

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GARRETT KAZUO IGE AND
LAWRENCE PARKER HUGHES II,

Defendants and Appellants.

G050722

(Super. Ct. No. FBA700552)

O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County,
John B. Gibson, Judge. Affirmed.

Waldemar D. Halka, under appointment by the Court of Appeal, for
Defendant and Appellant Garrett Kazuo Ige.

Ronda G. Norris, under appointment by the Court of Appeal, for Defendant
and Appellant Lawrence Parker Hughes II.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood,
Meagan J. Beale and Heather F. Crawford, Deputy Attorneys General, for Plaintiff and
Respondent.

Garrett Kazuo Ige (Garrett) and Lawrence Parker Hughes II (collectively defendants) were convicted by a jury of the first degree murder of Cheuk Lun Cheung (aka Alan) and Haang Fung Chin (aka Edward). The jury found true lying-in-wait and multiple-murder special-circumstance allegations. The court sentenced both defendants to two consecutive terms of life without the possibility of parole (LWOP).

Defendants challenge the adequacy of the court's instructions on aiding and abetting, the sufficiency of the evidence to support giving instructions on uncharged conspiracy and the adequacy of the uncharged conspiracy instructions given, the sufficiency of the evidence to support the lying-in-wait special-circumstance and first degree murder finding, and the propriety of the court not giving instructions requiring the jury to determine if witness Jeff Katayama was an accomplice. Garrett separately claims his punishment violates the Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution. We find no reversible error and affirm the judgment.

FACTS

1. Background

In early 2003 then 18-year-old Garrett lived with his mother in her San Gabriel house. His mother owned two cars, a white, 2003 Toyota Camry and a blue, 2000 Toyota Corolla. Garrett's then 22-year-old brother, Kenden Ige (Kenden), and his then 19-year-old friend, Hughes, were almost daily visitors.¹ Hughes was Garrett and Kenden's former neighbor, but he had become their semi-permanent house guest.

A group of young men, including Garrett, Kenden, Hughes, Carlos Ramirez, and Katayama, spent nearly every day in the garage drinking alcohol, smoking

¹ We refer to Kenden and Garrett by their first names to avoid confusion. Kenden was arrested and charged with Alan and Edward's murders in December 2004. A jury convicted Kenden of two counts of first degree murder in February 2008. He committed suicide two years later.

cigarettes, and ingesting marijuana, Ecstasy, and LSD. Katayama bought drugs from Alan, and Katayama believed Alan was affiliated with, and obtained drugs from, the Asian Boys criminal street gang. Sometime in early 2003, Alan and Garrett decided to grow psychedelic mushrooms for profit. Alan rented and equipped a house in Alhambra for this purpose. However, the operation never turned a profit, and Garrett owed Alan an unspecified amount of money in connection with the failure.

2. October 2, 2003

On the morning of October 2, Elaine Zhao, Alan's live-in girlfriend, saw Alan before she left for work. Zhao spoke to Alan at around 3:00 p.m. when she phoned to remind him to meet her at their apartment at 5:00 p.m. During this phone call, Zhao thought she heard Alan's friend, Edward, talking in the background.

Alan did not meet Zhao at their apartment at 5:00 p.m. as planned. Zhao tried calling both of Alan's cell numbers several times, but the calls went directly to voicemail. Zhao left their apartment to look for Alan. She drove to the cafe where Edward worked, but she soon learned Edward had not shown up for work as scheduled. Zhao contacted Alan's relatives and friends, but no one knew his whereabouts. Early the next morning, Zhao reported Alan missing to the Monterey Park Police Department.

3. October 3, 2003

In the morning of October 3, Wayne Mix and Ron Perry, employees of a youth camp in the Newberry Springs area of San Bernardino County, saw smoke rising from a campsite on the property. Mix and Perry drove in the direction of the smoke. They encountered a "light blue or purplish-colored Mazda or Toyota," followed by a "white, two-door Toyota" with a spoiler.

Mix used his truck to block the road. He told the drivers of the two cars they were on private property, and he asked them what they were doing. The driver of the blue Toyota said they had gotten stuck in the sand and started a fire to keep warm.

The driver appeared sweaty and in a hurry. He told Mix they had extinguished the fire before they left. Mix pulled his car to the side of the road and the two cars drove away.

Mix and Perry continued to the firepit and found a fire still burning. They extinguished the fire, and then noticed a few peculiar items in the ash, including shoes, a cell phone, a jewelry box, clothing, a paper towel tube, and a carpeted car mat. It also appeared someone had dug a four-foot deep, five-foot wide hole in the ground near the firepit, and there were tire tracks leading up to the edge of the hole. When Mix and Perry peered into the hole they saw a sock, a T-shirt, and a broken CD. The sock appeared to be bloodstained. They also found a plastic Save-On grocery bag trapped on a nearby fence that also appeared to have blood on it.

Mix and Perry contacted the San Bernardino County Sheriff's Department to report suspicious activity. Mix described the two persons in the blue Toyota as white males in their late teens or early 20's. Perry thought the young men looked Asian or Hispanic. Mix and Perry both said the driver of the white Toyota had darker skin and bushy hair. They thought he may have been Hispanic.

A deputy sheriff took Mix's and Perry's statements and then collected several items he found at the campsite, including five cigarette butts, Gatorade bottles, a drinking straw, the plastic bag, the T-shirt, and a pine cone because there are no pine trees in the area.

After the deputy left, Perry continued to sift through ashes in the fire pit. As a result, Perry discovered a burned wallet that contained Alan's driver's license. Perry contacted authorities and Alan's driver's license was soon linked to Zhao's missing persons report. The next day, homicide detectives processed the campsite as a crime scene. They collected cigarette butts, multiple pieces of a white T-shirt, and pieces of a car's floor mat. Although cadaver dogs alerted while searching the campsite, they did not locate a body.

4. Discovery of the Bodies and Alan's Car

On October 26, a man walking his dog in the desert near Barstow found the remains of two charred, nude bodies in a flood control channel. A large can of charcoal lighter fluid, tire tracks, and foot prints were near the bodies. The bodies appeared mummified, and there was evidence of animal and insect activity. The remnants of melted plastic bags were found over the heads of both bodies. There was a wire coat hanger twisted around the neck of one body.

A ring, gold chain, and medallion found on this body belonged to Alan, and his DNA matched a profile generated from the remains. Alan's DNA profile was found several places at the Newberry campsite, including a sock, the cardboard paper towel tube, the plastic Save-On grocery bag, and a drinking straw. The Newberry campsite is about 35 miles from where the bodies were discovered. A gold necklace on the second body belonged to Edward, but his body was too contaminated for DNA testing.

On November 4, police recovered Alan's Toyota Celica from a tow yard in Tijuana, Mexico. Although the car appeared to be exceptionally clean, some blood spots were found in the trunk. Subsequent DNA testing established the blood had come from a single male donor, most likely Edward.

5. Investigation

a. Defendants' Pretrial Statements

Barstow Police Department Detective Leo Griego interviewed Garrett at his residence in November. Garrett stated he knew Alan, but claimed Alan was Kenden's friend. He denied knowing Edward. Garrett admitted seeing them on October 2, but claimed he left to visit a friend and they were gone when he returned. Garrett told Griego that Alan sold drugs and gambled. In fact, Garrett admitted borrowing money and buying drugs from Alan, but claimed he did not currently owe Alan any money. Garrett claimed the only time he had been to Barstow was on the way to Las Vegas. Garrett identified a blue Toyota Corolla parked in their driveway as his mother's car. However, he said he

did not have a driver's license, nor did he drive his mother's car. He denied owing Alan money on more than one occasion.

About 10 days later, Griego interviewed Hughes at his parent's home. Hughes considered Kenden, Garrett, and Katayama to be close friends. He knew Alan through Kenden and Katayama, but he did not know Edward.

Hughes claimed Alan was into drugs and possibly involved with a gang. Hughes thought Alan's gang may have killed him and Edward. He told Griego Alan always seemed to have a lot of money and expensive things, notwithstanding the fact that Alan worked at a restaurant. Hughes told Griego he had last seen Alan and Edward at the Ige house sometime in October. He thought Kenden, Garrett, and maybe Katayama were also present. Hughes said Alan and Edward played some computer games and left a short time later.

Katayama told Griego he saw Alan and Edward and Alan's white Celica at the Ige house between 2:00 and 3:00 p.m. on October 2. At the time, Kenden, Garrett, and Hughes were home. Katayama said he repaid Alan for a car loan, and Kenden, Garrett, and Hughes were witnesses to the transaction.

Ramirez refused to talk when first questioned by police about Alan's and Edward's murders.

In 2006, after Hughes's DNA was found on a Gatorade bottle at the Newberry Springs campsite, Hughes admitted he had been with Kenden and Alan the day of the murder. He continued to deny being at the Newberry Springs campsite. Hughes described Kenden as "timid" and nonaggressive. Griego asked Hughes if he had been to Tijuana with Alan. Hughes said he, Katayama, Kenden, and several friends did go to Tijuana, but they went to a nightclub to meet some girls and not to dump Alan's car.

In 2008, after Garrett's arrest, he got caught with one of the 30 to 40 notes he and Kenden exchanged while they were incarcerated. The note read, "Should I say [Katayama] & Alan were fighting then [Edward] tried hitting [Katayama] and I tackled

him, then he grabbed a hammer and I grabbed the handle. Also, how do they not know who was who, Alan was still wearing his gold chain. Have Low tell his side next time, he's not gonna get the letter till after the prelims are over. Don't use any of this as an excuse to get out of the word [*sic*]. I don't want to be negative but even if this flies you'll probably have to go through multiple levels of appeals, and it may take a while. A long while. But at least you'll be upstate." When asked by a deputy, Garrett admitted the note was a response to one from Kenden.

b. Search Warrants

In January 2008, Griego executed a search warrant for the Ige home. Portions of a mattress and a high pressure washer tested positive for blood. In Garrett's bedroom, police found a leather-covered flask with a Jack Daniels insignia and a velvet-lined metal case containing a Zippo lighter. Garrett's fingerprints were on the Zippo lighter.

The investigators also collected dog hairs from the Ige home. Dog DNA from hair found in the Ige home was consistent with dog DNA collected from hair found at the Newberry Springs campsite.

A search of Garrett and Kenden's mother's Toyota Corolla disclosed numerous cigarette butts and soft drink bottles, and two Save-On plastic bags in the passenger compartment. The trunk was missing its floor mat. Tire tread impressions recovered from the Newberry Springs campsite shared pattern designs with the tires on the Ige Toyota Corolla and Alan's Toyota Celica. DNA testing revealed that five cigarette butts from the Newberry Springs campsite contained DNA consistent with Kenden's DNA.

c. Ramirez Testimony

In July 2007, Ramirez's father died. Ramirez came to police and said he felt guilty for withholding information concerning Alan's and Edward's homicides. Griego and Monterey Park Police Detective Ronald Lee interviewed Ramirez before

Kenden's trial. At the time, Ramirez told the officers he and Garrett were good friends and he spent a great deal of time in the Ige garage. He met Alan through Garrett when Ramirez became involved in the mushroom-growing operation. According to Ramirez, Alan rented a house in Alhambra and loaned Garrett money to start the business.² When the operation failed and Garrett, who was unemployed, could not repay the debt, Alan had become angry. Ramirez said he personally invested \$200 in the enterprise. He heard Alan had invested between \$8,000 and \$10,000.

Ramirez said he had been at the Ige home a couple of days before Alan's disappearance. He found no one at home and Mrs. Ige's Toyota Corolla was gone. Inside the garage, Ramirez noticed some things were out of place. A rug that had been in the garage for years was missing, as was an axe handle that was usually wedged between two mattresses on the floor. Someone had cut and removed parts of one mattress, and this mattress looked discolored by something resembling dried blood. He also noted that a swamp cooler that usually stood upright was now lying on its side.

Ramirez said he feared for the safety of himself and his family when he initially talked to police. The Ige brothers lived very close to his family home. In fact, he asked to be put into the witness protection program, or for the installation of a home security system at the county's expense. Ramirez also explained that he had not come forward earlier not only because of his fear of retaliation, but also his prior friendship with the Ige brothers and general revulsion at being called a "snitch."

Moreover, Ramirez gave additional information about the crimes just prior to Kenden's trial. According to his addendum, Ramirez returned to the Ige house a few days after Alan's disappearance. He, Kenden, Garrett, and Hughes drank some beer and talked about Alan's disappearance. Garrett, who had appeared somber and remorseful, told Ramirez that Kenden strangled one of the victims while Garrett and Hughes

² Katayama said he knew one of Garrett's friends was named "Carlos," and that he saw Carlos once or twice a week when Katayama lived at the Alhambra house.

bludgeoned the other victim with the axe handle. Kenden, Garrett, and Hughes then drove the bodies into the Barstow desert where they dumped and burned them. Garrett took money from the victims, and he showed Ramirez the Jack Daniels flask and Zippo lighter he bought with this money. Ramirez remembered hearing Hughes said something like they had to “take those fools out.”

d. Katayama’s Testimony

Katayama, a convicted drug dealer, testified under a grant of immunity. He said that he had been close friends with Alan, Edward, Kenden, and Garrett since high school. Alan was his drug connection, and Edward was Alan’s friend.

In 2003, Katayama was buying marijuana and Ecstasy from Alan. He spent nearly every day in the Ige garage with Kenden, Garrett, and Hughes, and he considered all of these young men to be close friends. Katayama knew the Iges were unemployed, broke, and frequently borrowed money from their mother and used her car. He said he tried to help them by supplying them with enough drugs to sell to other people.

As Katayama remembered it, Alan and Garrett wanted to grow psychedelic mushrooms. Alan rented a house in Alhambra for this purpose. Katayama said Alan, and possibly some partners of his, paid the rent, electricity, and “whatever items were needed” for the operation. In exchange, they “expect[ed] a return on the finished product.” When the project failed, Katayama said he moved into the Alhambra house to help grow mushrooms and to start growing marijuana as another potential way to repay Alan.

Katayama thought Garrett owed Alan about \$3,000, but he testified, “me and Alan had done business in the tens of thousands of dollars several times, so something much less than that.” He said Alan “seemed a little bit upset” about Garrett’s debt, “but . . . nothing major really, so I never really thought much of it.” Katayama believed Alan was a member of the Asian Boys criminal street gang, and Alan had repeatedly told Katayama that Garrett needed to pay his debt. Katayama also testified

that he overheard Kenden tell Alan to leave his little brother alone and “don’t threaten him.”

Katayama said he had seen Alan at the Ige garage the day before he disappeared. According to Katayama, Kenden, Garrett, and Hughes were home when Alan and Edward arrived in Alan’s white Toyota Celica. Katayama said he paid Alan \$1,400 for some Ecstasy and for the last month’s rent on the Alhambra house and left. He looked for apartments with his girlfriend and then went to Downtown Disney.

The following morning, Katayama received a call from Alan’s girlfriend. She could not reach Alan, and she wanted Katayama to call him. Katayama tried to reach Alan several times, but received no answer.

e. Forensics

A forensic pathologist performed autopsies on Alan’s and Edward’s bodies. He testified there had been a lot of tissue damage to the bodies due to decomposition, insect activity, large animal activity, and the fact someone burned the bodies after death.

The pathologist believed Alan most likely died due to ligature strangulation, and that Edward had been suffocated with a plastic bag. Alan had been strangled from behind with a piece of wire “applied with some considerable pressure to the neck,” and bits of fabric on the skull were consistent with his having had a hood placed over his head first. Edwards body was badly decomposed, and his head extensively burned. Nevertheless, the pathologist testified there were remnants of a melted plastic bag all around Edward’s skull, and Edward’s hyoid bone had been fractured. Both findings were consistent with suffocation and/or strangulation.

The pathologist also testified that in cases of suffocation or strangulation, it can take several minutes for the brain to die, although unconsciousness usually occurs within a minute or so. In any event, someone being strangled or suffocated would have a lot of adrenalin pumping and could mount a vigorous physical resistance. The condition of the bodies made it impossible to determine if either had suffered blunt force trauma.

However, the pathologist explained it was not necessary to break bones and still suffer fatal head and body wounds.

6. Defense Evidence

a. Garrett

At trial, Garrett testified that Kenden killed Alan and Edward. He and Hughes merely helped Kenden dispose of the bodies. He acknowledged owing Alan \$5,000 due to their failed psychedelic mushroom business. However, Garrett claimed he and Alan had worked out a repayment plan, and Garrett said he had repaid Alan several hundred dollars.

Garrett asserted Hughes had not been involved in the mushroom operation, but Ramirez had been. In fact, Ramirez had a key to the apartment Alan rented for the endeavor. Garrett claimed Katayama fomented distrust between Kenden and Alan by repeatedly claiming Alan pressured him for repayment of Garrett's loan. Kenden was already angry Garrett had become involved in the business venture, and he expressed concern that Alan might hurt Garrett.

Garrett testified that on the day of the murders he was home with Kenden, Katayama, and Hughes when Alan and Edward arrived in Alan's white Toyota Celica. Garrett said he and Hughes left a few minutes later. Garrett left in his friend's car while Hughes left the house on foot. According to Garrett, when he and Hughes left the house, Alan was inside playing video games with Kenden and Katayama. Edward was outside sitting in Alan's car.

Garrett returned home some hours later. Kenden and Hughes were sitting outside. Kenden seemed upset and said he "fucked up big time." According to Garrett, Kenden admitted strangling Alan and then using Katayama's phone to lure Edward inside the house. Kenden told Garrett he killed Alan because Alan threatened to kill Garrett.

Kenden took Garrett and Hughes to the garage to see the bodies. Garrett testified Alan's and Edward's bodies were lying by a mattress in the garage. A wire was

around one throat, and both had plastic bags over their heads. There was a small pool of blood near the bodies and blood spots on a torn mattress. The mattress was lying on a rug, and Garrett thought he saw blood on the rug.

Garrett thought the murders occurred inside the house because he saw what could have been the remnants of a struggle, i.e., broken furniture and household articles in disarray. Kenden begged Garrett, Hughes, and Katayama to help him dispose of the bodies, and Hughes and Garrett agreed to help. Katayama refused to help and left.

Garrett claimed he, Kenden, and Hughes got rid of the rug, mattress, and broken furniture before loading Alan's and Edward's bodies into the trunk of Alan's car. Kenden drove Alan's car while Garrett and Hughes followed in their mother's Toyota Corolla. Kenden took Alan's money. He gave Garrett \$300 to \$400, but Garrett denied buying a flask and lighter with the money. They drove to the Newberry Springs campsite where Alan's car got stuck in the sand. While they tried to free Alan's car, they smoked cigarettes and drank Gatorade.

Alan's car remained stuck until daylight, and it was then that the threesome noticed camp employees headed their way. Kenden quickly took things out of Alan's car, threw them into the firepit, and set them on fire. In tandem, Kenden, Garrett, and Hughes drove Alan's and Edward's bodies to a spot near Barstow where they dumped and burned them. Kenden and Hughes drove Alan's car to Mexico and dumped it while Garrett returned home with his mother's car.

Garrett admitted telling Ramirez about what happened that night, but he denied saying he and Hughes participated in the murders. Garrett also admitted lying to the police, but said he did so to protect his brother and to avoid further trouble for disposing the bodies.

b. Hughes

Hughes, a convicted felon who readily admitted to heavy drug use, said he helped Kenden and Garrett dispose of Alan's and Edward's bodies, but he did not

participate in the murders. He denied being involved in the mushroom business, and denied owing any money to Alan.

Hughes said he came to the Ige home on the morning of October 2 to do some work on their house. Hughes said he was being paid to work, although he also occasionally lived with the Ige brothers and freely used their drugs. Hughes said he left the house in the early afternoon to smoke methamphetamine with a friend. When he returned a couple of hours later, Kenden was walking out of the front door.

Kenden looked strange to Hughes. While they were smoking a cigarette in front of the house, Garrett drove up. Garrett asked Kenden what had happened. Kenden said he “fucked up” and killed Alan and Edward. Garrett and Hughes did not believe Kenden, which started an argument. To prove his point, Kenden took Garrett and Hughes into the garage and showed them the bodies.

Hughes testified he saw Alan’s and Edward’s bodies lying “in a heap” on the garage floor, both heads encased in plastic bags. Kenden told Hughes he killed Alan and Edward because Alan threatened to kill Garrett. Kenden also said Alan had threatened to have his gang kill everyone in the house. Another argument erupted, and the three men moved from the garage to one of the bedrooms inside the house. Hughes saw Katayama in the bedroom. Katayama left the house a short time later after promising to return and help them dispose of the bodies. He never returned.

Hughes said he, Kenden, and Garrett put the bodies in a large green storage bin and placed the bin in the back of Alan’s car. The car got stuck at the Newberry Springs campsite, and they spent hours trying to free the car. Then they drove to a store to buy Gatorade. Before they went into the store, Kenden handed Hughes \$200, which Hughes said he used to pay off the Mexican police when he and Garrett drove Alan’s car to Tijuana.

DISCUSSION

1. Aiding and Abetting and First Degree Murder

The prosecution pursued two theories of first degree murder: (1) murder with premeditation and deliberation; and (2) special circumstances lying-in-wait and multiple murders. The prosecution argued defendants could be found guilty as participants, direct aiders and abettors or, under the natural and probable consequence doctrine, as members of an uncharged conspiracy with Kenden to murder Alan and Edward. The jury was instructed on the natural and probable consequences doctrine as it related to a conspiracy, but not aiding and abetting.

In their opening brief, defendants claimed the aiding and abetting instruction given in this case denied them a fair trial because it failed to state aiders and abettors may be found guilty of lesser crimes than that of the perpetrator, relying on *People v. McCoy* (2001) 25 Cal.4th 1111 (*McCoy*).³ The Attorney General argued *McCoy* was limited to cases involving aiding and abetting under the natural and probable consequences doctrine (*id.* at p. 1118), and because the prosecution did not pursue aider and abettor liability for defendants based on the natural and probable consequences doctrine, *McCoy* was inapt. Furthermore, under the instructions given, the court correctly told the jury Garrett and Hughes could be found guilty of first degree murder if the jury concluded defendants gave aid or encouragement to Kenden with full knowledge of his intent to kill. (CALCRIM No. 401; *People v. Prettyman* (1996) 14 Cal.4th 248, 259.)

After briefing in this case, the California Supreme Court decided *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*.) In *Chiu*, our Supreme Court held, as a matter of law, that an aider and abettor cannot be held culpable for first degree murder based on the natural and probable consequences doctrine. (*Id.* at p. 166.) The court concluded that in cases of vicarious liability through the natural and probable consequences theory (*id.* at p.

³ Defendants also relied on *People v. Ramirez* (2013) 219 Cal.App.4th 655. However, the California Supreme Court granted review on December 18, 2013, S214133.

164), “the connection between the defendant’s culpability and the perpetrator’s premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved . . .” (*id.* at p. 166).

We invited the parties to discuss the applicability, if any, of *Chiu* in this case. In their letter briefs, defendants acknowledge they were not prosecuted as aiders and abettors under the natural and probable consequences doctrine. Instead, defendants assert the principles discussed in *Chiu* apply equally to coconspirators under the natural and probable consequences doctrine. The Attorney General argues *Chiu*’s application is limited to cases involving aiding and abetting liability under a natural and probable consequence theory. We need not discuss the extension of *Chiu* here. Assuming *Chiu* applies with equal force whenever the prosecution seeks to impose criminal liability for first degree murder based on the natural and probable consequences doctrine, it has no application here.

In this case, the prosecution could not specify what roles each defendant played in the murders. Consequently, the prosecution alleged, and the instructions explained, defendants’ culpability could be based on their personal participation in the murders, participation as direct aiders and abettors to murder, or as members of an uncharged conspiracy with Kenden to commit murder.

The court instructed the jury on direct aiding and abetting principles: “To prove the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant’s words or conduct did in fact aid and abet the perpetrator’s commission of the crime.” (CALCRIM No. 400.) This instruction also told the jury “[s]omeone aids and abets a crime if he or she knows [of]

the perpetrator's unlawful purpose, and he or she specifically intends to and does in fact aid, facilitate, promote, encourage or instigate the perpetrator's commission of that crime."

As the California Supreme Court observed in *Chiu*, "Aiders and abettors may still be convicted of first degree premeditated murder based on direct aiding and abetting principles. [Citation.] Under those principles, the prosecution must show that the defendant aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission. [Citation.]" (*Chiu, supra*, 59 Cal.4th at pp. 166-167.)

The "crime" intended here was murder. Thus, the jury necessarily found defendants acted with knowledge of the perpetrator's purpose and with the specific intent to assist, encourage, or facilitate murder. The prosecution's aiding and abetting theory did not rest on derivative liability for an unplanned murder. Therefore, the aiding and abetting instructions are adequate under *Chiu*.

With respect to uncharged conspiracy, the court instructed the jury the prosecution had presented evidence of a conspiracy, and that members of a conspiracy are criminally responsible for the acts or statements of any other member of the conspiracy if that act is done to further the conspiracy, and "that act is a natural and probable consequence of the common plan or design of the conspiracy."

The common plan here was "an agreement and intent to commit murder." Thus, the prosecution had to prove, "the defendants intended to agree and did agree with [each] other," or "Kenden . . . to commit murder," at the time of the agreement "one or more of the . . . alleged members" intended to commit murder, and one or more of the defendants or Kenden committed certain overt acts, at least one of which was committed

in California.⁴ Under the instructions as given, a guilty verdict required the jury to rely on each conspirator's own intent to find him guilty of first degree murder. (See *People v. Rivera* (2015) 234 Cal.App.4th 1350, 1356, petn. for review pending, petn. filed Apr. 9, 2015.) Thus, the court's instructions on uncharged conspiracy did not violate *Chiu's* prohibition against first degree murder convictions based on derivative liability under the natural and probable consequences doctrine.

2. *Uncharged Conspiracy & First Degree Murder*

As noted, the court gave instructions on uncharged conspiracy over defendants' objections. Defendants first argue uncharged conspiracy is not a valid theory of criminal liability in California as a matter of law. They claim the statutory definition of principals to a crime (Pen. Code, § 31) and the definition of the substantive crime of conspiracy (Pen. Code, § 182) leave no room for the vicarious liability theory of uncharged conspiracy.

As the Attorney General points out, our state Supreme Court rejected defendants' argument in *People v. Valdez* (2012) 55 Cal.4th 82: "Our decisions have 'long and firmly established that an uncharged conspiracy may properly be used to prove criminal liability for acts of a coconspirator. [Citations.] 'Failure to charge conspiracy as a separate offense does not preclude the People from proving that those substantive offenses which are charged were committed in furtherance of a criminal conspiracy [citation]; nor, it follows, does it preclude the giving of jury instructions based on a conspiracy theory [citations].' [Citation.]' [Citations.]" (*Id.* at p. 150.) The court further explained, "'like aiding and abetting, conspiracy (as used here) is itself a *theory of liability*. . . . 'For purposes of complicity in a cofelon's [criminal] act, the conspirator and the abettor stand in the same position.'" (*Ibid.*)

⁴ The alleged overt acts were (1) calling Edward and Alan into the garage, (2) obtained wire, (3) wrapped wire around Alan's neck, (4) obtained a bag, and (5) placed a bag over Edward's head.

Moreover, the Supreme Court recently reaffirmed this point in *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1200-1201, a case decided a month before defendants filed their reply briefs. In light of our Supreme Court's decisions on the topic, we reject defendants' claim uncharged conspiracy is not a valid theory of criminal liability in California. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Defendants next argue no substantial evidence supported giving instructions on uncharged conspiracy. According to defendants, the evidence raised only speculation and the possibility of a common plan or agreement to kill Alan. Again, we disagree. In the context of evaluating whether there was a sufficient evidentiary foundation for giving an instruction, substantial evidence means ““evidence sufficient to ‘deserve consideration by the jury.’”” (*People v. Wilson* (2005) 36 Cal.4th 309, 331.) The evidence of conspiracy was sufficient here.

The record reflects Garrett, Hughes, and Kenden knew Alan and had been enjoying the drugs he sold them. When the psychedelic mushroom business failed, Garrett owed Alan several thousand dollars and he was unable to repay this debt. There was evidence Alan became angry about Garrett's debt. According to Katayama, Alan threatened Garrett in front of Kenden. Hughes periodically lived with Garrett and Kenden, and he had a close personal relationship with both brothers. It is reasonable to infer knowledge of the psychedelic mushroom operation and Garrett's resultant money problems. Hughes's close relationship with the Iges also makes it reasonable to infer he would be willing to help Kenden protect Garrett.

Furthermore, the manner of killing indicates some advanced planning. The wire around Alan's neck had been manipulated by the perpetrators in a way that suggested he or they collected and prepared the wire before its use. The parties seem to agree that Edward was summoned to his death, and there is nothing to indicate the plastic bags, although a ubiquitous household item, were merely weapons of opportunity.

According to Ramirez, Garrett told him that Kenden strangled one victim while Garrett and Hughes bludgeoned the other. As Hughes told Ramirez, “We had to take care of those fools.” Thus, substantial evidence supported giving uncharged conspiracy instructions with respect to both defendants.

Finally, pointing once more to the natural and probable consequences theory, defendants assert “[b]ecause the natural and probable consequences doctrine is premised on the idea that the coconspirator intended only to commit some lesser crime, a juror who finds the coconspirator culpable for first degree murder under that doctrine has necessarily concluded the coconspirator did not intend to commit deliberate and premedita[tion].” The problem with this argument is two-fold. First, there was no lesser crime in this case. The identified target offense was murder. Second, the prosecution’s first degree murder theory relied on evidence of defendants’ premeditation and deliberation, not Kenden’s intent to commit murder.

3. Cumulative Error

Defendants claim the cumulative effect of the claimed instructional errors resulted in a miscarriage of justice. We have rejected defendants’ assignments of instructional error. Thus, we reject defendants’ cumulative error claim, too. (See *People v. Price* (1991) 1 Cal.4th 324, 491.)

4. Sufficiency of the Evidence to Prove Lying-in-Wait

The court instructed the jury on the lying-in-wait special-circumstance (Pen. Code, § 190.2, subd. (a)(15)) and first degree murder based on lying-in-wait (Pen. Code, § 189) with respect to both victims.

Defendants challenge the sufficiency of the evidence to support the jury’s lying-in-wait verdict and finding with respect to Alan. Specifically, defendants argue the prosecution failed to produce evidence of a substantial period of watching and waiting, and that Alan’s murder occurred during or immediately after a substantial period of watching and waiting. We conclude otherwise.

When the sufficiency of the evidence is challenged on appeal, the reviewing court “determines “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” [Citations.] We examine the record to determine “whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citation.] Further, “the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” [Citations.]” (*People v. Moon* (2005) 37 Cal.4th 1, 22.)

In a case where the sufficiency of the evidence is challenged as to the requirements of lying-in-wait for first degree murder and those of the lying-in-wait special circumstance, “[w]e focus on the special circumstance because it contains the more stringent requirements. [Citation.] If, as we find, the evidence supports the special circumstance, it necessarily supports the theory of first degree murder. [¶] The lying-in-wait special circumstance requires “an intentional murder, committed under circumstances which include (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” [Citations.]” (*People v. Hillhouse* (2002) 27 Cal.4th 469, 500.)

““The element of concealment is satisfied by a showing “that a defendant’s true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim.”” [Citation.]” (*Moon, supra*, 37 Cal.4th at p. 22.) The purpose of the watching and waiting element “is to distinguish those cases in which a defendant acts insidiously from those in which he acts out of rash impulse. [Citation.] This period need not continue for any particular length “of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.” [Citation.] [Citation.] ‘The factors

of concealing murderous intent, and striking from a position of advantage and surprise, “are the hallmark of a murder by lying in wait.” [Citation.]’ [Citation.]” (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1073.)

This case involves two brothers, Kenden and Garrett, and their friend and periodic housemate, Hughes. These three individuals were also friends with Katayama and Ramirez, and they all knew Alan. Alan was a drug dealer with possible ties to a criminal street gang. He had supplied the defendants, Katayama, and Ramirez with drugs to ingest and sell for quite some time. Garret and Alan tried to branch out into psychedelic mushrooms, but the venture failed and Garrett owed Alan a lot of money. Relationships became strained, and defendants feared Alan and his gang connections. Under these circumstances, it would have been reasonable for the jury to infer Kenden, Garrett, and Hughes planned to kill Alan to alleviate Garrett’s debt. Any one of the three, or all three together, could have manipulated some wire and gathered plastic bags in preparation to kill Alan before he arrived at the Ige house. The fact Katayama paid Alan some money on the same day Alan was killed suggests Garrett may have promised to pay Alan in an effort to lure him to his death.

Furthermore, the manner of killing suggests Alan had been surprised by his killer or killers. Whoever killed Alan came at him from behind, put a plastic bag over his head and a wire around his neck, and used both wire and bag to slowly asphyxiate him. This evidence supports the jury’s finding defendants concealed their murderous intent and struck Alan from a position of advantage. In short, the evidence is sufficient to sustain the jury’s finding defendants waited for the most opportune time to take Alan by surprise and attack him unawares. (See *People v. Hillhouse, supra*, 27 Cal.4th at pp. 500-501.)

5. *Was Katayama an Accomplice?*

Defendants argue the court committed reversible error by failing to give CALCRIM No. 334, which would have required the jury to determine whether Katayama

was an accomplice whose testimony required corroboration and should be viewed with caution.⁵ The Attorney General contends the evidence did not support giving the accomplice instruction with respect to Katayama, but the error, if any, is harmless. We agree with the Attorney General on both points.

“In order to establish that an individual is an accomplice, a defendant bears the burden of both producing evidence raising that issue and of proving the accomplice status by a preponderance of the evidence. [Citation.]” (*People v. Belton* (1979) 23 Cal.3d 516, 523, fn. omitted.) To be an accomplice, “the witness must be chargeable with the crime as a principal ([Pen. Code,] § 31) and not merely as an accessory after the fact ([Pen. Code,] §§ 32, 33). [Citation.] An aider and abettor is chargeable as a principal, but his liability as such depends on whether he promotes, encourages, or assists the perpetrator and *shares* the perpetrator’s criminal purpose. [Citation.] It is not sufficient that he merely gives assistance with knowledge of the perpetrator’s criminal purpose. [Citations.]” (*People v. Sully* (1991) 53 Cal.3d 1195, 1227, original italics.)

Defendants, relying on their own testimony, argue a reasonable juror could have found Katayama was present at the Ige house on the day of the murders, someone used Katayama’s cell phone to lure Edward, and Katayama and Garrett were on the hook for \$5,000 each to Alan for the failed psychedelic mushroom operation, as sufficient to show Katayama’s accomplice status. We disagree.

First, Katayama admitted going to the Ige house on the day Alan and Edward were killed. Defendants suggested Katayama had been there during and after the murders, but there was no physical evidence to support their testimony, and no evidence

⁵ Penal Code section 1111 provides: “A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.” This section also defines an accomplice as “who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.” (*Ibid.*)

of any kind to prove Katayama was at the Newberry Springs campsite, in any of the cars involved, or at the burial site in San Bernardino. Furthermore, nothing in the record demonstrates Katayama did anything to help defendants with knowledge of their intent to kill Alan and Edward, or that Katayama actually facilitated the murders in any way.

However, even assuming error, the failure to give cautionary instructions with regard to Katayama's testimony is harmless if there is sufficient corroborating evidence in the record. (*People v. Avila* (2006) 38 Cal.4th 491, 562.) The corroborating evidence must tend to connect the defendant with the crime without aid or assistance from the accomplice's testimony; however, the corroborative evidence may be slight, may be entitled to little consideration when standing alone, and need not establish all the elements of the crime. (*Id.* at pp. 562-563; *People v. Williams* (2013) 56 Cal.4th 630, 678-679.)

Here, defendants corroborated some of Katayama's testimony. They confirmed he was at Garret and Kenden's home the day Alan and Edward were killed. Ramirez corroborated some parts of Katayama's testimony about the psychedelic mushroom operation. This evidence tends to connect defendants with crimes, but it is by no means the most prejudicial. In short, defendants suffered no prejudice as the result of the court's failure to instruct the jury to determine if Katayama was an accomplice to murder.

6. Sentencing

Garrett was 18 years and 6 months old when he murdered Alan and Edward. On appeal, he claims the court's imposition of two, consecutive LWOP terms without consideration of his youth constitutes cruel and unusual under state and federal Constitutions. He cites *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455], and *Roper v. Simmons* (2005) 543 U.S. 551 (*Roper*), but neither case supports his position.

In *Roper*, the Supreme Court held the Eighth Amendment bars capital punishment for minors, even for murder. (*Roper, supra*, 543 U.S. at pp. 578-579.) In

Miller, the Supreme Court declared unconstitutional mandatory LWOP sentences for juvenile offenders. (*Miller v. Alabama, supra*, 567 U.S. ___ [132 S.Ct. 2455].) Then, the Supreme Court concluded the Eighth Amendment categorically bars LWOP for minors who commit nonhomicide offenses. (*Graham v. Florida* (2010) 560 U.S. 48 (*Graham*). And, in *People v. Caballero* (2012) 55 Cal.4th 262, our Supreme Court found cruel and unusual sentences committing juvenile offenders who committed a nonhomicide offense to terms that constitute a de facto LWOP sentence. (*Id.* at p. 268.)

Here, the crimes occurred six months after Garrett's 18th birthday. He was an adult. The line between legal youth and maturity is admittedly arbitrary, but established precedent considers the fact Garrett was an adult when he committed the instant crimes to distinguish his case from *Roper, Miller, Graham, and Caballero*. Furthermore, Garrett committed two homicides. Thus, consecutive LWOP terms are not categorically barred under the Eighth Amendment. (*People v. Abundio* (2013) 221 Cal.App.4th 1211, 1220-1221, citing *People v. Argeta* (2012) 210 Cal.App.4th 1478, 1482.)

Moreover, LWOP is the statutorily prescribed punishment for first degree special circumstances murder. (Pen. Code, § 190.2, subd. (a).) The Legislature, not the courts, define crimes and proscribe penalties. ““Our Supreme Court has emphasized “the considerable burden a defendant must overcome in challenging a penalty as cruel or unusual. The doctrine of separation of powers is firmly entrenched in the law of California, and a court should not lightly encroach on matters which are uniquely in the domain of the Legislature. Perhaps foremost among these are the definition of crime and the determination of punishment.””” (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 569.)

On the other hand, statutory penalties are subject to the constitutional prohibition against cruel or unusual punishments contained in article I, section 17 of the California Constitution. (*People v. Dillon* (1983) 34 Cal.3d 441, 450 (*Dillon*).) Under

Dillon, a constitutional violation occurs when a statutory punishment is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity. (*Dillon*, at p. 450; accord, *In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*)). “[A] punishment is impermissible if it is grossly disproportionate to the offense as defined or as committed, and/or to the individual culpability of the offender.” (*Dillon, supra*, 34 Cal.3d at p. 450.)

Whether a punishment is cruel or unusual in violation of the California Constitution under the legal principles set forth in *Lynch* and *Dillon*, “presents a question of law subject to independent review; it is ‘not a discretionary decision to which the appellate court must defer.’ [Citation.]” (*People v. Felix* (2003) 108 Cal.App.4th 994, 1000.) Such a reduction ““must be viewed as representing an exception rather than a general rule,”” and “[i]n such cases the punishment is reduced because the Constitution compels reduction, not because a trial court in its discretion believes the punishment too severe.’ [Citation.]” (*Ibid.*)

In assessing proportionality, courts must examine ““the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society.’ [Citation.]” (*Dillon, supra*, 34 Cal.3d at p. 479.) Factors surrounding the nature of the offense include the defendant’s motive, the way the crime was committed, the extent of the defendant’s involvement, how the crime was committed, and the consequences of the defendant’s actions. (*Id.* at p. 479; *People v. Wallace* (2008) 44 Cal.4th 1032, 1099.) Factors regarding the nature of the offender include his “age, prior criminality, personal characteristics, and state of mind.” (*Dillon, supra*, 34 Cal.3d at p. 479; see *People v. Felix, supra*, 108 Cal.App.4th at p. 1000.) “[A] punishment which is not disproportionate in the abstract is nevertheless constitutionally impermissible if it is disproportionate to the defendant’s individual culpability.” (*Dillon*, at p. 480.)

In Garrett’s case, mandatory LWOP sentences for each murder do not constitute cruel or unusual punishment. Garrett’s lack of prior criminal record seems

insignificant when compared to his known capacity for violence. He participated in the planned and gruesome murder of his friends, Alan and Edward, and the heartless disposal of their bodies in the desert. There was no error.

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.