary defense themes: that jurors should have a lingering doubt as to defendant's guilt based on the multiple defense witnesses who testified that **[*996]** defendant was incapable of committing the murder; and that life imprisonment was a sufficient punishment for the present crimes. Counsel discussed lingering doubt at length, arguing that the DNA evidence only linked defendant to the sexual assault and not the killing. They argued evidence suggested others must be involved and that no physical evidence tied Laura to defendant's car. They urged defendant had no history of child molestation, no history of having been abused himself, and no history of mental illness or drug addiction. All these facts were asserted to be inconsistent with defendant's guilt. Defense counsel suggested that DNA evidence may someday exonerate defendant. They also emphasized that

defendant would not be eligible for parole and there was no evidence that **[****32]** defendant had posed a danger to anyone during the two years that he spent in custody awaiting trial because "[t]here were no assaults on any guards or other inmates."

"[V]isible physical restraints like handcuffs or leg irons may erode the presumption of innocence because they suggest to the jury that the defendant is a dangerous person who must be separated from the rest of the community." (*People v. Hernandez (2011) 51 Cal.4th 733, 742 [121 Cal. Rptr. 3d 103, 247 P.3d 167]*; cf. *Deck, supra, 544 U.S. at pp. 632–633*.) The record on direct appeal here reveals that the jury convicted defendant of the gruesome murder and sexual assault of a nine-year-old girl who had been kidnapped from her home. The prosecution's subsequent penalty phase argument focused primarily on the circumstances of this horrific crime, which the jury had previously assessed, rather than on defendant's dangerousness. The bulk of the defense case, both with respect to jury argument and the evidence presented, emphasized a theory of lingering doubt, a factor in mitigation as to the circumstances of the crime. (See *Pen. Code, § 190.3, factor (a)*; *People v. Holmes, McClain and Newborn (2022) 12 Cal.5th 719, 753 [289 Cal.Rptr.3d 582, 503 P.3d 668]*.) The record before us only establishes **[**955]** that some prospective jurors may have seen a portion of a "wire" during voir dire over a month before the penalty phase began. In light of this record, the unjustified shackling was **[****33]** harmless beyond a reasonable doubt notwithstanding the possibility that some panel members may have seen some form of restraint during jury selection.[6]

B. *Guilt Phase Issues*

1. *Flight Instructions*

Based on defendant's flight from arresting officers, the court gave a consciousness **[***301]** of guilt instruction using a modified version of **[*997]** *CALJIC No. 2.52*.[7] (See *Pen. Code, § 1127c*.) The defense asked for an instruction on the *absence* of flight to show he had no consciousness of guilt. It noted that defendant had agreed to police interviews in 1991 and 1992 even after he had become the focus of the investigation.[8] The trial court observed the defense could argue the point to the jury, but it would not give "a pinpoint instruction on a negative."

Defendant contends the court's refusal to instruct on the absence of flight deprived him of a fair trial. He argues the court's refusal, coupled with its instruction on flight, led to "disparate treatment of the parallel inferences to be drawn from a defendant's response to an accusation," which improperly favored the prosecution.

We have previously rejected this argument in the context of admissibility. As *People v. Green (1980) 27 Cal.3d 1 [164 Cal. Rptr. 1, 609 P.2d 468]* observed, evidence regarding absence of flight is generally **[****34]** not admissible. *People v. Montgomery (1879) 53 Cal. 576* concluded the trial court did not err by excluding evidence that an in-custody defendant "had an opportunity to escape from the jail, but declined to avail himself of it." (*Id. at p. 577*.) *Montgomery* questioned whether an innocent inference could be made from the lack of escape, noting the defendant "may very naturally have been deterred from making an effort to escape from a fear that he would be recaptured, and that his fruitless attempt to escape would be evidence of guilt; or he may have felt so strong a confidence of his acquittal, for want of the requisite proof of his guilt, that he deemed it unnecessary to flee." (*Id. at pp. 577–578*.) *Green* clarified that "[t]he real issue here, however, is not whether this evidence is relevant but whether it should be excluded despite its relevance." (*Green, at p. 38*.) *Green* reasoned that such evidence presented "manifest risk of confusion and delay" and "the absence of flight is so ambiguous, so laden with conflicting interpretations, that its probative value on the issue of innocence is slight." (*Id. at pp. 38–39*; cf. *People v. Cowan (2010) 50 Cal.4th 401, 473 [113 Cal. Rptr. 3d 850, 236 P.3d 1074]* [exclusion **[*998]** of evidence regarding the defendant's offer to speak to police proper].) *Green* concluded an instruction on the absence of flight was properly denied because "the instruction **[****35]**

[6] If there is evidence outside of the appellate record that the jury's view of defendant's restraints was more extensive, a habeas corpus proceeding would allow evaluation of such evidence. (Cf. *People v. Mendoza Tello (1997) 15 Cal.4th 264, 266–268 [62 Cal. Rptr. 2d 437, 933 P.2d 1134]*.)

[7] The instruction stated here: "The flight of a person immediately after the commission of a crime, or after he is accused of a crime *and has knowledge of the accusation*, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide." (Italics added.) The italicized language was added after discussion with counsel.

[8] The proposed instruction stated: "The absence of flight of a person immediately after the commission of a crime, or after he is accused of a crime, although the person had the opportunity to take flight, is a fact which may be considered by you in light of all other proven facts, in deciding whether or not the defendant's guilt has been proven beyond a reasonable doubt. The absence of flight may tend to show that the defendant did not have a consciousness of guilt and this fact alone may be sufficient to create a reasonable doubt as to defendant's guilt. The weight and significance of such circumstances are matters of [*sic*] the jury to determine."

would have injected a new issue into the jury's deliberations and invited the kind of speculation that the *Montgomery* rule seeks to avoid." (*Green, at p. 39*.)

[956]** We affirmed *Green*'s reasoning in considering the question of instructions. *People v. Staten (2000) 24 Cal.4th 434 [101 Cal. Rptr. 2d 213, 11 P.3d 968]*, **[***302]** rejected the argument that the defense had "a 'reciprocal' right to an instruction on *absence* of flight, as showing lack of guilt." (*Id. at p. 459*.) *Staten* noted *Green* "observed that such an instruction would invite speculation; there are plausible reasons why a guilty person might refrain from flight. [Citation.] Our conclusion therein also forecloses any federal or state constitutional challenge based on due process." (*Ibid.*)

(9) Defendant relies on *Cool v. United States (1972) 409 U.S. 100 [34 L. Ed. 2d 335, 93 S. Ct. 354]*, but that case only bolsters our conclusion. Cool was arrested along with her husband and one Robert Voyles. Voyles had tried to pass counterfeit bills at a local store while Cool and her husband waited outside. Cool testified in her own defense and also called Voyles as a witness. The latter admitted his guilt but insisted Cool and her husband were blameless. Over defense objection the court instructed in a way that clearly implied the jury "should disregard Voyles' testimony unless it was 'convinced it [was] true beyond a reasonable doubt.'" (*Id. at p. 102*.) The high court **[****36]** concluded such an instruction placed an improper burden on the defense when an accomplice gave *exculpatory* testimony because "the effect of the judge's instructions is to require the defendant to establish his *innocence* beyond a reasonable doubt." (*Id. at p. 104*.) *Cool* underscored that accomplice testimony used to *exonerate* a defendant should not be treated in the same way as testimony used to *implicate* her. Similarly, there are valid reasons to treat evidence of flight differently from the absence of flight. "[T]here is no fundamental unfairness in not requiring an instruction on the absence of flight … . [U]nlike the flight of an accused from the scene of a crime or after accusation of a crime, the absence of flight presents such marginal relevance it is usually not even admissible. (See *People v. Green, supra, 27 Cal.3d at p. 37*.) Since flight and the absence of flight are not on similar logical or legal footings, the due process notions of fairness and parity … are inapplicable."[9] (**[*999]** *People v. Williams (1997) 55 Cal.App.4th 648, 653 [64 Cal. Rptr. 2d 203]*; see *People v. McGowan (2008) 160 Cal.App.4th 1099, 1105 [74 Cal. Rptr. 3d 57]*.)

2. *Third Party Culpability*

Defendant contends the trial court improperly excluded third party culpability evidence and precluded him from arguing that someone else committed the crimes here. There was no error.

a. *Background*

The defense sought pretrial **[****37]** discovery of files from a federal drug trafficking investigation tangentially involving the victim's father, Luis Arroyo. Defense counsel explained the information was relevant to Luis's possible involvement in Laura's disappearance. The court warned that if the defense was pursuing a third party culpability **[***303]** theory, and "if you are seeking reports that are going to suggest that some other specific party is involved in the murder, I thought that had to be the basis of a noticed motion." After reviewing the Drug Enforcement Administration records in camera, the court determined there was no relevant information pertaining to Mr. Arroyo and denied the request.

The court thereafter took evidence on the question of pretrial delay. (See discussion *ante*.) During that hearing, there was evidence that Luis Arroyo had completed a police investigative questionnaire. He listed as one of the "five most important causes that would have created this situation [involving **[**957]** Laura's case]" the sale of a family-owned taco shop to Guadalupe Echeverria. The defense also presented evidence of a letter sent by Echeverria's lawyer alleging the Arroyos had made misrepresentations about the sale. Echeverria died **[****38]** in December 1991. Detective Maxey testified he looked into the taco shop transaction but did not interview Echeverria.

At trial, Enrique Loa testified that he had seen a small brown car with several occupants parked in the cul-de-sac around 8:45 to 9:00 p.m. on the night of Laura's disappearance. Loa's sister, Teresa Thomas, testified Loa told her that night he had seen a brown Datsun with three men and a woman inside and that the occupants "squatted down to hide." Thomas then saw the car and occupants from her balcony. Robert Vazquez, who was with Loa that night, told police that he had seen a reddish-brown car parked in the cul-de-sac, describing the occupants as a Filipino man, two Filipino women in their thirties, and a Filipino woman "about 50 to 60." The victim's

[9] Defendant's reliance on *Wardius v. Oregon (1973) 412 U.S. 470 [37 L. Ed. 2d 82, 93 S. Ct. 2208]* fails for similar reasons. *Wardius* held that due process principles precluded enforcement of a rule requiring defendants give notice of an alibi defense "unless reciprocal discovery rights are given to criminal defendants" (*id. at p. 472*), reasoning "[i]t is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State" (*id. at p. 476*). As discussed, however, evidence of flight does not stand on equal footing with evidence regarding absence of flight.

mother informed police that some friends told her that they had seen a small brown **[*1000]** car with three men and a woman parked in the cul-de-sac between 8:50 and 9:00 p.m. On cross-examination, Mrs. Arroyo testified she did not remember hearing about a Datsun with four occupants or telling the police she suspected "a female from the taco shop" might have been involved in Laura's disappearance.

During cross-examination of Detective **[****39]** Maxey, defense counsel asked whether police investigated the Arroyos' possible involvement in drug activity. The court sustained three prosecution objections on relevance grounds. The questioning then turned to the taco shop sale. Maxey testified that both the person who sold the shop to the Arroyos and a subsequent purchaser were "unhappy with Mr. Arroyo." The court excluded, as calling for hearsay, questions about Luis's questionnaire responses, the attorney letter to the Arroyos, and the name of another person involved in the sale. When defense counsel began to ask whether Luis had received threats at his workplace, the prosecutor asked for a sidebar. The prosecutor objected "to apparently all these lines of questioning having to do with third-party culpability and trying to get it in through hearsay." The court suggested the admissibility of such evidence should have been raised in a noticed, pretrial motion. When defense counsel insisted she was not eliciting the evidence for its truth but only to raise doubts regarding the thoroughness of the police investigation, the court questioned the relevance of the evidence and concluded "when I see something like this, I'll go ahead and **[****40]** make sure that it doesn't get to the panel." When cross-examination resumed, defense counsel pursued a different line of questioning.

b. *There Was No Error*

Defendant cannot demonstrate error on this record. Initially, although defendant suggests the court "cut off the defense from fully developing" his eschewed **[***304]** third party culpability theory, he makes no effort to identify what specific evidence the court precluded. Through cross-examination of prosecution witnesses, the defense elicited that a car with up to four occupants had been seen parked in the cul-de-sac at the time of Laura's disappearance. Defense counsel asked Detective Maxey whether he investigated the taco shop sale as a possible motive for the crimes here. Although the court sustained hearsay objections to the contents of an attorney letter about the sale, defendant makes no argument here that a hearsay exception applied or that the letter itself was otherwise admissible.

(10) Further, there was no basis for admitting the taco shop evidence. The defense theory appears to have been that Echeverria was a disgruntled purchaser and that an older passenger in a "suspicious" car parked in the vicinity was a woman. Whatever evidence **[****41]** supported this theory would have **[*1001]** shown "mere motive or opportunity to commit the crime in another person" without providing any "direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Hall (1986) 41 Cal.3d 826, 833 [226 Cal. Rptr. 112, 718 P.2d 99]*.) "We have repeatedly upheld the exclusion of third party culpability evidence when the third party's link to a crime is tenuous or speculative." (*People v. Turner (2020) 10 Cal.5th 786, 817 [272 Cal. Rptr. 3d 50, **[**958]** 476 P.3d 676] (Turner)*.) As we explained in *Turner*, "admissible evidence of this nature points to the culpability of a *specific* third party, not the possibility that some unidentified third party could have committed the crime. [Citations.] For the evidence to be relevant and admissible, 'there must be *direct* or *circumstantial evidence linking the third person to the actual perpetration of the crime*.'" (*Id. at pp. 816–817*.) Defendant's argument here fails because there is no evidence linking the brown car's occupants, whoever they were, to the abduction of Laura, or with Echeverria for that matter. (See *People v. Kaurish (1990) 52 Cal.3d 648, 685 [276 Cal. Rptr. 788, 802 P.2d 278]*.) Defendant's third party evidence argument rests on two layers of speculation: 1. That Echeverria was one of the occupants of a car seen parked near the kidnapping scene, and 2. that those occupants had something to do with Laura's disappearance. (See **[****42]** *Turner, at pp. 817–818*; *People v. Ghobrial (2018) 5 Cal.5th 250, 283–284 [234 Cal. Rptr. 3d 669, 420 P.3d 179]*; *People v. Alcala (1992) 4 Cal.4th 742, 792–793 [15 Cal. Rptr. 2d 432, 842 P.2d 1192]*.) The state of the record defeats his claim.

C. *Penalty Phase Issues*

1. *Victim Impact Evidence*

Defendant contends the trial court improperly allowed victim impact testimony from Laura's third grade teacher, Mari Peterson. There was no error.

a. *Background*

Before the penalty phase, the parties discussed the prosecutor's intent to offer the video of a conversation between Laura and her teacher. Defense counsel noted that the teacher was on the prosecution's witness list and inquired whether she would merely authenticate the video or give victim impact testimony. The prosecutor clarified that the teacher would testify about the "impact of Laura's death on her, friends, and community. Her little friends and community." The defense objected to the presentation of victim impact testimony from someone outside the victim's family, and the parties discussed relevant case authority. The trial court overruled the objection but clarified that the teacher

[*305]** would only be allowed to discuss the impact of **[*1002]** Laura's death in the days immediately following the murder, excluding evidence that Laura's classmates purchased a plaque in her honor two or three years later.

Mari Peterson testified she was Laura's **[****43]** third grade teacher in 1991 and knew Laura "very well." Laura was Peterson's "favorite student that year" and "was the type of student that from the time you met her, you just wanted to love her." Laura "loved school," was "best friends with everybody," and would welcome new students. Peterson described the atmosphere at school the morning after Laura disappeared. Her father was passing out flyers and concerned parents were asking questions. Half the students "were crying already" and "wanted to know where their friend was." When Laura's body was discovered later that morning, Peterson and a psychologist broke the news to the students. Peterson described the impact on Laura's classmates: "Of course, they are not going to work. All they want to do is they want to know things. They want to know where she is. They want her back. Everybody wanted to sit at her desk. It was terrible." After Laura's death, parents began walking their children to and from school. Many children attended Laura's funeral, which "was packed," and Peterson described how Laura's body was in a "tiny little casket" with a teddy bear. At the burial there were "just so many kids crying." After Laura's death, Peterson **[****44]** was unable to teach third grade again. She felt guilty for missing the last day Laura attended class. Peterson identified Laura's class photo and a clip of the video conversation with Laura.

b. *There Was No Error*

(11) Defendant contends Peterson's testimony constituted "an inflammatory appeal to the raw sentiments of the jurors that went well beyond" permissible victim impact evidence, and the probative value of the evidence was substantially outweighed by the probability of undue prejudice. We reject these claims. "The *Eighth Amendment* does not categorically bar victim impact evidence. **[**959]** [Citation.] To the contrary, witnesses are permitted to share with jurors the harm that a capital crime caused in their lives." (*People v. Perez (2018) 4 Cal.5th 421, 461–462 [229 Cal. Rptr. 3d 303, 411 P.3d 490]*.) "That is because 'the effects of a capital crime are relevant … as a circumstance of the crime.' [Citations.] And so long as victim impact evidence does not invite the jury to respond in a purely irrational way, it is admissible." (*People v. Mendez (2019) 7 Cal.5th 680, 712 [249 Cal. Rptr. 3d 49, 443 P.3d 896]*.) "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." (*Payne v. Tennessee (1991) 501 U.S. 808, 825 [115 L. Ed. 2d 720, 111 S. Ct. 2597]*.) ""'Unless it invites a purely irrational **[****45]** response from the **[*1003]** jury, the devastating effect of a capital crime on loved ones *and the community* is relevant and admissible as a circumstance of the crime under *section 190.3, factor (a)*." [Citation.] "The federal Constitution bars victim impact evidence only if it is 'so unduly prejudicial' as to render the trial 'fundamentally unfair.'" [Citation.]'" (*People v. Westerfield (2019) 6 Cal.5th 632, 729 [243 Cal. Rptr. 3d 18, 433 P.3d 914], italics added (Westerfield)*.)

(12) *Westerfield* recently endorsed similar victim impact testimony from teachers "regarding [the victim's] character and contributions, and to the effect of her murder on themselves and [her] classmates." (*Westerfield, supra, 6 Cal.5th at p. 728*.) *Westerfield* reasoned: "'The purpose of victim impact evidence **[***306]** is to demonstrate the immediate harm caused by the defendant's criminal conduct.' [Citation.] That harm is not limited to immediate family members. [Citation.] Friends, coworkers, classmates, and teachers, may all be affected by the death of the victim under the specific circumstances of a case. [Citations.] Here, defendant's shocking abduction and murder of seven-year-old Danielle caused emotional harm to her teachers and classmates. Our review of the record does not persuade us that her teachers' testimony regarding Danielle and those effects would invite a purely irrational response from the jury **[****46]** or that it rendered defendant's trial fundamentally unfair under the circumstances." (*Id. at p. 729*.)

Westerfield's reasoning applies equally here. Laura was very close to her teacher and classmates. The impact of her death on this community was relevant to assessing the harm defendant caused. "Moreover, we have repeatedly held that evidence related to a murder victim's funeral is relevant and admissible." (*People v. Winbush (2017) 2 Cal.5th 402, 465 [213 Cal. Rptr. 3d 1, 387 P.3d 1187]*.) Peterson's descriptions of the funeral and burial were not so emotional as to elicit a purely irrational response from the jury. (See *ibid.* [testimony regarding victim's funeral and family's grave visits proper]; *People v. Brady (2010) 50 Cal.4th 547, 579–581 [113 Cal. Rptr. 3d 458, 236 P.3d 312]* [videotape of victim's funeral properly admitted]; see also *People v. Dykes (2009) 46 Cal.4th 731, 780, 782 [95 Cal. Rptr. 3d 78, 209 P.3d 1]*; *People v. Verdugo (2010) 50 Cal.4th 263, 296–298 [113 Cal. Rptr. 3d 803, 236 P.3d 1035]*.)

2. *Constitutionality of the Death Penalty Statute*

Defendant raises numerous familiar challenges to the constitutionality of California's death penalty scheme. His primary contention is that, when the jury returns a death

verdict, it must conclude beyond a reasonable doubt that the aggravating factors outweigh the mitigating ones, because such a finding increases punishment. Proof of that nature is not required. As we have previously stated, "the only burden of proof applicable at the penalty phase" **[*1004]** involves proof of the commission **[****47]** or conviction of other crimes under *Penal Code section 190.3 factors (b)* and *(c)*. (*People v. Capers (2019) 7 Cal.5th 989, 1015 [251 Cal. Rptr. 3d 80, 446 P.3d 726] (Capers)*.) "Otherwise, our cases do not require that a burden of proof be applied to aggravating evidence." (*Ibid.*) "We have previously held that the death penalty is not unconstitutional '"'for failing to require proof beyond a reasonable doubt that aggravating factors exist, outweigh the mitigating factors, and render death the appropriate punishment.' [Citation.]"' [Citation.] We also have consistently held the death penalty does **[**960]** not constitute an increased sentence. [Citation.] And we have determined that these conclusions are unaltered by *Apprendi v. New Jersey (2000) 530 U.S. 466 [147 L. Ed. 2d 435, 120 S. Ct. 2348]*, *Ring v. Arizona (2002) 536 U.S. 584 [153 L. Ed. 2d 556, 122 S. Ct. 2428]*, *Blakely v. Washington (2004) 542 U.S. 296 [159 L. Ed. 2d 403, 124 S. Ct. 2531]*, or *Cunningham v. California (2007) 549 U.S. 270 [166 L. Ed. 2d 856, 127 S. Ct. 856]*. [Citation.]" (*People v. Wilson (2021) 11 Cal.5th 259, 317 [277 Cal. Rptr. 3d 24, 484 P.3d 36] (Wilson)*.) The jury's determination of the appropriate sentence within the statutorily specified options "is 'an inherently moral and normative function, and not a factual one amenable to burden of proof calculations' [citation], [and] the prosecution has no obligation to bear a burden of proof or persuasion [citation]. Nor does the federal Constitution require an instruction that life **[***307]** is the presumptive penalty." (*Turner, supra, 10 Cal.5th at p. 828*.)

Defendant relies upon *Hurst v. Florida (2016) 577 U.S. 92 [193 L. Ed. 2d 504, 136 S. Ct. 616]*, but we have explained that case "does not alter our conclusion under the federal Constitution or under the **[****48]** *Sixth Amendment* about the burden of proof or unanimity regarding aggravating circumstances, the weighing of aggravating and mitigating circumstances, or the ultimate penalty determination. [Citations.] And we have concluded that *Hurst* does not cause us to reconsider our holdings that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi[v. New Jersey], supra, 530 U.S. 466*, or that the imposition of the death penalty does not require factual findings within the meaning of *Ring v. Arizona[, supra,] 536 U.S. 584*. [Citation.] As [defendant] acknowledges, neither *Ring* nor *Hurst* decided the standard of proof that applies to the ultimate weighing consideration." (*People v. McDaniel (2021) 12 Cal.5th 97, 155–156 [283 Cal. Rptr. 3d 32, 493 P.3d 815]*.)

Likewise, *Rauf v. State (Del. 2016) 145 A.3d 430*, cited by defendant, does not call our prior decisions into doubt. The Delaware statute at issue there, like the Florida statute in *Hurst*, required *the trial court*, rather than the jury, to engage in additional factfinding before it determined whether death was the appropriate sentence. Under that statutory approach, the jury's findings **[*1005]** were merely recommendations. (See *Del. Code Ann. tit. 11, § 4209(d)*.)[10] As we have noted with respect to *Hurst*, "[t]he California sentencing scheme is materially different from that in Florida, which, in contrast to our death penalty statutes, mandates that the trial court *alone* must find **[****49]** that sufficient aggravating circumstances outweigh the mitigating circumstances." (*Capers, supra, 7 Cal.5th at p. 1014*.) The same is true with respect to the Delaware statute at issue in *Rauf*.

In addition to his primary claim, defendant summarily asserts other challenges to the death penalty statute and related instructions that we have previously rejected. He does so "in order to urge reconsideration and to preserve these claims for federal review," but he presents no compelling argument to reconsider our precedents. We reject these claims as follows:

1. The death penalty statute is not impermissibly overbroad. It adequately narrows the class of defendants eligible for a death sentence. (*Wilson, supra, 11 Cal.5th at p. 317*; *People **[**961]** v. Chhoun (2021) 11 Cal.5th 1, 53 [275 Cal. Rptr. 3d 2, 480 P.3d 550] (Chhoun)*; *Bell, supra, 7 Cal.5th at p. 130*; **[***308]** *Westerfield, supra, 6 Cal.5th at p. 733*.)

2. *Penal Code section 190.3, factor (a)*, which directs the jury to consider the "circumstances of the crime," is not overbroad. (See *People v. Scully (2021) 11 Cal.5th 542, 610 [278 Cal. Rptr. 3d 792, 486 P.3d 1029] (Scully)*; *Wilson, supra, 11 Cal.5th at p. 317*; *Chhoun, supra, 11 Cal.5th at p.*

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[10] The Delaware statute states in part that "the Court, after considering the findings and recommendation of the jury and without hearing or reviewing any additional evidence, shall impose a sentence of death if the Court finds by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist. The jury's recommendation concerning whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist shall be given such consideration as deemed appropriate by the Court in light of the particular circumstances or details of the commission of the offense and the character and propensities of the offender as found to exist by the Court. The jury's recommendation shall not be binding upon the Court." (*Del. Code Ann. tit. 11, § 4209(d)(1)*.)

54; Bell, supra, 7 Cal.5th at p. 130.)

3. The prosecution did not bear the burden of persuasion regarding proof of any aggravating factor, the weighing of aggravating and mitigating factors, or imposition of the death penalty. There was also no requirement to instruct the jury regarding the lack of a burden of proof. (Wilson, supra, 11 Cal.5th at p. 317; Chhoun, supra, 11 Cal.5th at p. 54; Bell, supra, 7 Cal.5th at p. 131.)
[*1006]

4. The jury need not find individual aggravating factors unanimously. (Wilson, supra, 11 Cal.5th at p. 317; Chhoun, supra, 11 Cal.5th at p. 54; Westerfield, supra, 6 Cal.5th at p. 733.)

5. An instruction that the jury should determine whether "the **[****50]** aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole" was not impermissibly vague. (See Scully, supra, 11 Cal.5th at p. 609; Wilson, supra, 11 Cal.5th at p. 318.)

6. CALJIC No. 8.88 is not unconstitutional for directing the jury to determine whether the aggravating circumstances "warrant" death rather than that the death penalty is "appropriate," or for failing to expressly state that the jury should return a life sentence if it finds mitigating circumstances outweigh aggravating ones. (Wilson, supra, 11 Cal.5th at p. 318; Chhoun, supra, 11 Cal.5th at p. 54; People v. Morales (2020) 10 Cal.5th 76, 112 [266 Cal. Rptr. 3d 706, 470 P.3d 605].)

7. There is no presumption in favor of a life term. (Wilson, supra, 11 Cal.5th at pp. 317–318; Chhoun, supra, 11 Cal.5th at p. 54; People v. Ramirez (2021) 10 Cal.5th 983, 1039 [274 Cal. Rptr. 3d 309, 479 P.3d 797] (Ramirez).)

8. The jury need not make written findings. (Wilson, supra, 11 Cal.5th at p. 317; Chhoun, supra, 11 Cal.5th at p. 54; Bell, supra, 7 Cal.5th at p. 131.)

9. The use of adjectives "extreme" and "substantial" do not improperly limit the jury's consideration of certain mitigating factors. (Wilson, supra, 11 Cal.5th at p. 318; Chhoun, supra, 11 Cal.5th at p. 55; Bell, supra, 7 Cal.5th at p. 130.)

10. There was no requirement that inapplicable sentencing factors be deleted. (People v. Dworak (2021) 11 Cal.5th 881, 917 [281 Cal. Rptr. 3d 176, 490 P.3d 330]; Wilson, supra, 11 Cal.5th at p. 318; Chhoun, supra, 11 Cal.5th at p. 55.)

[*309]** 11. There was no requirement to identify factors that were only mitigating. (Chhoun, supra, 11 Cal.5th at p. 55; Ramirez, supra, 10 Cal.5th at p. 1040; Bell, supra, 7 Cal.5th at p. 130.)

12. Intercase proportionality review is not constitutionally required. (Wilson, supra, 11 Cal.5th at p. 318; Chhoun, supra, 11 Cal.5th at p. 55; Bell, supra, 7 Cal.5th at p. 131; Westerfield, supra, 6 ***[**962]*** Cal.5th at p. 734.)

13. The death penalty scheme does not violate equal protection principles "by providing significantly fewer procedural protections for persons facing a **[*1007]** death sentence than are afforded persons **[****51]** charged with noncapital crimes." (See Wilson, supra, 11 Cal.5th at p. 318; Chhoun, supra, 11 Cal.5th at p. 55; Bell, supra, 7 Cal.5th at p. 131.)

14. The death penalty is not a "regular" punishment that violates international norms. (Wilson, supra, 11 Cal.5th at p. 318; Chhoun, supra, 11 Cal.5th at p. 55; Bell, supra, 7 Cal.5th at pp. 131–132.)

D. *Cumulative Error Claim*

Defendant contends cumulative error deprived him of a fair trial. The only potential error identified was defendant's shackling, for which he failed to establish prejudice. Therefore, there is no reversable error to accumulate. (Bell, supra, 7 Cal.5th at p. 132; Westerfield, supra, 6 Cal.5th at p. 728.)

III. DISPOSITION

The judgment is affirmed.

Cantil-Sakauye, C. J., Liu, J., Kruger, J., Groban, J., Jenkins, J., and Menetrez, J.,* concurred.

Appellant's petition for a rehearing was denied June 15, 2022.

End of Document

* Associate Justice of the Court of Appeal, Fourth Appellate District, Division Two, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX B

***People v. Manuel Bracamontes*, Cal. Supreme Ct. Case No. S139702**
Order Denying Petition for Rehearing, June 15, 2022

S139702

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

MANUEL BRACAMONTES, Defendant and Appellant.

The petition for rehearing is denied.

CANTIL-SAKAUYE
Chief Justice

No. S139702

IN THE SUPREME COURT OF CALIFORNIA

REMITTITUR

TO THE SUPERIOR COURT, COUNTY OF SAN DIEGO
Case no. SCD178329

THE PEOPLE,
Plaintiff and Respondent,

v.

MANUEL BRACAMONTES,
Defendant and Appellant.

I, JORGE E. NAVARRETE, Clerk of the Supreme Court of the State of California, do hereby certify that the attached is a true copy of an original judgment entered in the above-entitled cause on April 11, 2022.

WITNESS MY HAND AND OFFICIAL
SEAL OF THE COURT, JUNE 15, 2022

JORGE E. NAVARRETE, Clerk

SEAL

By /s/ Anril Boelk
DEPUTY

APPENDIX C

Bracamontes v. California, Letter Granting Petitioner's Application for Extension of Time to File Petition for Writ of Certiorari to the Supreme Court of the State of California, Filed August 23, 2022, Application No. 22A180

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

August 25, 2022

Mr. Albert Joel Kutchins
Office of the State Public Defender
1111 Broadway
Suite 1000
Oakland, CA 94607

Re: Manuel Bracamontes
v. California
Application No. 22A180

Dear Mr. Kutchins:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kagan, who on August 25, 2022, extended the time to and including November 12, 2022.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Susan Frimpong
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. Albert Joel Kutchins
Office of the State Public Defender
1111 Broadway
Suite 1000
Oakland, CA 94607

Clerk
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-3600

APPENDIX D

California Penal Code sections 187, 190, 190.1, 190.2, 190.3, 190.4 and 190.5

Cal Pen Code § 187, Part 1 of 2

Deering's California Codes are current through the 2022 Regular Session.

Deering's California Codes Annotated > PENAL CODE (§§ 1 — 34370) > Part 1 Of Crimes and Punishments (Titles 1 — 17) > Title 8 Of Crimes Against the Person (Chs. 1 — 11) > Chapter 1 Homicide (§§ 187 — 199)

§ 187. Murder defined

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

(b) This section shall not apply to any person who commits an act that results in the death of a fetus if any of the following apply:

(1) The act complied with the Therapeutic Abortion Act, Article 2 (commencing with *Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code*.

(2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.

(3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.

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

History

Enacted 1872. Amended Stats 1970 ch 1311 § 1; *Stats 1996 ch 1023 § 385 (SB 1497)*, effective September 29, 1996.

End of Document

Cal Pen Code § 190

Deering's California Codes are current through the 2022 Regular Session.

Deering's California Codes Annotated > PENAL CODE (§§ 1 — 34370) > Part 1 Of Crimes and Punishments (Titles 1 — 17) > Title 8 Of Crimes Against the Person (Chs. 1 — 11) > Chapter 1 Homicide (§§ 187 — 199)

§ 190. Punishment for murder

(a) Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life. The penalty to be applied shall be determined as provided in *Sections 190.1*, *190.2*, *190.3*, *190.4*, and *190.5*.

Except as provided in subdivision (b), (c), or (d), every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 15 years to life.

(b) Except as provided in subdivision (c), every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 25 years to life if the victim was a peace officer, as defined in subdivision (a) of *Section 830.1*, subdivision (a), (b), or (c) of *Section 830.2*, subdivision (a) of *Section 830.33*, or *Section 830.5*, who was killed while engaged in the performance of his or her duties, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties.

(c) Every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of life without the possibility of parole if the victim was a peace officer, as defined in subdivision (a) of *Section 830.1*, subdivision (a), (b), or (c) of *Section 830.2*, subdivision (a) of *Section 830.33*, or *Section 830.5*, who was killed while engaged in the performance of his or her duties, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties, and any of the following facts has been charged and found true:

(1) The defendant specifically intended to kill the peace officer.

(2) The defendant specifically intended to inflict great bodily injury, as defined in *Section 12022.7*, on a peace officer.

(3) The defendant personally used a dangerous or deadly weapon in the commission of the offense, in violation of subdivision (b) of *Section 12022*.

(4) The defendant personally used a firearm in the commission of the offense, in violation of *Section 12022.5*.

(d) Every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 20 years to life if the killing was perpetrated by means of shooting a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict great bodily injury.

(e) Article 2.5 (commencing with *Section 2930*) of Chapter 7 of Title 1 of Part 3 shall not apply to reduce any minimum term of a sentence imposed pursuant to this section. A person sentenced pursuant to this section shall not be released on parole prior to serving the minimum term of confinement prescribed by this section.

History

Added by initiative measure § 2, approved November 7, 1978. Amended *Stats 1987 ch 1006 § 1*, approved by voters Prop. 67, effective June 8, 1988; *Stats 1993 ch 609 § 3 (SB 310)*, approved by voters Prop. 179, effective June 8, 1994; *Stats 1997 ch 413 § 1 (AB 446)*, approved by voters Prop. 222, effective June 3, 1998; *Stats 1998 ch 760 § 6 (SB 1690)*, approved by the voters, at the March 7, 2000, primary election (Prop 19), effective March 8, 2000.

End of Document

Cal Pen Code § 190.1

Deering's California Codes are current through the 2022 Regular Session.

Deering's California Codes Annotated > PENAL CODE (§§ 1 — 34370) > Part 1 Of Crimes and Punishments (Titles 1 — 17) > Title 8 Of Crimes Against the Person (Chs. 1 — 11) > Chapter 1 Homicide (§§ 187 — 199)

§ 190.1. Procedure in case involving death penalty

A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

(a) The question of the defendant's guilt shall be first determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in *Section 190.2* except for a special circumstance charged pursuant to paragraph (2) of subdivision (a) of *Section 190.2* where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder in the first or second degree.

(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (2) of subdivision (a) of *Section 190.2* which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in *Section 190.2* has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under *Section 1026* shall be determined as provided in *Section 190.4*. If he is found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such proceedings shall be conducted in accordance with the provisions of *Section 190.3* and *190.4*.

History

Added by initiative measure § 4, approved November 7, 1978.

End of Document

Cal Pen Code § 190.2

Deering's California Codes are current through the 2022 Regular Session.

Deering's California Codes Annotated > PENAL CODE (§§ 1 — 34370) > Part 1 Of Crimes and Punishments (Titles 1 — 17) > Title 8 Of Crimes Against the Person (Chs. 1 — 11) > Chapter 1 Homicide (§§ 187 — 199)

§ 190.2. Penalty on finding special circumstances

(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under *Section 190.4* to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was convicted previously of murder in the first or second degree. For the purpose of this paragraph, an offense committed in another jurisdiction, which if committed in California would be punishable as first or second degree murder, shall be deemed murder in the first or second degree.

(3) The defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree.

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden, or concealed in any place, area, dwelling, building, or structure, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect, an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or caused to be mailed or delivered, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.

(7) The victim was a peace officer, as defined in *Section 830.1*, *830.2*, *830.3*, *830.31*, *830.32*, *830.33*, *830.34*, *830.35*, *830.36*, *830.37*, *830.4*, *830.5*, *830.6*, *830.10*, *830.11*, or *830.12*, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer, as defined in the above-enumerated sections, or a former peace officer under any of those sections, and was intentionally killed in retaliation for the performance of his or her official duties.

(8) The victim was a federal law enforcement officer or agent who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a federal law enforcement officer or agent engaged in the performance of his or her duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his or her official duties.

(9) The victim was a firefighter, as defined in *Section 245.1*, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a firefighter engaged in the performance of his or her duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding. As used in

this paragraph, "juvenile proceeding" means a proceeding brought pursuant to Section *602* or *707 of the Welfare and Institutions Code*.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this or any other state, or of a federal prosecutor's office, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(12) The victim was a judge or former judge of any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(13) The victim was an elected or appointed official or former official of the federal government, or of any local or state government of this or any other state, and the killing was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity. As used in this section, the phrase "especially heinous, atrocious, or cruel, manifesting exceptional depravity" means a conscienceless or pitiless crime that is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim by means of lying in wait.

(16) The victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin.

(17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies:

(A) Robbery in violation of *Section 211* or *212.5*.

(B) Kidnapping in violation of *Section 207*, *209*, or *209.5*.

(C) Rape in violation of *Section 261*.

(D) Sodomy in violation of *Section 286*.

(E) The performance of a lewd or lascivious act upon the person of a child under the age of 14 years in violation of *Section 288*.

(F) Oral copulation in violation of Section 287 or former Section 288a.

(G) Burglary in the first or second degree in violation of *Section 460*.

(H) Arson in violation of subdivision (b) of *Section 451*.

(I) Train wrecking in violation of *Section 219*.

(J) Mayhem in violation of *Section 203*.

(K) Rape by instrument in violation of *Section 289*.

(L) Carjacking, as defined in *Section 215*.

(M) To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder.

(18) The murder was intentional and involved the infliction of torture.

(19) The defendant intentionally killed the victim by the administration of poison.

(20) The victim was a juror in any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(21) The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death. For purposes of this paragraph, "motor vehicle" means any vehicle as defined in *Section 415 of the Vehicle Code*.

(22) The defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of *Section 186.22*, and the murder was carried out to further the activities of the criminal street gang.

(b) Unless an intent to kill is specifically required under subdivision (a) for a special circumstance enumerated therein, an actual killer, as to whom the special circumstance has been found to be true under *Section 190.4*, need not have had any intent to kill at the time of the commission of the offense which is the basis of the special circumstance in order to suffer death or confinement in the state prison for life without the possibility of parole.

(c) Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under *Section 190.4*.

(d) Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under *Section 190.4*.

The penalty shall be determined as provided in this section and *Sections 190.1*, *190.3*, *190.4*, and *190.5*.

History

Added by initiative measure § 6, approved November 7, 1978. Amended *Stats 1989 ch 1165 § 16*, approved by the voters, Prop 114, effective June 6, 1990; Amendment adopted by voters, Prop 115 § 10, effective June 6, 1990; *Stats 1995 ch 478 § 2*, approved by the voters, at the March 26, 1996, primary election (Prop 196), effective March 27, 1996; *Stats 1998 ch 629 § 2 (SB 1878)*, approved by the voters at the March 7, 2000 primary election (Prop 18), effective March 8, 2000, amendment adopted by voters, Prop 21 § 11, effective March 8, 2000; *Stats 2018 ch 423 § 43 (SB 1494)*, effective January 1, 2019.

Cal Pen Code § 190.3

Deering's California Codes are current through the 2022 Regular Session.

Deering's California Codes Annotated > PENAL CODE (§§ 1 — 34370) > Part 1 Of Crimes and Punishments (Titles 1 — 17) > Title 8 Of Crimes Against the Person (Chs. 1 — 11) > Chapter 1 Homicide (§§ 187 — 199)

§ 190.3. Determination as to penalty of death or life imprisonment

If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of *Section 1672 of the Military and Veterans Code* or *Sections 37*, *128*, *219*, or *4500* of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

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

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to *Section 190.1*.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

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

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

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

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

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

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

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

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

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

History

Added by initiative measure § 8, approved November 7, 1978.

Cal Pen Code § 190.4

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Deering's California Codes Annotated > PENAL CODE (§§ 1 — 34370) > Part 1 Of Crimes and Punishments (Titles 1 — 17) > Title 8 Of Crimes Against the Person (Chs. 1 — 11) > Chapter 1 Homicide (§§ 187 — 199)

§ 190.4. Special finding on truth of each alleged special circumstance

(a) Whenever special circumstances as enumerated in *Section 190.2* are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to Subdivision (b) of *Section 190.1*.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Whenever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

If the trier of fact finds that any one or more of the special circumstances enumerated in *Section 190.2* as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of a separate penalty hearing.

In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach an unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by an unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and in the court's discretion shall either order a new jury impaneled to try the issues the previous jury was unable to reach the unanimous verdict on, or impose a punishment of confinement in state prison for a term of 25 years.

(b) If defendant was convicted by the court sitting without a jury the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

(c) If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to *Section 1026*, the truth of any

special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

(d) In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial, including any proceeding under a plea of not guilty by reason of insanity pursuant to *Section 1026* shall be considered an any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of *Section 11*. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in *Section 190.3*, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of the death penalty verdict pursuant to subdivision (7) of *Section 1181* shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of *Section 1239*. The granting of the application shall be reviewed on the People's appeal pursuant to paragraph (6).

History

Added by initiative measure § 10, approved November 7, 1978.

Cal Pen Code § 190.5

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§ 190.5. Death penalty for person under age 18

(a) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who is under the age of 18 at the time of the commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

(b) The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in *Section 190.2* or *190.25* has been found to be true under *Section 190.4*, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life.

(c) The trier of fact shall determine the existence of any special circumstance pursuant to the procedure set forth in *Section 190.4*.

History

Added by initiative measure § 12, approved November 7, 1978. Amendment adopted by voters, Prop 115 § 12, effective June 6, 1990.

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