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 Opening Brief

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Introduction

This is an appeal from a judgment of death following a jury verdict finding appellant Tupoutoe Mataele (T-Strong Mataele),[1] guilty of first degree murder of Danell Johnson (Pen. Code, Code, § 187, subd. (a), count 1), conspiracy to commit murder (Pen. Code, § 182, subd. (a)(1), count 2), and premeditated attempted murder of John Masubayashi (Pen. Code, §§ 664,

[1] "T-Strong Mataele" is appellant's true name as shown on his birth certificate; "T-Strong" is not a moniker. (RT 31:6993.)

subd. (a), 187, subd. (a), count 3), with jury true findings that the murder was committed while lying in wait (Pen. Code, § 190.2, former subd. (a)(15)) and that appellant personally used a firearm in the commission of each offense (Pen. Code, § 12022.5, subd. (a)(1)), and a court finding that appellant suffered a prior conviction for robbery within the meaning of the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and Penal Code section 667, subdivision (a)(1).[2] (CT 5:1379-1417, 1443, 1480, 1483, 1692-1697; RT 33:7514-7517, 7482; RT 34:7639; RT 42:9333, 9393, 9405.)

Prologue

The shooting of Johnson and Masubayashi, both of whom were Rascals gang members, stemmed from a dispute with Pinoy Real gang member James Chung. (RT 15:3595-3597, 3600-3603; RT 21:4948-4951.) The prosecution theorized that Chung wanted Johnson and Masubayashi killed, and that Chung and fellow Pinoy Real gang member Ryan Carrillo conspired with appellant

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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."

and codefendant Minh Nghia Lee to murder them. (RT 15:3606-3614; RT 18:4366, 20:4777-4780; RT 21:4955.)

The prosecution's case was based materially on the immunized testimony of Carrillo, a "very manipulative liar" (RT 29:6487-6488) who pled guilty to voluntary manslaughter of Johnson and attempted murder of Masubayashi and received a negotiated six-year sentence in exchange for testifying against appellant. (RT 21:4942, 22:5009, 5011-5015.) Carrillo testified that appellant was the shooter. (RT 22:5022-5024, 5027-5028.) But appellant testified that Carrillo shot Johnson and Masubayashi, and he (appellant) never conspired to kill Johnson or Masubayashi. (RT 30:6662, 6725-6726, 6735-6738.)

Carrillo was present when Johnson and Masubayashi were shot. (RT 22:5026.) Carrillo fled the scene of the crime, wearing a beanie and with blood on his clothes. (RT 20:4690-4691, 4697, 4710-4711, 4735-4740, 4753; RT 23:5218-5219; CT 4:1128.) 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.[3] (RT 20:4739-4740, 4753; RT 26:5839-5840.) Carrillo was five feet, nine inches tall, weighed 140 to 160 pounds, and was wearing a beanie. (RT 23:5218-5219, 28:6301, 30:6732.) Appellant was not wearing a beanie, 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 .)

Statement of Appealability

This appeal is automatic. (Cal. Const., art. VI, § 11, subd. (a); Pen. Code, § 1239, subd. (b).)

Statement of the Case

On September 12, 2002, the Orange County District Attorney filed an information charging appellant and codefendant Minh Nghia Lee with first degree murder of Danell Johnson (Pen. Code, §§ 187, subd. (a), 189, count 1),

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[3] A third eyewitness to the shooting, Matthew Towne, could not be located until the penalty phase of the trial, and was not permitted to testify. (*Post*, Args. 5 & 14.) He was standing outside the Gateway Urgent Care talking to Fowler and Rodriguez when 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.)

conspiracy to commit murder (Pen. Code, §§ 182, subd. (a)(1), 187, subd. (a), count 2), and attempted murder of John Masubayashi (Pen. Code, §§ 187, subd. (a), 189, 664, count 3). The information also alleged that (1) appellant and Lee intentionally committed the murder of Johnson while lying in wait (Pen. Code, § 190.2, former subd. (a)(15)), (2) appellant personally used a firearm in the commission of counts 1 through 3, inclusive (Pen. Code, § 12022.5, subd. (a)(1)), (3) Lee was a principal and was personally armed with a firearm in the commission of counts 1 through 3, inclusive (Pen. Code, § 12022, subd. (a)(1)), and (4) appellant suffered a prior serious and/or violent felony conviction for robbery (Pen. Code, § 211) within the meaning of the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and Penal Code section 667, subdivision (a)(1). (CT 1:19-23.)[4] Appellant entered pleas of not guilty to the charges and denied the enhancement allegations. (CT 1:25.)

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[4] Appellant and codefendant Lee were jointly tried before the same jury, but a death verdict was not sought against Lee. Lee was convicted as charged, and the special circumstance and firearm allegations were found true. He was sentenced to life in prison without the possibility of parole. (RT 33:7517-7521; CT 6:1570-1577.)

James Chung was charged with the same offenses as Lee, but was tried separately in a case that concluded prior to the start of appellant's trial. Chung was convicted as charged, and the special circumstance and firearm allegations were found true. He was sentenced to life in prison without the possibility of parole. (CT 1:121; RT 1:27, 3:1013, 21:4824-4825, 29:6626.)

Trial commenced with jury selection on May 16, 2005. (CT 3:852.) On June 9, 2005, the trial and alternate jurors were impaneled and sworn. (CT 4:926-935.)

The jury commenced deliberations on July 28, 2005. (CT 5:1235.) On August 3, 2005, appellant was convicted as charged and the special circumstance and enhancement allegations were found true. (CT 5:1379-1417; RT 33:7514-7517.) At a court trial on the truth of the prior conviction allegation on August 23, 2005, the court found true that appellant suffered a prior serious and/or violent felony conviction for robbery (Pen. Code, § 211) within the meaning of the Three Strikes law and Penal Code section 667, subdivision (a)(1). (CT 5:1237, 6:1443-1444; RT 34:7639.)

After the verdicts were received Juror No. 160 was excused by stipulation and replaced by Alternate Juror No. 302, who was seated as new Juror No. 11 for the penalty phase of trial. (CT 6:1416, 1444.)

The penalty phase began on August 23, 2005. (CT 6:1442; RT 34:7721.) Deliberations began on September 8, 2005, and on September 12, 2005 the jury returned a verdict of death. (CT 6:1476, 1482; RT 42:9333-9334.)

Appellant filed a motion to set aside the death verdict and a motion for new trial. (CT 6:1594-1605, 1614-1632, 1657-1662.) The trial court denied

both motions on October 7, 2005, and sentenced appellant to death on count 1.[5] (CT 6:1681-1697, 7:1698-1706; RT 31:4527-4536.)

Statement of Facts

A. Guilt phase–the prosecution's case.

(1) Relationship between the parties, and James Chung's dispute with Johnson and Masubayashi.

The shooting of Johnson and Masubayashi, both of whom were Tiny Rascals gang members, stemmed from a dispute with James Chung (aka Temper), a member of the Pinoy Real gang. Chung and others, including fellow Pinoy Real gang member Ryan Carrillo,[6] were assisting Peter Song in a fraud and drug criminal enterprise that Song was operating from a place in Los Angeles called the Penthouse, where they all lived together. (RT 15:3595-3597, 3600-3603, 21:4948-4951.)

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[5] On the noncapital counts and enhancements, appellant was sentenced as follows: (1) count 2, conspiracy to commit murder, 50 years-to-life (25 years-to-life doubled), plus four years for the firearm use enhancement, stayed pursuant to Penal Code section 654; (2) count 3 (attempted premeditated murder), life with the possibility of parole with a minimum of 14 years before parole eligibility plus four years for the firearm use enhancement, consecutive to count 1; and, (3) five years consecutive for the prior serious felony conviction as to count 3. (CT 7:1704-1706, 1720-1722.)

[6] Carrillo was originally charged together with Lee and appellant, but subsequently pled guilty to voluntary manslaughter of Johnson and attempted murder of Masubayashi and received a sentence of six years in state prison in exchange for testifying against appellant and Lee. (RT 21:4942, 22:5009, 5011-5015.)

A few weeks before the shooting, Johnson and Masubayashi moved to an apartment in Anaheim because Chung was angry with both of them; the apartment was previously used by the group but belonged to one Takahisa Suzuki. (RT 15:3615-3616, 21:4955.) Chung was angry with Johnson because Johnson received a traffic ticket while driving Chung's vehicle, but gave the officer false identification, and thus Chung was concerned that his (Chung's) parole status might be in jeopardy. (RT 15:3607-3612, 3614 20:4777-4780.) Chung was angry with Masubayashi over Masubayashi's complaint about Chung inviting girls to the Penthouse, and Chung wanted to replace Masubayashi as Peter Song's second-in-command in the criminal enterprise. (RT 22:5135.) Chung also was angry with Masubayashi because Chung almost got caught making a fraudulent transaction inside a bank; Chung faulted Masubayashi for not warning him that the transaction was to occur at an automatic teller machine, not in front of a bank teller; Chung threatened Masubayashi with a knife over this incident (which occurred shortly before Johnson and Masubayashi moved out of the Penthouse), telling Masubayashi to watch his back. (RT 15:3607-3609.)

Appellant associated with these people, but was not a member of Pinoy Real and had no dispute with either Johnson or Masubayashi. (RT 23:5356-

5357; see 15:3606-3612, 15:3614, 18:4366, 20:4777-4780; see CT Supp. AA 11:3011.)

(2) The events at the Penthouse hours before the shooting.

Carrillo testified that on the evening of November 11, 1997, before the shooting, he was at the Penthouse with appellant, Lee, and Chung. Appellant had a black .357 magnum long barrel handgun in his possession, which is the same gun that he had previously seen in appellant's possession. (RT 21:4961-4962.) Chung started complaining about Masubayashi and Johnson, and said that they should not be talking to them anymore. (RT 21:4958-4960.) Appellant stated, "Let's go smoke those mother fuckers," which Carrillo understood to mean kill them.[7] (RT 21:4961.) Chung, Lee, and Carrillo all said, "Let's do it." (RT 21:4963.) The four got into Chung's white Jeep and drove toward Anaheim. (RT 21:4966, 4969.) They stopped for a few minutes at Allan Quiambao's house in Norwalk, and then continued to Anaheim with Lee driving the Jeep. (RT 21:4970-4973.)

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[7] Carrillo's testimony was inconsistent with Allan Quiambao's testimony that a few weeks prior to November 11, 1997, Carrillo told him that he (Carrillo) was going to Anaheim to kill Johnson and Masubayashi. (RT 13:3288-3289.)

(3) The stop at Quiambao's house in Norwalk on the way to Anaheim.

When the four stopped at Quiambao's house, Lee was driving and Chung was in the front passenger seat; appellant and Carrillo were in the back seat. (RT 13:3143, 3146, 3151-3154.) Quiambao testified that Chung stated they were going to play billiards or go bowling in Anaheim, but also were going to Suzuki's apartment to talk to Johnson about a ticket he received while driving Chung's Jeep. (RT 13:3154-3155; see RT 20:4777-4780.)

Quiambao testified he gave a tape-recorded statement to the prosecution in January 2003 in which said that when appellant, Lee, Chung and Carrillo arrived at his house on November 11th they told him they were going to Anaheim to "do these two guys[,]" which meant that they were going to kill them.[8] (RT 13:3156, 3159.) In the statement, Quiambao said he told them not to kill Johnson and Masubayashi. (RT 13:3159.) Quiambao testified that when he gave the tape-recorded statement he was mistaken about the

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[8] The tape of Quiambao's interview was played for the jury. (RT 24:5543; CT 4:1115-1155.) During the interview, Quiambao said when appellant, Lee, Chung and Carrillo arrived at his house on November 11th they told him that they were going to Anaheim to kill Johnson and Masubayashi. (CT 4:1119-1121, 1124.) A few hours later, Carrillo returned. (CT 4:1119.) He was frantic and scared, and had blood on his clothes. (CT 4:1119-1120, 1126, 1128.) He told Quiambao that "they shot him." (CT 4:1119.) When asked to clarify, Carrillo told Quiambao that "T-Strong shot him." (CT 4:1129.)

facts. (RT 13:3172.) When appellant, Lee, Chung and Carrillo arrived at his house on November 11th they never told him of a plan to kill anyone. (RT 13:3172-3174.)

(4) The events at Suzuki's apartment in Anaheim where Johnson and Masubayashi were residing.

The group left Quiambao's house in Chung's Jeep and drove to Suzuki's apartment in Anaheim, making an unannounced visit to Johnson and Masubayashi. (RT 15:3620, 21:4974, 4977-4978.) Carrillo testified that prior to going into the apartment appellant told him that he was "going to do everybody in the apartment" (RT 21:4982), which meant "[t]o kill'em" (RT 21:4983).

Lee parked the Jeep in the parking lot by the Red Lobster restaurant, which was close to the apartment, and they agreed that Carrillo and appellant would go into the apartment because they were still on good terms with Masubayashi and Johnson. Chung and Lee waited in the Jeep. (RT 21:4974, 4977-4978.)

Carrillo and appellant went to the apartment and met Johnson and his girlfriend (Sia Her, aka "Molly") as they were returning from the grocery store. They went upstairs to the apartment and awoke Masubayashi. (RT 21:4979-4981.)

Masubayashi[9] testified that he was asleep when appellant and Carrillo came to the apartment. (RT 15:3620.) Appellant was wearing dark jeans and a green and black flannel shirt. (RT 15:3620, 17:3924-3925, 3931.) He and Johnson talked to appellant and Carrillo about going to play pool or going to a strip club. (RT 15:3621; see RT 21:4982-4984 [Carrillo's testimony: same]; see RT 14:3491-3492 [Her's testimony: same].)

The four men left the apartment together, and headed for a parking garage across the street where Masubayashi's car was parked. As they were walking out of the apartment complex they saw a police car. 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.) Masubayashi then went and got

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[9] Masubayashi was arrested on charges relating to his involvement in the bank fraud scheme, and while out of custody fled to his native Japan. (RT 15:3582-3584.) Testifying pursuant to Penal Code section 1334.4, he returned to California to testify in this case, with the prosecution's agreement that he would be allowed to return to Japan after testifying, despite an outstanding arrest warrant and prison term he was facing in Los Angeles County. (RT 15:3587.) After his testimony in the instant case, he understood he would be escorted through customs by law enforcement and would return to Japan; it was his intention never to return to the United States. He did not intend to accept responsibility for his criminal behavior or repay the victims of his fraud. Masubayashi was aware that a $50,000 bond posted by a bonding company had been forfeited. (RT 17:4148-4150.)

his car, and Johnson went back to the apartment to get appellant and Carrillo. (RT 15:3629-3631; see RT 14:3493, 3496 [Her's testimony].) They came out of the complex and got into the car. Masubayashi was driving, Johnson was in the front passenger seat, and appellant and Carrillo were in the back seat. (RT 15:3629-3631.)

(5) The shooting in the parking lot by the Red Lobster restaurant.

(a) The testimony of Masubayashi and Carrillo.

Masubayashi and Carrillo testified about the shooting, but their testimony differed in material respect. They both testified that Masubayashi, Johnson, appellant, and Carrillo left Suzuki's apartment together in Masubayashi's vehicle. (RT 15:3629-3631; RT 21:4985-4987.) Masubayashi was driving, Johnson was in the front passenger seat, and appellant and Carrillo were in the back seat. (RT 15:3629-3631, 22:5017-5018.) But according to Masubayashi, appellant and Carrillo told him to drive to the adjacent restaurant parking lot so they could pick up their car and drive separately. (RT 15:3631-3633.) Carrillo testified that appellant directed Masubayashi to drive by the Jeep in the Red Lobster parking lot so he could get something. (RT 22:5017-5018.) In Carrillo's version of events, he remained inside the car until after Johnson was shot and Masubayashi fled. (RT 22:5024-5026.) In Masubayashi's version of events, Carrillo got out of

the car with appellant before Johnson was shot and Masubayashi fled. (RT 15:3634.)

Masubayashi testified that as they entered the parking lot he saw Chung's Jeep but did not see anyone inside. (RT 15:3632-3634.) He pulled next to the Jeep and parked his car. (RT 15:3633-3635.) Carrillo testified that he could see Chung and Lee ducking down in the front seat, with both front seats of the Jeep reclined all the way back. (RT 22:5019-5020.)

Masubayashi described Johnson getting out of the passenger seat, allowing appellant *and Carrillo* to get out of the car. (RT 15:3634, 3637.) As Johnson was getting back into the car, after having let the two men out so that they could drive separately, Masubayashi heard a gunshot. (RT 15:3637.)

Carrillo's testimony is significantly different. He described Johnson getting out of the passenger side of the car to let only appellant out. (RT 22:5024-5026.) Carrillo claimed to have remained inside the car while Johnson and appellant stood side by side for a moment outside of the car. (RT 22:5024-5026.) Carrillo testified that he then heard appellant say, "All right then, nigger" (RT 22:5022), and appellant shook Johnson's hand. (RT 22:5020-5022.) He claimed to have seen appellant pull a gun out of the waistband of his pants and shoot Johnson in the head using the same gun that Carrillo described seeing appellant with earlier. (RT 22:5022-5024.)

Carrillo also testified that appellant leaned inside the car and shot Masubayashi in the chest while Masubayashi was still sitting in the driver's seat. (RT 22:5024.) Masubayashi got out of the car and started to run. (RT 15:3638-3639.) In Carrillo's version of events, it was after Masubayashi ran that Carrillo got out of the car and into the back seat of Chung's Jeep. (RT 22:5026.) Carrillo testified that appellant fired three more shots at Masubayashi before also getting into the Jeep. (RT 22:5027-5028.)

Masubayashi described first hearing a gunshot when Johnson was getting back into the car, after appellant and Carrillo had exited. (RT 15:3637.) Masubayashi testified that he saw Johnson's "head bobbing" and a person whom he believed to be appellant pointing a gun at him.[10] (RT 15:3637-3639.) Masubayashi testified that as he got out of the car and ran, he heard several gunshots. (RT 15:3638-3639, 3641, 3648.) One bullet entered his right chest (and remained at trial lodged in his left armpit), and a bullet fragment struck his neck. (RT 15:3648-3649, 3651.)

Masubayashi acknowledged that while in the hospital shortly after the shooting he told Detective Guy Reneau that Chung was "behind all of this."

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[10] Officer Bruce Linn testified that when interviewed at the hospital Masubayashi said appellant shot him. (RT 19:4488-4489.) He did not then say who was driving the Jeep, but in a subsequent interview identified Lee as the driver. (RT 19:4488, 4500.)

(RT 17:3951.) Masubayashi admitted that he could not identify the shooter because he did not see the shooter's face, and he did not know where the shots were fired from because his view was blocked. (RT 17:3952-3953.) Masubayashi "just heard a boom and saw an arm." (RT 17:3953.) He did not know for sure whether it was appellant's arm. (RT 17:3953-3954.) Masubayashi stated he did not see a gun. (RT 17:3954.) With respect to the identity of the shooter and whether Masubayashi actually saw a gun, Masubayashi told Detective Reneau, "I don't know. I don't know if I made this up or what I remember is what I see. What I see is like boom, boom."[11] (RT 3954-3955.)

Masubayashi described how he first ran toward a nearby restaurant, but then ran across the street. (RT 15:3642.) As he ran across the street, he looked back and saw appellant getting into the Jeep. (RT 15:3642.) Lee was driving. (RT 15:3643-3644.) The Jeep came out of the parking lot at a fast rate of speed and headed directly towards him. (RT 15:3642, 3645.) Masubayashi stepped behind a telephone pole for protection. (RT 15:3646.) The Jeep stopped at the telephone pole. (RT 15:3646.) The Jeep stopped just

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[11] Forensic specialist Andrew Canney responded to the scene of the shooting. (RT 25:5728.) Canney testified that it was dark in the area around the telephone pole where Masubayashi said he saw the Jeep. (RT 25:5759-5761.) Canney had to return during daylight hours in order to take pictures of the crime scene. (RT 25:5760-5761.)

short of hitting the pole. (RT 15:3642, 3646.) The Jeep backed up, and Masubayashi ran around the driver's side of the Jeep toward a restaurant.[12] (RT 15:3645-3647.) Masubayashi fell to the ground before getting to the restaurant, and saw the Jeep traveling down the street toward the freeway. (RT 15:3645-3649.)

Carrillo testified that after getting into the Jeep he heard either Lee or Chung say, "Oh, fuck, there he goes. He saw us. He saw us." (RT 22:5029.) Chung said, "Go get him." (RT 22:5029.) At that point, appellant, Lee, Chung, and Carrillo were all inside the Jeep. (RT 22:5029.) According to Carrillo, Lee was driving, Chung was in the front passenger seat, appellant was in the rear passenger seat behind Chung, and Carrillo was behind Lee. (RT 22:5033-5035.) Lee started the Jeep's engine and "sped after him," stating, "I'm going to run his ass over." (RT 22:5029.) Lee drove out onto Euclid, over the raised center divider, and toward Masubayashi. (RT 22:5030-5031.) Masubayashi stepped behind a telephone pole. (RT 22:5032.) Lee made a U-turn and "swerved around where John [Masubayashi] was at." (RT 22:5033.) Appellant leaned over Carrillo and fired two shots at Masubayashi from inside the Jeep. (RT 22:5034.) Appellant put more bullets in the gun

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[12] Abdorreza Ashtari Larki testified to observing these events from his vantage point outside the entrance of Norm's Restaurant. (RT 19:4509-4568.)

and then got out of the Jeep, stating that "he was going to finish John [Masubayashi] off." (RT 22:5033-5035.) As appellant was walking toward Masubayashi, Lee left the scene with Chung and Carrillo in the Jeep. (RT 22:5035-5036.)

(b) The testimony of Rodriguez and Fowler, two bystanders who observed the shooting.

Jose Rodriguez testified that he got off work at the Family Urgent Care Center on Euclid and was seated outside on a bench with John Fowler and Matthew Towne. (RT 20:4669-4671.) He heard what sounded like a car backfiring, and then saw a person shooting a gun. (RT 20:4671-4673.) He could see the flashes from the gunfire, and saw the gunman shoot two or three times after the sound of the car backfiring. (RT 20:4676.) The gunman was standing in a dark area of the Red Lobster parking lot, which was approximately 50 feet away. (RT 20:4674, 4676.) When interviewed by the police shortly after the shooting, Rodriguez described the shooter as five feet eleven inches tall and medium build. (RT 20:4690-4691, 4697.) Rodriguez testified at trial that the gunman was approximately six feet tall, black, heavyset, and about 25 years old. (RT 20:4674, 4678-4681, 4695.) But Rodriguez acknowledged that his recollection on the day of the incident–as reported to the police–would be "[a] lot better." (RT 20:4691.)

John Fowler testified that he had just gotten off work at the Family Urgent Care Center on Euclid when he heard a gunshot. (RT 20:4700-4701.) He looked in the direction of the noise and saw an individual walking through the parking lot holding a gun and firing. (RT 20:4703-4707.) It was dark outside, but he described the gunman to the police after the shooting as being thin-build and approximately five feet, ten inches tall. (RT 20:4710-4711, 4735.) When interviewed by a defense investigator a few months prior to trial, he stated the gunman was African-American, but at trial Fowler testified he was not certain of the person's race. (RT 20:4740, 28:6280.) Fowler testified the gunman's left side was exposed to him, and that in comparing appellant during trial in a standing position with his left side exposed, the shooter did not look anything approaching the size of appellant. (RT 28:6277.) Fowler testified that the gunman was wearing a beanie. (RT 20:4739-4740, 4753.)

(6) Return to Quiambao's house after the shooting.

Carrillo testified that he, Lee, and Chung went back to Quiambao's house after the shooting. On the way, Lee and Chung discussed they would tell the police that they were with each other in Los Angeles that night, and had let Carrillo and appellant borrow the Jeep. (RT 22:5037.)

Carrillo testified that he was the only one to go into Quiambao's house, and he told Quiambao the whole story. He had blood on his clothes, and

Quiambao gave him some clean clothes. (RT 13:3293-3294, 13:3331, 13:3333, 22:5039-5041.) Quiambao testified that Carrillo was upset, scared, and paranoid. (RT 13:3179-3182.) Carrillo kept stating over and over again, "They shot him." (RT 13:3183.) When Quiambao asked who shot him, Carrillo said T-Strong shot him. (RT 13:3184.)

Appellant returned to Quiambao's house approximately one to two hours after Carrillo. (RT 13:3185.) Carrillo testified that appellant said he ran to Quiambao's house from Anaheim, and that he hid the gun in the garage. (RT 22:5042-5043.) Appellant was wearing the same clothes as earlier that evening, but there was no blood on appellant's clothes. (CT 4:1135-1136.)

Quiambao testified that he confronted appellant and asked him several times, "Why did you shoot them?" (RT 13:3186.) Each time he asked appellant did not say anything, but simply looked at Quiambao. (RT 13:3186-3187.) Quiambao asked appellant what he did with the gun. Appellant said he "[t]hrew it away." (RT 13:3188.)

(7) The move to Utah.

Carrillo, appellant, and appellant's brother, Baby, moved to Utah shortly after the shooting and stayed with a relative of the Mataele brothers for approximately five months. (RT 22:5043-5049; see CT 4:1138-1139.) At the end of five months, Carrillo and Baby returned to Los Angeles. Carrillo

intended to obtain fake identification cards and return to Utah, but he never returned. (RT 22:5049-5050.)

(8) Masubayashi's sighting of appellant in the year 2000, and Masubayashi discussion with Glenda Perdon.

In the year 2000, after recovering from the shooting, Masubayashi testified he saw appellant at the Ramona Hotel. (RT 15:3691.) Masubayashi was scared. (RT 15:3691.) At the time, Masubayashi had just begun dating one Glenda "Perdon" Bloemhof, whom he came to understand was associated with the Pinoy Real gang. (RT 15:3691, 3697.) Masubayashi told Perdon he saw appellant at the Ramona Hotel. (RT 15:3691.) According to Masubayashi's statement to the prosecution, Perdon told Masubayashi that appellant had told her, in connection with the shooting of Johnson, that "he came in his pants watching that nigger flop." (CT Supp. AA 6:1617; RT 15:3697.) At trial, Masubayashi enlarged upon this statement, testifying that Perdon stated that appellant told her that "he came in his pants watching that nigger flop *after he shot him.*" (RT 15:3697, italics added.) But Masubayashi first mentioned this statement to the prosecution only ten days before trial. (RT 14:3468-3469, 15:3698; CT Supp. AA 6:1617.) Perdon did not recall making such a statement to Masubayashi.[13] (RT 14:3468-3469.)

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[13] Perdon never made this statement in any of her interviews with the police. (RT 25:5656; CT Supp. AA 6:1617.) She testified that she did not

(9) Police investigation.

Johnson died at the scene from a single, large caliber bullet (i.e., .38 or .357 caliber range) that traveled from the right side of the neck into the brain, causing severe hemorrhaging. (RT 16:3851, 19:4632, 4637-4640.) There was stippling residue, which indicated that the shot was fired at close range. (RT 13:3088-3089, 19:4632-4636.)

The firearm was never recovered, but analysis of bullets and fragments indicated the shots were fired from either a .38 special or .357 magnum handgun. (RT 20:4789.)

Lee was interviewed by law enforcement on November 12, 1997, the day after the shooting. A redacted version of the tape-recorded interview was played for the jury. (RT 24:5476; CT Supp. AA 2:507-528.) In the interview, Lee said he spent the evening in Los Angeles with James Chung. (CT Supp. AA 2:513-514.) He spent time at the Penthouse apartment with Suzuki and his girlfriend, Peter Song, and someone known as Antoine. (CT Supp. AA 2:513-514.) He left the apartment sometime between midnight and 3:00 a.m., but he

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recall making such a statement to Masubayashi. (RT 14:3468-3469.) Masubayashi also never made this statement in any of his several interviews with the police, and only first made the statement to the prosecutor and Investigator Gary Hendricks upon returning to the United States from Japan *10 days before trial*, thereby suggesting that the statement was fabricated. (RT 15:3698, 25:5656; CT Supp. AA 6:1617.)

never left Los Angeles. (CT Supp. AA 2:515-516.) Lee stated he drove Chung's Jeep between 8 p.m and 10 p.m. to get cigarettes from the nearby 7-Eleven, and then saw the Jeep again early in the morning parked outside Chung's apartment. (CT Supp. AA 2:519-520, 523-527.)

(10) Gang affiliation and testimony.

Appellant was a member of the SOS (Sons of Samoa) gang, but was trusted by members of the Pinoy Real gang. (RT 23:5356-5357.) Chung, Carrillo, Baby, Quiambao, and one Clarito Mina (aka Snoop) were members of Pinoy Real. (RT 13:3191, 3194, 3317, 21:4948-4949.) Lee was a member of the AMA gang. (RT 15:3602-3603, 3643-3644.) Masubayashi and Johnson were members of the Tiny Rascals gang, which at one point was allied with Pinoy Real. (RT 17:3986-3987, 22:5117-5118.)

Alfonso Valdez, a supervisor with the gang unit at the Orange County District Attorney's office, testified as a gang expert. (RT 24:5490-5538.) Valdez testified generally concerning the culture and habits of Asian criminal street gangs. (RT 24:5493-5495.) He explained Asian gangs are motivated primarily by economic gain, the importance of respect in gangs, and the methods of joining a gang, including committing a crime. (RT 24:5493-5494, 5499-5502.) Valdez testified that the offenses were consistent with someone committing a crime to join a gang. (RT 24:5507.)

Quiambao testified that because he belonged to the same gang, he would be willing to die for Mina (who was a close friend), as well as other fellow Pinoy Real members, and he would definitely be willing to lie for his fellow Pinoy Real members, even at the expense of someone else. (RT 13:3319-3320, 14:3353-3358.)

B. Guilt phase–the defense case.

(1) Appellant's testimony identifying Carrillo as the gunman.

Appellant testified that he was not involved in the murder of Johnson or attempted murder of Masubayashi, and was not involved in a conspiracy to commit murder. (RT 30:6662.) On November 11, 1997, he had a date during the day that lasted until approximately 6:00 p.m., and afterwards he returned to the Penthouse. (RT 30:6693-6694.)

In the early evening on November 11th, appellant went to get cigarettes with Lee, Carrillo, and Chung. Lee was driving. (RT 30:6803-6805.) They returned to the Penthouse, and he and Carrillo smoked methamphetamine. (RT 30:6808-6809.)

Later that evening, he went to Quiambao's house in Chung's Jeep with Carrillo and Chung, leaving Lee at the Penthouse. (RT 30:6698-6702, 6817; 31:6944-6945.) At Quiambao's house, Chung said he needed to talk to

Johnson and Masubayashi about a ticket Johnson received while driving the Jeep. (RT 30:6704.)

Appellant, Carrillo, and Chung left Quiambao's house and went to see Johnson and Masubayashi in Anaheim. (RT 30:6707-6708.) As they arrived at Johnson's and Masubayashi's apartment, Chung parked the Jeep in a restaurant parking lot adjacent to the apartment complex. (RT 30:6707-6708, 6722-6723.) Johnson and Molly were returning to the apartment from the grocery store. (RT 30:6710.) Chung handed appellant a gun, and then appellant and Carrillo accompanied Johnson and Molly inside the apartment. (RT 30:6709-6710, 6716.) Chung remained in the Jeep. (RT 30:6722.) Once inside the apartment, they talked about going out that night. (RT 30:6712-6714.)

Shortly thereafter, appellant, Carrillo, Johnson, and Masubayashi exited the apartment, but as they were leaving a police vehicle pulled into the parking lot. (RT 30:6714-6715.) Appellant was concerned about the gun in his possession, and so hid the gun under the tire well of a parked vehicle and went back to the apartment with Carrillo. (RT 30:6715, 6717-6718.) A few minutes later, they left the apartment a second time. (RT 30:6721.) Appellant told Carrillo to get the gun, which Carrillo did and kept in his (Carrillo's) possession. (RT 30:6721.) The four men then got into Masubayashi's vehicle,

and Masubayashi drove to the adjacent parking lot so they could get Chung. (RT 30:6721-6723.)

Appellant testified that as they pulled up to Chung's Jeep, he could not see anyone inside Chung's Jeep. (RT 30:6723.) He exited Masubayashi's vehicle and was walking to the Jeep when he saw Chung reclined inside the Jeep talking on the telephone. (RT 30:6723-6724.) Appellant then heard two gunshots. (RT 30:6725.) Appellant testified on direct examination, in part:

Q: All right. And where did the gunshots appear to be coming from?

A: From behind me.

Q: Your left? Your right?

A: From behind me.

Q: What do you do in response to hearing two gunshots?

A: I duck and look around.

Q: What did you see when you ducked and looked around?

A: Ryan [Carrillo] had his arm in John's [Masubayashi's] car.

Q: And how far away were you from Ryan Carrillo when you ducked and turned around and saw him with an arm inside?

A: I was at the jeep door.

Q: And how many feet away is the jeep door from where Ryan Carrillo was? Just an approximation.

A: Parking space. [RT 30:6725-6726.]

Appellant testified he ran to Carrillo, pushed him up against Masubayashi's vehicle, and yelled at him, stating, "What the fuck are you doing?" (RT 30:6727-6728.) Carrillo stated, "It's a setup, man. It's a setup." (RT 30:6728.) Appellant pushed Carrillo aside and knelt down to check on Johnson. (RT 30:6729.) He could see that Johnson was bleeding. (RT 30:6733.) Masubayashi got out of the vehicle and ran. Carrillo then shot Masubayashi. (RT 30:6729-6731.) Appellant testified on direct examination, in part:

Q: What is the very next thing you observed after you could feel something happening on the far side of the car?

A: Well, Ryan Carrillo comes around the back of the car. As he's walking behind the back of the car coming around, he shoots one time.

Q: And this is as he's walking around the back?

A: As he's coming around the back going towards John's way, John's side.

Q: Did you actually see him with your own eyes shootings (sic) once?

A: Yes, I seen this.

Q: All right. And what did you see him do after he shot once?

A: He took another like two steps until he was past the door, clear of the door, and was going diagonally toward the same direction that John was going.

Q: Did you see them do anything else?

A: After he took those two steps, he shot one more time.

Q: And what happened after he shot again?

A: He stopped. He assumed the shooter's position, and he shot one more time.

Q: So how many times total did he shoot after you heard the boom, boom, twice?

A: Three times. [RT 30:6730-6731.]

Appellant and Carrillo got into the passenger compartment of the Jeep, and appellant told the driver, "Go get John [Masubayashi]" (RT 30:6735), meaning go pick him up, not hurt him. (RT 30:6733-6737.) As they were driving toward Masubayashi, however, appellant told them to stop because appellant "wasn't going to be a part of it." (RT 30:6737.) The Jeep stopped and appellant exited. (RT 30:6737-6738.) Appellant then saw the Jeep swerve toward Masubayashi at the telephone pole. (RT 30:6741-6742.)

After initially refusing to testify who was driving the Jeep after the shooting, and refusing to identify codefendant Lee as being present, appellant testified that Snoop (i.e., Mina) was in the Jeep. (RT 30:6819, 6849, 6865.)

Appellant returned to Quiambao's house; Carrillo was already there. (RT 30:6752.) Quiambao asked appellant why he shot Johnson, but appellant said he did not shoot Johnson. (RT 30:6752.) Appellant confronted Carrillo. Carrillo told appellant that he was scared and so he (Carrillo) told Quiambao

that appellant had killed Johnson, when actually Carrillo had fired the shots. (RT 30:6763-6765.) Carrillo told appellant that it was a set-up and that Masubayashi had a gun. (RT 30:6766.)

At the time of the incident, Carrillo was five feet, nine inches tall and weighed approximately 140 to 160 pounds, whereas appellant was six feet tall and weighed approximately 300 to 350 pounds. (RT 30:6732; CT Supp. AA 2:322, 7:1813.) Appellant further testified that he knew Perdon, but denied saying to her that he "almost came" when he "saw that nigger flop." (RT 31:7042-7043.)

(2) Carrillo and Quiambao were both members of the Pinoy Real gang.

Carrillo was with appellant at the time of the shooting, was seen shortly thereafter with blood on his clothes, and according to independent witnesses fit the description of the shooter. (RT 20:4690-4691, 4697, 4710-4711, 4735; RT 21:4961-4987; RT 22:4988-5046; CT 4:1128.) Appellant, a very large man weighing approximately 300 to 350 pounds, and not fitting the medium-build description of the shooter, was a member of the Sons of Samoa (SOS) gang. (RT 23:5356-5357.)

In exchange for Carrillo's testimony against appellant, the prosecution accepted a plea to voluntary manslaughter of Johnson and attempted murder of Masubayashi, with a very lenient sentence of six years state prison. (RT

23:5345-5346.) In striking a deal with Carrillo in exchange for testimony against appellant, the prosecution joined forces with a "very manipulative liar." (RT 29:6487-6488.)

Quiambao's statement to the police, which largely repeated Carrillo's own self-serving out-of-court statements about the shooting (pointing to appellant as the shooter and distancing himself from the events), was unreliable because Quiambao was a friend of Carrillo from the Pinoy Real gang and readily admitted that he would lie for his fellow Pinoy Real gang members, even at the expense of someone else. (RT 13:3319-3320, 3144-3188; RT 14:3353-3358.)

(3) Masubayashi's purported identification of the shooter was unreliable.

Masubayashi's identification of the shooter's arm was not reliable in view of the stress of the moment, his limited view of the shooter, and the fact that the area where the shooting occurred was dark. (RT 15:3637; RT 20:4710-4711, 4735; RT 25:5759-5761.)

Masubayashi was unreliable in another identification at the scene of the shooting, further undermining his credibility. At trial, Masubayashi identified codefendant Lee as the Jeep's driver. (RT 15:3643-3644.) On cross-examination, Masubayashi admitted he initially told an Anaheim detective that he did not know who was driving the Jeep, and had also

identified Pinoy Real gang member Mina as the driver. (RT 17:4100-4105, 18:4307-4311; see RT 27:6124, 6126.)

Moreover, Perdon testified that sometime after the shooting she was in a motel room with Masubayashi and several other people. Mina came into the room, saw Masubayashi, and left. (RT 25:5600, 5603-5605, 5621.) Mina called Perdon the next day. While expressing concern about Perdon's relationship with Masubayashi, Mina told Perdon, "We shot that guy up." (RT 25:5607-5608.) Mina repeatedly told Perdon that he wanted her to stop seeing Masubayashi because that was the "guy we shot." (RT 25:5610.) Mina would not say precisely who shot Masubayashi. (RT 25:5609.) But since Mina was a Pinoy Real gang member, Mina's use of the pronoun "we" is reasonably understood as referring to himself and other members of the Pinoy Real gang–i.e., Pinoy Real gang member Carrillo, but not appellant.

(4) Substantial evidence corroborated appellant's testimony that Carrillo was the gunman.

Two independent witnesses to the shooting, Jose Rodriguez and John Fowler, when first interviewed, described the shooter as medium build, a description matching Carrillo but not appellant.[14] Sergeant Foster testified that

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[14] Carrillo was five feet, nine inches tall and weighed 140 to 160 pounds, whereas appellant was six feet tall and weighed 300 too 350 pounds. (RT 28:6301, 30:6732; CT Supp. AA 2:332, 7:1813.)

in the early morning hours on November 12, 1997, he arrived at the scene of the shooting and interviewed Jose Rodriguez. (RT 25:5715.) Rodriguez told him that he saw a person firing a handgun, and described the person as a "medium build" male. (RT 25:5715-5716.)

Officer Bowers testified that in the early morning hours on November 12, 1997, he arrived at the scene of the shooting and interviewed John Fowler. (RT 26:5839.) Fowler identified the gunman as an unknown male, five feet, ten inches tall. (RT 26:5839-5840.) Moreover, Fowler testified that the gunman's left side was exposed to him, and that in comparing appellant during trial in a standing position with his left side exposed, the shooter did not look anything approaching the size of appellant. (RT 28:6277.)

Fowler also testified that the gunman was wearing a beanie. (RT 20:4739-4740, 4753.) Carrillo admitted at trial that he was the one wearing a beanie at the time of the shootings. (RT 23:5218-5219.) Appellant was not wearing a beanie. (RT 30:6732.)

Appellant's testimony that Carrillo shot and killed Johnson, and then fired at Masubayashi (RT 30:6725-6726, 6729-6731), was corroborated by evidence that Carrillo had blood on his clothes and fled the scene of the shooting with Chung and Lee, leaving appellant behind to fend for himself.

(RT 13:3185; RT 20:4690-4691, 4697, 4710-4711, 4735-4740, 4753; RT 22:5037; RT 23:5218-5219; CT 4:1128.)

Appellant's testimony was corroborated by Shawn Monroe, who testified that shortly after the shooting Carrillo appeared unexpectedly at Monroe's house in Hollywood. (RT 27:6183.) Carrillo told Monroe that he was leaving town because he had just shot "some fools" in Orange County. (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 admitted that he (Carrillo) "did the shooting." (RT 28:6347-6348.)

Carrillo's sister-in-law, Alana Swift Eagle, testified that she knew Carrillo well, having been in his presence hundreds of times. (RT 29:6483-6486.) Carrillo had no fear of appellant and always carried a gun. (RT 29:6489, 6507.) Carrillo drank heavily and used methamphetamine daily. (RT 25:5705.) Carrillo was a dishonest person and a "very manipulative liar." (RT 29:6487-6488.)

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C. Penalty phase–the prosecution's case.

(1) Prior conviction–robbery of John Hagen when appellant was 19 years old.

In January 1994, appellant was convicted of second degree robbery of John Hagen.[15] (RT 35:7869, 8049; People's Exh. 71.) Hagen testified that he was in West Hollywood on December 20, 1993, when appellant stepped out from behind a bush, put a gun to Hagen's head, and demanded money. (RT 35:7853.) Hagen gave appellant his wallet, but told appellant that he did not have any money. (RT 35:7853-7854.) Hagen had only 65 cents in his pocket, which he also gave to appellant. (RT 35:7854.) Appellant then told Hagen something to the effect, "You better turn around and get out of here before I shoot you." (RT 35:7855.)

(2) Criminal activity when appellant was a minor.

(a) Misdemeanor assault and sexual battery on Melanie Janke when appellant was 13 years old.

Melanie Janke testified that on March 3, 1988, she and appellant were classmates in 7th grade at Lakeside Junior High School. (RT 35:7772-7773, 7776.) Appellant was 13 years old at the time. (See RT 42:9403.) She vaguely recalled an incident on that day when appellant exposed himself to her, but appellant did not touch her. (RT 35:7774, 7778-7779.) She also

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[15] Appellant was born on October 19, 1974. (RT 42:9403.)

vaguely recalled another incident during that same period of time when appellant touched her friend, Diane Ortiz. (RT 35:7774, 7777.) The incident with the friend is only a vague memory; she could not really recall what occurred. (RT 35:7777.) Janke further testified that a police officer came to her school, but only vaguely recalled speaking with the officer. (RT 35:7774-7775, 7777.)

Deputy Sheriff Claude Waddle testified he interviewed appellant in March 1988 about an incident involving Janke and Ortiz at Lakeside Junior High School. (RT 35:7782-7783.) Appellant admitted exposing himself to Janke and Ortiz, stating that "he showed them his dick." (RT 35:7789.) Appellant also stated that he touched both of them on the breast and on the buttocks. (RT 35:7790.)

(b) Robbery of Thomas Kinsey when appellant was 16 years old.

Thomas Kinsey testified that he vaguely recalled an incident in 1991 when he was confronted by a group of four individuals in Hollywood, one of whom was appellant.[16] (RT 35:7793-7794, 7796-7797.) He had a briefcase

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[16] On cross-examination, Kinsey was impeached with evidence that he had been drinking and was too intoxicated to drive (RT 35:7810-7811), and thus his perception and recollection of the events were adversely impacted. He also was impeached with evidence he suffered prior convictions for embezzlement, fraud, forgery, burglary, and grand theft (RT 35:7811-7814), all of which involved acts of moral turpitude and thus called into question his

with him at the time, and one of the four commented that it was a nice briefcase. (RT 35:7794.) One of the four then took the briefcase from him, another one pushed him, and one of them demanded money from him. (RT 35:7795.) He was afraid at the time, and the briefcase was taken against his will. (RT 25:7798, 7805.) The briefcase was never returned to him. (RT 35:7795.) Although appellant was one of the four, Kinsey had no recollection of appellant's specific actions or role in the incident, except that appellant was not the one who took the briefcase. (RT 35:7798, 7806, 7808, 7810.) The police arrived shortly after the incident occurred, but to Kinsey's recollection the person who took the briefcase had left the scene. (RT 35:7806-7807.)

Officer David Dooros testified that he was on patrol in Hollywood on June 14, 1991, when he came upon what appeared to be three men attempting to rob someone. (RT 35:7824-7825.) Dooros saw three men cornering Kinsey in the parking lot. (RT 35:7825.) Dooros placed the three men on the ground, and then Kinsey identified the person who pushed him. (RT 35:7829-7830.) That individual was identified by the police as Tupoutoe Mataele, a male weighing 275 pounds and standing 5'10" tall. (RT 35:7830.) Dooros also testified that Kinsey identified appellant as the one who initially approached him and stated, "[T]hat's a nice [brief]case. How much you want for it?" (RT

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credibility as a witness.

35:7832.) Kinsey told Dooros that the briefcase was then taken by another person who was with the three men, but that person fled prior to Dooros's arrival on the scene. (RT 35:7832.) Kinsey told Dooros that after the briefcase was taken appellant said, "[W]here's the rest of, or where's your other money?" (RT 35:7833.) Appellant told Kinsey several times, "I'm going to fuck you up." (RT 35:7850.) Appellant pushed Kinsey back and had his fist cocked, and then Dooros arrived on the scene. (RT 35:7833, 7835-7836.) No weapons were involved in the altercation (RT 35:7836) and Kinsey was not injured (RT 35:7851).

(3) Victim impact evidence.

Melvin Milton testified that Danell Johnson was his cousin. (RT 35:7871.) When he heard that Johnson was murdered he was "overwhelmed." (RT 35:7872.) Johnson's death has adversely affected the family, and it has continued to affect him over the years. (RT 35:7872.) After Johnson's death, their grandmother was admitted into a home because of a nervous breakdown. (RT 35:7872-7873.) Six months after Johnson's death, Johnson's mother also had a nervous breakdown, and became homeless. (RT 35:7873-7874.)

Carnell Hart testified that Danell Johnson was his cousin. (RT 35:7941.) He and Johnson were like brothers. (RT 35:7942.) He was extremely upset when he heard Johnson had died. (RT 35:7944-7945.) He

spoke with a detective handling the case and helped make arrangements for Johnson's funeral. (RT 35:7945-7946.) Johnson's death adversely affected his family. His aunt (i.e., Johnson's mother) Patricia Milton "went downhill, if you will." (RT 35:7947.) Johnson's mother is homeless. (RT 35:7948.)

Sia Her testified that Johnson was her boyfriend; they started living together as soon as Johnson got out of prison. (RT 35:7955-7956.) They had lived together approximately two years when he was killed. (RT 35:7958.) They had a serious relationship and were talking about getting married. (RT 35:7958.) She heard gunshots in the early morning of November 12, 1997, but at the time she did not know what the gunshots were related to. (RT 35:7958.) She took police detectives to Patricia Milton's house so they could inform her of Johnson's death. Milton could not understand why he had been killed, and never recovered from the news of her son's death. (RT 35:7959.) She helped plan the funeral. (RT 35:7960.) Johnson's death has adversely affected her life because now she cannot trust anyone. (RT 35:7960.)

D. Penalty phase–the defense case.

(1) Tongan cultural influence and the violence and abuse appellant suffered in childhood.

Dr. Inoke Funaki testified as an expert in Tongan culture, having received his Ph.D. in counseling psychology from Brigham Young University and having studied, and written about, Tongan culture for many years, as well

has having been born and raised in Tonga. (RT 38:8473-8475.) Appellant's parents, both of whom were born and raised in Tonga, raised appellant using a very authoritarian parenting style, which is part of the Tongan culture. (RT 38:8476-8477, 8486-8488.) The Tongan parenting style, which involves the use of physical punishment, would be considered very violent and abusive in the United States. (RT 38:8477.)

Lucky Mataele, appellant's nephew, was born and raised in Tonga, as was appellant's father, Pakimuka Mataele, and mother, Lupe Mataele. (RT 35:7964-7967, 7983.) As the youngest of numerous siblings, appellant's father was verbally and physically abused, something common in Tonga culture. (RT 35:7969-7972.) Appellant's father and mother moved to the United States in 1971 and 1973, respectively. (RT 35:7983-7984.) Lucky Mataele observed verbal and physical confrontations between appellant's parents, including bruises on Lupe Mataele and broken furniture in the house. (RT 35:7988-7989.) He also saw appellant's father beat appellant with a broom handle until appellant cried. (RT 35:7989.) He saw other signs of neglect, including lack of supervision over appellant and appellant's siblings, and lack of communication regarding school and discipline. (RT 35:7993-7996.) Appellant's father was a heavy drinker, and would have weekend

drinking parties where he would be abusive toward appellant, constantly telling appellant what to do and "slap[ing] him around." (RT 7996-7997.)

Appellant's mother, Lupe Mataele, testified that she was born and raised in Tonga, and moved to the United States in 1973. (RT 35:8005-8007, 8012, 8017.) Appellant is the oldest of four children. (RT 25:8017.) Appellant witnessed a lot of physical violence in the home, including incidents when his father would get drunk and beat and kick Lupe to the ground. (RT 8017-8018.) Appellant would stand there watching and cry. (RT 35:8018.) One night appellant's father kicked her and pushed her into the kitchen, where she fell down and then sat by the icebox. (RT 35:8020.) Appellant screamed at his father to stop beating and kicking his mother, and then appellant stood there crying. (RT 35:8020.) Lupe testified that appellant was never close with his father because he was always there when his father would beat her. (RT 35:8020.)

Lupe testified that appellant's father also would abuse appellant. (RT 35:8021, 8023.) He beat appellant with a hanger until appellant had bruises on his back and hands, preventing appellant from going to school. (RT 35:8021.) During some of the abuse against Lupe, appellant would tell his father, "Daddy, I hate you. I hate you, Daddy." (RT 35:8024.)

Lupe testified that from 1991 to 1993, and then again when appellant was released from prison in 1997, appellant helped pay the household bills because his father was not working. (RT 35:8034-8036.)

Lupe testified that appellant was very close with his first cousin, Loma Mataele, because Loma's family was living with them from 1985 to 1991. (RT 8035-8038.) Loma was murdered in July 1997. (RT 35:8041.) This greatly affected appellant, to the extent that for a period of time appellant could not even speak with Lupe. (RT 35:8040.) Lupe testified that appellant always shows respect to her. (RT 35:8045.) She loves appellant with all her heart. (RT 35:8047.)

Nyoka Mataele, appellant's aunt and spouse to Lucky Mataele, was born and married in Tonga, and came to the United States with her husband in 1970. (RT 36:8069.) She observed appellant being physically abused by both of his parents, including spanking and hitting. (RT 36:8072-8077.) She also saw signs of physical violence, including bruising and broken dishes. (RT 36:8082-8083.) Neither parent participated or supported appellant in school activities. (RT 36:8084-8085.) She has known appellant all his life. He is loving and very respectful of elders. (RT 36:8087.)

Piutiena Mataele, appellant's younger sister, witnessed verbal and physical fights involving her parents. (RT 36:8093-8094.) Appellant would

try to help her mother by trying to get her father away from her mother. (RT 36:8095.) She saw her father hitting appellant. (RT 36:8096.) Appellant contributed financially to the household. (RT 36:8101.) Appellant was always a loving brother and looked out for her and her siblings. (RT 36:8102.)

Ilaissaane Kelley, appellant's younger sister, recalled one time when they were in the kitchen and her father threw a butter knife at her mother. (RT 36:8107, 8110.) Her mother ran, but her father gave chase. (RT 36:8110.) Another time she returned home to find her father running after her mother, and her mother was crying and coughing up blood. (RT 36:8110-8111.) She also observed her father inflicting physical violence upon appellant, including beating him many times. (RT 36:8112-8113.) He would beat appellant with belts, wires, sticks, brooms, and a tennis racket. (RT 36:8113.)

Pakimuka Mataele, appellant's father, testified that he was born and raised in Tonga, and immigrated to the United States in 1971. (RT 36:8118-8119.) He admitted to regularly "beat[ing] the hell out of him [i.e., appellant]." (RT 36:8127-8128.) One time he saw some family friends burn appellant's hand with a cigarette. (RT 36:8130-8131.) He also admitted to beating his wife, usually when he was drunk. (RT 36:8134.) When he would beat his wife, appellant would try to help her, so he would beat appellant too. (RT 8133-8135.)

Q: Who would you beat up more severely, your wife or T-Strong?

A: Well, I beat him up a lot–a lot a long time ago, very bad. But then–

Q: Were you drinking a lot?

A: My wife, I beat her up, too, bad, too.

Q: Were you drinking a lot?

A: Because I was drunk at the time. She fall down and had to kick around, you know. [¶]

Q: Would–when you were beating your wife, would T-Strong get involved sometimes?

A: Yes.

Q: How would he get involved?

A: I chase him to the room to slap him, go in the room. He run into the room, and I go back. He run back and says, "Get off my mom. Leave my mom alone," you know. Well, I have to remember how the young man over here crying for his mom at that time. You know what I'm saying? I was a mean person at the time. [RT 36:8134-8135.]

Pakimuka testified that from 1985 through 1991 he continued to beat his wife. (RT 36:8139.) He also continued to beat appellant, but stopped when appellant was 14 or 15 years old because appellant was getting stronger. (RT 36:8139-8140.) Pakimuka further testified that when he was young he was beaten by his older brother, and he hated his older brother for beating him. (RT 36:8140.) When appellant was born as the oldest son he transferred that

hatred to appellant. (RT 36:8140.) Pakimuka testified, "I have kind of bad negative feeling for him [because appellant is an oldest son and I was beaten by an oldest son]." (RT 36:8140.)

Mike Fitch testified that he was appellant's football coach for two years while appellant was at Whittier High School. (RT 8164-8165.) During football season those two years, Fitch had contact with appellant on average twelve hours a week plus one game. He had the opportunity to see appellant interact with staff and other players. (RT 36:8165.) Appellant was always good, kind, obedient, polite, fun-loving, and a good team player. (RT 36:8166.) He got along well with other people, including coaches, friends, and teammates. (RT 36:8166.) Fitch testified that appellant was a contributing player both on and off the field. (RT 36:8166-8167.) He remembers appellant as a good kid. (RT 36:8167.)

Sela Anau, appellant's cousin, testified that she observed a lot of fights between appellant's father and mother, and saw a lot of abuse toward the children, including appellant. (RT 36:8172-8175.) She recalls that appellant was beaten by his father using fists, kicks, and a broom. (RT 36:8175-8176.) In 1998 and 1999, appellant organized weekly home meetings between family members where he encouraged the children to go to school, to get a job, and to love each other. (RT 36:8180-8181.) Appellant's counseling during these

home meetings led her son to complete high school and to serve in a mission in Tonga. (RT 36:8182.) She trusts appellant with her children. (RT 36:8183.)

Cecelia Emanuela Anau, appellant's cousin, testified she has cerebral palsy, but appellant is her favorite cousin because appellant always took care of her. (RT 36:8213-8216.) She has fond memories of appellant. (RT 36:8218.)

Filoi Tuitupou, appellant's cousin, testified that Loma was killed in 1997. Appellant attended Loma's funeral. (RT 36:8220-8222.) Appellant was always respectful to others. (RT 36:8225.) Appellant spent time with her family, and while there always helped with the family. (RT 36:8226.)

Cheyenne Vaka testified that she was with appellant and Loma on a street in Los Angeles when Loma was killed in their presence by one Richard Leon. (RT 36:8233-8237.) Leon was subsequently convicted of the murder of Loma. (RT 36:8240.) Loma's death had a significant adverse impact on appellant because he was the closest to Loma. (RT 36:8241, 37:8275.) Appellant was very sad and cried a lot. (RT 36:8241.)

Mona Keith, appellant's elementary school teacher, testified on direct examination that she taught music to appellant in 1986 and 1987. (RT

37:8277.) Appellant was an excellent student and was very courteous, obedient, polite, and respectful. (RT 37:8278-8279.)

Ramona Rodriguez testified that she met appellant in 1997 and that appellant helped her when she was being followed by someone in a vehicle. (RT 37:8329-8330.) Appellant was like a big brother or father to her. (RT 37:8331.) Although they never had a dating relationship, appellant treated her like family. (RT 37:8330-8331.)

Sean Monroe testified that in July 1992 he was confronted by a group of 10 to 15 men and shot on the left side of the chest and stomach. (RT 39:8744.) He dropped to the ground and appellant provided mouth-to-mouth resuscitation. (RT 39:8744.)

(2) Appellant's testimony.

Appellant testified in his own behalf in the penalty phase in support of a life sentence. (RT 41:9053-9190.) Appellant was born in Los Angeles in 1974. (RT 41:9053.) His father drank heavily, which would lead to physical violence in the house. (RT 41:9054-9056.) He was physically assaulted as a child by both his father and his father's friends. (RT 41:9057-9059, 9071-9073.) His father would hit him with a tennis racket, broom handle, and electric cord. (RT 41:9057.)

Appellant testified that his father also hit and kicked appellant's mother. (RT 41:9057.) Appellant would always take his mother's side and try to protect her. (RT 41:9058, 9072.)

Appellant had a lot of trouble in elementary school because he was different and was teased by the other students. He spoke differently and carried himself differently than the other students. When he was teased by the other students, he would hit them, causing him to become involved in a lot of fights. (RT 41:9062.)

Appellant left high school when he was sixteen and worked in construction. (RT 41:9084-9086.) While working in construction from 1991 to 1993, he gave his mother most of the money he earned. (RT 41:9086, 9094.)

Appellant testified that he did not rob Thomas Kinsey in 1991. (RT 41:9096.) Appellant explained that Kinsey approached him to sell him the briefcase for some crack cocaine. (RT 41:9096.) Appellant refused. (RT 41:9096.) There were others standing nearby, and they started fighting with Kinsey. (RT 41:9097-9098.) Appellant was standing there watching the fight when the police arrived. (RT 41:9098.) Appellant never touched Kinsey. (RT 41:9098.)

Appellant acknowledged that in 1993 he committed a robbery with a .22 caliber handgun, for which he was convicted. (RT 41:9107-9108, 9114.) He spent five years in state prison, and was released in March 1997. (RT 41:9114.)

From April 1997 to July 1997, appellant spent most of his time with Loma. They worked, played, and lived together. (RT 41:9117.) In July 1997, Loma was murdered. (RT 41:9118.) He and Loma were getting into a vehicle when a man shot Loma. (RT 41:9122.) The person also fired several shots at appellant. (RT 41:9122-9124.) Appellant testified at the preliminary hearing of the person accused of shooting Loma. (RT 41:9126.) Loma's death adversely affected appellant because Loma was a very close cousin. (RT 41:9126-9127.) He wrote a song about Loma called "Standing Tall." (RT 41:9126.)

Appellant testified that he started using methamphetamine in 1997, and by 1999 was a heavy user. (RT 41:9133.) Appellant was arrested on May 22, 2000, and has been in jail ever since. (RT 41:9134.)

(3) Clinical assessment of mental health issues adversely affecting appellant.

Dr. Kenneth Nudleman, a medical neurologist certified by the American Board of Neurology and Psychiatry, testified that he conducted several examinations of appellant in 2004. (RT 38:8440-8444.) One test,

which was performed with an electroencephalography (EEG), showed a pattern of change in the brain common in people with head injuries. (RT 38:8448.) Some of the signals in appellant's brain had changed because of a prior head injury. (RT 38:8448.)

Dr. Ronald Siegel, a psychopharmacologist, testified as an expert in the area of the affect of methamphetamine on a person. (RT 40:8794-8795, 8799-8802.) Methamphetamine is a stimulant, increasing heart rate and blood pressure. (RT 40:8802-8803.) Dr. Siegel testified that methamphetamine causes the body to go "into a fear or fight stage . . . , and the person is ready for action, and it's very fast." (RT 40:8803.) Methamphetamine stays in the body for several hours, and thus the affects of a standard dose can be felt for up to 15 hours. (RT 40:8807.) Long-term methamphetamine users often suffer from depression, sadness, an inability to concentrate, and difficulty in critical thinking and making judgments. (RT 40:8809.) Continued use of methamphetamine under these circumstances causes paranoia, a condition where one becomes irritated, impulsive, easily frustrated, and short-tempered. (RT 40:8809-8810.) Further continued use of methamphetamine causes psychosis and hallucinations, where reality is distorted. (RT 40:8813-8814.)

Dr. Nancy Kaser-Boyd, a psychologist, testified as an expert witness in the area of attention deficient disorder and posttraumatic stress disorder. (RT

40:8889-8898.) She reviewed appellant's family and early life history, including health and school records, and personally interviewed appellant. (RT 40:8901-8902.) Appellant's history includes child abuse, domestic violence within the family, and poverty. (RT 40:8904, 8907.) Appellant experienced racism at some of the schools he attended. (RT 40:8904.) All of this caused appellant anxiety and concern about his safety. (RT 40:8904.)

Dr. Kaser-Boyd testified that there is a correlation between adult dysfunctional behavior and the early risk factors, identified above, displayed by appellant. (RT 40:8907.) Appellant also suffered a number of head injuries, which caused concern whether those injuries caused impulsive behavior. (RT 40:8908-8909.)

A significant adverse factor in appellant's life occurred in July 1997 when his cousin–with whom appellant had a strong relationship–was assaulted by a man who shot and killed the cousin. (RT 40:8910.) Appellant was present during the assault and shooting, and came to the defense of his cousin, which caused appellant to suffer a near-death experience. (RT 40:8910.) This traumatic event caused appellant to suffer from posttraumatic stress disorder (RT 40:8911), which was "still in full swing on November 11, 1997 when the instant offense occurred." (RT 40:8916.) Appellant's methamphetamine use and consumption of alcohol is consistent with his attempt to numb himself

from the feeling surrounding the trauma experienced from the death of his cousin. (RT 40:8917.)

(4) Appellant's favorable prospects for rehabilitation in prison.

Sean Porter was appellant's camp counselor and football coach in 1990 when appellant was at Camp Kilpatrick, a juvenile detention facility. (RT 38:8453-8454.) He had daily contact with appellant. (RT 38:8455.) Appellant performed very well at Camp Kilpatrick. He interacted well with authority figures and his peers. Appellant's excellent performance led to Porter's decision to let appellant leave the program four to six weeks early and integrate back into his local public high school. (RT 38:8456.) Appellant was respectful, obedient, kind, and displayed compassion towards his peers. (RT 38:8457.) Porter also noted the lack of parental involvement by appellant's parents, which seemed to be caused by language and cultural barriers. (RT 38:8461.)

Dr. Timothy Collister, a clinical psychologist and neuropsychologist, testified that he conducted examinations and evaluations of appellant in February and March 1995. (RT 39:8613-8614.) Appellant has an above average intelligence and has a very strong neuropsychological profile, which means that appellant would benefit from educational opportunities. (RT 39:8615, 39:8617-8618, 8621.)

James Esten, a former employee of the California Department of Corrections, testified on direct examination that appellant was incarcerated during the period 1993 to 1997, during the period 2000 to 2001, and since 2001 in county jail pending trial in the instant case. (RT 39:8629-8633.) Disciplinary records from those incarcerations show that appellant had no history during those times of weapons, gang, and/or drug involvement. (RT 39:8634.) Appellant had one incident involving a mutual fight with another inmate, but no weapons were involved. (RT 39:8634.) There was another incident in which appellant refused to go to work because of a "work stoppage" by other inmates in his housing unit. (RT 39:8636-8637.) Appellant also had a number of minor rule violations. (RT 39:8661-8664, 8669.)

Appellant's prison work records show that he was consistently ranked "outstanding." (RT 39:8642-8643.) Appellant's history while incarcerated shows that he adjusts well to prison life and poses no danger to others. (RT 39:8646.) Esten testified that based on a review of appellant's prison and jail records appellant would be a good candidate to lead a productive nonviolent life in prison. (RT 39:8669.)

(5) Good character evidence showing appellant's kindness and willingness to help others in need.

Numerous witnesses testified to appellant's good character, including Estella Reid (RT 37:8340-8345), Edward Cross, Jr. (RT 37:8353-8364, 8377-8380), Fatulisi Mataele (RT 37:8386-8391), Ilaisaane Puaka (RT 37:8393-8407), Mele Akaveka (RT 38:8463-8468), Laura Silva (RT 38:8516-8521), James Harvey (RT 38:8522-8532), Eugenia Blackburn (RT 38:8560-8567, 8607), Voka Mataele (RT 39:8671-8708), and Stirling Broadhead (RT 41:9010-9021).

Estella Reid, a Polynesian dance instructor who knew appellant for a period of six years (1985 to 1991), testified that appellant was eager to learn and showed discipline in his efforts to learn Polynesian dances, despite his large size. Appellant was kind and considerate of others. (RT 37:8340-8345.)

Edward Cross, Jr., the father of appellant's best friend in junior high school welcomed appellant into his home from 1985 to 1991. Cross recounted incidents where appellant recovered his youngest son's stolen bicycle and mowed lawns with his son. Cross testified that appellant was always respectful and courteous. (RT 37:8353-8364, 8377-8380.)

Fatulisi Mataele was married to appellant's cousin. Appellant stayed with them for three months beginning in July 1997, after the death of appellant's cousin Loma. Appellant was devastated by the death of his cousin,

but was nonetheless a good housemate who helped clean and helped take care of the children who love him. (RT 37:8386-8391.)

Ilaisaane Puaka, appellant's cousin who lived with the Mataele family for four years following her parents' divorce, observed appellant's father being bullied and abused by his older brothers when they lived in Samoa. She testified to the domestic violence between appellant's parents and the physical beatings of appellant by his father and his father's drinking buddies while in the United States. The Mataele house was a crash-pad for anyone who needed a place to stay, and there was always excessive drinking. When appellant got older and saw that all of the kids were starting to get into trouble, appellant organized house meetings where everyone would support each other. (RT 37:8393-8407.)

Appellant's cousin, Mele Akaveka, testified she attended the family meetings organized by appellant, which favorably influenced her to change her partying lifestyle because of the advice she received from appellant. (RT 38:8463-8468.)

Laura Silva testified that she was appellant's classmate in elementary school (5th or 6th grade). She recalled that appellant was always respectful and protective of her and the other children at school. She also testified that appellant was bullied at school because of his race. (RT 38:8516-8521.)

James Harvey was the middle school vice principle where appellant attended school. He recalled that appellant received limited parental support, yet was always truthful. (RT 38:8522-8532.)

Eugenia Blackburn was appellant's sixth grade teacher. She testified that appellant as a child stuck out like a sore thumb because of his size and the clothes he wore, and he sometimes got in trouble but was always respectful. Appellant's parents never participated in any way. Appellant was a good student. (RT 38:8560-8567, 8607.)

Appellant's cousin Voka Mataele testified that he lived with appellant's family for six months in 1985. He observed appellant being bullied on the elementary school playground because of the way he was dressed. He also saw appellant stand up to gang members who harassed other students. He saw appellant being abused by his father. He observed appellant's close relationship with Loma, who was then murdered, and saw how hard it was for appellant to cope after the murder. He observed the family meetings appellant organized. (RT 39:8671-8708.)

Stirling Broadhead was the elementary school principal when appellant was in the fifth grade. He observed that appellant did not know how to properly dress himself and was the largest person in his class. Even though appellant had behavior problems, appellant was always respectful. Appellant

would stand up for children who were being bullied at school. (RT 41:9010-9021.)

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Jury Selection Issues

1. The trial court's dismissal for cause of Prospective Juror N. requires reversal of the death judgment because the record shows 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.

A. Introduction and procedural background.

The trial court began hearing challenges for cause after all prospective jurors had completed a 38-page jury questionnaire, and after dismissal of certain prospective jurors by stipulation. (RT 3:1040-1042, 1117-1148.)

Prospective Juror N. (Juror No. 259) was called on the morning of June 1, 2005. (RT 9:2185.) Juror N. affirmed that she would follow the law during the penalty phase and could return a verdict of death, and that her beliefs about capital punishment, including religious beliefs, would not prevent or substantially impair her ability to return a verdict of death in this case. (RT 9:2209-2211; CT JQ 13:3600-3635.)

Juror N. was well qualified to serve as a juror in a capital murder trial. Over defense objection, however, the trial court granted the prosecution's challenge for cause against Prospective Juror N. (RT 9:2262-2263.)

A prospective juror may be excused for cause when that juror's views on capital punishment would "prevent or substantially impair the performances of his duties as a juror in accordance with his instructions and his oath."

(*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841].) But a prospective jurors may not be excluded for merely expressing a personal opposition to capital punishment:

> A prospective juror personally opposed to the death penalty may nonetheless be capable of following an oath and the law. A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded unless a predilection would actually preclude him from engaging in the weighing process and returning a capital verdict.

(*People v. Kaurish* (1990) 52 Cal.3d 648, 699.)

As explained below, the trial court's finding of substantial impairment as to Juror N. is not supported by substantial evidence, thereby requiring reversal of the death judgment. (Cf. *Wainwright v. Witt, supra*, 469 U.S. at p. 424; *People v. Cooper* (1991) 53 Cal.3d 771, 809 [erroneous exclusion of even a single prospective juror because of his or her views on the death penalty is reversible error per se].)

B. Standard of review.

Appellant recognizes that granting a motion to excuse for cause constitutes an implicit finding of bias, warranting some degree of deference by the reviewing court. (*People v. Stewart* (2004) 33 Cal.4th 425, 451; *Uttecht v. Brown* (2007) 551 U.S. 1, 7-9 [127 S.Ct. 2218, 167 L.Ed.2d 1014].)

The trial court's resolution of conflicts on the question of juror bias is binding on this Court, and thus due some deference, *only where supported by substantial evidence.* (*People v. Hamilton* (2009) 45 Cal.4th 863, 889-890; *People v. Martinez* (2009) 47 Cal.4th 399, 427 ["The trial court's resolution of conflicts on the question of juror bias is binding on the reviewing court if supported by substantial evidence."].)

No deference is due here because, as explained below, the trial court's resolution, if any, of conflicts on the question of juror bias is not supported by substantial evidence.

C. Prospective Juror N.'s responses to the jury questionnaire and during voir dire reveal she could fairly and impartially decide the case and return a verdict for either life or death.

Juror N. was well qualified to serve as a juror in a capital murder trial. Her jury questionnaire revealed that she was a middle-aged female, married to a firefighter with three children, and employed at Boeing as a secretary. (CT JQ 13:3600-3605.) She previously served twice on a jury, once in a civil case and once in a criminal case. (CT JQ 13:3609.) She could render a fair and impartial decision based solely upon the evidence received in court, she could base that decision on the court's rulings and instruction, and after hearing all the evidence if she believed the defendant was guilty beyond a reasonable doubt she would be able to return a guilty verdict. (CT JQ 13:3621.) She did

not have any moral or religious principles which would prevent her from judging another. (CT JQ 13:3621.)

Although she expressed some concern for the youth of the defendants and the fact that the offenses were committed eight years earlier, she unequivocally stated she could either impose life in state prison or the death penalty. (CT JQ 13:3622, 3631.) She could consider and weigh all relevant factors in determining penalty. (CT JQ 13:3627-3628.) She did not believe the death penalty was a deterrent, but she felt that some people were simply evil and would continue to commit murder, and for those people she felt death was the appropriate sentence. (CT JQ 13:3629.) She would rather not assume the responsibility for making a life or death decision, but she could set aside any personal feelings and follow the law as explained by the judge. (CT JQ 13:3630, 3634.) She had a favorable view of the honesty of the prosecution, the police, and judges, and she strongly agreed that a person convicted of murder and sentenced to death should be swiftly executed. (CT JQ 13:3619, 3633.)

During general voir dire by the trial judge, Juror N. stated she knew some people of Somoan descent because she was raised in Gardena and Carson, and nearby "Wilmington is a big Samoan community . . . ." (RT

9:2185-2186.) This fact would not influence her impartiality in this case. (RT 9:2186-2187.)

During voir dire, trial defense counsel engaged Juror N. in the following colloquy:

Mr. Harley: . . . You've heard all the questions I've put to some of the other jurors. How do you feel about sitting in judgment of a case of this nature, recognizing who the attorneys are, who the parties are, and what the charges are?

Juror Number 259: I'm hoping the prosecution doesn't have enough evidence to get to the second phase.

Mr. Harley: Okay.

Juror Number 259: I don't want to see the second phase. I see two innocent men, and I'm hoping that he doesn't have enough.

Mr. Harley: Okay. But that's exactly where you should be. You see two innocent men because we've talked about this, not with you folks but with other people, that if you had to vote right now you'd have to vote not guilty.

Juror Number 259: Right.

Mr. Harley: Assuming you get to the second phase–again, I have to make these assumptions. Hopefully you don't get there. *But, if we do get to the second phase, do you feel you can engage in that weighing process that myself and the prosecutor have been talking about*?

Juror Number 259: *Yes.* [RT 9:2209-2210, italics added.]

Upon further questioning by defense counsel, Juror N. confirmed her ability to impartially decide the case during penalty phase.

Mr. Harley: That's basically what the second phase is all about is getting to that point, considering all those factors in aggravation and mitigation. *You would keep an open mind*?

Juror Number 259: *Yes*.

Mr. Harley: *Would you be leaning one way or the other at the start of the penalty phase*?

Juror Number 259: *No*.

Mr. Harley: And, recognizing the start of penalty phase means you're already convinced beyond a reasonable doubt that he's guilty of first-degree murder by means of lying in wait --

Juror Number 259: Right.

Mr. Harley: –and *you can embark on the start of the second phase with an open, neutral* --

Juror Number 259: *Yes*.

Mr. Harley: –detached mind. Anything you wish to volunteer in the selection process?

Juror Number 259: No, sir. [RT 9:2211, italics added.]

During voir dire by codefendant Lee's defense counsel, Juror N. commented about how young the defendants appear, and the fact that she has a son about their age. (RT 9:2227.) She acknowledged the difficulty of sitting in judgment of another person during the guilt phase trial, stating, "It's something I don't want to do. 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." (RT 9:2228.)

The prosecutor asked Juror N. about her statement to appellant's defense counsel, quoted above, that she was hoping not to get to the second phase of trial. (RT 9:2236.) Juror N. explained that she was not siding with one party over the other, but simply expressing her belief that the defendants are innocent until proven guilty, and she would hold the prosecution to that burden of proof. (RT 9:2236-2239.) Juror N. stated, "*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 told Juror N. that he was concerned she was siding with the defense, but Juror N. reiterated that she was simply stating her understanding of the prosecutor's burden of proof. The prosecutor engaged Juror N. in the following colloquy:

Mr. Murray: I'm trying to understand what you're saying.

Juror Number 259: –how I'm coming off to you, but I actually think you have a bigger burden than the other two lawyers. Because I actually see them as innocent and I actually think you have a bigger burden to tell me what you believe to make them guilty. And that's why I say, yeah, yeah, well, you're right. I am pulling for them.

Mr. Murray: Okay.

Juror Number 259: I'll tell you right now. Because I don't want to get to the second phase. I don't.

Mr. Murray: Okay.

Juror Number 259: I don't want that burden.

Mr. Murray: Okay. And I'm fine with that. I'll phrase it the way I tell people I have to phrase it in legal speak. Because of the way you feel, do you think that that would substantially impair your ability to render–I use this term that–everybody says "I don't want to say I'm unfair," but do you think it would substantially impair your ability to render a fair verdict, either at the guilt or the penalty phase?

Juror Number 259: Yes.

Mr. Murray: Okay. I appreciate–I appreciate your candor, okay, so I'm not going to ask you any more questions.

Juror Number 259: Okay. [RT 9:2239-2240.]

The prosecutor then moved to excuse Juror N. for cause. (RT 9:2258.) The prosecutor focused on the fact that she stated she hoped there would not be a penalty phase, and that her feelings would substantially impair her ability to render a fair verdict. (RT 9:2258-2259.)

Appellant's defense counsel responded,

> Well, your honor, yeah, I do object. And again, I think it's– it became a little bit confusing. Sure, those words came out of her mouth. But [prosecutor] Mr. Murray very skillfully 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.
>
> So I think the court has to review the entire dialogue, and that is my only comment as far as objecting to challenge for cause because I think she was confused. Those words came out

> of her mouth that Mr. Murray is using to assert his challenge for cause; I concede that.
>
> But I think the court has to look at how that was very artfully set up, throwing out the presumption of innocence and hoping that the defendants do get off, but at that point in time she would have to vote not guilty. And then finally getting her to say that she was unfair because she was actually hoping the defendants would get off, even though she was starting out on the guilt phase where she would have to vote not guilty. . . . [RT 9:2259-2260.]

Codefendant's trial counsel also objected, stating:

> Two comments she made before Mr. Murray's voir dire struck me as important. She said "yes, I can vote for the death penalty" and "yes, I can engage in the weighing process." And she throughout the process said "I hope we don't get there."
>
> So I don't think a challenge for cause is supported by everything that she said if we consider the questionnaire and all of the voir dire. She wasn't asked by Mr. Murray if she could vote for the death penalty and if she could engage in the weighing process. [RT 9:2260.]

The court granted the motion and dismissed Juror N., finding that her responses were equivocal and that she ultimately stated her feelings would substantially impair her ability to render a fair verdict. (RT 9:2262-2263.)

D. The trial court's finding of substantial impairment is not supported by substantial evidence, thereby requiring reversal of the death judgment.

The state and federal Constitutions guarantee a criminal defendant the right to due process, equal protection, trial by an impartial jury drawn from a representative cross-section of the community, and a fair and reliable penalty

determination. (*Wainwright v. Witt, supra*, 469 U.S. at p. 424; *People v. Wilson* (2008) 44 Cal.4th 758, 778; Cal. Const., art. 1, §§ 7, 15, 16 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

An accused's right to a fair and impartial jury drawn from a representative cross-section of the community is guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as article I, section 16, of the California Constitution. (*Morgan v. Illinois* (1992) 504 U.S. 719, 727 [112 S.Ct. 2222, 119 L.Ed.2d 492]; *People v. Fauber* (1992) 2 Cal.4th 792, 816.) In a capital case, "the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 521, fn. 20 [88 S.Ct. 1170, 20 L.Ed.2d 776].) Thus, "[i]t 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 the are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176 [106 S.Ct. 1758, 90 L.Ed.2d 137].)

In effect, when those opposed to capital punishment are excluded from the venire, the State "crosse[s] the line of neutrality," "produce[s] a jury

uncommonly willing to condemn a man to die," and violates the Sixth and Fourteenth Amendments. (*Witherspoon v. Illinois, supra*, 391 U.S. at pp. 520-521.) "[A] sentence of death cannot be carried out if the jury imposing or recommending it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Id.* at p. 522 [fn. omitted].)

As the United States Supreme 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.)

A juror may be excused for cause if the juror's views about capital punishment would prevent or substantially impair that juror's ability to return a verdict of death in the case before the juror. (*Wainwright v. Witt, supra*, 469 U.S. at p. 424; *People v. Ochoa* (2001) 26 Cal.4th 398, 431.) Reviewing for

abuse of discretion (*People v. Abilez* (2007) 41 Cal.4th 472, 497-498), the trial court's dismissal of a juror for cause is affirmed if "fairly supported" by the record. (*People v. Cunningham* (2001) 25 Cal.4th 926, 975.)

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, supra*, 469 U.S. at p. 423.)

A trial court abuses its discretion if its ruling exceeds the bounds of reason (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478), is arbitrary and capricious, or is rendered without knowledge and consideration of "all the material facts in evidence ... together also with the legal principles essential to an informed, intelligent and just decision." (*In re Cortez* (1971) 6 Cal.3d 78, 85-86.)

Moreover, a trial court must apply the *Witt* standard in an even-handed and impartial manner. (Cf. *People v. Champion* (1995) 9 Cal.4th 879, 908-909 [holding that "trial courts should be evenhanded in their questions to

prospective jurors during the 'death qualification' portion of the voir dire . . . ."].) A court's application of the *Witt* standard in an arbitrary, capricious, or partial manner does not comport with the essence of fairness guaranteed by due process of law. (Cf. *Gray v. Klauser* (9th Cir. 2001) 282 F.3d 633, 645-648, 651 [and authorities cited therein, holding that a trial court's unjustified or uneven application of legal standard in a way that favors the prosecution over the defense violates due process].)

Juror N.'s responses to questions in the juror questionnaire and during voir dire, when considered as a whole and in context, reveal that she could fairly and impartially decide the case and return a verdict for either life or death. She consistently expressed, in a heartfelt manner, exactly what our criminal justice system explicitly asks of jurors–i.e., that a defendant is presumed innocent until the prosecution has proven guilt beyond a reasonable doubt. (CT JQ 13:3600-3743; RT 9:2185-2240.)

This Court's decision in *People v. Heard* (2003) 31 Cal.4th 946 is instructive. In *Heard*, this Court reversed the death judgment finding that the trial court erred in excusing Prospective Juror H. for cause based upon his views concerning the death penalty. (*Id.* at p. 959.) Juror H.'s responses to the questions posed during voir dire indicated he was prepared to follow the law. (*Id.* at pp. 959-960.) This Court recognized that, to the extent that the

prospective juror's responses were less than definitive, any vagueness reasonably must have been viewed as a product of the ambiguity of the question itself. (*Id.* at p. 967.)

Like Juror H. in *People v. Heard, supra*, Juror N.'s questionnaire showed that she was prepared to follow the law and the trial court's instructions. (CT JQ 13:3631-3634; *People v. Heard, supra*, 31 Cal.4th at p. 959 [Juror H. affirmed he would neither vote automatically for life without parole or death, no matter what the evidence showed].) Juror H. denied that he would be reluctant to get to penalty phase, but answered "no" to the question, "Would you decide the case based upon the evidence without fear of having to reach the next stages?" (*Id.* at p. 960.) Although Juror N. expressed concern about the youth of both defendants and desired not to get to the penalty phase, she absolutely could apply the law as stated by the judge and return a death verdict, if warranted by the facts. (RT 9:2209-2210.) In context, Juror N.'s responses–like Juror H.'s responses in *Heard* –were not equivocal but, rather, reflected a mature response to the heavy burden of sitting in judgment of another human being.

> . . . *[W]e must keep in mind that a prospective juror who is [even] firmly opposed to the death penalty is not disqualified from serving on a capital jury.* "[N]ot 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. Martinez, supra*, 47 Cal.4th at p. 427, italics added, citing *Lockhart v. McCree, supra*, 476 U.S. at p. 176.)

Juror N. was *not* firmly opposed to the death penalty (CT JQ 13:3627-3634), but even if she had been that would not have been a basis to exclude her from appellant's jury. (*People v. Martinez, supra*, 47 Cal.4th at p. 427.)

The critical issue is whether the juror can apply the law and perform her duties as a juror in accordance with her oath without substantial impairment from her personal views on capital punishment. (*Ibid.*)

> "A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict."

(*People v. Martinez, supra*, 47 Cal.4th at p. 427, citing *People v. Stewart, supra*, 33 Cal.4th at p. 446; see *People v. Kaurish, supra*, 52 Cal.3d at p. 699.)

The critical questions of Juror N. on this issue–i.e., whether her views would actually preclude her from engaging in the weighing process and returning a capital verdict–are questions 11 and 18 on the jury questionnaire. Question 11 states, "Do you hold an opinion concerning the death penalty that, regardless of the evidence that may develop in the penalty phase of the trial,

you would automatically refuse to vote for the death penalty in any case?" (CT JQ 13:3631.) Juror N. answered, "No–if I believe the individual wilfully & without remorse did the crime–and has no chance of being rehabilitated–I would not have a problem voting for the death penalty." (CT JQ 13:3631.) Question 18 states, "Could you set aside your own personal feelings regarding what the law ought to be and follow the law as the Court explains it to you?" (CT JQ 13:3634.) Juror N. circled, "Yes." (CT JQ 13:3634.)

Nor was the fact that Juror N. felt a heavy burden in this case, and did not desire to get to the penalty phase, warrant excusal from the jury. (See *Adams v. Texas* (1980) 448 U.S. 38, 50 [100 S.Ct. 2521, 65 L.Ed.2d 581].)

In *Adams*, the United States Supreme Court held that the exclusion of prospective jurors on the ground that they were unwilling or unable to take a statutory oath that a mandatory penalty of death or life imprisonment would not "affect" their deliberations on any issue of fact contravened the Sixth and Fourteenth Amendments. (*Id.* at p. 40.) The state has a legitimate interest in obtaining jurors who will be impartial on the question of guilt and will make the discretionary judgments entrusted to them without conscious distortion or bias, despite their conscientious scruples against the death penalty. Nevertheless, the Texas trial court erred by excluding prospective jurors who could not or would not state under oath (as required by Texas Penal Code

section 12.31(b)) that the mandatory penalty of death or imprisonment for life (on conviction of a capital felony) would not affect their deliberations on any issue of fact. (*Id.* at pp. 48-50.) Justice White, writing for an 8-1 majority, observed that the state cannot require as a condition of service as a juror in a capital case a statement that the juror does not feel any burden of rendering judgment on another human being. (*Id.* at p. 50.)

Here, Juror N.'s thoughtful expression of a heavy burden in rendering judgment on another human being did not mean that her responses to the prosecutor's questions were ambiguous; nor did it suggest she was unable to serve as a trial juror. (RT 9:2209-2211.) Reliance by the trial court on these statements as a basis for dismissal would contravene the rule set forth in *Adams v. Texas, supra*, 448 U.S. at p. 50, prohibiting exclusion of a juror from a capital case on the basis of the burden felt in rendering judgment on another human being.

> . . . [N]either nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. . . . Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase . . . if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond a reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and

> judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would deprive the appellant of the impartial jury to which he or she is entitled under the law.

(*Adams v. Texas, supra*, 448 U.S. at p. 50.)

Appellant's trial counsel was correct that Juror N.'s response to the prosecutor's "substantial impairment" question was taken out of context. (RT 9:2259-2260.) Juror N. previously served as a trial juror on two cases, including a criminal case. (CT JQ 13:3609.) She understood the prosecution's burden of proof and the presumption of innocence. (RT 9:2211.) Her comments about the defendants reflected a correct understanding of the presumption of innocence–i.e., that as the defendants sat in court before trial they were presumed innocent. She explicitly told the prosecutor, "If you have enough [evidence] to convince me, I don't mind getting to the second phase. (RT 9:2238.) Her responses to questions in the juror questionnaire also were unambiguous, reflecting an ability to impartially hear and decide the case. (CT JQ 13:3600-3743.)

The record reveals that Juror N. was prepared to follow the law and the trial court's instructions, and that the trial court's findings to the contrary are not supported by substantial evidence. The trial court thus exceeded its discretion in excusing Juror N., thereby requiring reversal of the death

judgment. (Cf. *People v. Heard, supra*, 31 Cal.4th at p. 966; *Ross v. Oklahoma* (1988) 487 U.S. 81, 88 [108 S.Ct. 2273, 101 L.Ed.2d 80].

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2. The trial court's dismissal for cause of Prospective Juror H. requires reversal of the death judgment because the record shows 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.

A. Introduction and procedural background.

Prospective Juror H. (Juror No. 190) was called on the afternoon of June 1, 2005. (RT 9:2292.) She affirmed that she would follow the law during the penalty phase and could return a verdict of death, and that her beliefs about capital punishment would not prevent or substantially impair her ability to return a verdict of death in this case. (RT 10:3213-2317, 2340-2341, 2352-2371; CT JQ 29:8157-8192.)

Juror H. was well qualified to serve as a juror in a capital murder trial. Over defense objection, however, the trial court granted the prosecution's challenge for cause against Prospective Juror H. (RT 10:2388, 2390.)

A prospective juror may be excused for cause when that juror's views on capital punishment would "prevent or substantially impair the performances of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt, supra*, 469 U.S. at p. 424.) But a prospective jurors may not be excluded for merely expressing a personal opposition to capital punishment. (*People v. Kaurish, supra*, 52 Cal.3d 648, 699.)

As explained below, the trial court's finding of substantial impairment as to Juror H. is not supported by substantial evidence, thereby requiring reversal of the death judgment. (Cf. *Wainwright v. Witt, supra*, 469 U.S. at p. 424; *People v. Cooper, supra*, 53 Cal.3d at p. 809 [erroneous exclusion of even a single prospective juror because of his or her views on the death penalty is reversible error per se].)

B. Standard of review.

Appellant incorporates by reference Argument 1.B., *ante*, as though fully set forth herein. The trial court's resolution of conflicts on the question of juror bias is binding on this Court, and thus due some deference, only where supported by substantial evidence. (*People v. Hamilton, supra*, 45 Cal.4th at pp. 889-890; *People v. Martinez, supra*, 47 Cal.4th at p. 427.) No deference is due here because, as explained below, the trial court's resolution, if any, of conflicts on the question of juror bias is not supported by substantial evidence.

C. Prospective Juror H.'s responses to the jury questionnaire and during voir dire reveal she could fairly and impartially decide the case and return a verdict for either life or death.

Juror H. was well qualified to serve as a juror in a capital murder trial. Her jury questionnaire revealed that she was a 57 year-old married female with three children. (CT JQ 29:8160-8161.) Although she never previously served on a jury, she had a favorable view of law enforcement and the judicial

system. (CT JQ 29:8164-8165.) She could follow all instructions given by the court and could render a fair and impartial decision based upon the evidence. (CT JQ 29:8159, 8178, 8191.)

In response to a question about what changes she would make to the criminal justice system, she said that eliminating the death penalty would speed-up the system. (CT JQ 29:8166.) Although not morally opposed to the death penalty, she would not vote in favor of it because a mistake "could not be undone." (CT JQ 29:8179, 8186.) She could consider the listed aggravating and mitigating factors in determining whether to impose a sentence of death (CT JQ 29:8182-8185), but stated regardless of a defendant's background, upbringing, and mental health issues, "we are each responsible for our actions when we are adults." (CT JQ 29:8185.)

With respect to Juror H.'s views on the death penalty, she stated that she hated the death penalty and was not sure it was our right to make such a decision. (CT JQ 29:8187-8188.) Her feelings would not cause her to automatically vote for life without the possibility of parole. (CT JQ 29:8188.) In fact, Juror H. checked three instances when she might automatically vote for the death penalty: 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.) Despite her concern about

making a mistake, she agreed "somewhat" that any person who kills another should receive the death penalty. (CT JQ 29:8190.) She agreed with the post-conviction appeals process, and thus did not believe that execution should be swift. (CT JQ 29:8190.) She concluded by stating that she could set aside her own personal feelings and follow the law, and that she would have no difficulty in doing so. (CT JQ 29:8191.)

During voir dire, Juror H. stated that during the penalty phase she would not compare this case to notorious cases, such as Jeffrey Dahmer or Ted Bundy. (RT 10:2352-2363.) She was troubled by the fact that one jury of 12 people might decide the same facts differently than another jury of 12, but she could focus on the facts of this case and would not be influenced by her concern about the system. (RT 10:2353.)

The prosecutor engaged Juror H. in the following colloquy, seeing further explanation for answers in the questionnaire:

Mr. Murray: Okay. *On your juror questionnaire you say that you could not vote for the death penalty* because a mistake could be made that couldn't be undone.

Juror Number 190: Right.

Mr. Murray: *Is that still your opinion*?

Juror Number 190: *No. And That's what I indicated at the beginning. After writing that we had some time off. And, after reflecting, I in fact do not believe that way any more.* I think that the death penalty is a moral – I think it is moral. And I do

have concerns about – for the same reason, because the system is flawed, that a mistake might be made; but I also think that it could be certain beyond a reasonable doubt. And I could vote for the death penalty. [RT 10:2356, italics added.]

Not satisfied with Juror H.'s explanation, the prosecutor continued to question Juror H. about the death penalty:

Mr. Murray: . . . But, when I see a juror who says, "I could not vote for it," and then they completely change and say, "It's moral, and I could vote for it"–

Juror Number 190: Right.

Mr. Murray: –Can you understand that I'd be concerned about that?

Juror Number 190: Absolutely. I can definitely understand.

Mr. Murray: What is it that you heard that hasn't just educated you but it's made you completely change your mind about whether you could fairly evaluate evidence and vote for a death verdict?

Juror Number 190: When I wrote that, I'm thinking of when–especially when you're a child. But, as you're growing up, even though when I wake up in the morning and the news is that somebody has been put to death for a crime, and I get just sick. I mean I really hate that. And the thought that one person could have been put to death for a crime they didn't commit makes me sick. So that was what I was thinking when I wrote that. However, in my right and wrong, moral and not moral world, I believe the death penalty is a valid punishment, a moral and right punishment. Okay. But because I do have those concerns, maybe I wouldn't be fair to you or to – you know, if we got to the penalty phase.

Mr. Murray: Okay.

Juror Number 190: It's possible.

Mr. Murray: Well, that's – that's the crux of where I'm going.

Juror Number 190: Okay.

Mr. Murray: And any time I pick specific questions it's all going to the same place ultimately.

Juror Number 190: Okay.

Mr. Murray: So let me ask you: you say maybe you could be fair. I'll use one of Mr. Myers' phrases. Dig deep–or actually that's Mr. Harley's phrase. Dig deep and tell me. Could you be fair to both sides or not? Could you–would your beliefs substantially impair your ability to be a fair juror in this case?

Juror Number 190: No.

Mr. Murray: Okay. Let me ask you about a question that you answered on page 33–

Juror Number 190: Okay.

Mr. Murray: Where you were asked what do you think about having that kind of responsibility, the kind of responsibility of a juror on a capital case; and you wrote: I'm not sure it is our right.

Juror Number 190: Exactly. Exactly. I'm not sure.

Mr. Murray: What is it that has changed not only about whether you could do it or not–because on your questionnaire you said "I can't do it."

Juror Number 190: Right.

Mr. Murray: Now you say you can.

Juror Number 190: Right.

Mr. Murray: What is it that has changed from it's right and it's moral from on your questionnaire saying "I'm not sure it's our right?"

Juror Number 190: "I'm not sure it's our right" is that what I wrote[?]

Mr. Murray: Yes.

Juror Number 190: I'm not sure it's our right to take a life, the state's right to take a life.

Mr. Murray: Yes.

Juror Number 190: I am sure it's right for the state to–that it is okay for the state to do that. I have an emotional reaction, but I am sure that it's okay.

Mr. Murray: I'm trying to understand.

Juror Number 190: I understand your confusion and–

Mr. Murray: I'm trying to understand what–there has to have been something–I mean there has to have been something cataclysmic that's happened to make a person go from: It's not our right to take human life even though it's the law.

Juror Number 190: Right.

Mr. Murray: And it's constitutional. [¶] . . .

Juror Number 190: It's not you. I'm saying in–where I'm saying where there is truth and there is right and there is morality, that it is moral if–if it's, you know–if the truth is found, then it is moral to take a life. However, in my emotional reaction in my everyday world and knowing that people are flawed and that the system is flawed, it would be–it would be–my

emotional reaction is that it's difficult. It's–it's–if a mistake could be made, it would be hard.

Mr. Murray: I–

Juror Number 190: And I can see that's a problem for you, so–

Mr. Murray: I agree that–that the job of a juror in any criminal case is difficult and where there are capital charges for the death penalty is a potential punishment. I can't imagine a harder civic duty. But you also state on page 34 of 38, "I hate the death penalty."

Juror Number 190: I do. I hate that we have to have it.

Mr. Murray: But that's not what you wrote.

Juror Number 190: I also wrote in there that I thought the death penalty was moral, but I have a problem with the possibility of making a mistake.

Mr. Murray: As you sit here right now, you're saying that you could be fair and neutral.

Juror Number 190: I–I don't want to be here. But, yes, I could be fair and neutral. I even have–I wanted to tell you I have a letter, too. But I would rather not be here. But, if somebody has to make this decision, I think that I'm as capable and fair as anyone if this decision has to be made. [RT 10:2357-2362.]

The prosecutor rhetorically asked Juror H., "You think you're neutral now?" (RT 10:2362.) But when the prosecutor continued asking Juror H. "about her neutrality," trial defense counsel asked to approach the bench. (RT 10:2362.) At a side bar conference defense counsel expressed concern about the adversarial nature of the questioning. (RT 10:2363.) The trial court stated

that the juror's answers appeared to be equivocal, and that under those circumstances a challenge for cause could be granted. (RT 10:2363.) The trial court labeled Juror H.'s responses as "hugely inconsistent," and tentatively ruled that a challenge for cause would be granted. (RT 10:2364-2365.)

In the presence of the jury, the prosecutor asked Juror H. what changed her mind about being able to vote for the death penalty. She responded that it made a difference when she found out that she would be allowed to consider and weigh the mitigating and aggravating factors. (RT 10:2371.) She stated she answered the question in the questionnaire emotionally rather than intellectually or morally, and agreed it was true that she would "rather not" make such a decision. (RT 10:2372.) She believed, however, that she would be a neutral juror. (RT 10:2372-2373.) Juror H. stated, in part:

> Okay. What–what changed my ability to vote for a death penalty in a penalty phase was finding out that I would be able to take into account the aggravating and mitigating factors. I did not know about that [when completing the questionnaire]. And, just thinking about coming into a trial, finding somebody guilty of a murder, and not having specifics that I could weigh, that I actually agree with and could weigh, seemed overwhelming. It seemed like it would be overwhelming to come to a death penalty verdict. Okay. Having those factors, being able to assign weight, I believe that I could go either way. Okay. [RT 10:2371.]

The prosecutor challenged Juror H. for cause. (RT 10:2387-2388.) Appellant's trial defense counsel objected. (RT 10:2388.) The trial court

excused Juror H., stating, "I have already commented that she's equivocal on this and hugely inconsistent, and her credibility with me in open court is shattered. I do not believe her when she says that she could be a fair and impartial juror. She's all over the map. Her statements and her client questionnaire are straightforward and dramatic in terms of her opposition to the death penalty and when she said she would not vote for the death penalty." (RT 10:2390.)

D. The trial court's finding of substantial impairment is not supported by substantial evidence, thereby requiring reversal of the death judgment.

The state and federal Constitutions guarantee a criminal defendant the right to due process, equal protection, trial by an impartial jury drawn from a representative cross-section of the community, and a fair and reliable penalty determination. (*Wainwright v. Witt, supra*, 469 U.S. at p. 424; *People v. Wilson, supra*, 44 Cal.4th at p. 778; Cal. Const., art. 1, §§ 7, 15, 16 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

An accused's right to a fair and impartial jury drawn from a representative cross-section of the community is guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as article I, section 16, of the California Constitution. (*Morgan v. Illinois, supra*, 504 U.S. at p. 727; *People v. Fauber, supra*, 2 Cal.4th at p. 816.) In a

capital case, "the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." (*Witherspoon v. Illinois, supra*, 391 U.S. at p. 521, fn. 20.) Thus, "[i]t 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 the are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree, supra*, 476 U.S. at p. 176.) "[A] sentence of death cannot be carried out if the jury imposing or recommending it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Witherspoon v. Illinois, supra*, 391 U.S. at p. 522 [fn. omitted].)

Here, the prosecution did not meet its burden of proving that Juror H. lacked impartiality. (See *Wainwright v. Witt, supra*, 469 U.S. at p. 423.) Juror H.'s responses to questions in the juror questionnaire and during voir dire revealed that she could fairly and impartially decide the case and return a verdict for either life or death. In her juror questionnaire, which the court described as "straightforward and dramatic in terms of her opposition to the death penalty" (RT 10:2390), Juror H. consistently stated that she could put

her personal feelings aside and make a penalty determination according the law. (RT 10:3213-2317, 2352-2371; CT JQ 29:8157-8192.)

Nor is the court's comment about not believing "her when she says that she could be a fair and impartial juror" supported by substantial evidence. (RT 10:2390.) Voir dire began with questioning by appellant's trial defense counsel. (RT 9:2313.) Juror H. thoughtfully explained her position on the death penalty, including her answer in the juror questionnaire that she "*formerly considered the death penalty immoral*, but now just am concerned because human error might cause a very wrong decision." (CT JQ 29:8186, italics added.) Appellant's trial counsel engaged Juror H. in the following colloquy:

Mr. Harley: Okay. 190?

Juror Number 190: Yes?

Mr. Harley: What are your feelings about the second phase? I know you have a lot to say.

Juror Number 190: I do, and I've been reflecting on it–

Mr. Harley: Right.

Juror Number 190: –Since we filled the questionnaire out. And I found that I–when I filled it out, I thought I was more anti death penalty than I actually am. I'm coming down more in the middle. Initially when I filled it out, I thought that I would favor life without parole–

Mr. Harley: Right.

Juror Number 190: –At all times or in most circumstances. *But in looking at myself, I also think that death can be a moral decision after examining what I do believe.*

Mr. Harley: Okay. So right now–I'm not talking about the way you felt when you filled out the–

Juror Number 190: Correct.

Mr. Harley: –Questionnaire, *but right now after understanding the process you feel that you would be in the middle, not leaning one way or the other at the start of the second phase*?

Juror Number 190: *I do.*

Mr. Harley: And are you reasonably certain about that now that you've had a chance to pause, reflect, understand the process.

Juror Number 190: I do, especially having the (a) through (k) factors. *I didn't realize that we would have set factors to consider. And I'm grateful and relieved that we will, should we get there.*

Mr. Harley: Okay. All right. *So right now you feel confident in your ability to sit in judgment of a case of this nature should we get to the second phase*?

Juror Number 190: *I do.*

Mr. Harley: And you feel confident enough that no matter who asked you that question, whether it's me asking you again, co-counsel asking you or the prosecutor, you can say the same thing: *that you, having understood the process a little bit more fully, can be a fair juror, starting off at neutral in that second phase*?

Juror Number 190: *Yes, I do.*

Mr. Harley: Okay, thank you. I don't want to forget about the guilt phase, the guilt phase. How about the guilt phase, the first phase?

Juror Number 190: I think–I'm hoping that we have instructions that are very clear in the guilt phase also.

Mr. Harley: Okay.

Juror Number 190: I would depend on what the court told us to do and– . . . [¶]

Mr. Harley: *You just keep an open mind until you hear–you hear all the evidence, you hear what the court says, and then you can apply what you heard in court–*

Juror Number 190: *Yes.*

Mr. Harley: *–to the law as his honor instructs you.*

Juror Number 190: *I believe I can.*

Mr. Harley: *And arrive at a fair and just verdict?*

Juror Number 190: *Yes, yes.* [RT 9:2313-2316, italics added.]

Juror H. was next examined by codefendant Lee's trial counsel. (RT 9:2340-2341.) Juror H.'s responses, as follows, were entirely consistent with her responses to appellant's trial counsel, and to those contained in her juror questionnaire:

Mr. Myers: Juror Number 190, similar kind of questions. Do you have any concern about your ability to decide the issues in phase one?

Juror Number 190: No.

Mr. Myers: You know what I mean by phase one?

Juror Number 190: Yes.

Mr. Myers: You'll hold Mr. Murray to that burden of proof?

Juror Number 190: Yes.

Mr. Myers: Beyond a reasonable doubt?

Juror Number 190: Yes.

Mr. Myers: Okay. Do you think that's a fair standard of proof in a criminal case, or do you think it's too high or too low or do you think it's just right?

Juror Number 190: I think sometimes it's inexact.

Mr. Myers: Well, I would agree with you there. It's hard to define. But it is a–I think all of us would agree it's, number one, the highest standard we have in the legal proceedings. And number 2, it is a very high standard. It's not all possible doubt or beyond a shadow of a doubt, but it's up there. And the question I have–sometimes jurors think, you know, that's too high of a burden to put on the prosecution. And the corollary to that, sometimes jurors think, well, in addition to the standard being too high, we think the defense should–if they're accused and they say they're not guilty, they should prove it. And that's not our system. We have this high standard and we don't require people accused to prove they're not guilty. Do you agree with those ideas?

Juror Number 190: I do agree with them, yes.

Mr. Myers: You could apply those?

Juror Number 190: Yes.

Mr. Myers: In this proceeding?

Juror Number 190: Yes.

Mr. Myers: Any concern about that at all?

Juror Number 190: No. [RT 9:2340-2341.]

As shown above, the trial court's ruling that "she's equivocal on this and hugely inconsistent, and her credibility with me in open court is shattered" *is not supported by the record facts*. Juror H. was not equivocal; nor was she inconsistent in her responses. Juror H. certainly was a concerned citizen, and she honestly voiced her concern whether an erroneous decision might be made in a death penalty case. (RT 10:2357-2362; CT JQ 29:8179, 8186.) But Juror H. consistently and unhesitatingly stated that her concern about the potential for an erroneous decision would not prevent or substantially impair her ability to return a verdict of death in this case. (RT 10:2313-2317, 2340-2341, 2352-2371; CT JQ 29:8157-8192.)

> If the State had excluded only those prospective jurors who stated in advance trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply "neutral" with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.

(*Witherspoon v. Illinois, supra*, 391 U.S. at pp. 520-521.)

Juror H. explained that although she disliked the death penalty generally, there were circumstances warranting imposition of the death penalty. (CT JQ 29:8189.) A general dislike for the death penalty is not a disqualifying factor. (See *People v. Martinez, supra*, 47 Cal.4th at p. 427 ["a prospective juror who is firmly opposed to the death penalty is not disqualified from serving on a capital jury"].)

The critical issue was whether Juror H. could apply the law and perform her duties as a juror in accordance with her oath without substantial impairment from her personal views on capital punishment. (*People v. Martinez, supra*, 47 Cal.4th at p. 427.) On that critical issue, Juror H. clearly stated that she was willing to set aside her "own beliefs in deference to the rule of law." (See *Lockhart v. McCree, supra*, 476 U.S. at p. 176.) The trial court thus exceeded its discretion in excusing Juror H., thereby requiring reversal of the death judgment. (Cf. *People v. Heard, supra*, 31 Cal.4th at p. 966; *Ross v. Oklahoma, supra,* 487 U.S. at p. 88.

/ / /

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

A. Introduction.

During voir dire, prospective jurors were questioned about their views and feelings concerning the death penalty. (RT 5:1360, 5:1520, 6:1569-1595, 6:1609-1708, 7:1757-1902, 8:1960-2157, 9:2194-2313, 10:2374-2562, 12:2948-2979.) Prospective jurors also completed a juror questionnaire, which had an entire section entitled *Attitudes Regarding the Death Penalty.* (CT 3:840-850.) During voir dire, the trial court made clear it would permit a challenge to jurors whose views on capital punishment would "substantially impair" their ability to follow the instructions. (6:1646-1648.) Applying this standard, the trial court permitted the prosecution to challenge numerous prospective jurors because of their views on capital punishment. (RT 6:1648, 1650, 1656-1659; RT 7:1903, 1906-1907, 1998; RT 8:1961, 2085-2086; RT 9:2258, 2263, 2286; RT 10:2387, 2390; RT 12:2885, 2955, 3018.)

As discussed above, even accepting this standard as a correct application of the Sixth Amendment (and the parallel jury trial provisions of the state constitution), the trial court here applied this standard improperly as to two prospective jurors, requiring reversal of the penalty phase. (*Ante*, Arguments 1 & 2.) As explained below, the standard itself is inconsistent with

both the state and federal constitutions. For these reasons too the death judgment must be reversed.

The standard used by the trial court here was taken from the Sixth Amendment framework erected by a series of United States Supreme Court cases decided between 1968 and 1980. This standard reflected a then-common approach to the Sixth Amendment which did not examine the intent of the Framers in enacting the Sixth Amendment, but instead defined the scope of that amendment by identifying and balancing competing interests of the state and the defendant.

As more fully discussed below, however, in the past 13 years the Court has rejected this "competing interests" approach to the Sixth Amendment, reexamined its framework for analyzing the scope of the Sixth Amendment, and held that the contours of the Sixth Amendment are to be determined by the Framers' intent in enshrining the right to an "impartial jury" in the Constitution. As also discussed below, the test used by the trial court here is fundamentally inconsistent with the intent of the Framers in adopting the Sixth Amendment. Reversal of the penalty phase is required.

B. Development of the *Adams* test for discharging jurors based on their views of capital punishment.

In *Witherspoon v. Illinois, supra*, 391 U.S. 510, the high court first addressed whether the Sixth Amendment right to a jury trial permitted the state

to exclude from jury service in a capital case jurors who opposed the death penalty. *Witherspoon* held that the Sixth Amendment permitted the state to exclude jurors only if the record made "unmistakably clear" the jurors would (1) automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. (*Witherspoon v. Illinois, supra*, 391 U.S. at pp. 515, fn. 9, 522, fn. 21.)

Twelve years later, in *Adams v. Texas, supra*, 448 U.S. 38, the court revised this standard. As discussed in Arguments 1 and 2 above, *Adams* held that the Sixth Amendment permitted the state to discharge any juror "based on his views about capital punishment [if] those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Id.* at p. 45.) The court stated that its conclusion was part of an effort "to accommodate the State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths." (*Id.* at pp. 43-44.)

The approach to the Sixth Amendment which resulted in the rule set forth in *Adams*–an approach which considered the interests of the defendant and the interests of the state and then sought to reach a principled

accommodation of the two–was not unique to *Adams*. Indeed, on the very same day the court decided *Adams* it issued another decision applying the Sixth Amendment–*Ohio v. Roberts* (1980) 448 U.S. 56 [100 S.Ct. 2531, 65 L.Ed.2d 597], overruled by *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177]. In *Roberts*, the court addressed whether the Sixth Amendment confrontation right permitted the state to introduce preliminary hearing testimony against a defendant at trial. Ultimately, as it did in *Adams*, the court's Sixth Amendment analysis in *Roberts* recognized "competing interests" between the goals of the Confrontation Clause itself and effective law enforcement, sought to accommodate these competing interests, and ruled the evidence admissible. (*Ohio v. Roberts, supra*, 448 U.S. at pp. 64, 77.)

The question presented here is whether the approach to the Sixth Amendment taken in *Adams*–and the standard *Adams* set forth as a result–is consistent with the Court's current approach to the Sixth Amendment, or the intent of the Framers who drafted the Sixth Amendment. As discussed below, the *Adams* standard is consistent with neither.

C. The United States Supreme Court's modern Sixth Amendment precedent focuses not on identifying and accommodating competing interests, but on the historical understanding of the rights embraced by the Sixth Amendment and the intent of the Framers.

In a series of decisions issued over the last 13 years, the United States Supreme Court has reexamined much of its Sixth Amendment jurisprudence. In those decisions, the court has consistently explained that the contours of the Sixth Amendment are no longer to be determined by seeking to balance competing interested, but instead are to be determined by assessing the intent of the Framers. Indeed, the court's decisions over the last decade show that the court has not hesitated to overrule its prior Sixth Amendment precedents to incorporate into its Sixth Amendment jurisprudence a fidelity to the Framers' intent. (See, e.g., *Alleyne v. United States* (2013) 570 U.S. __ [133 S.Ct. 2151], overruling *Harris v. United States* (2002) 536 U.S. 545; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 553], overruling *Walton v. Arizona* (1990) 497 U.S. 639 (1990); *Crawford v. Washington, supra*, 541 U.S. 36, overruling *Ohio v. Roberts, supra*, 448 U.S. 56.)

The starting point for this analysis is the Court's decision in *Jones v. United States* (1999) 526 U.S. 227. There, the court addressed whether a particular factual finding was an element of the offense (which had to be proven to a jury under the Sixth Amendment) or merely a sentencing factor

which could be decided by a judge. In making this assessment, the court emphasized the Sixth Amendment implications based on the historical role of juries.

Thus, the court explained that, historically, there had been "competition" between judge and jury over their respective roles. (*Jones v. United States, supra*, 526 U.S. at p. 245.) Juries had the power "to thwart Parliament and Crown" both in the form of "flat-out acquittals in the face of guilt" and also "what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as 'pious perjury' on the jurors' part." (*Ibid.*, quoting 4 William Blackstone, *Commentaries on the Laws of England* at pp. 238-239.) The court explained that "[t]he potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary consequences." (*Ibid.*)

Of course, there is no more "sanguinary consequence" than capital punishment. Although *Jones* was not a capital case, the court's concern with the "genuine Sixth Amendment issue" that would flow from diminishing the jury's significance applies to death qualified juries as well. (*Id.* at p. 248.) The court echoed a crucial warning from Blackstone that was "well

understood" by Americans of the time: there is a need "'to guard with the most jealous circumspection'" against erosions of the jury trial right flowing from a variety of plausible pretenses for limiting the right. (*Ibid.*) As the court reiterated, "however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient), yet let it be remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters." (*Id.* at p. 246, quoting 4 *Blackstone, supra*, at pp. 342-344).

In capital cases, limiting juries to death-qualified juries is precisely the sort of convenience that Blackstone warned a free nation must guard against. That it may be more convenient to accommodate the Government's interest in only trying a capital case to a jury that has excluded from its ranks all of the individuals who might interfere with the Government's effort to impose a death sentence is no answer. The historical basis for the Sixth Amendment, as *Jones* emphasizes, is to interpose citizens between the government and an accused.

One year after *Jones*, the court again invoked the Sixth Amendment's "historical foundation" as support for its conclusion that a jury must find a defendant guilty of every element of any charged crime beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 477 [120 S.Ct. 2348,

147 L.Ed.2d 435].) Like *Jones*, *Apprendi* was not a capital case. It involved firearms charges and the potential for a sentencing enhancement under a New Jersey hate-crime statute. But in analyzing the question presented, the court again focused on the jury's historical role as a "guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties . . . ." (*Ibid.*, quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* 540-541 (4th ed. 1873).) These principles, important in a case where the consequence at stake for a defendant is imprisonment, are indispensable in the context of a capital case.

Two years later, the court applied the Sixth Amendment principles set forth in *Jones* and *Apprendi* in the capital context. (See *Ring v. Arizona, supra*, 536 U.S. 584.) *Ring* involved the question whether it violated the Sixth Amendment for a trial judge to alone determine the presence or absence of aggravating factors required for imposition of the death penalty after a jury's guilty verdict on a first degree murder charge. In answering that question "yes," the court reversed its earlier holding in *Walton v. Arizona, supra*, 497 U.S. 639 and recognized that "[a]lthough 'the doctrine of *stare decisis* is of fundamental importance to the rule of law[,]' ... [o]ur precedents are not sacrosanct." (*Ring v. Arizona, supra*, 536 U.S. at p. 608.)

In *Ring*, the court continued its focus on the historical right to a jury trial and discussed the juries of 1791, when the Sixth Amendment became law–just as Justice Stevens had done in his *Walton* dissent. (*Walton v. Arizona, supra*, 497 U.S. at p. 711.) *Ring* unequivocally stressed that at the time the Bill of Rights was adopted, the jury's right to determine "which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind" was "unquestioned." (*Ring v. Arizona, supra*, 536 U.S. at p. 608.) In addition, the court repeated that "the Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders." (*Id.* at p. 607.) "The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions in the Bill of Rights. It has never been efficient; but it has always been free." (*Ibid.*)

Two years after *Ring*, the court again overturned one of its earlier Sixth Amendment decisions which had not relied on a historical understanding of the Sixth Amendment. In *Crawford v. Washington, supra*, 541 U.S. 36 the court focused on an historical interpretation of the Sixth Amendment's Confrontation Clause and reversed its holding in *Ohio v. Roberts, supra*, 448 U.S. 56.

As noted above, in *Roberts* the court had held that the Sixth Amendment permitted the state to introduce preliminary hearing testimony against a defendant at trial as a method of accommodating the "competing interests" between the goals of the Sixth Amendment and the Government's interest in effective law enforcement. (*Ohio v. Roberts, supra*, 448 U.S. at pp. 64, 77.) In *Crawford*, however, the court took a very different approach, one that was consistent with the approach it took in *Jones, Apprendi* and *Ring*. The court examined the "historical record" and concluded that under the common law in 1791, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial . . . ." (*Crawford v. Washington, supra*, 541 U.S. at pp. 53-54.) The court acknowledged that its contrary holding in *Roberts* had failed to honor the historical role of the jury and thereby created a framework that did not "provide meaningful protection from even core confrontation violations." (*Id.* at p. 63.)

Only three months after *Crawford*, the court applied its historical record model yet again in the Sixth Amendment context. In *Blakeley v. Washington* (2004) 542 U.S. 296 [542 S.Ct. 296, 159 L.Ed.2d 403], the court held that it violated the Sixth Amendment for a judge to impose a longer sentence based on fact-finding not made by the jury. As the court reiterated, again citing

Blackstone, every accusation against a defendant should "be confirmed by the unanimous suffrage of twelve of his equals and neighbours." (*Id.* at p. 301.) Once again the court focused on the Framers' intent, stressing that "the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury." (*Id.* at pp. 306-08, citing Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 *The Complete Anti-Federalist* 315, 320 (H. Storing ed., 1981) [describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"]; John Adams, *Diary Entry* (Feb. 12, 1771), reprinted in 2 *Works of John Adams* 252, 253 (c. Adams ed., 1850) ["[T]he common people, should have as complete a control . . . in every judgment of a court of judicature" as in the legislature]; Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 *Papers of Thomas Jefferson*, 282, 283 (1. Boyd ed., 1958) ["Were I called upon to decide whether the people had best be omitted in the Legislature or Judiciary department, I would say it is better to leave them out of the Legislative."]; *Jones v. United States, supra*, 526 U.S. at pp. 244-248.)

Finally, in 2013 the high court again overruled a Sixth Amendment precedent which had not been connected to a historical understanding of the Sixth Amendment. In *Alleyne v. United States, supra*, 133 S.Ct. 2151, the

court held that the Sixth Amendment required a jury trial even for facts that served only to increase the mandatory minimum sentence for a crime. The court overruled its contrary decision in *Harris v. United States, supra*, 536 U.S. 545 precisely because it was "inconsistent . . . with the original meaning of the Sixth Amendment." (*Alleyne v. United States, supra*, 133 S.Ct. at p. 2155.)

The clear and consistent line of cases from *Jones* and *Apprendi* to *Ring*, *Crawford*, *Blakeley* and *Alleyne* leaves no doubt that the court has sought to connect Sixth Amendment jurisprudence to the historical role of juries and the intent of the Framers in adopting the Sixth Amendment. The approach to the death qualification of capital juries–based on the 1980 *Adams* decision–is utterly incompatible with the court's current approach to the Sixth Amendment. Unlike these recent cases–which specifically consider the Framers' intent when interpreting the Sixth Amendment's protections–the court's earlier death-qualification decisions did not consider the Framers' intent at all in deciding whether the practice of death qualification violates the Sixth Amendment. Instead, the court's death qualification decisions imported into the Sixth Amendment a balancing test which sought to accommodate the State's interest in implementing its death penalty system while trying to avoid unduly stacking the deck against a defendant. While this balancing approach

may be a perfectly valid approach to drafting legislation, it is plainly inconsistent with the court's recent approach to interpreting the Sixth Amendment by tethering the scope and protections of that amendment to a historical understanding of what it meant to guarantee a defendant an impartial jury.

It is worth noting that in the years since *Adams* was decided–and while the court has refined much of its Sixth Amendment jurisprudence to ensure that it aligns with the Framers' understandings–the court has never examined whether there is any historical support for the *Adams* death qualification standard. (See, e.g., *Lockhart v. McCree, supra*, 476 U.S. 162; *Uttecht v. Brown* (2007) 551 U.S. 1.) Indeed, in *Uttecht* the court explicitly noted that the relevant "principles" established in the case law create a standard that seeks to "balance" the interests of the defendant against the interest of the state–without even contemplating whether the "impartial jury" guarantee actually permits such "balancing." (*Uttecht v. Brown, supra*, 551 U.S. at p 9.)[17]

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[17] Whether the *Adams* standard actually does result in a jury that is "balanced" in terms of attitudes towards the death penalty is very much an open question. Justice Stevens recognized that, in fact, the *Adams* test does not result in a balanced jury at all, but results in a jury "biased in favor of conviction." (*Baze v. Rees* (2008) 553 U.S. 35, 84, Stevens, J., dissenting).

Ultimately, as the court's more recent pronouncements make clear, the propriety of death qualifying under the *Adams* standard in light of the Sixth Amendment depends not on whether that standard accommodates competing interests, but whether it violates the historical understanding of an impartial jury codified in the Sixth Amendment. As discussed below, it plainly does.

D. The Framers intended the "impartial jury" guarantee to prohibit jurors from being struck based on their views of the death penalty.

Permitting jurors to be struck for cause because of their views toward the death penalty is antithetical to the Framers' understanding of an impartial jury. When the Sixth Amendment was adopted, neither prosecutors nor defense counsel were permitted to exclude a juror based on that individual's attitude toward the death penalty. Jurors were permitted to consult their conscience and, in this limited way, "find the law" in addition to "finding the facts." (See 3 William Blackstone, *Commentaries on the Laws of England* 363; *United States v. Burr* (C.C.Va. 1807) 25 F. Cas. 49, 50.)

Indeed, this was–and should continue to be–a critical component of the Sixth Amendment's "impartial jury" protection. Steeped in the experience of overreaching criminal laws (such as libel laws that were used to punish political dissidents), the Framers considered a jury to be the conscience of the community, serving as an important bulwark against the machinery of the

judiciary. The jury was free to use its verdict to reject the application of a law that it deemed unjust–indeed, it was its duty to do so–and this was (and should again be) at the heart of the "impartial jury" guaranteed to all criminal defendants under the Sixth Amendment.[18] (See 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].)

At common law, striking a juror on the basis of bias, or "propter affectum," was limited to circumstances in which the jury had a bias toward a party (relational bias); it did not include striking a juror on the basis of her opinion of the law or the range of punishment for breaking the law. As Blackstone cogently articulated:

> Jurors may be challenged propter affectum, for suspicion of bias or partiality. This may either be a principal challenge, or to the favour. A principal challenge is such where the cause assigned carries with it prima facie evident marks of suspicion, either of malice or favour: as, that a juror is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money

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[18] A juror could of course still be struck for cause if the juror refused to deliberate at all. Consistent with the Framers' understanding, however, the Sixth Amendment's "impartial jury" guarantee ensures that a criminal defendant's case is tried before a jury that, upon deliberating, can consult their consciences and consider the fairness and justice of the law and punishment the jury is asked to apply.

> for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counselor, steward or attorney, or of the same society or corporation with him: all these are principal causes of challenge; which, if true, cannot be overruled for jurors must be omni exceptione majores.

(3 William Blackstone, *Commentaries on the Laws of England* 363.)[19]

Chief Justice Marshall acknowledged this exact understanding of the propter affectum challenge, and its connection to the Sixth Amendment, in *United States v. Burr* (C.C.Va. 1807) 25 F. Cas. 49, 50, noting that "[t]he end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connection with a party is such as to induce a suspicion of partiality." And the limited understanding of "bias" or "partiality" is not some historical footnote: at the time of the Framers, bias as to the law was both welcomed and expected from jurors. The colonial and early American experience teaches that the right to reject the law as instructed was crucial to the role the jury played in its check against the judiciary and executive. For example, when England made the stealing or killing of deer in the Royal forests an offense punishable by death, English juries responded by committing "pious perjury," i.e., rejecting these politically motivated laws by

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[19] Blackstone specified three other grounds that justified the exclusion of a juror: propter honoris respectum, which allowed challenges on the basis of nobility; propter delictum, which allowed challenges based on prior convictions; and propter defectum, which allowed challenges for defects, such as if the juror was an alien or slave. (*Id.* at pp. 361-364.)

acquitting the defendant of the charged offense. (John Hostettler, *Criminal Jury Old and New: Jury Power from Early Times to the Present Day* 82 (2004); see also *Sparf v. United States, supra,* 156 U.S. at p. 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].)

One well known example of such "pious perjury" is the 1734 trial of John Peter Zenger. The Royal Governor of New York, in an effort to punish Zenger for his criticism of the colonial administration, prosecuted Zenger for criminal libel. Andrew Hamilton, representing Zenger at trial, argued that jurors "have the right beyond all dispute to determine both the law and the fact" and thus could acquit Zenger on the basis he was telling the truth, even though the libel laws at the time did not provide that truth was a defense. (James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* 78-79 (Stanley N. Katz ed., 2d ed. 1972).) Zenger was acquitted on a general verdict. This trial, and others like it, provides necessary context for understanding what animated the Framers' intent in guaranteeing a defendant the constitutional right to an impartial jury.

Reinforcing how the Framers themselves viewed the issue, a different (and even more famous) Hamilton successfully made a similar argument

seventy years later on behalf of a man accused of libeling John Adams and Thomas Jefferson. In that case Founding Father Alexander Hamilton argued:

> It is admitted to be the duty of the court to direct the jury as to the law, and it is advisable for the jury, in most cases, to receive the law from the court; and in all cases, they ought to pay respectful attention to the opinion of the court. *But, it is also their duty to exercise their judgments upon the law, as well as the fact; and if they have a clear conviction that the law is different from what it is stated to be by the court, the jury are bound, in such cases, by the superior obligations of conscience, to follow their own convictions.* It is essential to the security of personal rights and public liberty, that the jury should have and exercise the power to judge both of the law and of the criminal intent.

(*People v. Croswell* (N.Y. Supp. 1804) 3 Johns. Cas. 337, 346, italics added.)

At base, the notion of striking a juror because of his opinion on the propriety of the law was entirely foreign to the nation's founders. In fact, it was expected that the jurors would follow their conscience and render a verdict that was against a law they deemed unjust–this was at the heart of the impartial jury as understood by the Framers. As John Adams wrote in 1771:

> And whenever a general Verdict is found, it assuredly determines both the Fact and the Law. It was never yet disputed, or doubted, that a general Verdict, given under the Direction of the court in Point of Law, was a legal Determination of the Issue. Therefore the Jury have a Power of deciding an Issue upon a general Verdict. And, if they have, is it not an Absurdity to suppose that the Law would oblige them to find a Verdict according to the Direction of the court, against their own Opinion, Judgment, and Conscience[?]

(1 *Legal Papers of John Adams* 230 (L. Kinvin Wroth & Hiller B. Zobel eds. (1965).)

See also Akhil Reed Amar, *America's Constitution* 238 (2005) ["Alongside their right and power to acquit against the evidence, eighteenth century jurors also claimed the right and power to determining legal as well as factual issues–to judge both law and fact 'completely'–when rendering any general verdict."].

This principle was echoed in the instructions given by Chief Judge Jay who, at the end of a trial before the Supreme Court, charged the jurors with the "good old rule" that:

> on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. *But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.* On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of the law. But still both objects are lawfully, within your power of decision.

(*Georgia v. Brailsford* (1794) 3 U.S. 1, 4, italics added.)

Indeed, the importance of this right was widely shared by those attending the Constitutional Convention. (See Federalist 83 (Hamilton), reprinted in *The Federalist Papers* 491, 499 (Clinton Rossiter ed., 1961) ["The

friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government."].)

The current death-qualification "substantial impairment" standard reflects none of this–and conflicts with all of it. To the Founding Fathers, it was the solemn duty of a jury to issue a verdict reflecting the jury's conscience. There was no exception to this rule carved out for cases where the State sought a sentence of death. Thus, the substantial impairment test announced in *Adams* in 1980–designed as a way to accommodate the interests of the state–contradicts the intent and understanding of the Framers of the Sixth Amendment and erodes the Sixth Amendment's guarantee of an impartial jury where it is needed most. Application of that test in this case violated appellant's Sixth Amendment rights and requires that the penalty judgment be reversed.

Article I, section 16 of the California Constitution, originally enacted in 1850, provides that "[t]rial by jury is an inviolate right and shall be secured to all . . . ." This Court has long recognized that the state right to a jury trial "is the right as it existed at common law, when the state Constitution was first

adopted." (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 75-76; accord *Crouchman v. Superior Court* (1988) 45 Cal.3d 1167, 1173-1274; *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 8-9; *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 287.) As this Court has noted, in assessing the scope of the state jury trial guarantee, "[i]t is the right to trial by jury as it existed at common law which is preserved; and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact. The right is the historical right enjoyed at the time it was guaranteed by the Constitution." (*Ibid.*)

Thus, in order to determine if the *Adams* "substantial impairment" test violated appellant's right to a jury trial under the state constitution, this Court must examine the common law. And as the above analysis of the common law shows, the substantial impairment test is simply irreconcilable with the common law. As such, the trial court's use of that test to permit juror discharges not only violated the Sixth Amendment, but it violated the state constitution as well.

The historical evidence shows that the substantial impairment test violates both state and federal law. Reversal of the death verdict is required.

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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 loss of evidence material to his defense of third party culpability.

A. Introduction and procedural background.

Although the shooting occurred on November 12, 1997, and appellant was identified as a suspect within hours, appellant was not charged until October 19, 2001, almost four years thereafter. (CT 1:11-15 [amended complaint],[20] 141, 148-149.) The information was filed September 12, 2002. (CT 1:19-23.) Appellant was arrested on unrelated charges on May 22, 2000. (CT Supp. TC 66.)

Appellant filed a pretrial motion to dismiss the information on the ground that the 4-year delay in filing charges resulted in the unavailability of witnesses and loss of evidence material to his defense of third party culpability–i.e., that Carrillo was the shooter–thereby violating his due process right to a speedy trial under the state and federal Constitutions. (CT 1:135-158, 245-251.)

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[20] The original complaint, filed May 23, 2000, charged Ryan Carrillo (not appellant) with the murder of Danell Johnson. (CT Supp. TC 35-36.)

The prosecution filed an opposition memorandum, arguing the defense made an insufficient showing of prejudice, but not otherwise seeking to justify the lengthy delay. (CT 1:167-171.)

The trial court reserved ruling on the motion until conclusion of the trial, at which time the motion was denied. (RT 42:9352-9353, 9366-9367; CT 6:1689-1691 [Order Denying Motion to Dismiss for Violation of Due Process].)

B. Standard of review.

A trial court's denial of a motion to dismiss for prefiling delay is reviewed for an abuse of discretion, with deference "to any underlying factual findings if substantial evidence supports them [citation]." (*People v. Cowan* (2010) 50 Cal.4th 401, 431; see also People v. *Morris* (1988) 46 Cal.3d 1, 38.) Unless the evidence is undisputed and there are no credibility determinations, "[t]he question of whether pre-accusation delay is unreasonable and prejudicial is a question of fact" to be determined by the trial court and therefore a court does not abuse its discretion if its determination is supported by substantial evidence. (*People v. Boysen* (2007) 165 Cal.App.4th 761, 777; see also *People v. Mitchell* (1972) 8 Cal.3d 164, 167.)

C. Prefiling delay may violate a defendant's constitutional right to due process.

A criminal defendant's speedy trial rights under the federal and state constitutions do not attach until he has been arrested or charged. (*People v. Cowan, supra*, 50 Cal.4th at p. 430.) However, a delay in prosecution may nonetheless deprive a defendant of a fair trial. A lengthy, unjustified delay between the commission of an alleged crime and the filing of an indictment or information may, if prejudicial, violate a defendant's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15, of the California Constitution. (*People v. Cowan, supra*, 50 Cal.4th at p. 430; see *United States v. Lovasco* (1977) 431 U.S. 783, 789-792 [97 S.Ct. 2044, 52 L.Ed.2d 752]; *United States v. Marion* (1971) 404 U.S. 307, 324-325 [92 S.Ct. 455, 30 L.Ed.2d 468].)

This Court has recognized the important interests at stake:

> The right of due process protects a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence.

(*People v. Cowan, supra*, 50 Cal.4th at p. 430 [internal quotation marks omitted].)

The trial court must apply a three-step test in assessing whether a defendant has been denied due process by pre-charging delay. First, the

defendant must make a showing that he has been prejudiced by the delay. If so, the burden shifts to the prosecution to offer a justification for the delay. Finally, the trial court must balance the harm to the defendant against the justification for delay. (*People v. Cowan, supra*, 50 Cal.4th at p. 430; *People v. Mirenda* (2009) 174 Cal.App.4th 1313, 1329; *People v. Boysen, supra*, 165 Cal.App.4th at pp. 771-772.)

In determining whether the defendant has been prejudiced, the length of time between the commission of the alleged offense and the filing of charges is not the critical issue. (*People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 914; *People v. Hartman* (1985) 170 Cal.App.3d 572, 579.) Indeed, "[p]rejudice sufficient to sustain dismissal has resulted after a delay of five months, while charges filed after ten years have been upheld." (*People v. Dunn-Gonzalez, supra*, 47 Cal.App.4th at p. 914; see *People v. Hartman, supra*, 170 Cal.App.3d at p. 579.) The question is whether the defendant has shown actual prejudice under the facts of his case. (*People v. Hartman, supra*, 170 Cal.App.3d at p. 579.)

Once the defendant has made a prima facie showing of harm, the trial court must consider whether the delay was justified. (*Garcia v. Superior Court* (1984) 163 Cal.App.3d 148, 151; *People v. Hartman, supra*, 170 Cal.App.3d at p. 579.) Delay resulting from good faith efforts to timely

investigate an offense may be reasonable. But not all investigative delay will suffice.

> The requirement of a legitimate reason for the prosecutorial delay cannot be met simply by showing an absence of deliberate, purposeful or oppressive police conduct. A "legitimate reason" logically requires something more than the absence of governmental bad faith. Negligence on the part of police officers in gathering evidence or in putting the case together for presentation to the district attorney, or incompetency on the part of the district attorney in evaluating a case for possible prosecution can hardly be considered a valid police purpose justifying a lengthy delay which results in the deprivation of a right to a fair trial.

(*Penney v. Superior Court* (1972) 28 Cal.App.3d 941, 953.)

Further, while either negligent or deliberate delay may deprive a defendant of due process, the character of the delay affects the balancing process:

> "Purposeful delay to gain an advantage is totally unjustified, and a relatively weak showing of prejudice would suffice to tip the scales towards finding a due process violation. If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation."

(*People v. Cowan, supra*, 50 Cal.4th at p. 431, quoting *People v. Nelson* (2008) 43 Cal.4th 1242, 1256.)

After the state has offered a justification for the delay at issue, the trial court must balance it against the prejudice. California courts have repeatedly stated that even a minimal showing of prejudice will warrant dismissal of the

action if the reason offered for the delay is unsubstantial. (See, e.g., *People v. Mirenda, supra*, 174 Cal.App.4th at p. 1330; *People v. Boysen, supra*, 165 Cal.App.4th at p. 777; *People v. Hartman, supra*, 170 Cal.App.3d at p. 582.) The reviewing court in *Boysen* summed up the inquiry as follows: "In a broad sense the trial court's task 'is to determine whether pre-charging delay violates the fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency.'" (*People v. Boysen, supra*, 165 Cal.App.4th at p. 777, quoting *People v. Dunn-Gonzalez, supra*, 47 Cal.App.4th at p. 914.)

Delay for the purpose of gaining a tactical advantage over the defendant is not justified. Whether negligence may justify delay apparently has not been decided. (*People v. Cowan, supra*, 50 Cal.4th at pp. 430-431; *People v. Nelson, supra*, 43 Cal.4th at pp. 1251-1254.)

Finally, a trial court has discretion to fashion a remedy less severe than dismissal of the entire action, if the prejudice to the defendant can be sufficiently ameliorated by such remedy. (*People v. Mirenda, supra*, 174 Cal.App.4th at pp. 1330, 1333-1334; *People v. Conrad* (2006) 145 Cal.App.4th 1175, 1185-1186.)

D. The trial court erred in denying appellant's motion to dismiss because the lengthy prefiling delay was unjustified and prejudicial, resulting in the unavailability of two exculpatory witnesses and loss of evidence material to his defense of third party culpability.

The trial court erred when it denied appellant's motion to dismiss the charges because appellant suffered significant prejudice from the delay and the prejudice was not outweighed by any justification. Moreover, the evidence gives rise to an inference that the delay in bringing the charges was for the purpose of gaining a tactical advantage over appellant, as shown by (1) the lack of a legitimate reason for the delay, (2) the significant prejudice to appellant arising therefrom, and (3) the well-known fact that delay in a case such as this involving eyewitness identification invariably works to the detriment of the accused. (See, e.g., *People v. Mirenda, supra*, 174 Cal.App.4th at pp. 1318, 1333; *Regina v. Robins* (Somerset Winter Assizes 1844) 1 Cox's C. C. 114 ["It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back?"].)

(1) Appellant met his burden of making a prima facie showing of prejudice.

Appellant met his burden of making a prima facie showing of prejudice. Courts have recognized that impairment of an accused's defense is the most difficult form of prejudice to prove "because time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" (*Doggett v. United States*

(1992) 505 U.S. 647, 654 [112 S.Ct. 2686, 120 L.Ed.2d 520]; *People v. Mirenda, supra*, 174 Cal.App.4th at p. 1329.) This is especially true when law enforcement has conducted a poor-quality investigation, as it did here. (See, e.g., *People v. Boysen, supra*, 165 Cal.App.4th at p. 780.) However, as the high court has stated:

> . . . Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. . . . .

(*Barker v. Wingo* (1972) 407 U.S. 514, 532 [92 S.Ct. 182, 33 L.Ed.2d 101].)

Two exculpatory witnesses were unavailable at trial, Detective Guy Reneau and Matthew Towne, and thus their prior statements, as set forth below, did not come into evidence and were not heard and/or considered by the jury.

Detective Reneau, who was unavailable to testify at trial due to poor health, was the first law enforcement officer to interview Masubayashi, which occurred in the hospital at approximately 1:00 p.m. on the day of the shooting.

(RT II:131; RT 17:3949-3959, 3982; RT 18:4292; CT 1:158; CT Supp. AA 2:319, 337-345.)

Masubayashi made exculpatory statements to Detective Reneau about the identity of the shooter, which were materially inconsistent with Masubayashi's testimony on direct examination that appellant was the shooter. Masubayashi testified that appellant shot Johnson and then shot him. (RT 15:3637-3639.) Yet, when Detective Reneau first asked Masubayashi who shot him, Masubayashi responded, "I don't, I don't know." (CT Supp. AA 10:2981.) When further questioned about the identity of the shooter, Masubayashi stated that the shooter was one of four or five Pinoy Real gang members. (CT Supp. AA 10:2981-2982.) Carrillo, not appellant, was a Pinoy Real gang member. (RT 13:3191-3194, 3317; RT 21:4948-4949, 23:5356-5357.)

Masubayashi also told Detective Reneau shortly after the shooting that Chung (aka Temper) was "behind all of this." (RT 17:3951.) Masubayashi 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.) Masubayashi "just heard a boom and saw an arm." (RT 17:3953.) But he did not know for sure whether the arm belonged to appellant. (RT 17:3953-3954.) Masubayashi stated that he did not see a gun.

(RT 17:3954.) With respect to the identity of the shooter and whether Masubayashi actually saw a gun, Masubayashi told Detective Reneau, "I don't know. I don't know if I made this up or what I remember is what I see. What I see is like boom, boom." (RT 3954-3955.)

Masubayashi's statements to Detective Reneau were admissible at trial for the truth of the matter asserted–i.e., that Masubayashi either did not know who shot him and/or that the shooter was one of four or five Pinoy Real gang members. (See Evid. Code, §§ 770, 1235; *People v. Ledesma* (2006) 39 Cal.4th 641, 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 [prior inconsistent statement of testifying witness properly admitted].)

Matthew Towne, an eyewitness to the shooting, moved outside of California and could not be located to testify at the guilt phase trial. (RT 29:6456, 6529; RT 31:7022; CT 6:1616-1618, 1644-1646; Court Exh. 10, Bates No. 18 [Interview of Towne by Officer Bowers].)

At the time of the shooting, Towne was standing outside the Gateway Urgent Care, where he was employed, talking to fellow employees John Fowler and Jose Rodriguez. (CT 6:1643 [affidavit of Matthew Towne].) 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 gave a statement to Officer Bowers at the scene shortly thereafter, wherein he also identified the shooter as having a thin build. (RT 31:7009; CT 6:1644.) The investigative report prepared by Bowers states, in part:

> . . . Towne said he heard a single gunshot. As he looked towards the parking lot, he saw a male 5'8" to 6' tall, thin build, walking eastbound through the parking lot away from the driver's side door. The unknown male fired 3 to 4 more shots in an eastbound direction. . . . . [Court Exh. 10, Bates No. 18 (Interview of Towne by Officer Bowers); see CT 6:1643-1644.]

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.)

The substantial prefiling delay also impaired the defense effort to locate witnesses and present other evidence relevant to the credibility of prosecution witnesses Carrillo and Allan Quiambao. (CT 1:135-158, 245-251.) Carrillo was engaged in various fraudulent activities and had a history of drug abuse and mental illness. (CT 1:156-157.) But as trial defense counsel explained in his affidavit, the prefiling delay prevented the defense from "locating and

interviewing witnesses who could offer evidence attacking his credibility by showing his character for dishonesty, the existence of his bias interest, and motive against defendant . . . ." (CT 1:157.) Defense counsel also explained in his affidavit that the prefiling delay prevented the defense from obtaining similar evidence to impeach Quiambao's credibility. (CT 1:157-158.)

The substantial prefiling delay also impaired the defense effort to call witness Perdon to testify that appellant never stated, "I came in my pants when I saw that nigger flop." (See RT 14:3468-3469.) In view of the lengthy prefiling delay, Perdon testified that she genuinely could not recall appellant ever talking about the shooting, and had no recollection of appellant ever stating, "I came in my pants when I saw that nigger flop." (RT 14:3468-3469.)

On cross-examination by the prosecutor, Perdon testified, in part:

Q: . . . Would you always remember hearing something like that that was disturbing if you're high [on methamphetamine]?

A: No.

Q: *You might remember it for a little while*?

A: *Correct.*

Q: *Might remember it for some period of time*?

A: *Correct.*

Q: But then you might not anymore, right?

A: Correct. [RT 25:5692, italics added.]

(See *Barker v. Wingo, supra*, 407 U.S. at p. 532 [recognizing "prejudice if defense witnesses are unable to recall accurately events of the distant past"].)

The prejudice caused by Perdon's inability to recall the events of the distant past was further aggravated when Masubayashi changed Perdon's statement about what appellant purportedly told her. Masubayashi testified that Perdon told him that appellant told her that "he came in his pants watching that nigger flop *after he shot him.*" (RT 15:3697, italics added.) Masubayashi changed Perdon's purported statement by adding the words "after he shot him." The change materially enhanced Masubayashi's statement for the prosecution because it included an express admission that appellant shot Johnson. Because the prosecution presented evidence that Johnson and Masubayashi were shot by the same gunman (RT 15:3637-3641, 3648; RT 22:5020-5024, 5034), Masubayashi's statement included an implied admission that appellant shot Masubayashi.

(2) Appellant made a substantial showing of unjustified delay in filing charges.

Appellant made a substantial showing of unjustified delay in filing charges. Appellant was first identified as a suspect within hours of the shooting, providing justifiable grounds to immediately charge appellant with the murder of Johnson and the attempted murder of Masubayashi. (CT 1:141, 148-149, 151; CT Supp. AA 2:342-345.)

When interviewed at the hospital at approximately 1:00 p.m. on the day of the shooting (Nov. 12th), Masubayashi stated that appellant, accompanied by Carrillo, shot Johnson and then fired at him (Masubayashi). (CT 1:141, 148-149.) Evidence developed earlier that day in police interviews of Sia Her (Johnson's girlfriend) and Alexis Huliganga (Masubayashi's girlfriend) showed that appellant, Carrillo, Masubayashi, and Johnson left the apartment in Anaheim together shortly before the shooting, thereby corroborating Masubayashi's statement that the four were together at the time of the shooting. (CT 1:149-150.)

Two days later, the police searched appellant's residence in Norwalk. (CT 1:151; CT Supp. AA 2:342.) On November 18, 1997, Masubayashi was interviewed a second time. He stated that appellant, accompanied by Carrillo, shot Johnson and then fired at him (Masubayashi), and that shortly before the shooting he saw appellant with a handgun. (CT Supp. AA 2:342-345.)

Shortly after the shooting, appellant and Carrillo moved to Utah, but returned to California a few months later. (CT Supp. AA 8:2258-2259, 2340; RT 15:3737-3738, 22:5044-5050, 23:5264-5267, 23:5320, 28:6299-6304, 30:6783-6784.) Despite the fact that appellant was a suspect from the beginning and returned to California a few months after the shooting, the prosecution let the case languish without justification for almost three years,

when Masubayashi was re-interviewed in May 2000. (CT 1:142.) Appellant still was not charged for another 17 months. (CT 1:11-15.)

Prefiling delay is unjustified where the investigation is completed but the prosecution nonetheless neglects to proceed. (See, e.g., *People v. Mirenda, supra*, 174 Cal.App.4th at pp. 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, supra*, 170 Cal.App.3d at pp. 577, 582-583 [by late 1977, all evidence used against defendant had been obtained but prosecution was not initiated until1983].) In contrast, delay has been found justified where it resulted from efforts to develop enough evidence against a defendant to proceed. (See, e.g., *People v. Nelson, supra*, 43 Cal.4th at p. 1256 [delay justified where case not fully solved until DNA cold hit comparison made]; *People v. Catlin* (2001) 26 Cal.4th 81, 109 [delay justified by limitations in forensic science available at the time of the offense].)

The prosecution could not have justified the delay between the shooting and the filing of charges as necessary for investigative reasons. A review of the trial record demonstrates that the investigation into the shooting was substantially complete shortly after Johnson's death at the scene. The autopsy was conducted on November 12, 1997, the same day as the shooting, and the

autopsy report was prepared November 14, 1997. (CT Supp. AA 2:377-390.) The crime scene was processed and all the physical evidence was gathered within days. (CT Supp. AA 2:377-415.) Ballistics evidence of the bullet removed from Johnson's body was completed by December 12, 1997. (CT Supp. AA 2:416.) Masubayashi, Her, Lee, Rodriguez, Fowler, Towne, and Larki were interviewed, and appellant was identified as the shooter. (RT 19:4571, 19:4597-4598, 24:5476, 25:5715-5716, 26:5839; CT Supp. AA 2:301-346, 2:507-528.) During Lee's interview on November 12, 1997, Lee denied involvement, but Lee identified Chung and Chung's white Jeep. (CT 4:1070-1083.) Chung was interviewed on November 12, 1997. (CT Supp. AA 10:2756-2797.)

The prejudice that accrues from such lengthy delay as occurred in this case has been recognized for nearly two centuries. Sitting for a British court in a case involving a 2-year prefiling delay, Baron Alderson stated:

> It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? If you accuse a man of a crime the next day, he may be enabled to bring forward his servants and family to say where he was and what he was about at the time; but if the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on his trial.

(*Regina v. Robins* (Somerset Winter Assizes 1844) 1 Cox's C. C. 114.)

Accordingly, there was no justification for the delay in indicting appellant. As set forth above, if a defendant makes even a minimal showing of prejudice, the burden shifts to the prosecution to justify the delay. (See *People v. Hartman, supra*, 170 Cal.App.3d at p. 579.) Appellant made a substantial showing of prejudice, but the prosecution offered absolutely no explanation or justification for the delay in its opposition memorandum, merely arguing there was no showing of prejudice. (See CT 1:167-171.)

At the hearing on the motion, the prosecutor again argued that the defense had not shown prejudice from the delay. (RT 42:9357-9360.) The prosecutor also argued that the delay was caused, in part, by appellant's conduct in leaving California after the shooting. (RT 42:9358.) But the prosecution did not explain how appellant's absence for a few months justified the lengthy delay of several years, nor did the prosecution explain why appellant was not charged after he was placed in custody in May 2000. (RT 42:9364; CT 1:11-15 [appellant first charged on October 19, 2001].)

(3) The prejudice appellant suffered to his defense considerably outweighed the unjustified prefiling delay, and the record gives rise to an inference of purposeful delay to gain a tactical advantage.

The prejudice appellant suffered to his defense considerably outweighed the unjustified prefiling delay. As this Court acknowledged, where the delay was purposeful, a relatively weaker showing of prejudice tips

the balance toward dismissal. (*People v. Cowan, supra*, 50 Cal.4th at p. 431.) The lack of any legitimate explanation for the delay strongly supports an inference that the delay was deliberate rather than simply negligent. In addition, purposeful delay to gain a tactical advantage is demonstrated in the record.

The trial court denied the motion to dismiss. (RT 42:9364-9367; CT 6:1689-1691.) The court held that there was no showing of prejudice, summarily stating that appellant "has not shown actual prejudice from the delay." (RT 42:9365; CT 6:1690.) The court further held there was no unjustifiable prefiling delay, stating in part:

> . . . The delay occurred in part due to defendant's flight from the crime scene and then to Utah with Ryan Carrillo. The delay was also attributable to codefendants Lee and Chung giving false cross alibis to the police the day after the murder and attempted murder. The delay was also due to legitimate police investigation in an effort to muster evidence to prove the case in court beyond a reasonable doubt. The trial facts showed that John Masubayashi was equivocal in his initial identification of codefendant Lee as the driver of the white Jeep Cherokee. Masubayashi also initially said he only saw the big dark arm of the shooter who wore a long sleeve flannel shirt, with a black and green pattern. Many of the material witnesses in the case were admitted gang members and this created further prosecutorial problems in gathering credible and persuasive evidence to prove the case at trial. [CT 6:1689-1690.]

The trial court's finding of no actual prejudice is erroneous because, as explained above, appellant presented substantial evidence of actual prejudice.

The trial court's finding of no unjustified delay also is erroneous because the ruling is not supported by substantial evidence. The record reveals that appellant was positively identified as the shooter by the surviving victim on the very day of the shooting, and within days thereafter the prosecution developed most of the evidence in the case. The fact that due to the delay several witnesses made additional statements would almost invariably be the situation in every case where the prosecution delays and re-interviews witnesses over and over again. If the trial court had properly balanced the prejudice to appellant's defense with the prosecution's failure to present valid justification for the delay, then it would have granted the motion to dismiss. Appellant thus was deprived of due process under both the federal and state constitutions by the lengthy delay between the date of the shooting and the filing of charges against him. Accordingly, appellant respectfully requests this Court reverse his convictions and dismiss all charges against him.

Alternatively, reversal of the true finding on the special circumstance allegation, which made appellant death-eligible, is compelled by due process and the Eighth Amendment, in the interest of justice. (U.S. Const., 5th, 8th & 14th Amends.) As noted above, a trial court has the discretion to fashion a remedy appropriate to alleviate the harm caused by prefiling delay. (*People v. Mirenda, supra*, 174 Cal.App.4th at pp. 1333-1334.) In light of the heightened

scrutiny and reliability necessary in capital cases (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-587 [108 S.Ct. 1981, 100 L.Ed.2d 575] [Eighth Amendment imposes a special need for reliability in the determination whether death is the appropriate punishment]), if this Court determines that the prejudice appellant suffered from the delay in indicting him is insufficient to warrant dismissal of all of the charges against him, it nonetheless should find that it was substantial enough to free him from a sentence of death, and thus this Court should, alternatively, reverse and dismiss the special circumstance allegation.

/ / /

5. Eyewitness Matthew Towne's statements to Officer Terrance Bowers at the scene of the shooting–providing a description of the gunman only a few minutes after the shooting and while Towne was visibly nervous and the gunman was still at large–were admissible as spontaneous statements, and thus the trial court's ruling excluding the statements as hearsay was a prejudicial abuse of discretion, thereby requiring reversal of appellant's convictions.

A. Introduction and procedural background.

During the guilt phase defense case-in-chief, appellant sought to elicit the following testimony from Officer Terrance Bowers, which was obtained when Bowers interviewed Matthew Towne at the scene of the shooting only a few minutes after the shooting:

> . . . Towne said he heard a single gunshot. As he looked towards the parking lot, he saw a male 5'8" to 6' tall, thin build, walking eastbound through the parking lot away from the driver's side door. The unknown male fired 3 to 4 more shots in an eastbound direction. . . . . [Court Exh. 10, Bates No. 18 (Interview of Towne by Officer Bowers); see CT 6:1643-1644.]

The court held an Evidence Code section 402 hearing to consider the admissibility of the statement. Bowers testified he arrived at the scene 5 to 10 minutes after the shooting, while the gunman was still at large. (RT 31:7008-7009.) He immediately made contact with John Fowler and Matthew Towne, two eyewitnesses to the shooting. (RT 31:7009.) He separated them, spoke with Fowler, and then spoke with Towne. (RT 31:7009, 7014.) Bowers asked Towne what he heard and saw; Bowers did not ask Towne leading questions. (RT 31:7009.) Towne was "visibly shaken," and "appeared to be nervous"

during the entire time he was asking him questions, which was only a few minutes. (RT 31:7010-7011; see CT 6:1643-1644.)

Defense counsel argued that the statement was admissible under Evidence Code section 1240 as a spontaneous statement because it was made shortly after Towne personally observed the shooting, while Towne was nervous, and in response to an ongoing emergency as the gunman was still at large. (RT 31:7016-7017, 7019-7020.)

The prosecutor argued that Bowers only had a general impression that Towne was nervous while being asked to describe the shooter, and that Towne had time to reflect, and thus the statement was not admissible as a spontaneous statement. (RT 31:7017-7019.)

The trial court sustained the prosecutor's objection to the statement, stating:

> The fact is, if it doesn't qualify as a spontaneous declaration foundationally, and it then comes into evidence, it is uncross-examined. And so, you know, we have to be mindful of the fact that this is an exception to the hearsay rule and requires a certain foundation be established. And I don't think the fact that a witness is nervous qualifies as a spontaneous declaration under 1240(b) where the Code requires that the statement was made– quote "was made spontaneously while the declarant was under the stress of excitement caused by such perception."
>
> This seems to be common nervousness and nothing more. It is almost like any other witness interview in the sense that just the mere presence of a police officer could cause somebody to

become nervous. It doesn't qualify. The objection is sustained. [RT 31:7021.]

As explained below, the trial court's ruling was an abuse of discretion because the court acknowledged that Towne was nervous when he gave the statement, and the trial court failed to apply the law in a reasoned manner, as 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, especially where, as here, the gunman is at large and there is an ongoing emergency.

B. Standard of review.

The admission of hearsay pursuant to Evidence Code section 1240 is reviewed for abuse of discretion. (*People v. Raley* (1992) 2 Cal.4th 870, 894.) When conducting such an abuse of discretion analysis, the reviewing court must be guided by the following principles:

> "The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown." (9 Witkin, Cal. Procedure (5th ed. 2008) *Appeal*, § 364, p. 420; see *Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355 [quoting this language].) "The scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action . . . .' Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion. [Citation.] . . . [¶] The legal principles

> that govern the subject of discretionary action vary greatly with context. [Citation.] They are derived from the common law or statutes under which discretion is conferred." (*City of Sacramento v. Drew* (1989) 207 Cal. App. 3d 1287, 1297-1298.) To determine if a court abused its discretion, we must thus consider "the legal principles and policies that should have guided the court's actions." (*People v. Carmony, supra*, 33 Cal.4th at p. 377.)

(*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.)

C. The statements made by Towne to Officer Bowers five to ten minutes after the shooting were admissible as spontaneous statements under Evidence Code section 1240 because Towne witnessed the shooting, he was still under the stress of the shooting, and he was responding to an ongoing emergency by describing the shooter who was still at large.

Section 1240 states: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." This section is known as the "spontaneous utterance exception to the hearsay rule." (*People v. Brown* (2003) 31 Cal.4th 518, 540.)

The word "spontaneous," as used in section 1240, describes "actions undertaken without deliberation or reflection." (*People v. Farmer* (1989) 47 Cal.3d 888, 903, overruled on another point in *People v. Waidla* (2000) 22

Cal.4th 690, 724, fn. 6.) Statements are spontaneous within the meaning of section 1240 if "'they were made under the stress of excitement and while the reflective powers were still in abeyance.'" (*People v. Poggi* (1988) 45 Cal.3d 306, 319 [italics omitted].)

Whether a statement is sufficiently spontaneous for admission under section 1240 "is informed by a number of factors, including the passage of time between the startling occurrence and the statement, whether the statement [is] a response to questioning, and the declarant's emotional state and physical condition." (*People v. Clark* (2011) 52 Cal.4th 856, 925.) When a court considers these factors, the ultimate focus is on the declarant's mental state: "The crucial element in determining whether a declaration is . . . admissible under this exception to the hearsay rule is thus not the nature of the statement but the mental state of the speaker. The nature of the utterance–how long it was made after the startling incident and whether the speaker blurted it out, for example–may be important, but solely as an indicator of the mental state of the declarant. The fact that a statement is made in response to questioning is one factor suggesting the answer may be the product of deliberation, but it does not ipso facto deprive the statement of spontaneity. Thus, an answer to a simple inquiry has been held to be spontaneous. [Citations.]" (*People v. Farmer, supra*, 47 Cal.3d at pp. 903-904.)

First, there was certainly an "occurrence startling enough to produce . . . nervous excitement and render the utterance spontaneous and unreflecting." (See *People v. Poggi, supra*, 45 Cal.3d at p. 318.) Towne heard a gunshot and then saw the gunman firing 3 to 4 more times. (Court Exh. 10, Bates No. 18.)

Second, Towne made the statements to Detective Bower just 5 to 10 minutes after he had personally witnessed the shooting, when his nervous excitement undoubtedly still dominated his reflective powers. (See *People v. Poggi, supra*, 45 Cal.3d at p. 318.) Towne was "visibly shaken," and "appeared to be nervous" during the entire few minutes he was being asked questions. (RT 31:7010-7011.)

Third, his statements described what occurred, provided a physical description of the gunman, and related directly to the circumstances that led to the call for police help. (See *People v. Poggi, supra*, 45 Cal.3d at p. 318 ["'the utterance must relate to the circumstance of the occurrence preceding it'"].)

Nor did too much time elapse between when the shooting occurred and when Towne spoke to Officer Bowers to qualify the statements as spontaneous. As this Court explained in *People v. Gutierrez* (2009) 45 Cal.4th 789, "[t]he crucial element in determining whether an out-of-court statement is admissible as a spontaneous statement is the mental state of the speaker" and not necessarily the time between the statement and the incident it describes.

(*Id.* at p. 811.) As discussed above, Towne was still "visibly shaken" and "nervous" when Officer Bowers arrived at the scene and spoke with him.

Moreover, the time that elapsed in this case (5 to 10 minutes) is significantly less than other periods of time that have still resulted in spontaneous statements. (See, e.g., *People v. Poggi, supra*, 45 Cal.3d at p. 319 [witness's statements made 30 minutes after attack held spontaneous]; *People v. Saracoglu* (2007) 152 Cal.App.4th 1584, 1589 ["no more than about 30 minutes had gone by" between the underlying incident and the witness's statement; court held statement was "spontaneous" and noted that "[m]uch longer periods of time have been found not to preclude application of the spontaneous utterance hearsay exception"]; *People v. Clark* (2011) 52 Cal.4th 856, 925-926 [victim's statement to the emergency room doctor that defendant threatened to kill her, made 9 to 10 hours after the incident still qualified for the spontaneous statement hearsay exception]; *People v. Raley, supra*, 2 Cal.4th at pp. 893-894 [statement made 18 hours after event held spontaneous under Evidence Code section 1240].)

Statements made at the scene of a shooting by percipient witnesses describing the gunman routinely qualify as spontaneous statements admissible under Evidence Code section 1240 where the witness is still under the stress of the events. (*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* (2011) 52 Cal.4th 769, 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* (2004) 34 Cal.4th 698, 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* (2011) 51 Cal.4th 449, 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].)

In view of the fact that Towne's statements were made minutes after the shooting and while Towne was still "under the stress of excitement and while his reflective powers were still in abeyance" (*People v. Poggi, supra*, 45 Cal.3d at p. 319), the trial court's ruling is not supported by substantial evidence. (See *People v. Phillips* (2000) 22 Cal.4th 226, 236 [trial court's ruling is upheld only if supported by substantial evidence].) Towne's statements to Officer Bowers were sufficiently spontaneous, and thus the trial

court abused its discretion in excluding the statements under Evidence Code section 1240.

D. Exclusion of Towne's statements to Officer Bowers prejudicially undermined appellant's defense of mistaken identification because the statements were exculpatory and materially supported appellant's defense of third party culpability (i.e., that Carrillo was the shooter), resulting in the deprivation of the constitutional rights to due process and to present a complete defense.

A judgment may not be reversed on appeal absent a showing that an error resulted "in a miscarriage of justice" (Cal. Const., art. VI, § 13), which means "that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1959) 46 Cal.2d 818, 836.)

Under *Watson*, a reasonable probability "does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*. [Citations.]" (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, italics in original.) Thus, prejudice must be found under *Watson* whenever the defendant can "'undermine confidence'" in the result achieved at trial. (*Ibid.*) In applying the *Watson* test, it is important to note that an evenly balanced case is one which the defendant is entitled to win. Indeed, *Watson* itself so provides: "But the fact that there exists at least such an equal balance of reasonable probabilities necessarily means that the court is of the

opinion 'that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*People v. Watson, supra*, 46 Cal.2d at p. 837.)

Moreover, "a criminal defendant is constitutionally entitled to present all relevant evidence of significant probative value in his favor ...." (*People v. Marshall* (1996) 13 Cal.4th 799, 836; see also *Webb v. Texas* (1972) 409 U.S. 95, 98, [93 S.Ct. 351, 34 L.Ed.2d 330]; *Washington v. Texas* (1967) 388 U.S. 14, 19 [87 S.Ct. 1920, 18 L.Ed.2d 1019]; *Davis v. Alaska* (1974) 415 U.S. 308 [94 S.Ct. 1105, 39 L.Ed.2d 347].) This standard of fairness has long been interpreted to require that criminal defendants be "*afforded a meaningful opportunity to present a complete defense.*" (*California v. Trombetta* (1984) 467 U.S. 479, 485 [104 S.Ct. 2528, 81 L.Ed.2d 413], italics added; *Crane v. Kentucky* (1986) 476 U.S. 683, 690 [106 S.Ct. 2142, 90 L.Ed.2d 636] ["the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'"].) The Sixth Amendment "requires at a minimum, that criminal defendants have ... the right to put before the jury evidence that might influence the determination of guilt." (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56 [107 S.Ct. 989, 94 L.Ed.2d 40].)

The trial court's exclusion of Towne's statements to Officer Bowers denied appellant the due process right to a fundamentally fair trial because the

ruling undermined the ultimate integrity of the fact finding process. (See *Ohio v. Roberts, supra*, 448 U.S. at p. 64, overruled on another point by *Crawford v. Washington, supra*, 541 U.S. 36; *Chambers v. Mississippi* (1973) 410 U.S. 284, 295 [93 S.Ct. 1038, 35 L.Ed.2d 297].)

Because the error violated appellant's federal constitutional right to present a complete defense, appellant's convictions 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 [87 S.Ct. 824, 17 L.Ed.2d 705]; *People v. Arreola* (1994) 7 Cal.4th 1144, 1161 ["Because such error is of federal constitutional dimension, we must assess prejudice under the 'harmless-beyond-a-reasonable-doubt' standard."]; *In re La Croix* (1974) 12 Cal.3d 146, 154.) 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. Spencer* (1967) 66 Cal.2d 158, 168.)

Reversal of appellant's convictions under the state law trial error standard is warranted because the record reveals that it is reasonably probable that a result more favorable to appellant would have been reached in the absence of the error in excluding Towne's statements to Officer Bowers. Towne described the gunman as a male 5'8" to 6' tall and thin build. (Court Exh. 10, Bates No. 18.) Towne's description of the gunman was exculpatory

because appellant is a very large man, weighing 300 to 350 pounds at the time of the shooting. (RT 28:6301, 30:6732; CT Supp. AA 2:332, 7:1813.) Accordingly, in view of appellant's substantial defense case (*ante*, § B. [Guilt phase–the defense case]), and the evidence showing that Chung and the Pinoy Real gang–wanting to get rid of Johnson and Masubayashi–framed appellant for the shooting (*ante*, § B. [Guilt phase–the defense case]), it is reasonably probable that a result more favorable to appellant would have been reached in the absence of the error.

Reversal also is warranted under the federal constitutional standard of error because the prosecution will not be able to prove that the error in excluding Towne's statements to Officer Bowers was harmless beyond a reasonable doubt. (See *People v. Marshall* (1997) 15 Cal.4th 1, 42 [fact that evidence is legally sufficient to sustain jury finding does not satisfy *Chapman* standard; evidence must be so overwhelming that the jury could not have had a reasonable doubt on the matter].)

The trial court's ruling prevented appellant from developing and presenting evidence that was at the core of his defense–i.e., that Carrillo was the gunman. Appellant presented defenses of mistaken identity and third party

culpability,[21] testifying that Carrillo was the gunman and presenting independent evidence showing that Carrillo was the gunman, including Carrillo's own admission to the shooting. (*Ante*, § B. [Guilt phase–the defense case]; RT 20:4690-4691, 4697, 4710-4711, 4735.)

Carrillo was 5'9" tall and thin build, weighing only 140 to 160 pounds at the time of the shooting. (RT 28:6301, 30:6732; CT Supp. AA 7:1813.) Towne's description of the shooter closely matched Carrillo, in both height (between 5'8" and 6" tall) and weight (thin build).

Towne's statements describing the shooter were both exculpatory and provided affirmative evidence in support of appellant's defense that Carrillo was the gunman. Towne's statements corroborated appellant's testimony identifying Carrillo as the shooter. The exclusion of Towne's statements thus weakened the force of appellant's testimony. This served to undermine appellant's defense to all of the charges because appellant testified that Carrillo was the gunman and that he (appellant) was not involved in a

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[21] A defendant may rely upon the theory that a third party committed the charged offense as a valid defense. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1017.) Evidence of the culpability of another party offered by a defendant to demonstrate that reasonable doubt exists concerning his own guilt must link that other person either directly or circumstantially to the actual perpetration of the crime. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325.)

conspiracy to commit murder. (RT 30:6662; *ante*, § B. [Guilt phase–the defense case].)

The prosecution thus will be unable to prove that the error was harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Spencer, supra*, 66 Cal.2d at p. 168 [beneficiary of the error has burden to prove there was no harm or suffer a reversal].)

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, and thus the trial court abused its discretion in excluding the statement, thereby requiring reversal of appellant's convictions for a deprivation of the constitutional rights to due process and to present a complete defense.

A. Introduction and summary of argument.

Appellant presented the testimony of Alana Swift Eagle (Ryan Carrillo's sister-in-law) in his guilt phase case-in-chief. (RT 29:6482-6490.) Before she testified, however, the trial court held a 402 hearing on the admissibility of Eagle's proffered testimony that in approximately December 2001, 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 [defense investigative report of David Carpenter, dated July 11, 2005]; Court Exh. 9 [Confidential Investigation Report dated 7/11/05]; RT 29:6469-6476.)

Trial defense counsel sought to admit Eagle's proffered testimony recounting Carrillo's statement to her as a prior inconsistent statement, since Carrillo testified in the prosecution's case-in-chief that appellant was the shooter. (RT 29:6471.)

The prosecutor objected to admission of the statement, arguing, "It's not an admission of any kind. He's not a party opponent. Period." (RT 29:6471.)

The trial court ruled that the statement "is excluded as hearsay." (RT 29:6473.) Revisiting the ruling moments later, the court stated:

> Okay. Just since we're waiting for the next witness, as far as the statement that Alana Swift Eagle has made to you, Mr. Harley, that Ryan Carrillo said to her something–no–"everything points to T-Strong, and I'm going to run with that," even if that is admissible as an exception to the hearsay rule–that is to say, as going to state of mind – the ambiguity of that statement concerns me greatly on relevance grounds.
>
> It's also–I mean the ambiguity of the statement is troublesome, as well. I mean, what does it mean? The probative value of that statement is outweighed by its prejudicial effect as well. And that's what I was contemplating when I brought up relevance. So, for a variety of reasons, that statement is being excluded. . . . . [RT 29:6476-6477.]

The ruling was an abuse of discretion because the statement was admissible as a prior inconsistent statement of Carrillo. (*Post*, § 6.C.) The statement was highly relevant because it amounted to an implied admission that Carrillo killed Johnson and was shifting the blame to appellant. (*Post*, § 6.D.) The statement was not ambiguous, but any perceived ambiguity in the statement would go to the weight of the evidence, not its admissibility. The court thus abused its discretion in excluding the statement under Evidence Code section 352. (*Post*, § 6.D.) Finally, Eagle's proffered testimony

recounting Ryan Carrillo's statement implicitly admitting to the killing deprived appellant of material evidence in support of his defense that Carrillo was the gunman, thereby requiring reversal of appellant's convictions. (*Post*, § 6.E.)

B. Standard of review.

Admission of hearsay pursuant to Evidence Code section 1240 is normally reviewed for abuse of discretion. (*People v. Raley, supra*, 2 Cal.4th at p. 894.) "Rulings under Evidence Code section 352 come within the trial court's discretion and will not be overturned absent an abuse of that discretion." (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070.) But where the court's ruling implicates a constitutional right, as here with the deprivation of the right to present a complete defense, the trial court's ruling is independently reviewed. (See *People v. Seijas* (2005) 36 Cal.4th 291, 304 [discussing standard of review in connection with constitutional right of confrontation].)

C. Eagle's proffered testimony was admissible as a prior inconsistent statement of Carrillo.

All relevant evidence is admissible. (Evid. Code, § 351; Cal. Const., art. 1, § 28.) Relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends "'logically, naturally, and by

reasonable inference' to establish material facts . . . . [Citations.]" (*People v. Garceau* (1993) 6 Cal.4th 140, 177.)

Evidence Code section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Prior inconsistent statements are admissible under this provision to prove their substance as well as to impeach the declarant. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 55, fn. 4.)

Evidence Code section 770 provides: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or (b) The witness has not been excused from giving further testimony in the action."

Pursuant to sections 1235 and 770, a witness's prior statement is admissible where it is inconsistent with that person's present testimony and he or she is given an opportunity to explain or deny the prior statement. (Evid. Code, §§ 770, subd. (a), 1235; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 78.)

The prerequisites for admissibility of Carrillo's prior statement were met. The statement was inconsistent with Carrillo's trial testimony that appellant killed Johnson and shot Masubayashi. (RT 22:5022-5028.) Carrillo testified in the prosecution's case-in-chief a few days earlier, and he had not been excused from giving further testimony in the action. (RT 23:5438, 5473.) Accordingly, Eagle's proffered testimony recounting Carrillo's statement was admissible at trial for the truth of the matter asserted. (See Evid. Code, §§ 770, 1235; *People v. Ledesma* (2006) 39 Cal.4th 641, 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 [prior inconsistent statement of testifying witness properly admitted].)

D. Carrillo's statement was highly relevant because it was an implied admission to the killing and evidence of an attempt to shift blame to appellant, and thus the court abused its discretion in excluding the statement under Evidence Code section 352.

Carrillo's statement was an implied admission to the killing, and evidence of an attempt to shift blame to appellant. This Court has long held:

> If a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both

> the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt.

(*People v. Preston* (1973) 9 Cal.3d 308, 313-314, citing, *People v. Tolbert* (1969) 70 Cal.2d 790, 805, cert. denied, 406 U.S. 971 (1972); *People v. Robinson* (1964) 61 Cal.2d 373, 401-402.)

Carrillo had been accused of committing a crime because he was charged with the murder of Johnson and the attempted murder of Masubayashi. In response to Eagle's question whether he killed Johnson, Carrillo did not deny that he had done so. Instead, Carrillo responded that "everything pointed to T-Strong and he (Carrillo) was 'going to run with that.'" (CT 5:1206.) This was an implied admission and an evasive answer, which was evidence that Carrillo was attempting to shift the blame to appellant. A reasonable person could infer from the statement that Carrillo was admitting to the shooting, as well as admitting that he was using appellant as a scapegoat. (See *People v. Preston, supra*, 9 Cal.3d at pp. 313-314; see also *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"].)

The trial court's concern about "the ambiguity of the statement" was misplaced. (RT 29:6477.) Words manifesting an implicit belief in the truth of

a statement frequently consist of equivocal or evasive responses. (See *People v. Richardson* (2008) 43 Cal.4th 959, 1020 [no error to instruct jury on adoptive admissions when defendant gave "false, evasive and contradictory" responses to police accusations that he participated in victim's murder].)

The person need not expressly agree with the declarant's statement; an evasive or equivocal reply, or silence, is the more typical reply in adoptive admission cases. (*People v. Humphries* (1986) 185 Cal.App.3d 1315, 1335, overruled on other grounds in *People v. Carter* (2003) 30 Cal.4th 1166, 1197.)

In *People v. Silva* (1988) 45 Cal.3d 604, for example, where the defendant smiled in acknowledgment as an accomplice described a murder to a third participant in a kidnapping, this Court held that the conduct constituted an adoptive admission. (*Id.* at pp. 623-625.)

In *People v. Preston, supra*, 9 Cal.3d 308, one defendant in a murder prosecution made a remark indicating that "an accident" had occurred at the victims' trailer when the victims returned home to find several persons committing a burglary. (*Id.* at pp. 313-314.) The statement was made in a conversation between four private persons. (*Id.* at p. 314) Because another defendant remained silent in the face of the remark, this Court considered his conduct to be an adoptive admission of guilt. (*Id.* at p. 314.)

Similarly, in *People v. Tolbert, supra*, 70 Cal.2d 790, a defendant's response of "Just forget about it" when a cousin asked him about the ownership of the gun was admissible as tending to prove his ownership of the gun. (*Id.* at pp. 805-806.)

In yet another case, *People v. Fauber* (1992) 2 Cal.4th 792, a witness's testimony about hearing the defendant and two others converse about getting rid of a body and a bicycle was admissible as an adoptive admission, even though the conversation did not involve statements directly accusing the defendant of a crime or calling for a particular reply. (*Id.* at pp. 851-853.) It was sufficient that the defendant participated in the conversation, and that the conversation gave him an opportunity to deny responsibility, to refuse to participate, or otherwise to dissociate from the planned activity, which he did not do. (*Id.* at p. 852.)

The words spoken directly to a party may constitute adoptive admissions even though the words contained only indirect or implied accusations of criminal conduct. (*People v. Davis* (2005) 36 Cal.4th 510, 537-540; *People v. Fauber, supra*, 2 Cal.4th at pp. 852-853.)

Moreover, any perceived ambiguity in the statement would go to the weight of the evidence and not its admissibility. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1122 [any ambiguity in defendant's statement went to the weight

of the evidence and not its admissibility], disapproved on another grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Medina* (1995) 11 Cal.4th 694, 752; *People v. Ochoa* (2001) 26 Cal.4th 398, 438.)

In *People v. Guerra, supra*, 37 Cal.4th 1067, for example, the courtroom bailiff testified about a conversation he had with the defendant in which the bailiff remarked he had been impressed by the cities he toured in Guatemala and the defendant responded by agreeing the cities were nice and then stating, "'In my country, I do this, no problem, I go home tonight.'" (*Id.* at p. 1122.) The trial court ruled that while the defendant's statement was ambiguous, it "was nonetheless admissible because what defendant was referring to when he said 'I do this' is for the trier of fact to determine." (*Ibid.*) This Court rejected the defendant's claim that the statement should have been excluded because the meaning of "'I do this' was ambiguous. His claim fails . . . because it 'concerns only the weight of this evidence, not its admissibility, which does not require complete unambiguity.'" (*Ibid.*)

Accordingly, Carrillo's statement was an implied admission to the killing and evidence showing his attempt to shift the blame to appellant, which was directly relevant to the disputed material fact whether appellant killed Johnson. (See *People v. Garceau, supra*, 6 Cal.4th at p. 177 [test of relevance

is whether the evidence tends "'logically, naturally, and by reasonable inference' to establish material facts"].)

In view of the fact that Carrillo's statement was an implied admission to the killing, and was evidence showing his attempt to shift the blame to appellant (i.e., a manifestation of his consciousness of guilt), the probative value far outweighed any prejudicial impact. (See *People v. Hall* (1986) 41 Cal.3d 826, 844; *People v. Ochoa* (2001) 26 Cal.4th 398, 437-438, abrogated on another point as noted in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.)

It is error to exclude evidence that a particular person other than the defendant may have been the killer. (*People v. Hall, supra*, 41 Cal.3d at p. 844.) "To be admissible, the third party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt." (*Ibid.*)

When evidence is offered to prove that another person committed the crime, as here, it is error to exclude evidence meeting the standard of *People v. Hall, supra*, 41 Cal.3d 826. For example, in *People v. Jackson* (1991) 235 Cal.App.3d 1670, the trial court sustained the prosecution's Evidence Code 352 objection to evidence of a third party's admission of guilt thirty minutes

after the offense, and excluded the evidence from the defendant's trial. (*Id.* at p. 1679.) The appellate court reversed, stating:

> . . . The trial court was certainly correct in determining that the evidence was strongly probative. It met the requirements of section 350 and *People v. Hall, supra.* It was relevant to defendant's guilt and was direct evidence that Tolbert fired shots at Dickson. Without Tolbert's statement, the only direct evidence that Tolbert did the shooting was defendant's testimony.
>
> Just as obviously the trial court was incorrect as a matter of law in concluding that the evidence was prejudicial. "[A] defendant's due process right to a fair trial requires that evidence, the probative value of which is stronger than the slight-relevancy category and which tends to establish a defendant's innocence, cannot be excluded on the theory that such evidence is prejudicial to the prosecution." . . . .

(*People v. Jackson, supra*, 235 Cal.App.3d at p. 1680, citing *People v. Reeder* (1978) 82 Cal.App.3d 543, 552.)

In *People v. Ochoa, supra*, 26 Cal.4th 398, for example, a detective testified that the defendant gang member "had on his forehead a tattoo of the number '187,' the California Penal Code section proscribing murder, which had been added after the charged homicides occurred." (*Id.* at p. 437.) This Court concluded that, in admitting evidence of the tattoo and the detective's testimony explaining its significance, the trial court had not abused its discretion under Evidence Code section 352, reasoning as follows: "The trial court properly found the tattoo represented an admission of defendant's

conduct and a manifestation of his consciousness of guilt. The court reasonably considered the tattoo highly probative, as it would be unlikely that an innocent person would so advertise his connection to murder." (*Id.* at p. 438.)

Carrillo's statement was highly probative because it was an implied admission to the killing and it was an attempt to shift blame to appellant, and thus the court abused its discretion in excluding the statement under Evidence Code section 352.

E. Exclusion of Eagle's proffered testimony recounting Carrillo's statement prejudicially undermined appellant's defense of mistaken identification because the statements were exculpatory and materially supported appellant's defense of third party culpability (i.e., that Carrillo was the shooter), resulting in the deprivation of the constitutional rights to due process and to present a complete defense.

A judgment may not be reversed on appeal absent a showing that an error resulted "in a miscarriage of justice" (Cal. Const., art. VI, § 13), which means "that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson, supra*, 46 Cal.2d at p. 836.) Under *Watson*, a reasonable probability "does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*. [Citations.]" (*College Hospital, Inc. v. Superior Court, supra*, 8 Cal.4th at p. 715, italics in original.)

Moreover, "a criminal defendant is constitutionally entitled to present all relevant evidence of significant probative value in his favor ...." (*People v. Marshall, supra*, 13 Cal.4th at p. 836; see also *Webb v. Texas, supra*, 409 U.S. at p. 98; *Washington v. Texas, supra*, 388 U.S. at p. 19; *Davis v. Alaska, supra*, 415 U.S. 308.) This standard of fairness has long been interpreted to require that criminal defendants be "*afforded a meaningful opportunity to present a complete defense.*" (*California v. Trombetta, supra*, 467 U.S. at p. 485, italics added; *Crane v. Kentucky, supra*, 476 U.S. at p. 690.) The Sixth Amendment "requires at a minimum, that criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." (*Pennsylvania v. Ritchie, supra*, 480 U.S. at p. 56.)

The trial court's exclusion of Eagle's proffered testimony recounting Carrillo's statement denied appellant the due process right to a fundamentally fair trial because the ruling undermined the ultimate integrity of the fact finding process. (See *Ohio v. Roberts, supra*, 448 U.S. at p. 64; *Chambers v. Mississippi, supra*, 410 U.S. at p. 295; U.S. Const., 5th, 6th, 8th & 14th Amends.)

Because the error violated appellant's federal constitutional rights to due process and to present a complete defense, appellant's convictions 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; *People v. Arreola, supra*, 7 Cal.4th at p. 1161 ["Because such error is of federal constitutional dimension, we must assess prejudice under the 'harmless-beyond-a-reasonable-doubt' standard."].) 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. Spencer, supra*, 66 Cal.2d at p. 168.)

Reversal of appellant's convictions under the state law trial error standard is warranted because the record reveals that it is reasonably probable that a result more favorable to appellant would have been reached in the absence of the error in excluding Carrillo's statement to Eagle. 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. Accordingly, in view of appellant's substantial defense case (*ante*, § B. [Guilt phase–the defense case]), and the evidence showing that Chung and the Pinoy Real gang (of which Carrillo was a member)–wanting to get rid of Johnson and Masubayashi–framed appellant for the shooting (*ante*, § B. [Guilt phase–the defense case]), it is reasonably probable that a result more favorable to appellant would have been reached in the absence of the error.

Reversal also is warranted under the federal constitutional standard of error because the prosecution will not be able to prove that the error in excluding Carrillo's statements to Eagle was harmless beyond a reasonable doubt. (See *People v. Marshall* (1997) 15 Cal.4th 1, 42 [fact that evidence is legally sufficient to sustain jury finding does not satisfy *Chapman* standard; evidence must be so overwhelming that the jury could not have had a reasonable doubt on the matter].)

The trial court's ruling prevented appellant from developing and presenting evidence at the core of his defense–i.e., that Carrillo was the gunman. Appellant presented a defense of third party culpability, testifying that Carrillo was the gunman and presenting independent evidence showing that Carrillo was the gunman, including Carrillo's own admission to the shooting. (*ante*, § B. [Guilt phase–the defense case]; RT 20:4690-4691, 4697, 4710-4711, 4735; RT 27:6183-6184.) Eagle's testimony would have provided evidence of an additional, independent admission by Carrillo to killing Johnson.

The prejudice in excluding Carrillo's implied admission to killing Johnson, and his statement evidencing an attempt to shift the blame to appellant for the killing, equally impacts counts 2 and 3 because the evidence

revealed that the same gunman fired at both Johnson and Masubayashi. (RT 22:5022-5028.)

Moreover, Carrillo's admission to Eagle would have materially corroborated appellant's testimony that appellant was not involved in a conspiracy to murder (count 2) and that he did not shoot Johnson and/or Masubayashi (counts 1 & 3). (*Ante*, § B. [Guilt phase–the defense case].) Exclusion of Eagle's proffered testimony thus weakened the force of appellant's testimony, thereby undermining appellant's defense to all of the charges. (RT 30:6662; *ante*, § B. [Guilt phase–the defense case].)

The prosecution thus will be unable to prove that the error was harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Spencer, supra*, 66 Cal.2d at p. 168 [beneficiary of the error has burden to prove there was no harm or suffer a reversal].)

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

/ / /

7. The trial court prejudicially erred in admitting Masubayashi's testimony recounting Perdon's statement of appellant's confession to shooting Johnson because Perdon genuinely did not recall making the statement (and thus it did not qualify as a prior inconsistent statement), the statement was unreliable, and the record discloses strong evidence that Masubayashi fabricated the statement, thereby requiring reversal of appellant's convictions for a violation of state statutory law against admission of unreliable hearsay and for a deprivation of the constitutional rights to due process and a fair and reliable jury trial.

A. Introduction, procedural background, and summary of argument.

After stepping off a return flight to the United States from his native Japan to testify in a case involving himself (count 3) and his deceased friend (Johnson, counts 1 & 2)–*a mere ten days before trial but years after extensive interviews by the police*–Masubayashi handed the prosecution what can only be described as evidentiary napalm–i.e, something so destructive that it would ensure annihilation of the defense, but which ultimately proved to be entirely unreliable, and which even the prosecutor ultimately viewed as toxic, unreliable evidence:

(Investigative report by DA Investigator Gary Hendricks, dated June 3, 2005)

> I met and had a conversation with witness JOHN MASUBAYASHI with regards to his upcoming testimony. Deputy District Attorney MIKE MURRAY and Anaheim Police Detective CHUCK SULLIVAN, were also with me during the conversation. *During our conversation, MASUBAYASHI made several statements that we were unaware of.*

> *Several years ago*, sometime *during the year 2000 before MASUBAYASHI went to the Anaheim Police Department*, GLENDA PARDON [sic] told MASUBAYASHI about a statement MATAELE told her. *PARDON [sic] said MATAELE told her, "I came in my pants when I saw that nigger flop".* MATAELE was referring to victim DANELL JOHNSON. [CT Supp. AA 6:1617, italics added.]

Despite extensive interviews of both Perdon and Masubayashi in the year 2000–i.e., after Perdon purportedly recounted this 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.)

When called to testify by the prosecution, Perdon answered the prosecution's questions in a straight-forward manner, admitted that she knew appellant, had been to Allan Quiambao house, and may have spoken to appellant a couple of times. (RT 14:3465-3471.) But she genuinely could not recall appellant ever talking about the shooting, and had no recollection of appellant ever stating, "I came in my pants when I saw that nigger flop." (RT 14:3468-3469.)

Trial defense objected to admission of Masubayashi's testimony recounting the purported extrajudicial statement made by Perdon, arguing that it was fabricated, unreliable hearsay, it did not qualify for admission under Evidence Code section 1235, and admission would deprive appellant of the

due process right to a fundamentally fair trial. (RT 14:3336, 3340, 3344, 3439.)

Finding Perdon's inability to recall evasive and untruthful, the trial court ruled that Masubayashi could testify to Perdon's statement because (1) the initial statement from appellant to Perdon qualified as an admission and (2) Perdon's statement to Masubayashi qualified as a prior inconsistent statement, admissible for the truth of the matter asserted. (RT 14:3439, 15:3676-3678.)

Masubayashi subsequently testified on direct examination that appellant confessed to shooting Johnson, as follows:

> Q: When you told Glenda Perdon that you had seen T-Strong, what is the statement that she related to you that T-Strong Mataele had said to her? And I understand that you may not be comfortable with some of the language. Just relate exactly what Glenda Perdon said that defendant Mataele said to her.
>
> A: He–he came in his pants watching that nigger flop *after he shot him.*
>
> Q: Danell [Johnson]?
>
> A: Yeah. [RT 15:3696-3697, italics added.]

Recognizing the devastating nature of this testimony, immediately prior thereto the court admonished the jury, "This witness is going to possibly testify that a statement was made by Mataele to someone. That is limited to Mataele alone and cannot be considered against the codefendant Lee." (RT 15:3696.) The court asked each individual juror whether the juror could follow the

court's instruction to consider the proffered statement only against appellant and not codefendant Lee; each juror responded that he/she would consider it only against appellant. (RT 15:3693-3695.)

But the trial court explicitly recognized that "there's a reasonable basis in the record" to support a finding that "this sounds manufactured." (RT 15:3677.) The court commented, in part:

> One of the things–I think there's a reasonable basis in the record–you have two theories here. 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.* [RT 15:3677, italics added.]

The trial court was correct that there was a real danger the confession was manufactured by Masubayashi, as shown by the fact that the confession was not disclosed earlier in any of the several police interviews with Masubayashi and/or Perdon, and that it was disclosed 10 days before trial (and years after the purported statement was made). (RT 14:3468-3469, 15:3698, 25:5656; CT Supp. AA 6:1617.)

The trial court's finding that Perdon was evasive and untruthful in her inability to recall was not supported by substantial evidence. Perdon was constantly high during the time the statement was allegedly made, having smoked methamphetamine daily during that time-period, thereby adversely

affecting her ability to remember events and accurately recall them. (RT 25:5685 [smoking methamphetamine from a pipe], 5686 ["With my mindset now or my memory back then, I can't rely on it. Because like I said, most of the time I was high."].) Even the prosecutor acknowledged this fact during closing rebuttal argument when he frankly told the jury:

> . . . In fact, yesterday I went back over my [closing] argument, I never mentioned the statement that Glenda Perdon said to John Masubayashi, I never mentioned it in my argument. *I didn't even touch it. It came from Glenda Perdon, who was high the whole time. I didn't go near it.* [RT 33:7396, italics added.]

The trial court's finding that Perdon was untruthful also was not supported by the evidence, as explained below, because (1) she was favorable to the prosecution and forthcoming in her testimony, (2) her prior statements to the police and trial testimony were consistent, (3) her chronic use of the mind-altering drug methamphetamine during the time the statement was purportedly made supports a genuine inability to recall, and (4) there is a reasonable basis in the record to support a finding that Masubayashi fabricated the statement. (*Post*, §§ 7.C. & 7.D.)

Finally, the proven unreliable nature of the confession, combined with its devastating evidentiary impact, eviscerated appellant's constitutional due process right to a fundamentally fair trial, thereby requiring reversal of his convictions in counts 1, 2 and 3. (*Post*, § 7.E.)

B. Standard of review.

Although admission of evidence over a hearsay objection is normally reviewed for an abuse of discretion (*People v. Cowan* (2010) 50 Cal.4th 401, 462), because the admission of the statement implicates the constitutional right to due process, the trial court's ruling is independently reviewed. (See *People v. Seijas, supra*, 36 Cal.4th at p. 304.)

C. Perdon's trial testimony was neither an express nor implied denial of a purported statement made to Masubayashi years earlier, and thus Masubayashi's testimony recounting the statement did not qualify as a prior inconsistent statement and was inadmissible hearsay.

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) The hearsay rule presumes hearsay statements are inadmissible because they are not made under oath, are not subject to cross-examination, and the jury does not have the opportunity to view the declarant's demeanor as the statement is made. (*People v. Duarte* (2000) 24 Cal.4th 603, 610; *People v. Ortiz* (1995) 38 Cal.App.4th 377, 387 [hearsay statements are inadmissible "when they are offered to prove the truth of the matter asserted"].) Accordingly, "[u]nless it falls within an exception to the general rule, hearsay is not admissible." (*People v. Duarte, supra*, 24 Cal.4th at p. 610.)

The only exception to the hearsay rule mentioned by the trial court in support of its ruling was the exception for prior inconsistent statements. (RT 15:3670, 3676, 3680.) Evidence Code section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Prior inconsistent statements are admissible under this provision to prove their substance as well as to impeach the declarant. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 55, fn. 4.)

Evidence Code section 770 provides: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or (b) The witness has not been excused from giving further testimony in the action."

Pursuant to sections 1235 and 770, a witness's prior statement is admissible where it is inconsistent with that person's present testimony and he or she is given an opportunity to explain or deny the prior statement. (Evid. Code, §§ 770, subd. (a), 1235; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 78.)

The prerequisite for admissibility of Perdon's prior statement was not met because Perdon genuinely did not recall the statement. (RT 14:3468-3469; RT 25:5681-5682, 5692; see *People v Ledesma* (2006) 39 Cal.4th 641, 711 [a lack of recollection establishes no facts to be impeached by a prior statement of the witness].)

After being questioned by defense counsel about how one could not recall hearing such a derogatory statement, the prosecutor engaged Perdon in the following colloquy:

Q: Then [defense counsel] Mr. Harley said "so disturbing if you heard it you'd remember it," right?

A: Correct.

Q: Would that be true if you were high on methamphetamine? Would you always remember that word? [¶] . . . Would you always remember hearing something like that that was disturbing if you're high?

A: No.

Q: You might remember it for a little while?

A: Correct.

Q: Might remember it for some period of time?

A: Correct.

Q: But then you might not anymore, right?

A: Correct. [RT 25:5692.]

The colloquy quoted above shows that Perdon was not an evasive prosecution witness. Penal Code section 1235 does not apply where, as here, a witness merely does not remember the event purportedly previously described. (*People v. Sapp* (2003) 31 Cal.4th 240, 296.) When a witness genuinely does not remember the event, the prior statement is not inconsistent and is not admissible under section 1235. (*People v. Gunder* (2007) 151 Cal.App.4th 412, 418; *People v. Sam* (1969) 71 Cal.2d 194, 208-210; *People v. Rios* (1985) 163 Cal.App.3d 852, 864) This is so because the "'fundamental requirement' of section 1235 is that the statement in fact be inconsistent with the witness's trial testimony." (*People v. Sam* (1969) 71 Cal.2d 194, 210.)

Appellant recognizes that the rule of exclusion does not apply when a trial witness is deliberately evasive or feigns a lack of memory. (*People v. Green* (1971) 3 Cal.3d 981, 988.) "[A] trial witness's deliberately evasive forgetfulness is an implied denial of prior statements, which creates 'inconsistency in effect' and authorizes admission of the witness's prior statements under Evidence Code section 1235." (*People v. Perez* (2000) 82 Cal.App.4th 760, 764; *People v. Green*, *supra*, 3 Cal.3d at p. 989.) Reliance is not only placed on the words spoken by a witness, but also on other indicators of a reluctance to testify at trial in determining whether a witness is engaged in

deliberate evasion. (*People v. Green*, *supra*, 3 Cal.3d at pp. 987-988 & fn. 6; *People v. O'Quinn* (1980) 109 Cal.App.3d 219, 225.)

If there is no reasonable basis in the record for concluding that the witness's forgetful statements are evasive and untruthful, admission of prior inconsistent statements is improper. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220.) The proponent of hearsay evidence bears the burden of showing that it falls within a hearsay exception and that it has sufficient indicia of reliability. (*People v. Woodell* (1998) 17 Cal.4th 448; *People v. Zapien, supra,* 4 Cal.4th at p. 929.)

The evidence does not support the trial court's finding that Perdon was evasive and untruthful in her inability to recall. First, Perdon answered extensive questions by the prosecutor, demonstrating she was not a reluctant witness. (RT 14:3465-3470; RT 25:5619-5638, 5684-5692.)

Second, Perdon was adverse to the defense, refusing to speak with trial defense counsel (RT 14:3473), which undermined any notion that she would be an evasive and/or untruthful prosecution witness.

Third, Perdon did not exhibit any defensiveness in her inability to recall the statement (RT 14:3468-3469, 25:5684-5692), further revealing that the trial court's finding of untruthfulness lacked evidentiary support.

Fourth, Perdon had a good friendship with Masubayashi and thus the record discloses no motive for her to be evasive in her answers to the prosecutor's questions. (RT 15:3690.)

Fifth, the prosecutor did not mention the statement during closing summation, apparently because he believed Perdon genuinely did not recall the statement (suggesting it was manufactured by Masubayashi). (See RT 32:7127-7215.)

Sixth, the trial court stated that there was "reasonable basis in the record" to support a finding that "this sounds manufactured" (RT 15:3677), which evidentiary basis weighs strongly against a finding that Perdon was untruthful in her inability to recall the statement. The evidentiary basis is found in the fact that neither Masubayashi nor Perdon mentioned any such statement in their extensive interviews with the police, and the fact that disclosure was first made a mere 10 days before trial, after Masubayashi had returned to the United States from Japan. (RT 14:3468-3469, 15:3698, 25:5656; CT Supp. AA 6:1617.)

There is no reasonable basis in the record for concluding that Perdon's failure to recall was evasive and untruthful, and thus the trial court abused its discretion by admitting Masubayashi's testimony, as set forth above, regarding appellant's purported statement to Perdon under Evidence Code section 1235.

D. Masubayashi's testimony that appellant confessed to shooting Johnson deprived appellant of the constitutional rights to due process and a fair and reliable jury trial.

Masubayashi's testimony recounting Perdon's statement to him several years earlier–where appellant purportedly made a derogatory statement and confessed to shooting Johnson–deprived appellant of the due process right to a fundamentally fair trial because the testimony violated state evidentiary rules against admission of unreliable hearsay and rendered the trial fundamentally unfair. (Cal. Const., art. 1, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

The record discloses strong evidence that Masubayashi fabricated the statement, rendering the statement unreliable. Despite purportedly hearing the statement from Perdon *prior to being interviewed by the police*, neither Perdon nor Masubayashi subsequently mentioned the statement to the police. (CT Supp. AA 6:1617; RT 27:6097-6099; CT 4:1197.)

Moreover, Masubayashi testified at trial that he did mention the statement to the police, having told both Detective Schmitt and Detective Sullivan. (RT 15:3741-3743.) But Masubayashi was being deceptive and untruthful in his testimony to the jury. The prosecutor explicitly stated that not a single person on the prosecution team (which included Detectives Schmitt and Sullivan) had learned of the statement until 10 days before trial–i.e., *five*

years after Masubayashi was interviewed by the police. (RT 25:5656; CT Supp. AA 6:1617.)

Perdon also could not vouch for the statement because she genuinely did not recall making any such statement. (RT 14:3468-3469.) Accordingly, the jury's consideration of this false and unreliable confession denied appellant the due process right to a fundamentally fair trial. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *White v. Illinois* (1992) 502 U.S. 346, 363-364 [112 S.Ct. 736, 116 L.Ed.2d 848] ["Reliability is ... a due process concern"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [94 S.Ct. 1868, 40 L.Ed.2d 431] [due process "cannot tolerate" convictions based on false evidence]; *Thompson v. City of Louisville* (1960) 362 U.S. 199, 204 [80 S.Ct. 624, 4 L.Ed.2d 654].)

The deprivation of appellant's state court rights (here, the statutory rules on admission of hearsay), as set forth above, also gives rise to a violation of appellant's right to due process under the Fifth and Fourteenth Amendments to the federal Constitution. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175] [arbitrary deprivation of a state-created liberty interest violates due process]; *Hewitt v. Helms* (1983) 459 U.S. 460, 466 [103 S.Ct. 864, 74 L.Ed.2d 675] [liberty interests protected by the Due Process Clause arise from two sources, the Due Process Clause itself and the

laws of the States]; *Walker v. Deeds* (9th Cir. 1995) 50 F.3d 670, 673 [sentencing court's failure to comply with state statute requiring a finding that habitual offender status is "just and proper" violated due process]; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 ["The failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state."]; *Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.)

Moreover, the state court's erroneous application of state law (here, the statutory rules on admission of hearsay) rendered appellant's trial fundamentally unfair, and thus denied appellant due process under the federal Constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 [112 S.Ct. 475, 116 L.Ed.2d 385]; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643; *Ortiz v. Stewart* (9th Cir. 1998) 149 F.3d 923, 934.)

Further, even correct applications of state law by state courts may violate the Due Process Clause:

> While adherence to state evidentiary rules suggests that the trial was conducted in a procedurally fair manner, it is certainly possible to have a fair trial even when state standards are violated; conversely, state procedural rules and evidentiary rules may countenance processes that do not comport with fundamental fairness. The issue . . . is whether the state proceedings satisfied due process.

(*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 919.)

State court procedural or evidentiary rulings can violate federal law "either by infringing upon a specific federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process." (*Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357.) As the United States Supreme Court stated many decades ago:

> Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

(*Brinegar v. United States* (1949) 338 U.S. 160, 174 [69 S.Ct. 1602, 93 L.Ed.2d 1879].)

The hearsay statement at issue here was a confession by appellant to shooting Johnson, and thus killing him, and since the evidence shows that the same person shot Masubayashi, this same statement amounted to an evidentiary admission to the attempted murder of Masubayashi. (RT 15:3696-3697, 22:5022-5028.) The statement was racially-charged and extremely derogatory. It was so inflammatory as to cast aspersion on any defendant making such a statement, so as to preclude the defendant from receiving a fundamentally fair trial.

The erroneous admission of Masubayashi's testimony recounting Perdon's statement about appellant's confession to shooting Johnson thus deprived appellant of the due process right to a fundamentally fair trial by lowering the prosecution's burden of proof on counts 1, 2, and 3, and denying appellant the right to a trial based on competent evidence and proof beyond a reasonable doubt. (Cf. *Jackson v. Virginia, supra*, 443 U.S. at pp. 317-320.)

E. Appellant's convictions should be reversed because the prosecution will be unable to prove beyond a reasonable doubt that the jury's consideration of appellant's confession did not contribute to the judgment.

The jury was instructed that it could consider Masubayashi's testimony recounting Perdon's statement about appellant's confession to shooting Johnson for the truth of the facts stated. (RT 33:7420; see RT 14:3439, 15:3678; CT 5:1280.) The jurors are presumed to have followed the instruction. (*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 83.)

The admission of hearsay statements requires reversal for state law error if there is a reasonable probability of a result more favorable to the defendant in the absence of the error. (Cf. *People v. Watson, supra*, 46 Cal.2d at p. 836; *People v. Duarte, supra*, 24 Cal.4th at pp. 618-619.) A reasonable probability "does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*. [Citations.]" (*College Hospital, Inc. v. Superior Court, supra*, 8 Cal.4th at p. 715, italics in original.)

The state trial error giving rise to the deprivation of the federal constitutional right to due process is evaluated under *Chapman* harmless error analysis. (*Chapman v. California, supra*, 386 U.S. at p. 24; see *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326 [*Chapman* asks whether the prosecution has "prove[d] beyond a reasonable doubt that the error . . . did not contribute to" the verdict].) Under the *Chapman* test, the People bear the burden to establish "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California, supra*, 386 U.S. at p. 24; see also *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 [106 S.Ct. 1431, 89 L.Ed.2d 674].) The appropriate inquiry is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [113 S.Ct. 2078, 124 L.Ed.2d 182]; *People v. Sakarias* (2000) 22 Cal.4th 596, 625 ["We may affirm the jury's verdicts despite the error if, but only if, it appears beyond a reasonable doubt that the error did not contribute to the particular verdict at issue."]).

This Court has long

> expressed a "recognition that confessions, 'as a class,' '[a]lmost invariably' will provide persuasive evidence of a defendant's guilt [citation], . . . that such *confessions often operate 'as a kind of evidentiary bombshell which shatters the defense'* [citation], .

> . . [and therefore] that the improper admission of a confession is much more likely to affect the outcome of a trial than are other categories of evidence, and thus is much more likely to be prejudicial . . . ."

(*People v. Neal* (2003) 31 Cal.4th 63, 86, italics added, quoting *People v. Cahill* (1993) 5 Cal.4th 478, 503; see *People v. Schader* (1965) 62 Cal.2d 716, 731, overruled on another ground in *People v. Cahill, supra*, 5 Cal.4th at pp. 509-510, fn. 17; accord, *Arizona v. Fulminante* (1991) 499 U.S. 279, 296 [111 S.Ct. 1246, 113 L.Ed.2d 302, 322] (opn. of White, J., for the court); *id.* at p. 313 (conc. opn. of Kennedy, J.).)

Reversal is warranted because under either standard the error arising from Masubayashi's testimony–recounting Perdon's statement about appellant's highly inflammatory confession to shooting Johnson–cannot be said to be harmless. (*People v. Watson, supra*, 46 Cal.2d at p. 836; *Chapman v. California, supra*, 386 U.S. at p. 24.)

The record does not support a finding that the confession to shooting Johnson was harmless beyond a reasonable doubt. Although Carrillo testified that appellant was the shooter, Carrillo was impeached with evidence that he was providing immunized testimony after striking a six-year deal with the prosecution (RT 23:5345-5346), he was a "very manipulative liar" (RT 29:6487-6488), he was present at the scene of the shooting, he was seen shortly thereafter with blood on his clothes, he was wearing a beanie like the

gunman, and according to independent witnesses he (Carrillo) fit the description of the shooter. (RT 20:4690-4691, 4697, 4710-4711, 4735; RT 21:4961-4987; RT 22:4988-5046; CT 4:1128.)

Allan Quiambao also pointed the finger at appellant, repeating Carrillo's own self-serving out-of-court statement to him that appellant was the shooter (admitted as an admission of a co-conspirator). (RT 13:3144-3188.) But Quiambao's testimony was impeached by evidence that he was close friends with Carrillo, and hailed from the same Pinoy Real gang. (RT 13:3319-3320, 14:3353-3358.) Quiambao candidly testified that he would lie for his fellow Pinoy Real gang members, even at the expense of someone else. (RT 13:3319-3320, 14:3353-3358.)

Masubayashi told Detective Reneau shortly after the shooting 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.) Masubayashi "just heard a boom and saw an arm." (RT 17:3953.) But he did not know for sure whether the arm belonged to appellant. (RT 17:3953-3954.) Masubayashi stated that he did not see a gun. (RT 17:3954.) With respect to the identity of the shooter and whether Masubayashi actually saw a gun, Masubayashi told Detective Reneau, "I don't

know. I don't know if I made this up or what I remember is what I see. What I see is like boom, boom." (RT 3954-3955.)

At trial, Masubayashi testified that he did not see the face of the shooter, only an arm that appeared to fit the description of appellant's arm. (RT 15:3638.) His identification of the shooter's arm was not reliable in view of the stress of the moment, his limited view of the shooter, and the fact that the area where the shooting occurred was dark. (RT 15:3637, 20:4710-4711, 4735, 25:5759-5761.)

Moreover, Masubayashi demonstrated he was unreliable in another identification at the scene of the shooting, further undermining his credibility. At trial, Masubayashi identified codefendant Lee as the Jeep's driver. (RT 15:3643-3644.) On cross-examination, Masubayashi admitted he initially told an Anaheim detective that he did not know who was driving the Jeep, and had also identified Clarito Mina as the driver. (RT 17:4100-4105, 18:4307-4311.)

The weakness of the prosecution's case was juxtaposed against a strong defense case, which included appellant's testimony 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. (RT 27:6183.) Carrillo told Monroe that he

was leaving town because he had just shot "some fools" in Orange County. (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.)

Chapman contemplates an inquiry into the impact which the particular error has had on the instant jury. This is true regardless of the weight of the evidence because *Chapman*

> instructs the reviewing court to consider not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. . . . Harmless-error review looks, we have said, to the basis on which "the jury actually rested its verdict." [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.

(*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.)

As the foregoing quotation reveals, the relative strength or weakness of the government's evidence does not necessarily render the error harmless. To the contrary, if the government has committed a fundamental constitutional error bearing a substantial impact, then reversal is compelled. This is so since it is the government's burden to show the guilty verdict "was surely

unattributable to the error." (*Id.* at p. 279; accord *People v. Quartermain* (1997) 16 Cal.4th 600, 621.)

Accordingly, 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 [review for harmless error requires not only an evaluation of the remaining incriminating evidence in the record but also "the most perceptive reflections as to the probabilities of the effect of error on a reasonable trier of fact"].) This sentiment also was held by Justice Harlan:

> Finally, if I were persuaded that the admission of the gun was 'harmless error,' I would vote to affirm, and if I were persuaded that it was arguably harmless error, I would vote to remand the case for state consideration of the point. But the question cannot be whether, in the view of this Court, the defendant actually committed the crimes charged, so that the error was 'harmless' in the sense that petitioner got what he deserved. The question is whether the error was such that it cannot be said that petitioner's guilt was adjudicated on the basis of constitutionally admissible evidence, which means, in this case, whether the properly admissible evidence was such that the improper admission of the gun could not have affected the result.

(*Bumper v. North Carolina* (1968) 391 U.S. 543, 553 (conc. opn. of Harlan, J.).)

Chapman and it progeny thus require a close and careful assessment of the actual impact which an error has had on the jury's deliberative process. The appellate court must be ever mindful the government bears a heavy

burden of persuasion in showing the error did not affect the jury. In this regard, the United States Supreme Court has made the difficulty of the government's task quite clear: the guilty verdict must have been "*surely* unattributable to the error." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279, italics added.)

The record shows that the jury had some difficulty reaching a verdict, as shown by the request for readback of trial testimony of Masubayashi, Quiambao, and Carrillo, among others. (RT 19:4507; CT 5:1238, 1370-1376.)

A request for readback of trial testimony, as here, is an indication that the case was close. (Cf. *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 490 [when considering the prejudicial nature of the error, "we consider whether the jury asked for a rereading of the erroneous instruction or of related evidence"]; *People v. Williams* (1971) 22 Cal.App.3d 34, 38-40 [request for read back of critical testimony]; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 [request for review of evidence, such as read back of testimony, is an indicator that the case was close and any error a tipper of the scales].)

This Court has recognized that although the erroneous admission of a confession might be harmless in a particular case, it nevertheless is "likely to be prejudicial in many cases." (*People v. Cahill, supra*, 5 Cal.4th at p. 503.) The erroneous admission of a confession "might be found harmless, for

example, (1) when the defendant was apprehended by the police in the course of committing the crime, (2) when there are numerous, disinterested reliable eyewitnesses to the crime whose testimony is confirmed by a wealth of uncontroverted physical evidence, or (3) in a case in which the prosecution introduced, in addition to the confession, a videotape of the commission of the crime . . . ." (*Id.* at p. 505.)

None of the harmless-error factors cited by this Court in *Cahill*, as quoted in the preceding paragraph, are present here, thus underscoring the fact that admission of the confession was prejudicial in this case. First, appellant was not apprehended by the police in the course of committing the crime; instead, he was arrested years after the crime was committed.

The second factor–i.e., numerous disinterested reliable eyewitnesses to the crime whose testimony is confirmed by a wealth of uncontroverted physical evidence–also is not present here. The two disinterested eyewitnesses to the crime--Rodriguez and Fowler–both first described the shooter as medium build, a description matching Carrillo but not appellant. (RT 25:5715-5716, 26:5839-5840, 28:6277, 30:6732; CT Supp. AA 2:332, 7:1813.) Indeed, Fowler testified that the gunman's left side was exposed to him, and that in comparing appellant during trial in a standing position with

his left side exposed, the shooter did not look anything approaching the size of appellant. (RT 28:6277.)

Fowler also testified that the gunman was wearing a beanie. (RT 20:4739-4740, 4753.) Carrillo admitted at trial that he was the one wearing a beanie at the time of the shootings. (RT 23:5218-5219.) Appellant was not wearing a beanie. (RT 30:6732.)

Third, this is not a case where the prosecution introduced a videotape of the commission of the crime; there was no videotape of the crime. (Cf. *People v. Cahill, supra*, 5 Cal.4th at p. 505.)

Accordingly, the prosecution will be unable to prove beyond a reasonable doubt that the guilty verdicts in counts 1, 2, and 3 were surely unattributable to the error in the admission of Masubayashi's testimony recounting Perdon's statement about appellant's confession to shooting Johnson . (Cf. *Sullivan v. Louisiana, supra*, 508 U.S. at p. 279.) Reversal of appellant's convictions is warranted.

/ / /

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.

A. Introduction.

Appellant explained in Argument 7, *ante*, that the trial court prejudicially erred by admitting into evidence Masubayashi's unreliable hearsay testimony that Perdon told him that appellant stated that "he came in his pants watching that nigger flop after he shot him." (*Ante*, Arg. 7; RT 15:3697.)

The error was compounded by the trial court's failure to instruct the jury to view the confession with caution. The trial court must instruct the jury sua sponte to view evidence of a defendant's oral confession with caution. (*People v. Carpenter* (1997) 15 Cal.4th 312, 392, abrogated by Proposition 115 on other points as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1224.)

B. Standard of review.

The de novo standard of review applies to a claim that the trial court had a duty to give a particular jury instruction sua sponte. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569 [determination whether the trial court has a duty to give a particular jury instruction sua sponte is reviewed de novo].)

C. Appellant's purported statement amounted to a confession to the crime of murder, as charged in count 1 (Johnson), and thus the trial court was required to sua sponte instruct the jury to view the confession with caution.

The trial court instructed the jury to view an *admission* with caution, which it defined as "a statement made by a defendant which does not by itself acknowledge his guilt of the crimes for which the defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence." (RT 33:7425; CT 5:1292.)

But the trial court never instructed the jury that it must view a *confession* with caution. (See CT 5:1292-1294.) Where a defendant has made a statement which is a full confession to the crime charged, or to some lesser included offense of which the defendant may be convicted, the jury must be instructed with respect to both confessions and admissions. (*People v. Fitzgerald* (1961) 56 Cal.2d 855, 861; *People v. Skinner* (1954) 123 Cal.App.2d 741, 748.)

Appellant's purported statement that "he came in his pants watching that nigger flop after he shot him" (RT 15:3697) amounted to a confession to the murder of Johnson as charged in count 1–i.e., an intentional killing.

In *People v. Morse* (1969) 70 Cal.2d 711, for example, the defendant was in jail awaiting sentencing in another case when the jailer found an inmate "lying outside defendant's cell with his head and neck suspended by a sort of

woven rope attached to the bars." (*Id.* at p. 720.) While the jailer and another individual tried to revive the inmate, the jailer saw defendant in his cell and asked him, "Joe, did you do this?" Defendant said, "Yeah." The jailer then asked defendant why he did it, to which defendant responded, "The sonofabitch wouldn't pay his debts." (*Ibid.*) Holding that the first question and answer amounted to a confession, this Court stated:

> We agree that the statements constitute a confession by defendant since it is obvious that they are a "declaration of his intentional participation in a criminal act" . . . and amount to a complete and express acknowledgment of the crime charged . . . . In fact, *the first question and answer, viewed in their context, constitute in themselves a confession whose directness and clarity would be difficult to improve upon. . . . .*

(*People v. Morse, supra*, 70 Cal.2d at p. 721, italics added, citations omitted.)

The statement appellant purportedly made is a confession because "it is a declaration of his intentional participation in a criminal act" (i.e., shooting Johnson) and it was "of such nature that no other inference than the guilt of the defendant may be drawn therefrom" (i.e., the prefatory derogatory reference shows the shooting was an intentional act). (See *People v. Ferdinand* (1924) 194 Cal. 555, 568-569; *People v. Morse, supra*, 70 Cal.2d at pp. 720-721 [defendant's statement constituted confession when he answered "yes" to question of whether he had killed victim].)

D. The failure to instruct the jury to view appellant's purported confession with caution was prejudicial because it was unreliable and the statement was not repeated accurately–i.e., Masubayashi added incriminating words identifying appellant as the shooter.

Appellant was prejudiced by the trial court's failure to instruct the jury to view with caution Masubayashi's testimony that appellant confessed to shooting Johnson because there was evidence that the statement was fabricated, the statement was not accurately repeated (and in fact Masubayashi added incriminating words identifying appellant as the shooter), and the racially-derogatory nature of the statement ensured that it operated, as confessions often do, "'as a kind of evidentiary bombshell which shatters the defense . . .'" (*People v. Neal, supra*, 31 Cal.4th at p. 86, quoting *People v. Cahill, supra*, 5 Cal.4th at p. 503.)

As this Court explained:

> . . . The rationale behind the cautionary instruction suggests it applies broadly. "The purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made." . . . This purpose would apply to any oral statement of the defendant, whether made before, during, or after the crime.

(*People v. Carpenter* (1997) 15 Cal.4th at p. 392, citing *People v. Beagle* (1972) 6 Cal.3d 441, 456.)

In view of the "evidentiary bombshell" nature of Masubayashi's testimony that appellant confessed to shooting Johnson (count 1), which then

directly linked him to the conspiracy to murder Johnson (count 2) and the attempted murder of Masubayashi (count 3), the trial court's failure to instruct the jury to view the confession with caution resulted in a violation of federal due process. (Cf. *United States v. Bernard* (9th Cir. 1980) 625 F.2d 854, 857-858; see also *Yates v. Evatt* (1991) 500 U.S. 391, 403-404 [111 S.Ct. 1884, 114 L.Ed.2d 432] [an instructional error may be found to be harmless where it is shown beyond a reasonable doubt that the error was "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record"]; *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346 [arbitrary deprivation of a state-created liberty interest violates due process]; *Hewitt v. Helms, supra*, 459 U.S. at p. 466 [liberty interests protected by the Due Process Clause arise from two sources, the Due Process Clause itself and the laws of the States]; U.S. Const., 5th, 6th, 8th & 14th Amends.)

Applying state law, this Court has held that the standard of prejudice for erroneous failure to give the cautionary instruction is "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.)

The standard of prejudice for the deprivation of a federal constitutional right, as here, is the *Chapman* harmless error analysis, which requires reversal

of appellant's convictions unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24; see *People v. Sengpadychith, supra*, 26 Cal.4th at p. 326.)

Under this test, the appropriate inquiry is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279; *People v. Sakarias, supra*, 22 Cal.4th at p. 625 ["We may affirm the jury's verdicts despite the error if, but only if, it appears beyond a reasonable doubt that the error did not contribute to the particular verdict at issue."]).

The cautionary instruction serves as an antidote to the great risks of error in a jury overly trusting recollection testimony of oral utterances. (*People v. Henry* (1972) 22 Cal.App.3d 951,958.) The instruction assists the jury in determining if the statement at issue was in fact made. (*People v. Padilla* (1995) 11 Cal.4th 891, 922, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 809.) The cautionary instruction also serves to warn the jury about possible flaws in the accuracy and meaning of a witness's testimony. (*People v. Bunyard, supra*, 45 Cal.3d at p. 1224.)

> "Since the cautionary instruction is intended to help the jury to determine whether the statement attributed to the defendant was in fact made, courts examining the prejudice in failing to give the instruction examine the record to see if there

> was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately. . . . ."

(*People v. Dickey* (2005) 35 Cal.4th 884, 905, citing *People v. Pensinger* (1991) 52 Cal.3d 1210, 1268.)

There was evidence that the statement was fabricated. Masubayashi testified that while dating Perdon after the shooting, Perdon told him that appellant admitted shooting Johnson. (RT 15:3697.) But Perdon never made this statement in any of her interviews with the police (RT 25:5656; CT Supp. AA 6:1617), and she testified that she did not recall making such a statement to Masubayashi. (RT 14:3468-3469.) Masubayashi also never made this statement in any of his several interviews with the police, and only first made the statement to the prosecutor and Investigator Gary Hendricks upon returning to the United States from Japan *10 days before trial*, thereby suggesting that the statement was fabricated. (RT 15:3698, 25:5656; CT Supp. AA 6:1617.)

There also was a conflict in the evidence about the content of appellant's purported statement to Perdon. When Masubayashi first disclosed the purported statement to Investigator Hendricks 10 days before trial, Masubayashi stated that Perdon said appellant "told her, 'I came in my pants when I saw that nigger flop'." (CT Supp. AA 6:1617.) Shortly thereafter

when Masubayashi testified at trial, Masubayashi changed his statement, testifying that Perdon told him that appellant said "he came in his pants watching that nigger flop *after he shot him.*" (RT 15:3697, italics added.) Masubayashi's first rendition of the statement does not identify appellant as the shooter, whereas in the second version appellant purportedly identifies himself as the shooter.

The prosecution will be unable to prove beyond a reasonable doubt that the trial court's failure to properly instruct the jury did not contribute to the verdict. The confession was an evidentiary bombshell, which was particularly damaging because the racially-derogatory nature of the statement ensured it would linger in the minds of the jurors. (See *People v. Ford* (1964) 60 Cal.2d 772, 799-800; *People v. Lopez* (1975) 47 Cal.App.3d 8, 14.)

Moreover, the factors showing prejudice by omission of a cautionary instruction are all present here, including evidence that the statement was in fact not made (i.e., evidence of fabrication) and evidence that the statement was not repeated accurately (i.e., evidence showing Masubayashi added incriminating words identifying appellant as the shooter). (*People v. Dickey, supra*, 35 Cal.4th at p. 905; *People v. Stankewitz, supra*, 51 Cal.3d at p. 94 [omission of cautionary instruction more likely to be harmful where there is evidence that the statement was fabricated or inaccurately remembered or

reported].) It cannot be said, therefore, that omission of the cautionary instruction as to appellant's purported admission to shooting Johnson did not contribute to the guilty verdicts. (Cf. *Sullivan v. Louisiana, supra*, 508 U.S. at p. 279.)

Because the prosecution presented evidence that Johnson and Masubayashi were shot by the same gunman (RT 15:3637-3641, 15:3648, 22:5020-5024, 22:5034), Masubayashi's statement included an implied confession that appellant shot Masubayashi.

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

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9. The trial court prejudicially erred by giving a flawed version of CALJIC No. 8.71 regarding consideration of second degree murder, thereby requiring reduction of the offense in count 1 to second degree murder.

A. Introduction.

Appellant was convicted in count 1 of first degree murder of Danell Johnson (Pen. Code, §§ 187, subd. (a)). (RT 33:7514-7517; CT 5:1379-1417.)

The trial court instructed the jury on both express malice second degree murder, premeditated first degree murder, and murder by means of lying in wait. (RT 33:7445-7453; CT 5:1332-1338.)

But the trial court gave a flawed version of CALJIC No. 8.71 [Doubt Whether First or Second Degree Murder], which 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. (RT 33:7452-7453; CT 5:1343; see *People v. Moore* (2011) 51 Cal.4th 386, 409-411.)

Although appellant presented the defense of third party culpability (i.e., that Carrillo was the gunman), in accordance with the instructions on second degree murder the jurors reasonably could have found that the killing of Johnson was an intentional killing, but committed without the requisite premeditation and deliberation necessary to elevate it to first degree murder

(on either theory advanced by the prosecution–i.e., premeditated first degree murder or murder by means of lying in wait).

The instructional error requires reduction of appellant's conviction in count 1 to second degree murder because (1) the instruction lowered the prosecution's burden of proof by making first degree murder the de facto default finding and (2) the instruction deprived appellant of the assurance that the jurors unanimously found that the prosecution proved, beyond a reasonable doubt, every fact necessary to constitute the crime of first degree murder. (Post, § 9.E.)

B. The trial court's duty to correctly instruct on issues raised by the evidence.

Appellant may raise the issue on appeal despite his failure to object below because the instruction affected his substantial rights. (Pen. Code, § 1259; *People v. Cleveland* (2004) 32 Cal.4th 704, 750.)

It is the trial court's duty to instruct on general principles of law relevant to the issues raised by the evidence. This is true even absent a request for an instruction by the defendant. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) "'The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' []" (*Ibid.*) The court has a corresponding duty, however, "'to refrain from instructing on

principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.' []" (*People v. Saddler* (1979) 24 Cal.3d 671.)

The defendant is generally entitled upon request to a "pinpoint" instruction, which charges the jury on how to relate the evidence supporting a particular defense to the prosecution's general burden of proving guilt beyond a reasonable doubt. (*People v. Earp* (1999) 20 Cal.4th 826, 886.) Although the trial court need not give an argumentative or confusing pinpoint instruction, it should modify an otherwise correct one rather than deny it outright. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1110.)

A defendant has a constitutional right to have the jury "'determine every material issue presented by the evidence.' []" (*People v. Flood* (1998) 18 Cal.4th 470, 480.) "Under established law, instructional error relieving the prosecution of the burden of proving beyond a reasonable doubt every element of the charged offense violates the defendant's rights under both the United States and California Constitutions." (*Id.* at pp. 479-480; see also *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368].)

Incorrect jury instructions may deprive a defendant of his right to due process. However, "not every ambiguity, inconsistency, or deficiency in a jury

instruction rises to the level of a due process violation." (*Middleton v. McNeil* (2004) 541 U.S. 433, 437 [124 S.Ct. 1830, 158 L.Ed.2d 701].) Individual instructions may not be assessed in isolation, "but must be viewed in the context of the overall charge." (*Ibid.* [internal quotation marks and citations omitted]; see also *People v. Letner* (2010) 50 Cal.4th 99, 182.) The high court explains that "[i]f the charge as a whole is ambiguous, the question is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." (*Middleton v. McNeil, supra*, 541 U.S. at p. 437 [internal quotation marks and citations omitted]; *People v. Letner, supra*, 50 Cal.4th at p. 182.)

C. Standard of review.

Instructional error is reviewed under the independent, de novo standard of review. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.)

D. The trial court erred by giving a flawed version of CALJIC No. 8.71 regarding consideration of second degree murder.

The trial court gave the 1996 revised version of CALJIC No. 8.71, which instructed the jurors as to what they should do if they agreed appellant had committed murder but had doubts about whether it was in the first or second degree. The version of CALJIC No. 8.71 given in appellant's trial 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.]

This version of 8.71 is flawed, since it 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, depriving appellant of the benefit of the judgment of individual jurors, and diminishing the prosecutor's burden of proof.

This Court recognized the confusion this instruction could engender in *People v. Moore, supra*, 51 Cal.4th at pp. 409-411. The Court stated:

> We conclude the better practice is not to use the 1996 revised versions of CALJIC Nos. 8.71 and 8.72, as the instructions carry at least some potential for confusing the jurors about the role of their individual judgments in deciding between first and second degree murder, and between murder and manslaughter.

(*People v. Moore, supra*, 51 Cal.4th at p 411.)

The standard instruction subsequently was revised. As now written, CALJIC No. 8.71 cannot lead to a first degree murder verdict if any individual juror has a reasonable doubt as to the degree of murder. It currently states:

> *If any juror* is convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but has a reasonable doubt whether the murder was of the first or of the second degree, that juror must give defendant the benefit of that doubt and find that the murder is of the second degree.

(CALJIC No. 8.71 (Fall 2011 Revision), italics added.)

Here, the trial court erred by giving the flawed version of CALJIC No. 8.71 regarding consideration of second degree murder because it contained a confusing unanimity requirement, and thus was an incorrect statement of the law and dangerously misleading.

E. The instructional error was prejudicial because it lowered the prosecution's burden of proof by making first degree murder the de facto default finding and it deprived appellant of the assurance that the jurors unanimously found that the prosecution proved, beyond a reasonable doubt, every fact necessary to constitute the crime of first degree murder, thereby requiring reduction of appellant's conviction in count 1 to second degree murder.

Jury instructions provide essential guidance to the jury. (*Carter v. Kentucky* (1981) 450 U.S. 288, 302 [101 S.Ct. 1112, 67 L.Ed.2d 241]; *Bollenbach v. United States* (1946) 326 U.S. 607, 612 [66 S.Ct. 402, 90 L.Ed.2d 350].)

> Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law.

(*Carter v. Kentucky, supra*, 450 U.S. at p. 302.)

A correctly-worded unanimity instruction vindicates federal and state constitutional rights. A criminal defendant has a federal constitutional right to due process and to a jury verdict that is unanimous as to the act for which he is being convicted. (*United States v. Frega* (9th Cir. 1999) 179 F.3d 793, 810; *United States v. Gordon* (9th Cir. 1988) 844 F.2d 1397, 1400-1401; *United States v. Echeverry* (9th Cir. 1983) 698 F.2d 375, 377; U.S. Const., 6th, 8th & 14th Amends.) Unless a correct unanimity instruction is given where appropriate, there is no assurance that the jurors unanimously found that the prosecutor proved, beyond a reasonable doubt, every fact necessary to constitute the crime with which the defendant is charged. (*In re Winship, supra*, 397 U.S. at p. 364.)

Moreover, failure to adequately instruct the jury upon matters relating to proof of any element of the charge, as here, violates the defendant's federal (5th, 6th and 14th Amendments) and California (Art. I, § 15 and § 16) constitutional rights to trial by jury and due process. (See *Carella v. California* (1989) 491 U.S. 263, 270 [105 S.Ct. 218, 109 L.Ed.2d 218] ["misdescription of an element of the offense . . . deprives the jury of its factfinding role" and thus is "not curable by overwhelming record evidence of guilt"] (conc. opn. of Scalia, J.); *Sullivan v. Louisiana, supra*, 508 U.S. at p. 279; *United States v. Gaudin* (1995) 515 U.S. 506, 510 [115 S.Ct. 2310, 132

L.Ed.2d 444]; *Apprendi v. New Jersey, supra*, 530 U.S. 466; *People v. Flood, supra*, 18 Cal.4th at p. 490; *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [erroneous instructions defining the elements of a crime violate the due process clause of the 14th Amendment]; *Rose v. Clark* (1986) 478 U.S. 570, 580-581 [106 S.Ct. 3101, 92 L.Ed.2d 460] [the failure to adequately instruct upon an element of the offense violates the Sixth Amendment right to trial by jury as applied to the states through the Fourteenth Amendment and the Fourteenth Amendment right to due process]; *People v. Hernandez* (1988) 46 Cal.3d 194, 211.)

The error also violated the Eighth Amendment, which requires heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 633-646 [100 S.Ct. 2382, 65 L.Ed.2d 392]; *Kyles v. Whitley* (1995) 514 U.S. 419, 422 [115 S.Ct. 1555, 131 L.Ed.2d 490]; *Burger v. Kemp* (1987) 483 U.S. 776, 785 [107 S.Ct. 3114, 97 L.Ed.2d 638]; U.S. Const., 8th & 14th Amends.)

Accordingly, because the instructional error lowered the prosecution's burden of proof by making first degree murder the de facto default finding, and because the instructional error deprived appellant of the assurance that the jurors unanimously found that the prosecution proved, beyond a reasonable

doubt, every fact necessary to constitute the crime of first degree murder, the trial court's failure to correctly instruct on these principles violated appellant's federal constitutional rights to trial by jury and due process.

The standard of prejudice for the deprivation of a federal constitutional right is the *Chapman* harmless error analysis, which requires reversal of appellant's convictions unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) Under this test, the appropriate inquiry is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279.)

Appellant presented the defense of third party culpability (i.e., that Carrillo was the gunman). But in view of the jury's verdict, which found that appellant was the gunman, the jury (or any one of them) could still have entertained a reasonable doubt whether appellant acted with the requisite premeditation and deliberation necessary for a verdict of first degree murder.

Deliberation and premeditation require a level of reflection greater than that required to merely form the intent to kill. (*People v. Anderson* (1968) 70 Cal.2d 15, 26.) To establish deliberation and premeditation, the intent to kill must be formed upon a preexisting reflection and result from careful thought

and weighing the considerations, as with a deliberate judgment or plan, carried on coolly and steadily according to a preconceived design. (*Ibid.*) Planning, motive, and an exacting method of attack are factors which can assist in the determination of deliberation and premeditation; however, these factors are not a prerequisite to a deliberation and premeditation finding, nor are they exclusive. (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.)

The evidence showed that Johnson was not killed at first opportunity, nor was he killed later inside the apartment. Appellant and Carrillo first encountered Johnson as he was returning to the apartment with groceries, but Johnson was not shot at that time. (RT 21:4979-4981.) They accompanied Johnson inside the apartment, but Johnson was not shot while inside the apartment. (RT 15:3621, 21:4979-4984.)

Masubayashi, Johnson, appellant, and Carrillo left the apartment together in Masubayashi's vehicle. (RT 21:4985-4987.) There was no shooting as they entered Masubayashi's vehicle, nor was there a shooting as they drove to the nearby restaurant parking lot. (RT 15:3631-3633, 22:5017-5018.)

The shooting then occurred in a public parking lot, which suggests that it was not being concealed from public view, thereby giving rise to an

inference that the shooting was the result of a momentary rash and hasty decision. (RT 15:3632-3637.)

Accordingly, in view of the evidence, one of the twelve jurors could have found that the killing was intentional, but still have entertained a reasonable doubt whether appellant acted with the requisite premeditation and deliberation necessary for a verdict of first degree murder. (See *People v. Ratliff* (1986) 41 Cal.3d 675, 695 [even a shooting at close range does not necessarily demonstrate an intent to kill]; see also *Braxton v. United States* (1991) 500 U.S. 344, 351-353 [111 S.Ct. 1854, 114 L.Ed.2d 385] [shooting "at a marshal" establishes "a substantial step toward [attempted murder], and perhaps the necessary intent" (emphasis in original).) The prosecution thus will be unable to prove that the instructional error–which 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–was harmless beyond a reasonable doubt.

> "[W]e 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."

(*United States v. Russell* (3d. Cir. 1998) 134 F.3d 171, 181, quoting *United States v. Edmonds* (3d Cir. 1996) 80 F.3d 810, 824.)

Appellant's conviction in count 1 must be reduced to second degree murder for instructional error.

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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.

A. Introduction.

The jury found true the lying in wait special circumstance (Pen. Code, § 190.2, former subd. (a)(5)). (RT 33:7516-7517; CT 5:1386.) As explained below, there is insufficient evidence, which is reasonable, credible, and of solid value, to sustain a finding that appellant committed the murder of Johnson while lying in wait. Accordingly, the true finding on the lying in wait special circumstance must be set aside and the death judgment, which was solely based thereon, reversed.

B. Standard of review.

Faced with a challenge to the sufficiency of the evidence, the court reviews "the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, *evidence which is reasonable, credible, and of solid value* – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578, italics added; *People* v. *Samuel* (1981) 29 Cal.3d 489, 505 [evidence relied upon must be "reasonable in nature, credible and of solid value"].) "The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence." (*People v.*

Rodriguez, supra, 20 Cal.4th at p. 11.) "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." (*Ibid.*, citing *People v. Stanley* (1995) 10 Cal.4th 764, 792-793.)

> In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." [Citation omitted.] The court does not, however, limit its review to the evidence favorable to the respondent. As *People v. Bassett, supra*, 69 Cal.2d 122, explained, "our task . . . is twofold. First, we must resolve the issue in the light of the whole record – i.e., the entire picture of the defendant put before the jury – and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is substantial; it is not enough for the respondent simply to point to "some" evidence supporting the finding, for "Not every surface conflict of evidence remains substantial in the light of other facts."

(*People v. Johnson, supra*, 26 Cal.3d at pp. 576-577 [citation omitted].)

The federal standard of review, under principles of federal due process, entails a determination of whether, upon review of the entire record 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. (*Jackson v. Virginia, supra*, 443 U.S. at p. 317-320.) The requisite qualitative nature of

the evidence is that which is sufficient to permit the trier of fact to reach a "subjective state of near certitude of the guilt of the accused . . . ." (*Id.* at p. 315.)

"'Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises the possibility, and this is not a sufficient basis for an inference of fact.'" (*People v. Reyes* (1974) 12 Cal.3d 486, 500, citing *People v. Redmond* (1969) 71 Cal.2d 745, 755.) Nor can "substantial evidence" be based on speculation:

> We may speculate about any number of scenarios that may have occurred on the morning in question. A reasonable inference, however, "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.

(*People v. Morris* (1988) 46 Cal.3d 1, 21 [citations omitted].)

In capital cases it is well recognized that heightened verdict reliability is required at both the guilt and penalty phases of trial. (*Beck v. Alabama, supra*, 447 U.S. at pp. 627-646; see also *Kyles v. Whitley, supra*, 514 U.S. at p. 422.)

Moreover, a conviction that is based on unreliable and/or untrustworthy evidence violates the constitutional guarantee of due process. (Cf. *White v. Illinois, supra*, 502 U.S. at pp. 363-364 ["Reliability is . . . a due process

concern"]; *Donnelly v. DeChristoforo, supra,* 416 U.S. at p. 646 [due process "cannot tolerate" convictions based on false evidence]; *Thompson v. City of Louisville, supra*, 362 U.S. at p. 204.) A conviction unsupported by substantial evidence denies a defendant due process of law. (*Jackson v. Virginia, supra*, 443 U.S. at p. 318; *People* v. *Bean* (1988) 46 Cal.3d 919, 932.) The same standard applies to special circumstance findings. (*People v. Stevens* (2007) 41 Cal.4th 182, 201.)

C. There is insufficient evidence, which is reasonable, credible, and of solid value, to sustain a finding that the murder occurred while lying in wait.

The prosecution alleged that appellant killed Danell Johnson while lying in wait, within the meaning of Penal Code section 190.2, former subdivision (a)(15).[22] (CT 1:19-23.) The jury was instructed on the lying-in-wait special circumstance in the language of CALJIC No. 8.81.15. (RT 33:7456-7457; CT 5:1347-1348.) The jury found this allegation to be true. (RT 33:7514-7517; CT 5:1379-1417.)

The lying-in-wait special circumstance set forth by former subdivision

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[22] At the time of Johnson's death, subdivision (a)(15) applied to a murder committed while lying in wait. In 2000, the language of subdivision (a)(15) was changed by ballot initiative, to apply to a murder committed by means of lying in wait. (*People v. Lewis* (2008) 43 Cal.4th 415, 511-512, fn. 25.) The murder here took place before this change in the law, and the change therefore does not affect this case. (*Ibid.*)

(a)(15) 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.)

The third element, and the trial court's instruction (CT 5:1347), incorporates the meaning of "while lying in wait" found by *Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, the first appellate court to address the meaning after the special circumstance was added to the Penal Code in 1978,[23] as follows:

> . . . Thus, the killing must take place during the period of concealment and watchful waiting or the lethal acts must begin at and flow continuously from the moment the concealment and watchful waiting ends. If a cognizable interruption separates the period of lying in wait from the period during which the killing takes place, the circumstances calling for the ultimate penalty do not exist.

(*Id.* at p. 1011.)

The evidence presented by the prosecutor is insufficient to support *any* of these three elements and, indeed, the evidence is woefully insufficient to

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[23] This Court has, at times, "declined to decide whether *Domino's* 'restrictive' reading of the lying-in-wait special circumstance is correct" while at other times has apparently "assumed the viability of the *Domino* formulation." (*People v. Lewis, supra*, 43 Cal.4th at p. 513.) *Domino* thus was the law in force during appellant's trial.

show "a factual matrix" of the three elements occurring simultaneously "sufficiently distinct from 'ordinary' premeditated murder . . . ." (*People v. Morales, supra*, 48 Cal.3d at p. 557.)

First, the evidence was insufficient to establish concealment. A defendant need not be physically hidden to be lying in wait, but concealment of purpose by actions or conduct is sufficient. (*People v. Streeter* (2012) 54 Cal.4th 205, 247.) Of course, appellant's actual presence in front of Johnson and at the vehicle where the shooting occurred was not concealed from Johnson. According to Carrillo, appellant confronted Johnson directly by shaking his hand and then displaying a handgun. (RT 22:5020-5022.) Appellant pulled the handgun from his (appellant's) waistband and shot Johnson in the head. (RT 22:5022-5024.) Thus, a rational trier of fact could not conclude beyond a reasonable doubt that the gunman's words or actions concealed his purpose.

With respect to the first element, this Court has cautioned that

> . . . *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, and the constitutional considerations raised by defendant might well prevent treating the commission of such murders as a special circumstance justifying the death penalty.

(*People v. Morales, supra*, 48 Cal.3d at p. 557, italics added.)

The evidence also does not eliminate the possibility that the gunman shot Johnson in haste, perhaps due to Johnson's refusal to give money that Johnson had been "flashing" shortly before the shooting. Chung told the police that Carrillo had said that Johnson "had been flashing a lot of money inside the apartment" and thus the motive may have been robbery. (CT Supp. AA 2:363.) Although not presented to the jury, Chung's statement to the police highlights the fact that the prosecution's evidence does not eliminate the possibility that Johnson was shot after refusing to give money to the gunman–i.e., a shooting done without concealment of purpose.

Second, the evidence was insufficient to establish a substantial period of uninterrupted watchful waiting. As construed by this Court, "watchful" does not require actual watching. A defendant who is "'alert and vigilant' in anticipation of the victim's arrival to take him or her by surprise" may suffice. (*People v. Streeter, supra*, 54 Cal.4th at p. 247.) The evidence belies any conclusions that the gunman was "'alert and vigilant' in anticipation of the victim's arrival to take him or her by surprise." Johnson and appellant were inside the apartment for a period of time before the shooting, and also before the shooting proceeded to Masubayashi's vehicle, but were interrupted when the police appeared. (RT 15:3621, 21:4979-4984.) Appellant went back to the apartment, and then returned to meet Johnson and Masubayashi at

Masubayashi's vehicle. (RT 15:3623-3631, 16:3843-3846.) They drove together to a public parking lot where Chung's vehicle was parked, and then Johnson and appellant exited the vehicle. The gunman was not "watching" for Johnson's "arrival to take him . . . by surprise." (See *People v. Streeter, supra*, 54 Cal.4th at p. 247.) Johnson was already there in the presence of both appellant and Carrillo. (RT 22:5019-5028.) For the same reason, the evidence failed to sufficiently establish that the gunman launched a surprise attack on Johnson immediately after a period of watchful waiting.

Third, a murder committed *while* lying in wait requires a continuous flow of events following the concealment, watchful waiting and surprise attack. In *People v. Lewis, supra*, 43 Cal.4th 415, the Court quoted the CALJIC instruction defining this element, as follows:

> . . . 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. [¶] If there is a clear interruption separating the period of lying in wait from the period during which the killing takes place, so that there is neither an immediate killing nor a continuous flow of the uninterrupted lethal events, the special circumstance is not proved."

(*Id.* at p. 512, quoting CALJIC No. 8.81.15 (1989 rev.).)

Aside from the insufficiency of the evidence relating to the individual components of concealment, watchful waiting, and a surprise attack, the

evidence did not prove that the flow of events was uninterrupted. *People v. Lewis, supra*, 43 Cal.4th 415, is instructive. There, three victims were kidnapped in separate incidents. Each was killed after having been driven around for one to three hours, while Lewis and his cohorts withdrew money from his or her bank account. (*Id.* at p. 514.) This Court reversed the lying-in-wait special circumstances attached to all three murders, finding that the record did not show the victims were killed in the course of lying in wait. The Court stated:

> In sum, in each of the cases at issue here, there was a period of watchful waiting culminating in surprise kidnapping, a series of nonlethal events, and then a cold, calculated, inevitable, and unsurprising dispatch of each victim. We have never held the lying-in-wait special circumstance to have been established on similar facts. Were we to hold that sufficient evidence supports the lying-in-wait special-circumstance allegations the jury found true here, it would be difficult to say that there is any distinction between a murder committed "by means of' lying in wait and a murder committed "while" lying in wait. Such a construction of the lying-in-wait special circumstance would read the word "while" out of the statute. Although we do not "minimize the heinousness of defendant's deeds" [citation], we are compelled to conclude that on these facts "the circumstances calling for the ultimate penalty [on the basis of lying in wait] do not exist." [Citation.]

(*People v. Lewis, supra*, 43 Cal.4th at p. 515.)

Here, as Johnson and Her were returning to the apartment from the grocery store, appellant and Carrillo met them outside. (RT 21:4979-4981.) They accompanied Johnson inside the apartment, where they stayed for a

period of time talking with Johnson and Masubayashi. (RT 15:3621, 21:4979-4984.) The four men then left the apartment and proceeded to Masubayashi's vehicle, but they were interrupted by police presence in the area. (RT 15:3622-3623, 3627, 16:3843-3846.) Johnson and Masubayashi spoke with the police and then returned to the apartment. (RT 15:3623, 3627, 16:3843-3846.) Appellant and Carrillo returned to the apartment immediately, spent some time there, and then after Johnson and Masubayashi returned, all four left for Masubayashi's vehicle. (RT 15:3629-3631.) The four men drove together to the location of Chung's vehicle. Appellant exited the vehicle and then Johnson was shot. (RT 22:5019-5024.) The murder of Johnson followed a series of encounters with him, and other nonlethal events, including an interruption of the events by the presence of the police, culminating in the shooting of Johnson in a face-to-face exchange. (RT 22:5022-5024.) The evidence thus reveals neither an immediate killing nor a continuous flow of the uninterrupted lethal events, and thus the special circumstance is not proved.

To paraphrase the *Domino* court, "the killing [did not] take place during the period of concealment and watchful waiting [nor did] the lethal acts . . . begin at and flow continuously from the moment the concealment and watchful waiting end[ed]." (*Domino v. Superior Court, supra*, 129 Cal.App.3d at p. 1011.) A "cognizable interruption separate[d] the period of

lying in wait from the period during which the killing [took] place, [and] the circumstances calling for the ultimate penalty do not exist." (*Ibid.*)

Reversal of the true finding on the lying-in-wait special circumstance is required for a denial of the constitutional rights to trial by jury and due process.[24] (See *Jackson v. Virginia, supra*, 443 U.S. at p. 318 [a conviction unsupported by substantial evidence denies a defendant due process of law]; *People* v. *Bean, supra*, 46 Cal.3d at p. 932; Cal. Const., art. 1, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

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[24] Retrial of the special circumstance allegation is barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. (*Burks v. United States* (1978) 437 U.S. 1, 18 [98 S.Ct. 2141, 57 L.Ed.2d 1]; *People v. Lewis, supra*, 43 Cal.4th at p. 509.)

11. The lying-in-wait special circumstance jury instructions were riddled with errors, operating individually and in combination to deprive appellant of a constitutionally fair trial, requiring reversal of the true finding thereon and the death judgment.

A. Introduction.

The errors in the lying-in-wait jury instructions, either individually or in combination, deprived appellant of the state and federal constitutional rights to trial by jury and due process, and to a reliable verdict and penalty determination. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15.)

The errors included instructions which should never have been given, instructions which incorrectly or inconsistently described the elements at issue or omitted elements altogether, and instructions which were incomprehensible. (*Post*, Arg. 11.D. and 11.E.)

There was a reasonable likelihood that the jury applied the charge as a whole in a way that prejudicially violated the constitution. (*Post*, Arg. 11.F.)

B. The trial court's duty to correctly instruct on issues raised by the evidence.

Appellant incorporates by reference Argument 9.B., *ante*, as though fully set forth herein. Appellant may raise these issue on appeal despite his failure to object below because the instructions affected his substantial rights. (Pen. Code, § 1259; *People v. Cleveland, supra*, 32 Cal.4th at p. 750.)

Moreover, the trial court has a duty to instruct on general principles of law relevant to the issues raised by the evidence. (*People v. Breverman, supra*, 19 Cal.4th at p. 154.) A defendant has a constitutional right to have the jury "'determine every material issue presented by the evidence.' []" (*People v. Flood, supra*, 18 Cal.4th at p. 480.) "Under established law, instructional error relieving the prosecution of the burden of proving beyond a reasonable doubt every element of the charged offense violates the defendant's rights under both the United States and California Constitutions." (*Id.* at pp. 479-480; see also *In re Winship, supra*, 397 U.S. at p. 364.)

C. Standard of review.

Instructional error is reviewed under the independent, de novo standard of review. (*People v. Cole, supra*, 33 Cal.4th at p. 1210.)

D. 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.) But this was erroneous because the instruction does not require a substantial period of watchful waiting or require that the purpose concealed must be a deadly one. (*Post*, Arg. 11.D.(1).) It does not make clear how murder while lying in wait is distinguished from premeditated and deliberate murder that is not committed while lying in wait. (*Post*, Arg. 11.D.(2).) Further, it does not

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. (*Post*, Arg. 11.D.(3).)

(1) The instruction does not require a substantial period of watchful waiting or require that the purpose concealed must be a deadly one.

The jury was instructed, in part, that "[t]he lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation." (RT 33:7456; CT 5:1347.) Justices Kennard and Moreno, in their separate concurring and dissenting opinions in *People v. Stevens, supra*, 41 Cal.4th at pp. 214, 216, concluded that CALJIC No. 8.81.15 is flawed. Both justices determined that it is error to instruct a jury that the lying in wait necessary to establish the special circumstance pursuant to former Penal Code section 190.2, subdivision (a)(15) need not last any longer than that required for the premeditation and deliberation necessary for first degree murder. (*People v. Stevens, supra* 41 Cal.4th at pp. 215-216 (con. & dis. opn. of Kennard, J.), 219-220 (con. & dis. opn. of Moreno, J.).) Such a reading eliminates the requirement of a *substantial* period of watchful waiting, an element this Court holds is essential to the special circumstance. (See *People v. Morales, supra*, 48 Cal.3d at p. 557.)

Appellant recognizes that the *Stevens* majority did not agree with this reasoning. (*People v. Stevens, supra*, 41 Cal.4th at pp. 203-204.) But this Court should revisit the issue. As Justice Moreno emphasized, instructing the jury that the lying in wait need not continue for any particular period but must be substantial (see CT 5:1347) is contradictory.[25] (*People v. Stevens, supra*, 41 Cal.4th at pp. 219-220 (dis. opn. of Moreno, J.).)

CALJIC No. 8.81.15 was further confusing in this case because it did not explain that the required concealment of purpose must be an intent to kill and that the act which appellant was watching and waiting for an opportune time to commit must have been the lethal attack. The instruction does not explain that the "act" is one designed to kill the alleged victim, that the concealed purpose is to kill, or that it is a lethal attack which must take the person by surprise by secret design. (But see *People v. Streeter, supra*, 54 Cal.4th at p. 251 [rejecting this argument].)

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[25] Similar inconsistencies plagued the element of concealment. First jurors were advised that "concealment by ambush" or "some other secret design" would suffice, "even though the victim is aware of the murderer's presence." (CALJIC No. 8.81.15 at ¶ 2.) However, in the fifth paragraph the jurors were told that a "mere concealment of purpose" is not sufficient. (CALJIC No. 8.81.15, ¶ 5.) There must also be a "position of advantage," but this pertains only if there is a "a substantial period of watching and waiting." In the first part of the instruction, watching and waiting need not take any longer than the premeditation required for a first-degree murder. (*Id.*)

(2) The instruction does not make clear how murder while lying in wait is distinguished from premeditated and deliberate murder that is not committed while lying in wait.

Appellant's jury would not have understood how the concept of murder while lying in wait actually differed from first degree premeditated and deliberate murder, in light of the language in 8.81.15. Both required intent to kill. (CT 5:1334-1335, 1347.) Both required a state of mind equivalent to premeditation and deliberation. (CT 5:1334-1335, 1347.) Although the special circumstance purported to require the additional elements of concealment of purpose and surprise attack (CT 5:1347), a reasonable juror would wonder how a defendant could commit first degree premeditated and deliberate murder without these factors.

(3) The instruction does not make clear how murder by means of lying in wait (first degree murder) is distinguished from first degree murder committed while lying in wait.

The lying-in-wait special circumstance instruction does not 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. The jurors were confusingly instructed with CALJIC No. 8.25, setting forth the elements of first degree murder by means of lying in wait, as follows:

> Murder which is immediately preceded by lying-in-wait is murder of the first degree.

> The term "lying-in-wait" is defined as waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence. The lying-in-wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation and deliberation.
>
> The word "premeditation" means considered beforehand.
>
> The word "deliberation" means formed or arrived at or determined as a result of careful thought and weighing of considerations for and against the proposed course of action. [CT 5:1336; RT 33:7448-7449.]

Appellant's jury would not have understood how the concept of murder while lying in wait actually differed from murder by means of lying in wait (i.e., first degree murder). The temporal element of murder by means of lying in wait is stated in CALJIC No. 8.25 in the *identical language* used in the special circumstance instruction (CALJIC No. 8.81.15, ¶ 2) Both instructions provided in relevant part: "*The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.*" (See CT 5:1336 [CALJIC No. 8.25], 5:1347 [CALJIC No. 8.81.15], italics added.)

But this Court has held that "first degree murder *by means of lying in wait* . . . is distinct from intentional murder *while lying in wait*, as required by the related but distinct special circumstance." (*People v. Russell* (2010) 50

Cal.4th 1228, 1244, fn. 3, italics in original.) Jurors must be given standards by which they may meaningfully distinguish a first degree premeditated murder from a death eligible, special circumstance killing. (*Godfrey v. Georgia* (1980) 446 U.S. 420, 427 [100 S.Ct. 1759, 64 L.Ed.2d 398]; *People v. Holt* (1997) 15 Cal.4th 619, 697.) Here, the jury instructions stated the temporal element in identical language, leaving the jurors no basis for making such a distinction.[26]

Appellant recognizes that this Court has repeatedly upheld the CALJIC No. 8.25 instruction on the elements of lying-in-wait murder. (*People v. Russell, supra*, 50 Cal.4th at p. 1244, citing *People v. Moon* (2005) 37 Cal.4th 1, 23.) In *People v. Russell, supra*, however, the instructions addressed only the theory of first degree murder, not the lying-in-wait special circumstance. (*People v. Russell, supra*, 50 Cal.4th at p. 1242-1245.) The jurors there were not presented with the confusing predicament faced by appellant's jurors, who were left to puzzle through two related but distinct instructions.

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[26] As explained above, CALJIC No. 8.81.15 contains another variation of the temporal element, requiring "a substantial period of watching and waiting." But this further adds to the confusion, making it impossible to know which of the instructions the jurors actually followed. (See *People v. Rhoden* (1972) 6 Cal.3d 519, 526.)

E. The lying-in-wait special circumstance instructions 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.

The jurors were instructed with CALJIC No. 8.83 (Special Circumstances–Sufficiency of Circumstantial Evidence–Generally) and No. 8.83.1 (Special Circumstances–Sufficiency of Circumstantial Evidence to Prove Required Mental State). (RT 33:7457-7458; CT 5:1349-1350.)

The difference in language between CALJIC Nos. 8.83 and 8.83.1 is striking. CALJIC No. 8.83 contains the language "before an inference essential to establish a special circumstance may be found to have been proved beyond a reasonable doubt, *each fact or circumstance upon which that inference necessarily rests must be proved beyond a reasonable doubt.*" (Italics added.)

No similar language is found in CALJIC No. 8.83.1 to address specific intents or mental states. Nothing in CALJIC No. 8.83.1 requires that the facts or circumstances upon which an inference of a required specific intent or mental state rests, be found beyond a reasonable doubt.

The instruction on the special circumstance of lying in wait includes the requirement that the duration of the lying in wait must "show a state of mind equivalent to premeditation or deliberation." (RT 33:7456; CT 5:1347; CALJIC No. 8.81.15.) This reduced burden of proof thus denied appellant his

rights to trial by jury and to due process under the federal and state Constitutions. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15.)

CALJIC No. 8.83.1 permitted a reduced standard of proof when specific intent or mental state is proved by circumstantial evidence. In other contexts, such as statutory construction, the specific is to prevail over the general. (*Santa Clara County v. Deputy Sheriffs' Assn.* (1992) 3 Cal.4th 873-883.)

Specific intent and mental state were also addressed in CALJIC Nos. 3.31 and 3.31.5, respectively. Those instructions require a union or joint operation of the act or conduct and the specific intent or mental state, and inform the jurors that the crime is not committed unless the specific intent or mental state exists. (RT 33:7434-7435; CT 5:1311-1312.) CALJIC Nos. 3.31 and 3.31.5 also do not instruct the jurors that the specific intent or mental state need be found beyond a reasonable doubt, nor that the facts which underlie those inferences must be found beyond a reasonable doubt.

The omission of reasonable doubt from CALJIC No. 8.83.1 permitted the jurors to find the elements of specific intent or mental state, wherever required, without finding their underlying facts beyond a reasonable doubt.

Here, the jurors may reasonably have concluded that because CALJIC No. 8.83.1 did not refer to reasonable doubt, their findings of fact supporting inferences of specific intent or of mental state need not be made by the constitutionally required level of proof. Yet required specific intents or mental states are elements just as indispensable to a guilty finding of most of the counts against appellant as any other element of the offenses charged. Each and every element must be found beyond a reasonable doubt or due process is denied. (*In re Winship, supra*, 397 U.S. at pp. 363, 364; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524 [99 S.Ct. 2450, 61 L.Ed.2d 39]; *Apprendi v. New Jersey, supra*, 530 U.S. at p. 477.)

F. The erroneous jury charge violated appellant's due process rights and the right to heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed.

"In a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement." (*Middleton v. McNeil, supra*, 541 U.S. at p. 437; see *People v. Mil* (2012) 53 Cal.4th 400, 417; U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. 1, § 1, 7, 15, 16 & 17.) Ambiguous or inconsistent instructions violate due process if there is a reasonable likelihood that the jury has misunderstood or misapplied them. (*People v. Letner, supra*, 50 Cal.4th at p. 182.)

The error also violated the Eighth Amendment, which requires heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama, supra,* 447 U.S. at pp. 633-646; *Kyles v. Whitley, supra,* 514 U.S. at p. 422; *Burger v. Kemp, supra*, 483 U.S. at p. 785; U.S. Const., 8th & 14th Amends.)

Further, because the error arbitrarily violated appellant's state created right to proper instruction on the burden of proof, under the state Constitution and the Evidence Code, including Evidence Code sections 500, 501 and 502, the error violated his right to due process under the Fourteenth Amendment. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346; see *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; U.S. Const., 5th & 14th Amends.)

The lying-in-wait special circumstance instructions, which misdescribed several elements, were likely to mislead a juror to believe that the intent required was no greater than, or different from, that for premeditation and deliberation, that a substantial period of watchful waiting was not required, that the purpose concealed did not have to be an intent to kill, and that the watchful waiting did not have to be for the purpose of launching a lethal attack.

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

Instructional error that omits an element or otherwise violates due process is reviewed under the stringent *Chapman v. California, supra*, 386 U.S. 18 "harmless beyond a reasonable doubt" standard. (*People v. Mil, supra*, 53 Cal.4th at p. 409; *People v. Hudson* (2006) 38 Cal.4th 1002, 1013; *Neder v. United States* (1999) 527 U.S. 1, 4 [119 S.Ct. 1827, 144 L.Ed.2d 35].)

This Court does not "'become in effect a second jury to determine whether the defendant is guilty.'" (*Neder v. United States, supra*, 527 U.S. at p. 19.) Rather, this Court must conduct a thorough review of the record and then determine whether it demonstrates beyond a reasonable doubt that the jury's verdict would have been the same absent the erroneous instructions. (*People v. Mil, supra*, 53 Cal.4th at p. 417.) The omission of an element, for example, is not harmless "'where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding . . . .'" (*Ibid.*, quoting *Neder v. United States, supra*, 527 U.S. at p. 19.) To say that an instructional error did not contribute to the verdict is "'to find that error unimportant *in relation to everything else the jury considered on the issue in question, as revealed by the record.*'" (*People v. Hudson, supra*, 38 Cal.4th at p. 1013 [italics in original], citing *People v. Harris* (1994) 9 Cal.4th 407, 426.)

Appellant explained in Argument 10, *ante*, that the evidence is insufficient to sustain the true finding on the lying-in-wait special circumstance. But as this Court has held, a reviewing court may not even consider the overwhelming weight of the prosecution's evidence on harmless error review of an instructional omission that lowers the prosecution's burden of proof. (See *People v. Aranda* (2012) 55 Cal.4th 342, 368.)

> . . . But if a reviewing court were to rely on its view of the overwhelming weight of the prosecution's evidence to declare there was no reasonable possibility that the jury based its verdict on a standard of proof less than beyond a reasonable doubt, the court would be in the position of expressing its own idea "of what a reasonable jury would have done. And when [a court] does that, 'the wrong entity judge[s] the defendant guilty.' [Citation.]" (*Sullivan, supra*, 508 U.S. at p. 281.) No matter how overwhelming a court may view the strength of the evidence of the defendant's guilt, that factor is not a proper consideration on which to conclude that the erroneous omission of . . . [an instruction which lowers the prosecution's burden of proof] was harmless under *Chapman*.

(*People v. Aranda, supra*, 55 Cal.4th at p. 368.)

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. According to Carrillo, appellant confronted Johnson directly by shaking his hand and then displaying a handgun. (RT 22:5020-5022.) Carrillo testified that appellant pulled the handgun from his (appellant's) waistband and shot

Johnson in the head. (RT 22:5022-5024.) A rational trier of fact thus could not conclude beyond a reasonable doubt that the gunman's words or actions concealed his purpose.

The evidence also did not establish a substantial period of watchful waiting. Before the shooting, Johnson and appellant met outside the apartment. They went inside the apartment together, and then they went to Masubayashi's vehicle, but were interrupted when the police appeared. (RT 15:3621, 21:4979-4984.) Appellant went back to the apartment, and then returned to meet Johnson and Masubayashi at Masubayashi's vehicle. (RT 15:3623-3631, 16:3843-3846.) They drove together to a public parking lot where Chung's vehicle was parked, and then Johnson and appellant exited the vehicle. The gunman was not watching for Johnson's arrival to take him by surprise. Johnson had already arrived and was in the presence of both appellant and Carrillo. (RT 22:5019-5028.)

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 murder of Johnson followed a series of encounters with him, and other nonlethal events, including an interruption of the events by the presence of the police, culminating in the shooting of Johnson in a face-to-face exchange. (RT

22:5022-5024.) The evidence thus reveals neither an immediate killing nor a continuous flow of the uninterrupted lethal events.

In view of the evidence presented in appellant's case, the prosecution will be unable to prove beyond a reasonable doubt that the jury's true finding on the lying-in-wait special circumstance would have been the same absent the erroneous instructions. (See *Sullivan v. Louisiana, supra*, 508 U.S. at p. 279; *People v. Sakarias, supra*, 22 Cal.4th at p. 625 ["We may affirm the jury's verdicts despite the error if, but only if, it appears beyond a reasonable doubt that the error did not contribute to the particular verdict at issue."]).

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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.

In recent cases, this Court has continued to reject without further analysis a claim that California's lying-in-wait special circumstance violates the Eighth Amendment because it fails to adequately narrow the class of persons eligible for the death penalty. (See, e.g., *People v. Streeter, supra*, 54 Cal.4th at pp. 252-253; *People v. Livingston* (2012) 53 Cal.4th 1145, 1174; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1095.)

Appellant asserts that the opinions in these cases actually provide further proof that the lying-in-wait special circumstance, as charged by prosecutors and construed by this Court, applies to virtually any first degree murder.

A. A special circumstance must genuinely narrow the class of persons eligible for the death penalty.

Pursuant to the Eighth Amendment, a state's capital sentencing scheme "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens* (1983) 462 U.S. 862, 876 [103 S.Ct. 2733, 77 L.Ed.2d 235]; see also *Arave v. Creech* (1993) 507 U.S. 463, 471 [113 S.Ct. 1534, 123 L.Ed.2d 188] [state court's limiting construction to statute satisfied constitutional concerns].) It

"must provide a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many in which it is not.'" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, quoting *Furman v. Georgia* (1972) 408 U.S. 238, 313 [92 S.Ct. 2726, 33 L.Ed.2d 346] (conc. opn., White, J.).) Further, the death penalty should be reserved for only the most extreme cases. (*Gregg v. Georgia* (1976) 428 U.S. 153, 182 [96 S.Ct. 2909, 49 L.Ed.2d 859].) Thus, the federal constitution requires that a capital sentencing statute provide the sentencer with identifiable criteria to separate a capitally-eligible crime from other first degree murders. (See *id.* at p. 199; see Cal. Const., art. 1, § 17.)

B. The constitutionality of California's lying-in-wait special circumstances has been questioned for over 20 years.

Over the years, several jurists have opined that California's lying-in-wait special circumstance is unconstitutional.

Former Penal Code section 190.2, subdivision (a)(15) was first found to be constitutionally invalid by Justice Mosk in his concurring and dissenting opinion in *People v. Morales, supra*, 48 Cal.3d at p. 574.[27] Justice Mosk concluded that the circumstance was so broad that it incorporated virtually every intentional killing, and therefore did not distinguish the few cases in

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[27] The majority of this Court in *Morales* found the lying-in-wait special circumstance to be constitutional. (*Id.* at pp. 557-558.)

which capital punishment is imposed from the many in which it is not. He explained: "Almost always the perpetrator waits, watches, and conceals his true purpose and intent before attacking his victim; almost never does he happen on his victim and immediately mount his attack with a declaration of his bloody aim." (*People v. Morales, supra,* 48 Cal.3d at p. 575 (conc. & dis. opn., of Mosk, J.).)

Justice Mosk also determined that the circumstance does not provide a meaningful basis for distinguishing those eligible for execution, stating:

> To my mind, the killer who waits, watches, and conceals is no more worthy of blame or sensitive to deterrence than the killer who attacks immediately and openly.

(*Ibid*; see *People v. Webster* (1991) 54 Cal.3d 411, 461-462 [conc. & dis. opn. of Mosk, J.].)

In *People v. Webster, supra*, Justice Broussard filed a concurring and dissenting opinion in which he concluded that the special circumstance is unconstitutional. Historically, lying in wait was intended to be "simply one kind of premeditated murder," he said. (*People v. Webster, supra*, 54 Cal.3d at p. 465 (conc. & dis. opn. of Broussard, J.).) To function as a special circumstance, however, it must provide "a qualitative moral difference" between ordinary first degree murders and capital murders, "one of such significance that a person who kills by lying in wait should be executed, or at

least imprisoned for life without possibility of parole, while one who kills without lying in wait (or any other special circumstance) deserves at most life imprisonment with possibility of parole." (*Id.* at pp. 465-466.) However, as it has been construed by the majority, it does not: "Lying in wait proves premeditation, and thus proves that a murder is of the first degree. But those first degree murderers who lie in wait are no more deserving of death than those who act with dispatch." (*Id.* at p. 468.)

In *Morales v. Woodford* (9th Cir. 2004) 388 F.3d 1159, 1180, Circuit Judge McKeown, dissenting in part, determined that California's lying-in-wait special circumstance had been expanded "to such a degree that the line between premeditated murder and capital murder is but an illusory veil." Judge McKeown explained that this Court had construed the element of concealment in a manner which made it essentially meaningless. (*Id.* at pp. 1185-1186.) Although concealment of purpose rather than actual physical concealment was found to be sufficient, sometimes not even that was demanded:

> In *People v. Hillhouse*, the California Supreme Court held that a defendant could be death eligible under the lying-in-wait special circumstance despite the fact that he announced his purpose to his victim, stating "I ought to kill you" prior to committing the murder. [*People v. Hillhouse* (2002) 27 Cal.4th 469, 501.] Under this recent iteration of the rule, criminal defendants meet the concealment test regardless of whether they

> are hidden or seen, and even whether they conceal their intentions or reveal them.

(*Morales v. Woodford, supra*, 388 F.3d at p. 1187.)

Justice McKeown found the second element of lying in wait–a substantial period of watching and waiting for an opportune time to act–to be even less limiting, because this Court has construed it to be the equivalent of an ordinary premeditated or deliberate murder. (*Id.* at pp. 1187-1188.)

The circuit judge then concluded that "the question of surprise is all that remains as a truly narrowing factor." (*Id.* at p. 1188.) But this too failed to adequately limit those defendants eligible for the ultimate punishment: " . . . taking a page from the California courts' book on concealment, surprise apparently can mean nothing more than concealment of purpose. Standing alone, I fail to see how this singular factor significantly narrows the pool of defendants eligible for the death penalty . . . ." (*Ibid.*)

Finally, in a concurring and dissenting opinion in *People v. Stevens, supra*, 41 Cal.4th 182, Justice Moreno concluded that the lying-in-wait special circumstance, as interpreted by this Court, violates the Eighth Amendment. (*Id.* at p. 216 (conc. & dis. opn. of Moreno, J.).) After reviewing the history of the circumstance and the way in which its three elements have been construed, the justice concluded that: "According to this court's jurisprudence, then, the lying-in-wait special circumstance, which requires neither lying nor waiting, is

nothing more than murder by surprise . . . ." (*Id.* at pp. 217-220, 220.) Such murder, however, fails to constitutionally narrow:

> Most of California's many special circumstances fulfill the function of identifying the subclass of murderers more deserving of death. . . . Not so with murder by surprise. The lying-in-wait special circumstance as interpreted by this court declares in effect: "The defendant deserves a greater punishment than the ordinary first degree murderer because not only did he commit first degree murder, but he failed to let the person know he was going to murder him before he did." How can we make sense of this kind of special circumstance? Not only is surprise a common feature of murder–since murderers usually want their killings to succeed, and victims usually don't want to be murdered–but it is not at all obvious that a murderer who does not conceal his purpose before murdering the victim is less culpable than one who does.

(*Id.* at p. 223.)

In sum, these well-reasoned and thorough opinions set out a compelling argument that the special circumstance is constitutionally invalid.[28]

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[28] Justice Kennard has also expressed concern with the constitutionality of the lying-in-wait special circumstance but ultimately concluded it is valid. (See *People v. Hillhouse, supra*, 27 Cal.4th at pp. 512-513 (conc. opn. of Kennard, J.); *People v. Jurado* (2006) 38 Cal.4th 72, 145-147 (conc. opn. of Kennard, J.); *People v. Stevens, supra*, 41 Cal.4th at pp. 214-216 (conc. & dis. opn. of Kennard, J.).) Justice Werdegar has determined that the circumstance is appropriately limited by requiring a defendant to actively conceal his purpose by deceitful behavior. (*Id.* at pp. 213-214 (conc. opn. of Werdegar, J.).)

C. This Court's recent opinions further expand the reach of the already-over-broad special circumstance.

As set forth above, a majority of this Court continues to hold that the lying-in-wait special circumstance does not unconstitutionally fail to narrow the class of persons eligible for the death penalty. (*People v. Streeter, supra*, 54 Cal.4th at pp. 252-253; *People v. Livingston, supra*, 53 Cal.4th at p. 1174; *People v. Mendoza, supra*, 52 Cal.4th at p. 1095.) However, an examination of the disparate facts in these cases actually strengthens the claim that the special circumstance encompasses virtually any first degree premeditated murder.

In *People v. Streeter, supra*, 54 Cal.4th 205, the Court upheld the lying-in-wait special circumstance even though a series of discrete events occurred between the alleged lying in wait and the victim's death, including an apparent effort by the defendant to leave the scene. Defendant Streeter asked Buttler, the mother of his son, to meet him at a restaurant so he could visit with their child. When Buttler arrived, Streeter took their son and started to walk toward his own car. Buttler followed and they began to argue. After Buttler tried to get their son out of Streeter's car, a struggle ensued, during which Streeter struck and kicked Buttler. Streeter then went to his trunk and got out a container. Buttler ran, but Streeter chased her and poured gasoline on her. Streeter returned to his car, and Buttler again ran. As Streeter approached her

holding a lighter, a bystander intervened and tried unsuccessfully to grab it from his hand. Streeter managed to get close enough to ignite the gas and set Buttler on fire. (*People v. Streeter, supra*, 54 Cal.4th at pp. 211-214.)

On appeal, defendant Streeter argued, inter alia, that he did not kill Buttler while lying in wait because there was a cognizable interruption between his waiting for her to arrive and the fatal attack. This Court rejected the claim, finding that his attempt to take their son away from the scene was a "preparatory step" in the assault. (*Id.* at pp. 248-249.)

In *People v. Livingston, supra*, 53 Cal.4th 1145, this Court found all elements of the lying-in-wait special circumstance present although the defendant apparently told his victims he would return to kill them. Therein, defendant Livingston and others with him got into an argument with one of the security guards at an apartment complex. Witnesses heard the group tell the guards they would "get them" later. Later that evening, Livingston approached the guard shack where four men, wearing bulletproof vests, were inside with guns. Livington stood in the doorway and fired an assault rifle, killing two of the guards and injuring the other two. (*Id.* at pp. 1145, 1152-1153.)

This Court found that the defendant had concealed his purpose, and his physical presence until he suddenly appeared at the door of the shack. (*Id.* at

p. 1172.) It also found a substantial waiting and watching for an opportune time to act, since Livingston left after the argument and returned later. Despite the fact that the victims were armed, wearing protective vests and forewarned that defendant would return, the Court characterized the shooting as a surprise attack on unsuspecting victims from a position of advantage. (*Id.* at p. 1173.)

Finally, in *People v. Mendoza, supra*, 52 Cal.4th 1056, the Court sustained the special circumstance where the victim approached the defendant, even though the latter did not know the encounter would occur. Defendant Mendoza was walking along the street with others. A police officer drove up behind them and stopped. The officer ordered one of the young men in the group to put his hands on the hood of the police car and began to pat him down. Mendoza pulled out a gun and shot the officer once, killing him. (*Id.* at pp. 1064-1065.)

At the close of Mendoza's trial, the trial court agreed that the evidence was insufficient to support the lying-in-wait special circumstance and dismissed it. (*Id.* at p. 1072.) This Court reversed the trial court's ruling and reinstated the special circumstance, finding that although the officer was aware of Mendoza's physical presence, the defendant had concealed his murderous purpose and taken the officer by surprise when he fired his weapon. (*Id.* at p. 1074.)

If the facts in each of these cases can support the lying-in-wait special circumstance, it is hard to imagine any first degree murder that would not qualify. These radically different situations provide yet more proof that California's lying-in-wait special circumstance pursuant to Penal Code section 190.2, subdivision (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's convictions should be reversed due to the cumulative prejudice caused by numerous errors, separately identified in Arguments 1 through 12, inclusive, *ante*, 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. (Cal. Const., art. 1, §§ 7, 15, 16 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.).

"The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." (*Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927, citing *Chambers v. Mississippi, supra*, 410 U.S. at pp. 298, 302-303 [combined effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial"]; see *Montana v. Egelhoff* (1996) 518 U.S. 37, 53 [116 S.Ct. 2013, 135 L.Ed.2d 361] [*Chambers* held that "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation"]; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn.15 [98 S.Ct. 1930, 56 L.Ed.2d 468] ["[T]he cumulative effect of the potentially damaging

circumstances of this case violated the due process guarantee of fundamental fairness . . . ."].)

"[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. [Citations.]." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) Thus, even in a case with strong government evidence, reversal is appropriate when "the sheer number of . . . legal errors raises the strong possibility the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone." (*Id.* at p. 845; see also *Gerlaugh v. Stewart* (9th Cir. 1997) 129 F.3d 1027, 1043; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476.)

Moreover, even if some of the errors raised in the preceding sections of this brief do not alone rise to the federal level, the cumulative effect of the combination of federal constitutional and other trial errors must still be reviewed under *Chapman v. California, supra*, 386 U.S. at p. 24. (See *People v. Woods* (2006) 146 Cal.App.4th 106, 117 [because some errors were of federal constitutional magnitude, cumulative effect of misconduct is assessed under the *Chapman* standard; respondent has the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict].) Indeed, it is well recognized that cumulative prejudice flowing from state law error can

result in the denial of a fair trial under the federal due process clause. This can occur, as here, "where the violation of a state's evidentiary rule has resulted in the denial of fundamental fairness, thereby violating due process . . . ." (*Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 286; see also *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, fn. 6.)

In a close case which turns on the credibility of witnesses, as here, anything which tends to discredit the defense witnesses in the eyes of the jury or to bolster the story told by the prosecution witness, "requires close scrutiny when determining the prejudicial nature of any error." (*People v. Briggs* (1962) 58 Cal.2d 385, 404; see also *United States v. Carroll* (6th Cir. 1994) 26 F.3d 1380, 1384 [curative instruction not sufficient where conflicting testimony was virtually the only evidence]; *United States v. Simtob* (9th Cir. 1990) 901 F.2d 799, 806; *People v. Taylor* (1986) 180 Cal.App.3d 622, 626 [error requires reversal in "close case where credibility was the key issue"].)

> In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.

(*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.)

When a case is close, a small degree of error in the lower court should, on appeal, be considered enough to have influenced the jury to wrongfully convict the appellant. (*People v. Wagner* (1975) 13 Cal.3d 612, 621; *People v.*

Collins (1968) 68 Cal.2d 319, 332.) "Where a trial court commits an evidentiary error, the error is not necessarily rendered harmless by the fact there was other, cumulative evidence properly admitted." (*Parle v. Runnels, supra*, 505 F.3d at p. 928; see (1973), *Krulewitch v. United States* (1949) 336 U.S. 440, 444-445 [69 S.Ct. 716, 93 L.Ed. 790] [holding that, in a close case, erroneously admitted evidence – even if cumulative of other evidence – can "tip[] the scales" against the defendant]; *Hawkins v. United States* (1954) 358 U.S. 74, 80 [79 S.Ct. 136, 3 L.Ed.2d 125] [concluding that erroneously admitted evidence, "though in part cumulative," may have "tip[ped] the scales against petitioner on the close and vital issue of his [state of mind]"].)

Here, there is a substantial record of serious errors that cumulatively violated appellant's due process rights under *Chambers v. Mississippi, supra*, 410 U.S. 284. Against the backdrop of a jury selected in a way as to 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), the substantial unjustified delay in charging appellant denied him due process because it resulted in the unavailability of exculpatory witnesses and loss of evidence material to his defense of third party culpability. (*Ante*, Arg. 4.)

What ensued was a trial of hearsay and innuendo, built upon a foundation of prejudicial, inadmissible evidence, including the admission of

Masubayashi's testimony recounting Perdon's purported statement of appellant's confession to shooting Johnson, which statement was shown to be fabricated. (*Ante,* Arg. 7.)

The erroneous admission of Masubayashi's testimony, as set forth in the preceding paragraph, was compounded by 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.)

Appellant was denied the constitutional right to present a complete defense because of the trial court's erroneous exclusion of relevant evidence critical to the defense case of third party culpability–i.e., that Carrillo was the gunman. (*Ante,* Args. 5 & 6.)

The trial court prejudicially erred in excluding eyewitness Matthew Towne's statements to Officer Terrance Bowers at the scene of the shooting–providing a description of the gunman only a few minutes after the shooting and while Towne was visibly nervous and the gunman was still at large, which description matched Carrillo but not appellant. (*Ante*, Arg. 5.)

The trial court prejudicially erred in excluding defense witness Alana 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.)

The trial court prejudicially erred by 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.)

Finally, against the backdrop of the insufficiency of the evidence to sustain the true finding on the lying-in-wait special circumstance (*ante*, Arg. 10), the lying-in-wait special circumstance jury instructions were riddled with errors, operating individually and in combination to deprive appellant of a constitutionally fair trial, requiring reversal of the true finding thereon and the death judgment. (*Ante*, Arg. 11.) 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.

/ / /

Penalty Phase and Sentencing

14. 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 Matthew Towne as a witness for the penalty phase, thereby depriving appellant of the state and federal constitutional rights to due process, to present a defense, to a penalty determination based on all available mitigating evidence, and to a fair and reliable determination of penalty.

A. Introduction and procedural background.

During the penalty phase, appellant sought to call Matthew Towne, an eyewitness to the shooting who had moved outside of California and could not be located to testify at the guilt phase trial, but who was located in time to testify at the penalty phase. (RT 34:7710-7720.)

Towne would have testified that at the time of the shooting he was standing outside the Gateway Urgent Care, where he was employed, talking to fellow employees John Fowler and Jose Rodriguez. (CT 6:1643 [affidavit of Matthew Towne].) 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 gave a statement to Officer Bowers at the scene shortly thereafter, wherein he also identified the shooter as having a thin build. (RT

31:7009; CT 6:1644.) The investigative report prepared by Bowers states, in part:

> . . . Towne said he heard a single gunshot. As he looked towards the parking lot, he saw a male 5'8" to 6' tall, thin build, walking eastbound through the parking lot away from the driver's side door. The unknown male fired 3 to 4 more shots in an eastbound direction. . . . . [Court Exh. 10, Bates No. 18 (Interview of Towne by Officer Bowers); see CT 6:1643-1644.]

Appellant sought to present Towne's testimony to establish lingering doubt as a mitigating factor under Penal Code section 190.3, factors (a) and (k). (RT 34:7713, 7717-7718.) 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.)

The prosecutor objected to Towne's proffered testimony, stating that although the defense could argue lingering doubt, it should be precluded from offering evidence that appellant was not the shooter. (RT 34:7710-7712.)

The court sustained the prosecutor's objection and excluded Towne's proffered testimony on the ground that the defense was precluded from relitigating issues of appellant's guilt at the penalty phase. (RT 35:7846-7849.)

The court instructed the jury on lingering doubt in the language of a defense requested special instruction, which stated:

> Each individual juror may consider as a mitigating factor residual or lingering doubt as to whether defendant killed the victim. Lingering or residual doubt is defined as the state of mind between beyond a reasonable doubt and beyond all possible doubts.
>
> Thus, if any individual juror has a lingering or residual doubt about whether the defendant killed the victim, he or she must consider this as a mitigating factor and assign to it the weight you deem appropriate. [RT 42:9307; CT 6:1515.]

As explained below, in view of the strong exculpatory nature of Towne's proffered testimony–pointing convincingly to Carrillo as the actual gunman–there is a reasonable possibility that exclusion of the testimony affected the verdict. Reversal of the death judgment thus is required for a deprivation of the state and federal constitutional rights to due process, to present a defense, to a penalty determination based on all available mitigating evidence, and to a fair and reliable determination of penalty. (Cal. Const., art. 1, §§ 7, 15, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.).

B. Standard of review.

The erroneous exclusion of mitigating evidence in a capital trial is subject to the *Chapman* harmless-beyond-a-reasonable-doubt standard of review. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1031-1032; see, e.g., *People v. Robertson, supra*, 48 Cal.3d at pp. 53-56 [error under *Skipper v. South Carolina* (1986) 476 U.S. 1 [106 S.Ct. 1669, 90 L.Ed.2d 1] in not considering good conduct of defendant while in jail is subject to *Chapman*

review), cert. denied, 493 U.S. 879 (1989); *Chapman v. California, supra*, 386 U.S. 18.)

C. Eyewitness Towne's proffered exculpatory testimony was material to the jury's consideration of the defense case in mitigation because it was defense-favorable evidence related directly to the circumstance of the crime and it was evidence relevant to the issue of lingering doubt whether appellant was the shooter, and thus exclusion of this critical testimony was prejudicial, requiring reversal of the death verdict.

"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, supra*, 476 U.S. at p. 4.) "'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. . . .'" (*McKoy v. North Carolina* (1990) 494 U.S. 433, 440 [110 S.Ct. 1227, 108 L.Ed.2d 369] [citation omitted]; see also Evid. Code, § 210 [relevant evidence is evidence having tendency in reason to prove or disprove any disputed fact of consequence to determination of action].)

"[E]vidence 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, 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 [citations omitted].)

Towne's proffered eyewitness testimony, which was entirely consistent with the statement he made to the police at the scene of the shooting, identified the shooter as having a thin build, thereby eliminating appellant as the shooter and provided persuasive evidence supporting appellant's defense of third party culpability–i.e., that Carrillo was the shooter. (RT 34:7709-7720; CT 1:135-158, 6:1643-1644; Court Exh. 10, p. 2.)

The proffered evidence was presented in admissible form because it was eyewitness testimony, fully subject to cross-examination, of a percipient witness to the shooting, and because the physical description eliminated appellant and matched that of Carrillo, it linked Carrillo circumstantially to the actual perpetration of the shooting of Johnson. (Cf. *People v. Bradford* (1997) 15 Cal.4th 1229, 1325.)

> [T]o be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt[] must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352.

(*Ibid.*; accord, *People v. Lynch* (2010) 50 Cal.4th 693, 756; *People v. Hall* (1986) 41 Cal.3d 826, 833 [third party culpability evidence is relevant and admissible only if it succeeds in "linking the third person to the actual perpetration of the crime"].) Accordingly, Towne's proffered exculpatory testimony was material to the jury's consideration of the defense case because (1) it related directly to the circumstances of the crime and (2) it would have been mitigating as it indicated appellant was not the shooter.

Moreover, lingering doubt as to the defendant's guilt is appropriate for consideration by the jury as a factor in mitigation, and the defendant has an absolute right to present evidence on the issue and argue its relevance to the jury at the penalty phase. (*People v. Gay* (2008) 42 Cal.4th 1195, 1213 [reversal of death verdict, concluding that the "trial court's evidentiary rulings [excluding evidence of lingering doubt] violated Penal Code section 190.3 and that the error, exacerbated by the trial court's admonition to the jury that defendant had been 'conclusively proven' to be the shooter and to disregard any statement or evidence to the contrary, was prejudicial"]; *People v. Linton, supra*, 56 Cal.4th at p. 1198.)

Evidence and argument on the issue of lingering doubt is relevant to either factor (a) or factor (k), or both. (See *People v. Gay*, *supra*, 42 Cal.4th at pp. 1217-1218 [relevant as a circumstances of the offense under factor (a)];

People v. Farmer (1989) 47 Cal.3d 888, 921, fn. 5 [defendant has the right to argue his possible innocence to the jury as a factor in mitigation]; *People v. Price* (1991) 1 Cal.4th 324 [subsection [k] of Penal Code section 190.3 encompasses the notion of residual or lingering doubt about a capital defendant's guilt, including the nature of his participation in the capital crime]; *People v. Sanchez* (1995) 12 Cal.4th 1 ["In resolving the issue of penalty, a capital jury may consider residual doubts about a defendant's guilt."]; see *People v. Cox* (1991) 53 Cal.3d. 618, 677; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.)

In *People v. Terry* (1964) 61 Cal.2d 137, cited with approval in *People v. Gay*, *supra*, 42 Cal.4th at pp. 1218-1221, during jury selection the trial court refused to permit the defendant to examine the jurors on their reaction to his claim of innocence and advised the jury they could not even consider that claim. (*Id.* at pp. 145-147.) On appeal from the judgment of death, this Court noted that the trial court "properly pointed out that the jury was not to relitigate the issue of the defendant's guilt of first degree murder." (*Id.* at p. 147.) This Court further stated, however, that the jury which determines the penalty "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."

(*Id.* at pp. 145-146.) The trial court in *Terry* thus erred in preventing the defendant from arguing "lingering doubts" concerning his "possible innocence of the crimes" as "a mitigating factor" to avoid a death verdict. (*Id.* at pp. 145-147.)

In *People v. Gay*, *supra*, 42 Cal.4th 1195, this Court reversed the defendant's death judgment, holding that the trial court abused its discretion when it barred defendant from offering evidence at the penalty retrial concerning the circumstances of the murder, which included evidence that another person admitted to firing all of the shots, as well as corroborating testimony from eyewitnesses. (*Id.* at p. 1217.) "The trial court was under the impression that a defendant at a penalty retrial could not present evidence that was inconsistent with the verdict reached in the guilt phase[,]" but that was incorrect: evidence of the circumstances of the offense, including evidence creating a lingering doubt as to guilt, is admissible at a penalty retrial under Penal Code section 190.3. (*Id.* at pp. 1217-1218.) A defendant may rely on such evidence to urge possible innocence as a factor in mitigation. (*Id.* at p. 1221.)

> Our holding that evidence of the circumstances of the offense, including evidence creating a lingering doubt as to the defendant's guilt of the offense, is admissible at a penalty retrial under Penal Code section 190.3 is in accord with other jurisdictions that, like California, have recognized the legitimacy

> of a lingering doubt defense at the penalty phase of a capital trial.

(*People v. Gay*, *supra*, 42 Cal.4th at p. 1221.)

In view of the fact that Towne's proffered testimony circumstantially linked Carrillo to the actual perpetration of the killing of Johnson, and eliminated appellant as the shooter, the trial court abused its discretion when it barred appellant from offering this evidence at the penalty concerning the circumstances of the murder. (See *People v. Gay*, *supra*, 42 Cal.4th at p. 1217.)

A trial court's error at the penalty phase will require reversal of a penalty verdict if "there is a reasonable (i.e. realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred." (*People v. Brown, supra*, 46 Cal.3d 432, 448; *People v. Lancaster*, *supra*, 41 Cal.4th at p. 94 [error in admitting or excluding evidence at the penalty phase of a capital trial is reversible if there is a reasonable possibility it affected the verdict].)

Where the error implicates a federal constitutional right (here, the rights to due process, to present a defense, to a penalty determination based on all available mitigating evidence, and to a fair and reliable determination of penalty (U.S. Const., 5th, 6th, 8th & 14th Amends.)), the applicable test is whether the error is harmless beyond a reasonable doubt. (*Chapman v.*

California, supra, 386 U.S. at p. 24.) Where a state court's erroneous application of state law renders a trial fundamentally unfair, as here, the error gives rise to a violation of federal due process. (See *Estelle v. McGuire, supra*, 502 U.S. at p. 72; *Donnelly v. DeChristoforo, supra*, 416 U.S. at p. 643; *Ortiz v. Stewart, supra*, 149 F.3d at p. 934.)

The penalty phase jury was instructed that it could review and consider all evidence presented during the guilt phase of trial. (RT 42:9316-9317.) Seizing upon these instructions, the prosecution argued extensively during closing summation that the circumstances of the killing of Johnson, together with appellant's lack of remorse as shown by his testimony denying that he shot Johnson, warranted a verdict of death. (RT 42:9201-9208, 9210, 9214-9218.) The prosecution thus squarely presented to the penalty phase jury the issue whether appellant actually committed the underlying offenses.

Appellant sought to counter this evidence by arguing that although the defense respected the verdict the jury should consider–in mitigation as lingering doubt–the exculpatory evidence pointing to Carrillo as the shooter. (RT 42:9258-9259.) Defense counsel argued, in part:

> You can also consider an instruction that we've referred to as lingering doubt. And, ladies and gentlemen, that is the state of mind between reasonable doubt and all possible doubt. We don't have any DNA evidence. We don't have any scientific evidence. We just have the word of John -- John Masubayashi

and Ryan Carrillo. And you've heard their career criminal background.

Now I'm not asking you to relitigate guilt. We accept your verdict. We respect your verdict. But whether you're deciding this awesome decision of whether or not another human being should be executed, perhaps as moral human beings you might require a higher standard of proof than beyond a reasonable doubt. [¶]

Perhaps 20 years down the road Mr. Carrillo is on his death bed and he wants to make his peace with somebody and finally admits, "yeah, it was me that had the gun when it happened." We don't know, ladies and gentlemen. All I'm asking you to do is follow that lingering doubt instruction.

And as moral, sympathetic human beings, it's something you can consider. And if you choose to -- you don't have to. If you choose to, you can require beyond a residual doubt. If there's some residual doubt there, you can use that as a factor which you can consider, take into account, and guide you to life without possibility of parole. [RT 42:9258-9260.]

But defense counsel's argument was undercut by the fact that the trial court prevented the jury from hearing Towne's proffered exculpatory testimony, which itself was strong, persuasive evidence of lingering doubt. Towne's proffered exculpatory testimony was material to the jury's consideration of lingering doubt whether appellant was the shooter, and thus there is a reasonable possibility that exclusion of the testimony affected the verdict. This is especially true here because Towne's proffered testimony was directly relevant to the issue whether appellant fired the shot that killed Johnson.

Moreover, one of the 12 jurors sitting in judgment of life or death did not return a verdict in the guilt phase, having first been substituted in as a regular juror only during the penalty phase. (CT 6:1416, 1444.) If Towne's exculpatory testimony had been admitted, there is a reasonable possibility that at least one juror would have had a lingering doubt about appellant's guilt of the first degree special-circumstance murder of Johnson.

Lingering doubt about appellant's guilt was an important mitigating factor in this case. By precluding material evidence of lingering doubt, the trial court prejudicially undermined the defense case in mitigation for a life sentence. Residual or lingering doubt whether appellant shot Johnson reasonably would have caused the sentencing jury to view the mitigating and aggravating circumstances differently, thus presenting a reasonable possibility the jury would have concluded that appellant did not deserve the death penalty. (See *People v. Gay*, *supra*, 42 Cal.4th at p. 1227 ["As other courts have noted, 'residual doubt is perhaps the most effective strategy to employ at sentencing.'"], citing *Chandler v. United States* (11th Cir. 2000) 218 F.3d 1305, 1320, fn. 28, *Williams v. Woodford* (9th Cir. 2002) 384 F.3d 567, 624, and Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* (1998) 98 Colum.L.Rev. 1538, 1563.)

Under the *Chapman* test, the exclusion of mitigating evidence in the form of Towne's proffered testimony requires reversal of the penalty verdict. This case is one in which the jury might have found the death penalty inappropriate. Appellant offered a substantial showing in mitigation: the absence of any prior acts of violence involving serious injury to another person, a deprived childhood replete with violence and abuse, a traumatic loss of a close friend, serious mental health issues, favorable prospects for rehabilitation in prison, and extensive good character evidence of appellant's kind nature. (*Ante*, Penalty phase–the defense case, § D.) In contrast, the prosecution's affirmative evidence in aggravation consisted of conduct when appellant was a teenager, with a significant portion of the evidence focusing on events when he was 13 and 16 years old. (*Ante*, Penalty phase–the prosecution's case, § C.) A reasonable doubt exists whether the jury would have returned a death verdict had they heard the excluded mitigating testimony of defense witness Matthew Towne.

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15. The trial court prejudicially erred by instructing that the guilt-phase alternate juror seated to deliberate at the penalty phase was to accept as having been proved beyond a reasonable doubt the guilty verdicts and true findings rendered by the jury in the guilt phase, requiring reversal of the death verdict for a violation of appellant's state and federal constitutional rights to a fair trial, due process and a reliable determination of penalty.

The penalty phase jury which decided whether appellant would live or die was *not* the identical jury that deliberated during the guilt phase. Following the verdicts in the guilt phase, a seated juror was replaced by an alternate juror. (CT 6:1416, 1444.)

Prior to penalty phase deliberations the trial court instructed the jurors that "for the purposes of this penalty phase of the trial, the alternate juror must accept as having been proved beyond a reasonable doubt those guilty verdicts and true findings rendered by the jury in the guilt phase of this trial." (RT 42:9316.) The trial court also instructed the jury that all members of the jury were required to "participate fully in the deliberations, including any review as may be necessary of the evidence presented in the guilt phase of the trial." (RT 42:9317.)

As explained below, the instruction requiring the guilt-phase alternate juror to accept as having been proved beyond a reasonable doubt the guilty verdicts and true findings rendered by the jury in the guilt phase requires reversal of the death verdict. This Court has correctly noted that the

connection between the guilt and penalty bases of a capital trial is "substantial and not merely formal." (*People v. Hamilton* (1988) 45 C.3d 351, 369.) Viewed conceptually, "the decision-making process of a death penalty case is a coherent whole" that "reflects the legislative preference for a single unitary jury to both phases." (*People v. Fields* (1983) 35 Cal.3d 329, 351-352.) Accordingly, if an alternate juror replaces an original juror at the commencement of the penalty phase "the jury must be instructed to disregard all past deliberations and begin anew." (*Id.* at p. 351, quoting *People v. Collins* (1976) 17 Cal.3d 687, 694.)

The reason is simple. The constitutional right to a trial by jury includes the requirement that each juror engage in all of the jury's deliberations. All 12 jurors must deliberate together:

> The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint.

(*People v. Collins, supra*, 17 Cal.3d at p. 691.)

As this Court has recognized, an alternate who takes his place in the jury box only at the commencement of the penalty phase joins a group "which

has already discussed and evaluated the circumstances of the crime, the capacity of the defendant, and other issues which bear both on guilt and on penalty." (*People v. Fields, supra*, 35 Cal.3d at p. 351.) Placing restrictions on the scope of the deliberations–effectively making certain findings or conclusions reached in earlier phases of the trial off-limits for the penalty jury, as here–violates the principle that the decision of the jury in this unitary proceeding must be the product of the total interaction of 12 minds on all matters having any bearing on the penalty verdict. Unless the reconstituted jury, with its new member, is instructed to begin its deliberations anew and to disregard all earlier deliberations, but with no precondition as to what conclusions or findings must be accepted as part of the penalty phase deliberations, appellant's constitutional rights to a fair penalty trial and a reliable capital sentencing decision under the Eighth and Fourteenth Amendments have been denied.

In the final analysis, the error here was a basic one. This Court has correctly noted that an alternate juror seated for the penalty phase is entitled under state law "to vote against the death penalty if she disagreed with the guilt phase verdict . . ." (*People v. Kaurish* (1990) 52 Cal.3d 648, 708.) But the instruction given here–requiring the guilt-phase alternate to "accept as having been proved beyond a reasonable doubt those guilty verdicts and true

findings rendered by the jury in the guilt phase of this trial"–mandated just the opposite and entirely undercut this fundamental principle.

Appellant recognizes that this Court has approved substitution of an alternate juror into the penalty phase jury in the event of "unforeseen" circumstances. (*People v. Fields, supra*, 35 Cal.3d at p. 351, fn. 9.) But when such a substitution occurs, the jury must be instructed strictly in accord with the principles enunciated in *Collins*, *Fields* and *Hamilton, supra*, without the restricting language employed by the trial court here.

The alternate juror seated at the penalty phase here had no participation at all in the deliberations which resulted in the guilt phase verdicts. As a consequence, the juror was not privy to the discussions among the original jurors during the deliberation relating to guilt, including the special circumstance allegation. Nevertheless, the alternate juror was expressly instructed to conclusively accept all the findings of the original jury.

Under the precedents discussed above, appellant was entitled to the same kind of wide-ranging deliberations as occur in capital juries that do not have an alternate juror substituted after the guilt phase. Such juries are not instructed they may not reconsider the defendant's guilt. To the contrary, they are allowed to consider anything that "lessens the gravity of the crime." (Pen. Code, § 190.3, subd. (k).)

Such disparate treatment violates fundamental principles of equal protection of the law and due process, and impermissibly promotes the imposition of an arbitrary and unreliable death sentence in contravention of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the parallel provisions of the California Constitution. (See *Zant v. Stephens, supra*, 462 U.S. at p. 874 [the jury's "discretion [in a capital case] must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"]; *Carter v. Kentucky, supra*, 450 U.S. at p. 302 ["Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law"]; U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16 & 17.)

In sum, although appellant was not entitled to a retrial of the guilt and special circumstances findings, he was entitled at the penalty phase to have the guilt phase alternate juror participate in a renewed and full discussion with the other 11 members as to all of the issues raised and determined in the guilt phase of the trial.

Appellant recognizes that this Court has addressed, and rejected, this same argument on one prior occasion. (See *People v. Cain* (1995) 10 Cal.4th 1, 66.) But *Cain* 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.) For all the reasons discussed above, *Cain* should be reconsidered.

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16. 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.

In seeking a verdict of death, the prosecution relied extensively on conduct committed by appellant when he was a juvenile. Appellant was born on October 19, 1974. (RT 42:9403.)

The prosecution introduced evidence that on March 3, 1998, when appellant was 13 years old and in seventh grade, he exposed his genitals to fellow student Melanie Janke and touched Janke and another classmate, Diane Ortiz, on the breasts and on the buttocks. (RT 35:7774, 7778-7779, 7782-7790.)

The prosecution introduced evidence that on June 14, 1991, when appellant was 16 years old, appellant and a three other people approached Thomas Kinsey. (RT 35:7793-7794, 7796-7797.) Kinsey was carrying a briefcase, which was taken from him by one of the other three people (not appellant). (RT 25:7798, 7805-7810, 7832.) The prosecution presented evidence that at some point appellant asked Kinsey for money, threatened Kinsey, and physically assaulted Kinsey (RT 35:7833, 7835-7836, 7850.)

Penal Code section 190.3, factor (b) provides that, in determining whether to sentence defendant to death or life imprisonment without the possibility of parole, the jury may consider "[t]he presence or absence of

criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence."

Appellant recognizes 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. (*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].) This Court addressed the United States Supreme Court's decision in *Roper v. Simmons* (2005) 543 U.S. 551, which held that the Eighth Amendment's prohibition against cruel and unusual punishment precludes execution of an individual who committed capital crimes while under the age of 18 years, explaining that the decision says nothing about the propriety of permitting a capital sentencing jury, trying an adult defendant, to consider the defendant's prior violent conduct committed as a juvenile. (*People v. Lee* (2011) 51 Cal.4th 620, 648-649; *People v. Taylor* (2010) 48 Cal.4th 574, 653-654.)

In view of evolving standards in Eighth Amendment jurisprudence, as set forth in of a trio of cases from the United States Supreme Court addressing application of the Eighth Amendment to harsh penalties imposed on juveniles (i.e., *Roper v. Simmons, supra*, 543 U.S. 551; *Graham v. Florida* (2010) 560

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

The high court has repeatedly recognized that there are substantial differences between juveniles and adults, differences which preclude applying traditional concepts of deterrence to juveniles. In *Roper v. Simmons, supra*, 543 U.S. 551, the high court held that the death penalty could not be imposed on defendants who were under the age of eighteen at the time of the crime. In reaching this result, the court noted that as compared to adults, teenagers have "[a] lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures"; and their character "is not as well formed." (*Id.* at pp. 569-70.) Based on these basic differences, the Court concluded that "it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles . . . ." (*Id.* at p. 571.) This was "of special concern" precisely because "the same characteristics that render juveniles less culpable than adults suggest as well the juveniles will be less susceptible to deterrence." (*Ibid.*) The court noted what every parent knows–"the likelihood that the teenage offender has

made . . . [a] cost-benefit analysis . . . is so remote as to be virtually nonexistent." (*Id.* at p. 572.)

In *Graham v. Florida, supra*, 130 S.Ct. 2011, the high court again recognized that traditional concepts of deterrence do not apply to juveniles. There, the court addressed the question of whether juveniles could receive a life without parole term for a non-homicide offense. The court cited scientific studies of adolescent brain structure and functioning which again confirmed the daily experience of parents everywhere that teenagers are still undeveloped personalities, labile and situation-dependent, impulse-driven, peer-sensitive, and largely lacking in the mechanisms of self-control which almost all of them will gain later in life. Because "their characters are not as well formed,'" the court found that "it would be misguided to equate the failings of a minor with those of an adult." (*Id.* at p. 2026.) The court held that deterrence did not justify a life without parole sentence because–in contrast to adults–'juveniles' 'lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions . . . .'" (*Id.* at p. 2028.)

In *Miller v. Alabama* (2012) 132 S.Ct. 2455 the court again addressed the concept of deterrence in connection with juveniles. There, the high court addressed the question of whether a life without parole term imposed on a juvenile constituted cruel and unusual punishment even for a homicide.

Ultimately, the Court "[did] not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles . . . ." (*Id.* at p. 2469.) Instead, the court reversed the life without parole terms imposed in both of the cases before it by finding that the schemes under which they were imposed were improperly mandatory. (*Id.* at p. 2460.)

But in reaching this more limited decision, it is important to note that the court fully embraced the view of deterrence expressed in both *Roper* and *Graham*. As it had in both *Roper* and *Graham*, the court again recognized that because of the "immaturity, recklessness and impetuosity" with which juvenile's act, they are less likely than adults to consider consequences and, as such, deterrence cannot justify imposing a life with parole term on a juvenile. (*Id.* at p. 2465.)

The high court's rationale in these cases directly undercuts the use of juvenile criminal activity to aggravate penalty in a capital case because the cases establish that juveniles and adults should not be treated the same when it comes to assumptions about deterrence.

In view of what the high court has said regarding children and deterrence, there are two reasons the traditional rationale for admission of criminal conduct at a capital penalty phase makes little sense when applied to

juvenile conduct. First, in connection with a juvenile conduct, the decision to commit the prior crime itself was made by a juvenile who was not deterred by the criminal sanction applicable to that crime precisely because of a "lack of maturity and underdeveloped sense of responsibility." (*Graham v. Florida, supra*, 130 S.Ct. at p. 2028.) Second, *Roper*, *Graham* and *Miller* all recognize that expecting deterrence with respect to a juvenile–as the state may legitimately expect from an adult–is a "misguided [attempt] to equate the failings of a minor with those of an adult." (*Graham v. Florida, supra*, 130 S.Ct. at p. 2026.)

Nor is the analysis altered by the fact that appellant was an adult when the offenses were committed in the instant case. Aggravating the capital murder here by relying on the fact that when appellant was a child he was not deterred from committing crimes by the criminal sanction available for that crime, implicates the precise concerns about ignoring the impact of youth on the "lack of maturity and . . . underdeveloped sense of responsibility" which juveniles possess and which renders them "less culpable than adults . . . [and] less susceptible to deterrence." (*Roper v. Simmons, supra*, 543 U.S. at p. 569-572.)

Eighth Amendment jurisprudence always "looks beyond historical conceptions to 'the evolving standards of decency that mark the progress of a

maturing society.'" (*Graham v. Florida, supra*, 130 S.Ct. at p. 2021; accord, *Roper v. Simmons, supra*, 543 U.S. at p. 561; *Trop v. Dulles* (1958) 356 U.S. 86, 101 [78 S.Ct. 590, 2 L.Ed.2d 630].) The analysis requires a review of "objective indicia of society's standards, as expressed in legislative enactments . . . ." (*Graham v. Florida, supra*, 130 S.Ct. at p. 2022; accord, *Roper v. Simmons, supra*, 543 U.S. at p. 563.) With these objective indicia in mind, the court must then bring its independent judgment to bear on the constitutional question. (*Graham v. Florida, supra*, 130 S.Ct. at p. 2022; *Roper v. Simmons, supra*, 543 U.S. at p. 563.)

The objective criteria consistently point in the same direction. Legislation from around the country establishes a clear nationwide consensus recognizing that because of their more limited decision-making capabilities in weighing future consequence, juveniles must be protected from making decisions that can adversely impact the rest of their life. For example, "[i]n recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent." (*Roper v. Simmons, supra*, 543 U.S. at p. 569.) Every state prohibits the sale of alcohol to juveniles. (See, e.g., *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 589.) Every state precludes juveniles from using tobacco products. (See *Clay v. American*

Tobacco Co. (S.D. Ill. 1999) 188 F.R.D. 483, 486 [noting that every state prohibits sale of tobacco products to minors].)

There is a basic, common strand–a national consensus–reflected by these consistent legislative judgments. Legislatures throughout the country recognize that as a class, juveniles are simply not developed enough to make the kinds of decisions which can impact the remainder of their life–such as the decision to take up smoking, to drink, to vote, to marry without parental consent. In turn, *Roper* and *Graham* recognized that the common concerns about maturity which animated these otherwise diverse legislative enactments are a key factor in assessing the constitutionality of a practice that involves juveniles. Significantly, *Roper* and *Graham* do not stand alone in recognizing the special fragility of juveniles and the implication of this recognition in assessing the protection juveniles should be given. (See, e.g., *J.D.B. v. North Carolina* (2011) 131 S.Ct. 2394, 2403 ["[T]he common law has reflected the reality that children are not adults" and has erected safeguards to "secure them from hurting themselves by their own improvident acts."]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115-116 ["Our history is replete with laws and judicial recognition that minors . . . generally are less mature and responsible than adults."].)

In sum, allowing the prosecution to aggravate a capital sentence by relying on appellant's conduct as a juvenile violates not only the principles animating the high court's decisions in *Miller*, *Graham*, *and Roper*, but a national consensus recognizing that juveniles are simply not mature enough to make decisions which impact the rest of their lives. The practice cannot be squared with Eighth Amendment jurisprudence.

Because the erroneous admission of this evidence at the penalty phase violated appellant's Eighth Amendment rights, reversal is required unless the state can prove the error harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at p. 24 [federal constitutional errors require reversal unless the state can prove the error harmless beyond a reasonable doubt].) The prosecution will be unable to carry its burden here for three reasons.

First, although the circumstances of this capital crime were undeniably tragic (as in all capital murders), the case does not present the type of crimes the Court often sees giving rise to a death sentence. (See, e.g., *In re Carpenter* (1995) 9 Cal.4th 634 [defendant sentenced to death for murdering five people]; *People v. Bittaker* (1989) 48 Cal.3d 1046 [defendant sentenced to death for kidnaping, raping, sodomizing and murdering five teenage girls]; *People v. Bonin* (1989) 47 Cal.3d 808 [defendant sentenced to death after

murdering ten people].) In contrast to these egregious cases, this case involves a single homicide.

Second, this case does not involve the type of defendant the Court often sees in death penalty cases. (See, e.g., *People v. Ray* (1996) 13 Cal.4th 313,330-331 [defendant had two prior murder convictions]; *People v. Nicolaus* (1991) 54 Cal.3d 551,567 [defendant convicted of murder in 1985 had killed his three children in 1964 and had been on death row for these prior homicides]; *People v. Hendricks* (1987) 43 Cal.3d 584, 588-589 [defendant had two prior murder convictions].) Here, appellant had been convicted of only a single prior offense (robbery when he was 19 years old), which was committed without the use of a gun or other weapon, and which resulted in no physical injury to the victim. (RT 35:7855, 7869, 8049; People's Exh. 71.)

Third, appellant presented a significant case in mitigation for a life sentence, consisting of evidence that appellant's conduct was influence by the violence and abuse he suffered in childhood and by serious mental health issues. (*Ante*, Statement of Facts, §§ D(1), D(2), D(3).) Appellant presented persuasive evidence showing favorable prospects for rehabilitation in prison and extensive evidence showing his good character. (*Ante*, Statement of Facts, § D(4) & D(5), respectively.)

In assessing all this evidence in mitigation, and in determining if the state can prove the error here harmless beyond a reasonable doubt, it is important to note that the question is not whether the jury would have unanimously imposed a life sentence absent the error. Instead, the question is whether on this record a single juror could reasonably have imposed a life sentence. (See *People v. Soojian* (2010) 190 Cal.App.4th 491, 521; *People v. Bowers* (2001) 87 Cal.App.4th 722, 735-736; *People v. Brown* (1988) 46 Cal.3d 432, 471 n.1 [conc. op. of Brossard, J.] [noting that a "hung jury is a more favorable verdict" than a guilty verdict].)

On this record the prosecution will be unable to prove beyond a reasonable doubt that jury's consideration of appellant's prior juvenile criminal activity did not contribute to the death verdict, thereby violating appellant's rights to due process, jury trial, and a fair and reliable penalty determination. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16 & 17.)

Reversal of the death judgment is required.

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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, thereby requiring reversal of the death judgment because erroneous admission of the robbery evidence prejudicially deprived appellant of the state and federal constitutional rights to due process and a reliable penalty determination.

A. Introduction and summary of argument.

The prosecution introduced evidence in aggravation that on June 14, 1991, Thomas Kinsey was robbed of his briefcase by an unidentified person, a violation of Penal Code section 211. (*Ante*, Statement of Facts, § C(2)(b).)

The evidence consisted of the eyewitness testimony of Kinsey and Officer Dooros, including statements by Kinsey to Dooros at the scene of the robbery. Kinsey testified that he vaguely recalled an incident in 1991 when he was confronted by a group of four individuals in Hollywood, one of whom was appellant. (RT 35:7793-7794, 7796-7797.) Kinsey was holding a briefcase, which was taken against his will by one of the individuals, but not by appellant. (RT 35:7798, 7806, 7808, 7810.) Office Dooros testified that he saw three men with Kinsey, one of whom was appellant. (RT 35:7829-7830.) Dooros did not see who took the briefcase, but Kinsey told him that the briefcase was taken by another person who was with the three men, but that person fled prior to Dooros's arrival on the scene. (RT 35:7832.)

The jury was instructed that evidence "has been introduced for the purpose of showing that the defendant has committed the following criminal activity: 2nd degree robbery of Thomas Kinsey . . . ." (CT 6:1513.) The jury was instructed on the elements of robbery on a direct perpetrator theory only, not on an aiding and abetting theory of liability.[29] (CT 6:1519-1523.)

Consistent with the jury instructions, the prosecutor argued that appellant directly perpetrated the robbery of Kinsey; the prosecutor did not advance theories of either aiding and abetting a robbery or attempted robbery. (RT 42:9221, 9224-9225, 9235.)

The evidence is woefully insufficient to sustain a finding that appellant perpetrated the robbery of Kinsey because there was no evidence appellant took property from Kinsey, a necessary element of the offense of robbery. (RT 35:7798, 7806, 7808, 7810, 7829-7830.)

Admission of evidence that appellant perpetrated a robbery of Kinsey (*ante*, Statement of Facts, § C(2)(b)) prejudicially denied appellant his state and federal constitutional rights to due process and a reliable penalty

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[29] The jury was instructed on one element of aiding and abetting liability in the language of CALJIC No. 9.40.1 (when intent must be formed), as follows: "For the purposes of determining whether a person is guilty as an aider and abettor to robbery, the commission of the crime of robbery is not confined to a fixed place or a limited period of time and continues so long as the stolen property is being carried away to a place of temporary safety." (CT 6:1520.)

determination because of the two incidents admitted to prove prior criminal conduct (i.e., robbery of Kinsey and assault on Melanie Jenke), the Kinsey robbery was the most aggravating and inflammatory evidence, and it was used by the prosecution in closing argument to secure a death verdict. (RT 42:9221, 9224-9225, 9235.) The prosecution cannot now prove beyond a reasonable doubt that the evidence of the Kinsey robbery did not contribute to the death verdict, thereby requiring reversal of the death judgment. (See *People v. Lancaster* (2007) 41 Cal.4th 50, 94.)

B. Standard of review.

Faced with a challenge to the sufficiency of the evidence, the issue is whether there is "substantial evidence – that is, *evidence which is reasonable, credible, and of solid value* – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson, supra*, 26 Cal.3d at p. 578, italics added; *People* v. *Samuel, supra*, 29 Cal.3d at p. 505 [evidence relied upon must be "reasonable in nature, credible and of solid value"].) The requisite qualitative nature of the evidence is that which is sufficient to permit the trier of fact to reach a "subjective state of near certitude of the guilt of the accused . . . ." (*Jackson v. Virginia, supra*, 443 U.S. at p. 315.)

C. The evidence is insufficient to sustain a finding that appellant perpetrated a robbery of Kinsey.

"Robbery is the taking of 'personal property in the possession of another against the will and from the person or immediate presence of that person accomplished by means of force or fear and with the specific intent permanently to deprive such person of such property.'" (*People v. Lewis* (2008) 43 Cal.4th 415, 464.)

To be convicted of robbery the defendant must have either actually perpetrated the robbery or the defendant must have been proven to be vicariously responsible for the robbery. (See *People v. Garrison* (1989) 47 Cal.3d 746, 777.)

Here, the sufficiency of the evidence to sustain a finding that appellant committed the offense of robbery must rest upon his liability as a direct perpetrator of the robbery because (1) the jury was not instructed on a theory of aiding and abetting liability (CT 6:1519-1523) and (2) the prosecution proceeded only on a theory of direct liability (RT 42:9221, 9224-9225, 9235).

On appeal, the evidence cannot be found sufficient on the basis of a theory not presented to the jury. (See *Ernst v. Searle* (1933) 218 Cal. 233, 240 ["The rule is well settled that the theory upon which a case is tried must be adhered to on appeal."]; *Flatley v. Mauro* (2006) 39 Cal.4th 299, 321, fn. 10 [a party "may not change his theory of the case for the first time on appeal"];

Cable Connection, Inc. v. DIRECTV, Inc. (2008) 44 Cal.4th 1334, 1350, fn. 12; *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316 ["It is a firmly entrenched principle of appellate practice that litigants must adhere to the theory on which a case was tried. Stated otherwise, a litigant may not change his or her position on appeal and assert a new theory. To permit this change in strategy would be unfair to the trial court and the opposing litigant."]; *Mills v. Maryland* (1988) 486 U.S. 367, 376 [108 S.Ct. 1860, 100 L.Ed.2d 384].)

A person may be liable for a criminal act as an aider and abettor. Appellant recognizes that the trial court mentioned aiding and abetting in connection with the asportation element of robbery. (CT 6:1510 [CALJIC No. 9.40.1].) But this isolated instruction alone was woefully insufficient to present the theory of aiding and abetting liability to the jury

Penal Code section 31 defines "principals" in a crime to include persons who "aid and abet in its commission, or, . . . have advised and encouraged its commission." An aider and abettor is a person who, "'acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.'" (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.)

The jury was never instructed on these essential elements of aiding and abetting liability, which are contained in CALJIC Nos. 3.00 and 3.01.[30] (See CT 6:1519-1523.)

The undisputed evidence, both from Kinsey and from Officer Dooros's testimony recounting Kinsey's statements to him at the scene, shows that the briefcase was taken by an unidentified person, not appellant, and that appellant did not take any property from Kinsey. (RT 35:7798, 7806, 7808, 7810, 7832.) The evidence thus is insufficient to sustain a finding that appellant perpetrated a robbery of Kinsey because the evidence does not establish that

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[30] CALJIC No. 3.00 provides, "Persons who are involved in [committing] [or] [attempting to commit] a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty. Principals include: 1. Those who directly and actively [commit] [or] [attempt to commit] the act constituting the crime, or 2. Those who aid and abet the [commission] [or] [attempted commission] of the crime."

CALJIC No. 3.01 provides, "A person aids and abets the [commission] [or] [attempted commission] of a crime when he or she: (1) With knowledge of the unlawful purpose of the perpetrator, and (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and (3) By act or advice aids, promotes, encourages or instigates the commission of the crime. [A person who aids and abets the [commission] [or] [attempted commission] of a crime need not be present at the scene of the crime.] [Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.] [Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.]"

appellant took personal property from Kinsey, an essential element of the offense of robbery.

D. The jury's consideration of the unproven robbery of Kinsey requires reversal of the death judgment because the aggravating nature of the evidence and the prosecution's reliance thereon to secure a death verdict make it impossible for the prosecution to now prove beyond a reasonable doubt that the evidence did not contribute to the death verdict.

The California statutory scheme allows, in aggravation, consideration of "the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence . . . ." (Pen. Code, § 190.3.) The requisite "criminal activity" must amount to conduct that violates a penal statute. (*People v. Boyd* (1985) 38 Cal.3d 762, 772.) The jury may not rely on evidence of such uncharged crimes of violence as an aggravating factor unless the crimes are proved beyond a reasonable doubt. (*People v. Robertson* (1982) 33 Cal.3d 21, 53-54.)

A judgment unsupported by substantial evidence, as here, denies a defendant due process of law. (Cf. *Jackson v. Virginia, supra*, 443 U.S. at p. 318; *White v. Illinois, supra*, 502 U.S. at pp. 363-364 ["Reliability is . . . a due process concern"]; *Donnelly v. DeChristoforo, supra*, 416 U.S. at p. 646 [due process "cannot tolerate" convictions based on false evidence]; *People* v.

Bean, supra, 46 Cal.3d at p. 932; Cal. Const., art. 1, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

In capital cases it is well recognized that heightened verdict reliability is required at both the guilt and penalty phases of trial. (*Beck v. Alabama, supra*, 447 U.S. at pp. 627-646; see also *Kyles v. Whitley, supra*, 514 U.S. at p. 422; *Burger v. Kemp, supra*, 483 U.S. at p. 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342 [113 S.Ct. 2112, 124 L.Ed.2d 306]; Cal. Const., art. 1, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

The standard of prejudice for the deprivation of a federal constitutional right, as here, is the *Chapman* harmless error analysis, which requires reversal unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24; see *People v. Sengpadychith, supra*, 26 Cal.4th at p. 326 [*Chapman* asks whether the prosecution has "prove[d] beyond a reasonable doubt that the error ... did not contribute to" the verdict].)

State law error in admitting or excluding evidence at the penalty phase of a capital trial is reversible if there is a reasonable possibility it affected the verdict. (*People v. Lancaster, supra*, 41 Cal.4th at p. 94; *People v. Jackson* (1996) 13 Cal.4th 1164, 1232.) This standard is the same, in substance and effect, as the harmless beyond a reasonable doubt standard of *Chapman v.*

California, supra, 386 U.S. at p. 24. (*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. (*Ante*, Statement of Facts, § C(2)(b).) Prosecution witness Officer Dooros testified he was responding to a possible "strong arm robbery." (RT 35:7823.) Dooros drew his service handgun and placed appellant on the ground. (RT 35:7872.) Kinsey told Dooros that appellant physically assaulted him and backed him into the corner. (RT 35:7829-7830, 7833.) Appellant then told Kinsey, "I'm going to fuck you up." (RT 35:7850).

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 argued, in part:

> He [appellant] tells Kinsey, "I'm going to fuck you up" twice. Now Mr. Mataele says he's making that up, and Kinsey must have conspired with some police officer that he doesn't know. And they must have held onto that conspiracy for eight years -- oh, no, that was like 13 or 14 years -- and come in and kept that conspiracy going to conspire against Mr. Mataele, who Mataele says I've never met either one of them prior to that or after that. So, one chance meeting, and they've fabricated that whole robbery. Or you can believe that it really happened and that after he tries to rob Kinsey – because the police officer actually sees Mataele push Kinsey and have his fist cocked back. Now who do you want to believe, the defendant saying I never

> did that, they're just lying or Mr. Kinsey and the police officer? So why does he then say "I'm going to fuck you up"? They've already got his briefcase. He says he doesn't have any money. He feeds off it. [RT 42:9225.]

In connection with a prosecutor's closing argument to the jury, this Court, and other courts, have recognized what logic dictates–i.e., the prosecutor's reliance in closing argument on erroneously admitted evidence is a strong indication of prejudice. (See e.g., *People v. Roder* (1983) 33 Cal.3d 491, 505 [error not harmless under *Chapman* because, in part, "the prosecutor relied on the [erroneous] presumption in his closing argument"]; *People v. Martinez* (1986) 188 Cal.App.3d 19, 26 [error not harmless under *Chapman* based, in part, on prosecutor's closing argument]; *People v. Frazier* (2001) 89 Cal.App.4th 30, 39 ["reasonable doubt [under *Chapman*] is reinforced here by the prosecutor's use of the propensity instruction in closing argument"]; *People v. Younger* (2000) 84 Cal.App.4th 1360, 1384 ["Our conclusion that there is such reasonable doubt is reinforced by the prosecutor's use of the instruction in her closing arguments."]; *People v. Brady* (1987) 190 Cal.App.3d 124, 138 ["argument of the district attorney, if anything, compounded the defect"]; *Depetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1063 [prosecutor's reliance on error in closing argument is indicative of prejudice].)

It is thus likely that the jury viewed the evidence as did the prosecutor, and attributed the robbery of Kinsey as a significant factor in aggravation warranting a sentence of death, especially because it was the most significant and aggravating of only two instances of prior criminal conduct admitted in aggravation.

In view of the fact that the prosecution viewed the robbery of Kinsey as a significant factor in aggravation warranting a sentence of death, and in view of the case in mitigation, consisting of evidence that appellant's conduct was influenced by the violence and abuse he suffered in childhood and by serious mental health issues (*ante*, Statement of Facts, §§ D(1), D(2), D(3)), and balanced by appellant's favorable prospects for rehabilitation in prison (*ante*, Statement of Facts, § D(4)) and good character (*ante*, Statement of Facts, § D(5)), the prosecution cannot now 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 [federal constitutional error requires reversal of the death judgment unless it can be demonstrated that the error is harmless beyond a reasonable doubt]; see *Chapman v. California, supra*, 386 U.S. at pp. 20-21; *Arizona v. Fulminante, supra*, 499 U.S. at p. 296; *People v. Cowan, supra*, 50 Cal.4th at p. 491.)

Reversal of the death judgment is required.

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.

Many features of California's capital-sentencing scheme violate both the United States Constitution and international law. This Court consistently has rejected a number of arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges to urge their reconsideration and to preserve these claims for federal review. Should the Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. The broad application of section 190.3, factor (a), violated appellant's constitutional rights.

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CT 6:1510-1511 [CALJIC No. 8.85].) Prosecutors throughout California have argued that the jury could

weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts that cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court never has applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) Instead, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." (See *Tuilaepa v. California* (1994) 512 U.S. 967, 986-988 (dis. opn. by Blackmun, J.) [noting California prosecutors' extensive, contradictory use of factor (a)].) As a result, California's capital-sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were sufficient, by themselves and without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363.) Appellant is aware

that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 33 Cal.4th 382, 401.) He urges this Court to reconsider this holding.

B. The death-penalty statute and accompanying jury instructions fail to set forth the appropriate burden of proof.

(1) Appellant's death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt.

California law does not require that a reasonable-doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.86 and 8.87; see *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1998) 16 Cal.4th 1223, 1255; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty-phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (CT 6:1510-1511, 1536 [CALJIC Nos. 8.85 and 8.88].) *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478, *Blakely v. Washington, supra*, 542 U.S.

at pp. 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604, and *Cunningham v. California* (2007) 549 U.S. 270, 280-282, 293, require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and, (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CT 6:1536 [CALJIC No. 8.88].) Because these additional findings were required before the jury could impose the death sentence, *Ring, Apprendi, Blakely*, and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson, supra*, 25 Cal.4th 543, 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). This Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose

a reasonable-doubt standard on California's penalty-phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges this Court to reconsider its holding in *Prieto* so that California's death-penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty-phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by the due process clause and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt that the factual bases for its decision are true, and that death is the appropriate sentence. This Court previously has rejected the claim that either the Fourteenth Amendment or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair*, *supra*, 36 Cal.4th at p. 753.)

Appellant requests that this Court reconsider its holding. Without a standard identifying that death had to be the appropriate penalty beyond a reasonable doubt, this Court can have no confidence in either the strength or the reliability of the ultimate verdict. Accordingly, the judgment must be set aside.

(2) Some burden of proof is required, or the jury should have been instructed that there was no burden of proof.

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, and therefore appellant is constitutionally entitled under the Fourteenth Amendment to the burden of proof provided by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the prosecution had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (CT 6:1510-1511, 1536), fail to provide the jury with the guidance required for administration of the death penalty to meet constitutional minimum standards and consequently violate the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the task is largely moral and normative, and thus is unlike

other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court also has rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that fact to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death-penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

(3) Appellant's death verdict was not premised on unanimous jury findings.

Imposing a death sentence violates the Sixth, Eighth, and Fourteenth Amendments when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d

719, 749.) This Court reaffirmed this holding after the decision in *Ring v. Arizona, supra*, 536 U.S. 584. (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.) Appellant asserts that *Prieto* was incorrectly decided, and that application of *Ring*'s reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., § 1158a.) Because capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732 [118 S.Ct. 2246, 141 L.Ed.2d 615]; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and because providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst* (9th Cir. 1990)

897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury. Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

(4) The instructions caused the penalty determination to turn on an impermissibly vague and ambiguous standard.

The question whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CT 6:1536 [CALJIC No. 8.88].) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing.

Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright*, *supra*, 486 U.S. at p. 362.) This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (See *People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Appellant asks this Court to reconsider that opinion.

(5) The instructions failed to inform the jury that the central determination is whether death is the appropriate punishment.

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (See *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them that they may return a death verdict if the aggravating evidence "warrants" death rather than life without parole. (CT 6:1536.) These determinations are not the same. To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307 [110 S.Ct. 1078; 108 L.Ed.2d 255]), the punishment must fit the offense and the offender; i.e., it must be appropriate. (See *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.) On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993)

6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution. The Court has previously rejected this claim. (See, e.g., *People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

(6) The penalty jury should be instructed on the presumption of life.

The presumption of innocence is a core constitutional and adjudicative value essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1993) 507 U.S. 272.) The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th &

14th Amends.), and his right to the equal protection of the laws (U.S. Const., 14th Amend.).

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, California's death penalty law is remarkably deficient in the protections needed to ensure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required in all cases.

C. The instructions to the jury on mitigating and aggravating factors violated appellant's constitutional rights.

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. The trial court failed to omit those factors from the jury instructions (CT 6:1510-1511), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook, supra,* 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

D. The prohibition against inter-case proportionality review guarantees arbitrary and disproportionate impositions of the death penalty.

The California capital-sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The lack of any other procedural protections in the California capital sentencing scheme constitutionally compels review for inter-case proportionality. This court's decisions in *Fierro; Pulley v. Harris* (1984) 465 U.S. 37, 42, 50–51; and *People v. Butler* (2009) 46 Cal.4th 847, 885 should be reconsidered.

E. California's capital-sentencing scheme violates the Equal Protection Clause.

The California death-penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes, in violation of the equal protection clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants. In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a

preponderance of the evidence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325.) In a capital case, there is no burden of proof at all, and the jurors need not agree on which aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that this Court has rejected these equal protection arguments (see *People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asserts that there is no rational basis for the distinctions made and asks the Court to reconsider its ruling.

F. California's use of the death penalty as a regular form of punishment falls short of international norms.

This Court has rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency (*Trop v. Dulles, supra*, 356 U.S. at p. 101)." (See *People v. Cook, supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment, as well as decisions of the United States Supreme Court citing international law in prohibiting the imposition of capital punishment under various circumstances (see *Roper v. Simmons* (2005) 543 U.S. 551, 554 [prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles]; *Atkins v. Virginia* (2002) 536 U.S. 304,

316, fn. 21 [noting that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved," citing the Brief for European Union as Amicus Curiae]; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22 [noting that "'[T]he climate of international opinion concerning the acceptability of a particular punishment' is an additional consideration which is 'not irrelevant.' [Citation.]"]), appellant urges this Court to reconsider its previous decisions. Even if the death penalty as a whole does not violate international law, appellant submits that his trial violated specific provisions applicable to his trial. These rights include the right to an impartial tribunal, which demands that each of the decision-makers, including the jury, be unbiased. (*Collins v. Jamaica* (1991) IIHRL 51, Communication No. 240/1987 [impartial juries]; see also International Covenant on Civil and Political Rights [ICCPR] (June 8, 1992) 999 U.N.T.S. 171, article 14(1) [criminal defendants entitled to fair hearing by impartial tribunal].) It also encompasses standards that require prosecutors to "perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system." (*Guidelines on the Role of Prosecutors*, Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders (1990).) Finally,

international law encompasses a right to a fair trial that includes specific rights but is broader than any one provision of national or international law. (Article 10 of the Universal Declaration; Article 14(1) of the ICCPR; Article 6(1) of the European Convention; Article XXVI of the American Declaration; and, Article 8 of the American Convention.)

G. The cumulative impact of the deficiencies in California's capital sentencing scheme render California's death penalty law constitutionally infirm.

The cumulative impact of the deficiencies in California's capital sentencing scheme render California's death penalty law constitutionally infirm. (See *Taylor v. Kentucky, supra,* 436 U.S. 478, 487, fn. 15; Cal. Const., art. 1, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.).

This Court's opinion in *People v. Garcia* (2011) 52 Cal.4th 706, 765 should be reconsidered.

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19. The errors in this case in both the guilt and penalty phases of trial, individually and cumulatively, or in any combination thereof, require reversal of the death judgment for a violation of the state and federal Constitutions.

The death judgment must be evaluated in light of the cumulative effect of the multiple errors occurring at both the guilt and penalty phases of appellant's trial. (*Taylor v. Kentucky, supra,* 436 U.S. 478, 487, fn. 15; *People v. Hill, supra,* 17 Cal.4th 800, 844-845; *Phillips v. Woodford* (9th Cir. 2001) 267 F.3d 966, 985, citing *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; Cal. Const., art. 1, §§ 7, 15 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.).

"The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." (*Parle v. Runnels, supra,* 505 F.3d at p. 927, citing *Chambers v. Mississippi, supra,* 410 U.S. at pp. 298, 302-303 [combined effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial"]; see also *Montana v. Egelhoff, supra,* 518 U.S. at p. 53[stating that *Chambers* held that "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation"); *Taylor v. Kentucky, supra,* 436 U.S. at p. 487, fn.15 ["[T]he cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness . . . ."].)

Evidence that may otherwise not have affected the guilt determination can have a prejudicial impact on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432,466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584,605,609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

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 identified above 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), which arguments are incorporated herein by reference, deprived appellant of a fair and reliable penalty determination. (Cf. *Woodson v. North Carolina, supra*, 428 U.S. at p. 304; *Zant v. Stephens, supra*, 462 U.S. at p. 879; *Payne v. Tennessee* (1991) 501 U.S. 808, 825-830 [111 S.Ct. 2597,

115 L.Ed.2d 720]; Cal. Const., art. 1, §§ 7, 15 & 17; U.S. Const. 5th, 6th, 8th & 14th Amends.)

In addition to the substantial jury selection and guilt phase errors identified above, the jury was permitted to hear and consider inadmissible evidence in aggravation. The jury's consideration of the unproven robbery of Thomas Kinsey based on the direct perpetrator theory advanced by the prosecution requires reversal of the death judgment because erroneous admission of the robbery evidence prejudicially deprived appellant of the state and federal constitutional rights to due process and a reliable penalty determination. (*Ante*, § 17.)

Inadmissible aggravating evidence also consisted of 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.)

Moreover, 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 Matthew Towne as a witness for the penalty phase. (*Ante*, § 14.) Towne's proffered eyewitness testimony circumstantially linked Carrillo to the actual

perpetration of the killing of Johnson, and eliminated appellant as the shooter, thereby providing strong evidence in mitigation. (*Ante*, § 14.)

The penalty phase jury instructions prevented the jury from making an individualized sentencing determination. (*Ante*, § 15.) The trial court instructed 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, requiring reversal of the death verdict for a violation of appellant's state and federal constitutional rights to a fair trial, due process and a reliable determination of penalty. (*Ante*, § 15.)

Thus, even if the Court were to hold that not one of the errors was prejudicial by itself, the cumulative effect of these errors sufficiently undermines confidence in the integrity of the penalty proceedings in this case. These numerous constitutional violations compounded one another, and created a pervasive pattern of unfairness that violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights by resulting in a penalty trial that was fundamentally flawed and a death sentence that is unreliable.

As shown above, this was a close case on the issue of penalty as evidenced by, among other things, the mitigation evidence which showed that appellant suffered from serious mental health issues and was adversely

influence by the violence and abuse he suffered in childhood. (*Ante*, Statement of Facts, §§ D(1), D(2), D(3).)

Appellant also presented good character evidence, which included the testimony of numerous witnesses knowledgeable about appellant. (*Ante*, Statement of Facts, §§ D(1), D(4) & (D)(5).) Their testimony supported a life sentence because it showed that appellant's conduct was influenced by circumstances in life beyond his control, and that appellant is a good and caring person with redeeming qualities. (*Ante*, Statement of Facts, §§ D(1), D(4) & (D)(5).)

It simply cannot be said that the combined effect of two or more of the errors detailed above had "no effect" on at least one of the jurors who determined that appellant should die by execution. (Cf. *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341 [105 S.Ct. 2633, 86 L.Ed.2d 231].) Appellant's death sentence must be reversed due to the cumulative effect of the errors in this case.

/ / /

Conclusion

For the reasons set forth above, appellant Tupoutoe Mataele respectfully requests reversal of his convictions and the judgment of death.

Respectfully submitted,

Dated: 3-4-2014 By: _____

Stephen M. Lathrop
Attorney for Defendant/Appellant
Tupoutoe Mataele

Certificate of Compliance

I hereby certify under penalty of perjury that there are 72,199 words in this brief.

Respectfully submitted,

Dated: 3-4-2014 By: _____

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Proof of Service

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 904 Silver Spur Road #430, Rolling Hills Estates, CA 90274. On March 4, 2014, I served the following document(s) described as **Appellant Tupoutoe Mataele's Opening Brief** on the interested party(ies) in this action by placing _ the original or X a true copy thereof enclosed, in (a) sealed envelope(s), addressed as follows:

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I am readily familiar with the firm's practice for collection and processing of correspondence and other materials for mailing with the United States Postal Service. On this date, I sealed the envelope(s) containing the above materials and placed the envelope(s) for collection and mailing on this date at the address above following our office's ordinary business practices. The envelope(s) will be deposited with the United States Postal Service on this date, in the ordinary course of business. I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this Proof of Service was executed on March 4, 2014, at Rolling Hills Estates, California.

Stephen M. Lathrop
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Signature