No. _____

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR M. MIRANDA-GUERRERO, *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

DENISE KENDALL
Assistant State Public Defender
**Counsel of Record*

OFFICE OF THE STATE
PUBLIC DEFENDER
1111 Broadway, Suite 1000
Oakland, CA 94607
Denise.Kendall@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. Victor M. Miranda-Guerrero, Case No. 00WF1146
Superior Court of Orange County (California).
(Trial judgment entered August 4, 2003)

People v. Victor M. Miranda-Guerrero, Case No. S118147
Supreme Court of California
(Direct appeal, decision issue date November 17, 2022)

People v. Victor M. Miranda-Guerrero, Case No. S118147
Supreme Court of California
(Petition for rehearing denied January 25, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

State Statutes

Constitutional Provisions

Jury Instructions

Other Authorities

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR M. MIRANDA-GUERRERO, *Petitioner*

v.

STATE OF CALIFORNIA, *Respondent*.

ON A PETITION FOR WRIT OF CERTIORARI

TO THE CALIFORNIA SUPREME COURT

(DEATH PENALTY CASE)

Petitioner, Victor M. Miranda-Guerrero, 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, Victor M. Miranda-Guerrero, and respondent, the People of the State of California.

OPINION BELOW

The California Supreme Court issued an opinion in this case on November 17, 2022, reported as *People v. Miranda-Guerrero*, 14 Cal.5th 1 (2022) (*Miranda-Guerrero).* A copy of the published opinion is attached as Appendix A. On January 25, 2023, 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 November 17, 2022, and denied a timely filed petition for rehearing on January 25, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. 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 . . .."

B. STATE STATUTORY PROVISIONS

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

//

STATEMENT OF CASE

I. INTRODUCTION

Petitioner was convicted and sentenced under California's death penalty law, adopted by an initiative measure in 1978. Cal. Penal Code §§ 190-190.4.[1] 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).

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 Instructions, 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.[2] Pursuant to section 190.3, the jury "shall

---

[1] 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.

[2] 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

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 now consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances" and could sentence petitioner to death only 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." 3 CT 641-42; 17 RT 3381-82; CALJIC No. 8.88.[3] 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

---

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.

[3] 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."

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.[4] Further, the state high court has also concluded that a capital sentencing jury 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

---

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

> 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

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).

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

II. PROCEDURAL HISTORY

Petitioner was charged with the first-degree murder of Bridgette Ballas and other offenses. The jury found petitioner guilty of the murder with special circumstances (murder while engaged in the commission or attempted commission of rape). The jury also convicted petitioner of other non-capital offenses (kidnap with the intent to commit rape, assault with the intent to commit rape, attempted carjacking, receiving stolen property). The jury found true allegations of serious felonies. *Miranda-Guerrero*, 14 Cal.5th at 6.

At the penalty phase, the prosecutor's case in aggravation consisted of the facts of the charged offenses and victim impact evidence from Bridgette Ballas's family. *Miranda-Guerrero*, 14 Cal.5th at 10. In mitigation, the defense presented evidence of the effects of petitioner's family life and childhood in Mexico on petitioner's neuropsychological, developmental and social impairments. *Id.* at 10-11.

The court then instructed the jury in accordance with the statutory sentencing scheme at issue here. 3 CT 641-42; 17 RT 3381-82; CALJIC No. 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. 17 RT 3382. 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.

17 RT 3382; CALJIC No. 8.88.

The jury returned a verdict of death, and judgment was entered on April 23, 2003. 3 CT 635, 698.

On direct appeal petitioner argued that the Sixth and Fourteenth Amendments, as interpreted in *Blakely v. Washington*, 542 U.S. 296 (2004), *Ring v. Arizona*, 536 U.S. 584, 604 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000), 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, *Blakely*, *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 239-40, *Miranda-Guerrero*, 14 Cal.5th at 1 (Cal. Sup. Ct. No. S118147).

The California Supreme Court, noting it had "repeatedly considered and rejected such challenges," "decline[d] to reconsider" its prior conclusions. *Miranda-Guerrero*, 14 Cal.5th at 32. It rejected petitioner's claims, citing *People v. McDaniel*, 12 Cal.5th 97, 142–43 (2021); *People v. Anderson*, 25 Cal.4th 543, 601 (2001) which hold "California's death penalty scheme is [not] constitutionally deficient because it does not require unanimous jury findings as to the aggravating circumstances and does not require the jury to find beyond a reasonable doubt any aggravating factors except prior felony convictions or violent crimes that did not result in a conviction."

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 v. Florida*, 577 U.S. 92, 94 (2016) (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.[5]

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.

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

---

[5] 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*.

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 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 uniformly applied 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*, 297 So.3d 487 (Fla. 2020), the Florida Supreme Court determined that it had erred in its 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 507-08. When a jury has found one or more "eligibility" factors, there is no state or federal constitutional mandate that the jury make the selection finding or recommend a sentence of death. *Id.* at 503.

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 penalty range increases to either life imprisonment without the possibility of parole or death. § 190.2, subd. (a). Without any further jury findings, the maximum punishment the defendant can receive is life imprisonment without the possibility of parole. *See, e.g., People v. Banks,* 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 of 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.[6] 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*.

---

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

CALCRIM No. 766, italics added.

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 April 1, 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.deathpenaltyinfo.org/pdf/FactSheet.pdf (last visited March 30, 2023). 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 29 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.[7] The statutes of several states are

---

[7] *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

silent on the standard of proof by which the state must prove aggravating factors to the trier of fact.[8] But with the exception of the Oregon Supreme Court,[9] the courts of these jurisdictions have explicitly determined that the trier of fact must find factors in aggravation beyond a reasonable doubt before it may use them to impose a sentence of death.[10] 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.[11]

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).

[8] *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).

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

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

[11] 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: April 24, 2023

Respectfully submitted,

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

/s/ Denise Kendall

DENISE KENDALL
Assistant State Public Defender
**Counsel of Record*

APPENDIX A

***People v. Miranda-Guerrero*, 14 Cal. 5th 1 (2022)**
California Supreme Court Opinion, November 17, 2022

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,
Plaintiff and Respondent,
v.
VICTOR M. MIRANDA-GUERRERO,
Defendant and Appellant.

S118147

Orange County Superior Court
00WF1146

November 17, 2022

Justice Liu authored the opinion of the Court, in which Chief Justice Cantil-Sakauye and Justices Corrigan, Kruger, Groban, Jenkins, and Guerrero concurred.

PEOPLE v. MIRANDA-GUERRERO

S118147

Opinion of the Court by Liu, J.

Defendant Victor M. Miranda-Guerrero was charged with six crimes and convicted of five: kidnapping to commit rape, murder, attempted carjacking, assault with intent to commit rape, and receiving stolen property. The jury could not reach a verdict on an additional assault charge, and it was dismissed. Although Miranda-Guerrero pleaded not guilty to all counts, the defense contested only the murder and assault allegations at trial. The jury found true a special circumstance that the murder occurred during the commission or attempted commission of rape, and it returned a death verdict. We affirm.

I. FACTS

A. Guilt Phase

The charged offenses occurred in Huntington Beach between September 1999 and May 2000.

1. September 1999 Kidnapping of Jamie H.

On September 12, 1999, Jamie H. was asleep in her car in a parking structure in downtown Huntington Beach when she was awakened by the driver's side window breaking. Miranda-Guerrero was standing outside Jamie's car, and he began punching her in the face. She fought back and tried to start the car. Miranda-Guerrero grabbed her hair and slammed her head into the car door. He opened the car door, pushed her into the passenger seat, and got into the driver's seat. He threw

a backpack into the back seat and told Jamie in broken English that he had "fire," which she took to mean that he had a gun.

Miranda-Guerrero started the car and drove to a residential area. He pulled over, and he and Jamie continued to fight. He unzipped his pants, exposed his erect penis, and told Jamie to get on top of him. She refused. He took a condom out of his pocket, put it on, and tried to kiss Jamie, but she turned away. He started driving again, and when he reached a stop sign, Jamie jumped out of the car. Miranda-Guerrero caught her shirt and dragged her along the street briefly before letting go, at which point she was able to escape with the help of a nearby driver.

Jamie had abrasions on her thigh, elbow, and buttocks from the attack, and a clump of her hair was missing. She got stitches on her eye and lip. A few days later, her car was found with a brick, broken glass, hair, keys, and blood in it. Blood found on Jamie's boots after the attack matched Miranda-Guerrero's DNA.

2. November 1999 Murder of Bridgette Ballas

a. Prosecution Case

On the night of November 26, 1999, Bridgette Ballas went out for drinks with a friend in downtown Huntington Beach. They went to Gallagher's Bar for a while and then walked to Aloha Grill, where they met several other people. Ballas's friend left around 1:00 or 1:30 a.m., but Ballas stayed at the bar. Her friend testified that, at that point, Ballas was not staggering or otherwise showing significant signs of impairment. She told police the next day that Ballas had five or six drinks during the time they were together.

Soon after her friend went home, Ballas left Aloha Grill with a small group of people, including an acquaintance with whom they had been sitting. The group walked a short distance to the house of Jason H., where they continued to hang out and drink. One woman who was part of that group testified that Ballas did not appear drunk and was not stumbling during the walk to Jason's house. Ballas told her at one point that she felt "kind of funny" because she did not know anyone at Jason's, and she left the house after 30 or 40 minutes.

Early in the morning of November 27, Richard B. heard someone scream "Oh my God" three times in quick succession. He looked out his window but did not see anything. When he went outside later that morning, he found Ballas lying partially in the street with her head on the curb. She was between two vehicles. Her pants were pulled down and her shirt was pulled up above her breasts, and she was nonresponsive when Richard tried to speak to her. The location where he found her was about seven-tenths of a mile from Jason's house and about a tenth of a mile from her apartment. He covered her with a blanket and called 911.

Ballas was breathing when Officer Juan Munoz arrived, so Munoz called for medical care. She was taken to Western Medical Center for emergency treatment. At that point, she was in a coma. A CT scan showed swelling of her brain and a blood clot on the left side of her brain, which was then surgically removed by Dr. Israel Chambi. Part of her temporal lobe was removed to provide more space for her brain to swell; it was damaged and soft. Dr. Chambi testified that he believed her injuries were consistent with blunt trauma resulting from likely more than one impact.

The doctor who performed Ballas's autopsy later came to a similar conclusion. Ballas also had an ear injury that appeared to come from pulling or tugging rather than from blunt trauma. No defensive wounds were found on her body, and no foreign DNA was found under her fingernails. Small pieces of gravel were found inside Ballas's labia, and several abrasions were found inside her vagina that, in the opinion of the doctor who conducted the sexual assault examination, were consistent with injuries often seen in women who have been forcibly penetrated. Saliva collected from a swab of one of Ballas's breasts matched Miranda-Guerrero's DNA. Despite treatment, she died after a few days from the severity of the swelling of her brain.

Miranda-Guerrero presented an alternative narrative that Ballas fell down and hit her head on the curb after urinating in the street. Police swabbed an area of the street around where Ballas was found for evidence. Part of a nearby gutter appeared damp in crime scene photographs, but that area was not swabbed. No urine was found on the swabs that were collected.

Over Miranda-Guerrero's motion to suppress, several hours of video from his interviews with police were played for the jury, including a portion of the interviews in which he told the officers that he had hit Ballas.

b. Defense Case

As noted, the theory of Miranda-Guerrero's defense was that the brain injury that killed Ballas resulted from her falling and hitting her head on the curb because she was intoxicated. Defense counsel argued that Miranda-Guerrero had met Ballas after she left Jason's house and that he was walking with her

when she stopped to urinate between the two cars where she was found. After urinating, she stood up and fell over. Miranda-Guerrero conceded that he raped her after she was knocked unconscious by the fall.

Jason testified that Ballas seemed intoxicated when he met her on the night of November 26; he said her eyes were glassy and her eyelids were "a little droopy." But he said she did not fall down or seem unsteady on her feet during the time he was with her that evening. A criminalist who conducted an analysis of Ballas's blood the morning she was found testified that she likely had a blood-alcohol level of 0.15 to 0.19 grams percent around 2:30 a.m. on November 27. He testified that the degree to which this blood alcohol level would affect a person's gross motor skills depends on the individual.

An officer who arrived at the scene before Ballas was taken to the hospital testified that the ground underneath her pelvic area on the street appeared wet, and the wetness drained toward the gutter. He tried to smell the wet spot after Ballas was taken away, and he said it did not smell like urine. A palm print from Ballas's right hand was also found on the tailgate of the car parked immediately in front of where she was found. The fingers on the print were pointing nearly straight up, with the thumb facing the street.

The radiologist who conducted the CT scan of Ballas testified that her injuries could have been caused by a fall from full height if she hit her head on the curb without breaking her fall. He said the injuries would also be consistent with her head being slammed into the curb by an attacker. And he said he had only seen a fall cause injuries like Ballas's when the patient was geriatric or when the person fell from a height or the fall

occurred during activities like bicycling, skateboarding, or rollerblading.

According to an officer who interviewed Richard after Ballas was found, Richard stated that the voice he heard yelling early in the morning on November 27 might have been male.

3. May 2000 Attempted Carjacking of Heidi D.

On the night of May 25, 2000, Heidi D. went out with a few of her friends in downtown Huntington Beach. They returned around midnight to the parking garage where they had left their car. Miranda-Guerrero approached the group as they got to the car. He started talking to the women, but he was incoherent. He tried to grab the keys from Heidi, and they started fighting over the keys near the driver's side door. She eventually let Miranda-Guerrero take the keys, and he got into the car.

One of Heidi's friends went to the driver's side door and told Miranda-Guerrero to give her the keys. He grabbed her by the back of her head and pulled her into the car. This conduct was the basis of the additional assault charge on which the jury could not reach a verdict. Another of her friends opened the passenger door and started hitting Miranda-Guerrero and trying to get the keys out of the ignition. He hit her back with his elbow. Heidi and a third friend ran to a nearby bar to get help, and the other two friends soon got away and joined them. Miranda-Guerrero was gone by the time they all got back to the car.

4. May 2000 Assault on Deena L.

a. Prosecution Case

Deena L. testified that on the evening of May 25, 2000, she went with her boyfriend and a few friends to Gallagher's Bar in

downtown Huntington Beach. She stayed until shortly before midnight and then left to walk home. Her friends and boyfriend remained at the bar. This was within an hour of the attack on Heidi and her friends. Deena noticed that a man was following her as she walked home, and when she turned around to return to an area with more people, he ran and caught up to her. He grabbed her hair and put his other hand over her mouth, and he pushed her down onto the sidewalk. She bit his fingers to try to get him to release her.

At that point, the man started slamming Deena's head against a brick planter next to the sidewalk. She testified that he slammed her head against the planter four to six times. She started to lose consciousness, but she was able to get out of the man's grasp and hit him. He ran away at that point. Deena found a police officer in a coffee shop and told him what had happened. When she and the officer left the coffee shop, they spotted Miranda-Guerrero walking in a nearby alley, and he was arrested.

Deena identified Miranda-Guerrero as the man who had attacked her. DNA collected from under Deena's fingernails and between her teeth matched Miranda-Guerrero's.

b. Defense Case

The defense theory was that the evidence was insufficient to show Miranda-Guerrero specifically intended to rape Deena when he attacked her.

A security worker at Gallagher's Bar testified that Miranda-Guerrero had come to the bar twice on the evening of May 25. The worker turned him away both times because he was too intoxicated. The first time Miranda-Guerrero came to

the bar was around 11:30 p.m.; the second time was around midnight, just before the assault on Deena.

5. Receiving Stolen Property

Christine J.'s car was broken into on September 1999 while parked in a parking structure in Huntington Beach. A purse and phone were taken. After Miranda-Guerrero was arrested, police obtained his backpack from the restaurant where he worked and found Christine's phone inside.

B. Penalty Phase

The prosecutor's case in aggravation consisted of victim impact testimony from Ballas's parents and sisters. The prosecutor also discussed the facts of the other charged offenses and the circumstances of Ballas's death.

Miranda-Guerrero's case in mitigation consisted principally of testimony about his childhood in Mexico and testimony from five psychologists about his cognitive functioning. Miranda-Guerrero was one of eight children and grew up very poor. His father drank too much and abused Miranda-Guerrero's mother. Miranda-Guerrero started working at a restaurant when he was about eight years old and left school when he was eleven or twelve.

Around the time Miranda-Guerrero stopped attending school, he went to work with Hector Ortega, the son of the woman for whom he had been working at the restaurant. He and Ortega manufactured leather belts in a room in the home of Ortega's mother. Ortega testified that this process involved smearing glue onto the belts with their hands without gloves or masks in a room with no fans, and that they eventually made hundreds of belts per day. The glue had a strong odor, and they would get headaches as they worked with it.

Dr. Antonio Puente interviewed Miranda-Guerrero and administered a series of neuropsychological tests. He found that Miranda-Guerrero's IQ was around 70, in the bottom two percentiles of the population, which he characterized as falling into "the mild mental retardation range or borderline retardation range." He described Miranda-Guerrero as "highly compromised intellectually, somewhat compromised educationally, and in some ways challenged neuropsychologically as well."

Dr. Robert Owen evaluated Miranda-Guerrero and administered a test to assess whether he showed antisocial or psychopathic characteristics. Dr. Owen testified that Miranda-Guerrero showed a much lower degree of antisocial and psychopathic characteristics than the general population of men in the criminal justice system.

Dr. Ricardo Weinstein examined Miranda-Guerrero on three occasions and conducted a quantitative electroencephalogram (QEEG) analysis, a type of neurophysiological measurement. Dr. Weinstein testified that Miranda-Guerrero had an IQ between 75 and 82 and was functioning at the borderline of "what we consider mental retardation." He testified that Miranda-Guerrero's cognitive functioning is typically equivalent to that of a person between the ages of six and ten, but when he is intoxicated, that level of functioning may deteriorate further. Dr. Barry Sterman reviewed the QEEG data collected by Dr. Weinstein and testified that there was evidence of "significant brain disturbance," particularly in areas related to moral judgment and impulse control.

Finally, Dr. Mark Cunningham reviewed various records and reports but did not personally examine Miranda-Guerrero.

He testified that Miranda-Guerrero has developmental impairments and "distinct brain abnormalities" that "provide some physiological basis for judgment, emotional and behavior disturbances."

In addition to cross-examining the defense witnesses, the prosecutor called Dr. David Frecker, who described the QEEG test used by Dr. Weinstein and Dr. Sterman as "fraught with many problems" and said his practice did not use that test because they "find it to be unreliable." In closing argument, the prosecutor played parts of the videotape of Miranda-Guerrero's interviews with police and argued that his conduct during those interviews demonstrated that his cognitive capacities were greater than the doctors' evaluations had shown.

II. GUILT PHASE ISSUES

A. Admission of Statements to Police

Miranda-Guerrero challenges the admission at his trial of statements he made to police officers during three custodial interrogations, which collectively spanned 12 hours between May 26 and May 29, 2000. He argues that his statements were obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and that they were involuntary in light of the totality of the circumstances. He expresses particular concern about the effect of admitting statements he made near the end of his second interview, in which he said he may have hit Bridgette Ballas "maybe two times." We find no error.

1. Facts

Miranda-Guerrero was arrested early in the morning on May 26, 2000, immediately after the attack on Deena. His first interview began about six hours later. He was interviewed by two detectives of the Huntington Beach Police Department,

Dave Dierking and Sam Lopez. Miranda-Guerrero's first question to the officers was whether they spoke Spanish. Early in the interview, before Miranda-Guerrero received his *Miranda* advisement, Dierking asked in which language he was more comfortable proceeding. Because his response — "maybe more I speak Spanish because maybe I don't understand everything" — indicated that his command of English was uncertain, Lopez served as translator for the remainder of the interrogation.

After some preliminary questions, the detectives asked Miranda-Guerrero how long he had been in the United States. He said he had been in the country two or three years. Lopez then gave him an advisement as to his *Miranda* rights. The full transcript of the advisement is reproduced below as it appeared in the exhibits used at Miranda-Guerrero's trial. The statements in brackets are translations included in the superior court's exhibit that it used to evaluate whether Miranda-Guerrero's statements should be suppressed.

> "[LOPEZ]: Okay. *Lo voy hacer dos modos, Ingles y Espanol*, okay? You have the right to remain silent. *Entiendes eso?* [Do you understand that?]
>
> "[MIRANDA-GUERRERO]: Of course.
>
> "[LOPEZ]: Anything you say may be used against you in court. *Entiendes eso?*
>
> "[MIRANDA-GUERRERO]: *Si, si antes estaba en la corte?* [If, if I was in court before?]
>
> "[LOPEZ]: *Todo que usted me dice, lo puedo usar en corte contra used* [*sic*]. [Everything that you say may be used in court against you.]
>
> "[MIRANDA-GUERRERO]: Yeah.

"[LOPEZ]: Okay, *primero Ingles y entonces Espanol*, okay? [[F]irst English and then Spanish.] *Usted tiene el derecho . . . usted tiene el derecho*, uh . . . [You have the right . . . you have the right, uh . . .] or, or you have the right to remain silent. Anything you say may be used against you in court. You have the right to the presence of an attorney before and during any questioning. If you cannot afford an attorney, one will be appointed for you free of charge before any questioning if you want.

"*De primero. Usted tiene el derecho para meser* [*sic*] *silencio.* [First of all, you have the right to remain silent.] *Usted no tienes que decir nada si quieres. Entiendes eso? Porque aqi* [*sic*] *en este los Estados Unidos tene* [*sic*] *derechos. Todo que usted me dice, lo puedo user . . . usar en corte contra used* [*sic*]. *Entiendes eso?* [You do not have to say anything if you want. Do you understand that? Because here in the United States you have rights. Everything that you tell me can be used, used in court against you. Do you understand that?] Okay.

"*Usted tiene el derecho a tener un abogado. Y si no tienes dinero para un abogado, el corte de* [*sic*] *da uno gratris* [*sic*] *de costa. Entiendes eso?* Eh, eh . . . *usted tiene el derecho obtener un abogado durante unos . . . unas preguntas. Entiendes eso? Si o no? Digame si.* [You have the right to have an attorney. If you do not have money for an attorney, the court will provide one free of charge. Do you understand that? Eh, eh . . . you have the right to obtain an attorney

during the, the questions. Do you understand? Yes or no? Tell me . . . yes.]

"[MIRANDA-GUERRERO]: Mm hm.

"[LOPEZ]: Okay, *porque es importante* [because it's important].

"[DIERKING]: Just so I know, I speak a little, is that a *si* or *no*?

"[MIRANDA-GUERRERO]: Yeah.

"[LOPEZ]: *Si. Si no tienes dinero por un abogado, el corte te da una gratis de costa. Entiendes eso? El corte te da uno. Entiendes eso?* [If you do not have money for an attorney, the court will give you one free of charge. Do you understand that? The court will give you one. Do you understand that?]

"[MIRANDA-GUERRERO]: Mm hm.

"[LOPEZ]: *Entonces con estos derechos en mento, quieres hablar con nosotros . . . sobre los cargos?* [Then, with these rights in mind, do you want to talk with us . . . about the charges?]

"[MIRANDA-GUERRERO]: *Pues no se . . . como de que?* [Well, I don't know . . . like about what?]

"[LOPEZ]: *Si o no? Quires* [*sic*] *hablar sobre los cargos? Quires* [*sic*] *hablar con nosotros?* [Yes or no? Do you want to talk about the charges? Do you want to talk with us?]

"[MIRANDA-GUERRERO]: *Pues si pe* — [Well yes, bu —]

"[LOPEZ]: Okay.

"[DIERKING]: Okay, do you understand those? Okay? Now you, you sorta indicated that you were just walking?"

The interview proceeded for about two hours without further advisement. As the parties agreed during the superior court's hearing on Miranda-Guerrero's suppression motion, the officers did not inform him of any rights he may have had under the Vienna Convention on Consular Relations, and "the subject of consular consultations did not come up."

Miranda-Guerrero's second interview began when Dierking and Lopez woke him up shortly after midnight that evening. At the start of the interview, Lopez asked Miranda-Guerrero the following question: "*Te acuerdas cuando hablamos de los derechos? Que tienes . . . permanecer silencio y todo eso.*" The superior court's exhibit indicates that Lopez's Spanish was deficient, but it translates his question as "Do you remember when we talked about the rights? That you have . . . to remain silent and all that." Miranda-Guerrero replied "Um-hmm." Lopez then asked in Spanish if Miranda-Guerrero wanted to talk to them again with those rights in mind. He said yes, and the interview proceeded.

The third interview was conducted two days later. At the beginning of the interview, Lopez read Miranda-Guerrero's rights to him from a card on which they were correctly translated into Spanish. He had Miranda-Guerrero read the card as well.

Although various statements Miranda-Guerrero made during his interviews were introduced at trial, the most incriminating statement regarding his murder charge came during the second interrogation. Miranda-Guerrero's explanation of the circumstances of Ballas's death changed over the course of his interviews. He claimed at first that he had never seen Ballas, then that he was walking with her on the night she died but that he left before she was hurt, and

eventually that she fell and hit her head, the position he maintained at trial. At the end of his second interview, which spanned more than seven hours, he told the officers that he may have hit Ballas twice. On further questioning, he said he could not recall any other details with certainty. Asked when he hit her, he said, "Maybe when she had fallen down . . . . Maybe . . . maybe that's when maybe I . . . when maybe I hit her. Because I hadn't remember [*sic*] that I had hit her." Asked if he now remembered hitting her, he responded, "Well . . . you're saying (I did). But I . . . . Really, I . . . . Well, I haven't remembered, but . . . but like, like, you'd say that (. . . ?) . . . no, no, no." When the officers asked again if he remembered hitting Ballas, he responded, "No man. But if I hit her maybe it was two. But no, I don't remember."

About three hours of video from the interviews were played during the trial. The prosecutor discussed Miranda-Guerrero's statements and changing story, emphasizing them particularly in rebuttal to the defense's closing argument. As he told the jury, "[i]t took hours and hours and hours of questions. . . . He didn't admit anything." The prosecutor pointed out that the first thing Miranda-Guerrero said when asked if he knew what had happened to Ballas, at a time when he was still denying that he had ever seen her, was "[p]erhaps she was killed." "What innocent person in the position of the defendant would ever say that?" he asked. "He repeatedly tells the police he never saw her fall," the prosecutor said. "And then only four hours into the second interview, six hours total, he finally tells the police the truth. And he tells the police, perhaps he hit her twice."

2. Miranda *Analysis*

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." To safeguard a suspect's Fifth Amendment privilege against self-incrimination from the "inherently compelling pressures" of the custodial setting (*Miranda*, *supra*, 384 U.S. at p. 467), the high court adopted a set of prophylactic measures requiring law enforcement officers to advise a suspect of his right to remain silent and to have counsel present prior to any custodial interrogation (*id.* at pp. 444–445). "A suspect who has heard and understood these rights may waive them," but the prosecutor " 'bears the burden of establishing by a preponderance of the evidence that the waiver was knowing, intelligent, and voluntary under the totality of the circumstances.' " (*People v. Leon* (2020) 8 Cal.5th 831, 843 (*Leon*).) "The totality approach permits — indeed, it mandates — inquiry into all the circumstances surrounding the interrogation," including the defendant's "age, experience, education, background, and intelligence," and "whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." (*Fare v. Michael C.* (1979) 442 U.S. 707, 725.)

"A statement obtained in violation of a suspect's *Miranda* rights may not be admitted to establish guilt in a criminal case." (*People v. Jackson* (2016) 1 Cal.5th 269, 339.) When evaluating the admissibility of a defendant's statements on appeal, we accept the trial court's resolution of disputed facts if supported by substantial evidence, and we independently determine from the undisputed facts and the facts properly found by the trial court whether the statements were illegally obtained. (*Ibid.*) Miranda-Guerrero challenges the adequacy of the *Miranda*

advisory and waiver only with respect to the first two of his three interviews, although he also challenges the voluntariness of his statements from the third interview.

Miranda-Guerrero did not argue before the trial court that his *Miranda* rights were violated due to a lack of English comprehension. But the record raises some question about whether his English fluency was adequate for him to understand his rights when he was advised of them in English. His response to the warning that what he said could be used against him — "if, if I was in court before?" — indicated that he did not grasp that relatively straightforward admonition. At several points, he struggled with questions put to him in English, for instance responding "Uh, it's where?" when asked with whom he lived, and answering "My brother?" when asked if he had ever had problems with women. When Dierking thanked him for cooperating with the officers during the first interview and said that the case would be given to the district attorney, Miranda-Guerrero admitted to Lopez that he didn't understand what Dierking had said. When asked where he first saw Deena L., he answered, "Oh because, because she's angry and because she said it." At some points, however, Miranda-Guerrero did respond appropriately and was able to ask clarifying questions.

We need not decide whether the *Miranda* advisement given in English was sufficient. Recognizing the language barrier, Lopez advised Miranda-Guerrero in Spanish as well. Some translation difficulties made the Spanish advisement suboptimal; it is not clear why the officers, who had access to a printed card with properly translated *Miranda* advisements, chose to advise Miranda-Guerrero at the first interview with a Spanish translation developed on the fly. However, we conclude

that under the totality of the circumstances, the Spanish admonition adequately informed Miranda-Guerrero of his rights.

As to the right to remain silent and the right to court appointment of counsel, Lopez's Spanish advisement was sufficient. He explained that Miranda-Guerrero had the right to silence, that he did not have to say anything if he did not want to, and that whatever he said could be used against him. He instructed Miranda-Guerrero twice that he had the right to a court-appointed attorney if he could not pay for counsel, and he took steps to phrase the right in clear and simple terms.

It is a closer question whether Lopez adequately advised Miranda-Guerrero of his right to consult with an attorney prior to his interrogation and to have an attorney present throughout the interview. *Miranda* admonitions require no "talismanic incantation," but they must contain each of the mandatory warnings, either as the high court set them out in *Miranda* itself or by some " '*fully effective equivalent*.' " (*California v. Prysock* (1981) 453 U.S. 355, 359–360 (*per curiam*), quoting *Miranda*, *supra*, 384 U.S. at p. 476.) Notifying a suspect that he or she has the right to a court-appointed attorney without explaining that this includes the right to have an attorney present before and during any custodial interviews is an insufficient admonition. (*Duckworth v. Eagan* (1989) 492 U.S. 195, 205.)

According to the translation in the superior court's exhibit, Lopez instructed Miranda-Guerrero that "you have the right to obtain an attorney during the, the questions." He did not specify which "questions" he was referring to, and nothing else in the advisement explained that Miranda-Guerrero's right to an attorney applied not just during court proceedings, but before and during any interrogation. Nor did Lopez take any steps to

clarify the ambiguous admonition, instead immediately asking Miranda-Guerrero to declare whether he understood the right.

In context, however, it would be reasonable for a suspect in Miranda-Guerrero's position to presume that "the questions" to which Lopez referred were the questions that the detectives were about to ask him. And while Miranda-Guerrero may not have understood every aspect of the *Miranda* advisement he was given in English, the full and accurate recitation of his rights in English may have helped clarify any ambiguity about what questions Lopez was referencing in the Spanish admonition. Perhaps most significantly, Miranda-Guerrero agreed at the beginning of the third interview that the rights he was advised of then — which included the right to have counsel present, explained multiple times and in accurate Spanish — were the same as the rights the detectives had discussed with him during the first interview. Considering the totality of the circumstances, we conclude that the admonition at the first interview was adequate to advise Miranda-Guerrero of his right to the presence of an attorney during the interrogation.

Miranda-Guerrero argues that even if he was adequately advised of his rights, he did not understand or waive them. He says he did not understand his rights because his initial response when asked if he understood them was "Mm hm" rather than something more affirmative. But when advised of his rights at the third interview, Miranda-Guerrero clearly indicated not only that he understood his rights, but that they were the same rights of which he had been advised at the first interview. Miranda-Guerrero similarly says he did not waive his rights because his initial response when asked if he wanted to talk to the detectives was "*Pues si pe* —," which the court's transcript translates as "Well yes, bu —." But he proceeded

immediately to speak with the officers, answered their questions without hesitation, and said nothing " 'that could be construed as an invocation of his' " *Miranda* rights. (*People v. Flores* (2020) 9 Cal.5th 371, 417.) Under these circumstances, we cannot conclude that his initial answers when asked at the first interview if he wanted to talk, standing alone, are sufficient to show he did not understand or waive his rights. (See *ibid.* [" 'A suspect's expressed willingness to answer questions after acknowledging an understanding of his or her Miranda rights has itself been held sufficient to constitute an implied waiver of such rights.' "].)

Miranda-Guerrero also argues that the totality of the circumstances suggests he did not knowingly and intelligently waive his rights, notwithstanding the proper advisement, because of his relative youth and limited education, his lack of experience with the American legal system, and his difficulty understanding English. As noted, he also claims he did not sufficiently express to the officers that he understood his rights because he answered "Mm hm" rather than something more affirmative when first asked whether he understood the advisement at his initial interview.

Miranda-Guerrero was 22 years old at the time of his police interviews, and he had left school when he was eleven or twelve. In *Leon*, we upheld the waiver of a defendant of similar age who had failed sixth grade, "consistently performed in the borderline range on intelligence tests," whose "knowledge of the legal system came mainly from Mexican soap operas," and who answered " 'uhm-hm' " when first asked if he understood his rights. (*Leon*, *supra*, 8 Cal.5th at pp. 840–841.) Certain aspects of the record in *Leon* were more indicative of a knowing and intelligent waiver than the evidence before us here. In

particular, the Spanish advisement in that case was given from a pre-printed form, and the interviewer, a native Spanish speaker, took care to give the advisement in a Spanish dialect with which the defendant was familiar. (*Id.* at p. 840.) But there are additional, affirmative indications in this case that Miranda-Guerrero understood the advisement he was given. Most notably, Miranda-Guerrero made clear at the start of the third interview that his understanding of the rights Lopez read him then from an accurately translated Spanish-language form was the same as his understanding from the first interview. We conclude that under these circumstances Miranda-Guerrero's waiver at the first interview was knowing and intelligent.

The Attorney General does not dispute that Miranda-Guerrero was not fully advised of his rights at the beginning of the second interview; the sole admonition provided was the question, in what the translator termed deficient Spanish, "Do you remember when we talked about the rights? That you have . . . to remain silent and all that." However, no readvisement was required.

Readvisement is not necessary following a valid admonition and waiver when the "subsequent interrogation is reasonably contemporaneous." (*People v. Spencer* (2018) 5 Cal.5th 642, 668.) "In determining whether a subsequent interrogation is reasonably contemporaneous, we consider the totality of the circumstances. Relevant considerations include: '1) the amount of time that has passed since the initial waiver; 2) any change in the identity of the interrogator or location of the interrogation; 3) an official reminder of the prior advisement; 4) the suspect's sophistication or past experience with law enforcement; and 5) further indicia that the defendant

subjectively understands and waives his rights.' " (*Ibid.*, quoting *People v. Smith* (2007) 40 Cal.4th 483, 504.)

We have held that interrogations taking place as long as 40 hours after a *Miranda* warning and waiver do not require readvisement when conducted by the same officers in the same location with an experienced defendant who "evinced no reluctance to be interviewed." (*People v. Williams* (2010) 49 Cal.4th 405, 434–435.) Miranda-Guerrero did not have experience with the criminal justice system at the time of his interviews, and he expressed some hesitation about proceeding when he was advised of his *Miranda* rights at the first interview. But his second interview took place fourteen hours after the first interview, in the same location and with the same detectives. He was also reminded, albeit briefly, of the original *Miranda* admonition at the beginning of the second interview. Considering all of the circumstances, we conclude that no readvisement was required at the second interview.

3. Voluntariness Analysis

Miranda-Guerrero also argues that his statements to officers were involuntary because the officers' methods were coercive, because he was not advised of his consular rights under the Vienna Convention, and because of his personal characteristics, including his limited education, inexperience with the criminal justice system, and lack of English proficiency. Under our precedents, his confession was not involuntary.

Involuntary statements to police are inadmissible for all purposes. (*People v. Peevy* (1998) 17 Cal.4th 1184, 1193.) Statements are involuntary when they are not the product of " 'a rational intellect and free will.' " (*People v. Maury* (2003) 30 Cal.4th 342, 404, quoting *Mincey v. Arizona* (1978) 437 U.S. 385,

398.) To use a defendant's statements to police at trial, the prosecutor must prove by a preponderance of the evidence that they were voluntary. (*People v. Peoples* (2016) 62 Cal.4th 718, 740 (*Peoples*).) On appeal, the voluntariness of the statements "is reviewed independently in light of the record in its entirety, including 'all the surrounding circumstances — both the characteristics of the accused and the details of the interrogation.' " (*People v. Benson* (1990) 52 Cal.3d 754, 779.) We " ' "examine the uncontradicted facts surrounding the making of the statements to determine independently whether the prosecution met its burden." ' " (*Maury*, at p. 404.) When testimony in the record is conflicting, we " ' "must 'accept that version of events which is most favorable to the People, to the extent that it is supported by the record.' " ' " (*Ibid.*)

"[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary'. . . ." (*Colorado v. Connelly* (1986) 479 U.S. 157, 167.) Coercion is not limited to physical abuse; it may involve "more subtle forms of psychological persuasion." (*Id.* at p. 164.) These techniques include " 'repeated suggestion and prolonged interrogation.' " (*People v. Hogan* (1982) 31 Cal.3d 815, 843, disapproved on another ground in *People v. Cooper* (1991) 53 Cal.3d 771.) They also include deprivation of sleep and food (*Greenwald v. Wisconsin* (1968) 390 U.S. 519, 521 (*per curiam*)), as well as "deception or communication of false information" (*Hogan*, at p. 840).

If coercive police conduct is present, we evaluate the totality of the circumstances to determine whether a defendant's statements were freely given. (*People v. Maury*, *supra*, 30 Cal.4th at p. 404.) Factors that we consider include the coercion discussed above, as well as "the length of the interrogation and

its location and continuity, and the defendant's maturity, education, and physical and mental health." (*Peoples*, *supra*, 62 Cal.4th at p. 740.) A defendant's "inexperience" and "low intelligence" may weigh against a finding of voluntariness, as do "deprivation and isolation imposed on [the] defendant during his confinement." (*People v. Neal* (2003) 31 Cal.4th 63, 68.)

Miranda-Guerrero asserts that several circumstances of the second interview raise concerns about the voluntariness of his confession at the end of that interview. The officers began interviewing him just after midnight, and the interrogation continued for more than seven hours until Miranda-Guerrero said he might have hit Ballas twice. Miranda-Guerrero notes that he "showed some signs of fatigue" (*Peoples, supra*, 62 Cal.4th at p. 741), telling the detectives at one point that he was "very sleepy." Further, the officers repeatedly emphasized Miranda-Guerrero's isolation and referred to the absence of any relationships in Miranda-Guerrero's life and the distance from his family as reasons why he might have attacked Ballas. In repeated accusations over the course of the night, the officers asserted dozens of times that he "beat," "hit," or "punched" Ballas.

While these aspects of the second interrogation of Miranda-Guerrero are relevant, they ultimately do not distinguish this case from prior cases in which we have declined to find involuntary a confession given in response to overnight questioning. In *Peoples*, for instance, we affirmed a finding of voluntariness in a case involving a twelve-hour overnight interview in which the police questioned the defendant "constantly for the first 10 hours of the interview." (*Peoples*, *supra*, 62 Cal.4th at p. 739.) An expert testified in that case that "the detectives used coercive techniques . . . over 50 times

during the 12-hour interrogation." (*Id.* at p. 740.) The interview in *Peoples* was both longer and more coercive than Miranda-Guerrero's second interview. Moreover, as in *Peoples*, Miranda-Guerrero "was given numerous breaks, drinks, and food," and the officers "never offered him leniency for his confession and never threatened a harsher penalty if he remained silent." (*Id.* at p. 741.) The defendant in *Peoples* also showed considerably greater signs of exhaustion than Miranda-Guerrero — "sweating, pulling out his hair, rubbing his skin, twitching his facial muscles, grinding his teeth, and at times appearing to fall asleep." (*Id.* at p. 739.)

Miranda-Guerrero says his confession was nevertheless involuntary because the detectives did not advise him of his right under Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 (Article 36) to have the Mexican consulate notified of his detention, even though the detectives became aware early in the interviews that he was likely not a citizen of the United States. Although the failure to notify a suspect of his or her consular rights does not by itself require suppression of the suspect's statements, this court and the United States Supreme Court have recognized that "[a] consular notification claim may be raised as part of a broader challenge to the voluntariness of a confession." (*Leon*, *supra*, 8 Cal.5th at p. 846, citing *Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 350.) But "[i]n most circumstances, there is likely to be little connection between an Article 36 violation and evidence or statements obtained by police." (*Sanchez-Llamas*, at p. 349.) Miranda-Guerrero says he would have invoked his *Miranda* rights to counsel and to remain silent if he had been advised of his consular rights or received consular assistance. But this argument is too speculative given the

record in this case. (See *Leon*, *supra*, 8 Cal.5th at p. 847; *People v. Vargas* (2020) 9 Cal.5th 793, 833.) Considering the totality of the circumstances and our independent review of the video of Miranda-Guerrero's interrogation, we cannot conclude that his confession during his second custodial interview was involuntary.

Furthermore, the first and third interviews exhibited few of the troubling features of the second interview. The first interview took place at 8:00 a.m. and lasted just over two hours. The third took place several days later at 10:00 a.m. and also lasted only a few hours. The questioning during the first interview was not aggressive or coercive, and while there were periods of insistent questioning in the third interview, they were relatively brief. We therefore conclude that Miranda-Guerrero's statements from the first and third interviews were voluntarily given as well.

B. Consular Notification

Miranda-Guerrero seeks a "comprehensive judicial 'review and reconsideration' of his conviction and sentence" because of the interviewing officers' failure to inform him of his right to the assistance of the Mexican consulate under Article 36. This review, he says, must " 'examine the facts' " of the conviction and sentence, "and in particular the prejudice" resulting from the violation of the convention. He claims this entitlement flows from the decision of the International Court of Justice in *Avena and Other Mexican Nationals* (*Mexico v. U.S.*) 2004 I.C.J. 12 (judg. of Mar. 31) (*Avena*), in which the court instructed that such review and reconsideration would be the appropriate remedy for violations of foreign nationals' consular rights. (*Id.* at pp. 59–60, ¶¶ 121–122.)

California codified the requirements of Article 36 in Penal Code section 834c. (*Leon*, *supra*, 8 Cal.5th at p. 845.) In *Leon*, we assumed without deciding that the rights found in Article 36 and section 834c are individually enforceable (*Leon*, at p. 846), and we do so here as well. But even if Miranda-Guerrero is authorized to enforce Article 36 and entitled to the remedy described in *Avena*, we have already found that he has not shown prejudice on this record from the violation of his consular rights. Any matters outside the record suggesting that Miranda-Guerrero was prejudiced may be raised in a petition for habeas corpus; we express no view here on the validity of such a claim. (See *In re Carpenter* (1995) 9 Cal.4th 634, 646 [review on direct appeal "is limited to the four corners of the record on appeal"].)

C. Denial of Presence at Certain Proceedings

Miranda-Guerrero claims he was prejudicially denied his constitutional and statutory rights to be present during five trial proceedings: (1) a meeting on juror misconduct; (2) discussions regarding spectator misconduct; (3) a meeting concerning the portions of his police interview to be played at trial; (4) a conference on jury instructions; and (5) a proceeding regarding a response to a jury question. We disagree.

A criminal defendant has both constitutional and statutory rights to be present at certain trial proceedings. (*People v. Cole* (2004) 33 Cal.4th 1158, 1230.) "The federal Constitution provides a defendant the right to be present if ' "(1) the proceeding is critical to the outcome of the case, and (2) the defendant's presence would contribute to the fairness of the proceeding," ' " and the state constitutional right is largely equivalent. (*People v. Caro* (2019) 7 Cal.5th 463, 478–479; see

*People v. Harri*s (2008) 43 Cal.4th 1269, 1306.) The statutory right is coextensive with the state constitutional right but can only be waived in writing. (*Cole*, at p. 1231; *People v. Wall* (2017) 3 Cal.5th 1048, 1060.)

Miranda-Guerrero claims that his absence from the five proceedings constitutes structural error, but we have said that "[e]rroneous exclusion of the defendant is . . . trial error that is reversible only if the defendant proves prejudice." (*People v. Perry* (2006) 38 Cal.4th 302, 312.)

1. Meeting on Potential Juror Misconduct

Between the guilt and penalty phases, the court informed the parties, in Miranda-Guerrero's presence, that Juror No. 11 had told the bailiff that Juror No. 1 called her spouse after the verdict was reached. The following afternoon in chambers, in Miranda-Guerrero's absence and without a waiver, the parties indicated it was unnecessary to question the jurors.

Miranda-Guerrero had no right to be present at the in-chambers meeting. In *Harris*, we held that "[t]he dismissal of a juror for misconduct is not a matter for which the defendant must be present." (*People v. Harris*, *supra*, 43 Cal.4th at p. 1309.) Deciding whether to investigate misconduct cannot be said to be more " ' "critical to the outcome of the case" ' " than deciding whether to dismiss a juror for misconduct. (*People v. Caro*, *supra*, 7 Cal.5th at pp. 478–479.) Miranda-Guerrero claims that he may "have perceived something about Juror No. 1" that warranted investigation or dismissal. But we have rejected similarly speculative theories about how a defendant "could have contributed to the fairness of the proceedings." (*Harris*, at p. 1307.) Moreover, any error was not prejudicial. Miranda-Guerrero was present when the court first announced

the Juror No. 1 issue and was aware that his counsel was given an option to request further investigation. He had ample opportunity to raise any concerns he may have had about Juror No. 1. "[N]othing in the record indicates" that Miranda-Guerrero's presence at the in-chambers meeting would have led to further inquiry or dismissal of the juror. (*Caro*, at p. 479.)

2. Meetings on Spectator Misconduct

During the trial, the parties and the court met in chambers twice without Miranda-Guerrero to discuss spectator misconduct. It was decided at the first meeting that the court would give a general admonition, and at the second meeting it was determined that the court would individually admonish an audience member. Miranda-Guerrero did not have a constitutional or statutory right to be present at either proceeding because they involved discussions on spectator misconduct and admonitions, which are "routine procedural discussions on matters that do not affect the outcome of the trial." (*People v. Perry*, *supra*, 38 Cal.4th at p. 312.) Conducting the meetings on spectator misconduct without Miranda-Guerrero present was not error.

3. Conference on Interview Excerpts To Be Played at Trial

After the court ruled on the admissibility of Miranda-Guerrero's police interview in his presence, the prosecutor indicated that the parties were going to work together to select which portions would be played to the jury. The parties agreed on the selected portions and informed the court of their agreement at an in-chambers meeting the following afternoon without Miranda-Guerrero present. The parties and the court

then discussed the timeline and process for verifying and playing the tapes to the jury.

In *People v. Davis* (2005) 36 Cal.4th 510, we held that a defendant had both a statutory and constitutional right to be present at a "hearing during which the contents of [a] jailhouse tape were discussed and agreed upon" because the defendant "could have assisted his attorneys in deciphering the tape" since he was present when it was made. (*Id.* at p. 531.) Miranda-Guerrero argues he had a right to be present because, as in *Davis*, he was "most familiar with the contents of the statements" in the tape and therefore could have "assisted his attorneys" in selecting the excerpts. But unlike in *Davis*, the court here had already ruled on the admissibility of the tapes, and the determination of which excerpts would be played was made by counsel before the in-chambers meeting. Accordingly, Miranda-Guerrero's presence at the meeting could not have " ' "contribute[d] to the fairness of the proceeding." ' " (*People v. Caro*, *supra*, 7 Cal.5th at p. 479.) Nor is it clear how a meeting discussing the logistics of playing preapproved portions of the tape could have been " 'critical to the outcome of the case.' " (*Id.* at pp. 478–479.)

In any event, no substantive decisions on the admissibility of the tape or its selected excerpts were made during the meeting. Miranda-Guerrero has not shown how excluding him from this logistical discussion could have " ' "prejudiced his case or denied him a fair and impartial trial." ' " (*People v. Caro*, *supra*, 7 Cal.5th at p. 479.) Any error in excluding him was not prejudicial.

4. Conference on Jury Instructions

At the end of the guilt phase, in Miranda-Guerrero's absence, the court discussed with counsel the jury instructions for lesser included offenses. We have repeatedly held that defendants "may ordinarily be excluded from conferences on questions of law, even if those questions are critical to the outcome of the case, because the defendant's presence would not contribute to the fairness of the proceeding." (*People v. Perry*, *supra*, 38 Cal.4th at p. 312.) These include "conference[s] on jury instructions." (*Ibid.*) Excluding Miranda-Guerrero from this conference was not error.

5. Meeting on Response to Jury Question

During jury deliberations at the guilt phase, the court and parties met to discuss jury questions with Miranda-Guerrero absent. The court read out the jury's latest question: "When establishing intent in a count, may we take into consideration established and agreed upon intents in other counts?" The court directed counsel to meet and confer about a proposed response. When the court reconvened, still without Miranda-Guerrero present, the court and parties settled on redirecting the jury to several CALJIC instructions.

In *People v. Jennings* (2010) 50 Cal.4th 616, 682, we held that a defendant "did not have a constitutional or statutory right to be personally present during the in-chambers discussion regarding how to respond to [a] jury's question" about an issue of law. This is because "[t]he formulation of an appropriate response to this question was a legal matter," and "a defendant does not have the right to be personally present during proceedings, held in-chambers and outside of the jury's presence, concerning questions of law." (*Ibid.*)

Miranda-Guerrero claims *Jennings* is distinguishable because "the question and proposed response" in *Jennings* "were read in defendant's presence." But that is a distinction without a difference; our holding in *Jennings* turned on the fact that the jury's question and the response to it involved legal issues. (*People v. Jennings*, *supra*, 50 Cal.4th at p. 682.) As in *Jennings*, "[t]he formulation of an appropriate response" to the jury's intent question here was a legal matter. (*Ibid.*) Accordingly, Miranda-Guerrero did not have a constitutional or statutory right to be present at the proceeding.

D. Juror Misconduct

Miranda-Guerrero claims that his conviction must be reversed because the trial court failed to discharge one of the jurors for misconduct and failed to hold a hearing into the juror's ability to serve after a suggestion of misconduct was raised. Even assuming the juror's actions were misconduct, Miranda-Guerrero was not prejudiced.

As noted, after the jury reached its guilt phase verdict but before the verdict was announced, Juror No. 1 informed her spouse on a phone call that she would be done later than expected. She also told her spouse that the jury had reached a verdict. The jury foreperson informed the bailiff of this call, the bailiff informed the court, and the court informed the parties. It was not clear whether Juror No. 1 told her spouse what the verdict was, but the court instructed the parties to assume she had for the purposes of deciding what to do about the issue.

In the court's view, the actions of Juror No. 1 did not constitute misconduct. Its position was that there was no need to discuss the issue further with the jury foreperson who reported the conversation, but it deferred to the parties about

whether to pursue further inquiry either with the foreperson or with Juror No. 1. After considering the issue, the parties advised the court that they did not believe there was need for further inquiry.

"It is misconduct for a juror during the course of trial to discuss the case with a nonjuror." (*People v. Danks* (2004) 32 Cal.4th 269, 304.) Juror misconduct raises a "presumption of prejudice," but that presumption is rebutted when the reviewing court determines, based on the record as a whole, that " ' "there is no substantial likelihood that the complaining party suffered actual harm." ' " (*People v. Lewis* (2009) 46 Cal.4th 1255, 1309.)

The jurors in this case were admonished not to talk about the proceedings with anyone outside the jury. Assuming without deciding that Juror No. 1 committed misconduct when she told her spouse that a verdict had been reached, no prejudice flowed from her actions. Juror No. 1 told her spouse that she would be done late, that a verdict had been reached, and possibly what the verdict was. There is no reasonable probability that conveying this information to her spouse biased Juror No. 1 against Miranda-Guerrero or made her incapable of serving as a penalty phase juror. (See *People v. Harris*, *supra*, 43 Cal.4th at p. 1303.) Miranda-Guerrero also argues that the trial court erred by declining to hold a hearing to inquire further into the juror's alleged misconduct. But " ' " '[a] hearing is required only where the court possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his duties . . . .' " ' " (*People v. Cowan* (2010) 50 Cal.4th 401, 506.) The trial court assumed that Juror No. 1 told her spouse what verdict the jury had reached and properly concluded that Miranda-Guerrero was not harmed even under

those circumstances. It was not required to hold a hearing to further investigate the juror's actions.

E. Motion for a New Trial

Shortly after the trial concluded, a newspaper article was published detailing various lawsuits and disciplinary actions against one of the prosecutor's medical experts, Dr. Israel Chambi, who was the medical witness most skeptical of Miranda-Guerrero's theory that a fall caused Ballas's injury. Miranda-Guerrero moved for a new trial, arguing that the article constituted new evidence "that could have affected the outcome of both the guilt and penalty phase of the trial." The court denied his motion.

Miranda-Guerrero asks that we remand the matter for the superior court to reconsider its ruling on the motion for a new trial in light of additional evidence he presents here in a request for judicial notice. This evidence consists of two unpublished Court of Appeal opinions from 2002 in suits against Dr. Chambi, which he says substantiate "several of the incidents documented in the newspaper article." We take judicial notice of the existence of the opinions but not the statements of fact contained therein. (See *People v. Woodell* (1998) 17 Cal.4th 448, 455.)

Under Penal Code section 1181, a new trial is warranted "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." (Pen. Code, § 1181, subd. 8.) " ' "To grant a new trial on the basis of newly discovered evidence, the evidence must make a different result probable on retrial." [Citation.] "[T]he trial court has broad discretion in ruling on a new trial motion . . . ," and its "ruling

will be disturbed only for clear abuse of that discretion." ' " (*People v. Beck and Cruz* (2019) 8 Cal.5th 548, 667.)

Miranda-Guerrero is not entitled to a remand for a further hearing on his new trial motion. He does not claim that the trial court abused its discretion in denying the motion based on the evidence before the court at the time. And our review on direct appeal "is limited to the four corners of the record on appeal." (*In re Carpenter*, *supra*, 9 Cal.4th at p. 646.) We decline to remand on the basis of evidence not presented to the trial court.

Nor in any event would the outcome be different on remand as a result of the Court of Appeal opinions he presents in his request for judicial notice. Those opinions were available when the trial took place. They would not be an appropriate basis for a new trial because Miranda-Guerrero could, "with reasonable diligence, have discovered and produced" them at his original trial. (Pen. Code, § 1181, subd. 8.)

Miranda-Guerrero also contends that the due process principles expressed in *Brady v. Maryland* (1963) 373 U.S. 83 required the prosecutor "to investigate the credibility" of Dr. Chambi before calling him as "a critical expert witness." He does not claim a *Brady* violation, but he suggests that the prosecutor's failure to investigate supports his request for remand to reconsider his new trial motion.

We are not persuaded by Miranda-Guerrero's claim that he is entitled to reconsideration of his new trial motion because of the prosecutor's failure to investigate Dr. Chambi. He argues that if the prosecutor had investigated Dr. Chambi's credibility, the prosecutor "would have found" the Court of Appeal opinions that Miranda-Guerrero presents in his request for judicial notice. Again, these opinions would not have supported his new trial motion because they were available at the time of the trial.

(See Pen. Code, § 1181, subd. 8.) He further suggests that the prosecutor's investigation might have revealed "information at the Medical Board of California about the professional status of its witness, Dr. Chambi." But he does not provide any such records, nor does he claim that the prosecutor's failure to uncover this information violated *Brady* or that there is a *Brady*-based duty to investigate witness credibility.

In sum, Miranda-Guerrero does not argue that the court abused its discretion in denying that motion on the basis of the record before it, and he has not demonstrated that the evidence he now proffers to support his new trial motion was unavailable at the time of trial. In light of the limited scope of our review of a trial court's decision to deny a new trial motion, Miranda-Guerrero is not entitled to a remand for further proceedings on his motion.

Finally, Miranda-Guerrero argues in passing that the fact that the impeachment evidence against Dr. Chambi was not introduced at trial made the proceedings "fundamentally unfair and violated appellant's rights to due process, to confront and cross-examine witnesses, to the effective assistance of counsel and to a reliable penalty determination." Again, he does not claim a *Brady* violation, nor does he claim that the trial court improperly limited his impeachment of Dr. Chambi. In the absence of argument to support these constitutional claims, we conclude they supply no basis for relief.

F. Prosecutorial Misconduct

Miranda-Guerrero claims that two groups of statements made by the prosecutor constituted misconduct and deprived him of a fair trial: comments about the police investigation,

which Miranda-Guerrero claims amounted to improper vouching, and derogatory comments directed at defense counsel.

During opening and closing argument, the prosecutor mentioned the quality of the work of the police officers who investigated Miranda-Guerrero's case. At the time these statements were made, Miranda-Guerrero did not clearly object or ask for a jury admonition. Midway through the prosecutor's closing argument, after almost all of these statements had occurred, defense counsel asked to speak with the court and prosecutor outside the presence of the jury and expressed concern that "we're getting into the area of improper personal vouching for the police department." Counsel noted that the defense had "not objected this far, but I think we're getting a little bit astray." Counsel's statement was insufficient to preserve a claim of prosecutorial misconduct. The defendant must generally object "in a timely fashion — and on the same ground," and must "request[] that the jury be admonished to disregard the impropriety." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Because defense counsel did neither, Miranda-Guerrero has forfeited this claim.

Miranda-Guerrero also argues that his trial was tainted by two parts of the prosecutor's closing argument in which he discussed defense counsel's conduct: questions about why defense counsel had elicited evidence regarding Ballas's liver and a kiss she shared with Jason on the night in question, and statements that an argument made by defense counsel was " 'intellectually dishonest' " and " 'an insult' " to the jury's intelligence. The questions about the defense's evidence immediately prompted the sidebar at which defense counsel mentioned concerns about vouching. Before raising the issue of improper vouching, counsel expressed concern that the

prosecutor had been "insinuati[ng] that the defense is doing something underhanded." Defense counsel further expressed that the prosecutor's comments could not "go any further without running some serious risks in the case in terms of potential misconduct." After the prosecutor said he did not intend to go further, the court told the attorneys that it had "not noted any error by the district attorney."

Later in the prosecutor's argument, defense counsel objected to the statement that part of the defense's argument had been "intellectually dishonest," though counsel did not reiterate that objection when the prosecutor subsequently said the argument was insulting to the jury. Counsel did not state the basis for the objection, and in context it is not clear that the objection was about the disparagement of the defense's position. In any event, even if these comments and the discussion of the defense's evidence strayed beyond appropriate commentary on the strength of the defense's argument into personal commentary on defense counsel, they were not so egregious that they made the trial unfair, nor is it reasonably probable that the jury would have come to a different outcome if the prosecutor had not made these statements. (See *People v. Dykes* (2009) 46 Cal.4th 731, 760, 772.)

G. Instructional Errors

Miranda-Guerrero raises a number of claims concerning the guilt phase jury instructions, each of which we have rejected previously. First, he argues that it was error for the superior court to instruct the jury on theories of first degree murder and felony murder because the information charged him only with a violation of Penal Code section 187, which he says describes only second degree murder. We have rejected this claim when it has

been brought in the past. (See, e.g., *People v. Contreras* (2013) 58 Cal.4th 123, 148 (*Contreras*).) We decline to reconsider our precedent on this issue.

Second, Miranda-Guerrero argues that the Sixth and Fourteenth Amendments to the federal Constitution, as interpreted in *Apprendi v. New Jersey* (2000) 530 U.S. 466, require more specificity in the charging instrument. We have rejected this claim as well (*People v. Nelson* (2016) 1 Cal.5th 513, 555) and decline to revisit our precedent.

Third, Miranda-Guerrero contends that six jury instructions used during his trial undermined the requirement of proof beyond a reasonable doubt. We have previously rejected this claim as to all of the instructions he identifies. (*People v. Nelson*, *supra*, 1 Cal.5th at pp. 553–554 [CALJIC Nos. 2.01, 2.02, 2.21.2, 2.22, 2.27]; *People v. Carey* (2007) 41 Cal.4th 109, 130 [CALJIC No. 2.21.1].) Miranda-Guerrero presents no persuasive reason why we should reconsider our holdings on this issue.

Fourth, he argues that the superior court erred by not requiring the jury to come to a unanimous verdict about which theory of first degree murder applied (premeditated murder or felony murder), so long as the jury unanimously concluded that he was guilty of first degree murder under some theory. As he acknowledges, we have rejected this claim before. (*People v. Jones* (2013) 57 Cal.4th 899, 973.) He presents no persuasive reason why we should reconsider our past holdings on this issue.

H. Cumulative Error

Miranda-Guerrero contends that the cumulative effect of the errors he claims occurred at the guilt phase warrants reversal even if no individual error does so. The only potential

errors, such as the possibility that a few comments by the prosecutor exceeded the bounds of appropriate argument, were minor. The cumulative effect of these errors does not rise to the level of prejudice necessary to reverse any of his convictions.

III. PENALTY PHASE ISSUES

Miranda-Guerrero argues that the admission of the statements he made in his police interviews requires reversal of his death sentence because the prosecutor used his statements to counter evidence of his cognitive impairments. Because we find no error in the admission of his statements, we need not consider their effect on the penalty verdict.

Miranda-Guerrero also argues that the death sentence is grossly disproportionate to the crime of felony murder absent a showing of some particular mens rea as to the killing. We have rejected this argument before (*Contreras*, *supra*, 58 Cal.4th at p. 163), and we do so again here. He also argues that imposing the death penalty for felony murder violates international law and that this international law principle is binding on our state because of the supremacy clause of the federal Constitution. We have rejected this claim as well. (*Contreras*, at pp. 165–166.)

Miranda-Guerrero argues that various other aspects of California's death penalty scheme are unconstitutional, while noting that our court has rejected these arguments in the past. He argues that our death penalty statutes are unconstitutionally overbroad because of the number of potential special circumstances; that the aggravating factor related to the circumstances of the crime is overbroad as well; that the lack of jury instruction regarding a burden of proof in the weighing of aggravating and mitigating factors undermined his constitutional rights; that the phrase "so substantial" in the jury

instruction on the weighing of aggravating and mitigating circumstances is impermissibly vague; that the jury should have been instructed to find whether death is "appropriate" rather than whether it is "warranted"; that the jury should have been instructed that there is a presumption favoring a sentence of life without the possibility of parole; that the jury should have been required to make written findings during the penalty phase; that the use of adjectives such as "extreme" and "substantial" in the sentencing factors creates an improper barrier to the consideration of mitigating evidence; that the jury should have been instructed as to which of the factors were mitigating and which were aggravating; that intercase proportionality review is required; and that equal protection requires more procedural protections for capital defendants than California law provides. We have rejected all of these arguments. (*Contreras*, *supra*, 58 Cal.4th at pp. 169–170, 172–173.)

He also argues that the jury should have been instructed that it must return a sentence of life without the possibility of parole if the mitigating factors outweighed the aggravating factors, and he says that California's use of the death penalty as a "regular form of punishment" violates international norms. We have rejected these arguments as well. (*People v. Jackson*, *supra*, 1 Cal.5th at pp. 373–374.)

Miranda-Guerrero further claims that California's death penalty scheme is constitutionally deficient because it does not require unanimous jury findings as to the aggravating circumstances and does not require the jury to find beyond a reasonable doubt any aggravating factors except prior felony convictions or violent crimes that did not result in a conviction. We have rejected these claims in the past (*People v. McDaniel*

(2021) 12 Cal.5th 97, 142–143; *People v. Anderson* (2001) 25 Cal.4th 543, 601) and decline to revisit our precedent here.

Finally, because we find no error in the penalty phase, we reject Miranda-Guerrero's claim that cumulative error infected the penalty determination.

IV. CONCLUSION

The judgment is affirmed.

LIU, J.

We Concur:

CANTIL-SAKAUYE, C. J.
CORRIGAN, J.
KRUGER, J.
GROBAN, J.
JENKINS, J.
GUERRERO, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion People v. Miranda-Guerrero

Procedural Posture (see XX below)
Original Appeal XX
Original Proceeding
Review Granted (published)
Review Granted (unpublished)
Rehearing Granted

Opinion No. S118147
Date Filed: November 17, 2022

Court: Superior
County: Orange
Judge: Francisco P. Briseño

Counsel:

Michael J. Hersek, State Public Defender, under appointment by the Supreme Court, Denise Kendall, Assistant State Public Defender, and Evan Young, Deputy State Public Defender, for Defendant and Appellant.

Kamala D. Harris and Rob Bonta, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Holly D. Wilkens, Kristine A. Gutierrez and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

Counsel who argued in Supreme Court (not intended for publication with opinion):

Denise Kendall
Assistant State Public Defender
1111 Broadway, Suite 1000
Oakland, CA 94607
(510) 267-3300

Meredith S. White
Deputy Attorney General
600 West Broadway, Suite 1800
San Diego, CA 92101
(619) 738-9069

APPENDIX B

People v. Victor M. Miranda-Guerrero,* Case No. S118147, *California Supreme Court Denial of Petition for Rehearing, January 25, 2023

S118147

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

VICTOR M. MIRANDA-GUERRERO, Defendant and Appellant.

The petition for rehearing is denied.

GUERRERO

Chief Justice

No. S118147

IN THE SUPREME COURT OF CALIFORNIA

REMITTITUR

TO THE SUPERIOR COURT, COUNTY OF ORANGE
Case no. 00WF1146

THE PEOPLE,
Plaintiff and Respondent,
v.
VICTOR M. MIRANDA-GUERRERO,
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 November 17, 2022.

WITNESS MY HAND AND OFFICIAL
SEAL OF THE COURT, JANUARY 25, 2023

SEAL

JORGE E. NAVARRETE, Clerk

By /s/ April Boelk
DEPUTY

APPENDIX C

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

State of California

PENAL CODE

Section 187

---

187. (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.

(Amended by Stats. 1996, Ch. 1023, Sec. 385. Effective September 29, 1996.)

PENAL CODE - PEN

PART 1. OF CRIMES AND PUNISHMENTS [25 - 680.4] *(Part 1 enacted 1872.)*
TITLE 8. OF CRIMES AGAINST THE PERSON [187 - 248] *(Title 8 enacted 1872.)*

CHAPTER 1. Homicide [187 - 199] *(Chapter 1 enacted 1872.)*

190. (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.

(Amended by Stats. 1998, Ch. 760, Sec. 6. Approved in Proposition 19 at the March 7, 2000, election. Prior History: Added Nov. 7, 1978, by initiative Prop. 7; amended June 7, 1988, by Prop. 67 (from Stats. 1987, Ch. 1006); amended June 7, 1994, by Prop. 179 (from Stats. 1993, Ch. 609); amended June 2, 1998, by Prop. 222 (from Stats. 1997, Ch. 413, Sec. 1, which incorporated Stats. 1996, Ch. 598).)

PENAL CODE - PEN

PART 1. OF CRIMES AND PUNISHMENTS [25 - 680.4] *(Part 1 enacted 1872.)*
TITLE 8. OF CRIMES AGAINST THE PERSON [187 - 248] *(Title 8 enacted 1872.)*

CHAPTER 1. Homicide [187 - 199] *(Chapter 1 enacted 1872.)*

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

190.1. (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.

(Repealed and added November 7, 1978, by initiative Proposition 7, Sec. 4.)

PENAL CODE - PEN

PART 1. OF CRIMES AND PUNISHMENTS [25 - 680.4] *(Part 1 enacted 1872.)*
TITLE 8. OF CRIMES AGAINST THE PERSON [187 - 248] *(Title 8 enacted 1872.)*

CHAPTER 1. Homicide [187 - 199] *(Chapter 1 enacted 1872.)*

190.2. (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.
(Amended by Stats. 2018, Ch. 423, Sec. 43. (SB 1494) Effective January 1, 2019. Prior History: Added Nov. 7, 1978, by initiative Prop. 7; amended June 5, 1990, by Prop. 114 (from Stats. 1989, Ch. 1165) and by initiative Prop. 115; amended March 26, 1996, by Prop. 196 (from Stats. 1995, Ch. 478, Sec. 2).)

PENAL CODE - PEN

PART 1. OF CRIMES AND PUNISHMENTS [25 - 680.4] *(Part 1 enacted 1872.)*
TITLE 8. OF CRIMES AGAINST THE PERSON [187 - 248] *(Title 8 enacted 1872.)*

CHAPTER 1. Homicide [187 - 199] *(Chapter 1 enacted 1872.)*

190.3. 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.
(Repealed and added November 7, 1978, by initiative Proposition 7, Sec. 8.)

PENAL CODE - PEN

PART 1. OF CRIMES AND PUNISHMENTS [25 - 680.4] *(Part 1 enacted 1872.)*
TITLE 8. OF CRIMES AGAINST THE PERSON [187 - 248] *(Title 8 enacted 1872.)*

CHAPTER 1. Homicide [187 - 199] *(Chapter 1 enacted 1872.)*

190.4. (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).

(Repealed and added November 7, 1978, by initiative Proposition 7, Sec. 10.)

PENAL CODE - PEN

PART 1. OF CRIMES AND PUNISHMENTS [25 - 680.4] *(Part 1 enacted 1872.)*
TITLE 8. OF CRIMES AGAINST THE PERSON [187 - 248] *(Title 8 enacted 1872.)*

CHAPTER 1. Homicide [187 - 199] *(Chapter 1 enacted 1872.)*

190.5. (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.

(Amended June 5, 1990, by initiative Proposition 115, Sec. 12.)