No. S138052

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. TUPOUTOE MATAELE, Defendant and Appellant.	Orange County Superior Court Case No. 00NF1347 Hon. James A. Stotler, Judge On Automatic Appeal From A Judgment and Sentence of Death

Appellant Tupoutoe Mataele's Reply Brief

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Appellant Tupoutoe Mataele's Reply Brief

Introduction

Appellant Tupoutoe Mataele[1] submits this reply to respondent's brief. Appellant replies to contentions by respondent necessitating an answer to present the issues fully to this Court. Appellant does not reply to arguments that are adequately addressed in the opening brief. The

[1] Appellant's true name as shown on his birth certificate is "T-Strong Mataele." (RT 31:6993; RB 11, fn. 11.)

absence of a reply to any particular argument, sub-argument or allegation made by respondent, or of a reassertion of any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant, but reflects the view that the issue has been adequately presented and the positions of the parties fully joined. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

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Jury Selection Issues

1. The dismissal for cause of Prospective Juror N. requires reversal of the death judgment because she could fairly and impartially return a verdict for either life or death.

Appellant explained in his opening brief that Prospective Juror N.'s responses to the jury questionnaire and during voir dire demonstrated that she could fairly and impartially decide the case and return a verdict for either life or death, and thus the finding of substantial impairment is not supported by substantial evidence. (Appellant's Opening Brief ("AOB") 59-65.)

Just last week this Court issued its decision in *People v. Leon* (June 29, 2015, S056766) __ Cal.4th __, wherein the Court made a statement equally applicable to this case:

> Here, *the record does not support the dismissals.* Written and oral voir dire responses of the three excused panelists *did not give the court sufficient information to conclude they were incapable of performing their duties as capital jurors*.

(*Id.* at slip opn. p. 19, italics added; *People v. Stewart* (2004) 33 Cal.4th 425, 451-452.)

Prospective Juror N. stated that she could follow the law, she could return a verdict of death in an appropriate case, and her personal

views of capital punishment, including religious beliefs, would not prevent or substantially impair her ability to return a verdict of death. (RT 9:2209-2211; CT JQ 13:3600-3635.)[2]

Trial defense counsel objected to dismissal on the ground that Prospective Juror N. unequivocally stated she could be fair and impartial, and any confusion in her responses was caused by the prosecutor's ambiguous questions. (RT 9:2259-2260 [prosecutor "pretty much twisted her belief in the presumption of innocence that she was giving the two defendants and kind of getting her to equate the presumption of innocence to mean she was unfair"].)

Respondent argues that "Prospective Juror N.'s responses were equivocal, and she stated that she could not be impartial." (Respondent's Brief ("RB") 38.) Respondent is mistaken. Prospective

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[2] References to rules are to the California Rules of Court. "RT" designates the Reporter's Transcript. "CT" designates the Clerk's Transcript of Jury Trial. "CT JQ" designates the Clerk's Transcript of Juror Questionnaires. "CT Supp. AA" designates the Supplemental Clerk's Transcript on Appeal as to Accuracy. "CT Supp. TC" designates the Clerk's Supplemental Transcript as to Completeness, dated January 30, 2006. "CT Sealed 987.2" designates the Sealed Clerk's Transcript of 987.2 Material. "CT Sealed 987.9" designates the Sealed Clerk's Transcript of 987.9 Material. Volume and page references are in the format "volume:page."

Juror N.'s written responses to the questionnaire, and her responses during voir dire, unequivocally demonstrate that she could fairly and impartially decide the case and return a verdict for either life or death. (RT 9:2209-2211; CT JQ 13:3600-3635.)

Prospective Juror N. stated that she did not think that the death penalty was a deterrent and she would rather not have the responsibility for imposing the death penalty. (CT JQ 13:3629-3630.) She noted appellant's youth. (CT JQ 13:3622.) But after expressing her personal views she stated unequivocally, "*I would not have a problem voting for the death penalty.*" (CT JQ 13:3631, italics added.)

Respondent acknowledges that during voir dire Prospective Juror N. stated unequivocally that she could impose the death penalty: "'It's something I don't want to do [i.e., impose the death penalty]. *I can do it.* I've been in trials before where I had to take the facts, but it's going to be very hard.'" (RB 39, quoting RT 9:2228, italics added.)

Respondent also acknowledges that when further questioned by the prosecutor during voir dire, Prospective Juror N. stated unequivocally that she was *not* opposed to the death penalty. (RB 39; RT 9:2234.)

In the face of these unequivocal statements, respondent nonetheless asserts that Prospective Juror N. could not be fair and impartial because she stated that as she sat there (1) she saw two innocent men who appeared young, (2) she did not want to get to a second phase of the trial, and (3) she would hold the prosecution to its burden of proof. (RB 39; RT 9:2210, 2227-2228, 2234-2238.) Each response was entirely legitimate, and did not provide a basis to exclude Prospective Juror N. from the jury.

First, the statement about "two innocent men" was made in connection with the presumption of innocence – i.e., that as she viewed the two men sitting there during voir dire, they were presumed innocent until proven guilty. (RT 9:2210, 2239-2240.)

> "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."

(*Estelle v. Williams* (1976) 425 U.S. 501, 503, quoting *Coffin v. United States* (1895) 156 U.S. 432, 453.)

Second, appellant's youthful appearance did not provide a valid basis for removal. Youth is a relevant factor in mitigation. (Pen. Code,

§ 190.3, subd. (i); see e.g., *Abdul-Kabir v. Quarterman* (2007) 127 S.Ct. 1654, 1672-1673; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 397 [youth at the time of crime mitigating]; see also *People v. Osband* (1996) 13 Cal.4th 622, 708-709 [age may be considered a factor in mitigation or aggravation].)

Nor did Prospective Juror N.'s concern that she might be sympathetic toward appellant because of his youthful appearance provide a valid basis for removal. (RB 38; CT JQ 13:3622.) In the penalty phase, sympathy for defendant may be based on a juror's in-court observations. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1420; *People v. Lanphear* (1984) 36 Cal.3d 163, 167.)

Prospective Juror N.'s forthright answer did not provide a basis for her removal because she stated that she could return a death verdict notwithstanding appellant's youthful appearance. (RT 9:2228 ["I can do it."]; CT JQ 13:3631 ["I would not have a problem voting for the death penalty."].)

Third, the statements about not wanting to get to a second phase of the trial, and holding the prosecution to its burden of proof, did not provide a valid basis for removal. (CT JQ 13:3630-3631.) These

statements were made in the context of Prospective Juror N.'s explanation that she preferred that the responsibility regarding imposition of the death penalty be given to someone else, but if given the responsibility she could follow the law and impose a death verdict. (CT JQ 13:3630-3631; RT 9:2209-2210, 2236-2237; see *People v. Davenport* (1995) 11 Cal.4th 1171, 1224 [prosecution bears burden of proof at the guilt phase].)

> . . . *But personal opposition to the death penalty is not an automatic ground for excusal.* "It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law."

(*People v. Leon, supra*, __ Cal.4th __ [June 29, 2015, No. S056766], slip opn. p. 21, italics added, citing *Lockhart v. McCree* (1986) 476 U.S. 162, 176.)

Respondent argues that Prospective Juror N. stated that she would be substantially impaired in her ability to render a fair verdict. (RB 42; RT 9:2240.) The prosecutor questioned Prospective Juror N. at some length about the burden of proof (RT 9:2236-2239), during which time

she stated unequivocally, "*If you have enough [evidence] to convince me, I don't mind getting to the second phase.* But, you know, if you're asking me how do I feel about the second phase, I don't want to get to the second phase if at all possible." (RT 9:2238, italics added.) The prosecutor ended the questioning with a convoluted question, which he acknowledged was "legal speak" (RT 9:2240), asking whether "it" would substantially impair her "ability to render a fair verdict, either at the guilt or the penalty phase[.]" Prospective Juror N. responded, "Yes." (RT 9:2240.)

Appellant explained in his opening brief – and as noted by trial defense counsel – Prospective Juror N.'s response to the prosecutor's "substantial impairment" question was taken out of context. (AOB 64-65; RT 9:2259-2260.)

The "substantial impairment" question also called for a legal conclusion about the legal effect of her answers, and thus Prospective Juror N.'s response was not competent evidence on the matter. (See Evid. Code, § 800; *People v. De Santis* (1992) 2 Cal.4th 1198, 1226; *Lombardo v. Santa Monica Young Men's Christian Assn.* (1985) 169 Cal.App.3d 529, 540.) As this Court stated in the analogous context of

a trial witness who agreed on cross-examination that she had committed perjury:

> Under defense counsel's persistent questioning in this case, Masse stated that he had committed perjury; but a lay witness's conclusion about the legal effect of his own actions is incompetent . . . .

(*People v. De Santis, supra*, 2 Cal.4th at p. 1226.)

Prospective Juror N.'s response to the prosecutor's "substantial impairment" question must be viewed in the context of her earlier responses, which unequivocally demonstrated she could follow the law and impose a death verdict. (RT 9:2209-2211, 2227-2240; CT JQ 13:3600-3635.)

The moving party bears "the burden of demonstrating to the trial court that the [*Witt*] standard [is] satisfied as to each of the challenged jurors." (*People v. Stewart, supra*, 33 Cal.4th at p. 445.)

> As with any other trial situation where an adversary wishes to exclude a juror because of bias, . . . it is the adversary seeking exclusion who must demonstrate through questioning that the potential juror lacks impartiality . . . . It is then the trial judge's duty to determine whether the challenge is proper.

(*Wainwright v. Witt* (1985) 469 U.S. 412, 423.)

To the extent that Prospective Juror N.'s response to the prosecutor's "substantial impairment" question was equivocal, thereby suggesting a need for further questioning of her, the prosecutor's failure to engage Prospective Juror N. in further voir dire shows that the prosecution failed to meet its burden of demonstrating to the trial court that the *Witt* standard was satisfied. (See *People v. Stewart, supra*, 33 Cal.4th at p. 445 [moving party bears the burden of demonstrating to the trial court that the *Witt* standard is satisfied as to each of the challenged jurors]; *Wainwright v. Witt, supra*, 469 U.S. at p. 423; *People v. Leon, supra*, __ Cal.4th __ [June 29, 2015, No. S056766], slip opn. pp. 19-24.)

Prospective Juror N.'s statement that she did not "mind getting to the second phase" if the prosecution carried its burden of proof in the guilt phase (RT 9:2238) – *together with the assurance that she could set aside her personal views and apply the law* (RT 9:2228; CT JQ 13:3631) – demonstrate that the record does not support a conclusion that Prospective Juror N. was disqualified. (See *People v. Leon, supra*, __ Cal.4th __ [June 29, 2015, No. S056766], slip opn. pp. 21-23.)

> The *Lockhart* approach contemplates a two-part inquiry. It recognizes that a prospective juror may have strong feelings about capital punishment that would

> generally lead to an automatic vote, one way or the other, on that question. However, it also allows for the possibility that such a juror might be able to set aside those views and fairly consider both sentencing alternatives, as the law requires. Both aspects of the inquiry are important. . . .

(*People v. Leon, supra*, __ Cal.4th __ [June 29, 2015, No. S056766], slip opn. p. 21, citing *Lockhart v. McCree* (1986) 476 U.S. 162, 176.)

By excluding Prospective Juror N. because of her concerns about the death penalty (although she would impose it), and because of her view of appellant as youthful (which could properly be considered during the penalty phase), "the State crossed the line of neutrality" and "produced a jury uncommonly willing to condemn a man to die," violating appellant's rights under the Sixth and Fourteenth Amendments. (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 520-521.)

Respondent points to the deference owed to the trial court's finding of substantial impairment, stating, "To the extent the prospective juror's views were conflicting, this Court must defer to the assessment of the trial court that the juror entertained views substantially impairing the ability to perform the duties of a juror." (RB 42, citing *People v. Salcido* (2008) 44 Cal.4th 93, 135.) Respondent's argument is misplaced because here the record shows that Prospective Juror N. could

apply the law and return a death verdict. (See RT 9:2209-2211, 2227-2240; CT JQ 13:3600-3635; *Uttecht v. Brown* (2007) 551 U.S. 1, 19 ["The need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment."]; see also *People v. McDonald* (1984) 37 Cal.3d 351, 377 ["deference is not abdication"].)

The trial court exceeded its discretion in excusing Prospective Juror N. because her responses to the questionnaire and during voir dire do not support reasonable grounds for a finding of substantial impairment. (See *People v. Heard* (2003) 31 Cal.4th 946, 966; *Ross v. Oklahoma* (1988) 487 U.S. 81, 88.)

"Under binding United States Supreme Court precedent, error in excusing a prospective juror for cause based on the juror's views about the death penalty requires *automatic* reversal of the penalty verdict." (*People v. Leon, supra*, __ Cal.4th __ [June 29, 2015, No. S056766], slip opn. p. 24, italics in original, citing *Gray v. Mississippi* (1987) 481 U.S. 648, 667-668.)

Reversal of the death judgment is required.

2. The dismissal for cause of Prospective Juror H. requires reversal of the death judgment because she could fairly and impartially return a verdict for either life or death.

Appellant explained in his opening brief that Prospective Juror H.'s responses to the jury questionnaire and during voir dire demonstrated that she could fairly and impartially decide the case and return a verdict for either life or death. (AOB 76-92.)

Here, "the record does not support the dismissals" because the record does not support the conclusion that Prospective Juror H. was "incapable of performing" her duties as capital juror. (See *People v. Leon, supra*, __ Cal.4th __ [June 29, 2015, No. S056766], slip opn. p. 19.)

Prospective Juror H. stated that she could follow the law during the penalty phase and return a verdict of death, and that her personal beliefs about capital punishment would not prevent her from returning a verdict of death in this case. (RT 10:3213-2317, 2340-2341, 2352-2371; CT JQ 29:8157-8192.)

Defense counsel objected to dismissal of Prospective Juror H., stating that she was well qualified to serve as a juror and could fairly and impartially decide the case. (RT 10:2388, 2390.)

Respondent argues that the trial court's finding of substantial impairment is supported by substantial evidence and entitled to deference. (RB 44.) Respondent points to Prospective Juror H.'s statements indicating she was opposed to the death penalty. (RB 44-45.) But respondent acknowledges that despite Prospective Juror H.'s personal objections to the death penalty, she stated that she could impose death penalty. (RB 46, citing RT 10:2356 ["And I could vote for the death penalty."].)

Respondent acknowledges that when the prosecutor asked her the "substantial impairment" question – i.e., a question similar to the one asked of Prospective Juror N., *ante,* – Prospective Juror H. stated her personal beliefs about the death penalty would *not* substantially impair her ability to be a fair juror in this case. (RB 46, citing RT 10:2358.)

Not satisfied with her response, the prosecutor engaged Prospective Juror H. in a lengthy colloquy, as quoted in respondent's brief. (RB 47-49, citing RT 10:2359-2362.) The colloquy explores Prospective Juror H.'s personal views on the death penalty, and then concludes with Prospective Juror H.'s unequivocal statement, "*I do*

think I could vote on it [i.e., the death penalty]." (RT 10:2362, italics added.)

As the high court has made clear, a prospective juror's personal views concerning the death penalty do not necessarily afford a basis for excusing the juror for bias.

> . . . . Because "[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State," . . . [it follows that] "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty."

(*Uttecht v. Brown, supra*, 551 U.S. at p. 6, citing *Witherspoon v. Illinois, supra*, 391 U.S. at pp. 522-523, fn. 21.)

This Court has made the point equally clear:

> . . . *But personal opposition to the death penalty is not an automatic ground for excusal.* "It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law."

(*People v. Leon, supra*, __ Cal.4th __ [June 29, 2015, No. S056766], slip opn. p. 21, italics added, citing *Lockhart v. McCree, supra*, 476 U.S.

at p. 176; *People v. Avila* (2006) 38 Cal.4th 491, 530 ["mere *difficulty* in imposing the death penalty does not, per se, prevent or substantially impair the performance of a juror's duties. The prospective juror might nonetheless be able to put aside his or her personal views and deliberate fairly under the death penalty law"]; *People v. Stewart, supra*, 33 Cal.4th at p. 447 [recognizing that California's death penalty sentencing process allows jurors to take into account their own values in weighing aggravating and mitigating factors].)

Respondent correctly concedes that Prospective Juror H. unequivocally maintained that she could be fair and impartial, noting that in the opening brief "Mataele focuses on the fact Prospective Juror H. *consistently maintained she could be fair and impartial* in spite of her position on the death penalty." (RB 53, italics added.)

Respondent argues that Prospective Juror H.'s statements during voir dire affirming she could impose the death penalty are belied by her initial statements in the questionnaire that she could not vote for death. (RB 53; CT JQ 29:8179, 8186.) Prospective Juror H.'s initial statements in the questionnaire were equivocal – i.e., she at once stated an inability to impose the death penalty (CT JQ 29:8179, 8186), but then

stated that her personal feelings would not cause her to automatically vote for life without the possibility of parole. (CT JQ 29:8188.) Indeed, Prospective Juror H. noted in the questionnaire three instances when she might automatically vote for the death penalty – i.e., when committed by someone with a violent background, when committed by someone who had committed murder in the past, and in the case of murder of a child. (CT JQ 29:8189.)

The trial court dismissed Prospective Juror H. on the grounds she was equivocal and inconsistent in her responses. (RT 10:2390.) This finding was not support by substantial evidence. Prospective Juror H. consistently maintained she could be fair and impartial despite her personal opinion about the death penalty. (RT 10:2356-2362, 2371-2373; see RB 53.) Her initial statement of inability to impose the death penalty (CT JQ 29:8179, 8186) was thoughtfully and consistently corrected by her, both in the questionnaire and on voir dire, wherein she explained that although personally opposed to the death penalty, she could following the law and impose it. (CT JQ 29:8159, 8178, 8185, 8188-8191; RT 10:2356-2362, 2371-2373.) Prospective Juror H. explained that her initial statement of inability to impose the death

penalty was an emotional response to not wanting to have to make such a decision. (RT 10:2372.) She would be a neutral juror able to impose the death penalty. (RT 10:2371-2373.)

In *People v. Leon, supra*, __ Cal.4th __ [June 29, 2015, No. S056766], for example, this Court reversed the death judgment on the ground that the record did not support a finding that three prospective jurors were incapable of performing their duties as capital jurors. (*Id.* at slip opn. p. 19.) The Court noted that "[a]ll three expressed general opposition to the death penalty . . . ." (*Ibid.*) All "three indicated that if the case reached that phase they would automatically vote for life imprisonment without parole." (*Ibid.*) During voir dire, all "three dismissed jurors repeated their previous answers, again stating they would automatically vote for life imprisonment without parole over death." (*Id.* at p. 20.) This Court found the dismissals erroneous because "the court did not inquire about the jurors' willingness to set aside their views and follow the law." (*Id.* at p. 21.)

Here, the trial court's dismissal of Prospective Juror H. is properly viewed as a dismissal based on her personal opposition to the death penalty. This was error. (*Lockhart v. McCree, supra*, 476 U.S. at

p. 176 ["not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that the are willing to temporarily set aside their own beliefs in deference to the rule of law"].)

> To exclude from a capital jury all those who will not promise to immovably embrace the death penalty in the case before them unconstitutionally biases the selection process.

(*People v. Pearson* (2012) 53 Cal.4th 306, 332.)

The trial court's focus on whether Prospective Juror H. was opposed to the death penalty was misplaced. (See *People v. Martinez* (2009) 47 Cal.4th 399, 427 ["a prospective juror who is firmly opposed to the death penalty is not disqualified from serving on a capital jury"].)

Instead, the relevant issue was whether Prospective Juror H. could set aside her personal views and impartially apply the law and impose death in the appropriate case. (See *People v. Leon, supra*, __ Cal.4th __ [June 29, 2015, No. S056766] at slip opn. pp. 21-23.) On that issue, Prospective Juror H. consistently maintained she could be fair and

impartial despite her personal position on the death penalty. (RT 10:2356-2362, 2371-2373; see RB 53.)

The trial court exceeded its discretion in excusing Prospective Juror H. because her responses to the questionnaire, and her responses during voir dire, do not support reasonable grounds for a finding of substantial impairment. (Cf. *People v. Heard, supra*, 31 Cal.4th at p. 966; *Ross v. Oklahoma, supra*, 487 U.S. at p. 88.)

Automatic reversal of the death judgment is required. (*People v. Leon, supra*, __ Cal.4th __ [June 29, 2015, No. S056766], slip opn. p. 24; *Gray v. Mississippi, supra*, 481 U.S. at pp. 667-668.)

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3. The "substantial impairment" standard for excluding jurors in capital cases is inconsistent with state and federal constitutional rights to jury trial.

Appellant explained in his opening brief that the substantial impairment test in *Wainwright v. Witt* (1985) 469 U.S. 412 should be reexamined due to its failure to secure capital juries consistent with the intent of the Framers and that represent the conscience of the defendant's community. (AOB 93-113.) During voir dire the prosecution was permitted to challenge prospective jurors for cause based on their views of the death penalty. (AOB 93.) Applying the substantial impairment standard, the court then sustained several of the prosecution's challenges for cause. (AOB 93.)

Appellant explained that the *impartial jury* guarantee of the Sixth Amendment and article I, section 16 of the California Constitution should be construed to prohibit jurors from being struck based on their views of the death penalty. (AOB 97-113.)

The current substantial impairment test – which seeks to balance competing interest of the state and the defendant – is antiquated and antithetical to the intent of the Framers, which viewed the Sixth Amendment right to an impartial jury as precluding impeachment of a

juror based on their personal views, and only permitted removal in limited cases involving actual bias or refusal to deliberate. (AOB 97-113; see 3 William Blackstone, *Commentaries on the Laws of England* 363; *United States v. Burr* (C.C.Va. 1807) 25 F. Cas. 49, 50 [Jurors were permitted to consult their conscience and, in this limited way, "find the law" in addition to "finding the facts."]; John Hostettler, *Criminal Jury Old and New: Jury Power from Early Times to the Present Day* 82 (2004); see also *Sparf v. United States* (1895) 156 U.S. 51, 143 [Gray, J., and Shiras, J., dissenting] [observing that juries in England and America returned general verdicts of acquittal in order to save a defendant prosecuted under an unjust law].)

Respondent acknowledges that the high court "has not expressly determined whether the substantial impairment standard is unconstitutional because it is inconsistent with the Framers' intent in adopting the Sixth Amendment." (RB 54.)

Respondent argues that "Courts must adhere to the established precedent until the Supreme Court explicitly reconsiders it." (RB 54, citing *Hohn v. United States* (1998) 524 U.S 236, 252-253.) Although this Court is bound by the high court's interpretation of federal law and

cannot impose a less rigorous test for capital juries than that mandated by federal law, it certainly can impose a more rigorous test under California law. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1126.)

Respondent does not address state law. (See RB 54-61.) California law differs from the Sixth Amendment in several ways that warrant a different analysis. The California Constitution explicitly makes the right to trial by jury "an inviolate right." (Cal. Const., art. 1, § 16.) To effect this right, the California Legislature has recognized that "the right to trial by jury is a cherished constitutional right." (Code of Civ. Proc., § 191.) The Code of Civil Procedure mandates the requirement for random selection of those in the "juror pool," "potential jurors," "prospective jurors," and "qualified jurors." Section 191 requires "that all persons selected for jury service shall be selected at random from the population of the area served by the court," and "that all qualified persons have an equal opportunity" to serve. (Code Civ. Proc., § 191.) Section 198, subdivision (a), requires that "[r]andom selection . . . be utilized in creating master and qualified juror lists . . . ." (Code Civ. Proc., § 198, subd. (a).) Subdivision (b) requires the jury

commissioner to "randomly select names of prospective trial jurors." (Code Civ. Proc.,§ 198, subd. (b).)

Code of Civil Procedure section 203 sets forth the only exceptions to jury service. (Code Civ. Proc., § 203, subd. (a).) Reservations, qualms, or personal opposition to capital punishment are not included. Section 204 provides, "No eligible person shall be exempt from service as a trial juror by reason of occupation, economic status, or any characteristic listed or defined in Section 11135 of the Government Code, or for any other reason." (Code Civ. Proc., § 204, subd. (a).)

Appellant's opening brief identified two prospective jurors who were denied the opportunity to serve on appellant's jury, based on the expression of personal beliefs about the death penalty. (*Ante*, Args. 1 & 2.) A review of the written and oral responses provided by these two prospective jurors, which are set forth in the opening brief, demonstrates that they were representative of the citizenry of California and the community in Orange County. (AOB 57-92.) They took imposition of the death penalty very seriously, had given the issue thought over time, and were willing and able to sit in judgment of appellant's life. (AOB 59-65, 77-85.)

Respondent argues that the substantial impairment test is consistent with the right to an impartial jury as contemplated by the Framers of the Sixth Amendment. (RB 54.) After noting that the Sixth Amendment was adopted in 1791, respondent reviews the judicial development of the substantial impairment test, culminating with *Adams v. Texas* (1980) 448 U.S. 38 and *Uttecht v. Brown, supra*, 551 U.S. 1. (RB 54, 58.) Respondent then cites several modern Sixth Amendment cases, arguing that the Framers' intent was considered in each of those cases. (RB 58, citing *United States v. Booker* (2005) 543 U.S. 220, *Blakely v. Washington* (2004) 542 U.S. 296, *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Jones v. United States* (1999) 526 U.S. 227.) Respondent concludes that the "substantial impairment standard is not at odds with these principles." (RB 59.) Respondent is mistaken.

The Framers viewed the right to a jury trial as a critical check to the power of the state to secure convictions and particular sentences, even when exercised in contravention to the law. (See 3 William Blackstone, *Commentaries on the Laws of England* 363; *United States v. Burr, supra*, 25 F. Cas. at p. 50; Federalist 83 (Hamilton), reprinted in

The Federalist Papers 491, 499 (Clinton Rossiter ed., 1961); Akhil Reed Amar (2005) *America's Constitution* 238.)

The notion that those who will not apply the death penalty should be excluded from serving as jurors in capital cases is a recent product of this nation's judiciary, and lacks any footing in the text of the Constitution or the expressed intent of the Framers. (Quigley, *Capital Jury Exclusion of Death Scrupled Jurors and International Due Process* (2004) 2 Ohio St. Crim. L 262, 269-271; Cohen & Smith, *The Death of Death-Qualification* (2008) 59 Case W. Res. L. Rev. 87.)

As stated in *The Death of Death-Qualification*, "the exclusion of prospective jurors based upon their views on the death penalty was not permitted at common law or at the adoption of the Sixth Amendment to the United States Constitution" and "substantially weakens the people's check" on government power. (*Id.* at p. 90.)

A recent note published in the Harvard Law Review raised similar points to those presented here. (See Note: *Live Free and Nullify: Against Purging Capital Juries of Death Penalty Opponents* (May 2014) 127 Harv.L.Rev. 2092.)

> . . . *The notion of jurors as arbiters of both law and facts was "accepted without controversy" for more than fifty years after the nation's founding*, and juries were expressly so instructed until the mid-1800s. America inherited the tradition from England. . . .

(*Id.* at p. 2095, italics added.)

Eliminating jurors with qualms about the death penalty results in capital juries predisposed to impose the death sentence. "Accounting for one bias may serve only to tilt the jury toward an opposite one." (*Id.* at p. 2108.) The Harvard Note comments that "the substantive content of impartiality is elusive and . . . the closest the system can achieve is to strive for representative diversity. Diversity fosters impartiality." (*Ibid.*) But that diversity and resultant impartiality is denied when capital juries do not represent the community.

Continuing with a jury selection system that excludes those with personal views about the death penalty is contrary to the intent of the Founders and underpinnings of the federal and state constitutional right to jury trial.

The historical evidence shows that the substantial impairment test violates both state and federal law. The trial court's application of the substantial impairment test in this case unconstitutionally resulted in a

jury that was not representative of the community and that was predisposed to impose the death penalty.

Reversal of the death verdict is warranted.

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Guilt Phase Issues

4. The substantial unjustified delay in charging appellant denied him due process because it resulted in the unavailability of exculpatory witnesses and the loss of evidence material to his defense.

A. Introduction and summary of argument.

Appellant explained in his opening brief that on the day of the shooting, November 12, 1997, he was identified by surviving victim Masubayashi. (AOB 115.)

Within 30 days after the shooting, the investigation was substantially completed: the autopsy was completed; the crime scene was processed; appellant's residence was searched; all the physical evidence was gathered; the analysis of the ballistics evidence was completed; and, numerous witnesses had been interviewed, including Masubayashi, Chung, Her, Lee, Rodriguez, Fowler, Towne, and Larki. (AOB 128-129; CT 2:412-413.)

Charges were not filed until October 19, 2001 – almost four years after the investigation was substantially completed. (CT 1:11-15.)

The unjustified delay was prejudicial. As a result of the delay, two exculpatory witnesses were unavailable at trial – Detective Guy

Reneau and Matthew Towne – and their prior statements were not admitted into evidence. (AOB 121-126.) Detective Reneau would have impeached the testimony of surviving victim Masubayashi with evidence that Masubayashi first denied knowing the identity of the shooter and then identified the shooter as a Pinoy Real gang member, thereby pointing to Carrillo and not appellant. (AOB 121-123; see RB 3 [appellant was not a member of the Pinoy Real gang].)

Towne – an eyewitness to the shooting – gave a physical description of the gunman that matched Carrillo's physical appearance and eliminated appellant as a possible shooter. (AOB 123-124.) Towne would have testified that the shooter was "thin" and "wearing a cap on his head . . . ." (CT 6:1643.) This description would have corroborated and reinforced Fowler's testimony, and it would have provided independent exculpatory evidence that Carrillo – who was thin and wearing a beanie on his head – was the shooter. Towne was a critical, defense-favorable witness on the disputed issue of the identity of the shooter.

Appellant further explained in the opening brief that the prefiling delay impaired the defense effort to locate witnesses and present other

evidence relevant to the credibility of prosecution witnesses Carrillo and Quiambao. (AOB 124-125.) The delay also undermined appellant's effort to impeach an incriminating statement purportedly made by appellant to Perdon – as recounted years later by Masubayashi – because Perdon was unable to recall appellant ever talking about the shooting, and thus Masubayashi's incriminating version of the purported statement was all the jury heard. (AOB 125-126.)

B. The investigation was substantially complete within 30 day of the shooting, but the prosecution delayed filing charges for almost four years.

Respondent acknowledges that appellant was identified by Masubayashi on the very day of the shooting. (RB 62; RT 19:4487-4489.) Appellant resided in Utah for a period of six months after the shooting, but then returned to California. (See RB 63; AOB 127.)

Respondent does not dispute that substantial investigation was completed within 30 days of the shooting, as set forth in the opening brief at pages 128-129, yet appellant was not charged until October 19, 2001 – i.e., almost four years after the shooting. (RT 63.)

C. Respondent's argument that the delay was justified is belied by the record.

Respondent argues that the delay was justified because (1) appellant left for Utah after the shooting, (2) Chung and Lee provided alibis when interviewed, and (3) "Masubayashi had doubts on his identification" of the driver of the vehicle involved in the shooting. (RB 71-72.) The delay in filing charges against appellant was not justified.

First, since appellant was identified on the day of the shooting, the prosecution had sufficient probable cause to file charges against him that day, regardless of his physical location. (See *People v. Marquez* (1992) 1 Cal.4th 553, 568 [probable cause to arrest defendant for murder supported by eyewitness identification]; *Rideout v. Superior Court* (1967) 67 Cal.2d 471, 473 [prosecution may charge a crime where there is "probable cause" that the defendant committed the crime].)

Second, Chung and Lee were both interviewed shortly after the shooting, as respondent acknowledges. (RB 71; CT Supp. AA 10:2756-2797 [Chung interview, November 12, 1997]; CT 4:1070-1083 [Lee interview, November 12, 1997].) Respondent does not suggest that

subsequently either Chung or Lee were unavailable, and thus there is no reasoned argument that statements made in their initial interviews justified the delay in charging appellant. (See *People v. Mirenda* (2009) 174 Cal.App.4th 1313, 1318, 1333 [delay was not justified where all the evidence had been collected and the identity of the shooter was known to police within a month of the offense]; People v. *Hartman* (1985) 170 Cal.App.3d 572, 582-583.)

Third, Masubayashi's doubts about his identification of the driver did not relate to his identification of appellant, and thus his doubts about the driver do not provide a reasoned justification for the failure to timely charge appellant.

Respondent also argues, "The case was at a standstill investigation-wise until Masubayashi contacted the Anaheim Police Department in April 2000 after seeing Mataele, and subsequent interviews led to statements by Chung, Carrillo and Quiambao implicating the defendants in the murder." (RB 72.) But Masubayashi was at all times available to the prosecution, and thus the fact that he saw appellant in April 2000 – 29 months after the shooting – could not

justify the delay in charging appellant. (See *People v. Mirenda, supra*, 174 Cal.App.4th at pp. 1318 & 1333.)

D. Respondent's argument that there was no actual prejudice is belied by the record, which demonstrates substantial actual prejudiced caused by the four-year charging delay.

With respect to Detective Reneau, respondent argues that appellant failed to establish actual prejudice because Masubayashi was questioned on cross-examination about his inconsistent statements to Reneau. (RB 66-67.) Although Masubayashi was questioned about his inconsistent statements, respondent does not dispute that if Reneau had been available at trial, then defense counsel could have elicited the inconsistent statements through Reneau's live testimony. (RB 66-67; Evid. Code, §§ 770, 1235; *People v. Ledesma* (2006) 39 Cal.4th 641, 711.)

Respondent argues that appellant fails to "establish that Detective Reneau could have shed any additional light on the matter beyond that in the recordings." (RB 67.) Respondent misses the point. The recorded statements were substantive, exculpatory evidence that Masubayashi either did not know who shot him and/or that the shooter

was a Pinoy Real gang member – i.e., someone other than appellant, whom respondent acknowledges was *not* a member of the Pinoy Real gang. (RB 3.) If the recorded statements had been played during trial, the jury would have been able to hear the full context of the exculpatory statements, including being able to judge Masubayashi's tone – and lack of hesitation – when denying that he could identify the shooter. Detective Reneau could have shed additional light on the matter beyond the recordings by testifying to Masubayashi's demeanor when making the statements. This additional evidence would have reinforced the credibility of Masubayashi's original statements, and strongly impeached his subsequent identification of appellant in a way that could not be accomplished through cross-examination of Masubayashi himself. (See *People v. Avila, supra*, 38 Cal.4th at pp. 579-580 [prior inconsistent statement to police officer identifying perpetrator admissible to impeach trial testimony of witness].)

With respect to witness Towne, respondent argues that appellant has not shown that "Towne would have been available had the authorities prosecuted Mataele sooner." (RB 68.) Not so. The defense maintained contact with Towne until November 2004 – i.e., *fully seven*

years after the shooting. (RB 67.) The trial and alternate jurors were impaneled and sworn on June 9, 2005 – i.e., approximately seven months after the defense first lost contact with Towne. (CT 4:926-935.) The record thus shows that if the prosecution had not delayed the case for four years, there is a reasonable probability that appellant's trial would have occurred well within the seven years that the defense maintained contact with Towne.

Respondent further argues: "Anyhow, Towne's testimony was cumulative." (RB 68.) But respondent acknowledges that Towne would have provided independent exculpatory testimony – i.e., he would have described the "shooter as having a thin build and between five feet eight inches to six feet tall." (RB 68-69.) Respondent argues this testimony would have been consistent with, and thus cumulative of, the testimony given by Rodriguez and Fowler. (RB 68-69.) This argument should be rejected because Towne's proffered testimony was powerfully exculpatory. (CT 6:1643.)

Towne heard a single gunshot and "saw a male 5'8" to 6' tall, thin build wearing a cap on his head walking eastbound through the parking lot away from the driver's side door of a black compact car." (CT

6:1643.) The gunman then "fired 3-4 more shots in an eastbound direction towards Euclid while walking eastbound." (CT 6:1643.)

Carrillo was present when Johnson and Masubayashi were shot. (RT 22:5026.) Carrillo had a thin build, and he fled the scene of the crime with blood on his clothes and wearing a beanie on his head. (RT 20:4690-4691, 4697, 4710-4711, 4735-4740, 4753; RT 23:5218-5219; CT 4:1128.)

Towne's description of the gunman matched Carrillo's physical appearance and eliminated appellant as a possible shooter. (CT 1:135-158, 1:245-251, 6:1644; Court Exh. 10, p. 2.) Appellant was not wearing a beanie or cap on his head, and he was twice the size of Carrillo, standing six feet tall and weighing approximately 300 to 350 pounds. (RT 28:6301, 30:6732; CT Supp. AA 2:332, 7:1813.)

Respondent cites no decisional authority – and there is none – where a court has ruled that eyewitness testimony on a materially disputed factual issue in the case is excluded as cumulative. Nor does respondent support its argument on this point with citation to any authority whatsoever. (See RB 68-69.)

With respect to the delay adversely impacting access to evidence to impeach Carrillo's and Quiambao's credibility, respondent argues that appellant's "general assertion fails to establish actual prejudice." (RB 69.) Respondent is mistaken. Trial defense counsel submitted a sworn declaration attesting to the fact that the defense investigation was materially hindered by the lengthy passage of time, specifically as it related to documenting, and presenting evidence of, the criminal and fraudulent activities of Carrillo and Quiambao. (CT 1:157-158.)

With respect to the delay undermining appellant's effort to impeach an incriminating statement purportedly made by appellant to Perdon, respondent does not dispute that over time Perdon's memory faded; instead, respondent argues that because of her drug use appellant can not show that her memory would have been any better absent the four-year delay in charging appellant. (RB 71, citing *People v. Jones* (2013) 57 Cal.4th 899, 922-923.) Respondent is mistaken. It is well recognized that passage of time adversely affects ability to recall, and that unjustified delay can "weaken the defense through the dimming of memories . . . ." (See *People v. Cowan* (2010) 50 Cal.4th 401, 430; *Linkletter v. Walker* (1965) 381 U.S. 618, 637; *General Motors Corp. v.*

Superior Court (1966) 65 Cal.2d 88, 91 [Due diligence in prosecuting lawsuits is required in order to "promote the trial of cases before evidence is lost, destroyed, or the memory of witnesses becomes dimmed."].)

Nor does *People v. Jones, supra*, 57 Cal.4th 899, support respondent's argument. In *Jones*, the trial court held that "because some of the witnesses were drug users, some memory loss on their part could be expected even if the case had been brought promptly." (*Id.* at p. 922.) Here, the prosecutor merely mentioned that Perdon used methamphetamine, but never provided any evidence on how methamphetamine use affects memory. (RT 42:9357.) Moreover, when ruling on the motion to dismiss, the trial court never mentioned Perdon's drug use as a factor affecting her ability to recall. (RT 42:9362-9367; CT 6:1689-1691.) Perdon's admitted diminished memory at trial, following substantial unjustified prosecution delay, thus supports a finding of prejudice.

Reversal of the judgment is required because the substantial unjustified delay in charging appellant denied him due process.

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5. Eyewitness Matthew Towne's statements at the scene of the shooting were admissible as spontaneous statements because Towne was visibly nervous and the gunman was still at large.

A. Introduction.

Appellant explained in his opening brief that the trial court prejudicially erred by denying the defense request to elicit testimony from Officer Bowers that at the scene of the shooting Matthew Towne stated that the gunman was a male 5'8" to 6' tall and thin build. (AOB 134-147; CT Supp. AA. 2:304 [Detective Bowers's report of interview of Towne].)

Towne's statement was made at the scene of the shooting and only minutes after the shooting occurred. Towne was "visibly shaken" and "appeared to be nervous." (RT 31:7010-7011; see CT 6:1643-1644) The statement was fully admissible under Evidence Code section 1240 as a spontaneous statement. (AOB 137-141.)

B. Towne's statements were fully admissible under Evidence Code section 1240.

Respondent argues that the record does not support appellant's assertion that Towne's statement to Officer Bowers was made within minutes of the shooting. (RB 76-77.) Respondent is mistaken.

"Bowers testified that he arrived at the scene five to ten minutes after the shooting . . . ." (RB 76; RT 31:7009.) The defense submitted Towne's affidavit, stating that within five minutes of the shooting the police arrived and Towne gave his statement. (CT 6:1643-1646.) Towne's affidavit states, in part:

> *Within five minutes the police arrived and I gave them a statement which I have reviewed.* That statement has a Bates number 000018 on the lower right hand corner. That statement is still true and correct. [CT 6:1644, italics added.]

The record thus supports appellant's assertion that within minutes of the shooting the police arrived and quickly interviewed Towne. (AOB 139-141.)

Respondent argues that substantial evidence "supported the trial court's finding that Towne's mental state was not one under the stress of excitement of the event." (RB 77.) The trial court's finding was not supported by substantial evidence.

The trial court held that nervousness of a witness does not qualify, and that Towne's nervousness seemed to be common nervousness caused by the presence of police. (RT 31:7021.) The first finding – that nervousness of a witness does not qualify under the Evidence Code – is

incorrect as a matter of law because statements made at the scene of a shooting by percipient witnesses describing a gunman *routinely qualify as spontaneous statements* admissible under Evidence Code section 1240. (See e.g., *People v. Brown* (2003) 31 Cal.4th 518, 541; *People v. Blacksher* (2011) 52 Cal.4th 769, 810; *People v. Morrison* (2004) 34 Cal.4th 698, 719; *People v. Thomas* (2011) 51 Cal.4th 449, 495-496.)

The second finding – that Towne's nervousness seemed to be common nervousness caused by the presence of police – is not supported by substantial evidence. Preliminarily, this finding appears colored by the trial court's initial, and legally incorrect, finding that nervousness of a witness does not qualify. (RT 31:7021.) Further, the finding that Towne's nervousness seemed to be common nervousness caused by the presence of police failed to account for the fact that Towne witnessed a killing and attempted killing by a gunman shooting multiple rounds from a handgun at close distance – i.e., a very startling event. (See *People v. Brown, supra*, 31 Cal.4th at p. 541 [statement made two and one-half hours after the shooting was properly admitted as a spontaneous utterance where the witness continued to labor under the stress of the event]; *People v. Blacksher, supra*, 52 Cal.4th at p. 810

[witness's statement to the police qualified as spontaneous under Evidence Code section 1240 where she heard gunshots in the next room and then saw the victims lying dead]; *People v. Morrison, supra*, 34 Cal.4th at p. 719 [identification of suspect by a witness at scene of shooting qualified as a spontaneous statement under Evidence Code section 1240 because the witness made the identifying remarks while under the stress of excitement caused by the crime]; *People v. Thomas, supra*, 51 Cal.4th at pp. 495-496 [statement that defendant was the man who slashed him was a spontaneous statement even though given minutes after the attack and in response to police questioning].)

C. The exclusion of Towne's powerfully exculpatory statements was prejudicial.

Respondent argues that if the trial court erred in excluding Towne's statements, appellant suffered no prejudice. (RB 78-79.) Not so. Towne's statements were powerfully exculpatory because he described the shooter as being "thin." (Court Exh. 10, Bates No. 18 (Interview of Towne by Officer Bowers); see CT 6:1643-1644.) Appellant was a very large man; but Carrillo was thin. (RT 23:5218-5219, 28:6301, 30:6732; CT Supp. AA 2:332, 7:1813; RB 9,

fn. 9.) Towne also would have testified that the shooter was "wearing a cap on his head . . . ." (CT 6:1643.) Appellant was not wearing a cap or beanie on his head. (RT 30:6732.) Accordingly, and for the further reasons set forth below, it is reasonably probable that appellant would have achieved a more favorable result absence the error in excluding Towne's statements. (*People v. Watson* (1959) 46 Cal.2d 818, 837.)

Respondent also argues that the error is one of state law only, and thus prejudice is evaluated under *People v. Watson, supra*, 46 Cal.2d 818. (RB 78.) Respondent is mistaken. Respondent correctly notes that the "right to present a defense is a fundamental element of due process." (RB 78, citing *Washington v. Texas* (1967) 388 U.S. 14, 19.) In view of the powerfully exculpatory nature of Towne's statements to Officer Bowers, and the fact that the defense sought to use those statements in support of the defense to the charges, the erroneous denial of the right to present that evidence deprived appellant of the Fifth and Sixth Amendment rights to present a complete defense and to jury trial, respectively. (See *California v. Trombetta* (1984) 467 U.S. 479, 485; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Pennsylvania v. Ritchie*

(1987) 480 U.S. 39, 56; *Chambers v. Mississippi* (1973) 410 U.S. 284, 295; U.S. Const., 5th, 6th & 14th Amends.)

Moreover, in view of the heightened verdict-reliability requirement in a capital case, exclusion of Towne's powerfully exculpatory statements deprived appellant of his rights under the Eighth and Fourteenth Amendments. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-646 [recognizing a heightened reliability requirement in the guilt phase of a capital trial]; *Gardner v. Florida* (1977) 430 U.S. 349, 357 [death is different, which requires greater scrutiny of capital guilt determinations].)

Appellant's convictions thus must be reversed unless the error can be shown to be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Respondent has not proven that the error in excluding Towne's statements to Officer Bowers was harmless beyond a reasonable doubt.

Respondent argues that "Mataele's defense theory that Carrillo was the shooter rested on his own self-serving testimony, and the incredible testimony of Quiambao and Monroe." (RB 79.) Not so. It is undisputed that Carrillo was present when Johnson and Masubayashi

were shot. (RT 22:5026.) It is undisputed that Carrillo fled the scene with blood on his clothes and wearing a beanie. (RT 20:4690-4691, 4697, 4710-4711, 4735-4740, 4753; RT 23:5218-5219; RT 28:6301; RT 30:6732; CT 4:1128.) It is undisputed that Carrillo was thin and that appellant was a very large man who was not wearing a beanie or cap on the night of the shooting. (RT 23:5218-5219, 28:6301, 30:6732; CT Supp. AA 2:332, 7:1813.)

It is further undisputed that two eyewitnesses interviewed at the scene described the gunman in a manner that matched Carrillo and eliminated appellant. Jose Rodriguez told the police that the person he saw firing the handgun was a male of "medium build." (RT 25:5715-5716.) John Fowler stated the gunman was five feet, ten inches tall and was wearing a beanie. (RT 20:4739-4740, 4753; RT 26:5839-5840.)

Matthew Towne would have testified that he heard a single gunshot and "saw a male 5'8" to 6' tall, thin build wearing a cap on his head walking eastbound through the parking lot away from the driver's side door of a black compact car." (CT 6:1643.) The gunman then "fired 3-4 more shots in an eastbound direction towards Euclid while

walking eastbound." (CT 6:1643.) Towne's description of the gunman matched Carrillo's physical appearance and eliminated appellant as a possible shooter. (CT 1:135-158, 1:245-251, 6:1644; Court Exh. 10, p. 2.)

Masubayashi first identified the shooter as a member of the Pinoy Real gang (CT Supp. AA 10:2981-2982), which was consistent with Carrillo's gang membership and eliminated appellant. (RT 13:3191-3194, 3317; RT 21:4948-4949, 23:5356- 5357; RB 3 [appellant was not a member of the Pinoy Real gang].)

The record before this Court thus belies respondent's assertion that "Mataele's defense theory that Carrillo was the shooter rested on his own self-serving testimony, and the incredible testimony of Quiambao and Monroe." (RB 79.)

Appellant presented substantial evidence that Carrillo was the shooter, and that Chung and the Pinoy Real gang – wanting to get rid of Johnson and Masubayashi – framed appellant for the shooting. (AOB 24-33.) In view of the fact that Towne's statements describing the shooter were both exculpatory and provided affirmative evidence in support of appellant's defense that Carrillo was the gunman, respondent

has not proven that exclusion of his statements was harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at p. 24.)

> The burden is on the beneficiary of the error "either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment."

(*People v. Stritzinger* (1983) 34 Cal.3d 505, 520, citations omitted; *People v. Louis* (1986) 42 Cal.3d 969, 993; *Chapman v. California, supra*, 386 U.S. at 24.)

Reversal of appellant's convictions in counts 1, 2 and 3 is warranted.

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6. Defense witness Alana Swift Eagle's proffered testimony recounting Ryan Carrillo's statement to her after the shooting – wherein Carrillo implicitly admitted killing Danell Johnson and shifted blame to appellant – was admissible as a prior inconsistent statement.

A. Introduction.

Appellant explained in his opening brief that that the trial court prejudicially erred by denying the defense request to present the testimony of Alana Swift Eagle that when she and Carrillo were riding together on a bus, she asked Carrillo if he had killed Johnson, to which Carrillo responded that "everything pointed to T-Strong and he (Carrillo) was 'going to run with that.'" (CT 5:1206; AOB 148-163.) Carrillo testified in the prosecution's case-in-chief that appellant was the shooter. (RT 29:6471.) Swift Eagle's statement thus was admissible as a prior inconsistent statement. (Evid. Code, §§ 770, subd. (a), 1235; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 78.)

B. Carrillo's statement to Swift Eagle was highly relevant.

Respondent argues that Carrillo's statement to Swift Eagle was irrelevant. (RB 81-82.) Acknowledging that "the identity of the shooter would be relevant," respondent argues that the statement was too ambiguous to have any relevance. (RB 82.) Respondent is mistaken.

The statement was highly relevant because it was an implied admission that Carrillo killed Johnson. (See *People v. Preston* (1973) 9 Cal.3d 308, 313-314.)

The statement also was an evasive answer, which was evidence that Carrillo was attempting to shift the blame to appellant, and from which it could be inferred that Carrillo was admitting to the shooting and using appellant as a scapegoat. (See *Kinkaid v Kinkaid* (2011) 197 Cal.App.4th 75, 83 [it is sufficient that the "evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation"].)

Respondent's argument that the statement was too ambiguous to be relevant should be rejected. Carrillo was charged with the murder of Johnson and the attempted murder of Masubayashi. (RT 21:4942, 22:5009, 5011-5015; RB 2-3, fn. 2.) The words of an accused often consist of equivocal or evasive responses. (*People v. Richardson* (2008) 43 Cal.4th 959, 1020.) "Silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence." (*People v. Riel* (2000) 22 Cal.4th 1153, 1189; *Estate of Neilson* (1962) 57 Cal.2d 733, 746.)

C. Carrillo's statement to Swift Eagle was admissible as a prior inconsistent statement.

Respondent next argues that the statement was not admissible as a prior inconsistent statement, and urges this Court to give deference to the trial court's ruling. (RB 83-84.) But no deference is owned to the trial court's ruling because the court misapplied the law, erroneously finding that the statement was too ambiguous to be admissible and finding that the probative value of that statement was outweighed by its prejudicial effect. (RT 29:6476-6477.) Any ambiguity and/or equivocation in the statement may be considered a tacit admission, and thus the statement was highly relevant and probative. (*People v. Preston, supra*, 9 Cal.3d at pp. 313-314.)

A highly relevant statement of a witness is admissible without regard to whether it is damaging (i.e., prejudicial) to the prosecution's case. (See *People v. Gionis* (1995) 9 Cal.4th 1196, 1214 [prejudicial is not synonymous with damaging when applying section 352].) The trial court's analysis was erroneous.

For the same reason, respondent's Evidence Code section 352 analysis is erroneous. (RB 85-86.) Respondent fails to cite any

authority that an otherwise relevant and admissible prior inconsistent statement of a witness can be excluded as too prejudicial to the prosecution's case. (See *People v. Babbitt* (1988) 45 Cal.3d 660, 684 [Evidence Code section 352 must yield to a defendant's due process right to a fair trial and to the right to present all relevant evidence of significant probative value to his or her defense].)

Carrillo's statement to Swift Eagle was a classic implied admission to the shooting (and shifting blame to appellant), which fully qualified as a prior inconsistent statement because it was inconsistent with his trial testimony that appellant killed Johnson and shot Masubayashi. (RT 22:5022-5028; see *People v. Ledesma, supra*, 39 Cal.4th at p. 711 [prior statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement]; *People v. Dement* (2011) 53 Cal.4th 1, 21-24.)

Respondent further argues – without citation to any legal authority whatsoever – that the "statement should also be taken in context with other statements Swift Eagle said took place on the bus." (RB 85.) The jury certainly would have been entitled to view the entire

context of the statement, but the fact that the statement was made while the two were riding on a bus – and that other statements were made – is no legal justification for excluding the statement as a prior inconsistent statement. (See *People v. Ledesma, supra*, 39 Cal.4th at p. 711.)

D. Appellant suffered prejudice from the exclusion of Swift Eagle's proffered testimony.

Respondent argues no prejudice is shown. (RB 86-89.) Preliminarily, respondent suggests that the *Chapman* harmless error analysis does not apply because appellant was not prevented from presenting his entire defense, only a portion thereof. (See RB 87 ["Although the *Chapman* standard may apply when a trial court completely excludes all evidence in support of a defendant's defense, this was not the case . . . ."].) Contrary to respondent's suggestion that *Chapman* only applies where the trial court prevents the defendant from presenting his entire defense, *Chapman* applies to any error that violates a defendant's federal constitutional right. (*Chapman v. California, supra*, 386 U.S. at 24; *People v. Stritzinger, supra*, 34 Cal.3d at p. 520.)

The *Chapman* standard applies here because the exclusion of Carrillo's statement deprived appellant of the Fifth and Sixth

Amendment rights to present a complete defense and to jury trial, respectively. (See *California v. Trombetta, supra*, 467 U.S. at p. 485; *Crane v. Kentucky, supra*, 476 U.S. at p. 690; *Pennsylvania v. Ritchie, supra*, 480 U.S. at p. 56; U.S. Const., 5th, 6th & 14th Amends.)

The trial court's exclusion of Carrillo's statement also denied appellant the due process right to a fundamentally fair trial because the ruling undermined the ultimate integrity of the fact finding process. (See *Chambers v. Mississippi, supra*, 410 U.S. at p. 295.)

Moreover, in view of the heightened verdict-reliability requirement in a capital case, exclusion of Carrillo's statement deprived appellant of his rights under the Eighth and Fourteenth Amendments. (See *Beck v. Alabama, supra,* 447 U.S. at pp. 627-646; *Gardner v. Florida, supra*, 430 U.S. at p. 357.)

Appellant's convictions thus must be reversed unless the error can be shown to be harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Respondent has not proven that the error in excluding Carrillo's statement was harmless beyond a reasonable doubt. Respondent argues that the "trial court's exclusion of the evidence at issue here did not

prevent Mataele from presenting other admissible evidence challenging Carrillo's credibility and supporting his defense that Carrillo was the shooter." (RB 87.) Although appellant presented substantial evidence that Carrillo was the shooter, Carrillo's own implied admission to being the shooter (and shifting the blame to appellant) was uniquely powerful evidence in support of appellant's defense, which was not duplicated in any way by other evidence. (See *In re Cox* (2003) 30 Cal.4th 974, 1032 [recognizing that a confession is uniquely powerful evidence]; *People v. Schader* (1965) 62 Cal.2d 716, 731 [a confession is "a kind of evidentiary bombshell"], overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509-510, fn. 17; *Arizona v. Fulminante* (1991) 499 U.S. 279, 296 [recognizing that evidence of a confession has a "profound impact on the jury"].)

Reversal also is required under the state *Watson* standard. Carrillo's statement was an implied admission to killing Johnson. The statement also was evidence of an attempt to shift the blame to appellant for the killing, which was a manifestation of Carrillo's consciousness of guilt for killing Johnson. In view of appellant's substantial defense case – and the evidence showing that Chung and the Pinoy Real gang (of

which Carrillo was a member) wanted to get rid of Johnson and Masubayashi and framed appellant for the shooting (AOB 24-33) – it is reasonably probable that a result more favorable to appellant would have been reached in the absence of the error.

Reversal of appellant's convictions in counts 1, 2 and 3 is warranted.

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7. The trial court prejudicially erred by admitting Masubayashi's testimony recounting Perdon's statement of appellant's purported confession to shooting Johnson.

A. Introduction.

Appellant explained in his opening brief that during trial Masubayashi stated that prior to his last interview by the police in the year 2000, Perdon told him that appellant – referring to the shooting of Johnson – told Perdon, "I came in my pants when I saw that nigger flop." (AOB 164-165; CT Supp. AA 6:1617.)

The prosecution asserted that Masubayashi first made the statement on June 3, 2005, prior to the swearing of jurors on June 9, 2005 (CT 4:926-935), but *after trial began* with jury selection on May 16, 2005 (CT 3:852).[3] (RT 27:6099; CT Supp. AA 6:1617.) Masubayashi claimed that he told the police about this statement when he was interviewed in the year 2000. (RT 15:3741-3743, 27:6099.)

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[3] Respondent states that the interview was conducted "days before Mataele's trial commenced . . . ." (RB 90.) This is incorrect, and may have resulted from appellant's opening brief, which incorrectly stated that the statement was made "ten days before" trial. (AOB 164.) The statement was actually made *after appellant's trial began*. (See CT 3:852 [start of jury selection on May 16, 2005]; CT Supp. AA 6:1617 [statement of June 3, 2005].)

Appellant explained that the trial court prejudicially erred by admitting this statement through the testimony of Masubayashi, over defense objection, because (1) Perdon genuinely did not recall making the statement, (2) the statement was unreliable, and (3) the record discloses strong evidence that Masubayashi fabricated the statement. (AOB 164-179.)

Respondent acknowledges that Masubayashi first made the statement *during trial* on June 3, 2005. (RB 90.) Respondent also acknowledges that on that date Masubayashi stated that Perdon had made the statement to him in the year 2000, which was "before Masubayashi went to the Anaheim Police Department" and was interviewed in May 2000. (RB 90; RT 27:6099.) Perdon was interviewed by the police in April and May 2000 (RT 18:4303-4304, 4347, 4436; RT 25:5652-5655), but she never disclosed any such statement by appellant. (RT 25:5668.) Accordingly, despite extensive interviews of both Perdon and Masubayashi in the year 2000 – i.e., after Perdon purportedly recounted the statement to Masubayashi – neither Perdon nor Masubayashi mentioned any such highly-charged,

racially-derogatory statement to the police. (RT 27:6097-6099; CT 4:1197.)

B. The abuse of discretion in admitting the statement as a prior inconsistent statement.

Respondent argues there was no abuse of discretion in admitting the statement as a prior inconsistent statement because the trial court found that Perdon's inability to recall was evasive and untruthful. (RB 92-93.) The trial court's finding is not supported by substantial evidence, and thus this case falls within the general rule that "the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event." (RB 92, citing *People v. Green* (1971) 3 Cal.3d 981, 988.) This issue is briefed at length in appellant's opening brief, wherein appellant identifies six separate reasons demonstrating why the trial court's finding is not supported by substantial evidence. (AOB 169-174.)

Respondent agrees that the trial court acknowledged the serious danger that the statement was fabricated, stating in part:

> . . . One is the defense theory that this sounds manufactured. And, okay, I'm aware of that. And, you know, *when it comes on late like this and then it comes from Masubayashi, in essence there is a danger there that*

is manufactured; and I do agree with that. . . . [RB 91; RT 15:3677, italics added.]

The trial court added, "On the other hand, how do you forget that? How could – *How could any reasonable person possibly forget that statement*?" (RT 15:3677-3778, italics added.)

The trial court's statement – "How could any reasonable person possibly forget that statement?" – is significant in showing an abuse of discretion because Perdon and Masubayashi were both interviewed in the year 2000, *after the statement was purportedly made*, and neither one disclosed any such statement during their interviews. (RT 27:6097-6099; CT 4:1197.) The answer to the court's rhetorical question about how "could any reasonable person possibly forget that statement" applies equally to both witnesses. How could Masubayashi have possibly forgotten that statement when interviewed by police in 2000?

It defies logic to believe that such an incriminating and racially-derogatory statement – if actually made – would not have been disclosed by either Perdon or Masubayashi in their extensive interviews with the police. The mid-trial disclosure, together with the lack of prior

disclosure by either Perdon or Masubayashi when interviewed by the police, logically gives rise to a strong inference of recent fabrication.

The strong inference of recent fabrication was not dispelled by Perdon's stated inability to recall having any such conversation with Masubayashi. Perdon was *not* a reluctant prosecution witnesses, and in fact she was adverse to the defense. She refused to speak with trial defense counsel. (RT 14:3473.) During trial, she answered numerous questions posed by the prosecutor. (RT 14:3465-3470; RT 25:5619-5638, 5684-5692.) She was friends with Masubayashi. (RT 15:3690.) She did not show any signs of defensiveness in her inability to recall the statement. (RT 14:3468-3469, 25:5684-5692.) The fact that Perdon was a cooperative and willing prosecution witness – and a friend of Masubayashi – demonstrates that her trial testimony was truthful. The trial court's finding of evasiveness was not supported by substantial evidence.

Respondent argues that this case is similar to *People v. Perez* (2000) 82 Cal.App.4th 760. Respondent is mistaken. In *Perez*, the appellate court upheld the trial court's finding of evasiveness where the "witness repeatedly answered 'I don't remember' or 'I don't recall'

when questioned at trial about what she saw the night of the murder and what she told the police." (RB 93, citing *People v. Perez, supra*, 82 Cal.App.4th at p. 766.) The appellate court noted that she was an extremely reluctant prosecution witness, having told the police that "she was afraid she would be shot if she testified and that she would lie at trial if the prosecution forced her to testify." (*Id.* at p. 763.) At trial, she answered "I don't recall" and "I don't remember" to "virtually all the questions . . . ." (*Ibid.*) Noting that the issue on appeal is "whether the record supports a finding that the forgetfulness at trial is deliberately evasive" (*id.* at p. 764), the appellate court found such evidence in the record on the basis of (1) her professed reluctance to testify, (2) her statement that she would lie if she were forced to testify, and (3) her favorable trial testimony for the defense that "Perez was *not* the person who shot the victim." (*Id.* at p. 766, italics in original.)

The instant case stands in stark contrast to *Perez*. Perdon was a willing and cooperative prosecution witness, answering numerous questions posed by the prosecution. (RT 14:3465-3470; RT 25:5619-5638, 5684-5692.) The witness in *Perez* was entirely uncooperative, and even stated that she was afraid to testify and would

lie if forced to testify. (*People v. Perez, supra*, 82 Cal.App.4th at p. 763.) That witness showed deliberate evasiveness when she refused to cooperate with the prosecution and then gave favorable defense testimony about the identity of the shooter. (*Id.* at p. 766.) None of these circumstances are present in the instant case.

C. The due process violation arising from admission of the statement.

Respondent acknowledges that a due process violation is shown where the "state's evidence was so unreliable or prejudicial that it rendered the trial fundamentally unfair." (RB 94, citing *People v. Partida* (2005) 37 Cal.4th 428 and *Estelle v. McGuire* (1991) 502 U.S. 62.)

Respondent argues that no due process violation is shown because the statement was properly admitted, *ante*, and fair inferences could be drawn therefrom. (RB 94-95.) Respondent is mistaken. The record discloses strong evidence that Masubayashi fabricated the statement, rendering the statement unreliable. (AOB 164-179.) First, despite purportedly hearing the statement from Perdon prior to being interviewed by the police in the year 2000, neither Perdon nor

Masubayashi subsequently mentioned the statement to the police. (CT Supp. AA 6:1617; RT 27:6097-6099; CT 4:1197.) As the court correctly noted, "[H]ow do you forget that? . . . How could any reasonable person possibly forget that statement?" (RT 15:3678.)

Second, Masubayashi testified that he disclosed the statement to Detectives Schmitt and Sullivan when interviewed by them years earlier. (RT 15:3741-3743.) But his testimony was directly contradicted by the prosecution's explicit statement that no such prior disclosure was made. (RT 25:5656; CT Supp. AA 6:1617.) The evidence thus showed that Masubayashi lied about the circumstances of his disclosure of the statement, thereby reaffirming the strong inference of fabrication arising from the mid-trial disclosure.

Third, as respondent acknowledges, after eliciting the statement the prosecutor stayed away from it, and even explicitly distanced himself from the statement, revealing that the prosecutor questioned the veracity of the statement. Respondent writes, "The prosecutor *did not argue the alleged statement* in closing argument, and even *went so far as to distance himself from it*. In rebuttal, the prosecutor argued the

statement 'came from *Glenda Perdon, who was high the whole time. I didn't go near it.*'" (RB 96, italics added, citing RT 33:7396.)

But the prosecutor did "go near it" by seeking, and then obtaining, a ruling admitting the statement into evidence, and then presenting the statement to the jury through Masubayashi's incredible testimony and in allowing Perdon to be examined on whether she made such a statement. (AOB 164-165; CT Supp. AA 6:1617.)

Admission of the statement deprived appellant of the constitutional rights to due process and a fair and reliable jury trial. (AOB 175-179; see *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320; *White v. Illinois* (1992) 502 U.S. 346, 363-364 ["Reliability is . . . a due process concern"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [due process "cannot tolerate" convictions based on false evidence].)

D. Appellant was severely prejudiced by the erroneous admission of the incriminating, racially-derogatory statement.

Respondent argues that "Masubayashi's statement did not impact the verdict" because the jury heard Perdon testify that she did not recall the statement and the evidence of guilt was overwhelming. (RB 96.) Respondent is mistaken.

The argument fails to consider that the statement was both racially-charged and amounted to an implied confession to shooting Johnson, and thus the prosecution has not met its burden of proving that the jury's consideration of the statement was harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at p. 24.)

Regardless of the strength or weakness of the prosecution's case, a particular error may require reversal in light of its power to influence the jury. (*United States v. Harrison* (9th Cir. 1994) 34 F.3d 886, 892; *Bumper v. North Carolina* (1968) 391 U.S. 543, 553 (conc. opn. of Harlan, J.).) The erroneous admission of a defendant's statement, amounting to a confession, is the quintessential type of error requiring reversal.

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so."

(*Arizona v. Fulminate, supra,* 499 U.S. at p. 296, citations omitted; see *People v. Neal* (2003) 31 Cal.4th 63, 86; *People v. Cahill, supra,* 5 Cal.4th at p. 503.)

Respondent also ignores the fact that the record demonstrates that the jury had some difficulty reaching a verdict. (See RB 96-99.) The jury requested readback of trial testimony of Masubayashi, Quiambao, and Carrillo, among others. (RT 19:4507; CT 5:1238, 1370-1376.) This indicates that the case was close and that the jury had some difficulty reaching a verdict. (See *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 490; *People v. Williams* (1971) 22 Cal.App.3d 34, 38-40; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295.)

Respondent argues that on appeal "Mataele presents a much skewed representation of the evidence at trial; giving his defense credibility it was not due." (RB 96, citing AOB 181-188.) Although citing to eight pages of appellant's opening brief, respondent does not assert any factual errors in the brief. (See RB 96-99.) Instead, respondent merely recounts some of the trial testimony and other evidence in support of the verdict. (RT 96-99.)

But respondent's burden is not merely to show the existence of evidence supporting the verdict. Respondent must prove that "the guilty verdict actually rendered in this trial *was surely unattributable to the error.*" (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, italics added; *People v. Sakarias* (2000) 22 Cal.4th 596, 625.)

In view of the fact that the statement was an implied confession to shooting Johnson, together with the jury's request for readback of trial testimony of Masubayashi and Carrillo, respondent cannot meet her burden of proving the error harmless in this case.

Moreover, appellant presented substantial evidence that Carrillo was the shooter. Carrillo was the thin male wearing a beanie at the scene of the shooting – fitting the description of the shooter given by Rodriguez and Fowler (and Towne) – and he was the one who fled the scene of the shooting with blood on his clothes. (RT 20:4690-4691, 4697, 20:4710-4711, 20:4735, 21:4961-4987, 22:4988-5046; CT 4:1128.)

The defense impeached Masubayashi's testimony with evidence that shortly after the shooting he stated that he could not identify the shooter because he did not see the shooter, and he did not know where

the shots were fired from because his view was blocked. (RT 17:3952-3953.) Further, Masubayashi testified at trial that he did not see the face of the shooter. (RT 15:3638.)

The defense impeached Carrillo's testimony identifying appellant as the shooter with evidence that (1) Carrillo was providing immunized testimony after striking a six-year deal with the prosecution (RT 23:5345-5346), (2) Carrillo was a "very manipulative liar" (RT 29:6487-6488), and (3) Carrillo fled the scene of the shooting, matched the description of the shooter, and had blood on his clothes. (RT 20:4690-4691, 20:4697, 20:4710-4711, 20:4735, 21:4961-4987, 22:4988-5046; CT 4:1128.)

Appellant denied shooting anyone. He testified that Carrillo shot and killed Johnson, and then fired at Masubayashi. (RT 30:6725-6726, 6729-6731.) Appellant's testimony was corroborated by Shawn Monroe, who testified that shortly after the shooting Carrillo appeared unexpectedly at Monroe's house in Hollywood and admitted to the shooting. (RT 27:6183-6184.) Appellant's testimony also was corroborated by Quiambao, who testified during the defense case to a

conversation he had with Carrillo in 2001 in which Carrillo stated that he (Carrillo) "did the shooting." (RT 28:6347-6348.)

Reversal of appellant's convictions on counts 1, 2, and 3 is warranted because the prosecution has been unable to prove beyond a reasonable doubt that the guilty verdicts were surely unattributable to the error in the admission of Masubayashi's statement. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.)

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8. The trial court prejudicially erred by failing to sua sponte instruct the jury to view with caution Masubayashi's testimony that appellant confessed to shooting Johnson.

Appellant explained in his opening brief that after erroneously admitting Masubayashi's unreliable hearsay testimony recounting appellant's purported statement to Perdon – amounting to a confession to shooting Johnson – the trial court compounded the error by failing to instruct the jury to view the confession with caution. (AOB 189-197; (*People v. Fitzgerald* (1961) 56 Cal.2d 855, 861 [requiring the jury to be instructed on both confessions and admissions].)

Respondent acknowledges the trial court's sua sponte duty to correctly instruct the jury, including the duty to instruct the jury to view with caution any out-of-court oral confession, in the language of CALJIC No. 2.70 or similar instruction. (RB 99-100.)

Respondent agrees with appellant that the court failed to instruct in the language of CALJIC No. 2.70 or similar instruction, but notes, as did appellant, that the court instructed on admissions with CALJIC No. 2.71. (RB 99-100; AOB 190.)

Acknowledging that the instruction on admissions was "the less applicable instruction" (RB 101), respondent argues that any error was

harmless because the jury was instructed to view an admission with caution. (RB 100-105.) Respondent relies principally on this Court's decision in *People v. Clark* (2011) 52 Cal.4th 856. (RB 101.) In *Clark*, two witnesses testified to oral statements made by defendant prior to commission of the crime, which did not amount to an admission but arguably were relevant to intent, plan, motive, or design, to commit the crime. (*People v. Clark, supra*, 52 Cal.4th at pp. 956-957.) The trial court failed to instruct that evidence of "an oral statement ought to be viewed with caution," pursuant to CALJIC No. 2.71.7. (*Id.* at p. 956, fn. 29.) The failure to instruct was harmless because the jury was instructed in the language of CALJIC No. 2.71 that an oral admission should be viewed with caution. (*Id.* at p. 957.)

Clark involved a *preoffense statement* not amounting to a confession, and thus *Clark* is distinguishable on its facts because it did not involve the issue presented here – i.e., the failure to instruct that an oral *confession* should be viewed with caution. (See *People v. Alvarez* (2002) 27 Cal.4th 1161, 1176 ["cases are not authority for propositions not considered."].)

A confession is qualitatively different that a mere statement showing intent, plan, motive, etc. (*Arizona v. Fulminate, supra,* 499 U.S. at p. 296 ["A confession is like no other evidence."].) Due process thus demands that a defendant be afforded significantly greater protection against misuse by requiring a specific cautionary instruction that a *confession* must be considered with caution. (See *People v. Fitzgerald* (1961) 56 Cal.2d 855, 861; *People v. Skinner* (1954) 123 Cal.App.2d 741, 748; *Arizona v. Fulminate, supra,* 499 U.S. at p. 296; U.S. Const., 5th, 8th & 14th Amends.)

Respondent also argues that the prejudice arising from the instructional error is measured only against the state *Watson* standard, not the more onerous *Chapman* constitutional standard.[4] (RB 100-105.) Respondent is mistaken. Where the instructional error gives rise to a violation of federal due process – as here in view of the damaging nature of the confession and the unreliable nature of thereof – the *Chapman* harmless error analysis applies, requiring reversal unless the prosecution can prove that that the error was harmless beyond a

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[4] In the very next section, *post*, § 9.D., respondent agrees that *Chapman* applies to instructional error. (RB 109.)

reasonable doubt.[5] (*Chapman v. California, supra*, 386 U.S. at p. 24; see *People v. Moore* (2011) 51 Cal.4th 386, 412 [applying the *Chapman* standard of prejudice to instructional error].)

For the reasons set forth in the opening brief – which include the existence of a strong inference that the confession was fabricated – respondent has not met its burden of proving that that the instructional error was harmless beyond a reasonable doubt. (AOB 192-197.)

Appellant's convictions in counts 1, 2, and 3 should be reversed for instructional error.

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[5] Applying state law, this Court has held that the standard of prejudice for erroneous failure to give a cautionary instruction is the *Watson* standard – i.e., "whether it is reasonably probable the jury would have reached a result more favorable to defendant had the instruction been given." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 94.)

9. The trial court prejudicially erred by giving a flawed version of CALJIC No. 8.71 regarding consideration of second degree murder in connection with count 1.

A. Introduction.

Appellant explained in his opening brief that the trial court instructed the jury with a flawed version of CALJIC No. 8.71 (Doubt Whether First or Second Degree Murder). The instruction suggested that a juror was to give the defendant the benefit of the doubt as to the degree of the offense *only if all jurors unanimously had a reasonable doubt as to the degree*, thereby making first degree murder the de facto default finding. (AOB 198-209; see *People v. Moore, supra*, 51 Cal.4th at pp. 409-411 [recognizing flaw in CALJIC No. 8.71].) The instruction stated:

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, *but you unanimously agree* that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree as well as a verdict of not guilty of murder in the first degree. [RT 33:7452-7453; CT 5:1343, italics added.]

The plain language of the instruction required the jury to consider second degree murder *only if all jurors first unanimously agreed* that

there was a reasonable doubt whether the murder was of the first or of the second degree. Of course, this was an incorrect statement of the law, which impermissibly reduced the prosecution's burden of proof on the charge of first degree murder in count 1 by making first degree murder the de facto default finding and depriving appellant of the benefit of the judgment of each individual juror. (See *Carella v. California* (1989) 491 U.S. 263, 270; *People v. Lee* (1987) 43 Cal.3d 666, 673-674.)

B. The instructional error is cognizable on appeal.

Respondent argues that the issue was forfeited by trial counsel's failure to object to the instruction. (RB 105, fn. 17.) Respondent is mistaken.

Respondent's forfeiture argument relies on an erroneous premise – i.e., that the instruction correctly states the law. (RB 105, fn. 17.) Appellant's claim is that the instruction was prejudicially misleading and lowered the prosecution's burden of proof on the charge of first degree murder. (AOB 201-209.)

The claim is that the instruction is *not* correct in law, and it denied due process by lowering the prosecution's burden of proof and depriving appellant of the benefit of the judgment of each individual

juror. No objection is necessary to preserve a claim that the court incorrectly instructed on the law essential to the charge. (Pen. Code, § 1259; *People v. Prieto* (2003) 30 Cal.4th 226, 268; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Gordon* (1990) 50 Cal.3d 1223, 1275 [a trial court "may give only such instruction as are correct statements of the law."].)

Respondent's citations to *People v. Bolin* (1998) 18 Cal.4th 297 and *People v. Johnson* (1993) 6 Cal.4th 1 are inapposite. (RB 105, fn. 17.) *Bolin* held that the trial court's instruction on consciousness of guilt was a correct statement of the law, and thus defendant's claim that the evidence did not support the instruction was waived because such a claim was not asserted in the trial court. (*People v. Bolin, supra*, 18 Cal.4th 326-327.) *Johnson* held that the trial court's instructions on sentencing discretion were correct statements of the law, and thus defendant's claim that additional instructions should have been given was waived because there was no request for clarifying instruction in the trial court. (*People v. Johnson, supra,* 6 Cal.4th at p. 52 ["defendant does not suggest the foregoing instructions were incorrect"].) Both

cases involved instructions that were correct statements of the law. The instruction at issue here is an incorrect statement of the law. (*People v. Moore, supra*, 51 Cal.4th at pp. 409-411 [recognizing flaw in CALJIC No. 8.71].)

In *People v. Moore, supra*, 51 Cal.4th 386 – in connection with a similar claim of instruction error – this Court did *not* apply the forfeiture doctrine, but instead considered the merits of the claim. (*Id.* at p. 410.) Respondent's forfeiture argument should be rejected.

C. The jury reasonably understood that they were to follow the flawed version of CALJIC No. 8.71 regarding consideration of second degree murder.

Respondent notes that this "Court has acknowledged the potential confusion of former CALJIC No. 8.71" (RB 106), but argues that any confusion was somehow cured because the court also instructed with CALJIC No. 17.40. (RB 107-109.) Respondent is mistaken.

The jury was instructed with CALJIC No. 17.40 (Individual Opinion Required – Duty to Deliberate) as follows:

> The People and the defendant are entitled to the individual opinion of each juror.
>
> Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you

> must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors.
>
> Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision.
>
> Do not decide any issue in this case by the flip of a coin, or by any other chance determination. [CT 5:1360.]

CALJIC No. 8.71 (Doubt Whether First or Second Degree Murder) is a specific instruction on how to make a determination between first and second degree murder, which explicitly told the jury to consider second degree murder *only if all jurors first unanimously agreed* that there was a reasonable doubt whether the murder was of the first or of the second degree. (RT 33:7452-7453; CT 5:1343.)

CALJIC No. 17.40 (Individual Opinion Required – Duty to Deliberate), on the other hand, is a general instruction that the defendant is entitled to the individual opinion of each juror. (CT 5:1360.) The instruction does not contradict CALJIC No. 8.71 – and is consistent therewith – because the law could require unanimous agreement that the offense is not first degree murder (before permitting contemplation of second degree murder) without offending the requirement that the

defendant is entitled to the individual opinion of each juror. In other words, there is nothing inherently contradictory about these two sets of instructions, and thus there is no basis in reason to find that CALJIC No. 17.40 somehow cured the legal deficiency present in the former version of CALJIC No. 8.71 given in this case.

CALJIC No. 8.71 is a specific instruction on how to make a determination between first and second degree murder, and it was given in connection with other instructions on count 1. (RT 33:7452-7453; CT 5:1343.) By contrast, CALJIC No. 17.40 is a general instruction that did not mention first or second degree murder. (CT 5:1360.) CALJIC No. 17.40 was not given in connection with other instructions on count 1, but instead was given at the conclusion of all jury instructions. (CT 5:1359.)

As this Court has held with respect to inconsistent jury instructions:

> More significantly, *where two instructions are inconsistent, the more specific charge controls the general charge.* . . . . In the present case, the correct instruction was a general negligence instruction, while the erroneous charge applied the principle of contributory negligence in the specific context of medical malpractice. Therefore, if the jury regarded the two instructions as inconsistent, it is

more likely that they followed the improper instruction. (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 878, italics added, footnote and citation omitted; see *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, 823 [common sense principle: the specific controls over the general].)

Accordingly, established rules of construction – that the more specific charge controls the general charge – support a finding that the jury reasonably understood they were required to follow the plain meaning of CALJIC No. 8.71.

D. The instructional error was prejudicial, requiring reduction of the offense in count 1 to second degree murder.

Respondent agrees that instructional error is reviewed under the *Chapman* standard, requiring reversal unless the prosecution proves that the error was harmless beyond a reasonable doubt. (RB 109; *Chapman v. California, supra*, 386 U.S. at p. 24.)

Respondent argues that "the evidence simply does not support a finding of second-degree murder." (RB 109-110.) Respondent points to the verdicts in this case. (RB 109.) But the instructions impermissibly limited the jury's consideration of second degree murder, and thus the

fact that the jury rendered a verdict of first degree murder does not preclude the possibility that at least one juror, if properly instructed, would have entertained a reasonable doubt whether the murder was of the first or second degree. (See *United States v. Price* (9th Cir. 2009) 566 F.3d 900, 914.)

Under *Chapman*, "reversal is unwarranted *not* when the record is devoid of evidence that the error had an adverse effect, but *only* when the state has shown beyond a reasonable doubt that the error *did not* have an adverse effect." (*People v. Jackson* (2014) 58 Cal.4th 724, 778 (conc. & dis. opn. of Liu, J.), italics in original; see *Gamache v. California* (2010) 562 U.S. __ [131 S.Ct. 591, 593] (statement of Sotomayor, J.).)

Contrary to respondent's argument, the evidence did support a finding of second degree murder. Appellant presented substantial evidence that he did not shoot Johnson or Masubayashi, and that Carrillo was the gunman. (AOB 24-33.) But even viewing appellant as the gunman, the evidence showed that prior to the shooting appellant had ample opportunity to shoot and kill Johnson – i.e., either first outside the apartment or later when they were together inside the

apartment – but he did not do so. (RT 15:3621, 21:4979-4984.) The shooting occurred hastily in the parking lot of a restaurant, which was in open view to the public, and which was observed by several witnesses. (AOB 13-19.)

Instead of concealing a purpose, the circumstances support an inference that the shooting resulted from an argument or disagreement of some kind, and thus even if committed with the express intent to kill (i.e., second degree murder), it was not necessarily committed with the requisite premeditation and deliberation necessary for a verdict of first degree murder. (*People v. Wolff* (1964) 61 Cal.2d 795, 821 ["legislative classification of murder into two degrees would be meaningless if 'deliberation' and 'premeditation' were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill"].)

The prosecution thus has not shown in this case that the instructional error was harmless beyond a reasonable doubt. (See *United States v. Russell* (3d. Cir. 1998) 134 F.3d 171, 181 ["we cannot affirm a non-unanimous verdict simply because the evidence is so overwhelming that the jury surely would have been unanimous had it

been properly instructed on unanimity"], quoting *United States v. Edmonds* (3d Cir. 1996) 80 F.3d 810, 824.)

Appellant's conviction in count 1 should be reduced to second degree murder.

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10. The evidence is insufficient to sustain the true finding on the lying-in-wait special circumstance, requiring reversal thereof and reversal of the death judgment.

Appellant explained in his opening brief that the evidence is insufficient to sustain a finding that he committed the murder of Johnson while lying in wait, which requires proof of an intentional killing, committed while each of the following three circumstances is present: "(1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage . . . ." (*People v. Morales* (1989) 48 Cal.3d 527, 557.)

Respondent argues that "there is substantial evidence from which the jury reasonably found Mataele concealed his purpose for coming to Suzuki's apartment, waited for the opportune time to kill Johnson and Masubayashi, and then ambushed them." (RB 110.) Respondent is mistaken.

With respect to concealment of purpose, respondent argues that there was evidence of a plan to kill Johnson before the group left the Penthouse to go to Suzuki's apartment, where they met Johnson and Masubayashi. (RB 112.) But this is not the narrow type of concealment

of purpose necessary to sustain a finding on the special circumstance because otherwise every gunman who arms himself with a gun and then approaches and shoots his victim would satisfy this element. (See *People v. Morales, supra*, 48 Cal.3d at p. 557 ["we do not mean to suggest that a mere concealment of purpose is sufficient to establish lying in wait – many "routine" murders are accomplished by such means"].)

The evidence is insufficient to establish concealment of purpose because the gunman pulled the handgun from his waistband, displayed it, and then shot Johnson in public view. (RT 22:5020-5024.) The shooting is indistinguishable from a "routine" murder where a handgun is used to shoot the victim. (See *People v. Morales, supra*, 48 Cal.3d at p. 557.)

Respondent also argues that evidence of concealment of purpose could be found from the actions of Chung and Lee, who remained in the Jeep hidden from view, because under a conspiracy theory appellant was "liable for their actions concealing the true purpose of their presence." (RB 113, citing *People v. Maciel* (2013) 57 Cal.4th 482, 515-516.) Respondent is mistaken. First, the citation to *People v. Maciel, supra*,

57 Cal.4th 482 is inapposite because *Maciel* addressed the sufficiency of the evidence for first degree murder; it did not address the issue whether vicarious liability could attach to a lying-in-wait special circumstance. (See *People v. Alvarez, supra*, 27 Cal.4th at p. 1176 ["cases are not authority for propositions not considered."].)

Second, respondent does not cite any authority supporting the novel proposition that there can be vicarious liability for the lying-in-wait special circumstance. (See RB 113.) Appellant is aware of no such authority.

Third, extending the breadth of the lying-in-wait special circumstance to include vicarious liability would render the special circumstance unconstitutional for failure to narrow the class of persons eligible for the death penalty. (See *Zant v. Stephens* (1983) 462 U.S. 862, 876; U.S. Const., 5th, 8th & 14th Amends.)

With respect to the elements of a substantial period of uninterrupted watchful waiting immediately followed by a surprise attack, respondent argues these elements were satisfied because Johnson and Masubayashi were lured out of the apartment and into a dark parking lot where no one else was present. (RB 114-115.) But this is

precisely what occurs in many "routine" murder cases, including gang murder cases where a handgun is used to shoot a rival gang member and the gunman flees the scene. (See, e.g., *People v. Fuentes* (2009) 171 Cal.App.4th 1133, 1135-1136; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1055-1060; *In re C.R.* (2008) 168 Cal.App.4th 1387, 1389; *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1074-1075.)

Respondent argues that the "purpose of the watching and waiting element is to distinguish those cases in which the defendant acts insidiously from those in which he *acts out of rash impulse.*" (RB 114, italics added, citing *People v. Stevens* (2007) 41 Cal.4th 182, 202.) But where a defendant acts out of rash impulse – firing a gun which kills the victim – the evidence shows no more than an unpremeditated express malice second degree murder. (See *People v. Wolff, supra*, 61 Cal.2d at p. 821.) If the purpose of the watching and waiting element is to distinguish only those cases involving second degree express malice murder – as respondent suggests – then the special circumstance is rendered unconstitutional for failure to narrow the class of persons eligible for the death penalty because all first degree premeditated

murders would qualify. (See *Zant v. Stephens, supra*, 462 U.S. at p. 876.)

The evidence was insufficient to establish a substantial period of uninterrupted watchful waiting, immediately followed by a surprise attack, because a few minutes before the shooting appellant had been talking to Johnson, and even accompanied Johnson into the apartment before being interrupted by the presence of police in the area, then returned to meet Johnson and Masubayashi at Masubayashi's vehicle. (RT 15:3623-3631, 16:3843-3846.) Under the circumstances, it simply cannot be said that the gunman was "watching" for Johnson's "arrival to take him . . . by surprise." (See *People v. Streeter* (2012) 54 Cal.4th 205, 247.)

Respondent also argues that the evidence shows an uninterrupted, continuous flow of events, starting when the group left the Penthouse and arrived at Suzuki's apartment. (RB 115-116.) Respondent is mistaken. Far from being a continuous course of watchful waiting, there were significant interruptions during which there was no watchful waiting and surprise attack. Carrillo told Detective Frazier about a plan to kill Johnson in the apartment (RT II:64), but if that was the plan, then

there was a significant interruption, causing a change in plans from when the group left the Penthouse and arrived at Suzuki's apartment.

The evidence also showed that as the group was walking out of Suzuki's apartment – after being interrupted by Johnson's girlfriend – they saw a police car in the vicinity. Appellant responded by hiding the gun he was carrying under a parked car. (RT 15:3622-3623, 3625.) Appellant and Carrillo went back toward the apartment, while Masubayashi and Johnson spoke with the police officers for a few minutes. (RT 15:3623, 3627, 16:3843-3846.) Any continuous plan was thus interrupted again by the presence of the police and the temporary abandonment of the gun. The murder thus was not committed while lying in wait because the requisite continuous flow of events – concealment, watchful waiting, and surprise attack – was not shown by the evidence. (See *People v. Lewis* (2008) 43 Cal.4th 415, 514-515; see *id.* at p. 51 ["for a killing to be perpetrated while lying in wait, both the concealment and watchful waiting as well as the killing must occur during the same time period, or in an uninterrupted attack commencing no later than the moment concealment ends"].)

Reversal of the true finding on the lying-in-wait special circumstance is warranted for insufficient evidence. (See *Jackson v. Virginia, supra*, 443 U.S. at p. 318 [a conviction unsupported by substantial evidence denies a defendant due process of law].)

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11. The jury instructions on the lying-in-wait special circumstance contained numerous errors, requiring reversal of the true finding thereon and the death judgment.

A. Introduction.

Appellant explained in his opening brief that the lying-in-wait jury instructions were woefully deficient. The instructions (1) failed to require a substantial period of watchful waiting or require that the purpose concealed must be a deadly one, (2) failed to make clear how murder while lying in wait is distinguished from premeditated and deliberate murder that is not committed while lying in wait, and (3) failed to make clear how murder by means of lying in wait (i.e., first degree murder) is distinguished from first degree murder committed while lying in wait. (AOB 222-227.) The lying-in-wait special circumstance instructions also provided a lower burden of proof for use of circumstantial evidence to prove the required mental state for the special circumstance than for proving the special circumstance generally. (AOB 228-230.)

B. The issue affects appellant's substantial rights and thus is cognizable on appeal without objection below.

Respondent argues the issue has been forfeited because no objection was made in the trial court. (RB 117.) Respondent is mistaken.

Since the error affects appellant's substantial rights – i.e., his constitutional rights to trial by jury and due process – the issue is not forfeiture, and the claim is properly reviewed on appeal even absent an objection below. (Pen. Code, § 1259; see *People v. Williams* (2010) 49 Cal.4th 405, 457; *People v. Prieto, supra*, 30 Cal.4th at p. 247 [holding that "instructional error that affects the defendant's substantial rights may be reviewed on appeal despite the absence of an objection"]; *People v. Carpenter* (1997) 15 Cal.4th 312, 380-381 [defendant may challenge on appeal the preponderance of the evidence standard for other crimes evidence without objection].)

Respondent acknowledges as much, stating that "claims of instructional error are reviewable by this Court on appeal to the extent they affected Mataele's substantial rights." (RB 117.)

C. The lying-in-wait special circumstance instructions were confusing, misleading, and erroneous.

The jury was instructed on the lying-in-wait special circumstance pursuant to CALJIC No. 8.81.15. (RT 33:7456-7457; CT 5:1347-1348.)

Respondent argues that the instruction is not deficient in failing to require a substantial period of watchful waiting or to require that the purpose concealed must be a deadly one. (RB 119-120, citing *People v. Stevens, supra*, 41 Cal.4th at pp. 203-204.) Appellant recognized in his opening brief that the *Stevens* majority did not agree that CALJIC No. 8.81.15 suffered from the errors identified herein. (AOB 224.) Appellant raised the issue to request that this Court revisit the issue and to preserve federal review. (AOB 224.) Respondent's argument, which is taken from the *Stevens* majority opinion, is fully addressed in appellant's opening brief. (AOB 223-224.)

Respondent argues that the instruction is not deficient in failing to require that the concealment of purpose must be an intent to kill. (RB 119-120, citing *People v. Streeter, supra*, 54 Cal.4th at p. 251.) Appellant recognized in his opening brief that *Streeter* held that the instruction is not deficient. (AOB 224.) Appellant raised the issue to

request that this Court revisit the issue and to preserve federal review. (AOB 224.) Respondent's argument is fully addressed in appellant's opening brief. (AOB 224.)

Respondent argues that the instruction is not deficient in failing to differentiate murder while lying in wait from first degree premeditated murder. (RB 120-122.) Appellant recognized in his opening brief that this Court has "upheld the CALJIC No. 8.25 instruction on the elements of lying-in-wait murder." (AOB 227.) Appellant raised the issue to request that this Court revisit the issue and to preserve federal review. Respondent's argument is fully addressed in appellant's opening brief. (AOB 120-122.)

Respondent argues that the trial court's instructions did not undermine and dilute the requirement of proof beyond a reasonable doubt (RB 123-124), noting that the "claim has been repeatedly presented to and rejected by this Court." (RB 123, citing *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1226.) Appellant raised the issue to request that this Court revisit the issue and to preserve federal review. Respondent's argument is fully addressed in appellant's opening brief. (AOB 228-230.)

D. The erroneous instructions were not harmless beyond a reasonable doubt.

Respondent agrees that instructional error is properly reviewed under the *Chapman* standard, requiring reversal unless the prosecution proves that the error was harmless beyond a reasonable doubt. (RB 124 [the "error requires reversal unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict"]; *Neder v. United States* (1999) 527 U.S. 1, 8-16; *Chapman v. California, supra*, 386 U.S. at p. 24.)

Respondent makes only a summary argument that there is no prejudice, arguing that the evidence was overwhelming and referring to its reply to Argument 10, *ante*. (RB 124-125.) Respondent is mistaken. The evidence offered by the prosecution in support of the true finding on the lying-in-wait special circumstance was weak and insubstantial. (*Ante*, Arg. 10; AOB 232-235.)

When reviewing an instructional error that lowers the prosecution's burden of proof, as here, the court does not consider the weight of the prosecution's evidence. (See *People v. Aranda* (2012) 55

Cal.4th 342, 368.) Respondent fails to recognize this principle, and instead points to the weight of the prosecution's evidence. (RB 124.)

The prosecution will be unable to prove that the instructional errors identified above were harmless beyond a reasonable doubt. The evidence revealed that the gunman did not conceal his purpose from Johnson – i.e., Carrillo testified that appellant confronted Johnson directly by shaking his hand and then displaying a handgun. (RT 22:5020-5022.)

The evidence also did not establish a substantial period of watchful waiting because before the shooting, Johnson and appellant met outside the apartment, went inside together, and then subsequently were interrupted when the police appeared, causing appellant to leave the handgun under a parked car. (RT 15:3621-3623, 3625; RT 21:4979-4984.) For the same reasons, the evidence does not establish that the gunman launched a surprise attack on Johnson immediately after a period of watchful waiting and/or that there was an uninterrupted flow of events.

The true finding on the lying-in-wait special circumstance should be reversed for prejudicial instructional error. (See *Sullivan v. Louisiana, supra*, 508 U.S. at p. 279.)

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12. The lying-in-wait special circumstance violates the Eighth Amendment because it fails to adequately narrow the class of persons eligible for the death penalty.

Appellant explained in his opening brief that the lying-in-wait special circumstance violates the Eighth Amendment because it fails to adequately narrow the class of persons eligible for the death penalty. (AOB 236-245.) Appellant acknowledged that this Court has rejected the argument, but has raised the issue to request that this Court revisit the issue and to preserve federal review. (AOB 236.)

Respondent argues that the lying-in-wait special circumstance "adequately narrow[s] the class of persons eligible for the death penalty." (RB 125.)

Appellant's opening brief fully addresses the argument that the lying-in-wait special circumstance – as interpreted and broadened by this Court over the years – violates the Eighth Amendment because it fails to adequately narrow the class of persons eligible for the death penalty. (AOB 236-245.)

California's lying-in-wait special circumstance (Pen. Code, § 190.2, subd. (a)(15)) has become so all-inclusive it provides no meaningful basis for distinguishing capital from non-capital murder.

Accordingly, the Court should revisit the issue, declare the special circumstance unconstitutional, strike it in this case, and reverse the death judgment.

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13. The cumulative effect of the guilt phase errors requires reversal of appellant's convictions for a denial of the constitutional rights to due process and a fair and reliable jury trial.

Appellant identified numerous errors in his opening brief during the guilt phase trial, which operated together, and in any combination of two or more, to deny appellant the due process right to a fundamentally fair and reliable trial. (AOB 246-252.)

Respondent summarily addresses appellant's cumulative prejudice argument, asserting that there is no cumulative prejudice because appellant "failed to show error or that he suffered prejudice as a result of any particular error or combined errors." (RB 127.)

Respondent cannot dispute that the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Donnelly v. DeChristoforo, supra*, 416 U.S. at pp. 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.)

This is the case here where the serious errors separately identified in Arguments 1 through 12 cumulatively, or in any combination thereof, violated appellant's due process rights under *Chambers v. Mississippi,*

supra, 410 U.S. at pp. 298, 302-303. These errors included the following:

(1) a jury selection process that unconstitutionally exclude those who would fairly and impartially decide the case and return a verdict for either life or death (*ante*, Args. 1, 2 & 3);

(2) the substantial unjustified delay in charging appellant, which denied him due process because the delay resulted in the unavailability of exculpatory witnesses and the loss of material evidence (*ante*, Arg. 4);

(3) the erroneous admission of Masubayashi's testimony recounting Perdon's purported statement of appellant's confession to shooting Johnson, which statement was shown to be unreliable (*ante,* Arg. 7);

(4) the failure of the trial court to instruct the jury to view the purported confession with caution, especially since Masubayashi's testimony was unreliable and the statement was not repeated accurately – i.e., Masubayashi added incriminating words identifying appellant as the shooter (*ante,* Arg. 8);

(5) the prejudicial error in excluding eyewitness Towne's statements to Officer Bowers at the scene of the shooting – providing a description of the gunman only a few minutes after the shooting that matched Carrillo and not appellant (*ante*, Arg. 5);

(6) the prejudicial error in excluding Swift Eagle's proffered testimony recounting Carrillo's statement to her after the shooting – wherein Carrillo implicitly admitted killing Johnson and shifted blame to appellant (*ante*, Arg. 6);

(7) the prejudicial error in giving a flawed version of CALJIC No. 8.71 regarding consideration of second degree murder, which lowered the prosecution's burden of proof by making first degree murder the de facto default finding and depriving appellant of a unanimous verdict on the facts necessary to constitute the crime of first degree murder (*ante*, Arg. 9);

(8) the insufficiency of the evidence to sustain the true finding on the lying-in-wait special circumstance (*ante*, Arg. 10);

(9) the prejudicial error in giving incorrect instructions defining the lying-in-wait special circumstance, requiring reversal of the true finding thereon and the death judgment (*ante*, Arg. 11); and,

(10) the error arising from the fact that the lying-in-wait special circumstance violates the Eighth Amendment because it fails to adequately narrow the class of persons eligible for the death penalty (*ante*, Arg. 12).

In view of the substantial record of the cumulative errors described above, the prosecution cannot prove beyond a reasonable doubt that there is no reasonable possibility that the combination and cumulative impact of the guilt phase errors in this case might have contributed to appellant's conviction. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

Appellant's convictions should be reversed.

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Penalty Phase and Sentencing

14. The exclusion of defense penalty phase witness Matthew Towne prejudicially deprived appellant of the right to present a penalty phase defense and to establish lingering doubt.

A. Introduction.

Appellant explained in his opening brief that the trial court prejudicially erred by denying the defense request to call Matthew Towne during the penalty phase in support of lingering doubt. (AOB 253-265.)

Towne – an eyewitness to the shooting – was unable to be located until the penalty phase of trial. (RT 34:7710-7720.) He would have given a description of the gunman consistent with Carrillo's physical appearance and eliminating appellant as a possible shooter, thereby providing strong evidence in support of the mitigating factor of lingering doubt. (CT 1:135-158, 1:245-251, 6:1644; Court Exh. 10, p. 2.)

Respondent does not dispute that a "capital defendant has a constitutional right to present all relevant mitigating evidence at the penalty phase." (*People v. Watson* (2008) 43 Cal.4th 652, 692; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4.) Nor does respondent dispute

that pursuant to Penal Code section 190.3 "evidence of the circumstances of the offense, 'including evidence that may create a lingering doubt as to the defendant's guilt,' is statutorily admissible in the penalty phase of trial as a factor in mitigation. . . . ." (*People v. Linton* (2013) 56 Cal.4th 1146, 1198, citing *People v. Hamilton* (2009) 45 Cal.4th 863, 912.)

B. Towne's proffered testimony would have been admissible at the guilt phase to establish that Carrillo was the shooter, and thus the same testimony was admissible at the penalty phase as relevant to lingering doubt in mitigation.

Respondent argues that evidence of the circumstances of the offense, including evidence that may create a lingering doubt as to the defendant's guilt of the offense, is only admissible at a *penalty retrial*, not at an initial penalty trial. (RB 130-131, citing *People v. Hamilton, supra*, 45 Cal.4th at p. 912, and *People v. Banks* (2014) 59 Cal.4th 1113, 1195.) Respondent is mistaken.

First, respondent cites *People v. Hamilton, supra*, 45 Cal.4th at p. 912, for the holding that with "the exception of a retrial of the penalty phase–which was not the case here–*evidence is not admissible at the penalty phase for the purpose of creating reasonable doubt.*" (RB 131,

italics added.) *Hamilton* was an appeal from a penalty retrial, and thus this Court had no occasion to decide – and did not decide – the issue whether evidence of the circumstances of the offense, including evidence that may create a lingering doubt as to the defendant's guilt of the offense, is admissible at the initial penalty trial. (*People v. Hamilton, supra*, 45 Cal.4th at pp. 872, 912-914.) *Hamilton* thus does not support the holding asserted by respondent. (See *People v. Alvarez, supra,* 27 Cal.4th at p. 1176 ["cases are not authority for propositions not considered."].)

Second, one of the 12 penalty phase jurors was first substituted in during the penalty phase, and thus did not personally return a verdict in the guilt phase. (CT 6:1416, 1444.) Accordingly, one of appellant's jurors shared some of the characteristics of jurors sitting for a penalty phase retrial because those jurors also would not have returned verdicts in the guilt phase.

Third, the rationale for the rule permitting evidence of the circumstances of the offense at a penalty retrial, including evidence that may create a lingering doubt as to the defendant's guilt of the offense, is equally applicable to the initial penalty trial. (See *People v. Gay* (2008)

42 Cal.4th 1195, 1213; *People v. Hamilton, supra*, 45 Cal.4th at p. 912-914.) At both an initial penalty trial and a penalty retrial the jury "may properly conclude that the prosecution has discharged its burden of proving defendant's guilt beyond a reasonable doubt but that it *may still demand a greater degree of certainty of guilt for the imposition of the death penalty*." (*People v. Terry* (1964) 61 Cal.2d 137, 145-146, italics added.)

Fourth, "evidence of the circumstances of the offense, 'including evidence that may create a *lingering doubt as to the defendant's guilt*,' is statutorily admissible in the penalty phase of trial as a factor in mitigation under section 190.3." (*People v. Linton* (2013) 56 Cal.4th 1146, 1198, italics added, citing *People v. Hamilton, supra*, 45 Cal.4th at p. 912.) "'The test for admissibility is . . . whether [the evidence] . . . relates to the circumstances of the crime or the aggravating or mitigating circumstances.'" (*People v. Linton, supra*, 56 Cal.4th at p. 1198.)

In connection with evidence relating to the circumstances of the crime, this Court has limited such evidence to that which would have been admissible at the guilt phase of trial. (See *People v. Linton, supra*, 56 Cal.4th at p. 1198 ["'Evidence that is inadmissible to raise reasonable

doubt at the guilt phase is inadmissible to raise lingering doubt at the penalty phase.'"], quoting *People v. Stitely* (2005) 35 Cal.4th 514, 566.)

In *People v. Banks, supra*, 59 Cal.4th 1113, in connection with a penalty retrial, this Court held:

> . . . . But the fact that "'the defendant cannot relitigate the issue of guilt or innocence . . . does not preclude the admission of evidence relating to the circumstances of the crime or the aggravating or mitigating circumstances, *including evidence which may mitigate a defendant's culpability by showing that he actually did not kill the victim.*'"

(*Id.* at p. 1195, italics added, quoting *People v. Gay, supra*, 42 Cal 4th at p. 1223.)

Towne's proffered testimony describing the shooting he observed would have been admissible at the guilt phase to show that the shooter looked similar to Carrillo, not appellant, thereby revealing that appellant actually did not kill the victim. (AOB 253-254.) The proffered testimony thus was admissible at the penalty phase as relevant to lingering doubt in mitigation.

C. There is a reasonable possibility that the error in excluding Towne's proffered eyewitness testimony affected the death verdict.

Respondent correctly notes that the error requires reversal of the death verdict if there is a "reasonable possibility" that the error affected the verdict. (RB 133.) Respondent fails to mention that in the penalty phase of a capital trial this standard is equivalent to the *Chapman* constitutional standard of prejudice, requiring the prosecution to prove that the error was harmless beyond a reasonable doubt. (*People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11.)

Respondent acknowledges that Towne's proffered testimony had "exculpatory value" because Towne would have testified that the "shooter had a 'thin build' and was wearing a cap." (RB 133.) Respondent characterizes this testimony as cumulative of the testimony of Fowler and Rodriguez. (RB 133-134.) Not so. Rodriguez gave conflicting testimony, first describing the shooter as medium build (RT 20:4690-4691, 4697) and then years later at trial describing the shooter as heavyset.[6] (RT 20:4674, 4678-4681, 4695.) Fowler testified that the

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[6] Rodriguez acknowledged at trial that his recollection on the day of the incident would be be "[a] lot better." (RT 20:4691.)

gunman was thin build and wearing a beanie (RT 20:4710-4711, 4735-4740, 4753), but as respondent notes he also described the shooter as African-American. (RB 134, fn. 20; RT 20:4740, 28:6280; AOB 19.)

Respondent also suggests that Fowler's statement about the shooter wearing a beanie was qualified. Respondent writes, "Fowler described the shooter to an officer as being five feet ten inches, thin, and *possibly wearing a beanie.* (RB 9, italics added.) Towne's proffered testimony unequivocally described the shooter as wearing a cap. (CT 6:1643-1644.) Towne stated:

> I heard a single gun shot. As I looked towards the parking lot across the street, I saw a male 5'8" to 6' tall, thin build *wearing a cap on his head* walking eastbound through the parking lot away from the driver's side door of a black compact car. This unknown male fired 3-4 more shots in an eastbound direction towards Euclid while walking eastbound. I didn't see anything else because I ducked behind the wall and ran inside the clinic. [¶]
>
> The man I saw shooting definitely had a thin build. The man was definitely not anywhere near 300 pounds. Based on his build I would estimate his weight to be 160-170 pounds. [CT 6:1643-1644, italics added.]

Towne's proffered testimony was not cumulative of Rodriguez's testimony because Rodriguez did not identify the gunman as wearing a cap and/or beanie. Rodriguez also did not identify the gunman as thin

build, but instead first the described the gunman as being medium build. (RT 20:4690-4691, 4697.)

Nor was Towne's proffered testimony somehow made inadmissible because it more closely fit the description of the gunman given by Fowler. Identification of the gunman was the central, contested issue in the case. The descriptions of the gunman given by Towne and Fowler were both independently relevant and material to this contested issue, and thus Towne's proffered testimony could not properly have been excluded at trial as cumulative. (See Evid. Code, §§ 210, 350; *People v. Green* (1980) 27 Cal.3d 1, 19.)

There is a reasonable possibility that the error in excluding Towne's proffered testimony affected the death verdict because Towne's testimony about the shooter being thin and wearing a cap fit the description of Carrillo and did not match appellant's appearance – i.e., appellant was a large man of approximately 300 to 350 pounds and was not wearing anything on his head that night. (RT 28:6301, 30:6732; CT 1:135-158, 1:245-251, 6:1644; CT Supp. AA 2:332, 7:1813; Court Exh. 10, p. 2.)

In sum, Towne's proffered eyewitness testimony was important because it corroborated other evidence admitted during the trial pointing to Carrillo as the shooter, including evidence that (1) Carrillo was present at the scene of the shooting, (2) Carrillo fit the description of the shooter as testified to by other witnesses, (3) Carrillo made an admission to the shooting, and (4) Carrillo fled the scene with blood on his clothes. (AOB 2-4, 24-30, 31-33.)

Reversal of the death verdict is warranted.

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15. The trial court prejudicially erred by instructing the guilt-phase alternate juror seated to deliberate at the penalty phase to accept as having been proved beyond a reasonable doubt the guilty verdicts and true findings rendered by the jury in the guilt phase.

Appellant explained in his opening brief that in view of the fact that an alternate juror was first seated during the penalty phase, the court prejudicially erred by instructing the juror to accept the guilty verdicts and true findings. (AOB 266-271; see *People v. Kaurish* (1990) 52 Cal.3d 648, 708 [an alternate juror seated for the penalty phase is entitled "to vote against the death penalty if she disagreed with the guilt phase verdict"].)

Respondent argues that the claim is forfeited because trial counsel did not object to the instruction. (RB 270, citing *People v. Capistrano* (2014) 59 Cal.4th 830, 875, fn. 11.) There is no forfeiture here because appellant's claim is that the instruction is incorrect in law, and thus "an objection is not required." (*Ibid*, citing *People v. Smithey* (1999) 20 Cal.4th 936, 976-977, fn. 7; Pen. Code, § 1259.)

Indeed, the only case cited by respondent in support of the forfeiture argument – *People v. Capistrano, supra*, 59 Cal.4th 830 – did *not* apply the forfeiture doctrine. (*Id.* at p. 875.)

Respondent next argues that the instruction is correct, relying on *People v. Cain* (1995) 10 Cal.4th 1. (RB 135-136.) Appellant acknowledged that "this Court has addressed, and rejected, this same argument on one prior occasion." (AOB 270, citing *People v. Cain* (1995) 10 Cal.4th 1, 66.) Appellant explained that *Cain* should be reconsidered because it is in substantial tension with the principle the Court recognized in *Kaurish* permitting alternate jurors seated for the penalty phase "to vote against the death penalty if [they] disagreed with the guilt phase verdict . . . ." (*People v. Kaurish, supra*, 52 Cal.3d at p. 708.) Respondent's points are fully addressed in the opening brief, except as set forth below. (AOB 266-270.)

Respondent argues that no conflict exists with this Court's decision in *Kaurish* because there a lingering doubt instruction was given, and thus the alternate juror seated for the penalty phase was entitled to vote against the death penalty if she disagreed with the guilt phase verdict. (RB 137-138.) Respondent's point is irrelevant. The instruction at issue here – mandating that the alternate juror seated during the penalty phase accept the guilty verdicts and true findings –

was *not* given in *Kaurish*. (*People v. Kaurish, supra*, 52 Cal.3d at p. 708.)

The explicit instruction in this case, which required the juror to accept the guilty verdicts and true findings, controls over the general lingering doubt instruction. (See *LeMons v. Regents of University of California, supra,* 21 Cal.3d 878 ["where two instructions are inconsistent, the more specific charge controls the general charge"]; *Gibson v. Ortiz, supra*, 387 F.3d at p. 823.)

Prejudicial error affecting only a single juror requires reversal of the death verdict. (See *People v. Hamilton* (1963) 60 Ca1.2d 105, 137 [any error which may have reasonably led one juror to impose the death penalty is substantial and prejudicial]; *Wiggins v. Smith* (2003) 539 U.S. 510, 537 [prejudice is established at the penalty phase if "there is a reasonable probability that at least one juror would have struck a different balance" between life and death].)

Accordingly, reversal of the death verdict is warranted for instructional error.

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16. The jury's consideration of appellant's prior juvenile criminal activity requires reversal of the death judgment.

Appellant explained in his opening brief that with respect to prior criminal activity in aggravation the prosecution relied extensively on conduct committed by appellant when he was 13 years old – exposing genitals and touching on breasts and buttocks (Janke and Ortiz) – and an assault on Kinsey when he was 16 years old. (AOB 272-282.)

Appellant recognized that "this Court has held that prior violent conduct committed while defendant was a juvenile may be admitted as evidence of criminal activity that involved the use or attempted use of force or violence." (AOB 273; *People v. Roldan* (2005) 35 Cal.4th 646, 737; *People v. Lucky* (1988) 45 Cal.3d 259, 294-295 [the phrase "criminal activity," as used in Penal Code section 190.3, factor (b), includes juvenile adjudications].)

Appellant explained that in view of evolving standards in Eighth Amendment jurisprudence, the jury's consideration of appellant's prior juvenile criminal activity requires reversal of the death judgment for a violation of the Eighth and Fourteenth Amendments. (See *Roper v. Simmons* (2005) 543 U.S. 551; *Graham v. Florida* (2010) 560 U.S. __

[130 S.Ct. 2011]; *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455].)

Respondent acknowledges the evolving standards in Eighth Amendment jurisprudence, noting "there are substantial differences between juveniles and adults . . . ." (RB 139.)

Respondent contends that these standards have no application to appellant "because he is not being punished more severely for his juvenile conduct." (RB 139; but see RB 141 [respondent concedes that "Mataele's juvenile conduct was highly relevant to the determination of his sentence"].)

At trial the prosecution did seek a more severe punishment in this case – i.e., the death penalty – based in part on appellant's juvenile conduct. The prosecutor introduced appellant's juvenile conduct in aggravation in support of a death verdict. (AOB 34-37.)

During closing summation, the prosecutor made repeated use of appellant's juvenile conduct in aggravation to persuade the jury to return a death verdict. (RT 42:9221, 9224-9226, 9235.) The prosecutor's reliance in closing argument on erroneously admitted evidence, as here, strongly indicates prejudice. (See *People v. Guzman* (1988) 45 Cal.3d

915, 963; *People v. Roder* (1983) 33 Cal.3d 491, 505; *Depetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1063 [prosecutor's reliance on error in closing argument is indicative of prejudice].)

Respondent further argues that neither *Graham* nor *Miller* held that juvenile criminal activity was inadmissible at the penalty phase of a capital trial. (RB 140-141.) Respondent's argument misses the point: these cases demonstrate evolving standards in Eighth Amendment jurisprudence, which now reveal that the Eighth Amendment prohibits the jury's consideration of a defendant's prior juvenile criminal activity in support of a death judgment.

In *People v. Bramit* (2009) 46 Cal.4th 1221 – a case not cited by respondent – this Court distinguished the high court's decision in *Roper* on the ground that admission of juvenile conduct is a challenge "to the admissibility of evidence, not the imposition of punishment[,]" and thus does not impact "Eighth Amendment analysis [which] hinges upon whether there is a national consensus in this country against a particular punishment." (*People v. Bramit, supra*, 46 Cal.4th at p. 1239.)

But in *Hall v. Florida* (2014) __ U.S. __, 134 S.Ct. 1986, the high court made clear this limitation on Eighth Amendment analysis is no

longer true. The Court employed the identical Eighth Amendment analysis employed in *Roper* (and *Graham* and *Miller*) – looking for a national consensus. But in *Hall*, the Court was not assessing whether there was a "national consensus against a particular punishment," but instead it was assessing whether an evidentiary rule enacted by the Florida legislature violated the Eighth Amendment. (*Hall v. Florida, supra*, 134 S.Ct. at pp. 1994-1995.)

In *Hall*, defendant was sentenced to death in Florida prior to the Supreme Court's ruling in *Atkins v. Virginia* (2002) 536 U.S. 304 that the Eighth Amendment precluded execution of the mentally retarded. In response to *Atkins*, the Florida legislature enacted a rule of evidence which provided that unless a defendant introduced an IQ test with a score lower than 70, he could not "present[] any additional evidence of his intellectual disability." (*Hall v. Florida, supra*, 134 S.Ct. at p. 1992.) In deciding whether this rule of evidence violated the Eighth Amendment, the high court applied the identical approach it employed in *Roper* – i.e., looking to see if the rule was consistent with a national consensus. (*Hall v. Florida, supra*, 134 S.Ct. at pp. 1996-1998.) The Court held that the Florida *evidentiary rule* was not consistent with the

national consensus, and thus violated the Eighth Amendment. (*Id.* at p. 1998.)

In light of *Hall*, this Court's suggestion in *Bramit* that traditional Eighth Amendment analysis was limited to assessing the propriety of a "particular punishment" is no longer true.

Respondent also suggests that juvenile activity is relevant as showing appellant's character – i.e., that he was not deterred and continued committing violent conduct into adulthood. (RB 140-141.) But *Roper*, *Graham* and *Miller* all recognize that the concept of deterrence simply does not work the same way with children as it does with adults, and that the character of a child is qualitatively different from the character of an adult. (*Roper v. Simmons, supra*, 543 U.S. at p. 571; *Graham v. Florida, supra*, 130 S.Ct. at p. 2028; *Miller v. Alabama, supra*, 132 S.Ct. at p. 2465.)

Respondent acknowledges that evidence erroneously admitted in aggravation requires reversal if there is "a reasonable possibility" that the error affected the verdict, which is "'essentially the same, in substance and effect, as the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California*.'" (RB 142, citations omitted.)

Respondent argues in summary fashion there is no prejudice because the "juvenile convictions[7] were not the most significant aggravation evidence." (RB 142.) But this ignores the fact that the prosecution introduced significant evidence of juvenile criminal activity, and then used that evidence to argue to the jury that appellant was deserving of the death penalty because the juvenile conduct showed that he failed to be reformed himself. (See RT 42:9221, 9224-9226, 9235.)

Respondent's summary prejudice argument also ignores the fact that this is a single homicide case, and one in which appellant presented a significant case for a life sentence, consisting of (1) evidence that his conduct was influence by the violence and abuse he suffered in childhood and by serious mental health issues, (2) evidence showing favorable prospects for rehabilitation in prison, and (3) evidence showing good character. (AOB 38-56.)

On this record – and considering that the issue is whether a single juror could reasonably have imposed a life sentence – the prosecution

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[7] Juvenile *convictions* are not at issue here, and thus respondent must mean juvenile criminal activity.

will be unable to prove beyond a reasonable doubt that the jury's consideration of appellant's prior juvenile criminal activity did not contribute to the death verdict.

Reversal of the death judgment is warranted.

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17. The evidence is insufficient as a matter of law to sustain a finding that appellant committed a robbery of Thomas Kinsey based on the direct perpetrator theory advanced by the prosecution.

A. Introduction.

Appellant explained in his opening brief that the prosecution introduced evidence in aggravation of a purported robbery of a briefcase from Thomas Kinsey. But on the direct perpetrator theory of robbery advanced by the prosecution the evidence was insufficient to sustain a finding of guilt because there was no evidence appellant took property from Kinsey, a necessary element of the offense of robbery.[8] (AOB 286-289.)

Respondent argues, "Mataele does not challenge the admission of the evidence. Instead, he reasons that because the evidence shows Mataele committed robbery as an aider and abettor and the jury was not fully instructed on aiding and abetting, his death judgment must be reversed on account of instructional error and insufficient evidence." (RB 142-143.) Respondent misconstrues appellant's argument. Appellant argued that the evidence was insufficient as a matter of law to

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[8] The prosecutor did not advance theories of either aiding and abetting or attempted robbery. (RT 42:9221, 9224-9225, 9235.)

sustain the requisite finding of a violation of a penal statute (AOB 284, 286-289), and thus "*[a]dmisison of evidence that appellant perpetrated a robbery of Kinsey* . . . prejudicially denied appellant his state and federal constitutional rights . . . ." (AOB 284, italics added.)

B. The issue is cognizable on appeal.

Respondent argues that a sufficiency-of-the-evidence challenge to admission of unadjudicated criminal activity under Penal Code section 190.3, factor (b), is forfeited absent an objection by defense counsel. (RB143-146.) Appellant recognizes this Court has held that the issue is forfeited absent an objection. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1174-1175.)

But the forfeiture rule should not apply here for a simple policy reason: an objection below would only have served to force defense counsel to help the prosecution to prove its case. If defense counsel had objected to admission of the evidence on the grounds asserted here – i.e., that the evidence was insufficient as a matter of law to prove the commission of a crime *on the theory presented by the prosecution and as instructed* – the prosecutor would have been alerted to the issue and may have corrected the deficiency by presenting an alternate theory (i.e.,

aiding and abetting and/or attempted robbery). The prosecutor alone has the burden to prove the case on her chosen theory. (See *Ernst v. Searle* (1933) 218 Cal. 233, 240; *Flatley v. Mauro* (2006) 39 Cal.4th 299, 321, fn. 10.) The law should not prevent consideration of a meritorious argument on appeal when all the defense has done is hold the prosecution to its burden of proving the case.

Moreover, since the error affects appellant's substantial rights – i.e., his constitutional rights to due process and a reliable penalty verdict – the issue is properly reviewed on appeal even absent an objection. (Pen. Code, § 1259; see AOB 289-290.)

C. The jury's consideration of the unproven robbery of Kinsey requires reversal of the death judgment.

Respondent does *not* argue that the evidence was sufficient to sustain a finding that appellant perpetrated a robbery of Kinsey on a direct perpetrator theory – i.e., the only theory advanced by the prosecution. (RB 146-152.)

Instead, respondent argues that assuming the instructions provided on robbery were incomplete, the error was harmless beyond a reasonable doubt. (RB 146.) Respondent is mistaken. Where the court

undertakes to instruct the jury on the elements of other crimes introduced in aggravation, as here, such instructions – as respondent acknowledges – must "'be accurate and complete.'" (RB 147, citing *People v. Prieto, supra*, 30 Cal.4th at p. 268.) The instructions on aiding and abetting liability were materially incomplete because, as respondent acknowledges, the trial court failed to instruct on aiding and abetting liability with CALJIC Nos. 3.00 and 3.01. (RB 149; see CT 6:1519-1523.)

The jury was not instructed on aiding and abetting liability, and the prosecutor never argued aiding and abetting liability, instead solely relying at trial on direct perpetrator liability. (AOB 283-285.) The jury's consideration of evidence of a purported robbery of Kinsey – which was not supported by substantial evidence on the only theory advanced at trial – was error. (See *People v. Kunkin* (1973) 9 Cal.3d 245, 251 [concluding that substantial evidence did not support jury verdict even though evidence might have been sufficient under theory on which the jury was not instructed].)

Nor has respondent met its burden of proving beyond a reasonable doubt that the error did not contribute to the death verdict.

(See RB 149-152.) Preliminarily, respondent's argument about an instructional error being harmless is misplaced because the issue here is the erroneous admission of evidence in the penalty phase, not instructional error. (AOB 289-293.) The error thus requires reversal if there is "a reasonable possibility" that the error affected the verdict, which is the same standard "as the harmless beyond a reasonable doubt standard of *Chapman* . . . ." (AOB 290-291, citing *People v. Lancaster, supra*, 41 Cal.4th at p. 94 and *People v. Ochoa* (1998) 19 Cal.4th 353, 479.)

The Kinsey robbery evidence formed a material part of the prosecution's case in aggravation, and it was inflammatory. (AOB 35-37; RT 35:7823-7872.) The prosecutor highlighted the Kinsey robbery and repeatedly referred to it during closing argument, urging the jury to return a death verdict based, in part, on this evidence. (RT 42:9221, 9224-9225, 9235.) The prosecutor's reliance in closing argument on erroneously admitted evidence is a strong indication of prejudice. (See e.g., *People v. Roder, supra*, 33 Cal.3d at p. 505; *People v. Martinez* (1986) 188 Cal.App.3d 19, 26; *Depetris v. Kuykendall, supra*, 239 F.3d

at p. 1063 [prosecutor's reliance on error in closing argument is indicative of prejudice].)

Admission of evidence that appellant perpetrated a robbery of Kinsey was further prejudicial because only two incidents were admitted to prove prior criminal conduct – the robbery of Kinsey and the assault on Melanie Jenke. Between the two, the robbery of Kinsey was the most aggravating and inflammatory evidence. (See RT 42:9221, 9224-9225, 9235.)

In view of the fact that the prosecutor viewed the robbery of Kinsey as a significant factor in aggravation warranting a sentence of death, and in view of the case in mitigation, the prosecution has failed to prove beyond a reasonable doubt that evidence of the Kinsey robbery did not contribute to the death verdict. (See *People v. Robertson* (1989) 48 Cal.3d 18, 62.)

Reversal of the death judgment is warranted.

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18. California's death penalty statute, as interpreted by this Court and applied at appellant's trial, violates the United States Constitution and international law.

Appellant explained in his opening brief that many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution and international law. (AOB 294-309.)

In *People v. Schmeck* (2005) 37 Cal.4th 240, a capital appellant presented a number of often-raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id.* at p. 303.) This Court acknowledged that in dealing with these attacks in prior cases, it had given conflicting signals on the detail needed in order for an appellant to preserve these attacks for subsequent review. (*Id.* at p. 303, fn. 22.) In order to avoid detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar

claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (*Id.* at p. 304.)

Accordingly, pursuant to *Schmeck* and in accordance with this Court's own practice in decisions filed since then, appellant has, in Argument 18 of the opening brief, identified the systemic and previously rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requests the Court to reconsider its decisions rejecting them. These arguments are squarely framed and sufficiently addressed in the opening brief, and therefore appellant makes no reply to respondent's argument at pages 152-162.

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19. The errors in both the guilt and penalty phases of trial, individually and cumulatively, or in any combination thereof, require reversal of the death judgment.

Appellant explained in his opening brief that numerous errors occurred at every stage of his trial, from jury selection through the guilt and penalty phases. (AOB 310-314.) The multiple errors require an analysis of prejudice that takes into account the cumulative and synergistic impact of the errors. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

Respondent summarily states that there were no errors, and thus there is no cumulative error. (RB 162.)

This Court must consider the cumulative prejudicial impact of the various constitutionally-based errors because cumulative prejudicial impact can itself be a violation of federal due process. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn. 15.) A trial is an integrated whole. This is particularly true of the penalty phase of a capital case, where the jury is charged with making a moral, normative judgment, and the jurors are free to assign whatever moral or sympathetic value they deem appropriate to each item of mitigating and aggravating evidence. The jurors are told to consider the "totality" of the mitigating

circumstances with the "totality" of the aggravating circumstances. (See RT 34:7740; CT 6:1536 [CALJIC No. 8.88].)

There is a substantial record of serious errors that individually and cumulatively, or in any combination, violated appellant's due process rights under *Chambers v. Mississippi, supra*, 410 U.S. 284 and require reversal of the death judgment.

The numerous and substantial errors in the jury selection and guilt phases of the trial, as set forth in Arguments 1 through 12, inclusive, including the cumulative effect of the errors in the guilt phase of trial (Argument 13), deprived appellant of a fair and reliable penalty determination. (*Ante*, §§ 1-13.)

The death sentence is unconstitutionally excessive and unreliable where, as here, the jury considered as aggravating evidence appellant's prior juvenile criminal activity, which included a sexual assault and battery upon Melanie Janke and Diane Ortiz – when appellant was 13 years old – and the Kinsey robbery evidence – when appellant was 16 years old. (*Ante*, § 16.)

The penalty phase jury instructions – requiring the guilt-phase alternate juror seated to deliberate at the penalty phase to accept as

having been proved beyond a reasonable doubt the guilty verdicts and true findings rendered by the jury in the guilt phase – prevented the jury from making an individualized sentencing determination. (*Ante*, § 15.)

The jury was prevented from hearing and considering relevant evidence in mitigation. The trial court prejudicially deprived appellant of his ability to present a penalty phase defense and to establish lingering doubt as a mitigating factor, when the court refused to allow him to call Towne as a witness for the penalty phase. (*Ante*, § 14.) Towne's proffered testimony circumstantially linked Carrillo to the killing of Johnson, and eliminated appellant as the shooter, thereby providing strong evidence in mitigation. (*Ante*, § 14.)

Finally, the admission of legally insufficient evidence in aggravation of an unproven robbery of Kinsey relieved the prosecution of its burden of proof and undermined the reliability of the penalty determination. (*Ante*, § 17.)

In view of the substantial individual and cumulative errors, and appellant's case in mitigation for a life sentence, it cannot be said that the combined effect of the errors detailed above had "no effect" on at least one of the jurors who determined that appellant should die by

execution. (See *Caldwell v. Mississippi, supra*, 472 U.S. at p. 341.) Appellant's death sentence must be reversed due to the cumulative effect of the numerous errors in this case.

/ / /

Conclusion

For the reasons set forth above and those set forth in appellant's opening brief, appellant Tupoutoe Mataele respectfully requests reversal of his convictions and the judgment of death.

Respectfully submitted,

Dated: 7-6-2015 By: _____

Stephen M. Lathrop
Attorney for Defendant/Appellant
Tupoutoe Mataele

Certificate of Compliance

I hereby certify under penalty of perjury that there are 24,998 words in this brief.

Respectfully submitted,

Dated: 7-6-2015 By: _____

Stephen M. Lathrop
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Tupoutoe Mataele

Proof of Service by Mail

I, Stephen M. Lathrop, declare as follows: I am over the age of 18 years and not a party to the case; I am a resident of the County of Los Angeles, California, where the mailing occurs; and my business address is 904 Silver Spur Road #430, Rolling Hills Estates, CA 90274.

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Stephen M. Lathrop